Case No.
S209643

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)

PETITIONER'S REPLY BRIEF ON THE MERITS

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Petitioner Mark Stevens

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INTRODUCTION AND SUMMARY OF ARGUMENT

The respondent's answer brief filed by the People[1] fails to meet the substance of petitioner's arguments, and fails to justify the use of expert opinion testimony based on hearsay as proof that the commitment offense involved force or violence, or that the prisoner received ninety (90) days of treatment during the year preceding his or her scheduled parole, as required under the Mentally Disordered Offender (MDO) statute (Penal Code sections 2960 *et seq.*) The People fail to confront the basic fact that the use of expert opinion testimony to prove matters that are both plainly factual in character and well within the common knowledge of the factfinder contravenes basic evidentiary principles, as set forth in Evidence Code section 801 and the applicable case law. Instead, the People rely on false claims of waiver and forfeiture, and a concocted and tortured analysis of the legislative history of the MDO statute, including the preposterous claim that the Legislature somehow "ratified" the cryptic and erroneous Second District *Miller* decision, to support their untenable claims that the issue of whether the criminal act involved "force or violence" and the purely numerical calculation of the days of treatment received by the prisoner somehow possess a "mental health component" that justifies the routine use of expert opinion testimony. As a result, this Court should reject the strained analysis advanced by the People in their brief and the Second District below, instead adopt the sound application of basic evidentiary principles and statutes set forth by the Fourth District in *Baker*, and reverse the commitment order in this case.

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[1]References to "RB" are to the respondent's answer brief on the merits filed by the People, while references to "POB" are to petitioner's opening brief.

I. CONTRARY TO THE PEOPLE'S CLAIM, PETITIONER HAS NOT WAIVED OR FORFEITED THE ISSUE OF WHETHER AN EXPERT MAY PROPERLY TESTIFY BASED ON HEARSAY AS TO THE CAUSATION AND TREATMENT REQUIREMENTS, AND SUCH ISSUE IS IN ANY EVENT PRESENTLY REVIEWABLE BY THIS COURT.

Initially, the People's claim that petitioner waived or forfeited the issue regarding the improper admission of Perry's hearsay testimony by "failing" to expressly object or obtain a timely ruling from the trial court (RB, pp.12-14) is without merit, both because no waiver or forfeiture occurred, and because any such alleged waiver or forfeiture is irrelevant and does not prevent review by this Court.

A. Contrary To The People's Claim And The Court Of Appeal's Opinion, Petitioner's Counsel Specifically And Timely Objected To The Admission Of Perry's Testimony On Grounds Of Hearsay And, Therefore, Did Not Waive Or Forfeit The Issue On Appeal.

Initially, this Court should reject the People's argument because no waiver or forfeiture in fact occurred. In contending that petitioner waived or forfeited his right to challenge the admission of evidence regarding the underlying offense,[2] the People ignore the distinction between the permissible use of hearsay as the basis for an expert's opinion, and the impermissible use of hearsay as substantive proof of the underlying facts. (*See* POB, pp. 16-17, 22.) Further, the People ignore the distinction between: (1) the requirement under the MDO statute that the commitment offense was caused or aggravated by the prisoner's severe mental disorder (Penal Code section 2962,

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[2]In his opening brief (p. 23), petitioner concedes that 90 day requirement is technically not at issue in this appeal. As a result, the discussion in section A. will focus upon the nature of the commitment offense. However, as explained in section B., this Court can properly consider the issue of the admissibility of hearsay evidence as to both such elements under the MDO statute.

subdivision (b)); and (2) the separate requirement that such offense constitute a crime of force or violence (Penal Code section 2962, subdivision (e)(2)). (*See* POB, pp. 10-11, 18-19, 21-22, 25.) Accordingly, and as set forth in petitioner's opening brief and discussed more fully in section II. A.1. *infra*, the causation issue arguably involves a "mental health component," while the issue of whether the crime involved force or violence – which deals solely with the nature of the act, rather than the actor – simply does not. As a result, although it was permissible for Perry to disclose the hearsay contents of the probation report to explain the basis for his opinion that petitioner's mental disorder caused or aggravated his commitment offense, it was improper for him to serve as a conduit or "channel" for the introduction of hearsay to prove a substantive fact or element – i.e. the nature of the commitment offense – under the MDO statute.

As a result, and because the acts of petitioner's counsel fully reflect the above principles, the People's forfeiture claim lacks merit. After petitioner's counsel initially objected to the People's open-ended request that Perry "describe the crime"– i.e. that he "channel" the facts contained in the probation report that Perry conceded formed the basis for his understanding (*see* 2 R.T. p. 305; RB, p. 6 n.6) – on grounds that the response called for hearsay and was not properly the subject of expert opinion, the prosecutor withdrew the question, essentially conceding the defect. (*See* 2 R.T. p. 308.) Thereafter, the prosecutor asked Perry to disclose the basis for his opinion that the offense was caused or aggravated by petitioner's severe mental disorder, to which petitioner's counsel did not object. (*Id.*) However, that "failure" to object, either to the question or Perry's subsequent answer, in which he described the aspects of the offense that supported his

opinion as to causation, was appropriate and did not constitute a waiver or forfeiture, both because (1) the question involved the permissible use of hearsay to explain the basis for Perry's opinion, rather than as substantive proof of the underlying facts; and (2) Perry's opinion concerned an issue – i.e. causation – that was beyond the scope of lay knowledge, and therefore properly the subject of expert testimony. By contrast, when the prosecutor attempted, during redirect examination, to use Perry to introduce into evidence the alleged facts contained in the probation report as substantive proof of a fact, and to support his "opinion" as to the character of the commitment offense – a matter that was not beyond common knowledge and not properly the subject of expert testimony – petitioner's counsel timely and properly objected, which objection was sustained by the trial court. (2 R.T. p. 315.) Later, during closing argument, petitioner's counsel fully explained the matter, as set forth above, in response to the trial court's incorrect statement that "[t]he testimony. . .about the commission of the crime came in without objection." (*See* 2 R.T. pp. 316-17.) As a result, the facts demonstrate that petitioner's counsel timely and expressly objected to the improper use of hearsay evidence regarding the underlying commitment offense on three separate occasions. Further, counsel did so only when the hearsay was used for a demonstrably improper purpose, i.e. as substantive proof regarding the facts of the offense, as opposed to the proper purpose of explaining the basis for an issue – causation – as to which Perry could properly opine.

Nothing in the People's brief compels a contrary conclusion. The notion that petitioner's counsel was required to press for a purely advisory ruling on an objection after the objection had been conceded and the improper question had been withdrawn

(RB, p. 13) is unsupported by any authority[3] and would needlessly prolong judicial proceedings, and otherwise makes no sense. Similarly, the claim that petitioner's counsel was somehow required to press the court to specify which of the grounds (hearsay and lack of foundation) it relied upon (RB, p. 13) is without merit, both in light of the court's prior ruling, and because those grounds (each of which are based on lack of personal knowledge) were, under the relevant facts, essentially identical. And, contrary to the People's claim (RB, pp. 13-14), the trial court's ambiguous statement that "I have testimony as to what [Perry] told us" (RT 2:315) cannot reasonably be interpreted as placing petitioner on notice that the court intended to use that prior testimony as substantive proof of the nature of the offense, particularly where, as here, it sustained petitioner's counsel's objection to such use.[4] Finally, the People's claim that petitioner's objections during closing argument came "too late" to preserve the issue for appeal (RB, p. 14) is likewise unsupported by authority and makes no sense, because the People, despite being made aware that hearsay evidence was inadmissible to show that the crime involved "force or violence," took no steps to clarify any perceived "ambiguity" in the

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[3]In particular, neither *People v. Morris* (1991) 53 Cal.3d 152 nor *People v. Hayes* (1990) 52 Cal.3d 577 involved objections to questions that were subsequently withdrawn. Instead, both cases involved motions by the defendant that were never ruled on by the court. The difference is material: in the above cases, the failure to press for a ruling left the matter unresolved, thereby "depriving the court of the opportunity to correct potential error" (*Morris*, 53 Cal.3d at p. 195) or of the opportunity to consider the issue at a time in which the record was more complete (*Hayes*, 52 Cal.3d at 618-19). By contrast, no such ambiguity or practical difficulty exists where, as here, the People initially conceded the issue, and the trial court later sustained an objection on the very same ground.

[4]Indeed, the trial court's comment at most indicates its failure to grasp the distinction between the use of hearsay to support Perry's opinion regarding causation and as substantive proof of the facts of the underlying offense, a failure confirmed by the court's subsequent statements during closing argument.

trial court's sustaining of petitioner's objections, or to introduce additional, competent evidence regarding that issue. As a result, the People's claim of waiver or forfeiture with respect to the "force or violence" issue is substantively without merit, and should be rejected by this Court.

B. Contrary To The People's Claim, The Present Matter Is Reviewable By This Court, Irrespective Of Any Alleged Waiver Or Forfeiture.

Moreover, even if this Court were to find that petitioner has waived or forfeited the issues involved in this case, that "fact" does not, for several reasons, prevent this Court from exercising its power of review in this case. First, any "failure" by trial counsel to properly object or otherwise preserve the issue is reviewable as ineffective assistance of counsel. (*See, e.g., People v. Pope* (1979) 23 Cal.3d 412, 425; *People v. Mitchum* (1992) 1 Cal.4th 1027, 1044 n.5.) Second, just as the Second District in this case could set forth, in dicta, its disagreement with the Fourth District's ruling in *People v. Baker* (2012) 204 Cal.App.4th 1234 despite finding that petitioner waived or forfeited the issue, so too can this Court exercise its authority to reconcile the conflict between the two appellate circuits and decide this recurring issue of public importance. (*See, e.g., Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1, 5; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 454 (Court may decide issue that is fairly included in petition for review where it involves an issue of law, or where issue has been fully briefed and it is in the public interest to decide it at that time.) Notably, the People do not contend otherwise: in addition to failing to oppose the petition for review, or to seek to dismiss such review as improvidently granted, both *People v. Eubanks* (2011) 53 Cal.4th 110, 142

and *People v. Wheeler* (2011) 53 Cal.4th 284, 300, on which the People rely, involved situations in which this Court, after finding a waiver or forfeiture, nonetheless proceeded to decide the issue on the merits. Because this Court was presumably aware, at the time that it granted review, of the Court of Appeal's holding regarding waiver or forfeiture (*see* Cal. Rules of Court, Rule 8.504, subdivision (b)(4)), yet unanimously granted review to reconcile the competing opinions in *Baker* and this case (*see People v. Braxton* (2004) 34 Cal.4th 798, 809), the People's claim of waiver represents much ado about nothing, and does not prevent review by this Court.

II. THE PEOPLE FAIL TO OVERCOME PETITIONER'S SHOWING THAT CERTAIN MATTERS UNDER THE MDO STATUTE ARE NOT PROPERLY THE SUBJECT OF EXPERT OPINION, AND MAY NOT BE PROVEN BY HEARSAY EVIDENCE.

The "merits" of the People's argument fare no better. The People eschew the basic and direct analysis advanced by petitioner in his opening brief and by the Fourth District in *Baker*, which simply applied fundamental evidentiary principles set forth in the Evidence Code and the case law to proceedings under the MDO Act. Likewise, the People ignore the obvious distinctions between certain of the factors under the MDO Act – including the existence of a severe mental disorder, the lack of remission, the issue of whether that disorder caused or aggravated the commitment offense, and whether the prisoner represents a substantial reason for that disorder – that clearly involve mental health issues, from the "force or violence" or 90 day issues, which clearly do not. Instead, the People engage in a tortured attempt to justify after the fact the use of expert

opinion testimony as to all of the disparate factors under the MDO statute. That attempt, however, fails, both because of its faulty premise – i.e. that the purely factual matters of whether the act involved force or violence and whether the prisoner received 90 days of treatment involve a "mental health component" – and because of its reliance on irrelevant or nonexistent legislative history or other "authority" to support that premise.

A. Contrary To The People's Claim, The Issue Of Whether The Commitment Offense Involved Force Or Violence Constitutes A Purely Factual Issue, And So Is Not Properly The Subject Of An Expert Opinion.

With respect to the issue of whether the commitment offense involved an act of "force or violence" under Penal Code section 2962, subdivision (e)(2) (RB, pp. 18-33), the People rely on an illogical and inaccurate characterization of that criteria, as well as an improper and ultimately irrelevant focus upon the so-called legislative history of the MDO Act, while ignoring the clear provisions of the Evidence Code and the applicable case law.

1. The People's Claim That The "Force Or Violence" Issue Includes A "Mental Health Component" Ignores The Fact That Such Issue Involves An Analysis Of The Nature Of The Act Rather Than The Medically Disordered Actor, And Is Otherwise Without Merit.

The baselessness of the People's position is evident from their initial argument that a mental health expert who lacks personal knowledge regarding the nature of the commitment offense, and who has no other specialized training, may nonetheless opine as

to whether that offense involved force or violence. (RB, pp. 19-21).[5] The People do not dispute, and thereby concede, that under Evidence Code section 801, subdivision (a), an expert may testify, in the form of an opinion, only when the subject of such testimony is "sufficiently beyond common experience" (POB, pp. 14-16; *see also* RB, p. 17); that under Evidence Code section 801, subdivision (b), an expert's testimony is limited to opinions rather than facts (POB, p. 16); and that an expert may not use the fact that his or her testimony may be based on hearsay as a pretext to "channel" the otherwise inadmissible contents of such hearsay. (POB, pp. 16-17; *People v. Gardeley* (1996) 14 Cal.4th 605, 619; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895.)

Instead, the People attempt to avoid the above principles by attempting to blur the distinction between the issue of whether a crime involves "force or violence" under Penal Code section 2962, subdivision (e)(2)(P) and whether that crime was caused or aggravated by the prisoner's severe mental disorder under Penal Code section 2962, subdivision (b) (RB, p. 19), and by contending, among other things, that the "force or violence" "should not be read in isolation" from the remainder of the MDO statute (RB, p. 19);[6] and that the "force or violence" requirement contained in that section "involves a

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[5]The People correctly observe that this Court's order granting review does not mention Penal Code section 2962, subdivision (e)(2)(A) - (O), which set forth a list of enumerated offenses that may justify commitment as an MDO (RB, pp. 18-19 n.10), and which was not involved in this case. However, there appears to be no principled distinction between a mental health expert that purports to testify, based on outside documents or other hearsay, that the prisoner committed one of those offenses, and an expert who testifies, based on such hearsay information, that the prisoner committed some other offense involving force or violence.

[6]The People at certain points in their brief erroneously cite section 2962 as section 2932. (*See* RB, p. 19.)

mental health component" that justifies the use of expert opinion. (RB, pp. 20-21.) However, those argument are, to put it charitably, preposterous. The "force or violence" criteria focuses entirely upon the criminal act, while the causation or aggravation requirement focuses primarily upon the criminal actor, and in particular the effects of his or her severe mental disorder upon the resulting criminal conduct. In this manner, the MDO statute differs not at all from a typical criminal statute, which involves both a criminal act (which generally constitutes an observable fact that requires percipient testimony) and a mens rea or criminal intent (which generally must be inferred from the act, and which may, depending on the circumstances, be the subject of expert opinion). Moreover, as stated in petitioner's opening brief (p. 28), an otherwise nonviolent act committed by a nondisordered or otherwise "normal" person does not suddenly become violent simply because the perpetrator suffered from a mental illness at the time of its commission.[7]

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[7]By contrast, the People's claim that the issue of whether particular conduct constitutes "force or violence" somehow depends on the psychological makeup of the defendant, and their attempt to use the facts of the present case to support that claim (*see* RB, p. 20) lack merit. The act of pushing a shopping cart into another person is an act of force or violence, regardless of whether it is done out of frustration or impatience or out of anger, and regardless of whether it is done by a mentally ill or healthy individual. In that situation, the only relevant issue regarding the defendant's mental state is whether the act was done accidentally, recklessly, or with the deliberate intent to injure that person, which determines not whether the conduct involved force or violence, but whether it, in fact, constituted a crime. Further, and contrary to the People's claim (RB, pp. 20-21) the issue of whether or not a person that threatens force or violence against others possesses a mental illness is irrelevant because, as the People concede, the statute expressly provides that the seriousness of the threat is to be determined according to the standard of a "reasonable person" who, presumably, lacks awareness of any such illness. Stated another way, the People's claim that such threats "take on added meaning" because of its maker's mental illness (RB, p. 21) is pure nonsense because, simply put, the MDO law, by utilizing the "reasonable person" standard, does not permit such "meaning" to be "added."

Simply put, and as the courts have specifically held (*see, e.g., People v. Collins* (1992) 10 Cal.App.4th 690, 696), the concepts of "force" or "violence" under the MDO statute involve matters of ordinary or common knowledge, with no specialized psychological or other technical meaning. As such, a mental health professional is no more qualified than a doctor, a lawyer, an Indian chief, or the proverbial man or woman in the street to opine as to whether a particular offense not otherwise enumerated in the MDO statute involved force or violence. Under those circumstances, expert testimony to support the "force or violence" requirement is not only unnecessary but prohibited, and should not be permitted in an MDO proceeding.

2. The Legislative History Cited By The People Does Not Support Either A Recognition That The Commitment Offense Involved A So-Called "Mental Health Component," Or An Intent To Differentially Treat Proceedings Under The MDO Statute.

The People's claim that the legislative history of the MDO Act reflects a legislative recognition that the "force or violence" issue involves a "mental health component," and an intent to create different evidentiary rules in MDO cases (RB, pp. 21-30) is equally specious. Initially, that purported history is, as a matter of law, irrelevant to the present issue, under the very authority on which the People rely. As stated by this Court in *Lopez v. Superior Court* (2010) 50 Cal.4th 1055 (RB, pp. 21-22), legislative history and other extrinsic aids come into play only if the statute is ambiguous, i.e. "susceptible of multiple interpretations." (*Lopez, supra*, 50 Cal.4th at p. 22.) Here, the People have not identified any portion of the MDO statute that deals with either the factors necessary for commitment as an MDO, or the manner of proving those factors in

court, that they contend is ambiguous. Instead, they rely solely on former Penal Code section 2962, subdivision (d), which dealt with the evaluation and certification of a prisoner for possible treatment as an MDO, prior to any court hearing (RB, pp. 22-24)[8] and on Penal Code section 2966, subdivision (b), which provides that the MDO hearings take place in the county in which the prisoner is being incarcerated or treated (RB, pp. 25-27). Both of those sections, however, involved entirely different subjects and procedures under the MDO Act, and have no rational connection to the issue of the form of proof required under the Act. Moreover, the People nowhere contend that the above statutes – which clearly assigned responsibility for such initial certification to the "person in charge of treating the prisoner and a practicing psychiatrist or psychologist from the State Department of Mental Health" and clearly specified the venue in which the MDO proceeding is to occur – were or are in any way ambiguous. As a result, there is simply no basis for this Court to accept the People's invitation to resort to the legislative history of completely unrelated portions of the MDO statute to resolve a nonexistent "ambiguity."

Moreover, even if consideration of legislative history or other extrinsic evidence were appropriate, the People's theory – that by making a treating or chief psychiatrist or psychologist responsible for the initial certification of a prisoner as an MDO, or by specifying the venue in which the MDO proceeding is to occur, the Legislature intended

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[8]In their brief (p. 24), the People correctly note that the statute has since been amended to delete the requirement that the chief psychiatrist certify a prisoner as an MDO. That fact, however, if anything merely underscores the absurdity of the People's reliance on a statute that not only involves an entirely different subject under the MDO Act, but that no longer applies.

to create an exception to the Evidence Code and to permit expert testimony as to each of the criteria under the MDO statute – is unsupported by either logic or the specific legislative history adduced by the People. In addition to the fact that the initial certification of a prisoner for possible treatment as an MDO has nothing to do with the conduct of the subsequent court proceeding, the fact that the Legislature at one point chose to place the responsibility for initially determining whether each of the MDO criteria were met in the hands of a single individual – i.e. a chief psychiatrist with the state Department of Mental Health – is easily explained by any number of factors, other than a nonexistent "intent" to permit mental health experts to testify as to factual or other non-expert matters. For example, the vesting of such responsibility in a single person is clearly consistent with administrative efficiency. Moreover, a chief psychiatrist – who has access to both the prisoner and his or her mental health history, as well as the expertise needed to opine as to the particular factors (e.g., the existence of a mental disorder, causation, and dangerousness) that do, in fact, have a "mental health component" – is clearly a logical person to make that initial determination, and his or her selection as such does not support the "intent" claimed by the People. Similarly, the fact that the Legislature chose to require that MDO proceedings take place in the county in which the prisoner is incarcerated or treated, as opposed to where the underlying offense occurred, likely signifies little more than the practical realization that: (1) it is more administratively convenient to conduct such proceedings in the venue where both the prisoner and his treating staff are located; and (2) doing so would create a local judiciary that is knowledgeable and experienced regarding the requirements of the MDO statute

and the conduct of MDO proceedings.[9]

Finally, and in addition to the fact that they involve disparate subjects under the MDO Act, none of the specific legislative history documents relied on by the People support the claimed intent. With respect to former section 2962, subdivision (d), the People rely (RB, p. 23) on a July 10, 1987 letter from the Department of Mental Health to the bill's author, and on an analysis of the bill by the DMH. However, the People nowhere explain how statements made by an outside agency or its personnel are somehow probative of the intent of the members of the Legislature to whom they addressed. Moreover, and as indicated above, even if one accepts the People's claim that the purpose of the section was to "ensure consistency throughout the entire [MDO] process," there is no indication how that salutary, if vague goal translates into a *de facto* revision of the Evidence Code so as to allow mental health experts to testify on decidedly non-expert, factual topics.[10] Similarly, with respect to the venue provisions of section 2966, subdivision (b), the People rely on letters to the Legislature from judges or even private citizens (*see* RB, p. 26) as somehow reflecting legislative intent, while failing to explain

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[9]The choice of the jurisdiction in which the prisoner is incarcerated or receives treatment, rather than the jurisdiction in which the offense occurred, makes further sense in light of the fact that, in cases involving the offenses enumerated under Penal Code section 2962, subdivision (e)(2)(A) - (O), such offenses can generally be proven through the record of conviction.

[10]By contrast, documents obtained by the People from the legislative committees that actually considered the legislation make clear that: (1) the primary purpose of the bill was to specify that communications between the prisoner and the mental health evaluator are not privileged; and (2) that the committee regarded the remaining changes, including those on which the People rely, as merely "technical." (See, e.g., Senate Committee on Judiciary, Analysis of Senate Bill No. 425 (1987-88 Regular Session 1987-88; Assembly Committee on Public Safety, Analysis of Senate Bill No. 425 (1987-88 Regular Session), as amended May 4, 1987).

how those comments – which pertain primarily to the effects of the choice of venue upon the administration of justice in the forum jurisdiction, and which in any event were apparently rejected by the Legislature, which refused to amend the venue statute – have anything to do with the manner of proving the various factors under the MDO statute.

In sum, the People's claim that the legislative history of the MDO Act supports the use of mental health experts to testify as to the purely factual, lay issues of whether a crime involves force or violence or whether the prisoner received the required 90 days of treatment represents little more than the product of a fertile imagination, and should be rejected by this Court.

3. Contrary To The People's Claim, The Cited Legislative History Does Not Support An Intent To "Ratify" The Second District's Erroneous Decision In Miller.

Equally imaginative – and equally without merit – is the People's suggestion that the Legislature, by amending section 2962, somehow "ratified" the statement in *People v. Miller* (1994) 25 Cal.App.4th 913 permitting the use of expert testimony based on hearsay to show that the commitment offense involved force or violence. (RB, pp. 27-30.) Contrary to the People's apparent interpretation, the decision in *Miller* hardly constituted a watershed of which the Legislature was obliged to take note, much less "ratify." First, the relevant statements in *Miller* were dicta, in light of the court's holding that petitioner had waived the issue on appeal. (*See Miller*, 25 Cal.App.4th at p. 917.) Second, the alleged holding in *Miller* on which the People and the Court of Appeal rely – i.e. that "[s]uch an opinion [as to whether or not a prisoner is an MDO] necessarily entails an opinion as to each of the criterion or elements thereto" – was both cryptic and

unsupported by any authority or analysis, and so was hardly likely to garner the attention of the Legislature. Third, those statements, and the *Miller* case in general, dealt with a specific form of hearsay, i.e. a probation report, as evidenced by the court's extensive discussion regarding the alleged reliability of those reports. (*See Id.* at pp. 917-18.) As a result, the decision in *Miller* – which was not explicitly followed by any court until the decision in the present case, and which the Fourth District in *Baker* felt free to disagree with – hardly reflects the type of clear exposition of the law that the Legislature was required to recognize or respect, much less "ratify."[11]

The People's position is without merit for other reasons as well. As indicated above, although section 2962 sets forth the various factors that must be proven to justify commitment as an MDO, it is silent as to the manner of proof as to such factors. Moreover, although it is true that section 2962 has been amended "several times," including to add the list of enumerated offenses contained in subdivision (e)(2)(A) - (O) (*see* RB, p. 27), those amendments merely added a series of specific offenses that, by definition, involve "force or violence," and did not purport to set forth a method by which

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[11]In this regard, the present case differs materially from those relied on by the People (RB, pp. 27-28). The case of *People v. Bouzas* (1991) 53 Cal.3d 467 involved "the courts' consistent interpretation" of a statute in numerous cases over a period of nearly a hundred years, during which time the statute had been amended over ten times without modifying that interpretation. (*See Id.* at pp. 474-75.) Similarly, *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 involved a statute that had been given "repeated scrutiny" by the Legislature, and been amended at least eight times in eleven years (*see* 38 Cal.3d at p. 353), while *People v. Hallner* (1954) 43 Cal.2d 715 involved a bribery statute that had been interpreted identically over a period of many years and in at least four reported appellate decisions. (*See* 43 Cal.2d at pp. 419-20.) As a result, those cases bear no conceivable relationship to the People's present claim that the Legislature somehow "ratified" the cryptic and unsupported dicta in *Miller* by enacting other, unrelated amendments to the MDO statute.

the forceful or violent nature of other offenses could be proven. Further, contrary to the People's contentions that the Legislature "*appears* to have ratified the *Miller* rule" and "*evidently* chose not to disturb the prevailing practice approved by *Miller*" (RB, pp. 27-28 (emphasis added)), the Legislature surely knows how to respond to or "ratify" a judicial decision that affects the administration of the MDO Act. (*See, e.g., People v. Anzalone* (1999) 19 Cal.4th 1074, 1082 (indicating that the Legislature added the enumerated offenses in subdivision (e)(2)(A) - (O) in response to the court's decision in *People v. Collins* (1992) 10 Cal.App.4th 690); Stats 1989 ch. 228 section 8 (stating that the Legislature's addition of the "substantial danger" requirement reflected its response to the Court of Appeal's decision in *People v. Gibson* (1988) 204 Cal. App. 3d 1425); *see also* RB, p. 28 and note 17.) And, far from supporting the People's position, the fact that the Legislature amended the Sexually Violent Predators (SVP) Act to expressly permit the use of certain hearsay documents if anything indicates that its failure to enact a similar provision with regard to the MDO statute constituted a deliberate decision to treat the two statutes differently, consistent with numerous other distinctions between the two statutes.[12] As a result, and like the remainder of their tortured analysis of the legislative history, the People's claim that the Legislature somehow "ratified" the Second District's

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[12]*See, e.g., People v. McKee* (2010) 47 Cal.4th 1172, 1201-02 (SVP Act involves indeterminate commitment in which defendant bears burden of proof, as opposed to one year commitment in MDO in which People bear burden); *People v. Lopez* (2004) 123 Cal.App.4th 1306, 1313 (SVP Act contains broader definition of mental disorder than MDO Act); *People v. Poe* (1999) 74 Cal.App.4th 826, 833 (MDO Act expressly excludes certain disorders covered by SVP Act and, unlike SVP Act, requires a finding that the disorder caused or aggravated the offense, and that defendant represents a present, substantial danger of harm).

decision in *Miller* or otherwise approved an exception to the Evidence Code for MDO proceedings *sub silentio* is absurd and should be rejected by this Court.[13]

4. Contrary To The People's Claim, The Fourth District's Decision In Baker Properly Analyzed And Applied Basic Rules Of Evidence To Proceedings Under The MDO Statute.

Finally, this Court should reject the People's illogical and baseless criticism of the Fourth District's decision in *People v. Baker* (2012) 204 Cal.App.4th 1234 (RB, pp. 30-33). While repeatedly denigrating the discussion in *Baker* as dicta (*see* RB, pp. 30, 32, 33), the People conveniently ignore the fact that, as shown above and in petitioner's opening brief (pp. 6, 9), the appellate court's decision in this case also constituted dicta, in light of its finding that petitioner had waived or forfeited the issue. The People nowhere explain why the academic discussion by the Second District in this case is entitled to greater deference than the equally positioned discussion by the court in *Baker*.

The People's remaining criticisms of the Fourth District's reasoning in *Baker* are equally specious. The People lament the fact that the opinion in *Baker* "contains no discussion of the legislative history and overriding purpose of the MDO Act" (RB, p. 32), despite the fact that, as shown above, such legislative history is irrelevant and in any

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[13]In their brief (pp. 29-30), the People rely in part on a statement by Assemblywoman Paula Boland, chair of the Committee on Public Safety that considered the amendments to the SVP Act, which described the amendment as "providing for 'proof of prior convictions by consistent evidence and documentary proof consistent with mentally disordered offender procedures,'" and which was cited by this Court in *People v. Otto* (2001) 26 Cal.4th 200. In doing so, however, the People conveniently fail to note that this Court dismissed that statement as meaningless, stating that "[w]e are loath to ignore the express terms of the statute because of an obscure remark made by one legislative member" (*see Otto*, 26 Cal.4th at p. 209), and fail to indicate why that "obscure" and demonstrably inaccurate remark should govern this case.

case does not support the position urged by the People. Moreover, while doing so, the People ironically ignoring the fact that the decision in *Baker* was instead driven by the only truly relevant considerations, namely the Evidence Code and other basic evidentiary principles. (*See Baker*, 204 Cal.App.4th at pp. 1245-46; POB, pp. 18-20.) Similarly, the People wrongly accuse the court in *Baker* of, "[w]ith little analysis," "summarily dismiss[ing]" the Second District's decision in *Miller*, and the "weight of authority" on which it purportedly relied (RB, p. 33), despite the fact that, as shown above (section II.A.3.), the "holding" in *Miller* consisted of a single paragraph, unsupported by any authority, which was quoted, in its entirety, by the court in *Baker*. (*See Miller*, 25 Cal.App.4th at p. 917; *Baker*, 204 Cal.App.4th at p. 1245 n.9.) Finally, the People's attempt to distinguish *Baker* on the ground that it involved the definition of arson contained in Penal Code section 2962, subdivision (e)(2)(L), as opposed to the "force or violence" provisions in section 2962, subdivisions (e)(2)(P) and (Q) (RB, p. 33 n.21) is entirely unpersuasive. Both cases and both sections call for the interpretation of documents (e.g. police or probation reports or the prisoner's criminal file) by persons that did not witness and otherwise lacked personal knowledge of the commitment offense. Similarly, both cases and both sections call for the determination of an issue (i.e. whether the offense involved "force or violence" or posed a "substantial danger of physical harm to others") that, in the People's own words, present a "distinct factual issue," and require no special expertise.[14] As a result, the People's attempted comparison between the

[14]There is also no merit to the People's claim that the "psychological makeup of the defendant may have less bearing" on the "substantial danger" issue found in *Baker* than it did on the "force or violence" issue found in this case. (RB, p. 33 n.21.) Instead,

interpretation of the criminal file to determine "substantial danger" in *Baker* and Perry's interpretation of the probation report in this case represents a classic distinction without a difference, and does not justify disregard of the Fourth District's decision in *Baker*.

In sum, the People's claim that the purely factual and lay issue of whether a criminal act involves force or violence somehow involves a "mental health component" that requires the use of expert opinion testimony, and their improper use of irrelevant "legislative history" to resolve a nonexistent "ambiguity" and otherwise support their claim, represent little more than an awkward attempt to fit a square peg into a round hole. This Court should reject that attempt, and instead apply the basic evidentiary principles and statutes articulated above and in petitioner's opening brief, as well as by the Fourth District in *Baker*, to find that the use of such hearsay evidence in the form of expert opinion testimony in MDO proceedings is improper.

B. Contrary To The People's Claim, The Determination Of Whether The Prisoner Has Received The Treatment Required Under The MDO Statute Commonly Involves A Purely Quantitative Inquiry Into The Number Of Days Of Treatment Received Rather Than A Qualitative Inquiry Into The Nature Or Efficacy Of Such Treatment, And So Is Not Properly The Subject Of Expert Opinion Testimony.

With a single, limited exception (discussed below), the principles and arguments set forth above and in petitioner's opening brief apply with equal force to the People's claim that the issue of whether a prisoner received the ninety (90) days of treatment

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both of those inquiries focus upon the nature and effects of the act, rather than the actor. In particular, whether or not a particular act of arson poses a substantial danger to others depends upon the facts pertaining to the fire, which may include among other things its intensity and location, and its proximity to persons and/or property. It does not, contrary to the People's suggestion, depend upon whether the person setting the fire suffered from a mental disorder at the time.

required under Penal Code section 2962, subdivision (c) is properly subject to expert opinion that is based on purportedly "reliable" hearsay. (RB, pp. 34-38; *see also* POB, pp. 23-25.) In particular, the People's claim that the 90 day treatment issue "has a clear, mental health component on which an expert's testimony would assist the trier of fact" (RB, p. 34) seriously overstates the actual, practical realities, as reflected in this and other MDO cases. As stated in petitioner's opening brief (pp. 2, 23; *see also* RB, p. 35), there may be rare instances – such as the two reported cases cited by the People (RB, p. 34)[15] – in which the nature or efficacy of the treatment received by the prisoner are at issue, and in which expert psychological opinion testimony might, therefore, be appropriate. However, that fact, and the existence of occasional, unusual circumstances, do not justify dispensing with the laws of evidence, and permitting expert opinion regarding the 90 day requirement in all cases arising out of the MDO statute. In particular, and as evidenced by Penal Code section 2981, which permits the People to use copies of the records of specified correctional or state treatment facilities to prove compliance with the 90 day requirement, the vast majority of MDO cases – including this one – involve a purely numerical calculation, often performed by a testifying expert that has simply reviewed

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[15]Those cases are *People v. Garcia* (2005) 127 Cal.App.4th 558 and *People v. Sheek* (2004) 122 Cal.App.4th 1606, in which the courts held that, where the prisoner suffers from more than one mental defect (i.e. pedophilia and depression), his or her 90 days of treatment must be directed at the same specific defect for which involuntary treatment is sought (*Garcia*), and which is alleged to have caused or aggravated the commitment offense (*Sheek*). The above cases constitute the only two reported MDO cases of which the undersigned counsel is aware that have discussed the nature or quality of the treatment received by the prisoner. Moreover, other than *Sheek*, in which he was counsel of record, the undersigned counsel is unaware of any other of the well over one hundred appellate cases in which he has represented MDOs on appeal that involved the quality rather than the number of days of treatment received by the prisoner.

and "channeled" those records, as to whether the number of days spent "in treatment" meet or exceed that requirement.[16] As a result, the People's claim that the 90 day requirement inevitably has a "mental health component" does not make it so, and ignore the practical realities under the MDO stature.

Again, nothing in the People's brief compels a contrary conclusion. The fact that there might, conceivably be an issue as to whether a patient is "in treatment" for a period totaling 90 days (RB, p. 35) does not justify the use of experts to opine that the 90 day requirement has been met in all cases, particularly given the track history under the MDO statute and the obvious Legislative belief (as evidenced by the enactment of section 2981) that the 90 day requirement may generally be proven through records, rather than expert opinion testimony.[17] Similarly, the fact that mental health professionals, including the

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[16]By way of example, the People in their brief (p. 2 n.3) identify a total of fifteen (15) reported cases in which the People utilized the "prevailing practice" of relying on expert opinion testimony of mental health professionals to prove each of the six factors, including the 90 day requirement, under the MDO statute. Of those cases, however, nine did not discuss the 90 day requirement at all, presumably because they involved undisputed expert testimony that the prisoner met that and other requirements under the MDO Act. Moreover, of the remaining six cases, only two (*People v. Achrem* (2013) 213 Cal.App.4th 153 and *People v. Martin* (2005) 127 Cal.App.4th 970) involved the 90 day requirement at all, and both of those cases involved the narrow issue of the location of such treatment (i.e. inpatient versus outpatient and treatment in public facilities such as prisons or state hospital versus private clinics), and whether the days spent in such locations could be aggregated to meet the 90 day requirement. The remaining cases each involved the same type of cryptic and conclusory statement by the "channeling" expert as found here that, based on his or her review, the prisoner met the 90 day requirement. (*See People v. Baker* (2012) 204 Cal.App.4th 1234, 1239; *People v. Hannibal* (2006) 143 Cal.App.4th 1087, 1090-91; *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1566-67; *People v. Coronado* (1994) 28 Cal.App.4th 1402, 1406.) In short, of all of the "typical" MDO cases identified by the People in which the "prevailing practice" of relying on experts to "channel" treatment records was used, not a single case involved an issue regarding the nature or quality, as opposed to the length, of such treatment.

[17]In their brief, the People argue that the legislative history of section 2981 – including the deletion of a provision that records of treatment would constitute "prima

prisoner's treating psychologist or psychiatrist, is charged under Penal Code section 2962, subdivision (d) with making the initial determination whether to certify the prisoner as an MDO indicates nothing more than that, as stated above (section II.A.2.), such persons are likely to have the greatest access to that prisoner in a structured setting such as a prison, county jail or state hospital. It does not contrary to the People's unsupported claim, indicate that the Legislature intended to dispense with the normal rules of evidence, or to entrust an expert with the responsibility of testifying as to each of the criteria under the MDO statute, including those that, like the 90 day requirement, do not call for any special expertise and are not properly the subject of expert testimony. Finally, the People's claim that "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" (RB, pp. 35-36 (emphasis in original)) proves too much. The mere fact that the People have the burden of proving a series of disparate elements – some of which have a "mental health

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facie evidence" that the defendant received 90 days of treatment and the insertion of the provision that certified records "may be admitted as evidence" – suggests that the Legislature recognized the need for expert testimony to "interpret" such records. (*See* RB, pp. 36-37.) However, that argument is, respectfully, nonsense, for several reasons. First, as with their remaining legislative history arguments, the People's argument depends in large extent on letters written by private interest groups, not by legislators themselves, and so are hardly probative of the purported intent of those legislators. Second, the cited amendments constituted only a small part of the statute, which dealt primarily with other issues under the MDO statute, including the manner of certification and the lack of an evidentiary privilege between the prisoner and his or her MDO examiner. Third, there is no indication that the Legislature intended the effects claimed by the People, namely to open the door to the routine introduction of expert testimony regarding the 90 day requirement. To the contrary, the July 10, 1987 letter from the California Attorneys for Criminal Justice – the only document that directly discusses the purpose of the amendment – indicates (page 3) that such purpose was to enable the prisoner to challenge the records and to prevent the prisoner from having to prove a negative or conduct an investigation of the treatment that he or she received while in prison.

component" and some of which are purely factual and do not – does not entitle an expert to testify as to the latter, any more than the fact that the People are required to prove each of the similarly disparate elements of burglary entitles them to introduce expert opinion as to the purely factual issue of whether the defendant in fact entered the property.

In sum, the People's claim that an expert may properly opine in all circumstances as to whether the prisoner received the required 90 days of treatment during the year preceding his or her scheduled parole, like their claim with respect to the "force and violence" requirement, constitutes little more than a prosecutorial "wish list." That claim seeks to disregard the practical realities of the MDO statute and the clear mandates of the Evidence Code, as well as the Fourth District's well reasoned opinion in *Baker*, based on contrived arguments and a legislative "intent" that is at best speculative and at worst nonexistent. This Court should, therefore, reject that argument, and hold that the purely numerical issue of whether the prisoner received the required 90 days of treatment is not amenable to expert testimony.

CONCLUSION

The Fourth District's decision in *Baker*, and the Second District's decision in this case, have created an irreconcilable conflict between the appellate courts that this Court can and should resolve. However, it should do so based on basic logic and on the law as this Court finds it – including fundamental and established evidentiary statutes and principles – and not on the type of fanciful claims of judicial convenience or efficiency, pre-existing procedure, or so-called legislative "intent" found in the People's brief or in

the Second District's opinion in this case. It should also do so based on a practical and realistic view of the relevant factors under the MDO statute, which include matters that are both factual and subjective, and are both beyond and within common experience, and not on some equally fanciful claim that they each involve a "mental health component." As a result, this Court should reject the arguments advanced by the People, and hold that the issues of whether the commitment offense involves force or violence and whether the prisoner has received 90 days of treatment during the year preceding his or her scheduled parole, as required under the MDO statute, are generally not properly the subject of expert opinion testimony, and that the use of hearsay evidence admitted to support an expert's "opinion" as to those matters is improper.

DATED: November 13, 2013

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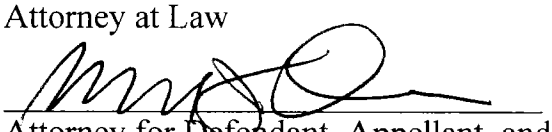

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1) of the California Rules of Court, the undersigned counsel states that the foregoing brief contains 8,260 words, according to the word count of the computer program used to prepare the brief.

DATED: November 13, 2013

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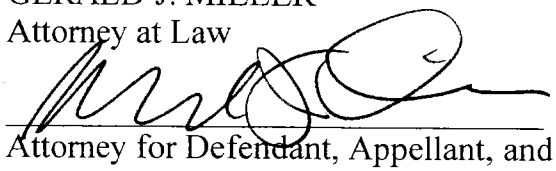

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PROOF OF SERVICE

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: November 13, 2013

DOCUMENT SERVED: PETITIONER'S REPLY BRIEF ON THE MERITS

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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 November 13, 2013 at Agoura Hills, California.

GERALD J. MILLER