In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARK STEVENS,

Defendant and Appellant.

Case No. S209643

San Luis Obispo County Superior Court, Case No. F471357
Honorable Roger D. Randall, Retired Judge*

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

May an expert's testimony in support of a defendant's commitment under the Mentally Disordered Offender Act (Pen. Code, § 2960, et seq.) that the defendant used force or violence in committing the commitment offense (Pen. Code, § 2962, subd. (e)(P)) and that he received treatment for at least 90 days in the year before being paroled (Pen. Code, § 2962, subd. (c)) [1] be based entirely on hearsay?

INTRODUCTION AND SUMMARY OF ARGUMENT

A parolee (defendant)[2] who is committed to a state hospital under the Mentally Disordered Offender (MDO) Act has the right to challenge his or her initial commitment in a jury trial at which the People must prove each of six criteria or "factors" beyond a reasonable doubt. At issue here are two of those factors: factor (2), requiring that the crime for which the defendant was sentenced was one of a list of enumerated offenses, or any crime in which the defendant used force or violence or caused serious bodily injury, or threatened to use force or violence likely to produce substantial physical harm; and factor (5), requiring that the defendant was in treatment for the severe mental disorder for at least 90 days during the year before his or her parole.

Since the MDO Act took effect in 1986, the prevailing practice at such trials has been for the People to prove each of the six factors through the expert opinion testimony of psychiatrists or psychologists who have

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[1] Unless otherwise specified, all subsequent statutory citations will be to the Penal Code.

[2] A person subject to the MDO Act may be described at various procedural stages as a defendant, prisoner, parolee, patient, offender, petitioner, or appellant. This brief will refer generically to such a person as a "defendant," as does this Court's order granting review.

personally examined the defendant and have reviewed relevant court, prison, and state hospital records.[3] Regarding the two factors at issue here, such experts have based their conclusions on their review of reliable documents, such as probation reports and prison records, pertaining to the defendant's underlying offense and mental health treatment in prison. The experts' testimonial opinions, subject to full cross-examination, are then admitted as substantive evidence that the defendant meets each factor.

This procedure was approved in *People v. Miller* (1994) 25 Cal.App.4th 913, and is founded upon the well-established rule that an expert witness is permitted to base his or her opinions and conclusions on reliable hearsay. This practical approach has avoided the need to summon the victims or other crime witnesses to court to testify again in a virtual retrial of the facts of the original crime, and has enabled the focus of MDO proceedings to be on the defendant's mental health.

At appellant's MDO hearing, the People proved factors (2) and (5) in the manner approved by *Miller*. Appellant now asks this Court to nullify this well-established practice and hold that a mental health expert may not give testimonial opinions regarding factors (2) and (5) based on reliable

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[3] See e.g., *People v. Achrem* (2013) 213 Cal.App.4th 153, 155 [forensic psychologist from Atascadero State Hospital opined that the defendant met all MDO factors except factor (5)]; *People v. Baker* (2012) 204 Cal.App.4th 1234, 1238-1239; *People v. Taylor* (2008) 160 Cal.App.4th 304, 307 [treating psychologist testified about crime facts]; *People v. Kortesmaki* (2007) 156 Cal.App.4th 922, 925; *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1090-1091; *People v. Green* (2006) 142 Cal.App.4th 907, 909-910; *People v. Fisher* (2006) 136 Cal.App.4th 76, 79; *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1566-1567; *People v. Martin* (2005) 127 Cal.App.4th 970, 976; *People v. Dyer* (2002) 95 Cal.App.4th 448, 451-452, 456; *People v. Valdez* (2001) 89 Cal.App.4th 1013, 1016; *People v. Campos* (1995) 32 Cal.App.4th 304, 307; *People v. Tate* (1994) 29 Cal.App.4th 1678, 1681; *People v. Coronado* (1994) 28 Cal.App.4th 1402, 1405; *Miller, supra*, 25 Cal.App.4th at p. 916.

hearsay in the form of court and prison records. Appellant's approach would evidently require the People to produce percipient witnesses to the underlying crimes, often several years later, to testify in a second criminal trial regarding typically undisputed crime facts. Such procedures are not only burdensome but unnecessary, and they were not contemplated by the Legislature in enacting the MDO Act.

Instead, the procedures mandated by the Act focus on psychological and psychiatric evaluations by mental health professionals. The overriding purpose of the MDO certification and commitment process is to determine whether a defendant's violent criminal behavior was caused or aggravated by a severe mental disorder that creates a current danger to others and for which the defendant continues to require treatment. All of the MDO factors are interrelated and must be read together in light of that purpose. And a careful reading of the MDO Act and its history indicates that each of the MDO factors, including the two factors at issue here, has a mental health component, rendering it a proper subject for expert opinion testimony based on reliable hearsay.

Factor (2), when based on a non-enumerated crime in which the defendant used or threatened to use force or violence, can involve the interpretation of facts in light of the defendant's particular psychological makeup, and is inextricably intertwined with factor (3) (whether the defendant's severe mental disorder was a cause or aggravating factor in the crime). The legislative history of section 2962 supports this understanding of factor (2) and furthermore suggests the Legislature implicitly ratified the *Miller* decision.

Factor (5), whether the defendant was "in treatment for the severe mental disorder" for at least 90 days during the year before parole, necessarily involves factual issues regarding whether the therapeutic course reflected in prison records constitutes treatment *for* the particular severe

mental disorder evidenced in support of the other factors, as well as whether the frequency of treatment comprises being "in treatment" for a given period of time. These, likewise, are mental health issues on which the expert opinion testimony of a psychiatrist or psychologist would assist the trier of fact.

Because each of the MDO factors is a proper subject for expert opinion testimony, an expert should be permitted to offer a testimonial opinion regarding factors (2) and (5) based on reliable hearsay, such as probation reports and prison treatment records. That expert opinion, in turn, may be relied upon as evidence that a defendant meets those factors. This Court should find that the pragmatic procedure long-approved in *Miller* and followed in countless MDO hearings, such as this one, is valid.

STATEMENT OF THE CASE

In 2009, appellant was convicted in the San Diego County Superior Court of petty theft with a prior theft-related conviction (§ 666) and was sentenced in 2010 to 32 months in state prison. (CT 1; Confidential CT 4.) Appellant was due for release on December 2, 2014. (CT 1.) Before appellant's release on parole, the Department of Corrections and Rehabilitation certified him as an MDO under section 2962(d). (2RT 304.) In a March 2, 2012 hearing at which appellant was represented by counsel, the Board of Parole Hearings (BPH) found appellant to meet the criteria for commitment as an MDO under section 2962, and therefore ordered him committed to the Atascadero State Hospital. (CT 1; 2RT 303.) Appellant then petitioned for a hearing in the San Luis Obispo Superior Court pursuant to section 2966, subdivision (b), to challenge the BPH determination. (CT 1.) Appellant waived his right to a jury trial on the petition. (CT 3, 14.)

In a bench trial, Dr. Kevin Perry, a clinical psychologist in the Forensic Services Department of Atascadero State Hospital, testified for the People. (2RT 305.) The parties stipulated that Dr. Perry, who had performed approximately 600 MDO evaluations (2RT 305), was qualified as an expert witness on the criteria of the MDO Act (§ 2960, et seq). (2RT 303.) To prepare appellant's evaluation, Dr. Perry reviewed appellant's medical records at Atascadero State Hospital, appellant's prior MDO evaluations, and the probation officer's report regarding appellant's MDO-qualifying offense. (2RT 305.) Dr. Perry also spoke with appellant's treating psychologist about appellant's behaviors and progress. (2RT 305-306.) Dr. Perry attempted to interview appellant, but appellant refused. (2RT 306.)

Dr. Perry opined that appellant met each of the MDO factors in section 2962.[4] Regarding factor (1) – that appellant had a "severe mental disorder" (§ 2962, subd. (a)(1)) – Dr. Perry testified that appellant suffered from schizophrenia undifferentiated type, as of March 2, 2012, as shown by records indicating that appellant responded to auditory hallucinations, held

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[4] As discussed *post*, those factors include: (1) that the defendant has a severe mental disorder; (2) that the defendant used force or violence in committing the underlying offense; (3) that the defendant's severe mental disorder caused or was an aggravating factor in committing the offense; (4) that the disorder is not in remission or capable of being kept in remission absent treatment; (5) that the defendant was in treatment for the disorder for at least 90 days in the year before being paroled; and (6) that because of the disorder, the defendant poses a serious threat of physical harm to other people. (§ 2962; *People v Jauregui Garcia* (2005) 127 Cal.App.4th 558, 564; *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.) For ease of reference, respondent will refer to the factors by number, based on the above enumeration, as they have been so-enumerated in several appellate decisions. (E.g., *Jauregui Garcia, supra,* 127 Cal.App.4th at p. 564; *Sheek, supra,* 122 Cal.App.4th at p. 1610; *Clark, supra,* 82 Cal.App.4th at pp. 1075-1076.)

grandiose delusions,[5] exhibited thought disorder via rambling, incoherent and illogical speech patterns, and displayed paranoia and psychomotor agitation. (2RT 306-307.)

Dr. Perry opined that appellant met factor (3) – that his severe mental disorder was a cause or an aggravating factor in the crime for which he was sentenced to prison (§2962, subd. (b)). (2RT 308, 314.) When the prosecutor asked Dr. Perry to describe the facts of the crime, appellant objected on the grounds that, "This calls for hearsay. Not subject to opinion." With no ruling on the objection from the trial court, the prosecutor withdrew the question, and next asked, "On which do you base your opinion that Mr. Stevens' severe mental disorder was an aggravating factor in the commission of the crime?" (2RT 308.) Appellant did not object to that question. Dr. Perry answered that he relied, in part, on the "circumstances of that crime." Dr. Perry explained that appellant, who had a pre-existing psychotic disorder, placed $27 worth of items at a drug store into his waistband and pockets and walked out of the store without paying for them. When confronted by loss prevention officers, appellant threatened to assault and kill the officers and attempted to push a shopping cart into them. Appellant told one of the arresting officers that he "watches the backs" of the store employees. (2RT 308-309, 311.)[6] Appellant did not object or move to strike or limit the use of any of that testimony.

Tying the crime facts to factor (3), Dr. Perry opined that assaulting and threatening someone's life over such a small value of merchandise suggested an irrational thought process, and that appellant's statement to the arresting officers was consistent with his delusions of being involved in

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[5] Among his many delusions was that he was a law enforcement agent. (2RT 306.)

[6] Dr. Perry apparently based that testimony on his understanding of the crime facts gleaned from the probation officer's report. (See 2RT 305.)

public safety. (2RT 308-309.) During cross-examination of Dr. Perry, appellant actively elicited further testimony about the crime facts. (2RT 314.) On redirect examination, the People asked Dr. Perry to explain why, in his opinion, appellant's crime of petty theft with a prior theft-related conviction met factor (2), even though such a crime does not, by definition, involve force or violence. Appellant objected on hearsay and foundational grounds, and the trial court sustained the objection, explaining, "I have testimony as to what he has told us." (2RT 315.)

Regarding factor (4) (§ 2962, subd. (a)(1)), Dr. Perry opined that appellant's severe mental disorder was not in remission as of March 22, 2012. (2RT 309-310.) Atascadero State Hospital records showed that in the three months preceding the BPH determination, appellant responded to auditory hallucinations in a threatening manner, and expressed grandiose delusions in a rambling and incoherent manner. Appellant exhibited active psychiatric symptoms as recent as one week prior to his hearing before the Board of Parole Hearings. (2RT 309-310.)

Addressing factor (5) (§ 2962, subd. (c)), the 90-day treatment requirement, Dr. Perry testified without objection that while in prison, appellant was enrolled in the Mental Health Services Delivery System where he was offered psychotropic medications and psychological support. (2RT 307.) Appellant was in the Mental Health Services Delivery System for the entire year before his parole date. (2RT 311.) Appellant did not voluntarily comply with his treatment plan during the year prior to his BPH hearing. (2RT 310.) From December 19, 2011, through January 5, 2012, appellant refused to take psychotropic medications. (2RT 312.) Atascadero State Hospital obtained a court order to involuntarily medicate appellant, effective January through July of 2012, due to the danger he presented to others. (2RT 310-312.) On January 22, 2012, appellant spit out his oral medications and kicked the door of the medication room. He

was therefore medicated by an intramuscular injection. (2RT 312.) Despite his substance abuse history, appellant had not begun to participate in the substance abuse prevention program at Atascadero State Hospital by the time of the March 2, 2012 hearing. (2RT 313.) Appellant likewise had not begun to work on a written treatment plan to manage his symptoms if released in the community. (2RT 313.)

Regarding factor (6), Dr. Perry opined that because of appellant's severe mental disorder, he posed a serious threat of physical harm to others as of the date of the BPH hearing. (§ 2962, subd. (d)(1).) (2RT 311-312.) Dr. Perry based that opinion on appellant's history of aggressive and threatening behavior during periods of psychiatric instability, the facts of the underlying felony in which he threatened to kill the loss prevention officers and tried to push a shopping cart into one of them, appellant's delusions and irrational behavior, his 2009 threat to harm a parole officer, and his recent threats to harm hospital staff members. (2RT 311-312.)

The parties stipulated that appellant was certified by the Department of Corrections and Rehabilitation prior to release on parole as required by section 2962, subdivision (d). (2RT 304.) Appellant's criminal history "rap sheet" (Confidential CT 1-5) was admitted into evidence without objection. (2RT 304.)

During summation arguments at the conclusion of evidence, appellant argued there was insufficient evidence of factor (2) because the underlying crime, petty theft with a prior, was not one of the offenses enumerated in section 2962, subdivision (e), and because there was no evidence apart from hearsay that appellant used force or violence in the crime. (2RT 316.) When the trial court noted that Dr. Perry's testimony about the crime facts was received without objection, appellant explained that he did not object because he believed the testimony had been admitted only as a foundation for the expert's opinion regarding factor (3) (that the

defendant's severe mental disorder caused or was an aggravating factor in committing the offense). (2RT 316.)

Citing *Miller, supra*, 25 Cal.App.4th 91, the trial court held that Dr. Perry's testimony was admissible to prove factor (2). (2RT 317.) The court found all MDO criteria had been met. In regard to factor (2), the trial court found that appellant's commitment offense "involves threats of great harm to others" within the meaning of section 2962, subdivision (e)(2)(Q). (2RT 316.)[7]

On appeal, appellant asserted that the evidence was insufficient to support factors (2) and (5), and that the trial court erred by admitting hearsay evidence to prove those factors. The Court of Appeal held that appellant forfeited the latter contention by failing to object properly on hearsay grounds. (Opn. 2.) Alternatively, the appellate court held that Dr. Perry's expert testimony was properly admitted and sufficed to support the MDO factors, reaffirming its earlier opinion in *Miller*. (Opn. 2-7.)

ARGUMENT

I. OVERVIEW OF THE MDO ACT

The MDO Act requires that defendants who have been convicted of violent felonies related to their mental disorders, and who continue to pose a danger to others, be civilly committed to a state hospital for mental health treatment upon being paroled or released from prison until their mental disorders can be kept in remission. (Pen. Code, § 2960 et seq; *In re Qawi*

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[7] Although this Court granted review on the issue of whether an expert's testimony that the defendant used force or violence in the commitment offense within the meaning of subpart (P) of section 2962, subdivision (e) may be based entirely on hearsay, it appears the trial court actually relied, either wholly or in part, on subpart (Q) of that statute, which applies where the offense involved *threats* of force or violence. (2RT 316.)

(2004) 32 Cal.4th 1, 9 [the MDO Act has the dual purpose of protecting the public while treating severely mentally ill offenders].) "The MDO Act is not penal or punitive, but is instead designed to 'protect the public' from offenders with severe mental illness and 'provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.'" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061.) The statutory scheme provides for treatment of certified MDOs at three stages of commitment: as a condition of parole (the stage at issue here), in conjunction with the extension of parole, and following release from parole. (*Ibid.*)

Section 2962 governs the first of the three commitment phases. (*Lopez, supra*, 50 Cal.4th at pp. 1061-1062.) Before the defendant is released from prison, a chief psychiatrist from the Department of Corrections and Rehabilitation must certify to the BPH: that the defendant has a severe mental disorder; that the disorder is not in remission or capable of being kept in remission absent treatment; that the disorder caused or was an aggravating factor in committing the offense; that the defendant was in treatment for the disorder for at least 90 days in the year before being paroled; and that because of the disorder, the defendant poses a serious threat of physical harm to other people. (§ 2962, subd. (d).) The defendant must be evaluated by both the person in charge of his or her treatment in prison and a psychologist or psychiatrist from the Department of State Hospitals (DSH). If those evaluators concur with the chief psychiatrist's conclusion that the defendant has a severe mental disorder which is not in remission or cannot be kept in remission without treatment, and that the disorder was a cause of or aggravated the defendant's criminal behavior, then the defendant is found to be an MDO and is to be involuntarily

committed to a state hospital for treatment as a condition of parole (§ 2962, subd. (d).)[8]

A defendant may challenge an MDO certification decision by requesting a hearing before the BPH. At that hearing, the Department of Corrections and Rehabilitation has the burden of proving that the defendant meets the following six criteria: (1) that the defendant has a severe mental disorder (§ 2962, subd. (a)(1)); (2) that the crime for which the defendant was sentenced to prison was either one of a list of enumerated offenses or any crime in which the defendant used or threatened to use force or violence (§ 2962, subd. (e)(2)); (3) that the defendant's severe mental disorder caused or was an aggravating factor in committing the offense (§ 2962, subd. (b)); (4) that the disorder is not in remission or capable of being kept in remission absent treatment (§ 2962, subd. (a)(1)); (5) that the defendant was in treatment for the disorder for at least 90 days in the year before being paroled (§ 2962, subd. (c)); and (6) that because of the disorder, the defendant poses a serious threat of physical harm to other people (§ 2962, subd. (d)(1)). (Accord, *Clark, supra,* 82 Cal.App.4th at pp. 1075-1076.)

If the BPH finds at the hearing that all six factors have been met, the defendant may challenge that finding by petitioning for a hearing in the superior court of the county in which the defendant is committed for treatment. Such a hearing must begin within 60 days of the filing of the defendant's petition. At the hearing, both parties have the right to a jury,

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[8] If one or both of the two evaluators do not concur with the chief psychiatrist, a situation not at issue here, the MDO Act provides for a further examination by two independent professionals. (§§ 2962, subd. (d)(2), (3), 2978.) Other provisions of the MDO Act, likewise not at issue, govern extensions of the state hospital commitment beyond the period of parole. (§ 2972.)

and the People, represented by the district attorney of the county of treatment, have the burden of proving beyond a reasonable doubt that, as of the time of the BPH hearing, the defendant met all six factors set forth above. (§ 2966, subd. (b).)

II. APPELLANT HAS FORFEITED ANY CHALLENGE TO THE ADMISSION OF EXPERT TESTIMONY BASED ON HEARSAY

Appellant contends that Dr. Perry's testimony regarding the facts of the underlying crime in support of factor (2), and regarding appellant's mental health treatment in prison in support of factor (5), should have been excluded as inadmissible hearsay. Insofar as that hearsay constituted the basis for Dr. Perry's expert opinions, appellant argues that those opinions failed to meet the requirements for admission under Evidence Code section 801, subdivision (a).

This Court should not reach the merits of appellant's contentions regarding the admissibility of expert testimony or hearsay because, as the Court of Appeal found below (Opn. 2), appellant failed to preserve them properly in the trial court. Failure to object to the admission of hearsay evidence at trial forfeits an appellate claim that such evidence was improperly admitted. (Evid. Code, § 353, subd. (a); *People v. Eubanks* (2011) 53 Cal.4th 110, 142 [failure to object to hearsay in expert's testimony forfeited issue]; *People v. Wheeler* (1992) 4 Cal.4th 284, 300.)

At the section 2962 hearing, appellant made absolutely no objection to Dr. Perry's expert testimony, based on hearsay, that appellant was in treatment for his severe mental disorder for at least 90 days within the meaning of MDO factor (5). (2RT 311.) In fact, appellant stipulated that Dr. Perry was qualified to render expert opinions on the MDO criteria. (2RT 303.) Thus, his current challenges to the admissibility of Dr. Perry's opinion testimony or hearsay as to factor (5) were plainly forfeited.

Regarding factor (2) of the MDO statute, appellant failed properly to preserve his current challenge to the court's use of Dr. Perry's hearsay testimony about the facts of his 2009 petty theft with a prior conviction to prove that the offense involved "force or violence" or threats thereof. Although appellant did object on hearsay grounds when the prosecutor asked Dr. Perry to "describe the crime," the prosecutor promptly withdrew that question unanswered, and appellant never pressed for a ruling on the objection from the trial court. (2RT 308.) (*People v. Morris* (1991) 53 Cal.3d 152, 195 [failure to press for a ruling on an evidentiary objection at trial forfeits the issue on appeal], disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830; *People v. Hayes* (1990) 52 Cal.3d 577, 619 ["counsel's failure to obtain a ruling is fatal to defendant's appellate contention, for a party objecting to the admission of evidence must press for an actual ruling or the point is not preserved for appeal."].) When the prosecutor then asked Dr. Perry for the basis of his opinion that appellant's severe mental disorder was an aggravating factor in the commission of the crime, and Dr. Perry responded by relating the facts of the 2009 offense, appellant did not object on hearsay or any other grounds, nor did he seek a ruling limiting the use of Dr. Perry's hearsay testimony. (2RT 308.) During cross-examination of Dr. Perry, appellant actively elicited further testimony about the crime facts. (2RT 314.)

On redirect examination, when the prosecutor asked Dr. Perry about the basis for his opinion that the crime involved force or violence, appellant did object on both hearsay and foundational grounds. The court sustained the objection without indicating which of the two grounds it was relying upon, but Dr. Perry's opinion and his testimony about the crime facts had already been admitted without objection. Indeed, the court explained, "I have testimony as to what he has told us." (2RT 315.) The latter remark put appellant on notice that the trial court intended to use Dr. Perry's

previously aired testimony about the crime facts as proof of that MDO criterion. Yet appellant did not argue at that point that such hearsay use of Dr. Perry's previous testimony was impermissible.

Appellant later explained during closing arguments that he failed to object earlier to Dr. Perry's hearsay testimony about the crime facts because he believed that testimony would be used only as the foundation for Dr. Perry's opinions and not as proof of the truth of the matters asserted. (2RT 316-317.) But at that point, it was too late for appellant to preserve his objections. The People had already rested their case in reliance upon the understanding that Dr. Perry's testimony about the crime facts was received into evidence without objection or limitations.

Accordingly, appellant failed to preserve his current contentions for appeal, and this Court should not reach the merits of them here.

III. A QUALIFIED EXPERT MAY GIVE A TESTIMONIAL OPINION, BASED ON RELIABLE HEARSAY, THAT A DEFENDANT MEETS FACTORS (2) AND (5) OF THE MDO STATUTE

Appellant challenges the admission of Dr. Perry's expert opinion testimony, based on information he obtained from hearsay sources such as the probation report or prison treatment records, to support factors (2) and (5) of the MDO Act.[9] That challenge should be rejected.

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[9] Despite references to *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (POB 17, 22-23), appellant does not expressly contend that such reliance on hearsay violates the Confrontation Clause of the Sixth Amendment. Regardless, the Confrontation Clause does not apply because MDO proceedings are civil, not criminal, in nature. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 712 [Crawford and the Confrontation Clause do not apply to MDO proceedings]; see also *People v. Otto* (2001) 26 Cal.4th 200, 214 ["There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause."]; *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1407 [the courts "uniformly have held that

(continued...)

This Court has long held that expert witnesses may give testimonial opinions based upon reliable hearsay. (*People v. Arias* (1996) 13 Cal.4th 92, 184; *In re Fields* (1990) 51 Cal.3d 1063, 1070; see Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618["Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions . . . . [¶]So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony," italics in original]; *People v. Montiel* (1993) 5 Cal.4th 877, 918.)

As appellant notes, "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." (*Gardeley, supra*, 14 Cal.4th at p. 619; see Petitioner's Opening Brief [POB] at 16.) Nevertheless, even if an expert's testimony cannot render otherwise inadmissible hearsay admissible, the *expert's opinion itself* can serve as substantive evidence admissible to prove an issue of fact. For example, in *Gardeley*, a gang expert testified, based on both his own investigations and on hearsay information from colleagues and agencies, that the primary activities of a particular gang included narcotics sales and witness intimidation. This Court held that the expert's opinion constituted evidence supporting the jury's finding that the gang met the "primary activities" requirement of Penal Code section 186.22, subdivisions (e) and (f), the gang enhancement

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(...continued)
[MDO] proceedings are civil in nature and, therefore, do not implicate the constitutional rights afforded to criminal defendants."]; *People v. Robinson* (1998) 63 Cal.App.4th 348, 350-352.)

statute. (*Gardeley, supra*, 14 Cal.4th at p. 620; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 [explaining that in *Gardeley*, the "primary activities" requirement of the gang enhancement statute "was satisfied by the testimony of a police gang expert who expressed his opinion" about the gang's activities.]; *People v .McCloud* (2013) 213 Cal.App.4th 1077, 1090 [experts' opinion testimony "constituted substantial evidence that McCloud currently suffers from a mental condition that predisposes him to commit criminal sexual acts."]; *Martin, supra*, 127 Cal.App.4th at p. 977 ["We must assume that the court in this case 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."].)

As appellant acknowledges (POB 8, fn. 3, 10, 24-25 & fn. 10), expert testimony from a qualified psychiatrist or psychologist is admissible to prove most of the criteria for MDO commitment under section 2962, including that the defendant suffers from a severe mental disorder (factor (1)), that the severe mental disorder was a cause or an aggravating factor in the underlying commitment offense (factor (3)), that the severe mental disorder is not in remission or cannot be kept in remission without treatment (factor (4)), and that by reason of the severe mental disorder, the defendant represents a substantial danger of physical harm to others (factor (6)). (*People v. Baker* (2012) 204 Cal.App.4th 1234, 1245, fn. 9, ["an expert opinion is required as to some of the criteria in order to determine whether the prisoner is an MDO," although not regarding factors (2) and (5)]; *Dodd, supra,* 133 Cal.App.4th at p. 1569 [a qualified expert may render an opinion on MDO criteria and may base that opinion on inadmissible but reliable hearsay]; *Miller, supra*, 25 Cal.App.4th at p. 917 ["Whether or not a prisoner is an MDO is the proper subject for expert

opinion. Such an opinion necessarily entails an opinion as to each of the criterion or elements thereof."].)

The issue in the present case therefore turns on the question of whether expert opinion testimony from a qualified psychiatrist or psychologist is admissible to prove: factor (2), that the defendant's underlying commitment offense involved force or violence, or threats of force or violence; and factor (5), that the defendant was in treatment for the severe mental disorder for at least 90 days during the year before his or her parole or release.

Evidence Code section 801 governs the scope of expert opinion testimony.

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(Evid. Code, § 801.) As this Court has explained,

> [T]he admissibility of expert opinion is a question of degree. The jury 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 whenever it would "assist" the

jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." [Citation.]

(*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 913.)

As discussed below, the expert testimony of a mental health professional would be helpful to a trier of fact in determining each of the two MDO factors at issue here. It follows that experts may base their testimonial opinions regarding each factor on reliable hearsay, and those opinions, in turn, may constitute substantial evidence in support of a finding that a defendant meets each factor.

A. Whether The Defendant's Commitment Offense Involved Force Or Violence, Or Threats Of Force Or Violence, For Purposes Of Factor (2) Involves A Psychological Component And Is A Proper Subject For Expert Testimony

Factor (2) requires the People to prove that in the underlying commitment offense, the defendant either "used force or violence, or caused serious bodily injury" (§ 2962, subd. (e)(2)(P)) or "expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used" (§ 2962, subd. (e)(2)(P)).[10]

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[10] Alternatively, factor (2) is satisfied if the commitment offense was one of the crimes enumerated in section 2962, subdivision (e)(2)(A) through (O). The issue of whether an expert can testify, based solely on hearsay, that a defendant's commitment offense was one of the crimes specifically enumerated in that subdivision appears to beyond the scope of (continued...)

Viewed in the context of the other MDO factors, factor (2) requires more than a simplistic finding of historical facts regarding the crime, as appellant posits. (POB 1, 10-11, 20-21.) Rather, as the Court of Appeal held below (Opn. 6), when factor (2) is based on the use of force or violence within the meaning of section 2932, subdivision (e)(2)(P), or threats of force or violence within the meaning of section 2932, subdivision (e)(2)(Q), it involves a mental health component as to which an expert's testimony can assist the trier of fact. The legislative history of the MDO Act supports that reading of factor (2). Moreover, it appears the Legislature ratified the *Miller* decision, on which prosecutors in hundreds of MDO hearings have relied, permitting the People to prove factor (2) through expert testimony based on reliable hearsay such as probation reports.

1. Factor (2), When Based On The Use of Force or Violence, Or Threats Of Force or Violence, Includes a Mental Health Component.

Factor (2) should not be read in isolation from the other factors required for MDO commitment. All six factors combine to serve one overriding purpose: to commit to state hospitals for treatment those defendants who acted violently in their commitment offenses, and who continue to pose a danger of violence, due at least in substantial part to a severe mental disorder that is not in remission and requires treatment. A nexus particularly exists between factor (2) and factor (3) (the severe mental disorder was a cause or aggravating factor in the crime). Combined,

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the question on which this Court granted review ("May an expert's testimony . . . that the defendant used force or violence in committing the commitment offense (Pen. Code, § 2962, subd. (e)(2)(P)) . . . be based entirely on hearsay?"), and in any event was not the basis on which the trial court relied in finding factor (2) to be satisfied. Accordingly, respondent does not address it.

the two factors require a finding that a severe mental disorder played a substantial role in the defendant's violent criminal conduct. Thus, in cases where the People rely on section 2962, subdivision (e)(2)(P) or (Q) to establish factor (2), they must show that a severe mental disorder played a substantial role in the defendant's use of force or violence, or threats of force or violence, during the commission of the crime.

Although appellant does not dispute that factor (3) is a proper subject for expert opinion testimony drawing upon hearsay (POB 25, fn. 10), a mental health expert cannot possibly form a conclusion regarding factor (3) without first concluding that the defendant actually used or threatened to use force or violence during the crime. For that reason, the Court of Appeal aptly concluded here that factor (2) involves a "mental health component." As the court explained below, "It is the mental health expert who can bring the raw facts together with a mental health explanation into perspective for the jury." (Opn. 6.)

Whether the conduct in a particular case constitutes "force or violence," or an "express[] or implied[]" threat thereof, can depend on the psychological makeup of the defendant, and therefore merits the expert opinion of a mental health professional. As the Court of Appeal observed (Opn. 6), the current case is a prime example. The conduct which was interpreted as an attempt by appellant to push a shopping cart into a loss prevention agent (2RT 308) might instead have been seen as a merely impatient but non-aggressive movement of a cart if committed by another offender who suffered no mental illness. Appellant's verbal threats to assault and kill the loss prevention agents (2RT 308) might not have been taken seriously or deemed sufficient to cause "a reasonable person" to "believe and expect that the force or violence would be used" (§ 2962, subd. (e), (2)(Q)) if uttered by a person with no mental illness, particularly if that person, like appellant, were armed with nothing but a shopping cart.

As Dr. Kelly explained in his testimony, those threats, and appellant's accompanying comments that he "watches the backs of the employees at the drug store," take on added meaning in light of appellant's history of mental illness and grandiose delusions that he was a law enforcement agent. (2RT 306, 308-309.)

Contrary to appellant's argument, factor (2) is not limited to "purely objective matters of fact and/or the application to the MDO statute of facts that do not have a mental aspect or component." (POB 10-11.) Because factor (2) involves a mental health component as to which a psychiatrist's or psychologist's expert testimony can assist the trier of fact, an expert opinion based on reliable hearsay is admissible as substantive evidence to prove factor (2).

2. The Legislative History Of The MDO Act Demonstrates That The Legislature Envisioned Factor (2) As Involving A Mental Health Component

The legislative history of section 2962 supports the Court of Appeal's conclusion that factor (2) contains a mental health component.

> When engaging in statutory construction, "[w]e begin with the statutory language because it is generally the most reliable indication of legislative intent. [Citation.] If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. [Citation.]." [Citation.] If the language is susceptible of multiple interpretations, "the court looks 'to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.] After considering these extrinsic aids, we 'must select the construction that comports most closely with

the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]." [Citation.]

(*Lopez, supra,* 50 Cal.4th at p. 1063.)

As originally enacted, section 2962, subdivision (d) required that, prior to release on parole, the defendant be evaluated by "the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health," and that a chief psychiatrist from the Department of Corrections and Rehabilitation certify to the Board of Prison Terms (now BPH) that the defendant has a severe mental disorder (factor (1)), that the severe mental disorder was a cause or aggravating factor in the underlying crime (factor (3)), and that the disorder is not in remission or cannot be kept in remission without treatment (factor (4)). (Former § 2962, subd. (d) (Stats. 1986, c. 858, § 2).) In 1987, the Legislature amended this portion of section 2962, subdivision (d) to require the chief psychiatrist's certification also to include findings that the defendant used force or violence or caused serious bodily injury in committing the underlying crime (factor (2)) and that the defendant was in treatment for the severe mental disorder for 90 days during the year before his or her parole (factor (5)). (Stats 1987, c. 687, § 7, p. 2181.)[11]

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[11] See Legis. Counsel's Digest, Sen. Bill No. 425, 687 Stats. 1987 (1987-1988 Reg. Sess.), Summary Dig., p. 205; Sen. Com. on Judiciary, Analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.) as amended May 4, 1987, pp. 2-3; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.) as amended May 4, 1987, pp. 2-3; D. Michael O'Connor, Calif. Department of Mental Health, letter for Sen. Dan McQuorquodale, July 10, 1987; California Department of Mental Health, Health and Welfare Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), June 17, 1987, p. 2; Board of Prison Terms, Youth and Adult

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By providing that a chief psychiatrist make a certified finding regarding factor (2), after evaluations by the person in charge of the defendant's treatment in prison and by a psychologist or psychiatrist from the DSH, the Legislature recognized that factor (2) involved a psychological or psychiatric component for which a mental health professional's opinion was necessary. One of the reasons for expanding the chief psychiatrist's certification duties in this respect was to "ensure consistency throughout the entire process" by having all evaluators certify the same criteria. (D. Michael O'Connor, Calif. Department of Mental Health, letter for Sen. Dan McQuorquodale, July 10, 1987 re Stats. 1987, c. 687 (S.B. 425); California Department of Mental Health, Health and Welfare Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), June 17, 1987, p. 2.) "This amendment would simply make the criteria for certification that is presently used by psychotherapist conform to the criteria used at the certification hearing." (Board of Prison Terms, Youth and Adult Correctional Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), June 5, 1987, p. 3.) The need for consistency acknowledged by the Legislature underscores the interrelatedness of all MDO factors. Consistency requires reliance upon the *same* violent acts committed during the underlying offense to satisfy both factor (2) (crime involving force or violence) and factor (3) (the severe mental disorder was a cause or aggravating factor in the crime involving force or violence). Consistency further requires that the "severe mental disorder" relied upon for factor (3) be the same disorder supporting factor (1) (the defendant has a severe

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Correctional Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), June 5, 1987, pp. 1, 3; Board of Prison Terms, Youth and Adult Correctional Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), April 27, 1987, p. 2.)

mental disorder), factor (4) (the severe mental disorder is not in remission or cannot be kept in remission without treatment), and factor (5) (the defendant was in treatment for at least 90 days for the severe mental disorder).

Admittedly, the requirement that a chief psychiatrist certify factor (2) no longer appears in section 2962, subdivision (d). It was deleted during the 1995 amendments to the MDO Act which also amended subdivision (e) of that section to add a list of enumerated offenses which would automatically satisfy factor (2). (Stats. 1995, c. 761, § 1.) However, the 1995 amendment does not suggest that the Legislature changed its view of the nature of the "force or violence" element of factor (2), or no longer regarded that element to be worthy of a mental health professional's finding. Rather, the amendment to the chief psychiatrist's certification requirement was appropriate because a specific finding that the crime involved "force or violence" would no longer be *required* in every case, given the new alternative of satisfying factor (2) by establishing that the defendant was convicted of one of the enumerated crimes.[12]

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[12] The legislative history suggests that the 1995 amendments were not intended to change the meaning of "force or violence" for purposes of factor (2), but merely to add an alternative way of satisfying that factor. Prior to that amendment, factor (2) could be satisfied only by a finding that the defendant "used force or violence, or caused great bodily injury" during the underlying crime. (Former Pen. Code, § 2962, subdivision (e) (Stats. 1986, c. 858, § 2).) While addressing a jury instruction interpreting "force or violence" for purposes of section 2962, subdivision (e), the court in *People v Collins* (1992) 10 Cal.App.4th 690, 697-698, suggested that the Legislature amend the statute to add reference to a list of qualifying offenses. The 1995 amendment to subdivision (e) was intended as an answer to *Collins*. (*People v. Anzalone* (1999) 19 Cal.4th 1074, 1082 [the suggestion for further legislation in *Collins* evidently led to the 1995 amendments to § 2962, subd. (e)].) But rather than *deleting* the "force or violence" element and *replacing* it with a list of qualifying offenses, the

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Further evidence that the Legislature envisioned factor (2) as a psychological issue lies in the legislative mandate that MDO judicial hearings take place "in the superior court of the county in which [the defendant] is being incarcerated or treated." (§ 2966, subd. (b).) That provision has had the effect of restricting MDO hearings under sections 2962 and 2966 to the only two counties in which MDOs are housed and treated during their first commitment period during parole — San Luis Obispo County (Atascadero State Hospital) and San Bernardino County (Patton State Hospital) – notwithstanding that the underlying convictions may have occurred hundreds of miles away in any of California's 58 counties.[13] While considering a 1986 "cleanup bill" (S.B. 1296) to modify

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1995 amendment preserved the use of force or violence concept as an additional, alternative way of establishing factor (2). (§ 2962, subd. (e)(2)(P) (Stats. 1995, c. 761, § 1).) In 1999, the Legislature added another alternative for crimes involving *threats* of force or violence (§ 2962, subd. (e)(2)(Q) (Stats. 1999, c. 16, § 1).) The intent of the Legislature in 1995 was to keep the existing, pre-*Collins* "force or violence" concept intact, even while taking up the *Collins* court's suggestion of enumerated offenses. (Sen. Com. on Criminal Procedure, Analysis of Sen. Bill No. 34 (1995-1996 Reg. Sess.) as amended April 5, 1995, p. 3; Sen. Com. on Criminal Procedure, Fact Sheet of Sen. Bill No. 34 (1995-1996 Reg. Sess.); Sen. Steve Peace, California Senate, letter to "All Members of the Legislature," January 11, 1995 re Stats. 1995, c. 761 (S.B. 34); Assem. Com. On Public Safety, Analysis of Sen. Bill No. 34 (1995-1996 Reg. Sess.) as amended May 1, 1995, pp. 1-2.)

[13] To illustrate, in the current case, appellant committed the underlying offense in San Diego County, where he was convicted (CT 1; Confidential CT 4), but his MDO hearing was held in San Luis Obispo County (CT 3-4), 309 miles from the central courthouse of the San Diego County Superior Court. Regarding other major population centers in California (measured from each county's main courthouse), the San Luis Obispo County Superior Court is located 189 miles from the Los Angeles County Superior Court, 221 miles from the Orange County Superior Court, 230 miles from the San Francisco City and County Superior Court, 243
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the MDO Act before it took effect, the Legislature received considerable input regarding the impact the venue provision would have on San Luis Obispo and Solano Counties,[14] and urging that the Act be amended to require superior court hearings in the county of conviction.[15] In a March 27, 1986 letter to State Senator Dan McCorquodale, San Luis Obispo County Superior Court Judge William E. Jensen noted that the expense of bringing witnesses from the original trial to San Luis Obispo or Solano Counties to testify at MDO hearings would far exceed the cost of transporting defendants to the counties of sentencing. (Honorable William E. Jensen, Superior Court of State of California, Solano County, letter to Sen. Dan McQuorquodale, March 27, 1986, p. 2.) The Legislature nevertheless declined to amend the venue provision of section 2966, subdivision (b) and chose to keep MDO trials in the forums most convenient to the treating state hospital psychologists and psychiatrists, rather than to crime witnesses. The clear message is that the Legislature envisioned MDO hearings under section 2966, subdivision (b) to focus on

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miles from the Riverside County Superior Court, and 290 miles from the Sacramento County Superior Court, but only 15 miles from Atascadero State Hospital. (www.maps.google.com.)

[14] It is unclear why Solano County was mentioned. The California Medical Facility in Vacaville, a correctional institution, is located in that county, and the DSH operates a mental health treatment facility within that institution.

[15] Raymond E. Mattison, Ernst and Mattisson, letter to Sen. Dan McQuorquodale, April 25, 1986 re Stats. 1986, c. 858 (S.B. 1427); Michael T. LeSage, Law Office of Michael T. LeSage, letter to "Fellow Attorney," May 9, 1986 re S.B. 1427; Honorable William R. Fredman, Superior Court of State of California, San Luis Obispo County, letter to Sen. Dan McQuorquodale, April 3, 1986 re S.B. 1427; Honorable William E. Jensen, Superior Court of State of California, Solano County, letter to Sen. Dan McQuorquodale, March 27, 1986 re S.B. 1427.

the defendant's mental health, not on a retrial (often years later) of the underlying crime facts.

Accordingly, the legislative history of section 2962 indicates that the Legislature viewed factor (2) as including a mental health component, and that it envisioned superior court hearings under sections 2962 and 2966, subdivision (b) as predominantly psychological inquiries, not retrials of the crime facts.

3. The Legislature Implicitly Ratified The *Miller* Decision Approving The Use Of Expert Testimony Based On Reliable Hearsay, Including Probation Reports, To Prove Factor (2).

In fact, by substantially amending factor (2) in 1995, one year after *Miller*, and amending section 2962 several times subsequently,[16] without addressing the form of evidence required to prove that factor, the Legislature appears to have ratified the *Miller* rule permitting the use of expert testimony based on reliable hearsay to establish that the commitment offense involved force or violence. "When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute." (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353; *People v. Hallner* (1954) 43 Cal.2d 715, 719 ["Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it

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[16] Stats. 1998, c. 936 (A.B. 105), § 16, eff. Sept. 28, 1998; Stats. 1999, c. 16 (S.B. 279), § , eff. April 22, 1999; Stats. 2000, c. 135 (A.B. 2539), § 137; Stats. 2010, c. 178 (S.B. 1115), § 82, operative Jan. 1, 2012; Stats. 2010, c. 219 (A.B. 1844), § 18, eff. Sept. 9, 2010; Stats. 2011, c. 285 (A.B. 1402), § 20; Stats. 2012, c. 448 (A.B. 2370), § 43; Stats. 2012, c. 457 (S.B. 1381) § 43; Stats. 2012, c. 24 (A.B. 1470), § 36, eff. June 27, 2012.

must be presumed that the Legislature is aware of the judicial construction and approves of it."].)

The 1995 amendments specifically addressed the manner in which a defendant may satisfy factor (2) by providing a list of enumerated predicate offenses that automatically qualify. Given that the 1995 amendments were a direct response to *Collins, supra*, 10 Cal.App.4th at pp. 697-698,[17] the Legislature was plainly aware of the judicial interpretations of factor (2) at the time. The 1995 amendments preserved the existing means of satisfying factor (2) – where the defendant "used force or violence" in the predicate offense (§ 2962, subd. (e)(2)(P)) – as an alternative to establishing that the predicate crime was an enumerated offense (§ 2962, subd. (e)(2)(A)-(O)). However, the legislation did not specify – nor does the MDO Act currently specify – the *type of evidence* required to prove that the defendant "used force or violence." The Legislature evidently chose not to disturb the prevailing practice approved by *Miller* of presenting expert testimony based on hearsay to establish that fact.

A further indication that the Legislature has ratified *Miller* lies in the legislative history of a 1996 amendment to the Sexually Violent Predators (SVP) Act (Welf. & Inst. Code, §§ 6600 et seq.). Like the MDO Act, the SVP Act provides for the involuntary commitment of certain inmates upon their release from prison, and requires the People to prove certain facts regarding the inmate's underlying commitment offense. (Welf. & Inst. Code, § 6600, subds. (a)(2), (b).) The SVP Act expressly provides for the

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[17] *Anzalone, supra,* 19 Cal.4th at p. 1082; Sen. Com. on Criminal Procedure, Analysis of Sen. Bill No. 34 (1995-1996 Reg. Sess.) as amended April 5, 1995, p. 3; Sen. Com. on Criminal Procedure, Fact Sheet of Sen. Bill No. 34 (1995-1996 Reg. Sess.); Sen. Steve Peace, California Senate, letter to "All Members of the Legislature," January 11, 1995; Assem. Com. On Public Safety, Analysis of Sen. Bill No. 34 (1995-1996 Reg. Sess.) as amended May 1, 1995, pp. 1-2.

use of hearsay from various forms of documentary evidence, including probation and sentencing reports, to establish the "details underlying the commission of an offense that led to a prior conviction, ..." (Welf & Inst. Code, § 6600, subd. (a)(3).) Originally, the SVP Act contained no express provision for documentary evidence. However, "The Legislature modified the act after prosecutors complained that 'they must bring victims back to court to re-litigate proof of prior convictions.'" (*People v. Otto* (2001) 26 Cal.4th 200, 208, quoting Sen. Com. on Crim. Proc., analysis of Assem. Bill No. 3130 (1995-1996 Reg. Sess.) as amended May 24, 1996, p. 7.) As this Court found,

> Thus, the Legislature apparently intended to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions. Moreover, since the SVP proceeding may occur years after the predicate offense or offenses, the Legislature may have also been responding to a concern that victims and other percipient witnesses would no longer be available.

(*Otto, supra*, 26 Cal.4th at p. 208.)

While there is no equivalent, express provision in the MDO Act regarding the use of documentary evidence to prove the facts of the underlying offense, the Legislature evidently understood this already to be an approved procedure for MDO proceedings. As noted in this Court's *Otto* decision, a committee statement by Assemblywoman Paula Boland, Chair of the Assembly Committee on Public Safety, regarding the proposed amendment to the SVP Act, describes the amendment as providing for "proof of prior convictions by consistent evidence and documentary *proof consistent with mentally disordered offender procedures.*" (Assemblywoman Boland, Assem. Com. on Public Safety, Statement re

Assem. Bill No. 3130 (1995-1996 Reg. Sess.) p. 2., italics added; see *Otto, supra*, at p. 209.)

This statement of legislative intent in the 1995-1996 session, over one year after the 1994 *Miller* decision, to permit documentary evidence to prove the facts of underlying offenses in SVP proceedings "consistent with mentally disordered offender proceedings," is a strong indication that the Legislature had ratified the *Miller* court's interpretation of the MDO Act. The same concerns regarding the burden and trauma to victims and the potential unavailability of witnesses years after the crimes, would exist in MDO proceedings if the MDO Act were understood to require percipient witness testimony in support of factor (2). However, in light of *Miller*, which permits factor (2) to be established via expert opinion testimony based on reliable documentary evidence, the Legislature apparently saw no need to amend the MDO Act in a manner similar to the 1996 amendment to the SVP Act.

Accordingly, the legislative history evinces an intent to implicitly ratify the *Miller* decision, permitting the People to prove factor (2) through expert opinion testimony based on hearsay.

4. This Court Should Not Follow The Fourth Appellate District's *Baker* Opinion, As It Fails To Comport With The Purpose And Legislative History Of The MDO Act.

Throughout these MDO proceedings, from the trial court to the current briefing, appellant has relied heavily on dicta in the Fourth Appellate District's outlier decision in *Baker, supra*, 204 Cal.App.4th at pp. 1245-1247, to support his position that expert opinion testimony is

inadmissible to prove factor (2).[18] (POB 1-2 ,6 ,9, 18-20, 26-29.) This Court should decline to follow *Baker*.

Baker addressed a different aspect of factor (2) than that presented in the current case. In *Baker*, the People did not rely on the "force or violence" or threats of "force or violence" provisions of section 2962, subdivision (e)(2)(P) and (Q) to satisfy factor (2) of the MDO Act. The defendant's underlying commitment offense in *Baker* was arson of an inhabited structure, for which she was sentenced to three years in prison. (*Baker, supra*, 204 Cal.App.4th at p. 1239.)[19] The list of offenses which automatically satisfy factor (2) includes "Arson in violation of subdivision (a) of Section 451 or arson in violation of any other provision of Section 455 *where the act posed a substantial danger of physical harm to others*." (§ 2962, subd. (e)(2)(L), italics added.) To prove at an MDO hearing that the underlying arson "posed a substantial danger of physical harm to others," the People presented a prison psychologist's expert opinion testimony, based on the psychologist's review of the crime facts described in the defendant's inmate central file. (*Baker, supra*, at pp. 1238-1239, 1244.)

The *Baker* court stated that the expert's testimony on this point should have been excluded under Evidence Code, section 801, subdivision (a), because, "Whether the arson posed a substantial danger of physical harm to others is not a question Dr. Studden was competent to answer. To the extent that this is a factual question, it is not one requiring the opinion

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[18] Appellant also relies on *Baker* in support of his argument regarding factor (5), which is discussed *post*.

[19] No abstract of judgment or complete probation report was presented showing the precise Penal Code section under which the defendant in *Baker* was convicted or the sentence she received. (*Id.* at p. 1244.)

of an expert to assist the trier of fact." (*Baker, supra,* 204 Cal.App.4th at p. 1245.) The court added that although an expert may rely on hearsay in support of an opinion, a court may not rely on such hearsay as independent proof of the facts asserted. (*Id.* at p. 1246.) In a footnote, *Baker* disagreed with the Second Appellate District's holding in *Miller* that, "'Whether or not a prisoner is an MDO is the proper subject for expert opinion. Such an opinion necessarily entails an opinion as to each of the criterion [*sic*] or elements thereof.'" (*Baker, supra*, at p. 1245, fn. 9, quoting *Miller, supra*, 25 Cal.App.4th at p. 917.) While acknowledging that "expert opinion is required as to some of the [MDO] criteria," *Baker* explained that "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, supra*, at p. 1245, fn. 9, italics in original.)

Nevertheless, *Baker* affirmed the MDO commitment order, holding that other evidence, namely a "fragment" of a probation report admitted at trial, was sufficient to support the "substantial risk" requirement, and that the defendant had forfeited any hearsay objection to that evidence by not objecting at trial. (*Id.* at p. 1247.) Hence, the *Baker* court's discussion regarding the use of expert testimony to prove factor (2) is dicta, as the Court of Appeal observed below (Opn. 1).

To the extent that the dicta in *Baker* could be read to preclude the type of expert testimony offered to prove factor (2) here, this Court should disapprove it. Unlike the Court of Appeal's opinion in the current case (Opn. 4-7), the *Baker* opinion contains no discussion of the legislative history and overriding purpose of the MDO Act. *Baker* fails to consider the particular role of factor (2) in connection with the other factors, in channeling MDO treatment to offenders whose severe mental disorders

caused or aggravated their violent criminal conduct, and who continue to pose a risk to others without treatment.

With little analysis, *Baker* summarily dismisses the 18-year-old *Miller* decision – and by inference both the weight of authority following it and the prevailing practice of prosecutors in over 25 years of MDO hearings[20] – without considering whether the Legislature had effectively ratified *Miller* or whether the Legislature ever intended MDO hearings to devolve into retrials of the crime facts several years after, and hundreds of miles from, the time and location of the crimes. (*Baker, supra*, 204 Cal.App.4th at p. 1245, fn. 9.)[21] As the Court of Appeal observed below, *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. Its dicta tell the People how not to proceed, but fail to tell the People how to proceed." (Opn. 5.) *Baker* is therefore not persuasive and should not be followed.

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[20] See footnote 3 supra.

[21] Moreover, as noted, *Baker* was faced with a distinct factual issue, whether the arson posed a "substantial danger of physical harm to others." (§ 2962, subd. (e)(2)(L).) Arguably, the psychological makeup of the defendant may have less bearing on that issue than on the issue in the present case, whether appellant "used force or violence" (§ 2962, subd. (e)(2)(P)) or "expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used" (§ 2962, subd. (e)(2)(Q)). Furthermore, the expert in *Baker* relied upon a description of the crime facts in the inmate's central file (*Baker, supra*, at pp. 1238-1239, 1244), not on a probation report, the source which *Miller* held to be a reliable basis for the opinion testimony at issue there. (*Miller, supra*, 25 Cal.App.4th at pp. 917-918.)

B. Whether The Defendant Was In Treatment For 90 Days For The Severe Mental Disorder Within The Meaning Of Factor (5) Is A Proper Subject For Expert Testimony Based Upon Reliable Hearsay

Factor (5) requires the People to prove that "[t]he prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release." (§ 2962, subd. (c).) Contrary to appellant's argument (POB 23-24), factor (5) involves more than a "purely numerical calculation." Factor (5) has a clear, mental health component on which an expert's testimony would assist the trier of fact.

The phrase, "treatment for the severe mental disorder," has been interpreted to refer only to treatment for the particular disorder at issue, the same "severe mental disorder" relied upon to satisfy factors (1) and (4) ("[t]he prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment," § 2962, subd. (a)(1)), and factor (3) ("the severe mental disorder was one of the causes or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison," § 2962, subd. (b)). (*People v. Garcia* (2005) 127 Cal.App.4th 558, 567 ["The mental disorder for which extended involuntary treatment is sought must be the same mental disorder for which defendant was treated as a condition of his parole. . . . Therefore, both the letter and spirit of the statute require the prosecutor to show that the defendant was treated for the same mental disorder for which the extended commitment is sought."]; *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610-1611 [where the "severe mental disorder" relied upon for the other factors of the MDO statute was pedophilia, treatment for a different disorder, depression, did not qualify for the 90-day treatment requirement of factor (5)].) Whether a certain type of therapy or medication provided to a defendant constitutes "treatment for" the defendant's specific mental

disorder is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)

Moreover, the *duration* of treatment calls for an expert's interpretations of treatment data. Nothing in the language of section 2962, subdivision (c) requires that a defendant receive therapy, medication, or other treatments *on each of 90 calendar days*. The subdivision merely requires that the defendant be "in treatment" for his or her severe mental disorder for at least 90 days. What constitutes being "in treatment" for a certain period of time is a matter of mental health expertise. For example, a regimen of twice-weekly, weekly, or bi-weekly treatment sessions over a period of 90 days might or might not constitute being "in treatment for the severe mental disorder for 90 days or more," depending on the nature of the treatment given for the disorder. The expert opinion of a qualified mental health would therefore "assist the trier of fact."

Indeed, the language of section 2962 itself appears to contemplate that the 90-day treatment requirement calls for a psychiatric or psychological opinion. In the first step toward MDO commitment, subdivision (d) of section 2962 requires that prior to release on parole, the defendant be evaluated by "the person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State DSH," and that the chief psychiatrist of the Department of Corrections and Rehabilitation certify to the BPH, among other things, "that the prisoner has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day, ..."

Appellant acknowledges that a mental health expert's testimony regarding factor (5) may be *required* in the "rare instance in which the nature or quality of a particular treatment is at issue." (POB 2, 23 (emphasis in original).) Yet the nature and quality of treatment are *always* at issue, as the People have the burden of proving each criterion of section

2962 beyond a reasonable doubt. (§ 2972, subd. (a).) The phrase, "in treatment for the severe mental disorder for 90 days or more," is meaningless without understanding what it means to be "in treatment" during a particular time period, or what types of treatment are given for a particular disorder.

The Court of Appeal in *Baker*, in an unexplained dictum, opined that whether a defendant was in treatment for 90 days or more within the meaning of factor (5) is "not a proper subject for expert opinion testimony." (*Baker, supra*, 204 Cal.App.4th at p. 1247.) *Baker* nevertheless held that the defendant forfeited that issue by failing to object at trial, and accordingly affirmed the MDO commitment order. (*Id.* at pp. 1247-1248) The *Baker* court provided no analysis to support its conclusion that factor (5) was not a proper subject for an expert opinion. Because the court utterly failed to address the obvious psychological issues encompassed in a finding that a person was "in treatment for" a *specific* mental disorder for a period or periods of at least 90 days, *Baker* is not persuasive.

Appellant suggests that by enacting section 2981, which authorizes the admission of certified copies of county jail, state prison, federal prison, or state hospital records for the purpose of proving the 90-day treatment requirement for MDO commitment, the Legislature intended that such records themselves be admissible to the exclusion of expert testimony. (POB 24, fn. 9.) The legislative history of section 2981 suggests otherwise. As the statute was originally drafted, such records would have constituted "prima facie evidence" that the defendant received 90 days of treatment within the year prior to release.[22] Due to opposition by California

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[22] Assem. Com. on Public Safety, Analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.) as amended May 4, 1987, p. 3; Board of Prison Terms, Youth and Adult Correctional Agency, analysis of Sen. Bill No. 425 (continued...)

Attorneys for Criminal Justice and the American Civil Liberties Union (David Nagler, California Attorneys for Criminal Justice, letter to Assemblyman Larry Stirling, July 10, 1987; Daphne L. Macklin, American Civil Liberties Union, letter to Sen. Dan McQuorquodale, July 14, 1987), the bill was amended to delete the "prima facie evidence" language, which the opponents understood to mean "evidence sufficient to establish a fact unless it is rebutted or contradicted." Instead, the statute provides merely that certified records "may be admitted as evidence."[23] The amendment suggests that the Legislature recognized records of treatment, by themselves, may not establish as an objective fact that a defendant was "in treatment for the severe mental disorder" for the requisite 90 days; rather, they are subject to interpretation.

Notably, the same bill, S.B. 425, also added to section 2962, subdivision (d)(1) the previously noted requirement that the chief psychiatrist certify that a defendant meets the 90-day treatment requirement at the outset of MDO proceedings (Stats. 1987, c. 687, § 7, p. 2181), a further indication that the Legislature viewed factor (5) as calling for a psychiatrist's finding.

The Court of Appeal below was therefore correct in concluding that factor (5) calls for a psychological conclusion for which expert testimony can assist the trier of fact. It follows that an expert may offer a testimonial

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(...continued)
(1987-1988 Reg. Sess.), June 5, 1987, p. 3; Board of Prison Terms, Youth and Adult Correctional Agency, analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.), April 27, 1987, p. 3.

[23] Assem. Comm. on Public Safety, Amendment analysis of Sen. Bill No. 425 (1987-1988 Reg. Sess.); Sen. Dan McQuorquodale, statement re: Sen. Bill No. 425 (1987-1988 Reg. Sess.) to Assembly Committee on Public Safety, July 13, 1987, p. 2; Sen. Dan McQuorquodale, statement re: Sen. Bill No. 425 (1987-1988 Reg. Sess.) to Assembly Committee on Public Safety [undated], p. 2.

opinion that a defendant was "in treatment for" the relevant severe mental disorder for at least 90 days during the year before parole, founded entirely upon reliable hearsay such as prison treatment records.

CONCLUSION

As this Court has held, the dual purposes of the MDO Act are to protect the public and to ensure that severely mentally ill offenders obtain treatment. The six factors required under section 2962 combine to carry out those goals by directing mandatory treatment under the MDO Act specifically to those defendants who acted violently in their commitment offenses, and who continue to pose a danger of violence, due at least in substantial part to a severe mental disorder that is not in remission and requires treatment. In keeping with those purposes, the Legislature envisioned superior court commitment hearings under section 2966, subdivision (b) to be predominantly psychiatric or psychological inquiries, not virtual retrials of the facts of the defendants' underlying crimes.

For years, the prevailing practice approved in *Miller* and reaffirmed by the Court of Appeal here – permitting qualified mental health professionals to offer expert opinions on the section 2962 factors, including factors (2) and (5), based on reliable hearsay – has functioned well to ensure that MDOs receive fair determinations on all of the MDO factors without requiring burdensome retrials of the crime facts. That approach recognizes the inherent psychological component of each factor and comports with the overriding mental health-oriented purpose of the MDO Act, as well as this Court's established decision law approving the substantive use of expert opinion testimony based on information obtained from reliable hearsay sources. By amending the MDO Act, including the specific provisions of section 2962 pertaining to factors (2) and (5),

numerous times without altering the *Miller* practice, the Legislature appears to have ratified *Miller*.

For the reasons discussed above, this Court should approve *Miller*, disapprove the contrary dicta in *Baker*, and affirm appellant's judgment of commitment under the MDO Act.

Dated: October 14, 2013

Respectfully submitted,

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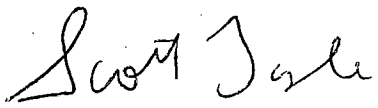

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,033 words.

Dated: October 10, 2013

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Mark Stevens***
No.: **S209643**

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 14, 2013**, 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, 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 14, 2014**, at Los Angeles, California.

Erlinda Zulueta
Declarant

Signature

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