Case No. A125969

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

S191934

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. AHKIN R. MILLS, Defendant and Appellant.	)	SUPREME COURT NO: _____

APPELLANT'S PETITION FOR REVIEW

After Decision in the Court of Appeal
First Appellate District, Division Two
Appeal from the Superior Court of Alameda County
Honorable Larry J. Goodman, Judge

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Under Appointment By the Court
of Appeal Under the First
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IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
vs.	)
AHKIN R. MILLS,	)
Defendant and Appellant.	)

APPELLANT'S PETITION FOR REVIEW

BY THE SUPREME COURT

TO: The Honorable TANI CANTIL-SAKAUYE, Chief Justice, and to the Honorable Associate Justices of the Supreme Court:

Appellant AHKIN R. MILLS petitions for review of the unpublished opinion of the First District Court of Appeal, Division Two, filed on January 30, 2011, a copy of which is appended.

It is respectfully submitted that review should be granted under the criteria set forth in Rule 8.500, subdivision (b)(1), California Rules of Court. The Petition is also necessary to exhaust Mr. Mills's state remedies.

ISSUES PRESENTED FOR REVIEW

A. Did it violate the Fifth, Sixth and Fourteenth Amendments to instruct a guilt-phase jury -- over defense objection -- that Mr. Mills was conclusively presumed to have been sane at the time of the homicide, when the defense at the guilt phase was that his mental illness had caused him not to premeditate and deliberate, and had caused him to conclude -- unreasonably -- he had the right to act in self-defense?

B. Did it violate the Fifth, Sixth and Fourteenth Amendment to instruct -- again over defense objection -- in the language of Penal Code section 29, a statute which limits the admissibility of evidence, and which does not articulate a legal principle of which a guilt jury need be aware?

C. Did it violate the Fifth, Sixth and Fourteenth Amendments to instruct that imperfect self-defense could not be based on a "delusion," where there was no evidence that Mr. Mills's misperceptions constituted "psychotic delusions," *to wit*: beliefs which lacked bases in objective reality?

D. Did it violate the Sixth and Fourteenth Amendments to permit the prosecutor, over defense objections, to cross-examine Mr. Mills on a range of matters relating to his relationship with defense counsel, including the length of legal representation, the dates of meetings with counsel, the subjects discussed with counsel, and the existence of a "script" for Mr. Mills's testimony?

REASONS REVIEW SHOULD BE GRANTED

A. The Guilt Phase Instruction That Mr. Mills Was "Conclusively Presumed" to Have been Sane.

The Ninth Circuit has twice recognized that it violates Fourteenth Amendment due process to give a "conclusive presumption of sanity" instruction at the guilt phase of a bifurcated California trial. Moreover, California law establishes that it is error to give any instruction, even if legally correct, when the instruction has no application to the issues before the jury and may confuse the jury.

The two Ninth Circuit cases are *Patterson* v. *Gomez* (9th Cir. 2000) 233 F.3d 959 ["*Patterson*"] and *Stark* v. *Hickman* (9th Cir. 2006) 455 F.3d 1070 ["*Stark*"]. Those cases applied *Sandstrom* v. *Montana* (1979) 442 U.S. 510 ["*Sandstrom*"] and *Francis* v. *Franklin* (1985) 471 U.S. 307 ["*Francis*"] in concluding that a presumption of sanity instruction had violated the Due Process Clause.

Between *Patterson* and *Stark*, this court decided *People* v. *Coddington* (2000) 23 Cal.4th 529, *overruled on other grounds, Price* v. *Superior Court* (2001) 25 Cal.4th 1046 "*Coddington*"]. In *Coddington*, the court stated as follows, in reference to a "presumption of sanity" instruction: "the instruction correctly states the law"; "[a] defendant who believes that an instruction requires clarification must request it"; "[a]ppellant neither objected to the instruction nor sought modification"; and "appellant suffered no prejudice here in any case." *People* v. *Coddington*, *supra*, 23 Cal.4th at 584.

This court in *Coddington* mentioned neither *Patterson*, not the Due Process Clause, nor any other federal constitutional provision. For this

reason, *Stark* found *Coddington* not to have undermined *Patterson*. *Stark*, *supra*, 433 F.3d at 1076.

The Court of Appeal in Mr. Mill's case deemed *Clark* v. *Arizona* (2006) 548 U.S. 735 to have undermined *Stark* and *Patterson*. Slip opinion, at pages 18-22. However, *Clark* dealt with lines of Due Process Clause jurisprudence entirely independent of the *Sandstrom-Francis* line. The relevant Due Process Clause concern in *Clark* had solely to do with whether Arizona law excluding evidence of diminished capacity and diminished actuality offended the Due Process Clause right to present evidence in ones defense. *See Montana* v. *Egelhoff* (1996) 518 U.S. 37.[1] *Clark* neither applied nor mentioned the *Sandstrom-Francis* line of Due Process Clause jurisprudence, nor did it undermine *Patterson* or *Stark*.

Mr. Mills submits that his is an excellent case in which this court may address the *Sandstrom-Francis* Due Process Clause issue in reference to a presumption of sanity instruction. Mr. Mills spent the early months of 2005 in the throes of delusional disorder with a range of paranoid, persecutory and idiosyncratic beliefs, focused on perceived threats from gangs and gang members.

The fears prompted Mr. Mills to move himself and his wife to Rodeo, where Mr. Mills's mental illness remained severe. Ultimately, Mr. Mills went to the Emeryville Train Station to take a train to Fresno. Mr. Mills formed the belief a man waiting for a train was there to kill him, and in the belief the man was drawing a weapon, Mr. Mills shot the man multiple times.

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[1]/ The other issue -- also not a *Sandstrom-Francis* issue -- was whether Arizona's definition of legal insanity offended the Due Process Clause.

The case before the jury had two focuses: the distinction between premeditated and deliberate murder and second degree murder, and the distinction between murder and manslaughter. The defense called a psychologist to describe Mr. Mills's mental disease and its characteristics.

The defense relied at the guilt trial on "imperfect self-defense," with the defense alienist undertaking to explain to the jury how Mr. Mills's delusional disorder and paranoid beliefs had compelled his erroneous conclusion that the other man had posed a deadly threat. The defense also relied at trial on the significance of those problems and beliefs to the question whether Mr. Mills had premeditated and deliberated a killing.

The prosecution elected not directly to challenge Mr. Mills's psychological defense at the guilt phase by calling its own alienist. The prosecutor pursued instead a "flank attack" on the psychological defense by requesting a set of special instructions.

One of the prosecutor's requested special instructions was based on Penal Code section 1026, subdivision (a). That instruction advised the jury that Mr. Mills was "conclusively presumed" to have been "sane' at the time of the homicide. The trial court gave the "conclusive presumption of sanity" instruction over the defense's Fourteenth Amendment Due Process Clause objection. Moreover, the trial court refused the defense's request that, if a "conclusive presumption of sanity" instruction were to be given, legal insanity should be defined for the jury.

In sum, this case contains all of the elements necessary to enable this court fully to consider and decide the propriety of a "presumption of sanity" instruction as a matter of Fourteenth Amendment due process. Mr. Mills urges this court to grant review on that issue.

B. The Guilt Phase Instruction under Penal Code Section 29.

In the early 1980s, Penal Code section 22 was amended, and sections 25, 28 and 29 were adopted, for specific purposes: to eliminate the diminished capacity defense (Pen. Code §§ 22(a), 25(a) and 28); to redefine the test of legal insanity (Pen. Code § 25(b)); and to limit the subjects on which an expert could testify in relation to the defendant's mental illness, disorder or defect (Pen. Code § 29). Section 29 was solely a limitation on the evidence which the jury would hear, and not a principle of law to guide the jury's resolution of factual issues.

Nonetheless, the prosecutor requested an instruction in the language of section 29, and the trial court gave the instruction over defense objection. The Court of Appeal in this case found no error. Slip opinion, at pages 22-23.

Mr. Mills submits that error occurred under the United States Constitution. He urges that review should also be granted on this issue.

C. The "Delusion" Instruction in Reference to Imperfect Self-Defense.

Legal principles and psychiatric concepts have again come into a turbulent confluence. The Fifth District in *People* v. *Padilla* (2002) 103 Cal.App.4th 675 ["*Padilla*"] considered hallucinations, which are defined as *perceptions* with no basis in "objective reality." The *Padilla* court held that an hallucination cannot support a claim of heat of passion on adequate provocation to reduce a homicide to manslaughter, but that evidence of a hallucination may be considered by the jury on the subjective questions of premeditation and deliberation.

In *People* v. *Mejia-Lenares* (2006) 135 Cal.App.4th 1437 ["*Mejia-Lenares*"], the Fifth District considered "psychotic delusions" -- defined as *beliefs* "unsupported by any basis in reality." It was held that such

delusional beliefs, as defined, cannot be the basis for a claim of imperfect self-defense. Yet neither case dealt with perceptions or beliefs other than *hallucinations* and *psychotic delusions*.

"Psychotic delusions" -- referred to in the *Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition -- Text Revision (2000)* ["*DSM-IV-TR*"] as "bizarre delusions" -- represent a narrow concept, as *Mejia-Lenares* recognized. A host of other objectively-unreasonable, mistaken beliefs may arise. Mr. Mills's beliefs fell into this "lesser" range of what might be deemed "delusional," because they had a basis in reality. Such beliefs did not fit the definition of a "psychotic delusion."

The prosecutor requested, and the trial court gave over defense objection, an instruction based on *Mejia-Lenares*: "The defense of imperfect self-defense is not available to a defendant whose belief in the need to use self-defense is based on delusion alone." This instruction would have led a reasonable juror to conclude that all forms of objective but unreasonable beliefs were excluded from the jury's resolution of the issue of imperfect self-defense, if based on mental disease.

The Court of Appeal found no error. Slip opinion, at pages 23-25. Mr. Mills asks this court to grant review to address this significant issue to ensure that the imperfect self-defense doctrine is not eroded out of existence.

D. The Prosecutor's Interference With Mr. Mills's Rights to Counsel and a Fair Trial.

The Sixth and Fourteenth Amendments afford a criminal defendant the right to counsel. As stated in *Gideon* v. *Wainwright* (1963) 372 U.S. 335, at 796: ". . . [L]awyers in criminal cases are necessities not luxuries." "Obvious and insidious attacks on the exercise of this constitution-

al right are antithetical to the concept of a fair trial." *United States* v. *McDonald* (5th Cir. 1980) 620 F.2d 559, 564. "The right to the advice of counsel would be of little value if the price for its exercise is the risk of an inference of guilt." *Commonwealth* v. *Person* (Mass. 1987) 508 N.E.2d 88, 91, quoting *Commonwealth* v. *Burke* (Mass. 1959) 159 N.E.2d 856, 863.

In *Strickland* v. *Washington* (1984) 466 U.S. 668, the Supreme Court noted a line of cases recognizing the Sixth Amendment right to counsel which "protect[s] the fundamental right to a fair trial." *Id.*, at 684-685, citing *Powell* v. *Alabama* (1932) 287 U.S. 45, *Johnson* v. *Zerbst* (1938) 304 U.S. 458, and *Gideon*, *supra*. The *Strickland* court further observed: "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled. [citation omitted.]." 372 U.S. at 796.

In this case, the prosecutor in cross-examining Mr. Mills went well over the constitutional line. The trial court failed fully to curb the excuses, refused to strike the relevant portions of the transcript, and refused to admonish the jury.

The prosecutor in cross-examining Mr. Mills made a direct connection between the existence of a "script" for Mr. Mills's testimony, and the length of representation by counsel and time spent with defense counsel "practicing" his trial testimony. The implication was that defense attorneys in general, and this defense attorney in particular, were in the business of fabricating evidence and writing "scripts" for trial.

As a result, Mr. Mills's Sixth and Fourteenth Amendment rights were violated. Yet the Court of Appeal found all of this to have been proper. Slip opinion, at pages 6-15. Mr. Mills submits that review should be granted on this issue as well.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Mr. Mills was convicted by a jury of first degree murder, with a Penal Code section 12022.53, subdivision (d) firearm discharge finding.[2] The jury subsequently found Mr. Mills to have been sane at the time of the offense. Mr. Mills is serving an indeterminate term of twenty-five-years-to-life, enhanced by twenty-five-years-to-life.

Mr. Mills was charged by an Information filed December 22, 2006. 2CT 291.[3] Jury trial commenced on May 27, 2008. 2CT 376. On June 2, 2008, the trial court declared a doubt as to Mr. Mills's competence, and a section 1368 referral was made. 2CT 390. Alienists were appointed (2CT 394, 396, 407), and Mr. Mills was found competent on the reports. 2CT 410.

On December 17, 2008, Mr. Mills added a plea of not-guilty-by-reason-of-insanity. 2CT 417, 418. The second jury trial commenced on April 8, 2009. 2CT 437. Guilt phase instructions and arguments were presented May 6 and 7, 2009. 3CT 526, 528. The guilt verdict and finding were returned on May 12, 2009. 3CT 604, 605. The sanity phase commenced on May 18, 2009. 3CT 617. The sanity finding was returned on May 20, 2009. 3CT 647, 648.

On August 12, 2009, Mr. Mills was sentenced to State Prison as above-described. 3CT 657, 659. Notice of Appeal was timely filed August 31, 2009. 3CT 686.

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[2]/ All code references are to the Penal Code, unless otherwise noted.

[3]/ Clerk's Transcript.

STATEMENT OF FACTS

For the purposes of this Petition, Mr. Mills refers the court to the factual summary at pages 1 through 4 of the Slip opinion. In brief, Ahkin Mills spent the early months of 2005 in the throes of delusional disorder with a range of paranoid, persecutory and idiosyncratic beliefs. Those beliefs were focused on perceived threats from various groups and individuals, including the Merced Gangster Crips and one of their leaders, Tyrone "T-Murder" Johnston, who was deemed to consider Mr. Mills a "snitch." Fear of the Merced Gangster Crips and others prompted Mr. Mills to move himself and his wife to Rodeo to live with a cousin, after which Mr. Mills's mental illness remained severe.

Ultimately, Mr. Mills went to the Emeryville Train Station to take a train to Fresno, in order to lure his pursuers away from his wife and cousin. At the station, Mr. Mills came to the belief a man waiting for a train was one of several people there to kill him. In the belief the man was drawing a weapon, Mr. Mills shot the man multiple times, reloading in the process. When the Emeryville police arrived, Mr. Mills went to the ground and identified himself as the only "shooter."

I

THE TRIAL COURT VIOLATED THE FOURTEENTH AMENDMENT WHEN IT INSTRUCTED THE GUILT-PHASE JURY THAT MR. MILLS WAS CONCLUSIVELY PRESUMED TO HAVE BEEN SANE AT THE TIME OF THE HOMICIDE.

A. Introduction to the Argument.

The defense relied at trial on "imperfect self-defense," with Dr. Smith undertaking to explain to the jury how Mr. Mills's delusional disorder and paranoid beliefs had compelled his erroneous conclusion that a man at a train station had posed a deadly threat. The defense also relied at trial on the significance of those problems and beliefs to the question whether Mr. Mills had premeditated and deliberated a killing.

The prosecution elected not directly to challenge Mr. Mills's psychological defense at the guilt phase by calling its own alienist. The prosecutor opted instead to undertake a "flank attack" on the psychological defense by requesting a set of special instructions.

One of the prosecutor's requested special instructions was based on Penal Code section 1026, subdivision (a). That instruction advised the jury that Mr. Mills was "conclusively presumed" to have been "sane' at the time of the homicide.

The trial court agreed to give the prosecution's "conclusive presumption of sanity" instruction over the defense's Fourteenth Amendment Due Process Clause objection. Moreover, the trial court refused the defense's request that, if a "conclusive presumption of sanity" instruction were to be given, legal insanity should be defined for the jury.

The Ninth Circuit has recognized that it violates due process to give a "conclusive presumption of sanity" instruction at the guilt phase. Moreover, California law has been clear for nearly a century that it is

error to give an instruction, even if legally correct, when the instruction has no application to the issues before the jury and may confuse the jury.

B. The Debate and Rulings in the Trial Court.

Citing Penal Code section 1026, the prosecutor's proposed Special Instruction No. 1 read: "For purposes of reaching your verdict during this guilt phase of the proceedings, the defendant is conclusively presumed to have been sane at the time of the offense." 2CT 500.

The defense filed an objection, arguing that the instruction "would violate Defendant's rights to due process and a fair trial because it might tend to confuse the jury and would have the effect of lower[ing] the prosecution's burden of proving intent. (*U.S. Const. Amends. V, VI, XIV; Cal. Const. Art. I §§ 7, 15.*)" 3CT 509. It was argued further that "this instruction might be mis-interpreted by the jury as directing them to disregard Defendant's evidence regarding mental illness, and that the jury may mis-interpret this instruction as directing them to presume a mental condition which has not been adequately defined or distinguished from Defendant's evidence regarding mental illness." 3CT 509-510. It was contended finally that "[i]n the event the Court intends to give this instruction over Defendant's objection," an instruction should be given to define legal insanity. 3CT 510.

The trial court determined to give the prosecutor's requested "conclusive presumption of sanity" instruction and to refuse the defense's requested "definition of legal insanity" instruction. 8RT 1076. The trial court elected "correctly [to state] the law" as requested by the prosecutor, even though that law was not relevant to any issue before the jury, while declining "correctly [to state] the law" as requested by the defense. The result was a violation of the Due Process Clause.

C. The Controlling Due Process Clause Principles Under the *Sandstrom-Francis* Line of United States Supreme Court Authority.

In 2000, the Ninth Circuit in 2000 decided *Patterson*, *supra*, 233 F.3d 959, and the same court six years later decided *Stark*, *supra*, 455 F.3d 1070. Each case arose after a California murder prosecution in which the defendant had entered not guilty and not-guilty-by-reason-of-insanity ["NGI"] pleas. In each case, the defense had relied at the guilt phase on psychological evidence in an effort to reduce the level of the homicide conviction. In each case, the defense had presented the testimony of an alienist. In each case, the jury had heard a presumption-of-sanity instruction at the guilt phase. And in each case, the Ninth Circuit relied upon *Sandstrom*, *supra*, 442 U.S. 510 and *Francis*, *supra*, 471 U.S. 307 in concluding that the presumption-of-sanity instruction had violated the Due Process Clause.

The Ninth Circuit in *Patterson* noted that the defendant "contended during the guilt phase that he did not have the requisite mental state for first degree murder" and contended during the sanity phase "that he was insane." *Ibid.* The court reviewed California law on both murder and insanity. *Ibid.* *Patterson* found that "the problem lies with what the jury was told to presume about petitioner's mental state," which was as follows: "At the time of the alleged offense charged in the Information, you were [sic] instructed to presume that the defendant was sane." *Ibid.*; original emphasis omitted.

The *Patterson* court concluded: "The problem with the instruction given in this case is that it tells the jury to presume a mental condition that -- depending on its definition -- is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime." *Id.* at 391.

Patterson noted that the most recent edition of Webster's New Collegiate Dictionary defined "sane" as including: "proceeding from a sound mind"; "rational"; "mentally sound"; and "able to anticipate and appraise the effect of one's actions." *Id.*, at 966. "Under these definitions, the instruction 'to presume that the defendant was sane' impermissibly relieves the state of its burden to prove beyond a reasonable doubt that defendant had the mental state necessary to commit first degree murder under California law." *Ibid.* "We hold that the guilt phase instruction to presume the defendant was sane was a violation of the Due Process Clause of the Fourteenth Amendment." *Id.*, at 966.

In *Stark*, the defendant had called alienists in support of a guilt phase defense "that he did not possess the mental state required for first degree murder." *Stark, supra*, 455 F.3d at 1075. The guilt phase instructions included the following: "In the guilt phase of a criminal action the defendant is conclusively presumed to be sane; . . ." *Ibid.* *Stark* noted that the California Court of Appeal had rejected a Due Process Clause challenge to this instruction in reliance on *People* v. *Coddington* (2000) 23 Cal.4th 529 [*overruled on other grounds, Price* v. *Superior Court* (2001) 25 Cal.4th 1046]. *Stark* was not persuaded that *Coddington* resolved the issue, because "[t]he *Coddington* court neither addressed the constitutionality of the instruction itself nor rendered a decision with regard to it." *Stark, supra*, 433 F.3d at 1076.

"'It is error to give an instruction which, although correctly stating a principle of law, has no application to the facts of the case.'" *People* v. *Anderson* (1965) 63 Cal.2d 351, 360, quoting *People* v. *Eggers* (1947) 30 Cal.2d 676, 687. "When the charge to the jury, though a correct statement of legal principles, is extended beyond such limitations so as to

cover an assumed issue which finds no support in the evidence it constitutes error. [Citations]." *People* v. *Silver* (1940) 16 Cal.2d 714, 722. This prohibition has a sound logical basis: "Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." *People* v. *Jackson*, *supra*, 42 Cal.2d at 547.

Stark was correct that the issue in *Coddington* was solely one of conflicting instructions. *Coddington* never mentions *Patterson*, the Due Process Clause, or any federal constitutional provision.

The ultimate question -- to paraphrase *Francis*, *supra*, 471 U.S. at 315-316 -- remains "what a reasonable juror could have understood the conclusive presumption of sanity charge as meaning." The dictionary definition of "sane" includes meanings such as "proceeding from a sound mind"; "rational"; and "mentally sound." *See Merriam-Webster.com.* Other definitions include "free from mental derangement" and "having a sound, healthy mind." *See Dictionary.com.*

As a result, the jurors were instructed that Mr. Mills was conclusively presumed to have been "free from mental derangement," to have had "a sound, healthy mind," and to have been "rational" and "mentally sound." The due process problem is inescapable.

D. *Clark* Does Not Alter the Legal Landscape.

1. The Multiple Potential Implications of Due Process at a Criminal Trial.

The gnarled tree of the Fourteenth Amendment Due Process Clause bears multiple fruit. For example, the Due Process Clause -- while requiring proof beyond a reasonable doubt of each element of a crime (*In re Winship* (1970) 397 U.S. 358) -- almost never limits a

state's ability to specify the elements of crimes. *See, e.g., Smith* v. *California* (1959) 361 U.S. 147, 150.

Moreover -- and of significance in reference to *Clark* -- a state may limit the evidence on which a defendant may rely in his defense. *See, e.g., Montana* v. *Egelhoff, supra*, 518 U.S. 37 [a state may validly preclude evidence of intoxication when offered to negate *mens rea*]. *Clark* falls in the *Egelhoff* line of Due Process Clause jurisprudence.

Yet there is an independent line of Due Process Clause jurisprudence dealing with *presumptions* in criminal cases. Once a state has defined a crime, has identified the relevant defenses, and has established the rules governing admission of evidence in relation to the crime and defense, the state may not validly rely on a *conclusive presumption* to establish an element of the crime or to defeat the defense. *See Francis, supra*, 471 U.S. 307 and *Sandstrom, supra*, 442 U.S. 510, on which the Ninth Circuit relied in *Stark* and *Patterson*.

2. Current California Homicide Law.

In 1872, California enacted Penal Code sections 187 *et seq.* to define murder. In *People* v. *Flannel* (1979) 25 Cal.3d 668, this court recognized that an "honest but unreasonable belief" in the need to defend will negate malice. *See, also, In re Christian S.* (1994) 7 Cal.4th 768. In 1981, the California Legislature abolished the diminished capacity defense and declared evidence of *diminished capacity* inadmissible, but it preserved the right to present evidence on mental issues as it bears on so-called *diminished actuality*. *See* Penal Code section 28. *See, also, People* v. *Williams* (1997) 16 Cal.4th 635, 676-677. In 1984, the Legislature limited the issues on which alienists may testify. *See* Penal Code section 29.

However, Penal Code section 1026 has contained its "conclusive presumption of sanity" language since its enactment in 1927. That language appears in subsection (a), which discusses the order of proof where a defendant has entered dual pleas of not guilty and not guilty by reason of insanity. This court, when it declared in *Coddington* that the "conclusive presumption of sanity" language "correctly stated the law," did not alter the definitions of murder or "imperfect" self-defense, nor did the court interpret or re-interpret Penal Code sections 25, 28, or 29.

3. The Holding of *Clark* v. *Arizona*.

Clark addressed "whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged. . . ." *Clark*, *supra*, 548 U.S. 742. Arizona through statutory and case law had established for Arizona courts not only that psychiatric evidence of "diminished capacity" was precluded on *mens rea* but that psychiatric evidence on "diminished actuality" was precluded.

In rejecting the due process challenge, the *Clark* court stated:

> The third principle implicated by Clark's argument is a defendant's right as a matter of simple due process to present evidence favorable to himself on an element that must be proven to convict him. . . . [¶] As Clark recognizes, however, the right to introduce relevant evidence can be curtailed if there is a good reason for doing that.
>
> *Id.*, at 769-770; footnote omitted.

The High Court noted specifically that its decision dealt solely with the choices made by the Arizona Legislature and courts:

> It bears repeating that not every State will find it worthwhile to make the judgment Arizona has made. . . . The point here is simply that Arizona has sensible reasons to assign the risks as it has done by channelling the evidence.
>
> *Id.*, at 778; footnotes omitted.

The other issue in *Clark* was whether Arizona's definition of legal insanity offended due process, which the High Court found it did not. Although the *Clark* decision contained a great deal of analysis of legal sanity, the types of evidence which may bear on *mens rea*, and related matters, the conclusions in *Clark* were narrow: (i) Arizona's definition of legal sanity did not offend due process; and (ii) Arizona's exclusion of psychiatric evidence on *mens rea* did not offend due process.

4. Accordingly, *Clark* Does Not Undermine *Sandstrom*, *Francis*, *Patterson* or *Stark*.

Neither *Clark* nor *Coddington* altered California law, and neither undermined the holdings of *Sandstrom* and *Francis* barring "conclusive presumptions" as a substitute for proof. Unless and until California law is changed, the reasoning of *Stark* and *Patterson* remains compelling.

II

THE TRIAL COURT SIMILARLY ERRED UNDER THE FOURTEENTH AMENDMENT AND UNDER STATE LAW WHEN IT INSTRUCTED IN THE LANGUAGE OF SECTION 29.

A. Introduction and Overview.

In the early 1980s, Penal Code section 22 was amended, and sections 25, 28 and 29 were adopted, for specific purposes: to eliminate the diminished capacity defense (Pen. Code §§ 22(a), 25(a) and 28); to redefine the test of legal insanity (Pen. Code § 25(b)); and to limit the subjects on which an expert could testify in relation to the defendant's mental illness, disorder or defect (Pen. Code § 29). Section 29 was not a principle of law to guide the jury's resolution of factual issues as to the elements of the offense.

Nonetheless, the prosecutor requested an instruction in the language of section 29, and the trial court gave the instruction over defense objection. Error occurred under both the United States Constitution and state law.

B. Penal Code Section 29.

Section 29 was enacted in 1981 (Stats. 1981 ch. 404 § 5) and replaced by the current, similar statute in 1984 (Stats. 1984 ch. 1433 §§ 2 and 3). As explained in *People* v. *Jackson* (1984) 152 Cal.App.3d 961, at 967: "[Sections 28 and 29] are a legitimate legislative determination on the admissibility of a class of evidence." As further explained in *People* v. *McCowan* (1986) 182 Cal.App.3d 1, at 12: "The restrictions imposed by sections 25, subdivision (a), 28 and 29 are determinations by

the electorate and the Legislature that for reasons of reliability or public policy, capacity evidence is inadmissible."

As to section 29 specifically, it was stated in *McCowan*: "Section 29 properly may be viewed . . . as a limitation on the use of expert testimony, and a determination that such testimony on the ultimate issue whether the accused had the requisite mental state is unnecessary." *Id.*, at 14. Section 29 establishes a limitation on evidence. It does not govern how a jury will apply that evidence to the legal issues before it.

C. The Issue in the Trial Court.

The prosecutor filed a Request for Special Instructions. Special Instruction No. 2 cited no authority other than section 29, and the special instruction was drafted in language substantially similar to section 29:

> In the guilt phase, any expert testifying about a defendant's mental disorder shall not testify as to whether the defendant had or did not have the required mental state. The question as to whether the defendant had or did not have the required mental state shall be decided by the trier of fact.
>
> 3CT 501.

The defense again argued that the instruction "would violate Defendant's rights to due process and a fair trial because it might tend to confuse the jury and would have the effect of lower[ing] the prosecution's burden of proving intent. (*U.S. Const. Amends. V, VI, XIV; Cal. Const. Art. I §§ 7, 15.*)" 3CT 510. The trial court overruled the objection, and -- with a minor addition -- the instruction was given as requested by the prosecutor. Mr. Mills submits this was error.

D. The Controlling Law.

The error here is relevant to that discussed in Argument I, because the Penal Code section 29 instruction had the effect of both exacerbating the error and compounding the prejudice in giving a "presumption of sanity" instruction. Not only were the jurors told by Special Instruction No. 1 that Mr. Mills was "conclusively presumed" to have been "rational," "mentally sound," and "free from mental derangement," but they were told by Special Instruction No. 2 that Dr. Smith could not testify to the contrary. Any doubts as to the import of Special Instruction No. 1 were obliterated by Special Instruction No. 2, such that the two instructions read together overwhelming violated the Due Process Clause as interpreted in *Sandstrom* and *Francis*.

The instruction in the language of section 29 -- whether considered in isolation or in combination with the error discussed in Argument I -- also had a substantial potential of confusing and misleading the jurors by advising them -- in effect -- that they were not permitted to accept Dr. Smith's opinion that Mr. Mills suffered from mental illness. The jury, as instructed in the language of section 29, was told either that it should ignore mental illness, or that it would have to make that "diagnosis" on its own.

Sandstrom and *Francis* have already been discussed, above. In addition, a defendant has Fifth, Sixth, and Fourteenth Amendment rights to present a defense without unreasonable restrictions and limitations. *See Crane* v. *Kentucky* (1986) 476 U.S. 683; *Davis* v. *Alaska* (1974) 415 U.S. 308; *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 294; *Webb* v. *Texas* (1972) 409 U.S. 95; and *Washington* v. *Texas* (1967) 388 U.S. 14. Multiple constitutional violations occurred.

III

THE TRIAL COURT ERRED IN INSTRUCTING THAT IMPERFECT SELF-DEFENSE COULD NOT BE BASED ON A "DELUSION," WHERE THERE WAS NO EVIDENCE THAT MR. MILLS'S PERCEPTIONS FIT THE DEFINITION OF A "PSYCHOTIC DELUSION."

A. Introduction.

The Fifth District in *Padilla*, *supra*, 103 Cal.App.4th 675 considered hallucinations, defined as *perceptions* with no basis in "objective reality." In *Mejia-Lenares*, *supra*, 135 Cal.App.4th 1437, the same court considered "psychotic delusions," defined as *beliefs* "unsupported by any basis in reality."

However, "psychotic delusions" -- referred to in the *DSM-IV-TR* as "bizarre delusions" -- represent a narrow concept, as *Mejia-Lenares* recognized. A host of other objectively-unreasonable, mistaken beliefs may arise. Mr. Mills's beliefs fell into this "lesser" range of what might be deemed "delusional," because they had a basis in reality. "Delusions" which derive from a "delusional disorder" are not "psychotic delusions."

The trial court gave over Fifth, Sixth, and Fourteenth Amendment objections (3CT 510-511) an instruction based on *Mejia-Lenares*: "The defense of imperfect self-defense is not available to a defendant whose belief in the need to use self-defense is based on delusion alone." This was error, on the evidence in this case. This instruction would have led a reasonable juror to conclude that all forms of objective but unreasonable beliefs were excluded from the jury's resolution of the issue of imperfect self-defense, if based on mental disease. Such a view was legally wrong.

B. *Padilla, Mejia-Lenares*, Hallucinations and Delusions.

In *Padilla*, the claim of error was exclusion of evidence of psychologists that the defendant had killed someone the defendant hallucinated had killed the defendant's father and brothers. *Padilla*, *supra*, 103 Cal.App.4th at 677. The Fifth District held that "evidence of a hallucination was inadmissible to negate malice so as to mitigate murder to voluntary manslaughter. *Ibid.* The *Padilla* court was careful to explain precisely what it meant by a hallucination:

> *A hallucination is a perception with no objective reality.* (American Heritage Dict. (4th ed. 2000) p. 792 ["[p]erception of visual, auditory, tactile, olfactory, or gustatory experiences without an external stimulus" (italics added)]; Oxford English Dict. (2d ed. 1989) p. 1047 ["apparent perception (usually by sight or hearing) of an external object when no such object is actually present" (italics added)]; Webster's 3d New Internat. Dict. (1986) p. 1023 ["perception of objects with no reality" (italics added)].)
>
> *Padilla*, *supra*, 103 Cal.App.4th at 678-679; emphasis added, original emphasis deleted.

The same court in *Mejia-Lenares* tackled the question of a "psychotic delusion" -- a *belief* with no basis in objective reality -- in reference to imperfect self-defense. In that case, the psychotic delusion was that someone "was transforming into the devil and wanted to kill [the defendant]." *Mejia-Lenares*, *supra*, 135 Cal.App.4th at 1444. The claim of error was refusal of a requested modification of CALJIC 8.73.1 "which would have instructed jurors also to consider evidence of hallucination on the issue of whether the perpetrator 'killed in the actual but

unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.'" *Id.*, at 1445; footnote omitted.

The Fifth District concluded that "imperfect self-defense cannot be based on delusion alone." *Id.*, at 1446; footnote omitted. However, the court made clear that it used the term "delusion" narrowly:

> . . . . [O]ur determination that a delusion, *unsupported by any basis in reality*, cannot sustain an imperfect self-defense claim, does not preclude all mentally ill defendants from using evidence of mental illness to assert imperfect self-defense. We are dealing in this case *only* with a mental aberration rising to the level of delusion and a killing which results *solely* from that delusion, and nothing we say should be read any more broadly.
>
> *Id.*, at 1454-1455; first emphasis added; other emphasis in original.

The significance of the definition of "delusion" becomes clear when the psychiatric literature is considered. The *DSM-IV-TR* explains the critical distinction between "bizarre delusions" in relation to schizophrenia, and "nonbizarre delusions" in relation to delusional disorder.

> Delusions are deemed bizarre if they are clearly implausible, not understandable, and not derived from ordinary life experiences (e.g., an individual's belief that a stranger has removed his or her internal organs and replaced them with someone else's organs without leaving any wounds or scars). In contrast, nonbizarre delusions involve situations that can conceivably occur in real life (e.g., being followed, poisoned, infected, loved at a distance, or deceived by one's spouse or lover).
>
> *DSM-IV-TR*, at page 324.

The evidence in Mr. Mills's case involved neither *Padilla* hallucinations nor *Mejia-Lenares* psychotic delusions. Mr. Mills's beliefs -- however unreasonable in an objective sense -- arose from delusional disorder and were rooted in reality, as Dr. Smith explained. The defense objection should have been sustained.

C. The Constitutional Issue.

Under the United States Constitution, the issue turns on "what a reasonable juror could have understood the charge as meaning. [Citation.]" *Francis* v. *Franklin*, *supra*, 471 U.S. at 315-316, citing *Sandstrom* v. *Montana*, *supra*, 442 U.S. at 514. Here the instruction had a severe vice, which was its implication that *all* unreasonable beliefs held by a person with a mental illness constitute "delusions" of the type which cannot support imperfect self-defense.

Accordingly, the instruction had the effect of misdefining the "malice" element of murder. That brings into play Justice Kennard's conclusion in her dissent in *People* v. *Breverman* (1998) 19 Cal.4th 142, which was that some errors in relation to lesser offenses in the malice-murder context leave the definition of malice "incomplete" and constitute federal constitutional error. *Id.*, at 187-195 [Kennard, J., dissenting].[4]

Justice Kennard perceived a number of constitutional consequences. The first involves the Sixth Amendment right to have the jury decide all "elemental facts" necessary to convict, which does not occur where an element is "misdescribed." *Id.*, at 189, citing *United States* v. *Gaudin* (1995) 515 U.S. 506, 522-523. Justice Kennard also saw "another avenue

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[4]/ The majority in *Breverman* expressly declined to address those concerns for the reason they had not been raised by the appellant. *Id.*, at 170 n. 19.

of federal constitutional analysis" in this area, based on the due process requirement of "fundamental fairness in the criminal procedures by which a defendant is convicted of a crime."[5] *Id.*, at 190. The problem is that the defendant may "be convicted of an offense of which, in the jury's view, he is factually innocent under the evidence presented at trial, and it is hard to imagine anything more fundamentally unfair than that." *Id.*, at 191.

Mr. Mills accordingly submits that there were related but distinct Fourteenth Amendment Due Process Clause consequences flowing from the error. The first was an incomplete definition -- and effective mis-definition -- of the "malice" element of murder (Justice Kennard's first position). The second was the "fundamental unfairness" flowing from the error (Justice Kennard's second position). The third and final consequence was denial of Mr. Mills's right to present his theory of the case to the jury.

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[5]/ Cited are *Albright* v. *Oliver* (1994) 510 U.S. 266, 283 (Kennedy, J., concurring); *United States* v. *Valenzuela-Bernal* (1982) 458 U.S. 858, 872; and *Spencer* v. *Texas* (1967) 385 U.S. 554, 563-564.

IV

MULTIPLE FEDERAL CONSTITUTIONAL VIOLATIONS OCCURRED WHEN THE PROSECUTOR WAS PERMITTED, OVER DEFENSE OBJECTIONS, TO CROSS-EXAMINE MR. MILLS ON A RANGE OF MATTERS RELATING TO HIS RELATIONSHIP WITH DEFENSE COUNSEL.

A. Introduction and Overview.

In this case, the prosecutor in cross-examining Mr. Mills went well over the constitutional line. The trial court failed fully to curb the excuses, refused to strike the relevant portions of the transcript, and refused to admonish the jury.

The prosecutor in cross-examining Mr. Mills made a direct connection between the existence of a "script" for Mr. Mills's testimony, and the length of representation by counsel and time spent with defense counsel "practicing" his trial testimony. The implication was that defense attorneys in general, and this defense attorney in particular, were in the business of fabricating evidence and writing "scripts" for trial. As a result, Mr. Mills's Sixth and Fourteenth Amendment rights were violated.

B. The Issues in the Trial Court.

The prosecutor commenced her cross-examination of Mr. Mills on April 28, 2009. 7RT 791. However, the prosecutor eventually reached the topic of Mr. Mills's purportedly having fabricated his testimony to avoid punishment. 7RT 830-831. The trial court deemed the reference to punishment to be an "improper area of questioning." 7RT 831. The prosecutor opted alternatively to suggest that Mr. Mills had been meeting with defense counsel for years to create a "script" for Mr. Mills's testimony.

[BY THE PROSECUTOR]:

Q. Now, you want your wife to get you off of this by sticking to the script about all your craziness, right?

A. No, ma'am.

Q. Actually, *let me interpose this, talk about the script.* How long have you been practicing your testimony?

A. Practicing my testimony?

Q. Yes.

[DEFENSE COUNSEL]: Objection. Argumentative. Improper as well.

THE COURT: Sustained.

[BY THE PROSECUTOR]:

Q. Let's see, you've known [defense counsel] here for four years, haven't you?

A. Yes.

Q. And you guys have been talking about this case for four years?

[DEFENSE COUNSEL]: Objection to this entire line.

THE COURT: No. It's proper.

[BY THE PROSECUTOR]:

Q. You've been talking about this case for four years?

A. We haven't been talking about the case for four years, no.

Q. You haven't?

A. No, ma'am.

Q. You don't talk about this case with [defense counsel]?

A. We talk about the case, but --

[DEFENSE COUNSEL]: I'm going to object at this point. Getting into privilege.

THE COURT: The fact that they talk is not privileged, but you can't get into what they talk about.

[THE PROSECUTOR]: I don't intend to, Judge. Thank you.

Q. You talk about this case with [defense counsel], correct?

[DEFENSE COUNSEL]: Same objection.

THE COURT: Overruled.

[BY THE PROSECUTOR]:

Q. You talk about this case, the shooting of Jason, with [defense counsel], right?

A. Yes, ma'am.

Q. And he's been your attorney for four years, right?

A. Yes, ma'am.

7RT 831-832; emphasis added.

After cross-examination on events leading to the shooting (7RT 834-845), the prosecutor returned to Mr. Mill's meetings with defense counsel:

> [BY THE PROSECUTOR]:
>
> Q. . . . Did you meet with, without going into the contents of what you said, *did you spend a good portion on Friday meeting with your attorney?*
>
> [DEFENSE COUNSEL]: Objection. Relevance.
>
> THE COURT: Overruled.
>
> [BY THE PROSECUTOR]:
>
> Q. Did you?
>
> A. Friday?
>
> Q. Yes.
>
> A. Yes, I think we talked.
>
> Q. How long was he at the jail with you?
>
> A. I think maybe an hour. I think. I'm not sure.
>
> Q. One hour on Friday?
>
> A. I think so, yes.
>
> Q. That's it?
>
> A. I think so, yes, ma'am.
>
> Q. And then how about Saturday?
>
> A. Saturday, yeah, I think about an hour, I think, yeah.

Q. *An hour on Friday, an hour on Saturday. Did you guys practice on Sunday?*

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[BY THE PROSECUTOR]:

Q. Did you meet on Sunday?

A. Sunday, I don't think we met on Sunday, no.

7RT 846; emphasis added.

On the following morning, defense counsel sought to re-raise the issue, seeking an order striking testimony and an admonition to the jury. 7RT 873-874. The trial court was unpersuaded. 7RT 874. This violated the United States Constitution in a number of respects.

C. The Controlling Law.

Multiple courts have found error and/or misconduct in the introduction of evidence at trial, or an argument to the jury, which either sought to convert reliance on counsel into evidence of guilt, or which implied that counsel had assisted in the fabrication or suppression of evidence. Such cases rely on the Sixth and Fourteenth Amendment right to counsel, on the Fourteenth Amendment right to a fair trial, or on both. *See Bruno* v. *Rushen* (9th Cir. 1983) 721 F.2d 1193; *Henderson* v. *United States* (D.C. 1993) 632 A.2d 419; *United States* v. *McDonald*, *supra*, 620 F.2d 559; *Zemina* v. *Solem* (8th Cir. 1978) 573 F.2d 1027; and *United States ex rel Macon* v. *Yeager* (3d Cir. 1973) 476 F.2d 613, cert. denied, 414 U.S. 855. *See*, *also*, *State* v. *Angel* (Conn. 2009) 973 A.2d 1207;

Commonwealth v. *Colavita* (Pa. 2007) 920 A.2d 836; *Commonwealth* v. *Nolin* (Mass. 2007) 859 N.E.2d 843; *State* v. *Dixon* (Kan. 2005) 112 P.3d 883; *Arthur* v. *State* (Ala. App. 1990) 575 So. 2d 1165, cert. denied, (Ala. 1991) 575 So. 2d 1191; and *Hunter* v. *State* (Md.App. 1990) 573 A.2d 85.

D. Application of that Law Here.

The prosecutor's cross-examination of Mr. Mills suggested three circumstances to the jury. It was suggested, first, that Mr. Mills had a "script" for his testimony. It was suggested, second, that there was a connection between that script and the fact of representation by defense counsel. It was suggested, third, that Mr. Mills and defense counsel had been using the script to practice Mr. Mills's testimony daily.

The effect of these three circumstances was to create, in the mind of an average juror, an inference that counsel had assisted in the preparation of false testimony. The three circumstances also gave rise to an inference that Mr. Mills's consultation with counsel in preparation for trial suggested Mr. Mills's guilt, because Mr. Mills could not proceed to trial armed only with the truth.

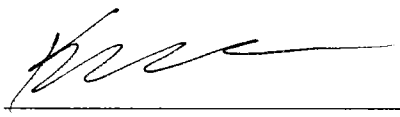
Thus did the conduct by the prosecutor, all of which occurred before the jury with the imprimatur of the trial judge, violate the Sixth Amendment right to counsel and the Fourteenth Amendment right to a fair trial. The error was "calculated to impute guilt" to Mr. Mills and "'[struck] at the jugular" of his testimony. *Bruno*, *supra*, 721 F.2d at 1195. It was a "insidious attack" on Mr. Mills's exercise of his right to counsel, and it denied him a fair trial. A constitutional violation occurred.

CONCLUSION

For the reasons stated, Mr. Mills respectfully urges that this Court should grant review. On review, the judgment of conviction should be reversed in its entirety.

Dated: April 1, 2011

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

IN COMPLIANCE WITH RULE 33, SUBDIVISION (B)

I hereby certify, pursuant to Rule 8.504, California Rules of Court, that the attached brief contains 7457 words. In this certificate, I am relying on the word count produced by Wordperfect 5.1.

Dated: April 1, 2011

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AHKIN R. MILLS

Filed 2/28/11

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AHKIN RAMOND MILLS,

Defendant and Appellant.

A125969

(Alameda County
Super. Ct. No. C154217)

After a jury found defendant Ahkin Ramond Mills guilty of first degree murder involving the personal use of a firearm (Pen. Code, §§ 187, 12022.53, subd. (d)), the trial court sentenced him to state prison for a total term of 50 years to life. Defendant contends that reversal is required by reason of: (1) the trial court's failure to hold a hearing to determine if new defense counsel was required; (2) prosecutorial misconduct, and (3) instructional error. We conclude that no reversible error occurred, and thus affirm the judgment.

BACKGROUND

On the afternoon of April 21, 2005, Jason Jackson-Andrade was in the Emeryville Amtrak station waiting for a train that would take him back to Sacramento after celebrating his uncle's birthday. While waiting, he encountered an already agitated defendant, who began uttering racial insults, curses and threats that "You ain't getting on the train." Defendant repeatedly asked Jackson-Andrade whether he had a gun. After listening to this tirade for several minutes, Jackson-Andrade did not respond, but simply walked away. Defendant appeared to calm down, and then followed and shot him

multiple times. Jackson-Andrade was seated when defendant fired the first shot. Jackson-Andrade pleaded "Please don't shoot me," and "Please no more," this after the fourth shot. He tried to crawl away, but the bullets kept coming. At one point in the fusillade, defendant paused when a bystander started to flee; then he heard Jackson-Andrade moan, and resumed firing at him. Jackson-Andrade was shot seven times, once in the chest, and five times in the back, and once in the back of the left thigh, with a six-round .357 Magnum.

Police responded to the scene within minutes. Defendant was apprehended, still in possession of the gun, and repeatedly told the officers, "I'm the only shooter. It's me." Jackson-Andrade's body was on the station floor, approximately 15 feet away from defendant. Jackson-Andrade died at the scene.

This much was undisputed. Defendant did not deny that it was he who shot and killed Jackson-Andrade. As defense counsel told the jury in his opening statement: "This case is not about whether Mr. Mills killed Mr. Jackson-Andrade. The evidence is going to show that in fact he did. This case is about why he killed him." The first question to defendant on direct examination was "Mr. Mills, did you shoot Mr. Jackson-Andrade?", and his answer was "Yes, I shot Mr. Jackson-Andrade." The next question was "Why did you shoot him?" His answer was, "I shot Mr. Jackson-Andrade because of what he said and the things he did. He told me he had a gun. He—when I walked into the station, he reached into his pocket and repeatedly had an argument. He told me he had a gun, told me he was going to kill me."

Defendant's version of events was that he believed he was in peril from men he knew only as "One Shot" and "Tyrone," whom he knew from Merced.[1] Defendant moved from Merced to Alameda County because he feared for his life. He thought he

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[1] Defendant's wife testified that her mother married one of Tyrone's "family members." She also testified that defendant thought the FBI, and possibly the Mafia, "were after him." Defendant's wife thought the explanation for his erratic behavior was that "my husband was on drugs."

A Merced police officer testified that Tyrone Johnson was known as member of the Merced Crips gang.

was receiving messages through the radio. He also believed that there had already been "attempts on my life in Merced." He also thought individuals associated with a record label were out to kill him. Defendant got a gun before he left Merced. After he left Merced, defendant thought he was being followed by Tyrone.

On the day of the killing, defendant had not slept for two days. That day he robbed a Sacramento storeowner, Kinh Hang, at gunpoint and carjacked Hang's vehicle. As he drove from Sacramento to the Bay Area, he thought Tyrone's people were still following him. He stopped briefly at the house of his wife and his cousin, but when he heard from his cousin that she thought she was being followed, he insisted she take him to the Emeryville train station. As defendant was walking to the station, "somebody told me that you're going to feel it today," which to defendant meant "I was going to get shot." Inside the station, defendant bought a ticket to Fresno, and loaded his gun.

Defendant was shocked when his wife walked up to wish him goodbye. He told her to leave because "I know they're here." He saw two individuals he thought were "suspicious," and associated with the "hit on me." It was then that Jackson-Andrade "called me over to him." The ensuing discussion quickly became "heated," and Jackson-Andrade told defendant he had a gun and "I'll kill you." Jackson-Andrade walked away. Defendant began singing outloud "Tyrone, you got the wrong guy" because "I wanted his hitman to hear . . . so . . . they can call off the hit." When Jackson-Andrade "got up and I seen like an object on his right side and he put his hand in his pocket, and when he put his hand in his pocket," "I thought he was trying to grab for his weapon," and "I pointed my gun and started to shoot at him." Defendant never heard Jackson-Andrade plead not to be shot. Defendant concluded his testimony by admitting "I feel terrible" about killing Jackson-Andrade.

On cross-examination, defendant further admitted that he reloaded the gun and kept firing while Jackson-Andrade was on the station floor even though "I didn't know if the gun [was] even shooting." In addition, he claimed that Jackson-Andrade ran towards him before he fired the first shot. Defendant further testified that he wasn't aiming his

shots because "I wasn't even looking . . . I was looking away." He had no idea how many shots he fired, and thought he hit Jackson-Andrade only twice.

Several witnesses testified to defendant's reputation in Merced as a non-violent person. Dr. Bruce Smith, a psychologist testified that "in April 2005, Mr. Mills was suffering from a disorder in the paranoid spectrum." An individual with this condition is prone to "non-bizarre delusions," that is, delusions that are not "utterly out of the realm of possibility. . . . They're delusions [of] things that actually happen in real life, such as one spouse is unfaithful or one is being followed by someone or one is being threatened by someone or there's somebody who is out to kill you, that sort of thing." Delusions are not the same as hallucinations, because the deluded person perceives external realities accurately, but "they just interpret them in these idiosyncratic ways." Defendant also has "paranoid personality style." Stress and sleep deprivation would only aggravate defendant's problems, and might also explain his partial recollection of events. After interviewing defendant, Dr. Smith concluded that defendant was suffering paranoid delusions. Answering a hypothetical question based upon defendant' condition on April 21, 2005, Dr. Smith gave his expert opinion that "I would think that if those [factual assumptions] were true that an individual such as I described would be terrified and convinced that he was about to be attacked in some way."

DISCUSSION

There Was No *Marsden* Error

Much of 2008 was devoted to determining whether defendant was mentally competent to stand trial. On October 14, 2008, defendant was declared competent, and criminal proceedings were reinstated. On December 5, 2008, defendant wrote a letter to Judge Jacobson, the supervising criminal judge, concerning a disagreement with his appointed counsel, Deputy Public Defender Lew. Defendant advised the court: "I . . . would like the Record to Reflect Mr. Lew and I have a Conflict of Interest regarding my cases, he at one time said I was not competent to Defend myself regarding my case, was examined and found competent. Mr. Lew also wanted a different plea than I. Your

Honor I would like the Record to Reflect we have a Conflict of Interest on how to go Forward with the cases." Neither defendant nor the trial court subsequently referred to this matter on the record.

Defendant contends that "it constituted error not to address the matters raised in his letter, whether viewed as an assertion of a conflict of interest' or as a request for the appointment of new counsel." Defendant contends that this inaction amounts to prejudicial error under *People v. Marsden* (1970) 2 Cal.3d 118. We do not agree.

It is apparent from the record that what defendant is treating as a conflict of interest was not a true conflict in the ordinary and traditional sense of the term, but rather his dissatisfaction with Mr. Lew having previously advised the court that he had a doubt as to defendant's competency. That was counsel's duty, and thus not "an adequate basis for substitution of counsel." (*People v. Freeman* (1994) 8 Cal.4th 450, 481 [defense counsel fulfilling duty of advising regarding plea offers and possible pleas].) Even now, defendant does not point to any specifics establishing the inadequacy of Mr. Lew's representation.

Under *Marsden,* a defendant is deprived of his or her constitutional right to the effective assistance of counsel when a trial court denies a motion to substitute one appointed counsel for another without giving him an opportunity to state the reasons for his request. (*People v. Ortiz,* (1990) 51 Cal.3d 975, 980, fn. 1.) However, "A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief." (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1070.) "The court's duty to conduct the [*Marsden*] inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' " (*People v. Lara* (2001) 86 Cal.App.4th 139, 151, quoting *People v. Molina* (1977) 74 Cal.App.3d 544, 549.) Requests under *Marsden* must be clear and unequivocal. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051, fn. 7.) "Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' "

(*People v. Mendoza* (2000) 24 Cal.4th 130, 157, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

Defendant's letter cannot reasonably be construed as an unequivocal claim for new counsel. Both parties acknowledge in their briefs that defendant never again raised the subject. There is thus a more than plausible basis to conclude that defendant's letter represented nothing more than an entirely understandable moment of exasperation or frustration. The absence of a true and unenduring unhappiness with Mr. Lew is best shown by what happened on December 17, 2008, less than two weeks later. Representing defendant, and with defendant by his side, Mr. Lew succeeded at a preliminary examination in having the carjacking charge dismissed. Mr. Lew then confirmed a trial date, and entered a plea of not guilty by reason of insanity on defendant's behalf—all of this with defendant present and not indicating in any way that he was dissatisfied with Mr. Lew's representation. This is strong proof that defendant was not demanding new counsel. In light of these circumstances, we conclude that the failure to hold a hearing cannot qualify as prejudicial. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 724; *People v. Hart* (1999) 20 Cal.4th 546, 603.)

There Was No Prosecutorial Misconduct

Defendant presents two claims of asserted prosecutorial misconduct. We discuss them separately.

(1)

Defendant argues that the prosecutor committed by cross-examining him as follows:

"Q. Mr. Mills, you want to avoid criminal responsibility for this matter, don't you?

"A. You say criminal responsibility?

"Q. Yes.

"A. I don't understand your question.

"Q. Well, you wan4t the jury to think you're crazy and then go to a hospital, get cured and avoid criminal responsibility and be back out there?

"A. No, ma'am.

"Q. That's not what you want?

"A. I just want to do my justified time.

"Q. Pardon me?

"A. I just want to do my justified time.

"Q. Well, your justified time is your life. You want to get that?

"A. No, ma'am.

"MR. LEW: Objection. It's argumentative.

"THE COURT: Improper area of questioning. Sustained.

"Q. Now, you want your wife to get you off of this by sticking to the script about all your craziness, right?

"A. No, ma'am.

"Q. Actually, let me interpose this, talk about the script. How long have you been practicing your testimony?

"A. Practicing my testimony?

"Q. Yes.

"MR. LEW: Objection. Argumentative. Improper as well.

"THE COURT: Sustained.

"Q. Let's see, you've known Mr. Lew here for four years, haven't you?

"A. Yes.

"Q. And you guys have been talking about this case for four years?

"MR. LEW: Objection to this entire line.

"THE COURT: No, it's proper.

"Q. You've been talking about this case for four years?

"A. We haven't been talking about this case for four years, no.

"Q. You haven't?

"A. No, ma'am.

"Q. You don't talk about this case with Mr. Lew?

"A. We talk about the case, but—

"MR. LEW: I'm going to object at this point. Getting into privilege.

"THE COURT: The fact they talk is not privileged, but you can't get into what they talk about.

"Q. You talk about this case with Mr. Lew, correct?

"MR. LEW: Same objection.

"THE COURT: Overruled.

"Q: You talk about this case, the shooting of Jason, with Mr. Lew, right?

"A. Yes, ma'am.

"Q. And he's been your attorney for four years, right?

"A. Yes, ma'am.

"Q. And you have copies of every piece of paper in this case?

"MR. LEW: Same objection.

"THE COURT: Overruled.

"A. No. I don't have copies of every piece of paper.

"Q. What don't you have a copy of?

"A. I don't have copies of a lot of things.

"Q. Go ahead.

"A. I can't explain to you, but I don't have all my discovery, everything.

"Q. Well, give me three things you think you're missing.

"A. I can't give it to you just right offhand.

"Q. Can you give me one?

"A. I don't have a—

"MR. LEW: Object as to the contents.

"THE COURT: Overruled.

"A. I don't have the copy of certain interviews that you've given to certain witnesses.

"Q. You don't have copies of interviews that I've done?

"A. Yes, ma'am.

"Q. And how is it that you know that you that that you don't have copies of it?

"MR. LEW: It gets into privilege.

"THE COURT: Sustained.

"[THE PROSECUTOR]: I'd ask counsel to stipulate at this time that he has a copy of every interview I have done.

"THE COURT: That doesn't mean that he gave it to his client and that's a privileged area."

"Q. Do you have copies of police reports?

"A. I have copies of some police reports, yes.

"Q. You have copies of transcripts of interviews?

"A. Some transcripts, yes.

"Q. And you had—some of these you've had since you and Mr. Lew sat together at the preliminary hearing back in '05?

"A. No, ma'am.

"Q. No?

"A. No.

"Q. You haven't had some of those?

"A. I had some. The majority of the case work my lawyer has held onto.

"Q. It's important from your perspective that you have copies of what other people are saying so that you can fit your story to what other people in this case are saying, right?

"MR. LEW: Objection. Argumentative.

"THE COURT: Overruled.

"A. No, ma'am.

"Q. That's not important to you?

"A. It's not important to me because I was there. I know what happened.

"Q. Right. So you don't really need what other people had to say because you know what you did?

"A. I know what happened on that day.

"Q. You know exactly what you did?

"A. I know exactly what happened on that day.

"Q. So on April 7, 2008, the phone call to your wife, do you recall saying, 'I still don't have everything. No tapes. I'm missing three transcripts. I need to know for sure if they made a statement or not. The lady made a statement on TV. I need everything. It's like a math problem and I can't solve it without all the numbers. I need all the numbers in order to solve all the problems.' [¶] Do you remember saying that?

"A. I believe so."

"Q. . . . You're a smart guy. You can fit your testimony based on what other facts are around something, right?

"MR. LEW: Argumentative.

"THE COURT: Overruled.

"Q. . . . You're a smart guy?

"A. Yes.

"Q. And you got to fit your testimony around the facts of what the other witnesses are saying, right?

"A. No.

"Q. For example. Just give one example. You have to explain why would have come inside that Amtrak station and chased after Jason, don't you?

"A. Yes, ma'am. I have to explain.

"Q. You have to come up with a reason, an excuse for why you went after a man that was trying to avoid you, right?

"A. I don't agree with the part of avoid[ing] me, but I had to give a reason why I walked in there, yes."

"Q. That's right, you do. [¶] Then you go on to say, do you remember saying this: 'Remember, I don't tell nothing. All the things I told you, I told you because I knew this day was going to come and I need you to tell them to help me get out of jail.' [¶] Do you remember saying that?

"A. No, ma'am.

"Q. Don't remember saying that you knew this day was going to come and you needed her to help you get out of jail?

"A. No, ma'am. I don't remember saying that.

"Q. 'I need to have you verify it, verify it. He was this and that and he kept saying this and that. You know what I mean?' [¶] You were instructing her on how she was supposed to get you out of jail?

"A. No, ma'am."

"Q. . . . Did you meet, without going into the contents of what you said, did you spend a good portion on Friday meeting with your attorney?

"MR. LEW: Objection. Relevance.

"THE COURT: Overruled.

"Q. Did you?

"A. Friday?

"Q. Yes.

"A. Yes, I think we talked.

"Q. How long was he at the jail with you?

"A. I think maybe an hour. I think. I'm not sure.

"Q. One hour on Friday?

"A. I think so, yes.

"Q. That's it?

"A. I think so, yes, ma'am.

"Q. And then how about Saturday?

"A. Saturday, yeah, I think about an hour, I think, yeah.

"Q. An hour on Friday, an hour on Saturday. Did you guys practice on Sunday?

"MR. LEW: Objection.

"THE COURT: Sustained.

"Q. Did you meet on Sunday?

"A. Sunday, I don't think we met on Sunday, no."

The following day, Mr. Lew told the court that the prosecutor's cross-examination amounted to misconduct because it had "the effect of essentially attacking my integrity as defense counsel, implicitly indicating that I have coached the defendant in his testimony." As for a remedy, "I would ask that portion be stricken and I'd ask for a period of instruction and I'd ask that the district attorney be prohibited from making further inquiries in that particular fashion."

The prosecutor opposed the motion, stating, "I did not say anything about coaching. I was talking about him practicing his testimony and how much time he spent doing that. I did not get into any attorney/client privilege. And I think it is perfectly permissible cross-examination to explore how many times he's been practicing his testimony."

The trial court denied defense counsel's motion for these reasons: "Well, I think every time that he got close to attorney/client privilege or anything I thought was unusual, you objected and I sustained your objection. [¶] Other than that, I think it's perfectly proper cross-examination for her [i.e., the prosecutor] to ask him how many times you guys met because there is a certain automatic response to some of his responses. So I think that's perfectly proper for her to inquire as to the reason for that."

The excerpts we have quoted are more extensive than those cited in defendant's brief, set forth to demonstrate that there is no merit to his argument that it was misconduct for the prosecutor to cross-examine him "on a range of matters relating to his relationship with defense counsel, including the length of legal representation, the dates of meeting with defense counsel, and the existence of a 'script' prepared for Mr. Mills's testimony." The extensive excerpts also show that the prosecutor did not actually accuse defense counsel of fabrication. The references to defendant following a "script" are problematic in the abstract, but the full context draws much of any potential sting. If anything, defendant was given far more prominence in the prosecutor's questions. It was defendant who was confronted with proof of what certainly could be argued was an attempt to fabricate favorable testimony. Moreover, it is questionable that a jury would be shocked at hearing that defendant had rehearsed, with or without counsel, what his

testimony at trial would cover. Indeed, it seems common sense, as no person at risk of his liberty would reveal his testimony to his own counsel for the first time at trial. This is obviously the reason defendant is unable to muster a single precedent flatly condemning as misconduct a prosecutor mentioning that a defendant and his attorney have gone over anticipated testimony.[2] In fact, it sounds like guaranteed malpractice if the attorney did not do so. Thus, it certainly was not misconduct for the prosecutor to bring to the jury's attention the fact that defendant's testimony was not spontaneous and unrehearsed, for that would be an obvious and relevant consideration in evaluating defendant's credibility. Of course, if defendant's testimony could be seen as contrived, the pertinence of the prosecutor's approach is even more comprehensible.

(2)

Defendant's second claim of misconduct is based on these comments made during the final part of the prosecutor's closing argument concerning the wallet taken from the carjacking victim Hang:

"Here's a little timeline that's important. In May of 2008, we were getting ready for trial. On May 29, 2008, is when Inspector Brock, God bless him, talks to Mr. Hang. Because this is what was going on, I was working with him to put together a board of a representation of, you know, the other people that were there that day, what they were doing, running for their lives. And as I was doing that with Inspector Brock, one of the items that I was incorrectly going to put on that board was this wallet. I thought that that was some abandoned property. But Inspector Brock was looking at it, it had a lot of serious stuff in it that you wouldn't think—you think somebody would want to claim, credit cards, driver's license. And then when Inspector Brock looked at the photos and he saw that that wallet with all the defendant's property, a light went off. I wonder how this ended up with defendant? So he, on May 29, 2008, he contacted Kinh Hang and asked him when was the last time you saw your wallet. And then shockingly we found

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[2] The most relevant California precedent has our Supreme Court merely cautioning that "such locutions as 'coached testimony' are to be avoided when there is no evidence of 'coaching.' " (*People v. Thomas* (1992) 2 Cal.4th 489, 537.)

out, well, the last time he saw his wallet was when somebody came in and at gunpoint threatened to kill his wife, demanded money, demanded his car keys, took his car with the wallet in it. That's how we got to where we are. So here, that's a problem for the defense. May 30, we reschedule the trial. On our witness list for that first trial, there's no Dr. Smith. It wasn't until the Sacramento stuff, all of a sudden, going to get doctor to try to manipulate—

"MR. LEW: No evidence as to when I retained Dr. Smith.

"[THE COURT]: No question whether he's on the witness list or not, certainly public record and it's in the court file.

"[THE PROSECUTOR]: We can tell from the testimony in the trial Dr. Smith was called in June for the first time, first time. An attempt to buy the defendant's walk away from murder."

Defendant argues that "There was no evidence before the jury to support the prosecutor's assertions regarding Inspector Brock"—who "was not called as a witness at trial. The references to the dates of actions by Inspector Brock came from his testimony at a preliminary hearing in relation to the . . . carjacking"—"yet those assertions, in isolation were not damaging to the defense. The problem was there was also no evidence before the jury regarding the defense witness list at the time of the [guilt phase] trial, or with regard to the date Dr. Smith was first retained. . . . The result was a violation of the Confrontation and Due Process Clauses" of the United States Constitution. The claim fails.

Defendant's objection did not mention, and thus did not preserve, the far broader grounds he now wishes to argue. The point is also waived because he did not request that the jury be admonished. (*People v. Gray* (2005) 37 Cal.4th 168, 215; *People v. Prieto* (2003) 30 Cal.4th 226, 259-260.) More substantively, we do not believe that the prosecutor's remarks constituted *prejudicial* misconduct. Their tone might seem snide, and they did obviously refer to factual matters the jury had not heard testimony about during the trial. In the absence of a timely objection by the defense, the prosecutor's remarks can be viewed as simply comment on the state of the theory and evidence behind

the defense. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179; *People v. Cornwell* (2005) 37 Cal.4th 50, 90.) Moreover, the remarks were brief, their subject not intrinsically inflammatory, so any harm could have been cured by the court upon appropriate request by the defense. (*People v. Hinton* (2006) 37 Cal.4th 839, 863; *People v. Wilson* (2005) 36 Cal.4th 309, 337.) There was no federal constitutional violation because the remarks were not " ' " ' "so egregious that it infect[ed] with such unfairness as to make the conviction a violation of due process" ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819), and were not " 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' " (*People v. Ervine* (2009) 47 Cal.4th 745, 806.)

There Was No Instructional Error

Defendant presents what he characterizes as three "interrelated instructional errors." We address each claim separately.

(1)

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed." (Pen. Code, § 1026, subd. (a).) The jury was instructed that "For the purpose of reaching a verdict in the guilt phase of this trial, you are to conclusively presume that the defendant was legally sane at the time the offense [is] alleged to have occurred."

Defendant acknowledges that our Supreme Court has held that the instruction is legally sound. (*People v. Coddington* (2000) 23 Cal.4th 529, 584 (*Coddington*).) However, he maintains we should follow two decisions of the Ninth Circuit holding that use of the instruction amounts to a conclusive presumption that violates due process: *Stark v. Hickman* (9th Cir. 2006) 455 F.3d 1070, 1076 (*Stark*); and *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959, 966-967 (*Patterson*). Defendant contends that this

instruction violated due process because it lowered the prosecution's burden of proving guilt beyond a reasonable doubt.

The Ninth Circuit in *Stark* appears to have given a logical basis for concluding why *Coddington* is not controlling here: "While the California Supreme Court stated in *Coddington* that the presumption of sanity instruction 'correctly states the law,' [citation], it did not address the exact holding in *Patterson, i.e.*, whether instructing the jury of this conclusive presumption violates due process. Specifically, the issue presented in *Coddington* was whether the presumption of sanity instruction given during the guilt phase of defendant's trial was error which prejudicially undermined his guilt phase defense of lack of premeditation of the murders charged. [Citation.] Thus, the *Coddington* court neither addressed the constitutionality of the instruction itself nor rendered a decision with regard to it. Rather, the court merely found, on the facts of that case, that the defendant was not prejudiced by the challenged instruction. Therefore, *Coddington* is not on point because the issue presented in this case was not actually decided there." (*Stark, supra*, 455 F.3d 1070, 1076.)

The *Stark* court then summarized the reasoning in *Patterson* that it was applying: "The Ninth Circuit . . . set aside Patterson's conviction, declaring that the California jury instruction on the presumption of sanity violated due process. [Citation.] In so ruling, the court relied upon the federal law established by the Supreme Court in *Sandstrom v. Montana* (1979) 442 U.S. 510 and *Francis v. Franklin* (1985) 471 U.S. 307. Both of these cases involved jury instructions that were found unconstitutional because they shifted the burden of proof to the defendant.

"In *Sandstrom*, the Court considered a jury instruction stating 'the law presumes that a person intends the ordinary consequences of his voluntary acts. [Citation.] The Court held that when given in a case in which the defendant's intent is an element, the instruction is unconstitutional because it has 'the effect of relieving the State of the burden of proof . . . on the critical question of [the defendant's] state of mind.' [Citation.] In *Francis*, the Court, relying on *Sandstrom*, considered instructions stating '[t]he acts of a person of sound mind and discretion are presumed to be the product of a person's will,

but the presumption may be rebutted[,]' and 'a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts[.]' [Citation.] The Court held that because intent was an element of the charged offense, such instructions were unconstitutional 'because a reasonable jury could have understood the challenged portions of the jury instruction . . . as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent.' [Citation.]

"Relying on *Sandstrom* and *Francis*, we declared in *Patterson* that California's instruction on the presumption of sanity was unconstitutional . . . . *Patterson*, 223 F.3d at 962-967. As we explained:

" 'The problem with the instruction given in this case is that it tells the jury to presume a mental condition that—depending on its definition—is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime. . . . If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for [the crime], that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable juror could have had in mind.' *Id.* at 965.

"In so ruling, we construed the legal definition of 'sanity' under California law with the commonly understood definitions of the term. [Citation.] Under California law, '[s]anity is defined using a modernized version of the *M'Naghten* Rule: a person is insane if he or she is "incapable of knowing or understanding the nature and quality of his or her act [or] distinguishing right from wrong at the time of the commission of the offense." ' *Id.* at 964 (quoting Cal. Penal Code § 25(b)). By contrast, the lay definitions of 'sane' include 'proceeding from a sound mind,' 'rational,' 'mentally sound,' and 'able to anticipate and appraise the effect of one's actions.' [Citation.] We explained that 'if a jury is instructed that a defendant must be presumed "sane"—that is, "rational" and

"mentally sound," and "able to anticipate and appraise the effect of [his] actions,"—a reasonable juror could well conclude that he or she must presume that the defendant had no [] mental disease, defect, or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty [of the requisite intent].' " (*Stark, supra*, 455 F.3d 1070, 1077-1078.)

We are not required to accept the Ninth Circuit's interpretation of federal law but only to consider it only insofar as we find it persuasive. (See *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 352.) While the reasoning in *Patterson* and *Stark* does not seem obviously flawed, neither does it seem unchallengeable. However, there is no need to parse *Patterson* and *Stark*, because we believe the subsequent decision of the United States Supreme Court in *Clark v. Arizona* (2006) 548 U.S. 735 (*Clark*) more or less virtually undermines that reasoning.

Clark involved a defendant accused of killing a police officer. "In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence, [citation] that 'at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong.' [Citation.] Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill a law enforcement officer." (*Clark, supra*, 548 U.S. 735, 744, fn. omitted.)

Arizona law held that the evidence of Clark's mental state could be admitted only with respect to the issue of whether he was insane, which under the governing statute apparently was—unlike California's bifurcated procedure under Penal Code section 1026—tried together with the issue of guilt. At a bench trial, Clark was found both guilty and sane. After the Arizona Court of Appeals affirmed, Clark obtained federal review. As the United States Supreme Court framed it, that review "present[ed] two questions: whether due process prohibits Arizona's use of an insanity test stated

solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind)." (*Clark*, *supra*, 548 U.S. 735, 742.)

The court found no due process violation as to the first point: "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. [Citations.] There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity." (*Clark*, *supra*, 548 U.S. 735, 752-753.)

The court also rejected Clark's second due process challenge. The court reasoned that, like the presumption of innocence, "The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility. [Citations.] This presumption dispenses with a requirement on the government's part to include as an element of every criminal charge an allegation that the defendant had such a capacity. The force of this presumption . . . varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength . . . .

"There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider)

evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*. . . . [¶] The second point where the force of the presumption of sanity may be tested is in the consideration of a defense of insanity raised by a defendant. Insanity rules like *M'Naghten* . . . are attempts to define, or at least to indicate, the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility [citations], even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the insanity presumption. A State may provide, for example, that whenever the defendant raises a claim of insanity by some quantum of credible evidence, the presumption disappears and the government must prove sanity to a specified degree of certainty . . . . Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it . . . ." (*Clark*, *supra*, 548 U.S. 735, 766-769, fns. omitted.)

Most relevant for present purposes is that the court accepted that "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that. . . . And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. . . . [M]ental disease and capacity evidence may be considered only for its bearing on the insanity defense . . . ." (*Clark*, *supra*, 548 U.S. 735, 770.)

"But if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial." (*Clark*, *supra*, 548 U.S. 735, 771.) "Are there, then characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue . . . ? We think there are: in the controversial character of some categories of mental disease, in the potential of mental disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it." (*Id.* at p. 774.) "Because allowing mental-disease

evidence on *mens rea* can . . . easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion." (*Id.* at p. 776.)

In light of the foregoing, the court concluded: "Arizona's rule serves to protect the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors. For these reasons, there is no violation of due process . . . and no cause to claim that channeling evidence on mental disease and capacity offends any ' "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' [Citation.]" (*Clark*, *supra*, 548 U.S. 735, 779, fn. omitted.)

Because *Clark* involved a bench trial, there was obviously no issue or discussion of jury instructions, and it thus it not directly controlling. But it is highly illuminating for our situation.

The instruction defendant challenges—the one which *Patterson* and *Stark* treated as violating due process—is merely one aspect of what the *Clark* court characterized as a state's "power" or "authority" to "restrict" or "channel" how insanity is considered without violating due process. (See *Clark*, *supra*, 548 U.S. 735, 770-771) California has not gone so far as to abolish or prohibit introduction of evidence on the issue of a defendant's sanity, but it has "curtailed" or "limited" it (*id.* at p. 770) in the sense that insanity is kept out of the guilt phase of a criminal trial.

Just as Arizona did in *Clark*, California has exercised its authority to specify how the issue of insanity is to be addressed in criminal trials. Penal Code section 1026 represents California's decision to keep the issues of guilt and sanity separate. Guilt is to be determined first. Because the issue of sanity is not germane to that determination, it does no harm to instruct the jury of the state's policy that, for purposes of proceedings devoted to that determination, the presumption is one of sanity. If the defendant wishes to challenge that presumption and have the issue of his or her sanity determined, that determination is to be made at a separate, *subsequent* proceeding. Only after the issue of guilt has already been determined adversely to the defendant, can he or she try to

overcome the presumption by a preponderance of evidence. (See *People v. Hernandez* (2000) 22 Cal.4th 512, 521.) But it makes eminent sense for the jury to be told that sanity is not to be considered in the determination of guilt. The challenged instruction does just that, and no more than that. It thus reflects the state's "authority . . . to deny a defendant the opportunity to displace the presumption of sanity . . . when addressing a different issue in the course of a criminal trial." (*Clark, supra*, 548 U.S. 735, 771.) The *Clark* court determined that the exercised of that authority entails no violation of due process. That conclusion fatally undermines the contrary predicate assumption of *Patterson* and *Stark*. We therefore conclude that the error claimed did not occur.

(2)

The jury was then instructed, in language virtually identical to Penal Code section 29, that "In the guilt phase, any expert testifying about a defendant's mental disorder shall not testify as to whether the defendant had or did not have the required mental state. The question as to whether the defendant had or did not have the required mental state shall be decided by the trier of fact, which in this case is the jury."[3] Defendant reframes his *Patterson-Stark* arguments to contend that this instruction violated due process by denying him the right to present a defense. For defendant, this instruction "exacerbate[ed] the error . . . in giving a 'presumption of sanity' instruction,"

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[3] "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29.) This language in turn restates much of Penal Code section 28, subdivision (a): "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." The two provisions were enacted together in 1984. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1111-1112.)

because this instruction told the jury that Dr. Smith "could testify to the contrary." This contention lacks merit.

Although ostensibly an attack on an instruction, the substance of defendant's argument is about the restriction of evidence embodied in Penal Code sections 28 and 29. The argument thus assumes a predicate that the preceding discussion establishes does not obtain. The *Clark* court held that "evidence tending to show that a defendant . . . lacks capacity to form *mens rea*" may be constitutionally restricted or eliminated. (*Clark*, *supra*, 548 U.S. 735, 769-770.) That is all that happened here. And, if more were needed, on this point *Coddington* is dispositive: "We reject . . . appellant's claim that exclusion of expert testimony on the ultimate question of fact as to whether appellant did form those mental states [i.e., of the charged offenses] denied him the right to present a defense and thereby deprived him of rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. All authority is to the contrary. [Citations.] Sections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of the charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." (*Coddington*, *supra*, 23 Cal.4th 529, 583.) *Clark* and *Coddington* compel us to reject defendant's contention.

(3)

Immediately after the jury was instructed with the two instructions just discussed, the trial court further instructed: "A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation. [¶] If you find that a defendant received a threat from a third party that he actually, even though unreasonably associated with the victim, Jason Jackson-Andrade, you may consider that evidence in evaluating the defendant's actions. The weight and significance of such evidence is for you to decide. [¶] The defense of

imperfect self-defense is not available to a defendant whose belief in the need to use self-defense is based on delusion alone."

Defendant acknowledges that the last sentence of this instruction is supported by *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 and *People v. Padilla* (2002) 103 Cal.App.4th 675, which held that imperfect self-defense cannot be based on the perceived need to defend oneself with deadly force against delusional or hallucinated fears. Defendant reasons that a delusion or hallucination has no basis in reality, but his fears—as evidenced by Dr. Smith's testimony—did, and thus it was error to give the instruction. But this misrepresents Dr. Smith's testimony. He testified that defendant could accurately perceive reality, but give that reality a completely unfounded and threatening interpretation. Thus, defendant could accurately perceive the victim's presence at the station, but interpret that he was an assassin dispatched by Tyrone to kill him, in his mind justifying an unprovoked attack on the unarmed Jackson-Andrade that culminated with defendant shooting him six times while he was helpless on the floor. Because that interpretation had no basis in reality[4], it qualified as a delusion, thereby warranting the instruction. Indeed, it was Dr. Smith who repeatedly used the word "delusional" to describe defendant's misperceptions of reality.

In any event, the following excerpt from *People v. Mejia-Lenares*, *supra*, 135 Cal.App.4th 1437, 1456-1457, persuades us that the decision is soundly reasoned:

"Persons operating under a delusion theoretically are insane since, because of their delusion, they do not know or understand the nature of their act or, if they do, they do not know that it is wrong. By contrast, persons operating under a mistake of fact are reasonable people who have simply made an unreasonable mistake. To allow a true delusion—a false belief with no foundation in fact—to form the basis of an unreasonable-mistake-of-fact defense erroneously mixes the concepts of a normally reasonable person making a genuine but unreasonable mistake of fact (a reasonable

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[4] Dr. Smith's characterization was that defendant's paranoid beliefs were "contrary to fact." But Dr. Smith refused to equate defendant's delusions with hallucinations.

person doing an unreasonable thing), and an insane person. Thus, while one who acts on a delusion may argue that he or she did not realize he or she was acting unlawfully as a result of the delusion, he or she may not take a delusional perception and treat it as if it were true for purposes of assessing wrongful intent. In other words, a defendant is not permitted to argue, "The devil was trying to kill me," and have the jury assess reasonableness, justification, or excuse as if the delusion were true, for purposes of evaluating state of mind.

"To hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion as the basis of unreasonable mistake of fact effectively permits him or her to use insanity as a defense without pleading not guilty by reason of insanity, and thus to do indirectly what he or she could not do directly while also avoiding the long-term commitment that may result from an insanity finding. If a defendant is operating under a delusion as the result of mental disease or defect, then the issue is one of insanity, not factual mistake. To allow a mistake-of-fact defense to be based not on a reasonable person standard but instead on the standard of a crazy person would undermine the defense that is intended to accommodate the problem."

This logic seems unassailable. In following it by using the instruction quoted above, the trial court did not err.

DISPOSITION

The judgment of conviction is affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.

PROOF OF SERVICE

I declare that:

I am employed in the County of Alameda, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2626 Harrison Street, Oakland, California 94612.

On April 1, 2011, I served the within PETITION FOR REVIEW on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 1, 2011 at Oakland, California.

Lauren Osher