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Attorney for Appellant
AHKIN H. MILLS

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. AHKIN H. MILLS, Defendant and Appellant. _____/	CASE NO. S191934 Court of Appeal No. A125969 Alameda County No. C154217 REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KYLE GEE

REQUEST FOR JUDICIAL NOTICE

Applicant AHKIN H. MILLS respectfully requests that the court judicially notice under Evidence Code section 459 portions of this court's records in *People* v. *Blacksher* (2011) 52 Cal.4th 769 (S076582). The items to be judicially noticed are attached and described as follows:

Exhibit A: Pages 204 through 209 of the Opening Brief in *Blacksher* (Bates-stamped 7 through 12, below);

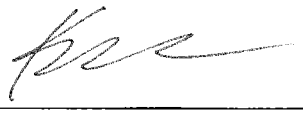
Exhibit B: Pages 177 through 185 of the Respondent's Brief in *Blacksher* (Bates-stamped 14 through 22, below); and

Exhibit C: Pages 79 through 83 of the Reply Brief in *Blacksher* (Bates-stamped 24 through 28, below).

The records are offered for the Court's use in resolution of the issue presented by Mr. Mills on review. Mr. Mills respectfully asks that the court grant the request and take judicial notice of the attached items.

Dated: May 27, 2012

Respectfully submitted,



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AHKIN H. MILLS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Review was granted in this case to address 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?" Mr. Mills had lost on that issue in the Court of Appeal.

On August 25, 2011, this court decided *Blacksher*. *Blacksher* addressed -- and from the Attorney General's perspective resolved -- the issue on which review was granted in Mr. Mills's case. *See Blacksher*, *supra*, 52 Cal.4th at 831-832.

At pages 4 through 9 his Reply Brief on the Merits, Mr. Mills addressed the potential significance of *Blacksher* to his case. Mr. Mills believes that the issue as presented in *Blacksher*, and as opposed by the Attorney General in *Blacksher*, has arguable significance to resolution of Mr. Mills's issue.

In effect, Mr. Mills is asking this court not to apply *Blacksher* to forclose his issue. Mr. Mills submits that resolution of that question require awareness of the issue as raised and resolved in *Blacksher* in order fully to determine: (i) what part of the *Blacksher* decision -- if any -- was *dictum*; (ii) whether *Blacksher* controls the outcome in Mr. Mill's case; and (iii) whether this court should overrule or decline to follow *Blacksher* on this point, in any respect.

EVIDENCE CODE SECTIONS 452 AND 459

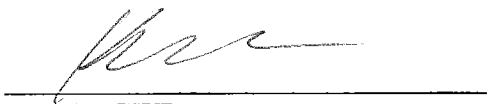
Evidence Code section 459 authorizes this Court to take judicial notice of matters specified in section 452. Subsection (d) permits judicial notice of "[r]ecords of (1) any court in the state ...."

CONCLUSION

The records are offered for the Court's use in reference to resolution of the sole issue presented on review. Mr. Mills respectfully asks that the court grant the request and take judicial notice of the attached items.

Dated: May 27, 2012

Respectfully submitted,



KYLE GEE
Attorney for Appellant
AHKIN H. MILLS

DECLARATION OF KYLE GEE

I, KYLE GEE, declare under penalty of perjury as follows:

1. I am an attorney, licensed to practice law in the State of California, and the appointed counsel on appeal for appellant AHKIN H. MILLS.

2. The attached are copies of records maintained by this court.

3. The records are offered for the court's use in reference to resolution of the issue on which review was granted in Mr. Mills's case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California on May 27, 2012.

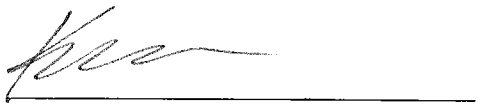


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EXHIBIT A

Opening's Brief, pp. 204-209

X. THE TRIAL COURT ERRED IN INSTRUCTING THE GUILT PHASE JURY WITH THE PRESUMPTION OF SANITY INSTRUCTION BECAUSE THAT INSTRUCTION ERRONEOUSLY LED THE JURY TO BELIEVE IT COULD NOT USE EVIDENCE OF APPELLANT'S MENTAL DISEASE TO FIND THAT HE DID NOT ACTUALLY HAVE THE REQUISITE MENTAL STATE FOR MURDER, THUS UNCONSTITUTIONALLY LOWERING THE PROSECUTION'S BURDEN OF PROOF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. Summary of Relevant Facts and Introduction to Argument.

During closing argument by the defense, the prosecutor objected to defense counsel's use of chart setting out appellant's history of treatment for mental illness. (RT 2793-96.) At this point, the trial judge stated that he intended to instruct the jury with CALJIC No. 10.26, the presumption of sanity, because he didn't "want the jury to be confused as to diminished actuality or lack of actual intent versus lack of capacity to form intent." (RT 2797.)

The trial court then instructed the jury that "[i]n the guilt trial or phase of this case, the defendant is conclusively presumed to have been sane at the time of the offenses [] are alleged to have been committed." (RT 2850; CT 1269.) No definition of "sanity" was given to the jury. Immediately following the presumption of sanity instruction, the jury was instructed that evidence of a mental disease should be considered only for

the purpose of determining whether appellant formed the required mental state. (RT 2850-51; CT 1270.)

Appellant contends that the presumption of sanity argument, without a definition of sanity, erroneously led the jury to believe it could not consider that evidence of appellant's mental disability precluded him from forming the requisite intent at the time of the crimes, thus unconstitutionally lowering the prosecution's burden of proof.

B. Summary of Applicable Law.

In People v. Coddington (2000) 23 Cal.4th 529, 584-85, this Court rejected an argument that the presumption of sanity instruction undermined the mental state defense. However, Patterson v. Gomez (9th Cir. 2000) 223 F.3d 959, 964-67 held that a presumption of sanity instruction given at guilt phase was unconstitutional under clearly established federal law as determined by the United States Supreme Court in Francis v. Franklin (1985) 471 U.S. 307. Francis held that an instruction setting out a rebuttable presumption that the acts of a person of sound mind are presumed to be the product of a person's will, and that a person is presumed to intend the natural and probable consequences of his acts were unconstitutional. This was because the jury could have understood the instructions as creating a mandatory presumption shifting the burden of

persuasion to the defendant on the issue of intent. (Francis, supra, 471 U.S. at 309, 325.)

Patterson v. Gomez, supra, 223 F.3d at 965 explained:

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

Patterson contrasted the legal definition of "sanity" under California law with the commonly understood ordinary definition, which includes "proceeding from a sound mind," "rational," and "able to anticipate and appraise the effects of one's own actions." (Id. at 966.) The Ninth Circuit then explained that

> "if a jury is instructed that a defendant must be presumed 'sane' -- that is, 'rational' and 'mentally sound,' and 'able to anticipate and appraise the effect of [his] actions -- a reasonable juror could well conclude that he or she must presume that the defendant had no [] mental disease, defect or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of

the [requisite intent for the crimes]." Ibid.

The trial court in Patterson did not explain to the jury that the presumption of sanity was the analytical basis for the bifurcated trial; nor did the court provide the definition of insanity that the jury was told to presume; nor did the court warn the jury that the presumption of "sanity" was used in a different sense than the conventional definition the jurors likely had in mind. (Ibid.) Consequently, the presumption of sanity instruction violated the Fourteenth Amendment guarantee of due process. (Id. at 966-67; see also Stark v. Hickman (N.D. Cal. 2003) ___ F. Supp. ___ [2003 U.S.Dist. LEXIS 18821][finding constitutional error where the trial court instructed the guilt phase jury that the defendant was presumed sane].)

C. The Unconstitutional Presumption of Sanity Instruction Was Prejudicial to Appellant's Defense.

Review for prejudice of a federal constitutional error is under Chapman v. California, supra, 386 U.S. at 24, requiring reversal unless the prosecution can show the error to be harmless beyond a reasonable doubt. The prosecution cannot meet this burden.

Patterson noted that because the defendant's mental state was the primary issue in the guilt phase,

> "any presumption that would have relieved the state of its burden to prove a crucial element of such mental state **necessarily played an important role in the jury's ultimate**

> **determination of guilt.**" (Patterson, supra, 223 F.3d at 967; emphasis supplied.)

The same is true in this case.

Moreover, as in Patterson, the prosecutor in this case relied on the unconstitutional presumption of sanity instruction in argument to the jury, and argued the presumption of sanity **not** in terms of the legal standard, but in its common definition:

> "He knew exactly what he was doing at all times and he is sane. **He is sane. Everybody was told that at the outset.** ¶ And right here, as we sit here and look back in May of 1995, [] one thing nobody can disagree about is Erven Blacksher was sane. ¶ **Sanity is mental health. It is having the ability to make judgments, be they good judgments or bad judgments, but it is the ability to make them, to act and consider things in a rational, reasonable manner, and then act accordingly**. He was sane, and he remains sane, and he will be sane for the rest of his life." (RT 2700; emphasis supplied.)

By arguing that appellant was necessarily "sane," and that "sane" meant he had the ability to act in a "rational, reasonable manner," the prosecutor contributed to the prejudicial impact of the erroneous instruction in the manner described by the Patterson court. That is, because the trial court instructed the jury to presume that appellant was sane (without defining sanity), and because the prosecutor argued that the presumption of sanity meant that appellant was "rational" and able to act accordingly, the jury would have concluded that they had to "presume that [appellant] had [] no

mental disease, defect, or disorder," thus presuming "a crucial element of the state's proof." (Patterson, supra, 223 F.2d at 965.)

Appellant's murder verdicts are thus unreliable and unconstitutional and this Court must reverse.

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EXHIBIT B

Respondent's Brief, pp. 177-185

X.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE PRESUMPTION OF SANITY DURING THE GUILT PHASE

Appellant contends that the court's presumption of sanity instruction, unaccompanied by the legal definition of sanity, erroneously led the jury to believe it could not consider whether appellant's alleged mental disability precluded him from forming the requisite intent to commit murder, thus unconstitutionally lowering the prosecution's burden of proof. (AOB 196.) By failing to object to the instruction in proceedings below, however, appellant has not preserved his claim for appeal. In any event, because this Court has previously rejected an identical challenge to the presumption of sanity instruction in *People v. Coddington* (2000) 23 Cal.4th 529, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, appellant's claim necessarily fails.

A. Proceedings Below

During a discussion on jury instructions, the trial court informed the parties that it intended to instruct the jury with CALJIC No. 3.32 ("Evidence Of Mental Disease—Received For Limited Purpose"). (RT 2556-2557.) Defense counsel agreed with the court's proposed wording of the instruction. (RT 2557.)

Later, during closing arguments, a dispute arose between the parties regarding which portions of appellant's mental health history had been introduced into evidence. (RT 2792-2796.) In response to "this difference of opinion," the trial court informed the parties that it intended to instruct the jury on the presumption of sanity contained in section 1026. (RT 2796-2797.)[30/]

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30. Section 1026, subdivision (a), states in pertinent part: "When a defendant pleads not guilty by reason of insanity, and also joins with it another

Defense counsel replied that he did not "have any problem with that." (RT 2797.) The court explained that even though the jury would be given limiting instructions, the court did not "want the jury to be confused as to diminished actuality or lack of actual intent versus lack of capacity to form intent." (*Ibid.*) Defense counsel reiterated that he had "no problem with that." (*Ibid.*)

At the conclusion of the guilt phase, the trial court instructed the jury as follows, in accordance with the presumption of sanity contained in section 1026, and the mental defect instruction contained in CALJIC 3.32:

> In the guilt trial or phase of this case, the defendant is conclusively presumed to have been sane at the time of the offenses—at the time of [*sic*] the offenses are alleged to have been committed.
>
> You have received evidence regarding a mental disease, mental defect or mental disorder of the defendant at the time of the commission of the crime[s] charged in counts one and two or the lesser crimes thereto, namely, second-degree murder and voluntary manslaughter.
>
> You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated and deliberated or harbored malice aforethought, which are elements of the crime charged in counts one and two, namely, first-degree murder; whether he formed the required specific intent or harbored malice aforethought, which are elements of the lesser crime of second-degree murder; or whether he formed the required specific intent, which is an element of the lesser crime of voluntary manslaughter.

(RT 2850-2851; see also CT 1269-1270.)

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plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed."

B. The Trial Court's Presumption Of Sanity Instruction Was A Correct Statement Of Law, According To This Court's Decision In *People v. Coddington*

Appellant contends that his murder convictions must be set aside because the presumption of sanity instruction did not allow the jury to consider whether his alleged mental disability precluded him from forming the requisite intent to commit murder. (AOB 196.) As appellant concedes, however, this Court previously rejected the same argument in *People v. Coddington, supra,* 23 Cal.4th 529. (See AOB 196.)

In *Coddington*, this Court rejected an identical challenge to the presumption of sanity instruction for three reasons: First, the Court noted that the defendant could not challenge the instruction on appeal because he had not objected to, nor sought modification of, the instruction at trial. (*Id.* at p. 584.) Second, the Court noted that the instruction correctly stated the law in California. (*Ibid.*) Finally, the Court noted that even if the instruction were invalid, there was "no possibility" that the defendant had been prejudiced by the instruction:

> [T]he prosecutor and defense counsel argued the presence or absence of mental disease during guilt phase closing argument, with defendant reminding the jury that whether [defendant] 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.

(*Id.* at pp. 584-585.)

Coddington is dispositive of appellant's claim. As in *Coddington*, appellant did not object or seek modification of the instruction below. Indeed, the record shows that after being informed of the court's intention to instruct the jury on the presumption of sanity contained in section 1026, defense counsel

expressed "no problem" with the instruction. (RT 2797.) Appellant's claim should therefore be deemed waived on appeal.

Even if the claim has not been waived, it lacks merit. As noted in *Coddington*, the presumption of sanity instruction is a correct statement of law. Even if invalid, however, appellant suffered no prejudice as a result of the instruction. The jury was properly instructed pursuant to CALJIC No. 3.32 that it could consider the evidence of appellant's mental defect or mental disorder in determining whether he formed the requisite specific intent. Moreover, appellant's ability to form the necessary intent was vigorously debated during the closing arguments of both the prosecutor and defense counsel. Additionally, the jury was instructed that the prosecutor carried the burden of proving beyond a reasonable doubt every element of appellant's guilt (RT 2838-2839, 2847-2848, 2851-2852, 2854, 2857-2858, 2860-2862), including the mental state for each charged crime (RT 2849-2854, 2857), and that it had to find that appellant harbored the specific intent to commit the charged crimes (RT 2849-2854, 2857). The jury was therefore well aware of significance of the mental defect evidence presented by the defense and the prosecution's burden of proof.

As further proof that the instruction did not prejudice appellant, there was virtually no evidence presented at trial that appellant's mind was so clouded by mental illness on the morning of the murders that he was unable to form the requisite intent. On the contrary, the evidence was overwhelming that appellant formed the requisite intent and carried out the murders of his nephew and sister in a cold and calculated manner. In the days leading up to the murders, appellant told several different family members that he intended to kill Torey, and that he would also kill Versenia if she got in his way. Although appellant was angry and consumed with thoughts of killing Torey, none of his family members had any trouble understanding him. Moreover, appellant's

disgruntlement with Torey and Versenia was based on reality, not delusion, i.e., appellant was upset at Torey's disrespectful attitude and Versenia's tendency to take Torey's side in his conflicts with appellant. Right before the murders, appellant told his brother that he had thought it over and made up his mind: he intended to go through with his plans to kill Torey. In fact, appellant was arrested just two nights before the murders when Versenia found him waiting in the dark for Torey to come home so he could kill him with a baseball bat. At the time appellant was arrested, the arresting police officer saw no indication that appellant needed to be involuntarily committed to a mental institution. On the morning of the murders, no one noticed anything unusual about appellant; he was able to converse normally on the phone with his brother and in person with his next-door neighbor and mother. Appellant procured a gun before the murders and hid the gun in his jacket before entering his mother's home. He then backed his car to the end of the driveway before going inside. He committed the murders early in the morning, after his brother-in-law had already left for work, and while everyone else in the house was still asleep. Immediately after the murders, he called two different family members and concocted a story about seeing masked men go into the house. He then purchased a bus ticket to Reno and left that same day. Upon his return, he no longer had the gun or the clothes he was wearing on the morning of the murders. In light of the overwhelming evidence that appellant knew exactly what he was doing before, during, and after the murders, there is no possibility that appellant was prejudiced by the court's instruction on the presumption of sanity.[31/]

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31. For these same reasons, appellant suffered no prejudice even if the more stringent federal standard of harmless error applies. (See *People v. Roder* (1983) 33 Cal.3d 491, 504 [instructions that improperly relieve the prosecution of its burden of proof are generally reviewed under *Chapman v. California, supra,* 386 U.S. 18].)

C. The Ninth Circuit's Decision In *Patterson v. Gomez* Is Not Binding On This Court; In Any Event, *Patterson* Is Distinguishable From This Case

Although appellant recognizes that *Coddington* applies to his claim, he nonetheless relies on the Ninth Circuit's opinion in *Patterson v. Gomez* (9th Cir. 2000) 223 F.3d 959, as his primary authority. (AOB 196-198.) *Patterson*, however, is not binding on this Court. (*People v. Bradford, supra,* 15 Cal.4th at p. 1292 ["cases from the federal courts of appeals . . . provide persuasive rather than binding authority" on California courts].) In any event, *Patterson* is distinguishable on its facts.[32/]

In *Patterson*, as in this case, the trial court instructed the jury on the presumption of sanity, but did not define sanity. (*Patterson v. Gomez, supra,* 223 F.3d at p. 964.) Also like the trial court in this case, the trial court in *Patterson* instructed the jury that it could consider evidence of the defendant's mental disease in determining whether he formed the requisite specific intent. (*Ibid.*) In finding the court's instructions unconstitutional, the Ninth Circuit explained:

> The problem with the instruction given in this case is that it tells the jury to presume a mental condition that—depending on its definition—is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of

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32. Appellant cites an unpublished opinion from the Northern District in which the holding of *Patterson* was found applicable to federal habeas proceedings "on the issue of whether the giving of [a presumption of sanity] instruction was error under clearly established federal law." (*Stark v. Hickman* (N.D.Cal. Oct. 21, 2003, No. C 02-290 MMC) 2003 WL 22416409, *7, app. pending, *Stark v. Hickman*, Ninth Circuit No. 03-17241.) What appellant fails to note, however, is that the district court, under facts remarkably similar to those present in this case, concluded that the Court of Appeal's opinion finding the instructional error harmless was not objectively unreasonable. (*Id.* at pp. *7-*9.)

> 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.

(*Patterson v. Gomez, supra,* 223 F.3d at p. 965, fn. omitted.) The Ninth Circuit concluded that the instructional error was not harmless. In so holding, the court observed that because the defendant's mental state was the "primary issue" in the guilt phase, "[a]ny presumption that would have relieved the state of its burden to prove a crucial element of such mental state necessarily played an important role in the jury's ultimate determination of guilt." (*Id.* at p. 967.) The court went on to find that the instruction "had a substantial and injurious effect or influence" on the jury's verdict for two reasons: (1) in his closing argument, the prosecutor "repeatedly relied on the presumption to tell the jury that [the defendant's] evidence [on his mental condition] was legally irrelevant and must be disregarded," and (2) the same jury that convicted the defendant obviously had some doubts about his sanity, given that it was unable to reach a verdict in the sanity phase of trial. (*Id.* at pp. 967-968.) As the Ninth Circuit observed:

> Because the [legal] definition of sanity is harder to satisfy than the lay definition, it is difficult to escape the conclusion that a jury unwilling to find unanimously that [the defendant] was sane under [the legal definition] would also have been unwilling, if properly instructed, to find that [the defendant] had the mental state necessary for first degree murder.

(*Patterson v. Gomez, supra,* 223 F.3d at p. 968.)

Unlike the prosecutor in *Patterson*, the prosecutor in this case did not tell the jury to disregard appellant's evidence because it was legally irrelevant in light of the presumption of sanity. While the prosecutor did briefly mention the presumption in his closing argument (RT 2700), he never suggested that it foreclosed the jury's consideration of appellant's evidence. Rather, by also emphasizing the mental defect instruction, addressing appellant's evidence regarding his mental illness, and arguing that appellant's actions indicated he formed the requisite specific intent, the prosecutor made it clear to the jury that the defense evidence was properly considered on the subject of appellant's intent. (RT 2693-2694, 2696, 2698-2700, 2709-2711, 2713-2719, 2722-2728, 2730-2735, 2746-2756, 2758-2760, 2833.) Defense counsel reinforced this notion by also emphasizing the mental defect instruction, and arguing that appellant did not form the requisite specific intent because of his mental impairment. (RT 2790-2792, 2810-2815, 2827-2831.) Defense counsel's closing argument, like that of the prosecutor's, clearly indicated to the jury that the presumption of sanity did not preclude it from considering appellant's mental impairment evidence on the issue of whether appellant formed the requisite specific intent.

Appellant contends that the prosecutor gave the jury a commonly understood definition of sanity rather than the legal definition during his closing argument, thus contributing to the prejudicial impact of the court's instruction. (AOB 199.) However, because it was clear from the mental defect instruction and the parties' closing arguments that it was up to the jury to decide whether appellant's alleged mental impairment prevented him from forming the requisite intent, any error in the prosecutor's definition of sanity was not prejudicial.

Additionally, there is no indication in the record that the jury was actually misled or confused by the presumption of sanity instruction. The jury did not request reinstruction on the issue of intent, or ask for clarification on the

interplay between the presumption of sanity instruction and the mental defect instruction. Moreover, unlike the jury in *Patterson*, the jury in this case was not undecided as to whether appellant was legally sane at the time of the murders. In sum, because *Patterson* is clearly distinguishable from this case, it provides no persuasive support for appellant's claim.

EXHIBIT C

Reply Brief, pp. 79-83

GUILT PHASE JURY INSTRUCTION ISSUES

X. THE TRIAL COURT ERRED IN INSTRUCTING THE GUILT PHASE JURY WITH THE PRESUMPTION OF SANITY INSTRUCTION BECAUSE THAT INSTRUCTION ERRONEOUSLY LED THE JURY TO BELIEVE IT COULD NOT USE EVIDENCE OF APPELLANT'S MENTAL DISEASE TO FIND THAT HE DID NOT ACTUALLY HAVE THE REQUISITE MENTAL STATE FOR MURDER, THUS UNCONSTITUTIONALLY LOWERING THE PROSECUTION'S BURDEN OF PROOF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. People v. Coddington.

Respondent first argues that the presumption of sanity instruction given in this case was a "correct statement of law," according to this Court's decision in People v. Coddington (2000) 23 Cal.4th 529, overruled on another ground by Price v. Superior Court (2001) 25 Cal.4th 1049, 1069, fn. 13. (RB, pp. 179-80.)

Appellant acknowledged in his Opening Brief that Coddington rejected an argument similar to that made here. (See AOB, p. 196.) Nonetheless, appellant maintains that the presumption of sanity instruction violated appellant's federal constitutional rights under the Sixth and Fourteenth Amendments. Appellant addresses this argument further immediately below.

Respondent also argues, in passing, that appellant's claim should be

deemed waived, because at one point defense counsel stated he had "no problem" with the presumption of sanity instruction. (RB, p. 180, citing to Vol. 12, RT 2797.) It is correct that the defense failed to object to this instruction and did not seek modification of it. However, this does not preclude appellate review. Under Penal Code sections 1259 and 1469, an appellate court can review a question of law involved in any jury instruction given "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, §§ 1259, 1469; see also People v. Croy (1985) 41 Cal.3d 1, 12, fn. 6.)

Respondent further argues that even if the instruction was invalid, it did not prejudice appellant, because the jury was instructed (1) it could consider appellant's mental defect or disorder in determining his specific intent (CALJIC No. 3.32) and (2) that the prosecution had the burden of proof on every element. (RB, p. 180.) Instructing the jury pursuant to CALJIC No. 3.32 did not cure the harm from the presumption of sanity instruction. (Patterson v. Gomez (9th Cir. 2000) 223 F.3d 959 964-65 [finding reversible error where the presumption of sanity instruction was given even though a variation of CALJIC No. 3.32 was also given].) The problem is that the erroneous presumption prevents the jury from giving effect to the principles stated in CALJIC No. 3.32. Nor does an instruction

that the prosecution carries the burden of proof vitiate the prejudice from the presumption of sanity instruction. To the contrary, the presumption instruction improperly and unconstitutionally lowers the prosecution's actual burden of proof. The issue is not who must carry the burden of proof, but what must be proved to meet the burden.

Respondent also argues that the closing arguments somehow cancel out the prejudice from the erroneous instruction. (RB, p. 180.) However, the reviewing court must presume that the jurors follow and rely on the judge's instructions and not the arguments of counsel. (People v. Morales (2001) 25 Cal.4th 34, 47; see also Kelly v. South Carolina (2002) 534 U.S. 246 [argument of counsel insufficient to cure ambiguity in jury instruction].)

Finally, respondent argues that the error could not have been prejudicial because of the "overwhelming evidence" that appellant "knew what he was doing." (RB, p. 181.) Respondent relies on a selective and incorrect recitation of the facts to support this argument. For example, respondent argues that "no one noticed anything unusual about appellant," RB, p. 181, ignoring Elijah's testimony that prior to the charged offense appellant was "drooling and foaming and he just wasn't making no sense." (Vol. 11, RT 2530.)

Respondent's argument is actually a factual determination that appellant's acts were "based on reality, not delusion." (RB, p. 181.) This factual determination was one the jury (not respondent) should have made; the erroneous instruction prevented them from doing so. The erroneous instruction to presume sanity thus resulted in an unreliable guilt phase determination.

B. Patterson v. Gomez.

Respondent argues that Patterson v. Gomez, supra, 223 F.3d 959, upon which appellant relies, is not binding authority and in any case is "distinguishable on its facts." (RB, p. 182.) Appellant relies not just on the Ninth Circuit case of Patterson v. Gomez, but also on Francis v. Franklin (1985) 471 U.S. 307, the United States Supreme Court opinion on which Patterson v. Gomez is based. (See AOB, p. 196.)

Respondent's attempt to distinguish the facts here from those in Patterson v. Gomez is unpersuasive. (See RB, p. 184.) The record clearly shows that here, as in Patterson v. Gomez, the prosecutor relied on the presumption in arguing the case to the jury. (Vol. 12, RT 2700.) Moreover, in both cases, the defendant's mental state was the primary issue at guilt phase. (See Patterson, supra, 223 F.3d at 967.) Thus, as argued in the Opening Brief, the instructional error violated appellant's federal

constitutional rights to due process, and requires reversal of his convictions.

(See AOB, pp. 198-200.)

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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 May 29, 2012, I served the within REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KYLE GEE 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:

Attorney General
Department of Justice
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-3664

FDAP
730 Harrison St., #201
San Francisco, CA 94107

Ahkin R. Mills
AA4742
CSP - Los Angeles County
PO Box 8457
Lancaster, CA 93539

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 29, 2012 at Oakland, California.

Laurenosher

Lauren Osher