[redacted]

3

Case No. **S209643**

SUPREME COURT
FILED

APR - 2 2013

Frank A. McGuire Clerk

Deputy

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK STEVENS, Defendant, Appellant, and Petitioner.	Court of Appeal No. B241356

Appeal from the Superior Court of California,
County of San Luis Obispo
Honorable Barry T. LaBarbara, Judge
(San Luis Obispo County No. F471357)

PETITION FOR REVIEW

GERALD J. MILLER
P.O. Box 432
Agoura Hills, CA 91376
(818) 584-5986
State Bar No. 120030

Attorney for Defendant, Appellant, and
Petitioner Mark Stevens

Case No.

_____

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK STEVENS, Defendant, Appellant, and Petitioner.	Court of Appeal No. B241356

Appeal from the Superior Court of California,
County of San Luis Obispo
Honorable Barry T. LaBarbara, Judge
(San Luis Obispo County No. F471357)

PETITION FOR REVIEW

GERALD J. MILLER
P.O. Box 432
Agoura Hills, CA 91376
(818) 584-5986
State Bar No. 120030

Attorney for Defendant, Appellant, and
Petitioner Mark Stevens

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

ISSUES PRESENTED

(1) Is a psychiatrist, psychologist, or other mental health expert entitled to testify as to the facts of the commitment offense for the purpose of establishing whether that offense constitutes a crime of force or violence under the Mentally Disordered Offender (MDO) statute, particularly where the expert lacks personal knowledge of those facts, and instead relies on hearsay contained in a police or probation report, or similar document?

(2) Is a psychiatrist, psychologist, or other mental health expert entitled to testify as to whether a prisoner received ninety (90) days of treatment in the year preceding his parole, as required under the MDO statute, particularly where the expert lacks personal knowledge of those facts regarding such treatment, and instead relies on hearsay contained in medical or other records?

WHY REVIEW SHOULD BE GRANTED

This Court should grant review to resolve an irreconcilable conflict between appellate districts regarding a matter of public importance, namely the proper evidentiary procedures and standards to be employed in proceedings under the Mentally Disordered Offender (MDO) statute, Penal Code sections 2960 *et seq*. As a result of a reported decision in the present case, a conflict now exists between the Second and Fourth Districts as to whether a psychological expert that has evaluated a prisoner for possible commitment as an MDO may testify as to certain necessary elements under the MDO statute – i.e. whether the commitment offense constitutes a crime of force or violence and

whether the prisoner received the required ninety (90) days of treatment during the year preceding his or her scheduled parole – that are purely factual in nature (and, therefore, clearly not properly the subject of expert testimony), and as to which the testifying expert lacks any personal knowledge. In answering the question in the affirmative, the Court of Appeal in this case disregarded numerous basic evidentiary principles governing the admission of both hearsay and expert testimony, as set forth in the Evidence Code and the accompanying case law, including the decisions of this Court. In addition, the court in essence carved out an exception to normal rules of evidence for MDO proceedings, based on little more than its subjective perceptions regarding the nature of those proceedings, the qualifications of mental health professionals, judicial convenience, and its own workload. In doing so, it also expressly disagreed with the contrary finding of the Fourth District in *People v. Baker* (2012) 204 Cal.App.4th 1234, which, in contrast with the present decision, held that those evidentiary principles fully apply to proceedings under the MDO statute. The resulting conflict, unless resolved by this Court, threatens to create at least two (and possibly more, given the location of mental hospitals throughout the state) divergent sets of rules governing proceedings under the MDO statute, based on nothing more than the particular hospital and appellate district in which the prisoner is housed. The interests of efficient judicial administration, as well as the liberty interests of persons subject to potential further incarceration as MDOs, should not be subject to such arbitrary considerations. As a result, this Court should grant review, resolve the conflict between the published decisions in this case and *Baker*, and clarify the application of basic evidentiary principles to proceedings under the MDO statute.

STATEMENT OF FACTS[1]

A. The MDO Petition, And The Resulting Commitment Order.

By petition filed March 5, 2012, appellant and petitioner Mark Stevens ("petitioner") requested a hearing following the BPT's March 2, 2012 order committing him as an MDO, pursuant to Penal Code section 2966, subdivision (b). (CT 1.) Following petitioner's waiver of a jury trial (CT 3; RT 1:3), the hearing was held on April 24, 2012 (CT 4; RT 2:303 *et seq.*) Following the testimony of Kevin Perry, a forensic psychologist at Atascadero State Hospital (ASH), the court denied the petition, found the criteria under section 2962 to be true, and ordered petitioner recommitted to the California Department of Mental Health for further treatment. (CT 4, 14-15; RT 2:317.)

Petitioner filed a timely notice of appeal on May 1, 2012. (CT 11.)

B. The April 24, 2012 MDO Hearing, And The Testimony By Dr. Perry.

Perry reviewed petitioner's medical records at ASH, as well as prior MDO evaluations and probation reports that described his qualifying offense. (RT 2:305.) He also spoke with petitioner's treating psychologist about his behavior and progress, and attempted to interview petitioner, who declined. (RT 2:305-06.) Perry testified, without objection, that in his expert opinion petitioner suffered from a severe mental disorder (schizophrenia); that he was not in remission; that his severe mental disorder caused, or at least aggravated, his 2009 commitment offense of petty theft with a prior; and that he represented a substantial danger of physical harm to others by reason of his severe mental

---

[1]References to "CT" are to the clerk's transcript in this action, while references to "RT" are to the volume and page number of the two volume reporter's transcript.

disorder. (RT 2:306-13.) Perry also testified that petitioner received 90 days or more of treatment for his severe mental disorder during the year prior to his scheduled December 20, 2011 release on parole, since he was in the prison mental health services delivery system during that entire year. (RT 2:311.)

In addition to the above testimony, to which petitioner did not object, the prosecutor asked Perry to "describe the crime." After petitioner's counsel objected, on grounds that the question called for "hearsay" and was "not subject to opinion," the prosecutor withdrew the question, and instead asked Perry to state the basis for his opinion that petitioner's mental disorder caused or aggravated the offense. Perry then testified, among other things, that petitioner was observed placing items at a drug store into his waistband and pockets and walking out of the store without paying; that petitioner threatened to assault and kill the loss prevention agents that confronted him; that petitioner tried to push a shopping cart into one of the agents; and that petitioner had only about $27 of merchandise at the time. It was, therefore, Perry's opinion that "to threaten someone's life and attempt to assault them over such minor items, to me suggest an irrational thought process." (RT 2:308-09.)

On cross-examination, Perry further testified that petitioner was convicted of petty theft with priors, and that the stolen property consisted of a notebook, a pen, some cold medicine, and a wash cloth. (RT 2:314.) Perry then conceded that petitioner was not convicted of any assaults or threats in the case, and that petitioner's prior record consisted primarily of drug- and property-related offenses. (*Id.*) On redirect, the prosecutor asked Perry why he believed that petitioner's offense met the criteria under the MDO statute,

even though petty theft with a prior by definition is not a crime that involves force or violence. Petitioner's counsel objected on grounds that the question called for hearsay and lacked foundation, and the trial court sustained the objection. (RT 2:315.)

During argument, petitioner's counsel stated that the People had failed to meet their burden with respect to the requirement under the MDO statute that petitioner's commitment offense constituted a crime of force or violence. (RT 2:316.) Counsel argued that, in addition to the fact that petty theft was not an enumerated offense under the MDO statute, Perry's description of some of the facts of the case was admitted solely as the foundation for his opinion that the offense was caused or aggravated by petitioner's severe mental disorder, and that there was no "admissible substantive evidence to indicate that force or violence was used in the commission of a petty theft for which [petitioner] was convicted." (*Id.*)

After petitioner's counsel specifically noted that Perry's testimony in that regard constituted inadmissible hearsay, the trial court stated that such testimony "came in without objection," whereupon petitioner's counsel clarified that he did not object to such testimony only because it constituted foundation for whether or not the mental illness was a cause or factor in the crime. (RT 2:316-17.) The prosecutor stated that, although the evidence came in with respect to the basis for Perry's opinion regarding causation, it also encompassed the "force or violence" criterion and that the court, therefore, had substantial evidence on which to base a finding on that criterion. (RT 2:317.) The trial court agreed, concluded that the "force or violence" criterion, as well as the remaining criteria, were met, and denied the petition. (RT 2:317-18.) In doing to, the court

observed that petitioner's counsel had raised the issue based on the recent Fourth District decision in *People v. Baker* (2012) 204 Cal.App.4th 1234, which had criticized the Second District's holding in *People v. Miller* (1994) 25 Cal.App.4th 913, but that *Miller* was the "better exposition of the law on the issue that we're dealing with." (RT 2:317.)

C. The Court Of Appeal's Reported Decision.

On February 27, 2013, the Second District Court of Appeal, Division Six issued its published decision (attached as an exhibit to this petition, pursuant to the Rules of Court), affirming petitioner's commitment order. The court initially held that petitioner's counsel failed to object to Perry's recitation of the facts regarding the commitment offense and, therefore, was "precluded from arguing for the first time on appeal that the testimony was hearsay or violated the confrontation clause." (Slip Opinion, p. 2.)

Nonetheless the court proceeded to decide the case on the merits, holding, in dicta, that the testimony was properly admitted, because "Doctor Perry's testimony concerning the probation report was not offered for the truth of the facts stated but as the basis for the doctor's expert opinion." (Slip Opinion, p. 3.) In addition, the court reaffirmed its prior holding in *Miller, supra*, stating that "it is settled law in this appellate district that a mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial" (Slip Opinion, pp. 2-3.) The court noted that "[t]his division is tasked with appellate review of a great many California MDO cases," and stated that it developed the rule in *Miller* in response to a "spate of appeals" in the early 1990s, in which prosecutors produced the victims of the underlying crimes to show that the crimes involved force or violence, in order to save them from being "'revictimized' by having to

testify again and relive their unpleasant experience." (Slip Opinion, p. 4.) The court justified the rule in *Miller* by stating that "[w]hen stripped of verbiage and adjectives, the basic inquiry centers on the prisoner's mental health and potential threat to the public," and asked rhetorically "Who better than a psychiatrist or a psychologist should opine, one way or another, on this ultimate issue?" (*Id.*, p. 5.)

In addition to upholding Perry's testimony regarding the commitment offense, and whether it involved force or violence, the court held that the *Miller* rule applied to each of the criteria under the MDO statute, including not only as to matters that called for the expression of an expert opinion, such as whether the prisoner had a severe mental disorder or was in remission, whether the disorder caused the commitment offense, or whether the prisoner represented a substantial danger of physical harm to others by reason of such disorder (*see* Penal Code section 2962, subdivisions (a) and (b)), but also as to purely factual inquiries, such as whether the commitment offense involved a crime of force or violence, and whether the prisoner received the required 90 days of treatment in the year preceding his parole (*see* Penal Code section 2962, subdivisions (c) and (e)). As to the latter two criteria, the court held that such matters were not "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," within the meaning of Evidence Code section 801, subdivision (a) (Slip Opinion, p. 3), and that there was a "mental health component" to each of the factors under the MDO statute, which "must be interpreted in the particular context of an MDO case." (*Id.*, pp. 6, 7.) With respect to the force or violence issue, the court stated that "[i]t is the mental health expert who can bring the raw facts together with a mental health explanation into

perspective for the jury." (*Id.*, p. 7.) With respect to the issue of whether the prisoner received 90 days of treatment in the year preceding his scheduled parole, the court stated that "[s]urely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar." It then rhetorically asked "Are the People required to produce the custodian of records to say that the prisoner received the 90 days of treatment?" and stated that the records were used in treatment and hence "reliable" and that a doctor's interpretation of those record would assist the trier of fact in making its determination. (*Id.*) It also stated that "[m]ost jurors do not have 'common experience' to read or interpret" medical reports, and that calling a custodian of records to testify as to the treatment provided and the mathematical computation of the number of days of treatment "would accomplish nothing." (*Id.*)[2]

In issuing its decision, the court disagreed with the analysis of the Fourth District in *Baker, supra,* which it ironically criticized as "dicta." (Slip Opinion, pp. 3-4, 5.) In particular, the court stated that *Baker* "take[s] an unrealistic view of the law of evidence in an MDO case," and "fail[s] to take into account the practical implications and fair administration of the MDO law." (Slip Opinion, p. 5.) The court stated that the *Baker* dicta "tell the People how not to proceed, but fail to tell the People how to proceed," and that "[a]bsent a stipulation, the People must prove each and every element of the MDO criteria." Further, the court stated that, under *Baker*, "the People would be required to

---

[2]The court also stated that an expert could properly opine as to whether the prisoner represented a substantial danger of physical harm to others as a result of his severe mental disorder (Slip Opinion, p. 7), a principle with which, as indicated above, petitioner does not disagree.

produce eyewitness testimony on the nature of the offense whether or not it involved the use of force or violence," the result that the court sought to avoid in *Miller*. (*Id.*)

In reaching its conclusion, the court conceded that, in the abstract, the issue of whether a crime involved force or violence was not within the expertise of an expert psychiatrist or psychologist, and that "[t]o be sure, the Evidence Code applies to MDO trials." (Slip Opinion, p. 5.) However, as indicated above, the court essentially carved out exceptions to those principles, stating that it "reach[ed] an opposite conclusion in the specific context of an MDO proceeding." (*Id.*) The court stated that the prisoner "has a panoply of constitutional and statutory rights which are adequate to protect him," and that there was also a "perfectly good Superior Court judge presiding over the trial whose job it is to safeguard those rights." (*Id.*, p. 7.)

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE SECOND DISTRICT'S REPORTED DECISION IN THIS CASE AND THE FOURTH DISTRICT'S REPORTED DECISION IN BAKER, AND TO CLARIFY THE STANDARDS GOVERNING THE ADMISSIBILITY OF EXPERT TESTIMONY AND HEARSAY EVIDENCE IN PROCEEDINGS UNDER THE MENTALLY DISORDERED OFFENDER STATUTE.

The foregoing facts, together with the applicable law, establish that review by this Court is necessary and appropriate, both to ensure uniformity in the administration of justice in this State, and to correct a palpably erroneous decision by the Court of Appeal in this case. The Court's decision created a clear and irreconcilable conflict between two of the five appellate districts in this State, each of which are home to state mental

hospitals and, therefore, to proceedings under the MDO statute. As a result, the failure to resolve that conflict would create differential standards for the admission of expert and opinion testimony as to several of the required elements under that statute. Moreover, under the present situation, prisoners sought to be committed as MDOs would face differential standards and procedures based on nothing more than happenstance, i.e. the location of the state prison or hospital in which they are incarcerated or committed. As a result, the public interest in the uniform administration of justice clearly warrants review by this Court. Further, in rendering its decision, the Second District Court of Appeal in the present case not only expressly disagreed with the prior holding of the Fourth District but, while paying lip service to the requirements imposed by the Evidence Code and the applicable case law, essentially carved out an exception to those requirements for MDO proceedings, despite the lack of any legislative authorization or logical reason to do so. As a result, this Court should grant review to resolve the conflict between the recently published decisions in two different appellate districts, and resolve this issue of public importance.

A. Under The Evidence Code, Expert Testimony May Be Admitted Only Where The Subject Matter Is Beyond The Common Experience Of The Factfinder, And Where It Involve Matters Of Opinion Rather Than Independent Proof Of A Fact, Neither Of Which Is The Situation In This Case.

Evidence Code section 801, subdivision (a) provides that an expert may testify, in the form of an opinion, only when his or her testimony is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (emphasis added). As a result, an expert may not properly express an

opinion where the matter does not involve the use of his or her specialized skill or experience, or is within the common experience of a judge or jury, such that the finder of fact is equally capable of reaching a judgment or opinion. (*See, e.g., People v. Johnson* (1993) 19 Cal.App.4th 778, 786 (expert could not properly opine that prison inmates had a tendency to lie); *People v. Torres* (1995) 33 Cal.App.4th 37, 45 ("[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness").)

Further, an expert's testimony is limited to opinions rather than facts, particularly where, as here, the expert did not personally observe or witness those facts, and where they are not being presented for the purpose of supporting the expert's opinion. (*See, e.g.*, Evidence Code section 801, subdivision (b); *Barham v. Widing* (1930) 210 Cal. 206, 214.) In particular, although an expert's opinion testimony may be based on hearsay, the expert generally may not testify to the contents of the hearsay (*Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 414; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 863-64), and cannot introduce hearsay or otherwise inadmissible matter under the guise of providing expert opinion. (*See, e.g., People v. Gardeley* (1996) 14 Cal.4th 605, 619 ("a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact"); *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895 (although experts can testify to the basis of their opinion, they may not act as a "channel" to place the opinion of out of court witnesses before the trier of fact).)

As a result, the courts have carefully distinguished between the use of hearsay

evidence to support an expert's opinion, and its substantive use to support an element of the case. (*See, e.g., People v. Montiel* (1993) 5 Cal.4th 877, 918-19; *People v. McFarland* (2000) 78 Cal.App.4th 489, 495). That is particularly so in light of the United States Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], in which the Court, with limited exceptions, held that the Sixth Amendment right of confrontation required that a defendant be afforded the opportunity to cross-examine a witness regarding any "testimonial" statements made by that witness, thereby limiting the exceptions to the rule against hearsay. (*See, e.g., People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-10; *People v. Cooper* (2007) 148 Cal.App.4th 731, 747; *see also People v. Martin* (2005) 127 Cal.App.4th 970, 977 (upholding MDO commitment order based on assumption that the trial court "considered the testimony about the probation report's contents solely for the proper purpose of assessing the experts' credibility, and not as independent proof of the facts contained therein").)

To the extent that an expert's testimony consists not of facts but of opinions that constitute legal conclusions, it is inadmissible and does not constitute "substantial evidence." (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841).

B. Under The Fourth District's Decision In Baker, Expert Testimony May Not Be Admitted To Establish Purely Factual Matters Of Which The Expert Lacks Personal Knowledge, Including That The Purported Commitment Offense Constituted A Crime Of Force Or Violence.

Applying the above principles, the Fourth District, in *People v. Baker* (2012) 204 Cal.App.4th 1234, recently held that expert testimony similar to that involved in this case was improper and hence inadmissible. In *Baker*, a psychologist that had evaluated the

appellant for treatment as an MDO testified that she had reviewed appellant's central criminal file, which included a description of the crime, her probation report, and information concerning her performance on parole. Based on that review, the psychologist opined not only that the offense was caused by appellant's mental illness, but also that the offense (arson) was a qualifying offense under section 2962 because it posed a danger to others, including potential fatalities. (*Id.* at p. 1239).[3] On appeal, appellant contended that there was insufficient evidence that she had committed a qualifying offense, and in particular that the expert's recitation of the facts surrounding the arson incident were hearsay and hence inadmissible, because it merely repeated the information contained in documents that were not admitted into evidence and that could therefore not be admitted as independent proof of those "facts." The Court of Appeal agreed, stating that appellant's hearsay objections were well taken and should have been sustained. The Court stated that the psychologist was not competent, under section 801, to opine as to whether the arson posed a substantial danger to others, because (1) to the extent it constituted a factual question, it did not require an expert opinion; and (2) to the extent it constituted a legal conclusion, it was not substantial evidence. (*Baker*, 204 Cal.App.4th at pp. 1246-47).[4] Moreover, the Court held that, although the psychologist

---

[3]In particular, the file stated that appellant was convicted of arson on an inhabited structure and described the underlying facts, including that the structure was appellant's mother's house; that appellant and her brother lived there; and that two people were taken to the hospital for smoke inhalation due to the incident. (*See* 204 Cal.App.4th at p. 1239).

[4]The court in *Baker* nonetheless upheld the commitment order, finding that a portion of the probation report, which was admitted into evidence without objection, and that stated that appellant's brother was treated for smoke inhalation, supported a determination that

could rely on hearsay documents to support her opinion regarding causation, those documents could not be used as independent proof of the facts surrounding the arson or, therefore, to support a finding that the crime involved force or violence or met the criteria under section 2962, subdivision (e)(2)(L). (*Baker*, 204 Cal.App.4th at pp. 1246-47).

In issuing the above holding, the court in *Baker* criticized statements made by the Second District in *People v. Miller* (1994) 25 Cal.App.4th 913. (*Baker*, 204 Cal.App.4th at p. 1245 n. 9). In *Miller*, appellant argued that trial court improperly admitted the testimony of the psychologist that evaluated him that his commitment offense involved force or violence, which was based on his review of the probation report, on grounds that it constituted inadmissible hearsay. The Second District rejected the argument, on the ground that appellant failed to object to the testimony to the trial court, and could not raise the issue for the first time on appeal. (*Miller*, 25 Cal.App.4th at p. 917). The Court proceeded, however, to address the merits, stating that "[w]hether or not a prisoner is an MDO is the proper subject for expert opinion," and that "[s]uch an opinion necessarily entails an opinion as to each of the criterion [sic] or elements thereof." (*Id.*) The Court in *Baker*, however, disagreed with that statement, stating that "[a]lthough an expert opinion is required as to some of the criteria in order to determine whether the prisoner is an MDO, expert opinion is not necessary – or admissible – with respect to the facts underlying the offense or whether the offense posed a risk of harm to others, or the factual inquiry as to whether the prisoner received 90 days of treatment." (*Baker*, 204

---

the offense involved a danger to others and, therefore, supported the commitment order. (*Baker*, 204 Cal.App.4th at p. 1247).

Cal.App.4th at p. 1245 n. 9).[5]

C. Review By This Court Is Both Necessary And Appropriate To Resolve The Conflict Between The Second And Fourth Districts And Ensure Uniform Administration Of The Mentally Disordered Offender Statute.

Applying the above principles to the facts of this case, it is clear that review by this Court is, for several reasons, necessary and appropriate in this case. First, and most fundamentally, review is necessary to resolve the conflict between the Fourth District's decision in *Baker* and the Second District's decision in this case. The two decisions are obviously fundamentally at odds and, as the court in this case recognized in its criticisms of *Baker*, represent fundamentally opposite views of the nature of MDO proceedings and the "practical implications and fair administration" of the MDO statute. (Slip Opinion, p. 5.) Moreover, this case involves both a vital cog in the State's criminal justice system (i.e. the MDO statute), and a key issue in the administration of that statute, given the central role played by expert opinion testimony in MDO proceedings. As a result, the existence of two divergent sets of rules governing such proceedings, and in particular the admission and use of expert opinion testimony – both of which are now reflected in reported appellate decisions – is clearly inimical to the uniform administration of justice. That is particularly so given the fact that, as here, MDO cases customarily arise out of the appellate district in which a state mental hospital is located and that, absent clarification

---

[5]After holding that the "force or violence" criterion was properly the subject of expert testimony, the Court in *Miller* stated that the expert could rely on the probation report, even though it was hearsay, because it was the type of document that may reasonably be relied on by experts under Evidence Code section 801, and because appellant had an adequate opportunity to challenge the underlying information in the report, both at the initial felony sentencing and at the MDO hearing. (*Miller*, 25 Cal.App.4th at pp. 917-18).

Cal.App.4th at p. 1245 n. 9).[5]

C. Review By This Court Is Both Necessary And Appropriate To Resolve The Conflict Between The Second And Fourth Districts And Ensure Uniform Administration Of The Mentally Disordered Offender Statute.

Applying the above principles to the facts of this case, it is clear that review by this Court is, for several reasons, necessary and appropriate in this case. First, and most fundamentally, review is necessary to resolve the conflict between the Fourth District's decision in *Baker* and the Second District's decision in this case. The two decisions are obviously fundamentally at odds and, as the court in this case recognized in its criticisms of *Baker*, represent fundamentally opposite views of the nature of MDO proceedings and the "practical implications and fair administration" of the MDO statute. (Slip Opinion, p. 5.) Moreover, this case involves both a vital cog in the State's criminal justice system (i.e. the MDO statute), and a key issue in the administration of that statute, given the central role played by expert opinion testimony in MDO proceedings. As a result, the existence of two divergent sets of rules governing such proceedings, and in particular the admission and use of expert opinion testimony – both of which are now reflected in reported appellate decisions – is clearly inimical to the uniform administration of justice. That is particularly so given the fact that, as here, MDO cases customarily arise out of the appellate district in which a state mental hospital is located and that, absent clarification

---

[5]After holding that the "force or violence" criterion was properly the subject of expert testimony, the Court in *Miller* stated that the expert could rely on the probation report, even though it was hearsay, because it was the type of document that may reasonably be relied on by experts under Evidence Code section 801, and because appellant had an adequate opportunity to challenge the underlying information in the report, both at the initial felony sentencing and at the MDO hearing. (*Miller*, 25 Cal.App.4th at pp. 917-18).

from this Court, the rules governing procedures in MDO cases will vary according to whether the prisoner is incarcerated in Atascadero State Hospital (located in the Second District), Patton State Hospital (located in the Fourth District), or any of the other state hospitals located in any of the other appellate districts,[6] each of which is presently free to adopt the reasoning in *Baker* or this case, or to craft their own individual rules for the admission of expert opinion testimony. Clearly, it is unfair and contrary to the interests of uniform, efficient judicial administration to have the rules and procedures governing MDO proceedings depend on nothing more than the happenstance of where the prisoner is presently being treated or incarcerated.

D. Review By This Court Is Also Appropriate In Light Of The Clearly Erroneous Nature Of The Court Of Appeal's Decision In This Case, Including Its Disregard Of The Requirements For The Admission Of Expert Opinion Testimony Set Forth In The Evidence Code And Case Law, And Its Improper Creation Of A Separate Set Of Rules And Procedures In MDO Proceedings.

In addition, review by this Court is appropriate because the Second District's opinion in this case was clearly erroneous, and both logically and legally flawed.[7] As shown above in section A., Evidence Code section 801 limits the introduction of expert testimony to matters that are beyond common knowledge or experience, and to matters of opinion rather than facts. In addition, the case law, including most notably decisions by this Court in *Gardeley* and *Whitfield*, clearly distinguishes between the admission of an

---

[6]Those facilities include hospitals located in Napa (First Appellate District), Coalinga (Fifth District), and Stockton and Vacaville (Third District).

[7]Pursuant to Rule 8.1125 of the California Rules of Court, is submitting a separate request that this Court alternatively depublish the Court of Appeal's decision in this case.

expert's testimony regarding factual matters for the purpose of explaining the basis for the expert's opinion and as independent "proof" of those facts, and prohibit the use of an expert to "channel" testimony as to factual matters that are otherwise hearsay and hence inadmissible. Moreover, although certain statutory requirements for commitment of a prisoner as a mentally disordered offender clearly reflect matters of opinion that are beyond common experience and therefore clearly call for the expression of expert psychological testimony,[8] those requirements also reflect matters – including whether the offense constituted a crime of "force or violence" and whether the prisoner received ninety (90) days of treatment for the disorder during the year preceding his or her scheduled parole – that are purely factual in nature, and/or that require no particular experience, training, or expertise. As a result, those matters are either not properly the subject of expert testimony at all or, at best, are not properly the subject of testimony by a psychologist, psychiatrist, or other mental health professional, whose expertise lies in the area of mental health, not criminology. Just as "you don't need a weatherman to know which way the wind blows" (*see, e.g., Jorgensen v. Beach 'n' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163, quoting Bob Dylan,"Subterranean Homesick Blues"), one does not need a psychologist to determine whether a particular offense that is not enumerated in the MDO statute involved the use of force or violence, or to review treatment records

---

[8]Those matters include that the prisoner has a severe mental disorder and that the disorder is not in remission or cannot be kept in remission without treatment (Penal Code section 2962, subdivision (a)); that the disorder caused or aggravated the crime for which the prisoner was sentenced (subdivision (b)); and that the prisoner by reason of his or her mental disorder, represent a "substantial danger of physical harm to others" (subdivision (d)(1)).

reflecting the purely numerical issue of the amount of days of treatment received by a prisoner prior to his or her scheduled parole.

As set forth above in section B., the Fourth District, in its decision in *Baker*, properly and straightforwardly applied these basic principles to the context of an MDO proceeding. Regrettably, however, the decision in the present case failed to do so. Instead, the court labored to articulate a rationale for the differential treatment of MDO proceedings that is neither persuasive nor consistent with the authority set forth above. The court hopelessly blurred the distinction between the admission of factual testimony as the basis for an expert's opinion and the admission of such testimony as independent proof of such facts. (Slip Opinion, pp. 2-3).[9] Moreover, while purporting to declare that "[t]o be sure, the Evidence Code applies to MDO trials" (Slip Opinion, p. 5), the court, in contrast to the opinion in *Baker*, in effect created a special rule for such proceedings, stating among other things that the statute must be viewed in the "specific context of an MDO proceeding" (Slip Opinion, p. 5), and that the individual requirements under the MDO statute "must be interpreted in the particular context of an MDO case" (*Id.*, p. 6.) As a result, the court relied on a series of wholly inappropriate "policy" justifications for disregarding the rules of evidence, including its own workload and the fact that it was

---

[9]Thus, for example, there was no basis for the appellate court's determination that 's counsel waived the issue by failing to object to the trial court (Slip Opinion, p. 2). Instead, trial counsel made clear that he did not object to the admission of such evidence to support Perry's opinion that petitioner's disorder caused or aggravated the commitment offense, but did object to the admission of such evidence as substantive proof that the offense involved false or violence. Further, because the present matter involved a court trial, trial counsel's objection at the close of evidence, rather than contemporaneously with the expert's testimony, was nonetheless timely and valid.

"tasked with appellate review of a great many California MDO cases," its professed concern that the victims of the underlying crimes not be "'revictimized' by having to testify again and relive their unpleasant experience" (Slip Opinion, p. 4), and its subjective belief that the existing provisions of the MDO statute and state and federal constitutions, including the presence of a "perfectly good Superior Court Judge" (*Id.*, p. 5) were adequate to protect a prisoner in an MDO proceeding. But the job of articulating what protections are "adequate" is not that of an appellate court where, as here, evidentiary principles of general application, as set forth in the Evidence Code and binding decisions by this Court, exist and govern the particular action. Similarly, the court's subjective desire to streamline MDO proceedings does not justify disregarding basic protections to which a prisoner, as well as every other litigant in California, is entitled.

The court's remaining attempts to justify its decision, and its disagreement with the decision in *Baker*, similarly do not withstand scrutiny. The court's characterization of the matter as involving whether an expert may opine as to the "ultimate issue" in the case (Slip Opinion, p. 5), ignored the fact that never raised that "issue," as well as the fact that the determination of the "ultimate issue" – i.e. whether petitioner qualified for treatment as an MDO – depended upon the resolution of several factual issues, which as shown above are not properly the subject of expert opinion testimony. Similarly, the court's statement that there is a "mental health component" to each of the criteria under the MDO statute (Slip Opinion, p. 6) is, respectfully, nonsense. Whether or not a crime involves force or violence does not depend upon whether its perpetrator suffered from a mental

illness at the time of its commission. Further, determination of whether the prisoner received the required ninety (90) days of treatment does not involve a qualitative determination as to the nature or efficacy of such treatment, but a purely numerical calculation that an expert is neither especially qualified to make nor allowed to "channel" to the finder of fact.[10] And, the court's refusal to revisit its prior holding in *Miller* that " mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial" (Slip Opinion, pp. 2-3) ignores the established principle that probation reports or other documents may be used to prove a prior conviction only if the , facts asserted in the document are independently admissible under the rules of evidence, including hearsay rules. (*See. e.g., People v. Guerrero* (1988) 44 Cal.3d 343, 352; *People v. Reed* (1996) 13 Cal.4th 217, 230.)

---

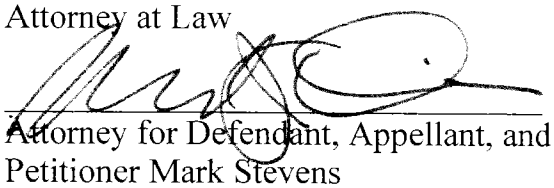
[10]In this regard, the appellate court's comments that "[s]urely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar," its rhetorical question as to whether the People were required to produce a custodian of records to say that the prisoner received ninety days of treatment, and its claim that such a requirement "would accomplish nothing" (Slip Opinion, p. 7) utterly miss the point. There is no indication that a review of medical records to determine the days on which treatment was rendered involves "deciphering" or any other special skill, and the trier of fact is just as qualified as a testifying expert to count those days and determine if they meet the statutory minimum. Moreover, allowing the expert to summarize the documents showing such treatment not only violates the proscription against improper "channeling," but deprives the prisoner of any ability to challenge that determination by reviewing the actual records or cross-examining the expert as to his or her conclusions. Further, the court's observation that records of treatment records are used not only to ascertain whether the 90 day rule has been met but also to administer treatment (Slip Opinion, p. 7), even if true, is irrelevant, because: (1) the testifying expert is almost invariably a third party retained to evaluate the prisoner for possible classification as an MDO, and therefore not involved in his or her care; and (2) that "fact" at most is relevant to the issue of whether the records were kept in the normal course of business, as required for admission under the "business records" exception to the rule against hearsay. (*See* Evidence Code section 1271, subdivision (a).)

Finally, the criticism by the present Court of Appeal of the result and reasoning in *Baker* (Slip Opinion, p. 5) is entirely misplaced. Contrary to the court's opinion, there is nothing "unrealistic," impractical or unfair about applying standards set forth in the Evidence Code and the binding decisions of this Court to proceedings under the MDO statute. Similarly, it is not the province of the court in *Baker* or elsewhere to "tell the People how to proceed"; rather, that determination is to be made by applying those principles that every other litigant in California is required to follow. And, the present court's lament that "[a]bsent a stipulation, the People must prove each and every element of the MDO criteria" means nothing more than the prosecutor must take the statute as he or she finds it, and that a prisoner scheduled for release on parole can continue to have his liberty deprived only upon a showing, beyond a reasonable doubt and by competent, admissible evidence, that each of those criteria were met.

In sum, then, both the need to secure uniform application of the Mentally Disordered Offender statute and efficient judicial administration, and the need to correct a patently erroneous and ill-conceived decision by the present Court of Appeal, justify this Court's review of the Court of Appeal's decision in this case.

DATED: March 29, 2013

GERALD J. MILLER
Attorney at Law



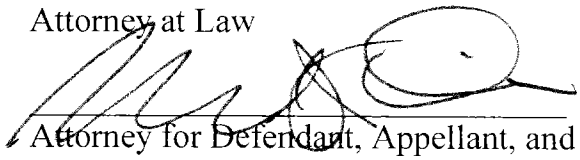
Attorney for Defendant, Appellant, and
Petitioner Mark Stevens

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1) of the California Rules of Court, the undersigned counsel states that the foregoing petition contains 6,415 words, according to the word count of the computer program used to prepare the brief.

DATED: March 29, 2013

GERALD J. MILLER
Attorney at Law



Attorney for Defendant, Appellant, and Petitioner Mark Stevens

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK STEVENS,

Defendant and Appellant.

2d Crim. No. B241356
(Super. Ct. No. F471357)
(San Luis Obispo County)

In mentally disordered offender (MDO) law, the familiar rule of *People v. Miller* (1994) 25 Cal.App.4th 913 has well served the interests of prisoners and the people for close to 20 years. A qualified mental health professional may rely on a probation report to render an opinion whether a defendant is an MDO. Here we respectfully disagree with the dicta expressed by our colleagues in *People v. Baker* (2012) 204 Cal.App.4th 1234, 1246.

Mark Stevens appeals from the judgment entered after the trial court determined he was an MDO. (Pen. Code, § 2960 et seq.)[1] He contends that 1. the People's expert was erroneously allowed to give an opinion on "force or violence," and 2. there is no substantial evidence to support the finding that the commitment offense, petty theft with a prior, is a qualifying offense. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

Doctor Kevin Perry, a clinical psychologist at Atascadero State Hospital, opined that appellant suffered from a severe mental disorder, schizophrenia undifferentiated type, and met all the MDO criteria.

Relying on the probation report, Doctor Perry described the circumstances of the 2009 commitment offense as follows: "Mr. Stevens was observed placing items at a drug store into his waistband and pockets and then walking out of the store without paying. When loss prevention officers then confronted him about that, Mr. Stevens threatened to assault and to kill the loss prevention agents. [¶] He, also, tried to push a shopping cart into one of them."

Although petty theft with a prior is not a crime of force or violence, the trial court found that appellant's threats and violent acts in the commission of the offense came within the "force or violence" provision of the MDO law.

Reliable Hearsay and Expert Opinion

Appellant argues that Doctor Perry's testimony was based upon hearsay. When asked whether appellant represented a danger of physical harm to others, Doctor Perry testified, without objection: "Mr. Stevens has a history of aggressive and threatening behaviors during periods of psychiatric instability. As I already testified, during the MDO qualifying offense he threatened to kill los[s] prevention agents."

At the conclusion of the trial, appellant argued that Doctor Perry's testimony was hearsay and there was no substantive evidence of force or violence. The trial court ruled: "The testimony, though, about the commission of the crime came in without objection." We agree. Appellant is precluded from arguing for the first time on appeal that the testimony was hearsay or violated the confrontation clause. (*People v. Miller, supra,* 25 Cal.App.4th at p. 917; *People v. Tafoya* (2007) 42 Cal.4th 147, 166.)

On the merits, it is settled law in this appellate district that a mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial. (*People v. Valdez* (2001) 89 Cal.App.4th 1013, 1017; *People v. Campos*

(1995) 32 Cal.App.4th 304, 310; *People v. Miller, supra*, 25 Cal.App.4th at pp. 917-918.) Doctor Perry's testimony concerning the probation report was not offered for the truth of the facts stated but as the basis for the doctor's expert opinion. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 747.) "The hearsay relied upon by an expert in forming his or her opinion is 'examined to assess the weight of the expert's opinion,' not the validity of [its] contents. [Citation.]" (*Ibid.*)

Sufficiency of the Evidence

Appellant contends that the evidence is insufficient because a trial court may not rely on hearsay, i.e., the probation report, as independent proof of the facts asserted in the hearsay statement. The contention is based on the theory that force or violence is a matter for the trier of fact to resolve. From this premise, appellant argues that Evidence Code section 801, subdivision (a) bars expert testimony on matters within the common experience of the trier of fact. But "[t]here is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case." (*People v. Wilson* (1944) 25 Cal.2d 341, 349.) Evidence Code section 801, subdivision (a) "does not flatly limit expert opinion testimony to subjects 'beyond common experience'; rather, it limits such testimony to such subjects *'sufficiently* beyond common experience *that the opinion of an expert would assist the trier of fact'* (italics added) . . . . The jury [or trial court] need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted wherever it would 'assist' the jury." (*People v. McDonald* (1984) 37 Cal.3d 351, 367; see also *People v. Stoll* (1989) 49 Cal.3d 1136, 1153-1154.)

Relying on the Fourth Appellate District opinion in *People v. Baker, supra,* 204 Cal.App.4th at page 1246, appellant argues that a witness's on-the-record-recitations of sources relied on for an expert opinion does not transform inadmissible matter into independent proof of a disputed fact. The discussion in *Baker* is dicta because defendant

did not object on hearsay grounds or object that it was "beyond the scope of expert opinion testimony . . . . Because there was no objection, the [trial] court could properly rely on [it]." (*Ibid.*)

Like the defendant in *Baker*, appellant did not timely object when Doctor Perry testified that appellant threatened to kill the loss prevention officers and charged an officer with a shopping cart. Doctor Perry explained it was "only about $27 worth of merchandise. So to threaten someone's life and attempt to assault them over such minor items, to me suggests an irrational thought process. [¶] And, according to the probation officer's report, Mr. Stevens, also made a statement consistent with delusional ideation. He stated to the arresting officers that he watches the backs of the employees at the drug store."

"[I]n the context of an MDO proceeding, . . . a qualified mental health professional may refer to and consider the underlying probation report in expressing an opinion that the prisoner is an MDO. This includes the criterion or element that the underlying offense is one involving 'force or violence.' " (*People v. Miller, supra,* 25 Cal.App.4th at p. 917.)

Explication of People v. Miller

This division is tasked with appellate review of a great many California MDO cases. Since the inception of the MDO law, we have reviewed hundreds of these cases. In the early 1990s, there was a spate of appeals where appellants were protesting the district attorney's policy of producing the victim or victims of the underlying crime or crimes to show the crime involved force or violence. The basic theory of these appeals was that it was "unfair" and "prejudicial" because the victims, in relating what had happened, were so sympathetic that the prisoner was incapable of receiving a fair jury trial on the MDO issue. This, coupled with a common sense view that such victims should not be "revictimized" by having to testify again and relive their unpleasant experience, we articulated the *Miller* rule. In a sexually violent predator case, the Legislature and California Supreme Court recognized that a person should not be

revictimized in a post-conviction proceeding by being recalled to again testify. (*People v. Otto* (2001) 26 Cal.4th 200, 208.)

Baker (204 Cal.App.4th at p. 1245, fn. 9) disagrees with the *Miller* rule: "[An] expert opinion is not necessary -- or admissible -- with respect to the facts underlying the offense or whether the offense posed a risk of harm to others, or the factual inquiry as to whether the prisoner received 90 days of treatment." If one asks, in the abstract, whether a psychiatrist or psychologist can render an opinion on the question of whether a crime involves force or violence, we agree it is not within the expertise of the witness. We reach an opposite conclusion in the specific context of an MDO proceeding. (*People v. Miller*, *supra*, 25 Cal.App.4th at p. 917.)

In our view, the dicta in *Baker, supra,* 204 Cal.App.4th 1234, take an unrealistic view of the law of evidence in an MDO case. To be sure, the Evidence Code applies to MDO trials. But *Baker's* dicta dramatically reduce the sweep of Evidence Code section 801 and violate the spirit of the *McDonald* rule. (See *ante* at p. 3.) *Baker's* dicta fail to take into account the practical implications and fair administration of the MDO law. Its dicta tell the People how not to proceed, but fail to tell the People how to proceed. Absent a stipulation, the People must prove each and every element of the MDO criteria. Following *Baker*, the People would be required to produce eyewitness testimony on the nature of the offense to determine whether or not it involved the use of force or violence. This, of course, is the very procedure that we sought to avoid when we decided *Miller*.

The *Miller* rule is firmly rooted and it works. When we articulated it, we considered the elements of a prima facie MDO case, statutory and decisional law regarding expert opinion evidence, and policy considerations of how the law should be applied. Relying on common sense, we came to a reasoned procedural rule. When stripped of verbiage and adjectives, the basic inquiry centers on the prisoner's mental health and potential threat to the public. Who better than a psychiatrist or a psychologist should opine, one way or another, on this ultimate issue?

"An offender is eligible for commitment under the MDO Act if all of the following six factors are met: (1) the prisoner has a severe mental disorder; (2) the prisoner used force or violence in committing the underlying offense; (3) the prisoner had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission in the absence of treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people. [Citations.]" (*People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; compare *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.)

We believe there is a mental health component to each of these factors. These factors must be interpreted in the particular context of an MDO case. There can be no doubt or room for debate on factors (1), (3), and (4), and *Baker* does not indicate to the contrary. As to factor (2), the very facts of this case illustrate just why there is a mental health component with respect to the use of force or violence, or the threat thereof. (*People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1082-1083.) It is the mental health expert who can bring the raw facts together with a mental health explanation into perspective for the jury. (See *ante*, at p. 4)

As to factor (5), whether an expert can testify that a prisoner has received 90 days of treatment, we ask, why not? Surely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar. Are the People required to produce the custodian of records to say that the prisoner received the 90 days of treatment? Such records are not kept merely for the 90 day rule, doctors rely on them in administering a course of treatment. They are "reliable" and a doctor's interpretation of these records will "assist" the trier of fact in making its determination. (Evid. Code § 801 subd. (a).) Most jurors do not have "common experience" to read or interpret such records. (*Ibid.*) Any requirement that the custodian of records be called as a witness to testify concerning the treatment provided and the mathematical computation of days of treatment would accomplish nothing. In addition, there is a mental health component

here as well. A doctor can relate to the jury the nature of the treatment, what it was to accomplish, and why it either succeeded in part, failed in part, or failed all together.

As to factor (6), whether the prisoner poses a threat of physical harm to other people, it is well established that such an opinion is the nature of forensic mental health opinion evidence. For example, such an expert is allowed, in some circumstances, to so opine in the context of the penalty phase in a capital murder case (*People v. Murtishaw* (1981) 29 Cal.3d 733, 774; *Barefoot v. Estelle* (1983) 463 U.S. 880, 896 [77 L.Ed.2d 1090, 1106]) and a sexually violent predator proceeding. (*People v. Therrian* (2003) 113 Cal.App.4th 609, 613; see also *People v. Williams* (2003) 31 Cal.4th 757, 761, 778.) Preclusion of expert testimony on this issue "is somewhat like asking us to disinvent the wheel." (*Barefoot*, at p. 896 [77 L.Ed.2d at p. 1106.)

Finally, the prisoner has a panoply of constitutional and statutory rights which are adequate to protect him. In addition, there is a perfectly good Superior Court Judge presiding over the trial whose job it is to safeguard those rights and who, pursuant to the Evidence Code, has considerable discretion in determining the admissibility of expert opinion evidence. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-619.)

We explained in *Miller* that a doctor can rely on reliable hearsay contained in a probation report in forming an expert opinion as to "force or violence," or a threat thereof. If the opinion is too speculative, we are confident that the trial court will not allow such opinion. We have explicated *Miller* and have shown, legally and logically, why there is a "mental health" component to each of the MDO factors. In our view, the MDO procedures that we adopted in *Miller* have served the prisoners and the People well for almost 20 years. To quote Justice Oliver Wendell Holmes: "The life of the law has not been logic; it has been experience." (Holmes, The Common Law (1881) reprinted in Leflar, Appellate Judicial Opinions (1974) p. 217; see also *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349 [65 L.Ed. 963, 983].) "[A] page of history is worth a volume of logic." (*New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349 [65 L.Ed. 963, 983].)

For these reasons, we reject the *Baker* dicta concerning the scope of expert opinion. Instead, we rely on the rationale of our *Miller* case.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Barry T. LaBarbara, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is P.O. Box 432, Agoura Hills, CA 91376-0432. On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Agoura Hills, California, addressed as follows:

DATE OF SERVICE: March 29, 2013

DOCUMENT SERVED: PETITION FOR REVIEW

PERSONS SERVED:

District Attorney
County of San Luis Obispo
County Government Center, Room 450
San Luis Obispo, CA 93408

Office of the Attorney General
300 S. Spring St.
Los Angeles, CA 90013

California Appellate Project
520 S. Grand Ave., Fourth Floor
Los Angeles, CA 90071
ATTN: Richard Lennon, Esq.

Clerk, Superior Court
County of San Luis Obispo
1050 Monterrey Street, Room 220
San Luis Obispo, CA 93408

Mark Stevens AT#062135
Atascadero State Hospital
P.O. Box 7004
Atascadero, CA 93423

Frederick F. Foss, Esq.
1199 Palm Street
San Luis Obispo, CA 93401

Clerk, Court of Appeal
Second Appellate District, Division Six
200 East Santa Clara Street
Ventura, CA 93001

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Agoura Hills, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 29, 2013 at Agoura Hills, California.

GERALD J. MILLER