In the Supreme Court of the State of California

COPY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

AHKIN R. MILLS,

Defendant and Appellant.

Case No. S191934

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

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ISSUE PRESENTED

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?

INTRODUCTION

A defendant is presumed both innocent and sane. The People bear the burden to prove every element of the crime, but the defendant bears the burden to prove insanity, if he stands convicted and contests that issue at the trial. Accordingly, contrary to appellant's argument, the jury instruction that appellant was conclusively presumed sane in determining guilt neither undermined his mental state defense to deliberate and premeditated murder nor shifted the prosecution's burden of proving guilt on a crime element in violation of due process. Arguments like appellant's were rejected in *People v. Coddington* (2000) 23 Cal.4th 529, 584-585 (overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), and in *People v. Blacksher* (2011) 52 Cal.4th 769, 831-832. In *Clark v. Arizona* (2006) 548 U.S. 735, 765-779, the United States Supreme Court held that a state is free to channel evidence bearing on sanity to a determination of that issue alone, and to preclude the factfinder from considering such evidence on the issue of mens rea. Appellant's argument consequently fails.

STATEMENT OF THE CASE

On December 22, 2006, the Alameda County District Attorney charged appellant with murder (Pen. Code, § 187)[1] and alleged that he personally and intentionally discharged a firearm in the commission of the offense (§§ 12022.5, subd. (a)(1), 12022.7, subd. (a), 12022.53, subds. (b)-

[1] All other unspecified statutory references are to the Penal Code.

(d)). (2 CT 291-292.) Appellant pleaded not guilty. (2 CT 294.) Later, he additionally pleaded not guilty by reason of insanity. (2 CT 417.)

On May 12, 2009, a jury found appellant guilty of first degree murder and found true the firearm-use allegations. (3 CT 604-606.) On May 20, 2009, the jury found appellant was legally sane at the time of the offense. (3 CT 647-648.) On August 12, 2009, the trial court sentenced appellant to a total term of 50 years to life. (3 CT 659, 683.)

On February 28, 2011, the Court of Appeal affirmed the judgment in an unpublished opinion. This Court granted appellant's petition for review on June 8, 2011.

STATEMENT OF FACTS AND PROCEDURE

During voir dire, the trial court told the prospective jurors that appellant had entered a plea of not guilty by reason of insanity, which meant "there may be two trials in this case." (Aug. RT 17.) "The way this works is in the first trial, we decide whether or not Mr. Mills is guilty of murder. . . . [¶] During that process, Mr. Mills is presumed or you have to accept that he is sane. That he is legally sane for the purposes of reaching that first verdict. [¶] If Mr. Mills is convicted of any crime, then we have a second trial, and the burden then shifts to the defense to show by a preponderance of the evidence that Mr. Mills was legally insane at the time the crime was committed." (*Ibid.*)[2]

At the guilt trial, the prosecutor presented witnesses to appellant's shooting of Jason Jackson-Andrade at the Emeryville Amtrak station shortly before 5:00 p.m. on April 21, 2005. (5 RT 436-439, 442-443.)

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[2] The prosecutor and defense counsel reiterated during voir dire that there might be two trials. (Aug. RT 60, 86, 93, 106, 110.) Additionally, defense counsel briefly defined legal insanity. (Aug. RT 60.)

Sal Fuerstenberg saw two men on the platform, one sitting and one standing. The latter was "yelling out a train of epithets and swear words and calling the sitting guy names and lots of very bad names." The "line of insults" was "punctuated by, 'You ain't getting on that train.'" (5 RT 445.) She did not hear the seated man say anything. (*Ibid.*) The tirade went on for two or three minutes. The seated man, who had been looking down at the ground, shook his head, got up, and walked into the train station. (5 RT 446-447.) The man who had been yelling abruptly changed his behavior. He walked toward the train tracks and bounced on his toes and hummed to himself. A few minutes later, the man turned and walked toward the train station. (5 RT 448-449.) Fuerstenberg heard the man say as he passed, "You got a gun, nigger? You got a gun? You got a gun?" (5 RT 449-450.) As the man walked into the station, Fuerstenberg thought she saw his hand extended with a gun pointing down. (5 RT 451.) "Within a couple of seconds," she heard three rounds of gunshots with three or four shots in each round. (5 RT 452.)

Linda Duhon was inside the train station. A man who had been sitting on the platform came into the station and asked if Duhon knew the man outside; she said she did not. (5 RT 530-532.) The man said he had done nothing to him, but he was "out there cussing me out and he act like he want to kill me [*sic*]." (5 RT 532.) Duhon earlier had seen the man outside "jumping up and down, acting like he was crazy." (6 RT 533.)

The man outside walked into the station. The man talking to Duhon sat down near her and turned his face away, and the other man approached them. (6 RT 536-538.) The standing man said to the seated man, "Motherfucker, you want to kill me?" The seated man kept his head turned away, but looked up when the other man repeated his question. Then the standing man said, "Well, if you ain't got no mother fucking gun, I do." He pulled out a gun, and the seated man "took off running." (6 RT 538.)

Duhon ran in the other direction, and heard several gunshots. (6 RT 539-540.)

Matthew Altier was also in the station. He heard one shot, then saw a man pointing a gun at another man seated on a bench. (6 RT 563-565.) The seated man held up his hands and said, "Please, don't shoot me again, don't shoot." (6 RT 565.) Altier identified appellant as the shooter. (6 RT 565-566.) He heard the victim repeatedly plead for his life as he attempted to crawl away, while appellant continued to fire shots. (6 RT 566-567.) As Altier went out the door, he heard the victim say, "No more. Please no more." (6 RT 567.) The shooter continued shooting the victim from four feet away. (6 RT 568.)

When the police arrived soon afterward, appellant got down on the ground and slid a handgun forward on the floor. (5 RT 481-482.) He said, "I'm the only shooter, it's me." (5 RT 482.) While seated in a patrol car, appellant made several statements, including he was "crazy" and "take me to the crazy house" (6 RT 686); he should be put "in a padded room" by himself and did not "want to kill anyone else" (6 RT 690); and he thought he knew what he did but the "devil made me do it." (6 RT 692.)

Jackson-Andrade died of multiple gunshot wounds. Six of the seven entry wounds were in his back. (6 RT 623-633.) The revolver appellant used could hold six bullets and had to be reloaded to fire additional shots. (6 RT 707-710.)

In a phone call after his arrest, appellant repeatedly reminded his wife about things he told her that he thought would help him get out of jail. He made several references to being "crazy." (People's Exh. Nos. 17, 17A.) He also said, "I killed somebody today," and told her to look in the paper. (*Id.* at p. 8.)

Appellant testified that he feared for his life based on threats from numerous individuals. (7 RT 722-765, 769-770, 776-779.) His wife

testified that appellant told her about some of the threats. (8 RT 997-1004, 1011.) Appellant claimed the victim said he had a gun and threatened his life. (7 RT 780-782, 902.) Appellant shot him because he thought he was reaching for a gun. (7 RT 785, 915.) Appellant admitted reloading his gun during the shooting. (7 RT 786, 904-909.) He also admitted committing an armed robbery and carjacking at a donut shop earlier that day, and removing the license plate of the stolen car. (7 RT 764, 765-766, 852-865; see 8 RT 1053-1057.)[3]

A psychologist testified appellant "was suffering from a disorder in the paranoid spectrum." It most closely fit the criteria of a delusional disorder. Appellant was not schizophrenic or bipolar. (7 RT 940.) Several friends and family members testified to appellant's nonviolent nature.

The prosecutor requested an instruction that appellant was conclusively presumed sane at the time of the offense for purposes of the guilt phase verdict. (2 CT 500.) Appellant objected to the instruction, arguing that it correctly stated the law, but violated his right to due process. He asked that if the court gave the instruction, it also define legal insanity. (3 CT 509-510.)

The court rejected appellant's request for a definition of legal insanity, stating, "I don't want to get into what the definition of sanity is in this phase of the proceedings and I don't think that you can be wrong by correctly stating the law." (8 RT 1076.) It instructed the jury, "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." (8 RT 1201.)

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[3] The robbery victim described appellant as "very calm." (8 RT 1056.) The vehicle was recovered in Oakland (not Rodeo). (8 RT 1058.)

At the sanity trial, appellant presented Dr. Larry Wornian, who opined that appellant was likely suffering from a paranoid schizophrenic condition at the time of the offense, and that he was psychotic at that time. Appellant could not distinguish between his delusions and reality. (9 RT 1232-1233, 1244-1245.) Appellant knew at one level that his act was wrong, but he was acting under the influence of his paranoid delusions and thought his life was being threatened. (9 RT 1244-1248.)

The prosecutor called Dr. Marlin Griffith, who opined that appellant was capable of knowing and understanding the nature and quality of the act he committed and of distinguishing right from wrong at the time of the offense. (9 RT 1311.) Among other things, Dr. Griffith cited appellant's phone call to his wife after his arrest, in which it appeared he "was seeking his wife's help to verify that he was acting crazy, quote, unquote." (9 RT 1312.) Dr. Griffith did not find any mental disorder when he evaluated appellant. There was one incident when appellant sought medication for depression, but no history of mental disorder. (9 RT 1312, 1314.) In Dr. Griffith's experience, it was inconsistent for an individual experiencing an acute psychotic episode to say he was crazy. (9 RT 1313.)

SUMMARY OF ARGUMENT

The Legislature has established that a defendant is conclusively presumed sane at the guilt phase of trial. (§§ 1016, 1026, subd. (a).) If he enters a plea of not guilty by reason of insanity, he must prove his insanity by a preponderance of the evidence at a separate sanity trial. (§§ 25, subd. (b), 1026, subd. (a).) The Legislature also abolished the defense of diminished capacity. (§§ 25, subd. (a), 28, subds. (a), (b).) If a defendant wishes to challenge his capacity to form a particular mental state, he must do so at the separate sanity trial. (§§ 25, subd. (b), 28, subd. (c).) This Court has held that a trial court may instruct a jury at the guilt phase of trial that a defendant is conclusively presumed sane at the time of the crime.

(*People v. Blacksher, supra,* 52 Cal.4th at pp. 831-832; *People v. Coddington, supra,* 23 Cal.4th at pp. 584-585.) The Court of Appeal upheld the same instruction here, citing *Clark v. Arizona, supra,* 548 U.S. 735, which held that states may, consistent with due process, restrict evidence bearing on sanity to the sanity phase of a trial, where the defendant bears the burden of proof. (*Id.* at pp. 765-779.) An instruction at the guilt trial that a defendant is presumed sane implements *Clark*'s holding and does not violate due process.

ARGUMENT

I. THE TRIAL COURT DID NOT VIOLATE DUE PROCESS BY INSTRUCTING THE JURY AT THE GUILT PHASE THAT APPELLANT WAS CONCLUSIVELY PRESUMED SANE

The trial court correctly instructed the jury at the guilt phase of trial that appellant was conclusively presumed sane. Because in a bifurcated trial sanity could be decided only after a conviction of crime, the instruction correctly allocated the sanity issue to the subsequent proceeding. The trial court's additional instructions on the People's burden of proof and the elements of first degree murder made clear that the jury could consider appellant's mental state evidence on the element of deliberation and premeditation. This forecloses appellant's argument that the challenged instruction violated his right to due process.

A. Rules Governing the Issue of Sanity

Among the pleas a defendant may enter are not guilty and not guilty by reason of insanity. (§ 1016.) If the defendant enters both pleas, the guilt trial is held first, followed, if necessary, by the sanity trial. (§ 1026, subd. (a); *People v. Hernandez* (2000) 22 Cal.4th 512, 520.) The defendant is conclusively presumed sane at the guilt phase of trial. (§§ 1016, 1026, subd. (a); *Hernandez, supra,* at p. 520; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1430.) In that phase, "the defendant is tried on his or

her factual guilt without reference to the insanity plea." (*Dobson, supra*, at p. 1431.) At the sanity trial, the defendant must prove by a preponderance of the evidence "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b); see *Hernandez, supra,* at pp. 520-521.)[4] "California follows the test of insanity laid down in *M'Naghten's Case* (1843) 8 Eng.Rep. 718." (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1447.)[5]

In 1981, the Legislature abolished the defense of diminished capacity, and in 1982 the voters agreed by statutory initiative. (§§ 25, subd. (a), 28, subds. (a), (b); *People v. Mejia-Lenares, supra,* 135 Cal.App.4th at p. 1450.) If a defendant wishes to challenge his capacity to form a particular mental state, he must do so at the separate sanity trial. (§§ 25, subd. (b), 28, subd. (c); *People v. Mejia-Lenares, supra,* at p. 1456.) "Capacity," as used in the *M'Naghten* rule, "is understood to mean the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them." (*Clark v. Arizona, supra,* 548 U.S. at p. 749, fn. 7.)

"A successful insanity plea relieves the defendant of all criminal responsibility." (*People v. Dobson, supra,* 161 Cal.App.4th at p. 1432.) "The plea of insanity is thus necessarily one of 'concession and avoidance.' [Citation.] 'Commission of the overt act is conceded' but punishment is avoided '*upon the sole ground* that at the time the overt act was committed

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[4] The test is disjunctive, despite the conjunctive in the literal wording. (*People v. Skinner* (1985) 39 Cal.3d 765, 769.)

[5] The court in *M'Naghten's Case* also stated, "'[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction . . . .'" (*Leland v. Oregon* (1952) 343 U.S. 790, 796.)

the defendant was [insane].' [Citation.]" (*People v. Hernandez, supra,*, 22 Cal.4th at p. 521.)

"Although guilt and sanity are separate issues, the evidence as to each may be overlapping. Thus, at the guilt phase, a defendant may present evidence to show that he or she lacked the mental state required to commit the charged crime. [Citation.] A finding of such mental state does not foreclose a finding of insanity." (*People v. Hernandez, supra,* 22 Cal.4th at p. 520.) "Insanity is a plea raising an *affirmative defense* to a criminal charge, although one that does not negative an element of the offense." (*Id.* at p. 522.) "'[T]he issue at the insanity trial is not whether in fact the defendant has committed the act but whether or not he should be punished.' [Citation.]" (*Ibid.*)

"It has long been the rule in California that 'insanity may not be used as a basis for extending leniency. It is either a complete defense, or none at all. There is no *degree* of insanity which may be established to affect the degree of crime.' [Citation.] Thus, '"there is no degree of insanity sufficient to acquit of murder but not of manslaughter."' [Citation.]" (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th at p. 1447.)

B. In *Coddington* and *Blacksher* this Court Upheld an Instruction That a Defendant is Conclusively Presumed Sane

In *People v. Coddington, supra,* 23 Cal.4th 529, this Court considered a trial court's instruction to 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." (*Id.* at p. 584.) "Although that instruction correctly states the law [citations], appellant contends that this was error which prejudicially undermined his guilt phase defense of lack of premeditation of the murders." (*Ibid.*) The defendant did not object to the instruction or seek modification. He conceded the jury had been instructed "that if the

defendant did not premeditate because of mental illness or defect, he was not guilty of first degree murder." (*Ibid.*) The Court rejected the contention 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." (*Ibid.*) The Court distinguished the instruction given in *People v. Burton* (1971) 6 Cal.3d 375, 390 (disapproved on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1156), and noted both the prosecutor and defense counsel had argued the presence or absence of mental disease during their guilt phase closing arguments. (*Ibid.*)[6] "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 p. 585.) The Court concluded, "There was no possibility of confusion arising from the instruction of which appellant complains here." (*Ibid.*)

In *People v. Blacksher, supra,* 52 Cal.4th 769, this Court found the trial 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.'" (*Id.* at p. 831.) The defendant had claimed the trial court's instruction on the presumption of sanity, and failure to give a requested pinpoint instruction,

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[6] In addition to considering a wholly different instruction (*People v. Coddington, supra,* 23 Cal.4th at p. 584 & fn. 23), the Court in *People v. Burton, supra,* 6 Cal.3d at p. 390, addressed a defense of diminished capacity, which it found was potentially affected by the instruction at issue. No such conflict arises here. Moreover, the Court found it "need not now decide whether such a conflict would be fatal." (*Id.* at p. 390.) Accordingly, the comment that the instructions at issue, which were not given here in any case, were *potentially* in conflict is dictum.

"hampered his mental illness defense and lowered the prosecution's burden of proof in violation of his due process rights." (*Ibid.*) He argued the court's instruction led the jury to believe it could not consider whether his mental illness precluded him from forming the intent to commit murder. (*Ibid.*)

The Court noted the defendant had not objected to the instruction or requested a further definition of sanity. (*People v. Blacksher, supra,* 52 Cal.4th at p. 831.) It rejected the argument that the "instruction effectively negated the defense that because of his mental illness he could not form the mental state required for murder." (*Ibid.*) The jury had been given CALJIC No. 3.32, "which is the standard instruction for this very defense." (*Blacksher, supra,* at p. 831.) The Court further observed it had "rejected an identical argument" in *People v. Coddington, supra,* 23 Cal.4th 529, 584-585, and it was "neither persuaded nor bound by any contrary decision of the lower federal courts." (*Blacksher, supra,* at p. 831.)

The Court further found the defendant's proposed pinpoint instruction did not correctly state the law and was "confusing to the point of near incomprehensibility." (*People v. Blacksher, supra,* 52 Cal.4th at p. 832.)

> Unlike CALJIC No. 3.32, the proposed instruction would have required the jury to *presume* that defendant's mental illness negated the mental state required for first degree murder if it was not convinced that he did not act under the influence of that mental illness. The mere fact that defendant acted under the influence of mental illness does not necessarily mean he lacked the required mental state. The question, as it is properly phrased in CALJIC No. 3.32, is "whether the defendant actually formed the required specific intent." This question is considered in the context of any evidence regarding mental illness. Defendant's proposed instruction would, in effect, have resurrected the defense of diminished capacity, a defense this state has long rejected. [Citation.]

(*People v. Blacksher, supra,* 52 Cal.4th at p. 832.)

Appellant contends this Court's rulings in *Coddington* and *Blacksher* do not resolve the issue here because the defendants in those cases did not object to the instruction or request a definition of sanity and because this Court did not consider the due process argument. His contentions are without merit.

In *People v. Coddington, supra,* 23 Cal.4th at pp. 584-585, this Court considered and rejected the defendant's claim on the merits, notwithstanding his failure to object or request clarification. Appellant does not explain how a separate analysis under the due process clause would have produced a different outcome in that case. In *People v. Blacksher, supra,* 52 Cal.4th at pp. 831-832, this Court again considered and rejected the defendant's claim on the merits despite his failure to object or request a definition of sanity. In *Blacksher*, the defendant specifically argued the instruction violated his right to due process. (*Id.* at p. 831.) The Court stated it had "rejected an identical argument" in *Coddington.* (*Blacksher, supra,* at p. 831.) Accordingly, not only did the Court reject the claim on the merits in both cases, it rejected it on due process grounds.

In any event, as we explain below, the guilt phase instruction that a defendant is conclusively presumed sane does not violate due process. It is fully consistent with California's allocation of the burden of proof on guilt and sanity, an allocation that was upheld in *Clark v. Arizona, supra,* 548 U.S. 735.

C. *Clark v. Arizona* is in Accord with *Coddington* and *Blacksher*

In *Clark v. Arizona, supra,* 548 U.S. 735 (*Clark*), the Supreme Court considered the holding of the Arizona court in *State v. Mott* (1997) 187 Ariz. 536, 931 P.2d 1046, "that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on

an insanity defense; such evidence 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." (*Clark, supra,* at pp. 756-757.)

The high court initially distinguished the categories of evidence with a potential bearing on mens rea. First, there was "'observation evidence' in the everyday sense, 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." (*Clark, supra,* 548 U.S. at p. 757.) Second, there was "'mental-disease evidence' in the form of opinion testimony that Clark suffered from a mental disease with features described by the witness." (*Id.* at p. 758.) Third, there was "'capacity evidence' about a defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*)." (*Ibid.*) Arizona did not restrict the first category of "observation evidence" on the issue of mens rea. (*Id.* at p. 760.) "Thus, only opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule, is restricted." (*Ibid.*) The issue before the court was "the challenge to *Mott* on due process grounds, comprising objections to limits on the use of mental-disease and capacity evidence." (*Id.* at p. 762.)

The court identified the factors involved: "Clark's argument that the *Mott* rule violates the Fourteenth Amendment guarantee of due process turns 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." (*Clark, supra,* 548 U.S. at p. 765.)

"The first presumption is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, [citations], including the mental element or *mens rea*." (*Clark, supra,* 548 U.S. at p. 766.) "As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states." (*Ibid.*)

"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." (*Clark, supra,* 548 U.S. at p. 766; see *Leland v. Oregon, supra,* 343 U.S. at p. 799 ["In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity."].)

> This presumption dispenses with a requirement on the government's part to include as an element of every criminal charge an allegation that the defendant had such a capacity. The force of this presumption, 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].

(*Clark, supra,* 548 U.S. at pp. 766-767, footnotes omitted.) The court added, "Although a desired evidentiary use is restricted, that is not equivalent to a *Sandstrom* presumption. See *Sandstrom v. Montana*, 442 U.S. 510, 514-524 (1979) (due process forbids use of presumption that relieves the prosecution of burden of proving mental state by inference of

intent from an act)." (*Clark, supra,* at p. 767, fn. 36, parallel citations omitted.)

Because *Clark* expressly stated the presumption of sanity is not equivalent to a *Sandstrom* presumption, appellant's contrary argument—that the presumption of sanity instruction acts as a presumption on an element of the offense—is without merit.[7] As *Clark* explained, the prosecution has no burden on the issue of sanity. Sanity is presumed in every case and need not be proved as an element of any crime. In California, the defendant bears the burden to rebut the presumption of sanity by a preponderance of the evidence. Accordingly, appellant's analysis regarding evidentiary presumptions is inapposite, as are the cases on which he relies.

In states that allow the factfinder to consider evidence of mental disease or incapacity for its bearing on the government's burden to prove mens rea, "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." (*Clark, supra,* 548 U.S. at p. 768.) That approach is not required by due process, however. (*Id.* at p. 767, fn. 37 ["We do not, however, read any part of *Leland* [*v. Oregon, supra,* 343

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[7] In *Sandstrom v. Montana* (1979) 442 U.S. 510, 512, the court considered a jury instruction that stated, "the law presumes that a person intends the ordinary consequences of his voluntary acts." It held the instruction impermissibly shifted the burden on the element of intent. (*Id.* at p. 521.) Similarly, in *Francis v. Franklin* (1985) 471 U.S. 307, 309, the court rejected instructions that stated, "The 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." As in *Sandstrom*, the instructions impermissibly shifted the burden on the element of intent. (*Id.* at p. 325.)

U.S. 790] to require as a matter of due process that evidence of incapacity be considered to rebut the *mens rea* element of a crime"].)

Other states allow the factfinder to consider evidence of mental disease or incapacity only on the issue of sanity. "Insanity rules like *M'Naghten* . . . are attempts to define, or at least to indicate, the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility, [citations], even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt." (*Clark, supra,* 548 U.S. at pp. 768-769.)

"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." (*Clark, supra,* 548 U.S. at p. 769.) This is the principle upon which appellant most strongly relies. The court agreed that "evidence tending to show that a defendant suffers from mental disease and lacks capacity to form *mens rea* is relevant to rebut evidence that he did in fact form the required *mens rea* at the time in question." (*Ibid.*) Nevertheless, a state may, consistent with due process, choose to channel that evidence and restrict its use to the question of sanity alone. (*Id.* at p. 770.)

Since a state has the authority to choose a definition of insanity, and to impose on a defendant the burden of proving insanity, "it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial. Yet, as we have explained, just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the issue of *mens rea*." (*Clark, supra,* 548 U.S. at p. 771.) In that event, "once reasonable doubt was found, acquittal would be required, and the standards

established for the defense of insanity would go by the boards." (*Id.* at pp. 771-772.) A state is free to accept such a possibility in its law, but due process does not require it to do so. (*Id.* at p. 772.) Arizona, like California, chose not to accept that possibility.

> The [Arizona] Supreme Court pointed out that the State had declined to adopt a defense of diminished capacity (allowing a jury to decide when to excuse a defendant because of greater than normal difficulty in conforming to the law). The court reasoned that the State's choice would be undercut if evidence of incapacity could be considered for whatever a jury might think sufficient to raise a reasonable doubt about *mens rea*, even if it did not show insanity. [Citation.] In other words, if a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would in functional terms be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would prevail as a stand-alone defense.

(*Clark, supra,* 548 U.S. at p. 772, footnotes omitted.)

This Court made the same point in *People v. Blacksher, supra,* 52 Cal.4th at page 832. If a defendant can show the absence of a required mental state based on evidence that he lacked the capacity to form that mental state, though perhaps not to the degree required to prove insanity, he will have resurrected the diminished capacity defense. (*Ibid.*) Yet California has abolished that defense. California has instead chosen to channel evidence of cognitive and moral incapacity to the sanity phase of a trial. If a defendant wishes to challenge his capacity to form the requisite mental state, he must plead not guilty by reason of insanity and bear the required burden to prove he is insane. He may not bypass the sanity phase of a trial by seeking to raise reasonable doubt based upon a lack of capacity to form the mental state required for conviction of a crime, thereby lowering his own burden of proof on insanity.

Appellant, like the dissent in *Clark*, nevertheless argues that if evidence of incapacity could show insanity, it would at least be doubtful that the defendant could form the mental state required for guilt, thus precluding a guilty verdict in the first place. Accordingly, it would violate due process if the state impeded a defendant from using mental disease and capacity evidence directly to rebut the prosecution's evidence of mens rea. (*Clark, supra,* 548 U.S. at pp. 773-774.) The *Clark* majority responded,

> Are there, then, characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion? We think there are: in the controversial character of some categories of mental disease, in the potential of mental-disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it.

(*Clark, supra,* 548 U.S. at p. 774.)

Noting the uncertainty inherent in psychiatric evidence and opinion testimony, the court concluded "the consequence of this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct." (*Clark, supra,* 548 U.S. at p. 775.) It also noted the "potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all." (*Ibid.*) The limits of such evidence was shown by the experts' disagreement in *Clark* on whether the defendant's schizophrenia "left him bereft of cognitive or moral capacity." (*Id.* at p. 776.) "Because allowing mental-disease evidence on *mens rea* can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a

defendant may be assigned the burden of persuasion." (*Ibid.*) Finally, there are risks inherent in the opinions of experts that necessarily entail some degree of judgment regarding the defendant's state of mind, an elusive matter no matter how conscientious the enquiry. (*Id.* at pp. 776-777.) "In sum, these empirical and conceptual problems add up to a real risk that an expert's judgment in giving capacity evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have." (*Id.* at p. 778.) This risks supports a state's decision to channel such expert testimony to consideration on the insanity defense. (*Ibid.*)

The court concluded, "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." (*Clark, supra,* 548 U.S. at p. 779.) The rule did not violate due process. (*Ibid.*)

D. The Trial Court's Instruction at the Guilt Phase That Appellant Was Conclusively Presumed Sane Implements *Clark's* Holding

The Court of Appeal correctly relied on *Clark, supra,* 548 U.S. 735, in rejecting appellant's challenge to the trial court's presumption of sanity instruction. Although *Clark* involved a bench trial at which the issues of guilt and sanity were tried together, *Clark* nevertheless supports the instruction given here.

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

> determined adversely to the defendant, can he or she try to overcome the presumption by a preponderance of the evidence. [Citation.] But it makes eminent sense for the jury to be told that sanity is not to be considered in the determination of guilt. The challenged instruction does just that, and no more than that. It thus reflects the state's "authority . . . to deny a defendant the opportunity to displace the presumption of sanity . . . when addressing a different issue in the course of a criminal trial." (*Clark, supra,* 548 U.S. 735, 771.) The *Clark* court determined that the exercise[] of that authority entails no violation of due process. That conclusion fatally undermines the contrary predicate assumption of *Patterson* and *Stark*.[8] We therefore conclude that the error claimed did not occur.

(Slip Opn. at pp. 21-22.)

As the Court of Appeal explained, the trial court's instruction that a defendant is conclusively presumed sane at the time of the offense correctly channeled the jury's consideration of the mental state evidence. While the jury was presented with, and instructed to consider, a vast array of evidence bearing on appellant's behavior before, during, and after the crime, including evidence relating to his mental state, the jury was instructed that it was not to consider whether appellant committed the act while insane. The jury clearly understood that determination would be made at a separate proceeding, if necessary. The presumption of sanity instruction thus implements California's statutory scheme.

It 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. *Clark* supports the correctness of that instruction in its conclusion that 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." (*Clark, supra,* 548 U.S. at p. 779.)

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

Such confusion and misunderstanding is best avoided if the jury is instructed on the distinctions made in state law between the determinations of crime and sanity. Thus, the presumption of sanity instruction gives effect to California's separation of those determinations.

Contrary to appellant's claim, the instruction did not prevent the jury from considering evidence bearing on his mental state or shift the burden of proof to him. As in *People v. Blacksher, supra,* 52 Cal.4th at page 831, the trial court gave CALJIC No. 3.32:

> 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.

(8 RT 1196; 3 CT 563 [CALJIC No. 3.32].)

The court also instructed,

> A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation.

(8 RT 1201; 3 CT 591 [CALJIC No. 8.73.1].)

The court instructed that appellant was presumed innocent, and that the presumption placed on the People the burden to prove him guilty beyond a reasonable doubt. (8 RT 1195.) It instructed on the requirement of a willful, deliberate, and premeditated killing for first degree murder. (8 RT 1198-1199.) It instructed that to establish a killing was murder and not manslaughter, "the burden is on the People to prove beyond a reasonable doubt each of the elements of murder . . . ." (8 RT 1202.) In addition to the

presumption of sanity instruction (8 RT 1201), the court instructed: "Do not single out any particular sentence or any particular point or instruction and ignore the others. Consider the instructions as a whole and each in light of the others" (8 RT 1184).

During the prosecution's closing argument, the prosecutor mentioned the presumption of sanity once: "The purpose of reaching your verdict during this guilt phase, the defendant is conclusively presumed to have been sane at the time he committed this crime. The insanity issue will follow. For this stage, conclusively presumed to be sane [*sic*]." (8 RT 1084.) Appellant's counsel did not address the presumption of sanity in closing argument.

Both parties addressed appellant's mental state at length. The prosecutor argued appellant was "putting on a performance" at the train station. (8 RT 1090.) Her argument focused on showing that appellant's mental state defense was fabricated, and that appellant was "[l]ying about everything." (8 RT 1115.) She also argued the defense expert's testimony was not reliable. (8 RT 1101-1108.) Defense counsel conceded appellant was guilty of manslaughter. (8 RT 1117.) Counsel argued appellant was not guilty of murder because he did not have malice and did not deliberate and premeditate. He argued appellant's "judgment was clouded by mental illness." (8 RT 1129.) He also argued the jury would receive instructions on mental disease and mental illness and that the jury could consider that evidence on the issues of malice and whether appellant acted in the actual but unreasonable belief in the need to defend himself. (8 RT 1152.)

Based on the entire record, including the court's instructions and the parties' arguments, "There was no possibility of confusion arising from the instruction of which appellant complains here." (*People v. Coddington, supra,* 23 Cal.4th at p. 585.) As in *Coddington* and *Blacksher*, the jury was not foreclosed from considering evidence of appellant's mental state on the

question whether he "actually formed the required specific intent, premeditated, deliberated or harbored malice aforethought." (8 RT 1196.) Rather, it was expressly instructed to consider such evidence. (*Ibid.*) Moreover, as we have explained, the presumption of sanity instruction correctly channeled the jury's consideration of appellant's sanity to the appropriate proceeding.

Appellant does not quarrel with California's statutory scheme of bifurcated trials on guilt and sanity, nor does he quarrel with the state's allocation of the burden of proof in each. He contests only the trial court's instruction that made those distinctions explicit. As explained in *Coddington, Blacksher,* and *Clark*, the instruction did not violate due process.[9]

E. The Contrary Decisions in *Patterson* and *Stark* are Neither Controlling nor Persuasive

Appellant's reliance on *Patterson v. Gomez, supra,* 223 F.3d 959, and *Stark v. Hickman, supra,* 455 F.3d 1070, is unavailing. As this Court pointed out in *People v. Blacksher, supra,* 52 Cal.4th at page 831, the Court is not bound by contrary decisions of the lower federal courts.

In any event, as the Court of Appeal explained, "there is no need to parse *Patterson* and *Stark*, because we believe the subsequent decision of the United States Supreme Court in *Clark v. Arizona* (2006) 548 U.S. 735 (*Clark*) more or less virtually undermines that reasoning." (Slip. Opn. at p. 18.)

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[9] Appellant makes a subsidiary argument to the effect that the presumption of sanity instruction entailed an inapplicable legal principle. Under *Clark, supra,* 548 U.S. 735, this claim necessarily fails. The distinction between guilt and sanity was central to the jury's determination, in separate proceedings, of those issues.

Patterson did not cite this Court's decision in *Coddington*, which had been decided several weeks earlier. Instead, the court cited *Sandstrom v. Montana, supra,* 442 U.S. 510, and *Francis v. Franklin, supra,* 471 U.S. 307, to support its conclusion that the presumption of sanity instruction violated due process by impermissibly relieving the state of its burden to prove beyond a reasonable doubt that the defendant had the mental state required for first degree murder. (*Patterson v. Gomez, supra,* 223 F.3d at pp. 966-967.) Yet, as *Clark* explained, the presumption of sanity "is not equivalent to a *Sandstrom* presumption." (*Clark, supra,* 548 U.S. at p. 767, fn. 36.) Instead, it is a principle as universal as the presumption of innocence. (*Id.* at pp. 766-767.) Equally universal is the rule that the accused bears the burden of rebutting the presumption. (*Ibid.*; *Leland v. Oregon, supra,* 343 U.S. at p. 799.)

Patterson also cited this Court's decision in *People v. Burton, supra,* 6 Cal.3d 375. (*Patterson v. Gomez, supra,* 223 F.3d at p. 965.) As noted, *Burton* dealt with a different instruction, the defense was one of diminished capacity, and the Court's brief statement on the issue was dictum.

Moreover, the analysis in *Patterson* is highly flawed. *Patterson* speculated about the definition of sanity the jury might have used and concluded the jury would have been confused by the instructions as a whole.[10] It held the presumption of sanity instruction impermissibly shifted

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[10] There is no evidence the jury had a copy of a dictionary during deliberations. Appellant's similar speculation regarding what the jury might have believed in his case is equally without merit. As the trial court explained, it did not "want to get into what the definition of sanity is in this phase of the proceedings." (8 RT 1076.) The court's decision not to confuse the jury with instructions on what it was not deciding was certainly reasonable. Appellant's assumption that the jury would have come up with its own definition of sanity, having been told that issue was not before it is baseless.

the burden to the defendant on the issue of his mental state. (*Patterson v. Gomez, supra,* 223 F.3d at pp. 965-967.) The court incorrectly stated that, depending on the definition of sanity, the jury was "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." (*Id.* at p. 965.) But the jury was told nothing of the sort. A defendant can suffer from a mental disease and yet be sane, as any rational juror would understand. The concepts are separate and distinct, as the instructions made clear, and as this Court explained in *People v. Hernandez, supra,* 22 Cal.4th at page 520. It is the *Patterson* court that confused them. The jury was expressly instructed to consider evidence regarding the defendant's mental disease or mental disorder "for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crime charged . . . ." (*Id.* at p. 964.) While the federal court conflated the concepts of mens rea and sanity, there is no reason to assume the jury did so. Indeed, the jury had been instructed to presume the defendant was sane after it had been instructed to consider evidence of mental disease on the issue of mens rea, and after it had been instructed that a sanity trial would follow the guilt trial depending on the verdict. (*Id.* at pp. 964, 966.)

In *Stark v. Hickman, supra,* 455 F.3d at pages 1076-1079, the federal court relied on the analysis in *Patterson* to reverse another California murder conviction on grounds the presumption of sanity instruction violated due process. The court found *Coddington* had not decided the constitutionality of the instruction. (*Id.* at p. 1076.) *Stark* made no mention of *Clark, supra,* 548 U.S. 735, which had been decided several weeks earlier. It thus failed to give any weight to the United States Supreme Court's holding that a state may, consistent with due process, channel evidence bearing on sanity to a determination of that issue alone, and

preclude the factfinder from considering such evidence on the issue of mens rea.

Patterson and *Stark* are neither controlling nor persuasive. On the contrary, as explained in *Clark*, they are wrong.

The question for the jury at the guilt phase of trial is whether the defendant had the requisite mens rea at the time of the crime, assuming for purposes of that determination he had the capacity to form the required mental state. The question at the sanity trial is whether the defendant in fact had the capacity to form that mental state in light of evidence of his mental disease or defect. The presumption of sanity instruction, in conjunction with instructions on the elements of the crime, including mens rea, explains this distinction in simple terms. It does not violate due process.

CONCLUSION

For the reasons stated, respondent respectfully asks that the judgment be affirmed.

Dated: October 31, 2011

Respectfully submitted,

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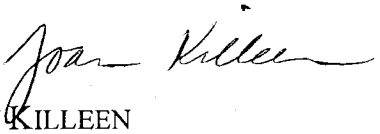

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,812 words.

Dated: October 31, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Ahkin R. Mills**
No.: **S191934**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 31, 2011, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 31, 2011, at San Francisco, California.

L. SORENSEN
Declarant

L. Sorensen
Signature

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