No. 23-70023

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

IN RE CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC.,

*Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI‘I,

*Respondent.*

Petition for Writ of Mandamus or Other Extraordinary Writ

# AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I IN SUPPORT OF RESPONDENT

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# AMICUS CURIAE BRIEF OF THE STATE OF HAWAI‘I IN SUPPORT OF RESPONDENT

## I. INTRODUCTION

The State of Hawai‘i ("State"), by and through its Attorney General, submits this Amicus Curiae brief in support of Respondent United States District Court for the District of Hawai‘i ("USDC").[1] The State urges this Court to find that USDC Criminal Local Rule 5.2(a)(8), which mandates that criminal competency evaluations be filed under seal, does not violate the First Amendment to the United States Constitution.[2]

Like the USDC, the Supreme Court of the State of Hawai‘i has promulgated rules requiring that certain sensitive information be filed under seal in court proceedings. Petitioner Civil Beat Law Center for the Public Interest, Inc. ("Petitioner") has filed a lawsuit against the State challenging certain of those rules based on the same general arguments raised in the instant petition against the USDC. The State prevailed against Petitioner in the USDC, and the USDC's decision is now on appeal in this Court. *See Civil Beat Law Center for the Public*

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[1] The State of Hawai‘i is authorized to file this brief as amicus curiae pursuant to Fed. R. App. P. 29(a)(2). In accordance with Fed. R. App. P. 29(a)(6), this brief is submitted within seven days after the filing of the brief of the party being supported, in this case, Respondent.

[2] The State does not take a position with respect to whether there is a common law right of access to criminal competency evaluations, nor as to the other challenged provisions of Criminal Local Rule 5.2.

*Interest, Inc. v. Maile*, No. 23-15108 (9th Cir.). Because the outcome of this case could potentially affect that appeal, the State files this amicus brief in support of the USDC, providing the State's perspective as to why Petitioner's assertions regarding criminal competency evaluations lack merit.

## II. BACKGROUND

### A. Petitioner has already unsuccessfully challenged the Hawai'i Supreme Court's rules requiring that criminal competency evaluations be filed under seal.

The instant Petition follows Petitioner's unsuccessful attempt to challenge similar rules promulgated and applied by the Hawai'i Supreme Court. In *Civ. Beat Law Ctr. for Pub. Int., Inc. v. Maile*, No. 22-CV-00386-DKW-KJM, 2022 WL 17960922 (D. Haw. Dec. 27, 2022), Petitioner alleged that Hawai'i Court Records Rules ("HCRR") 2.19 and 9.1 are unconstitutional on their face and as applied by the Hawai'i Supreme Court to criminal responsibility and competency evaluations. HCRR 2.19 defines "personal information" to include "medical and health records," which the Hawai'i Supreme Court has interpreted to include criminal responsibility and competency evaluations, and HCRR 9.1(a) requires that "personal information" be submitted under seal. Confidential court records remain confidential unless otherwise ordered. HCRR 10.4.

On December 27, 2022, the USDC granted summary judgment in favor of the State on Petitioner's constitutional challenge to HCRR 2.19 and 9.1. *See*

*Maile*, 2022 WL 17960922. The USDC first held that the rules are not unconstitutional on their face; indeed, Petitioner had failed to show a constitutional right of access to an individual's medical and health records.[3] *Id.* at *2-3. The USDC also held that the rules were not unconstitutional as applied by the Hawai'i Supreme Court to require that criminal responsibility and competency evaluations be filed under seal. *Id.* at *3-4. Even assuming that the public has a qualified First Amendment right to access criminal competency evaluations (*id.* at *4), the USDC found no constitutional infirmity in the Hawai'i Supreme Court requiring interested parties to move to *un*seal evaluations they seek to access, rather than requiring criminal defendants to file a motion to seal each and every evaluation. *Id*.

Petitioner appealed the USDC's decision to this Court on January 27, 2023. *See Civ. Beat Law Ctr. for Pub. Int., Inc. v. Maile*, No. 23-15108 (9th Cir.).[4]

### B. The instant Petition similarly challenges the automatic sealing of criminal competency evaluations.

In this case, Petitioner challenges the USDC's adoption of Criminal

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[3] Petitioner did *not* allege that the HCRR violated any common law right of access.

[4] Petitioner's Opening Brief was filed on April 26, 2023 and the State's Answering Brief was filed June 26, 2023.

Local Rules which require certain sensitive information regarding criminal defendants to be initially filed under seal, subject to possible future motions to unseal. Specifically, Petitioners challenge USDC Hawai‘i Local Rule ("L.R.") 5.2(a), subsections (2), (8), and (9), which require that presentence investigation reports and sentencing statements (L.R. 5.2(a)(2)), competency evaluations (L.R. 5.2(a)(8)), and filings setting forth the substantial assistance of defendants in the investigation and prosecution of others (L.R. 5.2(a)(9)), be automatically filed under seal. L.R. 5.2(b)(4) provides that the court may "at any time" determine that a document no longer needs to be sealed. Petitioner argues that by merely sealing certain documents by default, L.R. 5.2(a)(2), (8), and (9) necessarily violate the First Amendment to the United States Constitution and common law rights of access to court records. Dkt. 1-2, Page 9.

## III. ARGUMENT

A First Amendment qualified right of access extends to certain documents filed in criminal proceedings. *Forbes Media LLC v. United States*, 61 F.4th 1072, 1077 (9th Cir. 2023). However, as this Court recently held, "the First Amendment is *not* an all-access pass to any court proceeding or court record." *Id.* (emphasis added). Rather, a *qualified* First Amendment right of access only attaches to a particular judicial proceeding or record if it meets the Supreme Court's "experience and logic" test. *Id.*

Under the "experience" prong of the test, courts must consider whether the specific type of proceeding or record at issue "has been traditionally conducted in an open fashion[.]" *Id.* at 1077-78 (quotation omitted); *see also Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) (applying test to judicial records). Under the "logic" prong, courts consider "whether public access plays a significant positive role in the functioning of the particular process in question." *Forbes*, 61 F.4th at 1078 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press Enterprise II*)). Neither prong supports extending a qualified First Amendment right of access to criminal competency evaluations.

### A. The "experience" prong of the First Amendment test is not met because there is no established history or tradition of open access to criminal competency evaluations.

In its argument that there is a First Amendment right of access to competency *evaluations*, Petitioner relies solely on cases which concern (1) a right of access to criminal pre-trial or competency *proceedings* in general[5] or (2) a

[5] Specifically, *Press Enterprise II*, 478 U.S. 1, 12 (finding that preliminary hearings have been presumptively open to the public); *United States v. Guerrero*, 693 F.3d 990, 1000-02 (9th Cir. 2012) (finding district court did not err in finding a qualified right of access to mental competency hearings); *Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1465 (9th Cir. 1990) (finding a qualified right of access to plea agreements); and *Westchester Rockland Newspapers v. Leggett*, 399 N.E. 2d 518, 523 (1979) (holding that "[t]he right of the public to attend court proceedings generally includes pretrial proceedings in criminal cases.").

*common law* right of access to specific psychiatric evaluations.[6] None definitively hold that competency *evaluations* categorically have traditionally been open to the public and thus satisfy the "experience" prong of the First Amendment test.[7]

First, even assuming that other criminal pre-trial proceedings, including competency hearings, have historically been open to the public, it does not obviate the need to analyze whether competency evaluations themselves have historically been publicly available. The "right of access to documents submitted for use in a hearing must be considered separately from the [public's] right to attend the hearing itself." *U.S. v. Corbitt*, 879 F.2d 224, 228-29 (7th Cir. 1989) (citation omitted); *see also Forbes*, 61 F.4th 1072, 1078 ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial.'") (quoting

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[6] Specifically, Petitioner cites *United States v. Kaczynski*, 154 F.3d 930, 931-32 (9th Cir. 1998) (upholding the district court's order disclosing a redacted version of defendant's competency report), and *U.S. v. Schlette*, 842 F.2d 1574, 1583-84 & 1583 n.5 (9th Cir. 1988) (allowing disclosure of a redacted version of a psychiatric report).

[7] Indeed, in *Guerrero*, which Petitioner relies heavily on, this Court emphasized that it was not resolving the underlying legal issue as to whether there is a right of public access to competency proceedings. 693 F.3d at 1000. Instead, the question before the Court was whether a writ of mandamus was warranted to overturn the district court's denial of a motion to seal competency proceedings. *Id.* at 999. In denying the petition for mandamus, the Court merely found that the district court's conclusion that criminal competency proceedings have historically been open to the public was not clearly erroneous. *Id*. at 1001. However, the Court did not affirmatively hold that there is in fact a history of public access to competency hearings, as it concluded that it did not have jurisdiction to reach the merits of the district court's decision. *Id.* at 994-95.

*Press Enterprise II*, 478 U.S. at 7) (internal quotation marks omitted); *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) ("[T]he First Amendment does not grant the press or the public an automatic constitutional right of access to every document connected to judicial activity. Rather, courts must apply the *Press-Enterprise II* standards to a particular class of documents or proceedings and determine whether the right attaches to that class.").

Second, the common law cases cited by Petitioner have *not* held that there is a history of access to competency *evaluations*. Petitioner cites to *Kaczysnki* and *Schlette*, where this Court relied on the common law to hold that public access to a competency report (*Kaczynski*) and a presentence report, psychiatric report, and post-sentence report (*Schlette*) should be granted. However, these cases are distinguishable. First, they involved requests to unseal *specific* documents, not facial attacks on the constitutionality of court rules. *Kaczynski*, 154 F.3d at 931, *Schlette*, 842 F.2d at 1576. Second, the Court focused on the "important public need" prong of the common law test, and found that in the specific cases before them, the legitimate need for disclosure outweighed the need for confidentiality. *See Kaczynski*, 154 F.3d at 931-32, *Schlette*, 842 F.2d at 1583-84.

Thus, to determine whether competency reports satisfy the "experience" prong of the First Amendment test, this Court must look to whether competency evaluations are open to the public "throughout the United States" not just in any

particular jurisdiction. *Guerrero*, 693 F.3d at 1000 (quotation omitted). While *Guerrero* found only one unpublished federal court decision regarding the right of access to a criminal competency *hearing* (*id.*), there is a much more robust history of confidentiality in competency evaluations themselves. Indeed, Petitioners identified at least five other federal jurisdictions[8] with rules and filing procedures that keep competency evaluations from automatic public disclosure. Petition at Page 34. In upholding the Hawai'i Supreme Court's court rules, the USDC also identified four States[9] in which courts upheld the sealing of competency reports. *See Maile*, 2022 WL 17960922 at *3 n.4.

Moreover, the State's own research shows at least eleven states where competency reports are automatically sealed either by statute or court rule. *See* Ala. R. Crim. P. 11.5(a); Cal. Penal Code § 1369.5(a)-(c); Ga. Code §§ 17-7-129(a)-(b) & 17-7-130(b)(1); Mass. Gen. Laws §§ 15 & 36A; Mo. Rev. Stat. § 552.030(3); N.M. R. 5-602.1(O); N.H. R. Crim. P. 51(e); N.C. Gen Stat. § 15A-1002(d) (competency report kept confidential until entered into evidence); Pa. R.

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[8] Specifically, Petitioner states that the Districts of Montana, the Northern Marianas Islands, and Western Washington have local rules that require competency evaluations to be automatically sealed, while the Districts of Arizona and Southern California have filing procedures that appear to deny public access to competency evaluations. Petition at Page 35.

[9] Specifically, Pennsylvania, Colorado, Ohio, and Idaho. *Maile*, 2022 WL 17960922 at *3 n.4.

Crim. Pro. 569(B)(1); Wis. Stat. § 971.14(4) (report shall not be disclosed to others besides those listed prior to the competency hearing); Vt. R. for Pub. Access to Ct. Recs. R. 6(b)(4). Additionally, in Arizona, reports are treated as "confidential in all respects" and are automatically sealed after the defendant pleads guilty or insane, after trial is completed, or after the defendant is found unable to be restored to competence. Ariz. Rev. Stat. § 13-4508(E); Ariz. R. Crim. P Rule 11.7(c). And in Michigan and Florida, state courts have recognized that competency reports are generally considered confidential. *See Manuel v. State*, 162 So.3d 1157, 1160 (Fla. Dist. Ct. App. 2015) (competency reports prepared for indigent defendants at the direction of the trial court, or reports prepared at the request of defense counsel, are considered to be privileged and confidential); *People v. Atkins*, 444 Mich. 737, 740-41 (1994) (finding that competency reports that have not been admitted into evidence have traditionally been viewed as confidential in Michigan).

In sum, the "experience" prong of the First Amendment test cannot be satisfied because there is no established history and practice of unfettered access to competency evaluations across the United States. "[T]he experience test requires that a right [to public access] be established nationwide." *Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 393 (5th Cir. 2014); *see also El Vocero de Puerto Rico (Caribbean Intern. News Corp.) v. Puerto Rico*, 508 U.S. 147, 150-51 (1993) (the experience prong looks to the practice of the entire United States). Thus, there can

only be a First Amendment right of access to competency evaluations if the "logic" prong of the test is met.

### B. The "logic" prong of the First Amendment test is not met because public access to competency evaluations will not have a significant positive role in the judicial process.

Petitioner cites to this Court's holding in *Guerrero* to argue that the "logic" prong is satisfied (Petition at Page 36), but again, *Guerrero* specifically discussed the benefits of public access to competency *hearings*, not competency *evaluations* themselves. In holding that public access to competency hearings "plays a significant positive role in the functioning of the particular process in question[,]" (quotation omitted) *Guerrero* discussed the adversarial nature of the hearing, recognizing that "[a]n adversarial competency hearing better resembles a criminal trial" than a grand jury proceeding. 693 F.3d at 1001. It also discussed the fact that "[a]llowing public access to a competency hearing . . . ensure[s] the proceedings are conducted in an open, objective, and fair manner." *Id.* It does not necessarily follow, however, that these reasons supporting public access to competency *hearings* also mean that public access to competency *evaluations* "plays a significant positive role" in the criminal justice process—specifically, determining whether a defendant is competent to stand trial or was legally insane at the time a crime was committed. *Id.* (quotation omitted).

First, competency examinations, unlike competency hearings, are not

adversarial proceedings akin to trials. An expert appointed to conduct a psychiatric evaluation and assess the defendant's sanity, capacity, or competency to stand trial is a neutral agent of the court. 29 Fed. Prac. & Proc. Evid. § 6303 (2d ed.). While there is value in opening adversarial *court* proceedings to the public to guard against "the corrupt or overzealous prosecutor" or the "biased, or eccentric judge," (*Press-Enterprise II*, 478 U.S. at 12-13) (quotation omitted), the same cannot be said for competency examinations themselves.

Second, even if the integrity of competency examinations could benefit in some way from public access to the completed evaluations themselves, this Court has long recognized that the general interest in opening judicial proceedings to public scrutiny is not alone sufficient to satisfy the "logic" prong of the First Amendment test. "Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1213 (9th Cir. 1989). Were courts to accept that the First Amendment mandates opening judicial proceedings in every instance where doing so could serve the interest of "self-governance or the integrity of the criminal fact-finding process[,]" this Court aptly recognized that "few, if any, judicial proceedings would remain closed." *Id.* Thus, "the mere recitation of these interests" is insufficient to "open a particular

proceeding merely because it is in some way integral to our criminal justice system." *Id.* Instead, to determine whether the logic prong is met, courts must weigh the benefit of public access against its detriments to the particular process itself. "[W]here the harm caused by disclosure of judicial records outweighs the benefit of disclosure to the public, public access no longer plays a significant positive role in the functioning of the particular process in question." *Forbes*, 61 F.4th at 1079 (internal quotation marks omitted) (quoting *United States v. Index Newspapers*, 766 F.3d 1072, 1087-88 (9th Cir. 2014)).

Thus, the third reason why *Guerrero*'s discussion of competency *hearings* is not dispositive as to the right of access to competency *evaluations* is that there are recognized harms to the criminal justice process that could result from public disclosure of competency evaluations. It is important here to emphasize that the purpose of competency evaluations is to protect defendants' due process rights. *See Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *U.S. ex rel. Robinson v. Pate*, 345 F.2d 691, 693 (1965) ("The conviction by a state court of a person for an alleged crime committed while insane violates due process under the Fourteenth Amendment."). Therefore, if public access to competency evaluations would undermine the very purpose of having such evaluations, it necessarily

follows that "public access [would] no longer play[] a significant positive role in the functioning of the particular process in question." *Forbes*, 61 F.4th at 1079 (quotation omitted).

As the Court of Appeals of Michigan recognized, "[t]he possibility that the entire contents of a competency report, including those portions not dealing with competency itself, could be disseminated to the public at large, *would seriously undermine the [competency evaluation]* process." *Detroit News, Inc. v. Recorder's Court Judge*, 202 Mich. App. 595, 604 (1993) (emphasis added), *aff'd sub nom People v. Atkins*, 444 Mich. 737 (1994). This is because, "without the guarantee of confidentiality, [a defendant] might be reluctant to speak candidly with the examining psychiatrist[,]" and further, "[i]n certain situations, defendants may even choose not to raise the issue of competency and forgo a competency evaluation to avoid public disclosure." *Id.* at 604-05 (footnote omitted). Thus, public access to competency evaluations could have a chilling effect, with the result that "the flow of necessary information to the examining psychiatrist and ultimately to the court would be hindered by unrestricted access to competency reports." *Id.* at 605; *see also U.S. v. Amodeo*, 71 F.3d 1044, 1050 (2nd Cir. 1995) ("If release [of a document] is likely to cause persons in the particular or future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.").

Moreover, even though competency evaluations are necessitated by due process, their mandatory nature also exposes defendants to the risk "of saying something or responding in a manner [during the examination] that is detrimental to or incriminates the defendant." *Caraballo v. State*, 39 So.3d 1234, 1252 (Fla. 2010); *see also U.S. v. Alvarez*, 519 F.2d 1036, 1042 (3rd Cir. 1975) (holding that "statements exacted by the compulsion of a court ordered psychiatric examination," at least those which go to the fact of the offense of the voluntariness of the accused's statements, cannot be used at trial against the defendant without violating the Fifth Amendment). Affording defendants the assurance that their statements will not used against them for improper purposes promotes the purpose of competency evaluations. *Caraballo*, 39 So. 3d at 1252. On the other hand, allowing competency evaluations to be disseminated to the public at large undermines defendants' rights to a fair trial. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378-79 (1979) (recognizing that closure of pretrial proceedings is sometimes proper to insure that the fairness of a trial will not be jeopardized by the dissemination of inadmissible, prejudicial information about the defendant throughout the community).

Further, a presumptive public access to the hearing itself opens competency proceedings to public scrutiny and the benefits inherent therein, while allowing the defendant a degree of control over what information is put forth. As this Court

recognized in *Guerrero*, "[i]n competency proceedings, a defendant has the right to be represented by counsel and the opportunity to testify, present evidence, subpoena witnesses, and to confront and cross-examine witnesses." 693 F.3d at 1001 (citation omitted). All or part of the competency evaluation may eventually be disclosed during the hearing itself, and the parties may present their arguments as to why it does or does not support the accused's competency to stand trial. Therefore, holding that there is no presumptive right of public access to competency evaluations from the time they are prepared merely delays public access until such evidence is introduced and discussed at the competency hearing. *Cf. Seattle Times Co. v. Eberharter*, 105 Wash.2d 144, 152-53 (1986) (*en banc*) (finding that public access to search warrants is not necessary to provide public scrutiny to the judicial process but merely "postpone[s]" such scrutiny, because the process can be publicly scrutinized once suit is filed against the accused or, if no charges are filed, the accused files suit for an improper search).

Thus, even if *Guerrero* stands for the proposition that there is a qualified First Amendment right of access to competency hearings, public access to competency *evaluations* does not play a "significant positive role" in the functioning of the competency evaluation process.

## IV. CONCLUSION

For the foregoing reasons, the State of Hawai‘i respectfully requests that this Court find that there is no qualified First Amendment right of public access to criminal competency evaluations.

DATED: Honolulu, Hawai‘i, July 3, 2023

Respectfully submitted,

/s/ *Lauren K. Chun*
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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**CERTIFICATE OF SERVICE**

I hereby certify I electronically filed the Amicus Curiae Brief of the State of Hawai‘i in Support of Respondent with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2023.

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DATED: Honolulu, Hawai‘i, July 3, 2023.

Respectfully submitted,

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