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.	)	SUPREME COURT NO: S191934

OPENING BRIEF ON THE MERITS

First Appellate District, Division Two, Case No. A125969
Alameda County Superior Court, Case No. C154217
Honorable Larry J. Goodman, Judge

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vs.

AHKIN R. MILLS,

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Appellant.
_____/

INTRODUCTION TO THE BRIEF

A. The Issue on Review.

This court granted review of the following issue:

> Did the trial court err by instructing the jury to accept a conclusive presumption that defendant was legally sane for purposes of the guilt phase of the trial?

Resolution of that issue requires consideration of two subsidiary questions:

(1) Did the instruction violate the Sixth and Fourteenth Amendment rights to due process and jury trial -- as interpreted in cases such as *Sandstrom* v. *Montana* (1979) 442 U.S. 510 ("*Sandstrom*") -- because a reasonable juror may have interpreted the instruction as creating a constitutionally-prohibited presumption as to premeditation, deliberation, and/or malice, and/or because a reasonable juror might have interpreted the instruction as unconstitutionally "shifting the burden" as to those elements?

(2) Did the instruction violate California case authority -- including *People* v. *Anderson* (1965) 63 Cal.2d 351 -- holding that jurors should not be instructed on principles of law unnecessary to the jury's resolution of the factual issues before it, and holding further that a trial court must define for the jury statutory terms which have a "technical meaning peculiar to the law"?

B. The Issue in Procedural Context.

Four cases create an unusual procedural conundrum. On July 3, 2000, this court decided *People* v. *Coddington* (2000) 23 Cal.4th 529 ("*Coddington*"), overruled on other grounds in *Price* v. *Superior Court* (2001) 25 Cal.4th 1046. This court in *Coddington* rejected a claim of error in the use of the "conclusive presumption of sanity" language of Penal Code section 1026 at the guilt phase.[1] Among the court's bases for so ruling were that the defense had not objected to the instruction or

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[1]/ All code references will be to the California Penal Code, unless otherwise noted.

sought its modification, that the language was a "correct statement of law," and that jurors were unlikely to be confused by the instruction in light of the other instructions and the arguments to the jury. *Coddington* neither referred to the United States Constitution nor discussed United States Supreme Court cases regarding "presumptions."

Six weeks later, the Ninth Circuit decided *Patterson* v. *Gomez* (9th Cir. 2000) 223 F.3d 959 ("*Patterson*"). The Ninth Circuit concluded that it had violated the Due Process Clause to instruct on a "presumption of sanity" at the guilt phase of a California murder trial, in which the defendant had relied upon evidence of mental disease or defect to resist jury findings of premeditation, deliberation, and malice. *Patterson* made no reference to *Coddington*.

Six years later, the Ninth Circuit in *Stark* v. *Hickman* (9th Cir. 2006) 455 F.3d 1070 ("*Stark*") considered the implications of *Coddington* to the *Patterson* holding. *Stark* concluded that *Coddington* did not undermine *Patterson* because this court in *Coddington* had not addressed the Due Process Clause issue decided in *Patterson*.

Five years thereafter, on June 8, 2011, this court granted review in Mr. Mills's case, after the Court of Appeal in an unpublished opinion had relied in substantial part on *Coddington* in finding no error in having given a "conclusive presumption of sanity" instruction over defense objection at the guilt phase.

On August 25, 2011, this court decided *People* v. *Blacksher* (2011) ___ Cal.4th ___, 2011 Cal LEXIS 2011 ("*Blacksher*"). The court in *Blacksher* relied on *Coddington* in again rejecting a claim of error in having instructed on a "conclusive presumption of sanity" at the guilt phase of a bifurcated trial. Although the court in *Blacksher* referred to

the Due Process Clause, it did not discuss United States Supreme Court cases interpreting "presumptions." While not expressly referring to *Patterson* or *Stark*, the court noted in *Blacksher* that it was "neither persuaded nor bound" by cases from the federal Courts of Appeals.

Thus do two decisions of this court appear to be generally against Mr. Mills, at least in *dictum*. Respondent is in the enviable position of being able to cite *Coddington* and *Blacksher*.

C. Summary of Mr. Mills's Position.

Mr. Mills respectfully submits that he should prevail, notwithstanding *Coddington* and *Blacksher*. Neither *Coddington* nor *Blacksher* involved an objection to the challenged instruction in the trial court, while Mr. Mills's counsel specifically objected to the instruction under the Sixth and Fourteenth Amendments. Neither *Coddington* nor *Blacksher* involved a situation in which the trial court had refused to define for the jury the term "legally sane" which the jury was told was to be "conclusively presumed," as occurred in Mr. Mills's case. In short, Mr. Mills's case presents a fully preserved issue, where the defendants in *Coddington* and *Blacksher* did not.

Mr. Mills will rely on three lines of jurisprudence, one from the United States Supreme Court and two from this court. The line of authority from the United States Supreme Court concerns the federal constitutional ban against "presumptions" bearing on an element of the charged offense. Under that line of authority, an instructional presumption is unconstitutional when the instruction is such that a reasonable juror may interpret it as creating a presumption as to an element of an offense or as shifting the burden on that element of the defense.

The primary line of California authority is that which prohibits instructions on matters of no relevance to the jury's resolution of the issues before it. The secondary line of California authority is that dealing with instructions containing terms with a "technical meaning particular to the law."

Mr. Mills will begin with a summary of the procedural events in the trial court and Court of Appeal, and a summary of the trial evidence. He will argue the federal constitutional issues in Argument I, and he will present the state law issues in Argument II. Argument I will include a historical look at Penal Code section 1026, in which the "conclusive presumption of sanity" language appears, to demonstrate that the genesis and effect of the language was solely procedural.

STATEMENT OF THE CASE

At the guilt phase of a bifurcated guilt-sanity trial, Mr. Mills was convicted by a jury of first degree murder, with a firearm discharge finding. The jury subsequently found Mr. Mills to have been sane at the time of the offense. He is serving an effective term of fifty-years-to-life.

Mr. Mills was charged by an Information filed December 22, 2006. 2CT 291.[2] On December 17, 2008, Mr. Mills was allowed to add a plea of not-guilty-by-reason-of-insanity. 2CT 417, 418.

Jury trial commenced on April 8, 2009, and the guilt verdict and finding were returned on May 12, 2009. 2CT 437; 3CT 604, 605. The sanity phase commenced on May 18, 2009, and the sanity finding was returned on May 20, 2009. 3CT 617, 647, 648.

On August 12, 2009, Mr. Mills was sentenced. 3CT 657, 659. Notice of Appeal was timely filed August 31, 2009. 3CT 686.

The opinion of the California Court of Appeal, First Appellate District, Division Two, was filed on January 30, 2011. This court granted review on June 11, 2011.

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[2]/ Clerk's Transcript.

STATEMENT OF FACTS

A. Introduction and Overview.

Ahkin Mills spent the early months of 2005 in the throes of a delusional disorder with a range of paranoid, persecutory, and idiosyncratic beliefs. Those beliefs were focused on perceived threats from various groups and individuals, including a street gang and one of its leaders. That fear 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, to lure his pursuers away from his wife and cousin. At the station, Mr. Mills formed a belief a man was 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 surrendered himself.

The trial had two focuses: the distinction between premeditated and deliberate murder and second degree murder, and the distinction between murder and manslaughter based on "imperfect self-defense. The defense at the guilt phase called a psychologist to describe Mr. Mills's mental disease and its characteristics, and the prosecution opted not to call an alienist at the guilt phase.

B. The Emeryville Amtrak Station Witnesses.

1. Rasheed Bashir, the Railway Clerk.

Mr. Bashir saw Mr. Mills on the platform, "bouncing up and down" as if listening to a Walkman. 6RT 591, 606. Mr. Mills later approached and asked about the 2:00 p.m. train to Fresno, and Mr. Bashir told him the next train was at 6:00 p.m. and he could exchange his ticket.

6RT 596, 608. Mr. Mills handed Mr. Bashir a ticket for the 1:15 p.m. train, and Mr. Bashir issued a new ticket. 6RT 596-597.

For 30 to 45 seconds, Mr. Mills stared into space, without saying anything. 6RT 610. Mr. Mills then returned to the platform and "paced up and down." 6RT 599, 610.

2. Sal Fuerstenberg, Who Was on the Train Platform.

Mr. Fuerstenberg heard Mr. Mills yell at a man who was seated: "You ain't getting on that train." 5RT 444-445. However, Mr. Fuerstenberg described Mr. Mills as "almost passive" and "lacking in emotion." 5RT 462.

The seated man walked inside the station, and Mr. Mills had an "almost instantaneous" and "very abrupt" change in mood. 5RT 446-448, 468. Mr. Mills bounced on the tracks, while mumbling, humming, and singing. 5RT 448, 465, 467.

Moments later, Mr. Mills walked toward the station, saying: "You got a gun, nigger? You got a gun? You got a gun?" 5RT 449-451, 467. Mr. Mills behavior was "a little nuts." 5RT 468.

Mr. Mills entered the station. 5RT 466-467. Within seconds, there were three sets of gunshots. 5RT 452.

3. Linda Duhon, Who Had Been on the Platform and Inside the Station.

Ms. Duhon saw Mr. Mills "jumping up and down," talking to himself, and "acting like he was crazy." 6RT 528, 531, 533, 545. He stood in front of a seated man, whom she assumed he knew. 6RT 533-534. After Ms. Duhon went inside the station, the seated man came

inside and said: "He's out there cussing me out and he act like he want to kill me." 6RT 531-533.

Mr. Mills entered the station, approached the first man, and said, "Mother fucker, you want to kill me." 6RT 536-538. After repeating that statement, he said: "Well, if you ain't got no mother fucking gun, I do." 6RT 538. Mr. Mills produced a gun, and there were gunshots. 6RT 538-539. Ms. Duhon fell and heard four or five more shots. 6RT 539-540.

4. Matthew Altier, Who Was Inside the Station.

Mr. Altier saw Mr. Mills enter the station from the platform. 6RT 562, 564. Mr. Mills was disheveled and looked "very, very scary." 6RT 584. Mr. Altier heard a shot and looked up to see Mr. Mills pointing a revolver at a man on a bench. 6RT 564-565. The man said: "Please don't shoot me again, don't shoot." 6RT 565. Mr. Mills continued shooting. 6RT 567-568.

5. Rasheed Bashir's Observations of the Shooting.

Mr. Bashir saw Mr. Mills run into the station and begin yelling. 6RT 600, 611-612. Mr. Bashir heard three or four gunshots and saw a seated man slump. 6RT 601, 613. After 10 to 15 seconds, Mr. Bashir heard three or four more gunshots. 6RT 603-604. He ran outside, hearing another three or four shots. 6RT 604.

C. The Arresting Officers.

Officer Davis entered the station and saw Mr. Mills go down into a prone position, with a handgun in his right hand. 5RT 481, 492.

When Officer Davis asked whether there were "more shooters," Mr. Mills answered: "I'm the only shooter, it's me." 5RT 481-482.

Officer Whitaker saw Mr. Mills face down, with his hands spread and a gun near his hand. 5RT 502-503. Mr. Mills repeated, "I'm the shooter," four or five times. 5RT 503, 505, 516. After Officer Whitaker had handcuffed Mr. Mills, and as she was searching him, he said: "Oh, that feels good." 5RT 504-505. He subsequently asked several times: "Can I have my cigarette to relieve my stress?" 5RT 506.

D. Evidence at the Scene.

Nine .357 cartridge casings, and eleven .357 cartridges, were found on the floor of the Amtrak station. Two casings and two cartridges were recovered from the revolver. 6RT 713-714; Exhibit 16, pages 26, 68, 75, 79-82, 94, and Exhibit G. Mr. Mills's backpack, a wallet, and a split .357 ammunition box were also found. See, Exhibit 16, pages 9, 15-18, 78, 83-84, 87-89, 93-103, 108-110, and 114.

E. Mr. Mills's Statements to Police at the Amtrak Station.

In the police car, Mr. Mills was "lifting up" and looking around quickly; he was sweating; and his eyes were glassy. 6RT 685-686. His speech was rambling, and he spoke in disjointed sentences. 6RT 698-699. When asked whether the temperature in the car was cool enough, Mr. Mills asked to be taken to "the crazy house." 6RT 699-700.

Mr. Mills repeatedly said: "Put me in a padded room by myself. I don't want to kill anyone else." 6RT 690. He stated: "People kept coming up on me. Every time the trains came, there would be five or six at a time." 6RT 690. Mr. Mills said: "You asked some people, that guy said he had a gun. I think I know what I did. The devil made me do it."

6RT 691-692. At one point, Mr. Mills asked Detective Johnson "to ask them people, that guy said he had a gun, he came up on me." 6RT 700.

Mr. Mills calmed down and responded to questions. 6RT 686-689, 700-701. He was continuously looking out both side windows. 6RT 692. When Mr. Mills saw news cameras, he stated: "Don't let them know the names of my family, I feel they are in danger. I don't want them to be hurt." 6RT 693. Mr. Mills said: "Write this down. I knew I had a chemical imbalance, so I took some thizzle" (Ecstasy). "I took an E-pill, Ecstasy." 6RT 696.

F. Mr. Mills's Telephone Call to His Wife.

The jury heard a recording of a telephone call on April 22, 2005, at 4:16 a.m. 6RT 614. Mr. Mills repeatedly stated something to the effect of "they tried to kill me today at the train station." Ex. 17A, at pages 1, 4, 6, 8, 13, 21. He also expressed multiple times that "a bunch of them" had been "everywhere" and "coming" at him. *Id.*, at pages 7, 13, 18. He made reference to "a war going on." *Id.*, at page 4.

Mr. Mills advised his wife to "get out of Sacramento" and to "remember what I told you about all the names." *Id.*, at page 2. Mr. Mills also admonished his wife not to "trust nobody" (*id.*, at page 6), to "stay on guard" (*id.*, at page 7), not to "walk nowhere" (*id.*, at page 8), to change both door locks (*id.*, at page 18), to "protect [her]self" (*id.*, at page 19), "never to be at home by [her]self" (*ibid.*), to "lock her door" (*ibid.*), and to purchase "one of those metal doors" with a "double bolt" lock (*id.*, at page 20).

Mr. Mills told his wife to "call all those dudes" in order that "people know what's going on because somebody did get killed today," and "it was not me." *Id.*, at page 2. He later stated: "They running,

they scared mother fuckers. They don't know what's going on." *Id.*, at page 20.

Mr. Mills also made multiple references to being crazy, to the "crazy home" or "crazy house," to not being in his "right mind," to his medication, to his "chemical imbalance," and to "5150." *Id.*, at pages 1, 5, 6, 8, 9, 15, 16. He said: "I feel out of my body." *Id.*, at page 17. He stated that he did not want to "be locked up for life." *Id.*, at page 2.

Several times Mr. Mills asked Mrs. Mills to remember the "stuff" he had been telling her "about all the dudes and stuff" and "about all that shit about the people talking to me," which was going to "help [him] out" and "help [him] get out of jail." *Id.*, at pages 2, 3. He later admonished Mrs. Mills: "You got to be . . . truthful with them." *Id.*, at page 16.

G. The Forensic Evidence.

The decedent had sustained seven gunshot entry wounds, with five to the upper back. 6RT 624, 629, 635. There were also gunshot wounds to the back left thigh and right torso. 6RT 625-626, 631-632.

The .357-Magnum revolver would hold six rounds, but the cylinder contained only two casings and two cartridges. 6RT 705, 707, 713. Mr. Mills's blood showed evidence of marijuana use, but no Ecstasy was detected. 8RT 1072-1074.

H. The Robbery Earlier that Day in Sacramento.

Kinh Hang owned O'Henry Donuts and Coffee. 8RT 1047, 1049. On April 21, 2005, Mr. Hang and his wife arrived at the shop at 1:00 a.m. 8RT 1047-1048. Mr. Mills tried to enter at 3:00 or 4:00 a.m., before they were open. 8RT 1049, 1063.

At 4:00 a.m., Mr. Hang went out to move his car, and when he returned, he invited Mr. Mills inside. 8RT 1050-1052. Mr. Mills said he was waiting for a friend and wanted to leave the country. 8RT 1052, 1058. Mr. Mills ate a doughnut but then produced a gun. 8RT 1058.

Mr. Mills spoke in a calm voice and said he wanted to get out of town. 8RT 1070. He pointed the gun at Mr. Hang's wife and said: "Give me the money or I will kill your wife." 8RT 1053-1054. Mr. Hang gave him $3.00. 8RT 1054, 1068. Mr. Mills asked for Mr. Hang's car keys. 8RT 1056-1057. Mr. Hang had $5000 in his car. 8RT 1059-1060. The car was recovered in the Bay Area. 8RT 1058.

I. Mr. Mills's Cousin.

Telitha Epps was Mr. Mills's cousin, and Mr. Mills and his wife Toni lived with Ms. Epps in Rodeo. 6RT 642. Mr. Mills talked about being in trouble in Merced and people being after him. 6RT 650. He said billboards spoke to him and the FBI was after him. 6RT 651. He told her he had cheated on his wife with a woman whose ex-boyfriend was a gang member, and they were coming after him. 6RT 652.

Early on the morning of April 21, 2005, Mr. Mills arrived home after being "missing" for a couple of days. 6RT 644-645. He was frantic, and she could barely understand what he was saying. 6RT 645. He was waving a black gun. 6RT 646-649. He said he had hitchhiked from Sacramento and had not slept for days. 6RT 650, 654. Ms. Epps put the gun on top of a kitchen cabinet. 6RT 651.

Ms. Epps took Mrs. Mills to work, and when she returned, Mr. Mills said: "I got to get out of here." 6RT 654. He stated: "I don't want to bring any harm to you or Toni. I know they're still after me."

6RT 655. Mr. Mills wanted to go to the train station. 6RT 655. His demeanor was "very strange, nervous, scared, shaking." 6RT 657-658.

After dropping Mr. Mills at the station, Ms. Epps called Mrs. Mills at work, and Mrs. Mills asked to be driven to the station. 6RT 658. Ms. Epps remained in the vehicle while Ms. Mills went inside briefly. 6RT 659.

J. Mr. Mills's Wife.

Toni Mills met Mr. Mills at church in 1992. 8RT 994-995. After they married, they lived in Merced. 8RT 995.

Mr. Mills formed a belief that someone was after them. 8RT 996-997. Tyrone Johnston was in a gang and was "not a nice person." 8RT 998-999. On occasion, Mr. Mills had told her he was with Tyrone. 8RT 1018-1019. Mr. Mills later said Tyrone was telling people Mr. Mills was a snitch. 8RT 999. Mr. Mills believed that the FBI was after him, and that Tyrone was working with "a bad cop or something" to get Mr. Mills. 8RT 1000.

Mr. Mills also thought other people were after him. 8RT 1000-1001. Mr. Mills had dated a girl with a connection to a record label, and her boyfriend found out and was after him. 8RT 1001.

In addition, Mr. Mills said he had an altercation with a man whom Mr. Mills believed had a gun. This was someone with whom he had an altercation in the past. 8RT 1002.

Mr. Mills had begun staying away from home. He said he could not come home because people were following him. 8RT 1003-1004.

One night in Merced, a man came to the door and asked for Mr. Mills. The man tried to open the door, and they called police. 8RT 1002-1003.

That same night, Mr. Mills said: "We got to go." 8RT 1024-1025. When they left Merced, Mr. Mills was frantic and scared. 8RT 1023.

While in Rodeo, Mr. Mills told his wife he had been in the car thinking about someone, when the radio mentioned that person's name. 8RT 1004. Another time he intended to cash a check, and when a commercial came on for Bank of America, Mr. Mills said: "See, I told you they're listening. They're trying to tell me which bank to go to." 8RT 1004.

Mr. Mills said he thought the FBI was in a Fed Ex truck. 8RT 1005. He once said the FBI was connected to the telephone wires. 8RT 1023. Mrs. Mills believed Mr. Mills was on drugs. 8RT 1005.

Prior to the shooting, Mr. Mills had taken his cousin to Sacramento and was gone a day and a half. 8RT 1010. The morning he returned, he kept saying: "They're still after me." 8RT 1011, 1021-1022.

When Mrs. Mills later went to the train station, she saw Mr. Mills outside, "kind of dancing around by himself." 8RT 1011-1012. She tried to talk to him, but he kept saying: "Get back in the car, there are people here trying to get me." 8RT 1012-1013. Mrs. Mills did not see anyone. 8RT 1012-1013.

K. Mr. Mills's Testimony.

Mr. Mills began his testimony, as follows: "I shot [Mr. Jackson-Andrade] because of what he said and the things that he did. He told me he had a gun. When I walked into the station, he reached in his pocket. He told me he had a gun, told me he was going to kill me." 7RT 719.

Mr. Mills had once played basketball with "One-Shot," who wanted to fight because Mr. Mills kept blocking his shot. 7RT 722, 734-

724. When Mr. Mills later saw One-Shot, One-Shot said, "I got something for you," and ran inside the building. 7RT 725. One-Shot came back out, displayed a revolver, and asked: "You want to fight me?" 7RT 725-726. Mr. Mills became afraid for himself and his wife. 7RT 726. He moved to Mariposa, and then to Los Angeles, and then to Fresno, because he did not want One-Shot to know where Mr. Mills and his wife lived. 7RT 727-728. Mr. Mills returned to Merced because they needed a second income. 7RT 728-729.

Around the end of 2004, Mr. Mills encountered "Tyrone." 7RT 727, 729. Tyrone learned that Mr. Mills was not working, and he asked Mr. Mills to give him rides. 7RT 729-730. Tyrone gave him gas money. 7RT 730. Tyrone's nickname was "T-Murder," and he was the leader of the Merced Gangster Crips. 7RT 731, 735.

Eventually, Tyrone's house was raided, and Tyrone and his friends were arrested, and there was a rumor that Mr. Mills had informed on Tyrone. 7RT 734. Someone told Mr. Mills they intended to get rid of him. 7RT 735. Mr. Mills saw Tyrone's white car following him. 7RT 737.

"Chuck" was the CEO for a record label, and "Poet" was the rapper. 7RT 739, 742-743. "Jack," who was a Norteno, was financing the record label. 7RT 741, 760. Jack owned a "truck club" in Merced. 7RT 744, 761.

In early 2005, Mr. Mills told Chuck the Merced Gangster Crips had a hit out on him. 7RT 739, 747. The record people were to provide him with a gun for protection. 7RT 739-741.

Mr. Mills was having an affair with "Carol." 7RT 741. Chuck found out about the affair and became jealous. 7RT 742-743. On the

night Chuck was supposed to provide the gun, Chuck told Mr. Mills to stop calling him. 7RT 745.

Sometime after midnight that same night, someone tried to enter Mr. Mill's house. Mr. Mills's wife called police, and they left Merced that night. 7RT 746-748.

While in Rodeo, he would get his directions from the radio. Whenever Mr. Mills and his wife would hear a Bank of America commercial, he would tell her to drive to Bank of America. Also while in Rodeo, a commercial on the radio announced the date and place of Mr. Mills's birth. 7RT 788-789.

Telitha's brother Willy stayed at the house at times. 7RT 719, 749, 751. Willy had come home, saying a person from Sacramento was trying to kill him. 7RT 749-750. Willy asked Mr. Mills to accompany him to Sacramento as protection, and they went there approximately two days before the shooting. 7RT 751-752. Mr. Mills took Willy's gun, in case someone tried to harm them. 7RT 818, 820.

In Sacramento, Willy dropped Mr. Mills near Willy's girlfriend's apartment. 7RT 754, 828-830. Mr. Mills did not want the people after Willy to be after him, so he left the apartment, taking the box of bullets for Willy's gun. 7RT 754, 820, 838, 841. Mr. Mills wandered around Sacramento for a day and a half. 7RT 842.

Mr. Mills encountered Mike Dyson, whom he had known since grade school. 7RT 755. Mr. Dyson said Tyrone was trying to get rid of everyone who had snitched on him. 7RT 756. Mike Dyson told Mr. Mills there was still a hit out on him. 7RT 781.

After Mr. Mills and Mike parted, a brown car with tinted windows began to follow Mr. Mills. 7RT 757. When the car -- which Mr. Mills

associated with Tyrone -- again appeared, Mr. Mills went into a Denny's. 7RT 757-759.

Mr. Mills had not slept for two days. While in Denny's, he saw a truck, after which Mexican men entered wearing Norteno red, and Carol's husband was a Norteno. 7RT 759-761.

Mr. Mills walked toward a donut shop to use the pay phone, but he could not remember the number. 7RT 762. He tried to go inside, but they were not open. 7RT 851-852. After they opened, he bought a doughnut and went back outside. 7RT 763, 852.

Mr. Mills saw the brown car again, which he associated with one of Tyrone's "goons." 7RT 762-763. When two Mexican men started toward him, Mr. Mills ran to the donut shop. 7RT 763-764. Mr. Mills said he was sorry but the Bloods were making him do this and he wanted their car keys 7RT 764, 844-845.

Mr. Mills got on the freeway but got off because he was tired. 7RT 764. Mr. Mills removed the license plate using a screwdriver he found in the car. 7RT 864-865. Between Sacramento and the shooting, Mr. Mills smoked half a joint. 7RT 827.

Mr. Mills got back on the freeway and again saw the brown car. 7RT 764. In Rodeo, Mr. Mills parked at the beginning of the projects because he did not want the car at his cousin's house. 7RT 866. There was a briefcase in the car containing a couple of thousand dollars. 7RT 765. Mr. Mills took the money with him in his backpack. 7RT 861, 867. Mr. Mills believed the donut shop owner's wallet had been in the briefcase. 7RT 765.

Mr. Mills's wife and cousin asked what had happened, and he told them someone was chasing him and trying to kill him. 7RT 867-868.

After Telitha had taken Toni to work, she said she thought someone had been following her. 7RT 766-767, 869. Mr. Mills asked her to take him to the train station, thinking that whoever was following her would follow him. 7RT 767. He had the gun in his backpack. 7RT 767, 770, 895.

As Mr. Mills approached the station, someone said, "You're going to feel it today," which Mr. Mills interpreted as meaning he would be shot. 7RT 769-770. Mr. Mills loaded the gun after hearing what the man had said. 7RT 770.

Mr. Mills bought a ticket to Fresno. He knew "the feds" had access to the railroad computer, and he used his and his brother's middle names to purchase the ticket. He thought "the feds" would be after him because he had been with Tyrone. 7RT 771-772.

Mr. Mills fell asleep on the platform and missed the train. After exchanging his ticket, he walked up and down the platform and sang so he would not miss the next train. He thought Tyrone might be in a taxi in front of the building. When Mr. Mills's wife showed up, he told her, "I don't know who they are, but I know they're here." He told her to go home. 7RT 773-777.

Mr. Mills became aware of two black men. The man to his left was holding a bag wrapped around what looked like a gun. The man said into his cell phone: "He looks scared." Mr. Mills associated the two men with the hit. Mr. Mills knew there was a hit but did not know the hitman. He was suspicious of everyone. 7RT 777-779.

Mr. Mills remembered Mr. Jackson-Andrade being on a bench and motioning him over. 7RT 779, 884. Mr. Jackson-Andrade asked Mr. Mills where he was from, and when Mr. Mills said he was from Merced,

Mr. Jackson-Andrade became angry and said, "Nigger, I'm from East Oakland, nigger." 7RT 780.

Mr. Mills remembered arguing and cursing. 7RT 884-885. Mr. Mills was "a little loud," and Mr. Jackson-Andrade was "kind of soft, but still yelling." 7RT 885. Mr. Jackson-Andrade said, "Nigger, I'll kill you," and he said he was "from the '80s" and had a gun. 7RT 780-781. 7RT 781. Mr. Jackson-Andrade was still speaking as he entered the station, and he made a gesture that meant he had a gun. 7RT 781-782, 887.

Mr. Mills was "hopping around" and singing. He was saying, "Tyrone, you got the wrong guy. I did not snitch on you." He wanted Tyrone's hitman to hear. 7RT 783-784.

Mr. Mills entered the building through a different door. 7RT 784. He was shocked to see Mr. Jackson-Andrade inside, and Mr. Mills said to himself, "He has a gun." 7RT 784-785, 889. Mr. Mills saw an object, and when Mr. Jackson-Andrade put his hand in his pocket, Mr. Mills took the gun from his sweatshirt and began to shoot. 7RT 785, 891, 899.

Mr. Mills's backpack fell, and everything spilled out. 7RT 905. Mr. Mills had started shooting because the man had jumped up and put his hand in his pocket. 7RT 785. Mr. Jackson-Andrade had presented a threat and had been coming at him. 7RT 907-908. Mr. Mills did not remember how many times he had pulled the trigger. 7RT 785, 901, 904.

Mr. Mills turned to pick up bullets and reload, and when he turned back he saw Mr. Jackson-Andrade trying to get up with his right hand near his stomach. 7RT 786, 904-905, 907, 909-910. Mr. Mills thought he was trying to grab his weapon. 7RT 786, 907-908. Mr. Mills ran up

and shot him, he thought twice. 7RT 786, 910. He could not remember how many times he had pulled the trigger. 7RT 901, 904. Mr. Mills did not hear him say, "Please don't shoot." 7RT 785.

Mr. Mills ran to the front and yelled, "Help me, help me." When he saw the police, he threw the gun and lay on the ground. 7RT 787.

L. The Defense Alienist, Dr. Smith.

Bruce Smith, M.D. was in private practice in clinical and forensic psychology. His subspecialty was the assessment of psychopathology. He had been doing forensic work for nearly 30 years. 7RT 936-937.

In Dr. Smith's opinion, Mr. Mills in April 2005 had suffered from a disorder in the "paranoid spectrum." 7RT 940. Mr. Mills's symptoms at that time most closely fit the criteria for a delusional disorder, with persecutory beliefs. 7RT 940, 992. The criteria of the disorder include "non-bizarre" delusions, which are delusions within the realm of possibility. 7RT 941. The most common delusional beliefs are persecutory. 7RT 943. Other elements of functioning are not destroyed. 7RT 941.

The delusions are usually of sufficient severity to be considered psychotic. 7RT 941. Mr. Mills -- while not satisfying all criteria for paranoid personality disorder -- tended to be hypervigilant, to interpret events in a highly personalized manner, to interpret circumstances as particularly threatening, to be highly suspicious, and to have thoughts of persecution. 7RT 942, 956. Dr. Smith believed Mr. Mills interpreted events delusionally. 7RT 957.

Based on psychological tests, Mr. Mills had not been feigning. 7RT 955-956. Based on testing, Dr. Smith concluded Mr. Mills was more vulnerable to stress than most individuals. 7RT 944. Severe stress can push a paranoid individual into an acutely delusional state. 7RT 945.

Paranoid individuals do not experience themselves as troubled. 7RT 960. Paranoid individuals tend to move in and out of more acutely disturbed states. 7RT 959. At the time of trial, Mr. Mills was paranoid but not delusional. 7RT 959.

At the time of the homicide, Mr. Mills had been sleep deprived for several days. 7RT 953. Sleep deprivation will cause disorientation and may render a paranoid person "crazy" and agitated. 7RT 953. Mr. Mills had been functioning at a psychotic level. 7RT 954. The events of April 2005 may have represented Mr. Mills's first severe psychotic episode. 7RT 960.

Dr. Smith was asked to consider a hypothetical based on Mr. Mills's mental disease, his recent history, his perceptions on the day of the shooting, and his contact with the decedent. 7RT 961-962. Dr. Smith opined that such an individual would have been "terrified" and "convinced he was about to be attacked." 7RT 962.

I

THE TRIAL COURT VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS, WHEN IT INSTRUCTED THE GUILT-PHASE JURY OVER DEFENSE OBJECTION THAT MR. MILLS WAS CONCLUSIVELY PRESUMED TO HAVE BEEN LEGALLY 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 an erroneous conclusion that Mr. Jackson-Andrade had posed a deadly threat, which bore on whether he had harbored "malice." 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 for a "flank attack" on the psychological defense through special instructions.

One special instruction was based on section 1026. The trial court agreed to give a "conclusive presumption of sanity" instruction over the defense's Sixth and Fourteenth Amendment objections. Moreover, the trial court refused a defense request that, if a "conclusive presumption of sanity" instruction were to be given, legal insanity should be defined for the jury.

As will be explained in this Argument I, it violated the Sixth and Fourteenth Amendments to have given the instruction at the guilt phase of a bifurcated trial. As will be separately explained in Argument II, it was error under California law to give an instruction which had no appli-

cation to the issues before the jury and which contained an undefined term with "technical meaning peculiar to the law."

B. The Debate and Rulings in the Trial Court.

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 to the proposed instruction, arguing as follows:

> . . . [T]he Defense respectfully submits that on the facts of the instant case, giving this 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.*) Specifically, the Defense submits 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.

The defense brief continued: "In 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 instruction and to refuse the defense's requested instruction:

> THE COURT: I don't want to get into what the definition of sanity is in this phase of the proceedings and I don't think you can be wrong by correctly stating the law.
>
> 8RT 1076.

In short, 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. However, the trial court declined "correctly [to state] the law" as requested by the defense.

C. The Instruction in Context.

First of relevance, the jury heard CALJIC 3.32, as follows:

> You have received evidence regarding a mental disease or mental disorder of the defendant at the time of the commission of the crime charged in Count One, namely murder, or a lesser crime thereto, namely voluntary manslaughter. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated, deliberated or harbored malice aforethought, which is an element of the crime charged in Count One, namely murder.
>
> 8RT 1196.

The jury heard instructions to define malice-murder and its degrees, including CALJIC 8.20. 8RT 1196-1199. The jury heard CALJIC 8.40 to define voluntary manslaughter based on imperfect self-defense. 8RT 1199. The jury also heard CALJIC 5.17, which defined imperfect self-defense. 8RT 1200.

Immediately thereafter, the jury heard the prosecutor's Special Instruction No. 1:

> 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 offenses [sic] alleged to have occurred.
>
> 8RT 1201.

As Mr. Mills will now explain, the "conclusive presumption of sanity" language in section 1026 arose solely as a matter of procedure. It has no role in a jury's deliberations on guilt.

D. The Genesis and Significance of Section 1026.

1. The Law Prior to 1927 as to Trial of the Issue of Sanity.

From 1851 until 1880, California law recognized only three pleas (guilty, not guilty, and "former judgment"), first as part of the Code of 1851,[3] and then as part of the Penal Code of 1872.[4] Under both the 1851 Code[5] and the 1872 Penal Code,[6] a "not guilty" plea challenged "every material allegation" of the indictment and rendered admissible "[a]ll matters of fact tending to establish a defence [or defense]." In 1880, a fourth plea of "once in jeopardy" was added, and sections 1019 and 1020 were amended to accommodate the new plea.[7]

In 1864, this court adopted the M'Naughten test for insanity, with the burden on the defendant by a preponderance of the evidence. *People*

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[3]/ Stats. 1851, § 298.

[4]/ Former Penal Code § 1016 (Stats. 1872).

[5]/ Stats. 1851, §§ 303 and 304.

[6]/ Former Penal Code §§ 1019 and 1020 (Stats. 1872).

[7]/ Former Penal Code §§ 1019 and 1020 (amended 1880).

v. *Coffman* (1864) 24 Cal. 230. The peculiar character of the early system of trying the issue of sanity was described in *People* v. *Leong Fook* (1928) 206 Cal. 64 ("*Leong Fook*"):

> Upon entering a plea of "not guilty" the defendant put in issue every material allegation of the indictment or information. (Pen. Code, sec. 1019.) Upon such plea and during the ensuing trial the defendant, in all crimes to which the existence of a criminal intent was essential, was presumed to be sane until the contrary was established by a preponderance of evidence. [Citation.] Upon such plea and trial the defendant was presumed to be innocent until the contrary was proved. (Pen. Code, sec. 1026.) . . . [T]he presumption of innocence [did not] prevail over the presumption that every person is sane, . . .
>
> *Leong Fook, supra*, 206 Cal. at 67-68.

Where the offense charged was malice murder, the prosecutor was entitled to establish "the circumstances connected with the offense" as bearing on specific intent. *Id.*, at 68. At the same time, "the defendant was also entitled to have admitted in evidence all of the facts and circumstances attending the commission of the homicide for the purpose not only of disproving intent but also, in all cases wherein murder of the first degree was charged, for the purpose of mitigation. (Pen. Code, sec. 1105.)" *Ibid.* The defendant's insanity did not "in any degree diminish the quality of the homicide as an unlawful act." *Id.*, at 71.

2. The 1927 Amendments, to Create a Plea of "Not Guilty of Insanity," and to Bifurcate Trial of Guilt and Sanity.

In 1925, the Legislature created the Commission for the Reform of Criminal Procedure ("Commission"), which was given the task of mod-

ernizing California criminal procedure. Stats. 1925, page 622. The *Report of the Commission* ("*Commission Report*") was published in 1927, and it contained a broad range of recommendations.

In the portion dealing with "Insanity," the Commission identified one problem as lack of notice to the prosecution that sanity was at issue:

> Under a plea of "not guilty" and without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged. This lack of notice that such defense would be made has very frequently placed the people at a very great disadvantage.
>
> *Commission Report*, at page 16.

The Commission identified a second problem as confusion flowing from joint trial of guilt and sanity:

> An even more serious fault of the present system is that a defendant . . . is able to bring into the case the whole matter of his sanity at the time of the offense charged. This enables him to submit to the jury great masses of evidence having no bearing upon the question whether the offense was committed.
>
> *Commission Report*, at pages 16-17.

Multiple recommendations were made, including a plea of "not guilty by reason of insanity" and a bifurcated trial of guilt and sanity:

> . . . [W]e we recommend that section 1016 be amended to provide that where a defendant intends to raise the defense of insanity at the time the alleged offense was committed,

> he shall plead "not guilty by reason of insanity." This plea may be joined with any of the present pleas, but one who does not make such plea shall be conclusively deemed to have been sane at the time of the commission of the alleged offense. When defendant pleads "not guilty by reason of insanity" joining with it any other pleas, he shall first be tried in the regular way as to the issue raised by the other pleas without any question of insanity being raised.
>
> *Commission Report*, at page 17.

The anticipated benefits of the new system were described:

> It is believed that this will obviate practically all the difficulties in the present system. The making of the plea "not guilty by reason of insanity" will give to the people notice that they must meet this issue. By having the trial on the merits distinct from the trial as to the issue of sanity, the present great confusion will be avoided, the issue will be clean cut and much time will be saved. If the defendant is found not guilty, all of the time, expense and delay now consumed in trying the issue of insanity will be saved. If defendant be found guilty, the issue of his sanity will be tried without any confusion with other matters.
>
> *Commission Report*, at pages 17-18.

The Legislature in 1927 adopted these recommendations. Section 1016 was amended to add a plea of "[n]ot guilty by reason of insanity";[8] section 1016 was further amended to add a new paragraph to accommodate multiple pleas and explain the significance of a NGI plea without a guilty plea (and the reverse);[9] and section 1020 was amended to exclude

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[8]/ Former Penal Code § 1016 (amended Stats. 1927, p. 1148).

[9]/ Former Penal Code § 1016 (amended Stats. 1927, p. 1148).

the NGI plea from among those on which "[a]ll matters of fact tending to establish a defense" would be admissible at the guilt trial.[10]

Furthermore, a new section 1026 was added, to set forth the procedures to be followed at the bifurcated trial of guilt and sanity:

> When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and *in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.* If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed.
>
> Former Penal Code § 1026 (amended Stats. 1927, p. 1149); emphasis added.

The import of these amendments was discussed in *People* v. *Hickman* (1928) 204 Cal. 470.[11] The appellant "contend[ed] that by entering the plea on which he elected to stand, he denied his guilt as effectively as if he had entered a plea of 'not guilty,' and was therefore

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[10]/ Former Penal Code § 1020 (amended Stats. 1927, p. 1149).

[11]/ In *Hickman* (1928) 204 Cal. 470, the defendant charged with murder entered a plea of "not guilty by reason of insanity." *Id.*, at 473. The prosecutor presented no evidence as to guilt, relying on the indictment and the plea. *Id.*, at 473-474. Evidence was then presented on the issue of sanity, and the defendant was found sane. *Id.*, at 474.

entitled to the trial guaranteed by the state constitution upon all the issues involved in the case, as well as upon the issue of his sanity." *Id.*, at 473.

The court rejected a state constitutional "jury trial" challenge to bifurcated trial, for the reason that former Article I, § 7 (now Article I, § 16) "does not purport to direct what procedure is to be followed in the exercise of the right. . . ." *Id.*, at 476. The court continued:

> The present statute was passed by the legislature on the recommendation of the commission for the reform of criminal procedure, created by the legislature in 1925 to make a study of the methods of criminal procedure, and to recommend such new system, or such amendments to the then existing system, as would in its opinion tend to provide for this state the most efficient system for the swift and certain administration of criminal justice. . . . Its provisions are plain, and we deem it unnecessary to enter into a critical analysis or restatement of its various features to show that every essential right of one charged with crime by indictment or information has been safeguarded, . . .
>
> *Id.*, at 477.

The new statutory scheme was also discussed by this court in *Leong Fook, supra*, 206 Cal. 64, in which the defendant had asserted in the trial court that he was entitled "to place the defense of insanity before the jury . . . upon his plea of 'not guilty.'" *Id.*, at 66. As for the validity of a bifurcated trial, the court found itself "unable to discover any vital or constitutional defect in the changed order of procedure provided for in the portion of the new section 1026 . . . ." *Ibid.*

The court then turned to the "conclusive presumption of insanity" language in sections 1016 and 1026.

> We come now to consider the further provisions of the recent amendments to the Penal Code embodied in section 1026 thereof, to the effect that . . . he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. As we have already seen, the presumption of sanity is inherent in criminal trials, and while at the outset of such trials under our procedure, in the course thereof, prior to the recent changes therein, it was a disputable presumption, it could only be disputed by the defendant upon his affirmative assumption of the burden of disproving it under his general plea of "not guilty"; and if he either repudiated such plea or refused to assume such burden the presumption of his sanity became conclusive upon the jury trying the cause. (Code Civ. Proc., sec. 1961.) When, therefore, the legislature saw fit to limit the defendant's plea of "not guilty," so that it no longer included the defense of insanity and hence the right of the defendant in the absence of such special plea to offer under the limited plea of "not guilty" his proof of such defense, and when the legislature further provided that the right of the defendant to make such defense should be preserved to him in the form of a special plea and that his proofs in support of such defense should be heard in a separate hearing before a jury, the effect of such changed procedure would logically be to render the presumption of sanity conclusive even in the absence of the provision in the new section 1026 making it so, for the very reason that proof to rebut it was no longer presentable under the recently limited plea of "not guilty," . . .
>
> *Id.*, at 75-76.

Neither the Commission nor Legislature had addressed whether mental state evidence would continue to be admissible when the charged offenses required a specific mental state. However, this court in 1928 declared in *People* v. *Troche* (1928) 206 Cal. 35, 46 that there was no "middle ground," and the court concluded in *Leong Fook*, *supra*, 206 Cal.

at 71-72 that the issue of the defendant's capacity to form intent was properly restricted to the sanity phase.

3. Subsequent Evolution of the Case and Statutory Law.

In 1949, *People* v. *Wells* (1949) 33 Cal.2d 330 became the foundation for "diminished capacity" in California: "If he acted only under the influence of fear of bodily harm, in the belief, honest though unreasonable, that he was defending himself from such harm by the use of a necessary amount of force, then defendant . . . would not have committed that particular aggravated offense with which he is charged, for the essential element of 'malice aforethought' would be lacking." *Id.*, at 345. In *People* v. *Wolff* (1964) 61 Cal.2d 795, the court reduced a conviction to second-degree murder because Wolff could not "maturely and meaningfully reflect upon the gravity of his contemplated act," rendering the evidence insufficient as to premeditation and deliberation. *Id.*, at 821-822. In *People* v. *Conley* (1966) 64 Cal.2d 310, the court held that "if because of mental defect, disease, or intoxication . . . the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought and cannot be guilty of murder in the first degree." *Id.*, at 322-323.

In 1978, this court adopted the test of insanity proposed by the American Law Institute. *People* v. *Drew* (1978) 22 Cal.3d 333, 339-348. Also in 1978, Dan White killed George Moscone and Harvey Milk, being convicted only of manslaughter.

The Legislature responded in 1981 by eliminating the diminished capacity defense (Pen. Code § 28) and excluding expert opinion on intent and mental state (Pen. Code § 29). In 1982, Proposition 8 abolished the

diminished capacity defense (Pen. Code § 25(a)) and reinstated the M'Naughten test of insanity (Pen. Code § 25(b)).

4. The State of Affairs Today.

Current section 28, subdivision (a) now provides, in part: "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." In *Coddington, supra*, 23 Cal.4th at 581-583, this court described the law under sections 28 and 29:

> Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, . . .
>
> *Coddington, supra*, 23 Cal.4th at 582-583; footnotes omitted.

Mr. Mills deems it clear that the "conclusive presumption of sanity" language in section 1026 has solely a "procedural" role. He turns now to the law on "presumptions."

E. United States Supreme Court Case Law Regarding "Presumptions."

"Presumptions" in the criminal context come in various forms, including "mandatory" and "permissive," and "conclusive" and "rebuttable." As will be demonstrated, the "conclusive presumption of sanity"

instruction based on language of section 1026 created a "mandatory" and "conclusive" presumption, and it shifted the burden to Mr. Mills.

The first fundamental constitutional concern is the due process requirement of "proof beyond a reasonable doubt of every fact necessary to constitute the charge of which [the defendant] is charged." *In re Winship* (1970) 397 U.S. 358, 364. "This 'bedrock "axiomatic and elementary" [constitutional] principal,' [citation], prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. [Citations.]" *Francis* v. *Franklin* (1985) 471 U.S. 307, 313 ("*Francis*"). *Accord Sandstrom, supra*, 442 U.S. at 520-524.

There is also a Sixth Amendment component to the issue:

> Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations.] Such directions subvert the presumption of innocence accorded to accused persons *and* also invade the truth-finding task assigned solely to juries in criminal cases.
>
> *Carella* v. *California* (1989) 491 U.S. 263, 265 ("*Carella*"); emphasis added.

See, also, People v. *Flood* (1998) 18 Cal. 4th 470, 491-492.

When confronted with a claim of error in an instruction which creates a presumption, the first question is "whether the presumption in question is mandatory, that is, whether the specific instruction, both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts. See *Sandstrom, supra*, at 514, . . ."

Carella, supra, 491 U.S. at 266. *See, also, Francis, supra*, 471 U.S. at 315-316 [the question turns on "what a reasonable juror could have understood the charge as meaning. [Citation.]"].

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.
>
> *Id.*, at 313; footnote omitted.

Not surprisingly, the United States Supreme Court has deemed a mandatory presumption to be a "far more troublesome evidentiary device" than a permissive presumption: ". . . it may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. [Citations.]" *Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 157.

The second analytical question is whether "a reasonable juror could . . . have interpreted the presumption as 'conclusive' . . . ." *Sandstrom, supra*, 442 U.S. at 517. As that concept was explained in *Francis, supra*, 471 U.S. at 313 fn. 2:

> A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element

> unless the defendant persuades the jury that such a finding is unwarranted. [Citation.]

A separate issue arises, even if a mandatory presumption is not "conclusive." . . . "[A] State . . . may not shift the burden of proof to the defendant" by such an instruction. [Citation.]" *Sandstrom*, *supra*, 442 U.S. at 524.

As stated in *Rose* v. *Clark* (1986) 478 U.S. 570, 592: "Under *Sandstrom*, both mandatory conclusive presumptions, which remove the presumed element from the case once the State has proved the predicate fact, and mandatory rebuttable presumptions, which require the jury to find the presumed element unless the defendant rebuts the presumption, are unconstitutional. [Citations.]" The Supreme Court in *Yates* v. *Evatt* (1991) 500 U.S. 391 -- while deeming the challenged instructions not to be conclusive (*id.*, at 401-402) -- nonetheless held: "Although the presumptions were rebuttable . . . , the mandate to apply them remained, as did their tendency to shift the burden of proof on malice from the prosecution to petitioner." *Id.*, at 402; footnote omitted.

When considering an allegedly improper presumption, the question turns on "the way in which a reasonable juror could have interpreted the instruction." *Sandstrom*, *supra*, 442 U.S. at 514. A possibility the jury may not have relied on a presumption does not save the instruction, because a verdict cannot stand where an alternative, unconstitutional theory was given to the jury. *Id.*, at 526.

Moreover, instructions which contradict an improper presumption do not cure a constitutional infirmity.

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to ab-

> solve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.
>
> *Francis*, *supra*, 471 U.S. at 322; footnote omitted.

Finally, instructions on the presumption of innocence and reasonable doubt standard are insufficient to explain and qualify the infirm instruction. *Francis*, *supra*, 471 U.S. at 319. Regardless of the possibility the jury followed the correct general instructions, there is no assurance it did so. *Id.*, at 322.

F. The Significant Cases from This Court and the Ninth Circuit.

1. From *Bruton* in 1971 to *Coddington* in 2000.

In *People* v. *Burton* (1971) 6 Cal.3d 375, the jury had heard former CALJIC 73, which provided as follows:

> The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the person committing the act. All persons are of sound mind who are *neither idiots nor lunatics nor affected with insanity*.
>
> *For the purposes of the issues now at trial you must presume that the defendant was sane* at the time of his alleged conduct which, it is charged, constituted the crime described in the information.
>
> *Burton*, *supra*, 6 Cal.3d at 390 fn. 7; emphasis added.

The jury in *Burton* also heard former CALJIC 305.1, which advised the jury that it must consider the evidence of "mental illness, intoxication or any other cause" in relation to "diminished capacity." *Ibid.*

After reversing on other grounds (*id.*, at 381-384), this court addressed the appellant's contention "that the instruction given with respect to proof of intent (CALJIC No. 73) conflicted with and vitiated the instruction given on diminished capacity. . . ." *Id.*, at 390; footnote omitted. The court reasoned:

> The gist of the instruction on intent was to limit lack of sound mind to idiocy, lunacy, or insanity and thus order the jury to find the requisite sound mind supporting the requisite intent unless the defendant was an idiot, a lunatic or insane. Furthermore, this instruction directed the jury to assume defendant was sane. However, the instruction on diminished capacity quite correctly informed the jury that a "substantially reduced mental capacity, whether caused by mental illness, intoxication or any other cause" could negate the ability to form specific required mental states. There is certainly a potential conflict in the instruction which could well mislead the jury.
>
> *Ibid.*

The court -- because it had reversed on other grounds -- stated that it "need not now decide whether such a conflict would be fatal, . . ."

The defendant in *Coddington*, *supra*, 23 Cal.4th 529 sought to rely on *Burton*, after the trial court had "instructed *prospective jurors* that during the guilt phase of the trial the defendant was to be conclusively presumed to be sane at the time of the crime." *Coddington*, *supra*, at 584; emphasis added. This court described the appellant's claim of error, as follows: "Although that instruction correctly states the law [citation],

appellant contends that this was error which prejudicially undermined his guilt phase defense of lack of premeditation of the murders." *Ibid.*

This court first found that the appellant had waived any error by failing to object or to request supplemental instructions:

> [Appellant] concedes that the jury was instructed that if the defendant did not premeditate because of mental illness or defect, he was not guilty of first degree murder, but claims, nonetheless, that the jury would conclude that the presumption-of-sanity instruction meant that the evidence of his odd behavior prior to the killings could not be considered. A defendant who believes that an instruction requires clarification must request it. [Citation]. Appellant neither objected to the instruction nor sought modification.
>
> *Ibid.*

The court also found that the appellant had not been prejudiced by the instruction:

> We are satisfied that appellant suffered no prejudice here in any case. As defendant observes, we noted in *People* v. *Burton* (1971) 6 Cal.3d 375, 390 [ ] that the instruction given there could mislead the jury when evidence of mental illness was offered at the guilt phase. The *Burton* instruction was very different from that of which appellant complains here. Moreover, the prosecutor and defense counsel argued the presence or absence of mental disease during guilt phase closing argument, with defendant reminding the jury that whether appellant was mentally ill was for the jury to decide. The guilt phase instructions given shortly thereafter expressly advised the jury that premeditation and deliberation were elements of first degree murder and that evidence that the defendant suffered from a mental illness or defect could be considered in determining if those mental states were present. There was

> no possibility of confusion arising from the instruction of which appellant complains here.
>
> *Coddington*, *supra*, at 584-585.

Mr. Mills, of course, faces no issue of "waiver," as he both objected to the instruction and requested a clarifying instruction. In Mr. Mills's case, the instruction was given as part of the trial court's final charge to the jury, and not among the instructions to prospective jurors. However, *Coddington* contains troubling language, in this court's conclusions as to "correctly states the law" and "no possibility of confusion."

2. *Patterson* and *Stark*.

Several weeks after *Coddington* was filed, the Ninth Circuit decided *Patterson*, *supra*, 223 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" 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. Finally, the Ninth Circuit in each case 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 due process.

In *Sandstrom*, the jury had convicted the defendant of the Montana crime of "deliberate homicide," which required proof that he had acted "purposely or knowingly." The jury had been instructed that "the law

presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom, supra*, 442 U.S. at 513.

In *Francis*, the defendant had been convicted of "malice murder," after the jury had been instructed that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the 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 but the presumption may be rebutted." *Francis, supra*, 471 U.S. at 311. As explained in *Francis*:

> The court today holds that contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion -- create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge explains the infirm language sufficiently to eliminate this possibility. If such a reasonable possibility of an unconstitutional understanding exists, "we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction."
>
> *Id.* at 322 fn. 8, quoting *Sandstrom.*

The Ninth Circuit in *Patterson* reviewed California's bifurcated system of trial of guilt and sanity. *Patterson, supra*, 223 F.3d at 964. The Ninth Circuit 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.* " . . . [T]he problem lies with what the jury was told to presume

about petitioner's mental state" (*ibid.*), based on the following instruction at the guilt phase:

> Evidence has been received regarding a mental disease or mental disorder of the defendant at the time of the crime in the Information. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crime charged in the Information, and are [sic] found in the definitions of murder.
>
> If from all the evidence you determine to be credible you have a reasonable doubt whether the defendant formed any required mental state or had the necessary specific intent, you must find that he did not have such mental state or specific intent.
>
> *At the time of the alleged offense charged in the Information, you were [sic] instructed to presume that the defendant was sane.*
>
> *Ibid.*; emphasis in original.

The court in *Patterson* observed that the last paragraph, while "an accurate technical statement of the law," was "not a standard jury instruction in California." *Id.*, at 965. The *Patterson* court noted that similar language in an earlier version of CALJIC 3.34 had been accompanied by a "Use Note" warning that the language should not be used if a specific intent crime were charged and if there were evidence suggesting diminished capacity. *Ibid.* Finally, the *Patterson* court observed that this court in *People v. Burton, supra*, 6 Cal.3d 375 had deemed the Use Note to an earlier version of CALJIC 3.34 to be "a correct and fully adequate way to handle the situation" of potential confusion caused by such an instruction. *Id.*, at 391.

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.

> 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. In a first degree murder case, the evidence would be used to show that he did not willfully deliberate and premeditate the killing. 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 first degree murder, 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.
>
> *Ibid.*

Patterson noted that the most recent edition of Webster's New Collegiate Dictionary -- a resource used in *Sandstrom* to identify the lay definition of "presume" -- defined "sane" as including the following: "proceeding from a sound mind"; "rational"; "mentally sound"; and "able to anticipate and appraise the effect of one's actions." *Patterson*, *supra*, 223 F.3d 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.*

> In order to convict a defendant of first degree murder, the state must prove beyond a reasonable doubt that the defendant was guilty of "willful, deliberate, and premeditated killing." Where, as here, evidence is introduced at trial that a defendant was suffering from a mental disease, defect, or disorder, the jury is entitled to consider evidence of such disease, defect, or disorder in determining whether the defendant actually had the mental state necessary for first degree murder. But 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 such 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 willfulness, premeditation, and deliberation.
>
> 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.
>
> *Patterson, supra*, 223 F.3d at 966-967.

The *Patterson* court recalled what the United States Supreme Court had written in *Francis*: "'Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of *intent,* and because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause.' [Citation]." *Patterson, supra*, 223 F.3d at 967, quoting *Francis, supra*, 471 U.S. at 325; emphasis in original. *Patterson* continued: "If

the italicized word 'intent' is changed to 'mental state,' this language captures our case precisely." *Patterson, supra*, 223 F.3d at 967.

In *Stark*, the defendant had called two alienists to testify 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.*

The Ninth Circuit in *Stark* was not persuaded that *Coddington* had resolved the issue before it:

> . . . [W]e find that contrary to the California Court of Appeal's conclusion, *Coddington* is not dispositive of the instant issue. While the California Supreme Court stated in *Coddington* that the presumption of sanity instruction "correctly states the law," *id.* at 584, 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 the defendant's trial was error which prejudicially undermined his guilt phase defense of lack of premeditation of the murders charged. *Id.* 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*, 433 F.3d at 1076.

3. The Decision in *Blacksher*.

In *Blacksher, supra*, 2011 Cal. LEXIS 8582, an issue was raised equivalent to that in *Coddington*, and this court rejected the claim of error:

> Defendant contends the court's instructions erroneously led the jury to believe it could not consider whether defendant's mental illness precluded him from forming the intent to commit murder. Specifically, he claims the court's instruction on the presumption of sanity . . . hampered his mental illness defense and lowered the prosecution's burden of proof in violation of his due process rights.
>
> The court properly instructed the jury that: "In the guilt trial or phase of this case, the defendant is conclusively presumed to have been sane at the time[] the offenses ... are alleged to have been committed." Defense counsel did not object to this instruction and requested no further definition of sanity. Defendant now argues that this instruction effectively negated the defense that because of his mental illness he could not form the mental state required for murder. Yet the jury was given CALJIC No. 3.32, which is the standard instruction for this very defense. As defendant acknowledges, we rejected an identical argument in [*Coddington*], and we are neither persuaded nor bound by any contrary decisions of the lower federal courts. [Citation.]
>
> *People* v. *Blacksher, supra*, 2011 Cal. LEXIS 8582, 116-117.

Two aspects of *Blacksher* are noteworthy. First, the court stated that the trial court had "properly instructed" the jury as to a "conclusive presumption of sanity," which was one step beyond *Coddington*'s "correctly stated the law" language. Yet this court never identified an issue

before Mr. Blacksher's jury to which a "conclusive presumption of sanity" would reasonably apply.

Moreover, the reference to "contrary decisions of the lower federal courts" seems implicitly to refer to *Patterson* and *Stark*. As in *Coddington*, however, this court in *Blacksher* did not address *Sandstrom*, *Francis*, or any other United States Supreme Court case dealing with "presumptions."

G. Application of the Law Here.

The ultimate question -- to paraphrase *Francis*, *supra*, 471 U.S. at 315-316 -- is "what a reasonable juror could have understood the conclusive presumption of sanity charge as meaning." As was true when *Patterson* was decided, the definition of "sane" includes "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.Reference.com*.

The adjective "legal," in turn, has common meanings including "relating to law" (*Merriam-Webster.com*), "pertaining to law" (*Dictionary.Reference.com*), and "recognized by law" (both). Thus would "legally sane" to a lay juror have meanings such as "mentally sound in the eyes of the law," "free from mental derangement in the eyes of the law," and having "a sound, healthy mind in the eyes of the law." Mr. Mills respectively submits that the due process problem is inescapable.

As noted, the Ninth Circuit in *Patterson* court quoted the following from *Francis*, *supra*, 471 U.S. at 325: "Because a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and

because the charge read as a whole does not explain or cure the error, we hold that the jury charge does not comport with the requirements of the Due Process Clause." *See Patterson, supra*, 223 F.3d at 967. *Patterson* concluded: "If . . . 'intent' is changed to 'mental state,' this language captures our case precisely." *Patterson, supra*, 223 F.3d at 967.

It is true that Mr. Mills's jury heard CALJIC 3.32. However, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity," for the reason that the "reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis, supra*, 471 U.S. at 322; footnote omitted. Moreover, instructions on the presumption of innocence and reasonable doubt standard are insufficient to cure a constitutionally infirm instruction, for the same reason. *Id.*, at 319.

Mr. Mills again acknowledges that this court in *Coddington* and *Blacksher* spoke of "correctly stated the law," "no possibility of confusion," and "properly instructed," and such language suggests the court is not receptive to the *Sandstrom-Francis* claim of error accepted in *Patterson* and *Stark*. However, the court in neither *Coddington* nor *Blacksher* analyzed the issue within the *Sandstrom-Francis* analytical framework.

Mr. Mills therefore submits, with deference, that the Ninth Circuit in *Patterson* and *Stark* correctly resolved the issue. He submits that the section 1026 language created an unconstitutional "mandatory" and "conclusive" presumption, and that -- even if "conclusively" had not appeared in the instruction -- the effect would have been a mandatory instruction which unconstitutionally shifted the burden of proof to Mr. Mills.

Mr. Mills accordingly asks this court to consider the issue further and to conclude that the "conclusive presumption of sanity" instruction violated the Sixth and Fourteenth Amendments based on the facts and circumstances of Mr. Mills's case.

H. The Error Was Prejudicial.

Because a Due Process Clause violation occurred, the issue of prejudice must be analyzed under *Chapman* v. *California* (1967) 386 U.S. 18, 24. The question "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan* v. *Louisiana* (1993) 508 U.S. 275, 279; emphasis in original. As stated in *Yates* v. *Evatt*, *supra*, 500 U.S. at 403-404:

> To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption.

Turning more particularly to the facts and circumstances of this case, the jury heard from Mr. Mills directly as to his delusional beliefs, prior to and at the time of the homicide, and the validity of those beliefs was amply supported by the testimony of his cousin and wife. Moreover, the bizarre and paranoid behavior on the train platform was described by Mr. Bashir, Mr. Furstenberg and Ms. Duhon, and that same behavior

continued in the presence of Detective Johnson. Finally, the *only* alienist from whom the jury heard was Dr. Smith.

The prosecutor opted not to call an alienist to challenge Dr. Smith's diagnosis of delusional disorder, or to challenge the implications of Mr. Mills's mental condition to the issues in this case. The prosecutor sought instead to rely upon a range of circumstantial evidence -- such as Mr. Mills's claims of being crazy in his call to his wife -- to establish that his post-shooting thinking was inconsistent with mental illness. Finally, the prosecutor sought to prevent the jury from considering the defense evidence of delusional disorder and unreasonable beliefs through a conclusive presumption of sanity instruction.

Because of the federal constitutional violations, the burden has shifted to the respondent to demonstrate beyond a reasonable doubt that the presumption on which the jury was instructed did not adversely affect the defense on either the premeditation and deliberation finding, or the malice finding. Mr. Mills submits that burden cannot be satisfied. The judgment should be reversed.

II

THE TRIAL COURT ERRED UNDER CALIFORNIA LAW WHEN IT INSTRUCTED THE GUILT PHASE JURY AS TO A "CONCLUSIVE PRESUMPTION OF SANITY."

A. Introduction to the Argument.

Mr. Mills asks this court separately to evaluate the instruction under California case law. He respectfully submits that "correctly stat[ing] the law" does not resolve the issue.

B. California Case Law Disapproves Instructions Stating an Inapplicable Legal Principle.

Penal Code section 1093, subdivision (f) provides in part that "the Judge . . . may charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party. . . ." Section 1127 specifies similarly that "the judge may instruct the jury regarding the law applicable to the facts of the case, . . . " These statutes require the trial court to instruct on those legal principles of law "openly and closely" associated with the issues to be resolved by the jury. *People* v. *Sedeno* (1974) 10 Cal.3d 703, 715. Those are the "principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." *People v. St. Martin* (1970) 1 Cal.3d 524, 531.

However: "'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. The trial court "has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of

confusing the jury or relieving it from making findings on relevant issues.'" *People* v. *Saddler* (1979) 24 Cal.3d 671, 681. "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 basis, which has been described by this court as "obvious": "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* (1954) 42 Cal.2d 540, 547. As explained in *People* v. *Roe* (1922) 189 Cal. 548, 559:

> The error of inapplicable instructions rests in the fact that they . . . , instead of enlightening, tend to confuse and mislead the jury. This is so because such instructions, in effect, either create a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue.

Roe found that giving inapplicable instructions "constitutes error equally as grave as would be the giving of instructions fundamentally wrong. [Citation.]" *Ibid.* The fact that language appears in a statute is not determinative of whether the jury should be instructed in the statutory language. *See People* v. *Spencer* (1963) 60 Cal.2d 64, 86-87.

Mr. Mills questions whether *Coddington*'s reference to "correctly states the law" (*Coddington*, *supra*, 23 Cal.4th at 584) was intended as disapproval of the long-standing rule established in *Roe*. Mr. Mills does not believe that was the court's intent.

In short, the language from section 1026 has significance solely as a matter of criminal procedure. It should not be the basis for a jury instruction.

C. Instructions Containing a Term With a "Technical Meaning Peculiar to the Law."

This court has explained that "'"an instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court."' [Citaton.]" *People* v. *Failla* (1966) 64 Cal.2d 560, 564. As explained further in *People* v. *Estrada* (1995) 11 Cal.4th 568, 574-575:

> When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.] Thus, . . . terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. (*Id.*, at p. 1360.)

Virtually no legal term has a more "technical" meaning than "insanity," a definition on which treatises have been written. As noted, above, this court first adopted the M'Naughten test of insanity; in 1978 the court opted for the American Law Institute definition; and in 1982, the populace rejected the latter in favor of the former. This court should not presume that the jury would have recognized the meaning of "legal sanity," after the trial court had refused to define it for the jury. This is a separate reason the instruction should not have been given.

D. The Error Was Prejudicial.

With an error under state law, the question is whether it is reasonably probable that a more favorable result would have resulted in the absence of the error. *People* v. *Watson* (1956) 46 Cal.2d 818, 836. A "reasonable probability" means only "a reasonable chance, more than an abstract possibility," of a better result absent the error. *College Hospital* v. *Superior Court* (1994) 8 Cal.4th 704, 715, citing *Watson*, *supra*, 46 Cal.2d at 837. This does not require that Mr. Mills demonstrate it is "more likely than not" he would have fared better at trial. *People* v. *Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918.

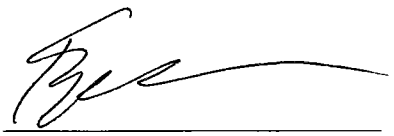
Mr. Mills in Argument I discussed the extensive trial evidence bearing on his mental state at the time of the homicide. He discussed the testimony of Dr. Smith, and he noted that the prosecutor opted not to challenge that testimony through a prosecution alienist. Mr. Mills submits that the error in giving a "conclusive presumption of sanity" instruction was prejudicial, under any standard of prejudice.

CONCLUSION

For the foregoing reasons, Mr. Mills submits that error occurred, under the Sixth and Fourteenth Amendments, and under California law. The judgment should be reversed and remanded for a new trial, with appropriate instructions.

Dated: September 28, 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 13,751 words. In this certificate, I am relying on the word count produced by Wordperfect 5.1.

Dated: September 28, 2011

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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 September 28, 2011, I served the within APPELLANT'S OPENING BRIEF ON THE MERITS 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 September 28, 2011 at Oakland, California.

Kyle Gee