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

REPLY 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.

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_____/

PRELIMINARY STATEMENT

Appellant AHKIN R. MILLS in this Reply Brief on the Merits will address certain contentions and arguments advanced in the Attorney General's Respondent's Brief on the Merits ("RBM"). As for any matter not specifically addressed, Mr. Mills will rely on the arguments and authorities set forth in his Opening Brief on the Merits ("OBM").

INTRODUCTION TO THE REPLY BRIEF ON THE MERITS

The Respondent's Brief on the Merits is reasonably predictable and straightforward, with the exception of its heavy reliance on *Clark* v. *Arizona* (2006) 548 U.S. 735. As will be explained, *Clark* had nothing to do with California homicide law, California evidentiary law, or California procedural law, and *Clark* said nothing which bears on whether a California jury should be instructed on a "conclusive presumption of sanity" at the guilt phase of a bifurcated guilt and sanity trial.

Perhaps the most telling case citation in Respondent's Brief on the Merits appears at RBM 7-8, when reference is made to the following language from *People* v. *Dobson* (2008) 161 Cal.App.4th 1422, 1431: "In the first phase of trial, the defendant is tried on his or her factual issue of guilt *without reference to his insanity plea*." Emphasis added. Would that it had been so at Mr. Mills's trial.

Dobson's observation captures perfectly Mr. Mills's view of California procedure in the event of dual pleas of "not guilty" and "not guilty by reason of insanity." Yet this procedural demarcation was not observed in Mr. Mills's case, when the trial court -- over defense objection -- blurred the line between the two phases of trial by transmuting a *procedural* provision of Penal Code section 1026[1] into a *substantive* instruction to Mr. Mills's guilt phase jury. The trial court's decision to give a "conclusive presumption of legal sanity" instruction at the guilt phase violated the Fourteenth Amendment requirement of "proof beyond a reasonable doubt" and the Sixth Amendment guarantee of trial by jury,

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

as those rights are protected by the holdings of cases such as *Sandstrom* v. *Montana* (1979) 442 U.S. 510 ("*Sandstrom*").

Throughout its brief, the Attorney General subtly but persistently seeks to blur the line between the guilt phase of trial and the sanity phase of trial. For example, the third sentence of the Respondent's Brief on the Merits begins as follows: "The People bear the burden to prove every element of the crime, but the defendant bears the burden to prove sanity, if he stands convicted and contests that issue at trial." RBM 1.

While correct as far as it goes, a fully accurate articulation of these two burdens would have been as follows: "The People bear the burden to prove every element of the crime [beyond a reasonable doubt at the guilt phase]; but the defendant [thereafter] bears the burden to prove insanity [at the subsequent sanity phase of trial], if he stands convicted and contests that issue at trial." The defendant's burden as to insanity at the sanity phase should play no role at the guilt phase, under California's law and procedure, or under the federal constitution.

Throughout its brief, the Attorney General also subtly but persistently seeks to blur the line between evidentiary restrictions with respect to mental disease or defect, and constitutionally prohibited presumptions related to mental disease or defect. In addition, the Attorney General subtly but persistently seeks to blur the line between definitions of crime and defenses, and constitutionally prohibited presumptions bearing on the prosecution's burden of proof and the right to jury trial.

Mr. Mills emphasizes once more that the question before this court does not concern how the California Legislature has defined the elements of first degree or second degree malice-murder. Nor does the issue concern what evidence the California Legislature has deemed admissible

and inadmissible at the guilt phase, under Penal Code sections 22, 25, or 28. Nor does the question concern the mitigating defenses which have been recognized by this court, or the definition of insanity which California has adopted. Mr. Mills concedes these matters to be within the Legislature's and courts' authority under well-established federal constitutional principles which the United States Supreme Court recently re-affirmed in *Clark*.

Mr. Mills's issue has a different focus. His challenge concerns what a guilt phase jury may constitutionally be told, in reference to the jury's consideration of admissible evidence of mental disease and defect, as that evidence bears on the elements of first and second degree murder, and on "imperfect self-defense." His position, which he has conceded is seemingly at odds with *Coddington* and *Blacksher,*[2] is that a substantive instruction on a "conclusive presumption of sanity" violates the federal constitutional ban against conclusive presumptions which bear on the *mens rea* elements of an offense and a defense.

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[2]/ *People* v. *Coddington* (2000) 23 Cal.4th 529, overruled on other grounds in *Price* v. *Superior Court* (2001) 25 Cal.4th 1046; and *People* v. *Blacksher* (2011) 52 Cal.4th 769.

ORGANIZATION OF THE REPLY BRIEF

The Reply Brief on the Merits will generally track the organization of the Respondent's Brief on the Merits. Mr. Mills will begin in Argument I, at pages 6-7, with limited observations as to the Attorney General's discussion of *Blacksher*, *supra*, 52 Cal.4th 769 and *Coddington*, *supra*, 23 Cal.4th 529 (RBM 9-12).

Thereafter, Mr. Mills will spend significant time in Argument II, at pages 8-27, discussing *Clark* v. *Arizona*, *supra*, although he does so with reluctance. As explained in the Introduction to Argument II, he deems *Clark* inapposite, because the issues considered in *Clark* had solely to do with a state's power to define the *mens rea* element of crimes, to define the defenses to the *mens rea* element of a crime, to limit the evidence which may be considered by the trier of fact on the *mens rea* element at the guilt phase, or to define legal insanity.

In Argument II, Mr. Mills will dissect *Clark* and its limited holdings. Mr. Mills will expose the fallacy of the Attorney General's contention that a "conclusive presumption of sanity" instruction to a guilt phase jury "implements *Clark*'s holding." See, RBM 19-23.

In Argument III, at pages 28-30, Mr. Mills will dispute the Attorney General's "hybrid" claim of "no error" and "no prejudice," which is based on other instructions. RBM 21-23. In Argument IV, at pages 31-32, Mr. Mills will have observations with regard to *Patterson* and *Stark*,[3] which cases the Attorney General dismisses as "unpersuasive." RBM 25-27. Finally, in Argument V, at page 33, Mr. Mills notes the Attorney General's failure to discuss relevant state law.

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[3]/ *Patterson* v. *Gomez* (9th Circuit 2000) 223 F.3d 959 and *Stark* v. *Hickman* (9th Cir. 2006) 455 F.3d 1070.

I

MR. MILLS URGES THIS COURT TO ADDRESS HIS CLAIMS OF ERROR ANEW, NOTWITHSTANDING THE *CODDINGTON* AND *BLACKSHER* DECISIONS.

A. Introduction.

At RBM 9-10, the Attorney General presents a summary of this court's decision in *Coddington*, *supra*, 23 Cal.4th at 584-585, and at RBM 10-11, the Attorney General summarizes the recent decision in *Blacksher*, *supra*, 52 Cal.4th at 831-852. The Attorney General's summaries of the two cases largely mirrors OBM 2-4, 40-41, and 47-48.

At RBM 12, the Attorney General advances the following three points: (i) "[a]ppellant does not explain how a separate [due process] analysis [in *Coddington*] would have produced a different outcome in that case"; (ii) "[i]n *Blacksher*, the defendant specifically argued the instruction violated his right to due process . . . and . . . the court rejected [the claim] on due process grounds"; and (iii) the instruction "is fully consistent with California's allocation of the burden or proof on guilt and sanity, an allocation that was upheld in *Clark v. Arizona*, *supra*, 547 U.S. 735."

B. Mr. Mills's Responsive Arguments.

As for the Attorney General's first point, Mr. Mills deems the entirety of his Opening Brief on the Merits -- and particularly OBM 34-38 and 48-51 -- to be an explanation of how "a different outcome" should have been reached in *Coddington*, had the *Sandstrom* issue been squarely considered. As for the Attorney General's third point, Mr. Mills will address in Argument II, at pages 8-27, the lack of significance of *Clark* to the *Sandstrom* issue.

That leaves the Attorney General's second point, which is -- as begrudgingly conceded in part at OBM 2-4 -- that *Blacksher* appears "to be generally against Mr. Mills, at least in *dictum*," even though the opinion in *Blacksher* did not discuss *Sandstrom* or any other United States Supreme Court case. That circumstance arguably leaves Mr. Mills with little to say.

Justice Baxter authored *Coddington*, Justices Werdegar and Chin joined, and Justice Kennard's dissent focused on another issue. Justice Corrigan was the author of *Blacksher*, and every current member of this court with the exception of Justice Liu was a signatory. This court knows far better than either party what it considered and what it meant when *Blacksher* and *Coddington* were decided

However, most of Mr. Mills's Opening Brief on the Merits (OBM 26-51) was devoted to an explanation of why he believed, with deference, that the conclusions reached in *Blacksher* and *Coddington*, whether or not in *dictum*, were at odds with cases such as *Sandstrom*. Another part of Mr. Mills's Opening Brief on the Merits (OBM 52-54) was devoted to an explanation of why he believed, with deference, that the court's "correct statement of the law" rationale is at odds with the holdings of cases such as *People* v. *Anderson* (1965) 63 Cal.2d 351, *People v. Jackson* (1954) 42 Cal.2d 540, and *People v. Roe* (1922) 189 Cal. 548.

This court knows what it was thinking and what it intended in *Blacksher* and *Coddington*, and if the Opening Brief did not change the court's mind, a Reply Brief will not. The best Mr. Mills can do now is to remind the court of the distinctions between his procedural circumstances and the procedural circumstances in *Coddington* and *Blacksher*, and to urge the court to consider these questions further in light of

Sandstrom, *Anderson*, *Roe* and the other cases cited in the Opening Brief on the Merits.

In neither *Coddington* nor *Blacksher* had there been a defense objection at trial to the challenged instruction, while Mr. Mills's counsel specifically objected under the Sixth and Fourteenth Amendments. In neither *Coddington* nor *Blacksher* had the trial court refused to define for the jury the term "legally sane" which the jury was told was to be "conclusively presumed." In summary, Mr. Mills's issues were fully preserved, while they were not in *Coddington* and *Blacksher.*

Even were this court to deem Mr. Mills's procedural posture indistinguishable from *Coddington* and *Blacksher*, and even were the court to deem the *Sandstrom* and *Roe* issues to have been fully raised, considered, and resolved in *Coddington* and *Blacksher*, Mr. Mills asks the court to address them anew, with full discussion of the *Sandstrom* and *Anderson-Roe* principles. The court has shown itself willing to rethink a position (*People* v. *Birks* (1998) 19 Cal.4th 108), and it would be appropriate to do so here.

II

CLARK IS NOT "IN ACCORD WITH *CODDINGTON* AND *BLACKSHER*, NOR DOES A "CONCLUSIVE PRESUMPTION OF LEGAL SANITY" INSTRUCTION AT THE GUILT PHASE "IMPLEMENT" *CLARK*'S HOLDING.

A. Introduction.

Throughout the Respondent's Brief on the Merits the Attorney General seeks to pound a very round peg into a very square hole, when it is asserted that the United States Supreme Court's decision in *Clark* is somehow dispositive of Mr. Mills's claim of error. At RBM 1, the Attorney General refers to the *Clark* holding and concludes that "[a]ppellant's argument accordingly fails." At RBM 7, it is contended that "[a]n instruction at the guilt phase that a defendant is presumed sane implements *Clark*'s holding . . . ." It is asserted at RBM 12, that "*Clark v. Arizona* is in accord with *Coddington* and *Blacksher*." Finally, the Attorney General's subsection heading at RBM 19 again asserts that "the trial court's instruction at the guilt phase that appellant was conclusively presumed sane implements *Clark*'s holding."

None of these assertions is legally or logically correct. *Clark* had two holdings, one relating to Arizona's legal definition of sanity, and the other relating to Arizona's exclusion of psychological and psychiatric evidence at the guilt phase on the issue of *mens rea*. While California can draw comfort from *Clark* in the sense that Penal Code sections 22, 25, and 28 pass constitutional muster at the guilt phase, and that California's definition of legal insanity and assignment of the burden pass constitutional muster at the sanity phase, *Clark* does not dictate the result in relation to either the *Sandstrom* or the *Anderson-Roe* issue.

B. Mr. Mills's Views as to *Clark*, in Brief.

The gnarled tree of the Fourteenth Amendment Due Process Clause has multiple branches. For example, the Due Process Clause 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. At the same time, however, once a state has prescribed the elements of a crime, the Due Process Clause requires the state to present proof beyond a reasonable doubt of each element of that crime. *See In re Winship* (1970) 397 U.S. 358.

Such independent lines of due process may fully and comfortably co-exist, without one undermining another. For example, it would be specious for the state to argue under *Smith* that the Legislature was not constitutionally required to include a *mens rea* element in the definition of a crime, and then to leap to a conclusion that the state need not prove that element beyond a reasonable doubt. While the Due Process Clause says little about the choices a state may constitutionally make in terms of elements of a crime, and defenses to a crime, the Due Process Clause says a great deal about the burden of proof and level of proof required to convict of a crime.

Moreover, a state may validly limit the evidence on which a defendant may rely in defense of a crime, including defense against the *mens rea* element. *See, e.g., Montana* v. *Egelhoff* (1996) 518 U.S. 37 [a state may validly preclude evidence of intoxication when offered to negate *mens rea*]. Again, however, this line of due process law does not undermine the right to jury trial, or the requirement of proof beyond a reasonable doubt, and the ban against conclusive and mandatory presumptions.

One of the two due process questions addressed in *Clark* was "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.[4] 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.
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> *Id.*, at 769-770; footnote 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.

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

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[4]/ Unlike California, Arizona's statutory and case law had established for Arizona courts that not only was "diminished capacity" evidence precluded on *mens rea* but that psychiatric evidence on "diminished actuality" was precluded.

> 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 channeling the evidence.
>
> *Id.*, at 778; footnotes omitted.

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 defenses, the state may not validly rely on a *conclusive presumption* to establish an element of the crime or to defeat a defense. *See Francis* v. *Franklin* (1985) 471 U.S. 307 ("*Francis*"); and *Sandstrom*, *supra*, 442 U.S. 510.

Clark did not address or alter California law, and nothing in *Clark* undermines the holdings of *Sandstrom* and *Francis* barring a "conclusive presumption" as a substitute for proof. Unless and until California law is changed, and unless and until *Sandstrom* and *Francis* are abandoned by the United States Supreme Court, *Clark* has no persuasive relevance here, and Mr. Mills's federal constitutional claim survives intact.

C. Mr. Mills's Views as to *Clark*, in Detail.

1. The Two Issues in *Clark*.

The United States Supreme Court began its analysis in *Clark* by defining the issues before it:

> The case presents 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. at 742.

Everything which the Attorney General has to say about *Clark*, and every alleged implication of *Clark* to Mr. Mills's case, must be considered and evaluated in reference to those two issues.

2. The Trial and Appellate Court Proceedings in *Clark*.

The defendant in *Clark* had been charged with "intentionally or knowingly killing a police officer who was acting in the line of duty." *Id.*, at 743. At a court trial, the defendant "relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so . . . ." *Ibid.* Evidence of mental illness had been offered at the court trial "for two purposes": "to rebut the prosecutor's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly"; and (ii) to support "the affirmative defense of insanity," *to wit*: "that 'at the time of commission of the criminal act [he] did not know the criminal act was wrong,' [citation]." *Id.*, at 744. In declining to permit the defendant to rely on psychiatric or psychological evidence to dispute *mens rea*, the trial court "cited *State* v. *Mott*, 187 Ariz. 536, 931 P.2d 1046 (en banc), cert. denied, 520 U.S. 1234, 117 S. Ct. 1832, 137 L. Ed. 2d 1038 (1997), which 'refused to allow psychiatric testimony to negate specific intent,' 187 Ariz., at 541, 931 P. 2d at 1051, and held that 'Arizona does not allow evidence of a defendant's mental disorder

short of insanity . . . to negate the mens rea element of a crime,' *ibid.*" *Clark*, *supra*, 548 U.S. at 745; footnote omitted.

The defendant's claims on appeal in *Arizona* were that Arizona's narrow definition of insanity offended due process, at that *Mott*'s evidentiary holding offended due process. The Arizona Court of Appeal rejected these constitutional claims, and the Arizona Supreme Court denied review. The United States Supreme Court "granted certiorari to decide whether due process prohibits Arizona from thus narrowing its insanity test or from excluding evidence of mental illness and incapacity due to mental illness to rebut evidence of the requisite criminal intent. [Citation.]" *Clark*, *supra*, 548 U.S. at 747.

3. The Supreme Court's Resolution of the "Definition of Insanity" Issue.

In Part II of its *Clark* opinion, the United States Supreme Court concluded that Arizona's definition of insanity did not offend the Due Process Clause. *Id.*, at 747-756. Although the circumstances of that analysis are of little or no concern here, it will be briefly summarized.

First, the United States Supreme Court logically viewed the *M'Naghten* test of insanity in terms of "cognitive capacity" and "moral capacity." Neither reflects California's historic -- and now abrogated -- definition of "diminished capacity," which was couched in terms of "diminished responsibility." As explained in *Clark*:

> The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental

> disease or defect leaves a defendant unable to understand that his action is wrong.
>
> *Id.*, at 747.

The United States Supreme Court referred later in *Clark* to a third type of "capacity" as it applies in the realm of legal insanity: "The volitional incapacity or irresistible-impulse test . . . asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions." *Id.*, at 749. In a footnote, the Supreme Court stated: "'Capacity' is understood to mean the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them." *Id.*, at 749 fn. 7.

Clark noted that "[h]istory shows no deference to M'Naghten that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses, [citation]." *Ibid.* The court deemed it "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." *Id.*, at 753.

Clark rejected the argument that "some constitutional minimum has been shortchanged" by Arizona's abrogation of the "cognitive incapacity" test, leaving only the "moral incapacity" test. In so holding, the court stated that "cognitive incapacity is itself enough to demonstrate moral incapacity." *Ibid.* The court continued:

> Cognitive incapacity, in other words, is a sufficient condition for establishing a defense of insanity, albeit not a necessary one. As a defendant can therefore make out moral incapacity by demonstrating cognitive incapacity,

> evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime.
>
> *Id.*, at 753-754; footnote omitted.

After noting that "Clark can point to no evidence bearing on insanity that was excluded" (*id.*, at 755-756), the court deemed itself "satisfied that neither in theory nor in practice did Arizona's 1993 abridgment of the insanity formulation deprive Clark of due process." *Id.*, at 756.

Thus far in *Clark*, there is little of significance to Mr. Mills's issue. Nonetheless, it is intriguing to consider the several ways in which the United States Supreme Court defined "capacity," and the United States Supreme Court's apparent conclusion that lack of "moral capacity" also satisfies the "cognitive capacity" prong under the *M'Naghten* test.

4. The Supreme Court's Resolution of the Due Process Issue Regarding Arizona's Exclusion at the Guilt Phase of Psychiatric and Psychological Evidence on the Issue of *Mens Rea*, in Reference to Both "Diminished Capacity" and "Diminished Actuality."

The procedural posture in *Clark* may have a tendency to "muddy the waters" a bit, for the reason that the issue of guilt and the issue of sanity were heard in a single court trial, with no distinction between a "guilt phase" and a "sanity phase." The trial court was receiving all psychiatric and psychological evidence at one proceeding, while not considering that evidence on the issue of guilt (as it bore on *mens rea*).

In that regard, the trial in *Clark* resembled to an extent a pre-1927 guilt-sanity trial in California, in which the trier of fact was considering both guilt and sanity in a single proceeding, with the state bearing the burden as to guilt and the defendant bearing the burden as to insanity.

The legal posture in *Clark* may also have a tendency to "muddy the waters" a bit, because Arizona law precludes psychiatric and psychological evidence from consideration on the issue of *mens rea*, in terms of *both* "diminished capacity" and "diminished actuality." California, of course, precludes such evidence at the guilt phase on "diminished capacity" but not on "diminished actuality."

Part III of *Clark* addressed whether a Due Process Clause violation had occurred when the Arizona trial court "held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect . . . could not be considered on the element of mens rea, that is, what the State must show about a defendant's mental state (such as intent or understanding) when he performed the act charged against him. [Citation.]" *Id.*, at 756-757. The court identified three "categories of evidence with a potential bearing on mens rea": (i) "'observation evidence' in the everyday sense";[5] (ii) "mental-disease evidence";[6] and (iii) "evidence we will refer to as 'capacity evidence' about a defendant's capacity for cognition and moral judgment

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[5]/ This was further described as "testimony from those who observed what Clark did and heard what he said; this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics." *Id.*, at 757.

[6]/ This was further described as "opinion testimony that Clark suffered from a mental disease with features described by the witness." *Id.*, at 759.

(and ultimately also his capacity to form mens rea)." *Id.*, at 758-758. With regard to this latter category of "capacity evidence" in the context of a guilt trial, the court noted that "[h]ere, as it usually does, this testimony came from the same experts and concentrated on those specific details of the mental condition that make the difference between sanity and insanity under the Arizona definition." *Id.*, at 758.

In Parts III-B and III-C (*id.*, at 760- 765), the *Clark* majority concluded that "the only issue properly before us is the challenge to [*State* v.] *Mott* on due process grounds, comprising objections to limits on the use of mental-disease and capacity evidence." *Id.*, at 762. In Part III-D, the court deemed the defendant's Due Process Clause argument to "[turn] on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him." *Id.*, at 765.

As for the "presumption of innocence," *Clark* recognized that this presumption requires that the prosecution "[prove] beyond a reasonable doubt each element of the offense charged [citations], including the mental element or mens rea." *Id.*, at 766. The court continued, as follows, with regard to the "presumption of sanity":

> The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the mens rea necessary for a verdict of guilt and the consequent criminal responsibility. [Citations.] . . . *The force of this presumption, like the presumption of innocence, is measured by the quantum of evidence necessary to overcome it*; unlike the presumption of innocence, however, the force of the presumption of sanity 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 through the kind of evidence and degree of persuasiveness necessary to overcome it, [citation].
>
> *Id.*, at 766-767; emphasis added; footnote omitted.

Clark identified "two points" at which "the sanity or capacity presumption may be placed in issue." *Id.*, at 767. The first is familiar to California courts and practitioners, in terms of so-called "diminished actuality," and in terms of the now-abrogated "diminished responsibility" defense:

> . . . [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. [Citation.] In such States the evidence showing incapacity to form the guilty state of mind, for example, qualifies the probative force of other evidence, which considered alone indicates that the defendant actually formed the guilty state of mind. . . . In jurisdictions that allow mental-disease and capacity evidence to be considered on par with any other relevant evidence when deciding whether the prosecution has proven mens rea beyond a reasonable doubt, the evidence of mental disease or incapacity need only support what the factfinder regards as a reasonable doubt about the capacity to form (or the actual formation of) the mens rea, in order to require acquittal of the charge. Thus, in these States the strength of the presumption of sanity is no greater than the strength of the evidence of abnormal mental state that the factfinder thinks is enough to raise a reasonable doubt.
>
> *Id.*, at 767-768.

The "second point" at which "the force of the presumption of sanity may be tested is in the consideration of a defense of insanity raised by a defendant." *Id.*, at 768.

> The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the sanity 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. . . . [Citation.] Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity. . . . In any case, the defendant's burden defines the presumption of sanity, whether that burden be to burst a bubble or to show something more.
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> *Id.*, at 769.

The court then turned to the "third principle" of significance in *Clark*, which was "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." *Ibid.*; footnote omitted. However, "the right to introduce relevant evidence can be curtailed if there is a good reason for doing that." *Id.*, at 770. "And if evidence may be kept out entirely, its consideration may be subject to limitation, . . ." *Ibid.* In that regard, Arizona law was summarized, as follows:

> . . . [M]ental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant's burden as defined by the terms of that defense. The mental-disease and capacity evidence is thus being channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the factfinder of insanity; the evidence is not being excluded

> entirely, and the question is whether reasons for requiring it to be channeled and restricted are good enough to satisfy the standard of fundamental fairness that due process requires.
>
> *Id.*, at 770-771.

Part E of the *Clark* decision was devoted to the question whether Arizona's "reasons for requiring it to be channeled and restricted" were "good enough to satisfy the standard of fundamental fairness. . . ." *Id.*, at 771-778. The ultimate conclusions in Part F were: (i) "Arizona's rule serves to preserve the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors"; and (ii) "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]." *Id.*, at 779.

In the course of Part E, the Supreme Court noted repeatedly that it was evaluating Arizona's law under the Due Process Clause and not dictating an approach which other states must adopt. The court noted "that a State may place a burden of persuasion on a defendant claiming insanity," and that -- if so -- a state "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." *Id.*, at 771. However: "a State is of course free to accept such a possibility in its law." *Id.*, at 772. A state legislature "may well be willing to allow

such evidence to be considered on the mens rea element for whatever the factfinder thinks it is worth." *Ibid.*[7]

After discussing in some detail the "good reasons" which Arizona may have had in its evidentiary choices (*id.*, at 773-778), the court again emphasized that other states may validly make other choices:

> Now, a State is of course free to accept such a possibility in its law. . . . the legislature may well be willing to allow such evidence to be considered on the *mens rea* element for whatever the factfinder thinks it is worth. What counts for due process, however, is simply that a State that wishes to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of evidence of mental disease and incapacity to the insanity defense.
>
> *Id.*, at 778.

California, of course, has made other choices.

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[7]/ In a footnote, the court in *Clark* noted that "diminished capacity" in California had the meaning of "diminished responsibility": "Though the term "diminished capacity" has been given different meanings [citation], California, a jurisdiction with which the concept has traditionally been associated, understood it to be simply a '"showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication,"' People v. Berry, 18 Cal.3d 509, 517, 134 Cal. Rptr. 415, 556 P.2d 777, 781 (1976) (quoting People v. Castillo, 70 Cal.2d 264, 270, 74 Cal. Rptr. 385, 449 P.2d 449, 452 (1969); emphasis deleted), abrogated by Cal. Penal Code Ann. §§ 25(a), 28(a)-(b), 29 (West 1999 and Supp. 2006)." *Clark*, *supra*, 548 U.S. at 772 fn. 41.

D. Mr. Mills's Multiple Points of Disagreement With the Attorney General's Conclusions as to the Purported Significance of *Clark*.

In *Clark*, the United States Supreme Court noted that it had recognized in *Fisher* v. *United States* (1946) 328 U.S. 463, 466-476 that Congress had "considerable leeway" in defining the "strength" of the presumption of sanity "through the kind of evidence and degree or persuasiveness necessary to overcome it [citation]." *Clark*, *supra*, 548 U.S. at 767. The court then added in a footnote: "Although a desired evidentiary use is restricted, that is not the same as a *Sandstrom* presumption." *Id.*, at 767 fn. 36.

Footnote 36 observed that which is self-evident: an *evidentiary restriction* is not legally equivalent to an instruction creating an unconstitutional *conclusive presumption*. Yet the Attorney General at RBM 14-15 quotes footnote 36 and makes the quantum leap to a conclusion that "appellant's contrary argument -- that the presumption of sanity instruction acts as a presumption on an element of the offense -- is without merit." RBM 15, footnote omitted. However, an "evidentiary restriction" bears on what the jury is allowed to hear and consider, while an unconstitutional mandatory presumption is an "evidentiary device" which is forbidden because of its dual effects of shifting the burden to the defendant and requiring the jury to find an "elemental fact" upon proof of a "basic fact." *Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 157.

At RBM 16, the Attorney General quotes *Clark* to the effect that a state may deny to the defendant the ability "to displace the presumption of sanity more easily" at the guilt phase than at the sanity phase. The Attorney General at RBM 17 contends that this court made the same point in *Blacksher*, *supra*, 52 Cal.4th at 832, when it found no error in

the rejection of a proposed defense instruction because the "instruction would, in effect, have resurrected the defense of diminished capacity." The Attorney General asserts further that Mr. Mills "may not bypass the sanity phase of a trial by seeking to raise reasonable doubt based on a lack of capacity to form the requisite mental state. . . ." RBM 17.

However, there was nothing in Mr. Mills's defense at trial, or in the other instructions his jury would hear, which tended to raise "legal insanity" or "diminished capacity" in the context of his guilt trial.

The guilt phase jury was to hear CALJIC 3.32, to inform them 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.[8]

Nothing in this instruction -- or any other -- raised the potential for Mr. Mills's jury to rely on "legal insanity" or "diminished capacity" at the guilt phase, and the "conclusive presumption of sanity" instruction was entirely unnecessary.

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[8]/ The jury was also to hear CALJIC 5.16, which included the following: "There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." 8RT 1199-1200.

Without citation to the Opening Brief on the Merits -- *and there could be no such citation* -- it is wrongly asserted at RBM 18 that "[a]ppellant . . . argues that if evidence of incapacity could show insanity, it would be at least doubtful that the defendant could form the mental state required for guilt, thus precluding a guilty verdict in the first place." Mr. Mills made no such argument, nor anything remotely similar to such an argument. His argument was that there was evidence of mental disease and defect in his case from which the jury could readily have concluded that he did not premeditate, that he did not deliberate, that he did not intend to kill, and/or that he acted in imperfect self-defense. Mr. Mills never made any contention with respect to his "capacity," "diminished," "cognitive," "moral," or otherwise.

At RBM 19-20, the Attorney General quotes the Court of Appeal's Slip opinion, at pages 21-22, where it is stated that "*it does no harm* to instruct the jury of the state's policy that, for the purpose of proceedings devoted to [the guilt] determination, the presumption is one of sanity." Emphasis added. With deference, the initial question is whether the Court of Appeal's "no harm" conclusion is valid, in light of *Sandstrom*, and Mr. Mills submits with deference that the Court of Appeal was wrong on this point. The further question is whether such an instruction added something to the jury's universe of knowledge which would bear even remotely on the guilt issues, and neither the Court of Appeal nor the Attorney General had identified what that "something" might be.

The quoted portion of the Slip opinion also includes that "*it makes eminent sense* for the jury to be told that sanity is not to be considered in the determination of guilt." Emphasis added. However, the jury in Mr. Mills's case was not told that "sanity [was] not to be considered in the

determination of guilt." Mr. Mills's jury was told that his sanity was to be conclusively presumed against him in the determination of guilt.

Moreover, whatever "sense" there might be in such a "conclusive presumption of sanity" instruction -- which Mr. Mills continues to dispute -- it would only make "sense" if the jury knew what was meant by "sanity" in this context. Yet the trial court flatly refused to define the term "legally insane" which the jury was told was to be "conclusively presumed" against Mr. Mills at the guilt phase.

At RBM 20, the Attorney General argues that the "conclusive presumption of sanity" instruction "correctly channeled the jury's consideration of the mental state evidence." The reasoning appears to be that, if the guilt phase jury had not been told that Mr. Mills was "conclusively presumed to have been legally sane," the jury at the guilt phase might have returned a verdict of legally insane at the guilt phase.

If that represents the Attorney General's concern, it runs afoul of a basic presumption of California law, which is that jurors are presumed to follow the instructions they hear. *People* v. *Bonin* (1988) 46 Cal.3d 695, 699.[9] Legally and logically, there was no chance that Mr. Mills's *guilt phase* jury would find him legally insane, with or without a "conclusive presumption of insanity" instruction.

At RBM 20, the Attorney General argues that "[i]t would avail the state little to have the authority *Clark* confers if the state is not also permitted to instruct the jury of the distinction it has made between guilt and sanity." Mr. Mills has never argued that his jury should not know

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[9]/ "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. Citation]" *People* v. *Mickey* (1991) 54 Cal.3d 612, 689 fn. 17.

that the trial was to have two phases, that the first phase was to concern the question of his guilt of crime under instructions relevant to guilt, and that the second phase was to concern the issue of "legal sanity" under instructions relevant to that issue. His complaint was in the giving of a substantive instruction that he was "conclusively presumed to have been legally sane," and to have refused to explain what "legally sane" meant, all of which allowed the jury to give the legally technical term "sane" whatever lay meaning the jurors adopted.

Moreover, the argument is specious that it "would avail the state little to have the authority *Clark* confers" -- the power to limit evidence and define sanity -- if the state is not permitted also to give a "conclusive presumption of sanity" instruction at the guilt phase. Practically and legally, this argument differs little from a contention that it "would avail the state little to have the authority" to define the elements of crimes if the state were not permitted to prove those elements on proof less than beyond a reasonable doubt.

Mr. Mills will belabor this issue no further. In relation to Mr. Mills's claim of error, *Clark* is used by the Attorney General as a make-weight. While *Clark* may have broad significance in Arizona, and broad significance to other due process doctrines, it has no persuasive force on the *Sandstrom* issue presented here.

III

THE ATTORNEY GENERAL FAILS TO DEMONSTRATE THAT THE OTHER INSTRUCTIONS OR ARGUMENTS OF COUNSEL EITHER PREVENTED CONSTITUTIONAL ERROR IN THE FIRST INSTANCE OR RENDERED THAT ERROR NOT PREJUDICIAL.

A. Introduction.

At RBM 21-23, the Attorney General addresses the other instructions and arguments of counsel. It is not entirely clear whether this discussion is purported to establish that the jury would not have interpreted the "conclusive presumption of sanity" instruction as creating an unconstitutional presumption, or purportedly to establish that Mr. Mills did not suffer prejudice from the unconstitutional presumption. In either event, the Attorney's General's arguments are unpersuasive.

B. The Instructions and Argument Did Not Avoid Constitutional Error.

If the former possibility reflects the Attorney General's position, it fails to satisfy standards articulated by the United States Supreme Court. With 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), and a possibility the jury may not have relied on the presumption does not cure the error. *Id.*, at 526. Other instructional "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity," because "[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 an infirm instruction. *Id.*, at 319.

When these standards are brought to bear on the Attorney General's argument, it is clear that "a reasonable juror could have interpreted the instruction" as Mr. Mills fears. *Sandstrom*, *supra*, 442 U.S. at 514. No other instruction "explained" the "conclusive presumption of sanity" instruction so as to cure its "infirmity," and no other instruction told the jurors to ignore the "conclusive presumption of sanity" instruction in determining guilt. *Francis*, *supra*, 471 U.S. at 322. The best the Attorney General has done is to identify CALJIC 3.32 as an instruction a juror *might* have found to conflict with the constitutionally infirm instruction, and this court cannot know "which of the two irreconcilable instructions" was heeded by the jurors. *Ibid.*

C. The Instructions and Argument Did Not Render the Constitutional Error Non-Prejudicial.

If the Attorney General is arguing that Mr. Mills suffered no prejudice from the instruction, the issue is whether the State can demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. *See Carella* v. *California* (1989) 491 U.S. 263, 266-267, discussing *Rose* v. *Clark* (1986) 478 U.S. 570, 580-581.

> 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.
>
> *Yates* v. *Evatt* (1991) 500 U.S. 391, 403-404.

The Attorney General omits entirely to discuss the trial evidence. As a result, no argument is advanced by respondent to support a conclusion that the constitutionally invalid instruction did not contribute to the verdict on premeditation and deliberation, on intent to kill, or on imperfect self-defense. Thus was the constitutional violation prejudicial at every level of homicide liability, which would leave only voluntary manslaughter as a level of guilt which was not prejudiced by the infirm instruction.

IV

THE LOGIC OF *PATTERSON* AND *STARK*, WHILE NOT BINDING ON CALIFORNIA COURTS, REMAINS LOGICALLY AND LEGALLY PERSUASIVE.

At RBM 23-26, the Attorney General urges this court not to be influenced by the Ninth Circuit's analysis in *Patterson* v. *Gomez*, *supra*, 223 F.3d 559 and *Stark* v. *Hickman*, *supra*, 455 F.3d 1070. It is argued first that Ninth Circuit authority is not binding in California (RBM 23), a point which Mr. Mills cannot dispute. It is argued second that *Patterson* and *Stark* have been eclipsed by *Clark* (RBM 23-24), a contention which was addressed at length in Argument II, above. It is argued third that *Patterson*'s reliance on *People* v. *Burton* (1971) 6 Cal.3d 375 was misplaced (RBM 24); yet the linchpin of the *Patterson* analysis was not *Burton* but *Francis* v. *Franklin*, 471 U.S. 325:

> The Supreme Court wrote 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.
>
> 471 U.S. at 325 (emphasis added). If the italicized word "intent" is changed to "mental state," this language captures our case precisely.
>
> *Patterson*, *supra*, 223 F.3d at 967; emphasis in original.

At RBM 24, it is asserted that *Patterson*'s analysis is "highly flawed" because the Ninth Circuit "speculated about the definition of sanity the jury might have used," in light of *Patterson*'s reference to a dictionary. However, this was not "speculation"; it was precisely the analysis undertaken in *Sandstrom* -- by reference to a dictionary -- in resolving how "a reasonable jury could have interpreted" the presumption at issue in *Sandstrom*. *See Sandstrom*, *supra*, 442 U.S. at 517.

Also in footnote 10 at RBM 24, the Attorney General defends the trial court's refusal to define legal insanity as a "decision not to confuse the jury with instructions on what it was not deciding . . ." This contention is cruelly ironic, because that is Mr. Mills's core claim of error: his jury should not have been confused by an instruction on an issue which his jury was not deciding at the guilt phase.

At RBM 25, *Patterson*'s analysis is faulted purportedly because "[a] defendant can suffer from mental disease and yet be sane, as any rational juror would understand." While a "rational" criminal appellant practitioner may know this to be true, it is a counter-intuitive notion, and such understanding comes only after years of legal experience.

Turning to *Stark* v. *Hickman supra*, 455 F.3d 1070, it is contended at RBM 25 that *Stark* failed to consider *Clark*. This omission, however, is entirely understandable, since *Clark* had nothing to do with the *Sandstrom* issue being decided in *Stark*.

In sum, there is nothing in the Attorney General's criticisms of *Patterson* and *Stark* which undermines their persuasive force. They should serve as a guide for this court's resolution of Mr. Mills's issue.

V

THE ATTORNEY GENERAL'S PEREMPTORY DISMISSAL OF THE STATE LAW ARGUMENTS -- IN A FOOTNOTE -- FAILS TO GIVE PROPER DEFERENCE TO PRIOR DECISIONS OF THIS COURT.

At OBM 52-55, Mr. Mills discussed decisions of this court dealing with instructions on legal principles of no relevance to the issues before the jury, and instructions containing technical legal terms. Cited were cases such as *People* v. *Anderson*, *supra*, 63 Cal.2d 351 and *People* v. *Roe*, *supra*, 189 Cal. 548.

The Attorney General's entire response appears at RBM 23 fn. 9, where *Clark* is cited. In view of the Attorney General's declination to address these matters, Mr. Mills has no reply.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Opening Brief on the Merits, 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: November 21, 2011

Respectfully submitted,

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AHKIN R. MILLS

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 8212 words. In this certificate, I am relying on the word count produced by Wordperfect 5.1.

Dated: November 21, 2011

KYLE GEE

Attorney for Appellant
AHKIN R. MILLS

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 November 21, 2011, I served the within APPELLANT'S REPLY 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 November 21, 2011 at Oakland, California.

Lauren Osher

Lauren Osher