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 OPENING BRIEF

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ISSUE PRESENTED

Pursuant to Cal. Rules of Court, Rule 8.520(b)(2)(A), this Court's order granting review specified that the issue to be briefed is as follows:

> "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)) be based entirely on hearsay?"

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should reverse the Court of Appeal's decision, and hold that the issue of whether a prisoner's commitment offense constituted a crime of force or violence under the Mentally Disordered Offender (MDO) statute – as well as whether the prisoner received the ninety (90) days of treatment during the year prior to parole, as required under that statute – are not amenable to expert opinion testimony or, at minimum, cannot be based entirely on hearsay. Contrary to the Court of Appeal's opinion in this case, such a holding is consistent not only with the Fourth Appellate District's well-reasoned *Baker* decision but, more importantly, with basic evidentiary statutes and principles, including the decisions of this Court. The issue of whether the commitment offense involved force or violence depends upon an analysis of the facts of the offense, as to which a psychologist or other mental health expert typically lacks personal knowledge, and his or her opinion as to that issue is outside the realm of his or her professional expertise, and therefore of no greater value than the opinion of the trier of fact or other lay person. As such, it fails to meet the basic threshold for the admission of expert testimony, which is

limited to opinions rather than facts, and as to issues that are outside the common experience of the trier of fact. Similarly, other than the rare and limited situations in which a mental health expert is required to consider the nature and quality of the treatment received during the year preceding the prisoner's scheduled parole (or in which the expert actually treated the prisoner and therefore has personal knowledge of such treatment), the issue of whether the prisoner received the required 90 days of treatment involves a purely factual and numerical determination, for which the Legislature and courts have provided several readily available means of proof. As a result, permitting a mental health expert to opine as to these elements – which, contrary to the Court of Appeal's opinion and unlike the remaining requirements of the MDO statute, involve no "mental health component" whatsoever – violates the clear prohibitions against the introduction of hearsay or otherwise inadmissible matter under the guise of providing expert opinion and the use of experts as a "channel" for such matter, as well as other relevant statutory provisions. Accordingly, this Court should reject the flawed reasoning by the Court of Appeal in this case, adopt the solid reasoning of the Fourth District in *Baker*, and hold that the relevant evidentiary principles apply fully to proceedings under the MDO statute, by reversing the commitment order in this case.

STATEMENT OF FACTS[1]

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

By petition filed March 5, 2012, appellant and petitioner Mark Stevens ("petitioner") requested a hearing following the March 2, 2012 order by the Board of Prison Terms (BPT) committing him as an MDO, pursuant to Penal Code section 2966, subdivision (b). (C.T. p. 1.) Following petitioner's waiver of a jury trial (C.T. p. 3; 1 R.T. p. 3), the hearing was held on April 24, 2012 (C.T. p. 4; 2 R.T. pp. 303 *et seq.*) Following the testimony of Kevin Perry, a forensic psychologist at Atascadero State Hospital (ASH), the court denied the petition, found the criteria under section 2962 to be true, and ordered petitioner recommitted to the California Department of Mental Health for further treatment. (C.T. pp. 4, 14-15; 2 R.T. p. 317.)

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

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

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

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[1]References to "C.T." are to the clerk's transcript in this action, while references to "R.T." are to the volume and page number of the two volume reporter's transcript.

and that he represented a substantial danger of physical harm to others by reason of his severe mental disorder. (2 R.T. pp. 306-13.) Perry also testified that petitioner received 90 days or more of treatment for his severe mental disorder during the year prior to his scheduled December 20, 2011 release on parole, since he was in the prison mental health services delivery system during that entire year. (2 R.T. p. 311.)

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

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

Perry why he believed that petitioner's offense met the criteria under the MDO statute, even though petty theft with a prior by definition is not a crime that involves force or violence. Petitioner's counsel objected on grounds that the question called for hearsay and lacked foundation, and the trial court sustained the objection. (2 R.T. p. 315.)

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

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

remaining criteria, were met, and denied the petition. (2 R.T. pp. 317-18.) In doing to, the court observed that petitioner's counsel had raised the issue based on the recent Fourth District decision in *People v. Baker* (2012) 204 Cal.App.4th 1234, which had criticized the Second District's holding in *People v. Miller* (1994) 25 Cal.App.4th 913, but that *Miller* was the "better exposition of the law on the issue that we're dealing with." (RT 2:317.)

C. The Court Of Appeal's Reported Decision.

On February 27, 2013, the Second District Court of Appeal, Division Six issued its published decision, affirming petitioner's commitment order. *People v. Stevens* (2013) 213 Cal.App.4th 1401 (review granted June 12, 2013).[2] The court initially held that petitioner's counsel failed to object to Perry's recitation of the facts regarding the commitment offense and, therefore, was "precluded from arguing for the first time on appeal that the testimony was hearsay or violated the confrontation clause." (213 Cal.App.4th at p. 1404; Slip Opinion, p. 2.)

Nonetheless the court proceeded to decide the case on the merits, holding, in dicta, that the testimony was properly admitted, because "Dr. Perry's testimony concerning the probation report was not offered for the truth of the facts stated but as the basis for the doctor's expert opinion." (213 Cal.App.4th at p. 1404; Slip Opinion, p. 3.) In addition, the court reaffirmed its prior holding in *Miller, supra*, stating that "it is settled law in this

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[2]While mindful of the fact that this Court's grant of review in this case has resulted in the depublication of the Court of Appeal decision, this brief will, for the convenience of this Court, refer to the internal page numbers of both the original Court of Appeal's decision and the Slip Opinion attached to the petition for review in this case.

appellate district that a mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial" (213 Cal.App.4th at p. 1404; Slip Opinion, pp. 2-3.) The court noted that "[t]his division is tasked with appellate review of a great many California MDO cases," and stated that it developed the rule in *Miller* in response to a "spate of appeals" in the early 1990s, in which prosecutors produced the victims of the underlying crimes to show that the crimes involved force or violence, in order to save them from being "'revictimized' by having to testify again and relive their unpleasant experience." (213 Cal.App.4th at p. 1406; Slip Opinion, p. 4.) The court justified the rule in *Miller* by stating that "[w]hen stripped of verbiage and adjectives, the basic inquiry centers on the prisoner's mental health and potential threat to the public," and asked rhetorically "Who better than a psychiatrist or a psychologist should opine, one way or another, on this ultimate issue?" (213 Cal.App.4th at p. 1407; Slip Opinion, p. 5.)

In addition to upholding Perry's testimony regarding the commitment offense, and whether it involved force or violence, the court held that the *Miller* rule applied to <u>each</u> of the criteria under the MDO statute, including not only matters that called for the expression of an expert opinion, such as whether the prisoner had a severe mental disorder or was in remission, whether the disorder caused the commitment offense, or whether the prisoner represented a substantial danger of physical harm to others by reason of such disorder (*see* Penal Code section 2962, subdivisions (a) and (b)), but also purely factual inquiries, such as whether the commitment offense involved a crime of force or violence, and whether the prisoner received the required 90 days of treatment in the year preceding his parole (*see* Penal Code section 2962, subdivisions (c) and (e)). As to the

latter two criteria, the court held that such matters were "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," within the meaning of Evidence Code section 801, subdivision (a) (213 Cal.App.4th at p. 1405; Slip Opinion, p. 3), and that there was a "mental health component" to each of the factors under the MDO statute, which "must be interpreted in the particular context of an MDO case." (213 Cal.App.4th at p. 1407; Slip Opinion, pp. 6, 7.) With respect to the force or violence issue, the court stated that "[i]t is the mental health expert who can bring the raw facts together with a mental health explanation into perspective for the jury." (213 Cal.App.4th at p. 1407; Slip Opinion, p. 7.) With respect to the issue of whether the prisoner received 90 days of treatment in the year preceding his scheduled parole, the court stated that "[s]urely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar." It then rhetorically asked "Are the People required to produce the custodian of records to say that the prisoner received the 90 days of treatment?" and stated that the records were used in treatment and hence "reliable" and that a doctor's interpretation of them would assist the trier of fact. (*Id.*) It also stated that "[m]ost jurors do not have 'common experience' to read or interpret" medical reports, and that calling a custodian of records to testify as to the treatment provided and the mathematical computation of the number of days of treatment "would accomplish nothing." " (213 Cal.App.4th at pp. 1407-08; Slip Opinion, p. 7.) [3]

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[3]The court also stated that an expert could properly opine as to whether the prisoner represented a substantial danger of physical harm to others as a result of his severe mental disorder (213 Cal.App.4th at p. 1407; Slip Opinion, p. 7), a principle with which petitioner does not disagree.

In issuing its decision, the court disagreed with the analysis of the Fourth District in *Baker, supra,* which it ironically criticized as "dicta." (213 Cal.App.4th at pp. 1406-08; Slip Opinion, pp. 3-4, 5.) In particular, the court stated that *Baker* "take[s] an unrealistic view of the law of evidence in an MDO case," and "fail[s] to take into account the practical implications and fair administration of the MDO law." (213 Cal.App.4th at p. 1406; Slip Opinion, p. 5.) The court stated that the *Baker* dicta "tell the People how not to proceed, but fail to tell the People how to proceed," and that "[a]bsent a stipulation, the People must prove each and every element of the MDO criteria." Further, the court stated that, under *Baker*, "the People would be required to produce eyewitness testimony on the nature of the offense whether or not it involved the use of force or violence," the result that the court sought to avoid in *Miller*. " (213 Cal.App.4th at pp. 1406-07; Slip Opinion, p. 7.)

In reaching its conclusion, the court conceded that, in the abstract, the issue of whether a crime involved force or violence was not within the expertise of an expert psychiatrist or psychologist, and that "[t]o be sure, the Evidence Code applies to MDO trials." (213 Cal.App.4th at p. 1406; Slip Opinion, p. 5.) However, as indicated above, the court essentially carved out exceptions to those principles, stating that it "reach[ed] an opposite conclusion in the specific context of an MDO proceeding." (*Id.*) The court stated that the prisoner "has a panoply of constitutional and statutory rights which are adequate to protect him," and that there was also a "perfectly good superior court judge presiding over the trial whose job it is to safeguard those rights." (213 Cal.App.4th at p. 1408; Slip Opinion, p. 7.)

LEGAL ARGUMENT

THIS COURT SHOULD REVERSE THE COURT OF APPEAL'S DECISION, BECAUSE IT IMPROPERLY PERMITS THE USE OF EXPERT TESTIMONY AS TO THE "FORCE OR VIOLENCE" AND TREATMENT REQUIREMENTS UNDER THE MDO STATUTE, DESPITE THE FACT THAT SUCH REQUIREMENTS INVOLVE PURE ISSUES OF FACT OR MATTERS THAT ARE NOT BEYOND COMMON KNOWLEDGE, AND ARE THEREFORE NOT PROPERLY THE SUBJECT OF INDEPENDENT PROOF THROUGH THE OPINION TESTIMONY OF EXPERTS.

The foregoing facts, together with the applicable law, establish that the Court of Appeal's decision was erroneous, and should be reversed, and that this Court should instead adopt the reasoning of the Fourth District in *Baker*. As enacted by the Legislature, the MDO statute contains a series of diverse elements and requirements, each of which must be met to justify the unusual and drastic step of involuntarily committing a prisoner beyond the expiration of his or her prison sentence. As such, those diverse elements, each of which must be proven beyond a reasonable doubt, are subject to differential treatment by the courts in the course of proceedings under the MDO statute. Just as certain of those elements are considered immutable and not subject to change (and therefore, once proven, need not be proven again during subsequent recommitment proceedings), those elements differ materially in their nature and character, and the manner in which they may properly be proven. In particular, certain of those factors, not at issue in this case, are subjective in character, and clearly involve psychological or mental health components that are beyond the common knowledge or understanding of the trier of fact. As such, they are properly the subject of expert opinion testimony. By contrast, other elements – including those involved in this case – involve purely objective

matters of fact, and/or the application to the MDO statute of facts that do not have a mental health aspect or component, and as to which a psychologist or other mental health professional has no particular expertise, beyond that of the trier of fact or other lay person. As shown below, those elements – specifically the issues of (1) whether the commitment offense involved a crime of force or violence; and (2) whether the prisoner received 90 days of mental health treatment during the year preceding his or her scheduled parole – are, therefore, not amenable to expert testimony or, at best, involve manners of proof as to which the expert lacks personal knowledge, and that are, therefore, hearsay. As such, the use of psychological experts to opine as to those elements violates basic evidentiary statutes and principles that govern the very admissibility of expert opinion testimony and the basic distinction between the permissible use of hearsay as the basis for expert opinion and its impermissible use as proof of the independent facts that must be established to justify continued commitment as an MDO, as well as other portions of the MDO statute. Here, the Court of Appeal failed to recognize or properly apply those principles and distinctions, and its "one size fits all" approach to the diverse criteria under the MDO statute is otherwise untenable, and would improperly and unjustifiably carve out an exception to the Evidence Code and case law for MDO proceedings. As a result, this Court should reverse the judgment in this case, and impose a uniform standard for the use of expert testimony in MDO proceedings that is faithful to and consistent with the evidentiary statutes and principles that apply generally in this State.

A. Under The Mentally Disordered Offender Statute, The People Among Other Things Must Prove Beyond A Reasonable Doubt That The Commitment Offense Involved Force Or Violence, And That The Prisoner Received Ninety Days Of Treatment During The Year Preceding His Or Her Scheduled Parole.

Penal Code section 2962 permits the State, in certain instances, to require that a mentally disordered prisoner that is about to be paroled continue to receive treatment by the Department of Mental Health for a particular severe mental disorder as a condition of that parole. To require such continued treatment, the State must prove several criteria contained within the statute to establish that a substantial danger of physical harm exists if no treatment is provided. Those criteria include that the prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment (subdivision (a));[4] that the disorder caused or aggravated the crime for which the prisoner was sentenced (subdivision (b)); that the prisoner have been in treatment for the disorder for 90 or more days within the year prior to the prisoner's parole or release (subdivision (c)); that the prisoner by reason of his or her mental disorder, represent a "substantial danger of physical harm to others" (subdivision (d)(1)); and that the crime for which the prisoner was sentenced fall into one of a number of specified categories (subdivision (e)). (*See, e.g., People v. Sheek* (2004) 122 Cal.App.4th 1606, 1610). As to the latter requirement, section 2962, subdivision (e)(2) sets forth a series of enumerated offenses

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[4]Subsection (a) defines "severe mental disorder" as "an illness or disease or condition that substantially impairs the person's though, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely." The subsection also defines "remission" as "a finding that the overt signs of the severe mental disorder are controlled either by psychotropic medication or psychosocial support."

(subdivisions (A) through (O)), while subdivisions (P) and (Q) provide a series of "catch-all" provisions. Specifically, subdivision (P) provides that a commitment offense may consist of a non-enumerated offense "in which the prisoner used force or violence, or caused serious bodily injury," while subdivision (Q) provides that such an offense may consist of "[a] crime in which the perpetrator 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."

To support an order requiring treatment of a prisoner as an MDO, the People must prove each of the criteria under Penal Code section 2962 beyond a reasonable doubt. (Penal Code section 2966, subdivision (b); *see also, e.g., People v. Miller* (1994) 25 Cal.App.4th 913, 919; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-83). As a result, the courts have frequently reversed commitment orders based upon the People's failure to prove one or more of the required elements. (*See, e.g., People v. Noble* (2002) 100 Cal.App.4th 184, 190 (trial court erred in allocating to the defendant the burden of proving that his mental disorder was in remission and that he was not dangerous to others); *People v. Green* (2006) 142 Cal.App.4th 907, 911-12 (reversing commitment order on the ground that appellant's offense of felony vandalism did not constitute a crime of force or violence under the MDO statute)).

The courts have held that three of the above criteria (i.e. the existence of a severe mental disorder; whether the disorder is in remission and whether the prisoner poses a serious threat of physical harm to others) are subject to change, while the remaining three

criteria (i.e. whether the commitment offense involved force or violence; whether the prisoner was treated for the disorder for at least 90 days in the year before his or her scheduled release; and whether the disorder caused or aggravated the commitment offense) concern past events that once established, that are incapable of change. As a result, the courts have differentiated between an initial commitment and subsequent recommitment proceeding(s) under the MDO statute, holding that only the three requirements that are subject to change need be proven in a recommitment proceeding. (*People v. Francis* (2002) 98 Cal.App.4th 873, 878-79; *People v. Hannibal* (2006) 143 Cal App 4th 1087, 1094-95.)

B. Under The Evidence Code And The Applicable Case Law, Expert Testimony May Be Admitted Only Where The Subject Matter Is Beyond The Common Experience Of The Factfinder, And Where It Involve Matters Of Opinion Rather Than Independent Proof Of A Fact.

Evidence Code section 801, subdivision (a) provides that an expert may testify, in the form of an opinion, only when his or her testimony is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (emphasis added). As a result, an expert may not properly express an opinion where the matter does not involve the use of his or her specialized skill or experience, or is within the common experience of a judge or jury, such that the finder of fact is equally capable of reaching a judgment or opinion. (*See, e.g., People v. Johnson* (1993) 19 Cal.App.4th 778, 786 (expert could not properly opine that prison inmates had a tendency to lie); *People v. Torres* (1995) 33 Cal.App.4th 37, 45 ("[e]xpert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and

intelligently by the trier of fact as by the witness").) This Court has summarized the rule as follows:

> "Although courts have not always used the same language, the decisive consideration in determining the [necessity] of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that [persons] of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert [is required]."

Campbell v. General Motors Corp. (1982) 32 Cal.3d 112, 124, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103. Thus, for example, in *People v. McDowell* (2012) 54 Cal.4th 395, this Court recently held that the trial court, during the penalty phase of a death penalty trial, properly excluded the evidence of a defense expert that a person's bad family experiences as a child often caused behavioral problems as an adult, stating that the jury was capable of evaluating the issue without expert opinion testimony. (*Id.* at pp. 424-26.) Similarly, this Court in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1 held that opinion testimony that a criminal defendant was a credible witness should have been excluded, because the determination of credibility is not sufficiently beyond common experience that the expert's opinion would assist the trier of fact, and that the jury is as well equipped as the testifying expert to determine whether a witness is being truthful. (*Id.* at p. 82; *see also, e.g., Westbrooks v. State of California* (1985) 173 Cal.App.3d 1203, 1209-10 (trial court properly excluded purported expert testimony that the presence of flares, a deputy sheriff and a sheriff's vehicle established that the subject property was not dangerous); *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 290-91 (trial court erred by admitting purported expert opinion in wrongful termination

case that certain facts in evidence constituted "indicators" of employment retaliation).)

Further, an expert's testimony is limited to opinions rather than facts, particularly where, as here, the expert did not personally observe or witness those facts, and where they are not being presented for the purpose of supporting the expert's opinion. (*See, e.g.*, Evidence Code section 801, subdivision (b); *Barham v. Widing* (1930) 210 Cal. 206, 214; *see also People v. Baker* (2012) 204 Cal.App.4th 1234, 1245.) In particular, although an expert's opinion testimony may be based on hearsay, the expert generally may not testify to the contents of the hearsay. (*Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 414; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 863-64.) Similarly, a witness cannot introduce hearsay or otherwise inadmissible matter under the guise of providing expert opinion. (*See, e.g., People v. Price* (1991) 1 Cal.4th 324, 416; *People v. Coleman* (1985) 38 Cal.3d 69, 92; *see also People v. Carpenter* (1997) 15 Cal.4th 312, 403.) Stated another way, "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" (*People v. Gardeley* (1996) 14 Cal.4th 605, 619) and, although experts can testify to the basis of their opinion, they may not act as a "channel" to place the opinion of out of court witnesses before the trier of fact. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 895.)[5]

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[5]The above principles apply to documentary evidence on which an expert has purported to rely, but which has not been properly authenticated. Thus, for example, in *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, the Court of Appeal reversed an order granting summary judgment in favor of a medical malpractice defendant, which was based in part on an expert witness's declaration, in which he purported to summarize medical records that he had reviewed, but that had not themselves been introduced into evidence. The court noted that, although such records were admissible under the business

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

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

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records exception to the rule against hearsay, defendants failed to properly authenticate them. (*Id.* at p. 742.) Further, the court stated that, although medical records, like other hearsay, could be used as the basis for an expert medical opinion, the attempted use of the expert to testify to the truth of the facts stated in the records, as to which he lacked any personal knowledge, was improper. (*Id.* at p. 743.) As a result, the court held that the declaration of alleged facts had "no evidentiary foundation," and that "[a]n expert's opinion based on assumptions of fact without evidentiary support has no evidentiary value." (*Id.*)

supra, 204 Cal.App.3d at pp. 1245-46).

C. Under The Fourth District's Decision In Baker, Expert Testimony May Not Be Admitted To Establish Purely Factual Matters Of Which The Expert Lacks Personal Knowledge, Including That The Purported Commitment Offense Constituted A Crime Of Force Or Violence Or That The Prisoner Received The Ninety Days Of Treatment Required Under The MDO Statute.

Applying the above principles, the Fourth District, in *People v. Baker* (2012) 204 Cal.App.4th 1234 held that expert testimony similar to that involved in this case was improper and hence inadmissible. In *Baker*, a psychologist that had evaluated the appellant for treatment as an MDO testified that she had reviewed appellant's central criminal file, which included a description of the crime, her probation report, and information concerning her performance on parole. Based on that review, the psychologist opined not only that the offense was caused by appellant's mental illness, but also that the offense (arson) was a qualifying offense under section 2962 because it posed a danger to others, including potential fatalities. (*Id.* at p. 1239).[6] On appeal, appellant contended that there was insufficient evidence that she had committed a qualifying offense, and in particular that the expert's recitation of the facts surrounding the arson incident were hearsay and hence inadmissible, because it merely repeated the information contained in documents that were not admitted into evidence and that could therefore not be admitted as independent proof of those "facts." The Court of Appeal

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

agreed, stating that appellant's hearsay objections were well taken and should have been sustained. The Court stated that the psychologist was not competent, under section 801, to opine as to whether the arson posed a substantial danger to others, because (1) to the extent it constituted a factual question, it did not require an expert opinion; and (2) to the extent it constituted a legal conclusion, it was not substantial evidence. (*Baker*, 204 Cal.App.4th at pp. 1246-47). Moreover, the Court held that, although the psychologist could rely on hearsay documents to support her opinion regarding causation, those documents could not be used as independent proof of the facts surrounding the arson or, therefore, to support a finding that the crime involved force or violence or met the criteria under section 2962, subdivision (e)(2)(L). (*Baker*, 204 Cal.App.4th at pp. 1246-47).[7]

In issuing the above holding, the court in *Baker* criticized statements made by the Second District in *People v. Miller* (1994) 25 Cal.App.4th 913. (*Baker*, 204 Cal.App.4th at p. 1245 n. 9). In *Miller*, appellant argued that trial court improperly admitted the testimony of the psychologist that evaluated him that his commitment offense involved force or violence, which was based on his review of the probation report, on grounds that it constituted inadmissible hearsay. The Second District rejected the argument, on the ground that appellant failed to object to the testimony to the trial court, and could not raise the issue for the first time on appeal. (*Miller*, 25 Cal.App.4th at p. 917). The Court

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[7]The court in *Baker* nonetheless upheld the commitment order, finding that a portion of the probation report, which was admitted into evidence without objection, and that stated that appellant's brother was treated for smoke inhalation, supported a determination that the offense involved a danger to others and, therefore, supported the commitment order. (*Baker*, 204 Cal.App.4th at p. 1247).

proceeded, however, to address the merits, stating that "[w]hether or not a prisoner is an MDO is the proper subject for expert opinion," and that "[s]uch an opinion necessarily entails an opinion as to each of the criterion [sic] or elements thereof." (*Id.*) The Court in *Baker*, however, disagreed with that statement, stating that "[a]lthough an expert opinion is required as to some of the criteria in order to determine whether the prisoner is an MDO, expert opinion is not necessary – or admissible – with respect to the facts underlying the offense or whether the offense posed a risk of harm to others, or the factual inquiry as to whether the prisoner received 90 days of treatment." (*Baker*, 204 Cal.App.4th at p. 1245 n. 9).[8]

D. Because Both The "Force Or Violence" And The Ninety Day Treatment Requirements Involve Independent Proof Of Facts That Do Not Require Any Particular Expertise, Rather Than The Mere "Channeling" Of Hearsay Or Other Inadmissible Evidence, This Court Should Reverse The Court Of Appeal's Decision, And The Commitment Order In This Case.

Applying the above principles and authority to the facts of this case, and to the relevant elements of the MDO statute, it is evident that the trial court and the Court of Appeal erred, and that, as the Fourth District in *Baker* correctly held, the use of expert opinion testimony with respect to the "force or violence" and 90 days of treatment criteria is, with certain limited, inapplicable exceptions, improper. The determination of whether

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

appellant's commitment offense of petty theft, which is not an enumerated offense under Penal Code section 2962, subdivisions (e)(2)(A) through (O), nonetheless involved the use or threat of force or violence so as to fall under the "catch-all" provisions of subdivisions (P) or (Q), depended upon an examination of the facts of that offense, and the common sense application of those facts to the language of the MDO statute. As such, it did not involve matters that were "sufficiently beyond common experience," as required under Evidence Code section 801, subdivision (a), so as to permit expert testimony at all. Instead, the force or violence issue resembles basic commonplace or uncomplicated matters, such as the issue of credibility found in *Johnson* and *Coffman and Marlow*, the effects of a bad childhood on adult behavior, as found in *McDowell*, and the "indicators" of particular behavior found in *Kotla*. Like those matters, the issue of whether a particular crime or set of facts involved force or violence depends on "inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness" (*Torres, supra*), and as to which persons of ordinary education "could reach a conclusion as intelligently as the witness" (*Campbell*, *Cole*, *supra*). Moreover, even if that were not the case, there was and could be no showing that the People's expert Perry – whose education, experience, and training were in psychology, rather than criminology – distinguished him from other lay persons or the proverbial "man on the street" with respect to the force or violence issue. Stated another way, a mental health professional has no "special knowledge, skill, experience, training, [or] education," as required under Evidence Code section 801, subdivision (b), that would mark him as qualified to opine as to whether a given set of circumstances involved force or violence.

Moreover, even if it were otherwise proper, the purported use of expert testimony found in this case – which consisted of Perry's narrative recitation of "facts" contained in reports that he apparently reviewed (*see* 2 R.T. pp. 308-09, 314-15) – clearly involved the use of hearsay, in violation of several basic evidentiary principles. As shown above the case law, including most notably this Court's decisions in *Gardeley* and *Whitfield*, clearly distinguishes between the admission of an expert's testimony regarding factual matters for the purpose of explaining the basis for the expert's opinion and as independent "proof" of those facts. Moreover, those cases, as well as *Montiel* and the case law following the United States Supreme Court's decision in *Crawford*, prohibit the use of an expert to "channel" testimony or evidence as to factual matters that are otherwise hearsay and hence inadmissible. That distinction – which appellant's counsel drew in this case (*see* 2 R.T. pp. 315-17) – as well as the prohibition against such "channeling," comport not only with statutory and case law, but with fairness and basic common sense. Here, and in the vast majority of MDO cases, the expert typically lacks personal knowledge of the facts regarding the commitment offense. Instead, that expert typically bases his or her "opinion" as to whether that involves force or violence on a police or probation report or some other document, which may or may not be introduced into evidence, whose author is invariably unavailable for cross-examination, and whose accuracy is, therefore, not reasonably subject to question. As a result, the result in this and other MDO cases is that the "force or violence" element is frequently established, as here, by the "on-the-record recitation of sources" (*Gardeley, supra*, 14 Cal.4th at p. 619) on which the expert "relied," rather than the "independent proof" of the fact of force or violence required

under the MDO statute. Moreover, that "proof" is based on "sources" whose accuracy cannot be "test[ed] in the crucible of cross-examination" (*Crawford*, 541 U.S. at p. 61) or otherwise challenged by a prisoner, whose liberty following the completion of his prison term is clearly at issue. As a result, the use of hearsay, such as that found in this case, to support an purported expert opinion that the commitment offense constituted a crime of "force or violence" under the MDO statute constitutes a classic instance of introducing inadmissible matter under the guise of providing expert opinion (*see Price, Coleman*, and *Carpenter, supra*), and raises serious and potentially constitutional issues of fairness and due process.

For both similar and additional reasons, the use of hearsay to satisfy the 90 day requirement, though technically not at issue in this case, is, as the Fourth District found in *Baker*, equally improper. In contrast to the rare instance in which the nature or quality of a particular treatment is at issue (*see, e.g., People v. Sheek* (2004) 122 Cal.App.4th 1606), and the even rarer instance where expert psychological testimony is necessary to resolve that issue, the issue of whether the treatment requirement under Penal Code section 2962, subdivision (c) has been met is, by its very nature, a purely factual inquiry that involves a purely numerical calculation as to whether the number of days of treatment received by the prisoner during the year prior to his or her scheduled parole exceeded ninety. (*See, e.g., People v. Del Valle* (2002) 100 Cal App 4th 88 (five days of outpatient treatment at a community clinic could not be aggregated with 85 days of mental health treatment while in prison to meet 90 day requirement); *People v. Achrem* (2013) 213 Cal.App.4th 153 (73 days of treatment at Enhanced Outpatient Program could be aggregated with treatment

received while in prison to meet the 90 day requirement).) As a result, the issue is clearly not related to a subject that is beyond common knowledge, or involves a special skill (i.e. the ability to count) that a mental health expert uniquely possesses, so as to properly constitute the subject of expert opinion testimony, and the use of "experts" to similarly regurgitate or "channel" information that they simply gleaned from hospital or medical records is equally improper. Moreover, and unlike the "force or violence" issue, the 90 day requirement may easily be met through exceptions to the rule against hearsay enacted by the Legislature. In particular, that element may be proven by simply introducing the hospital or medical records themselves, either under the "business records" exception under Evidence Code section 1271, subdivision (a), which of course applies to all such documents, including medical or treatment records, or under Penal Code section 2981, which specifically authorizes the introduction of certified copies of "records or copies of records of any state penitentiary, county jail, federal penitentiary, or state hospital in which that person has been confined" for the purpose of providing the 90 day requirement.[9]

Moreover, although certain statutory requirements for commitment of a prisoner as a mentally disordered offender clearly reflect matters of opinion that are beyond common

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[9]If anything, the enactment of section 2981 represents a legislative determination that proof that the 90 day requirement was met should be made through the actual records of treatment kept by the hospital, prison, or other facility involved in the treatment of a mentally ill inmate, which can be reviewed and challenged if necessary, rather than by simply allowing an "expert" to "channel" those records and preclude any further inquiry. Notably, however, the Court of Appeal did not address the existence or significance of section 2981 in its opinion in this case.

experience and therefore call for the expression of expert psychological testimony,[10] that fact does not justify permitting experts to additionally opine as to whether the force or violence or 90 day treatment requirements were met. To the contrary, the courts already treat the various diverse criteria for commitment under the MDO statute differently, by for instance holding that only certain criteria that are subject to change need be proven at a subsequent recommitment proceeding. (*See Francis, Hannibal, supra.*) As a result, and contrary to the Second District's holdings in *Miller* and this case, there is nothing anomalous about a rule that recognizes the diverse nature of the criteria for commitment specified under the MDO statute, and that permits expert testimony as to some but not all of those criteria.

In sum, just as "you don't need a weatherman to know which way the wind blows" (*see, e.g., Jorgensen v. Beach 'n' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163, quoting Bob Dylan,"Subterranean Homesick Blues"), one does not need a psychologist to determine whether a particular offense that is not enumerated in the MDO statute involved the use of force or violence, or to review treatment records reflecting the purely numerical issue of the amount of days of treatment received by a prisoner prior to his or her scheduled parole. Because the Court of Appeal's decision in this case violated that basic principle and, as shown below, was otherwise fatally flawed, it should and must be

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

reversed.

E. Because, Unlike The Fourth District's Opinion In *Baker*, The Court Of Appeal's Decision In This Case Disregarded Basic Evidentiary Principles And Failed To Justify The Differential Treatment Of Cases Arising Under The MDO Statute, It Should And Must Be Reversed.

As indicated above, the Fourth District, in its decision in *Baker*, properly and straightforwardly applied these basic principles to the context of an MDO proceeding. Regrettably, however, the Second District's decision in the present case failed to do so, and instead labored to articulate a rationale for the differential treatment of MDO proceedings that is neither persuasive nor consistent with the above authority. The court hopelessly blurred the distinction between the admission of factual testimony as the basis for an expert's opinion and the admission of such testimony as independent proof of such facts. (213 Cal.App.4th at pp. 1404-05; Slip Opinion, pp. 2-3).[11] Moreover, while purporting to declare that "[t]o be sure, the Evidence Code applies to MDO trials" (213 Cal.App.4th at p. 1406; Slip Opinion, p. 5), the court, in contrast to the opinion in *Baker*, in effect created a special rule for such proceedings, stating among other things that the statute must be viewed in the "specific context of an MDO proceeding" (213 Cal.App.4th at p. 1406; Slip Opinion, p. 5), and that the individual requirements under the MDO

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[11]Thus, for example, there was no basis for the appellate court's determination that 's counsel waived the issue by failing to object to the trial court (213 Cal.App.4th at p. 1404; Slip Opinion, p. 2). Instead, trial counsel made clear that he did not object to the admission of such evidence to support Perry's opinion that petitioner's disorder caused or aggravated the commitment offense, but did object to the admission of such evidence as substantive proof that the offense involved false or violence. (*See* 2 R.T. pp. 316-17.) Further, because the present matter involved a court trial, trial counsel's objection at the close of evidence, rather than contemporaneously with the expert's testimony, was nonetheless timely and valid.

statute "must be interpreted in the particular context of an MDO case" (213 Cal.App.4th at p. 1407; Slip Opinion, p. 6.) As a result, the court relied on a series of wholly inappropriate "policy" justifications for disregarding the rules of evidence, including its own workload and the fact that it was "tasked with appellate review of a great many California MDO cases," its professed concern that the victims of the underlying crimes not be "'revictimized' by having to testify again and relive their unpleasant experience" (213 Cal.App.4th at p. 1406; Slip Opinion, p. 4), and its subjective belief that the existing provisions of the MDO statute and state and federal constitutions, including the presence of a "perfectly good superior court judge" (213 Cal.App.4th at p. 1408; Slip Opinion, p. 5) were adequate to protect a prisoner in an MDO proceeding. But the job of articulating what protections are "adequate" is not that of an appellate court where, as here, evidentiary principles of general application, as set forth in the Evidence Code and binding decisions by this Court, exist and govern the particular action. Similarly, the court's subjective desire to streamline MDO proceedings does not justify disregarding basic protections to which a prisoner, as well as every other litigant in California, is entitled.

The court's remaining attempts to justify its decision, and its disagreement with the decision in *Baker*, similarly do not withstand scrutiny. The court's characterization of the matter as involving whether an expert may opine as to the "ultimate issue" in the case (213 Cal.App.4th at p. 1405; Slip Opinion, p. 5), ignored the fact that petitioner never raised that "issue," as well as the fact that the determination of the "ultimate issue" – i.e. whether petitioner qualified for treatment as an MDO – depended upon the resolution of

several factual issues, which as shown above are not properly the subject of expert opinion testimony. Similarly, the court's statement that there is a "mental health component" to each of the criteria under the MDO statute (213 Cal.App.4th at p.1407; Slip Opinion, p. 6) is, respectfully, nonsense. Whether or not a crime involves force or violence does not depend upon whether its perpetrator suffered from a mental illness at the time of its commission, and a crime does not become any more or less violent if the perpetrator suffers from a mental disorder. Further, contrary to the appellate court's statement that "[a] doctor can relate to the jury the nature of the treatment, what it was to accomplish, and why it either succeeded in part, failed or part, or failed all together" (213 Cal.App.4th at p. 1408; Slip Opinion, p. 7), none of those "issues" are involved in the present case, nor in the vast majority of MDO cases. Instead, and as indicated above in section D., determination of whether the prisoner received the required ninety (90) days of treatment does not involve a qualitative determination as to the nature or efficacy of such treatment, but a purely numerical calculation that an expert is neither especially qualified to make nor allowed to "channel" to the finder of fact.[12] And, the court's refusal

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[12]In this regard, the appellate court's comments that "[s]urely a treating or testifying doctor is capable of deciphering medical records and counting days on a Gregorian calendar," its rhetorical question as to whether the People were required to produce a custodian of records to say that the prisoner received ninety days of treatment, and its claim that such a requirement "would accomplish nothing" (213 Cal.App.4th at pp. 1407-08; Slip Opinion, p. 7) utterly miss the point. There is no indication that a review of medical records to determine the days on which treatment was rendered involves "deciphering" or any other special skill, and the trier of fact is just as qualified as a testifying expert to count those days and determine if they meet the statutory minimum. Moreover, allowing the expert to summarize the documents showing such treatment not only violates the proscription against improper "channeling," but deprives the prisoner of any ability to challenge that determination by reviewing the actual records or cross-

to revisit its prior holding in *Miller* that " mental health expert may rely on reliable hearsay in a probation report in rendering an opinion at an MDO trial" (213 Cal.App.4th at p. 1406; Slip Opinion, pp. 2-3) ignores the established principle that probation reports or other documents may be used to prove a prior conviction only if the facts asserted in the document are independently admissible under the rules of evidence, including hearsay rules. (*See. e.g., People v. Guerrero* (1988) 44 Cal.3d 343, 352; *People v. Reed* (1996) 13 Cal.4th 217, 230.)

Finally, the criticism by the present Court of Appeal of the result and reasoning in *Baker* (213 Cal.App.4th at pp. 1406-07; Slip Opinion, p. 5) is entirely misplaced. Contrary to the court's opinion, there is nothing "unrealistic," impractical or unfair about applying standards set forth in the Evidence Code and the binding decisions of this Court to proceedings under the MDO statute. Similarly, it is not the province of the court in *Baker* or elsewhere to "tell the People how to proceed"; rather, that determination is to be made by applying those principles that every other litigant in California is required to follow. And, the present court's lament that "[a]bsent a stipulation, the People must prove each and every element of the MDO criteria" means nothing more than the

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examining the expert as to his or her conclusions. Further, the court's observation that records of treatment records are used not only to ascertain whether the 90 day rule has been met but also to administer treatment (213 Cal.App.4th at p.1407; Slip Opinion, p. 7), even if true, is irrelevant, because: (1) the testifying expert is almost invariably a third party retained to evaluate the prisoner for possible classification as an MDO, and therefore not involved in his or her care; and (2) that "fact" at most is relevant to the issue of whether the records were kept in the normal course of business, as required for admission under the "business records" exception to the rule against hearsay. (*See* Evidence Code section 1271, subdivision (a); *see also* Penal Code section 2981.)

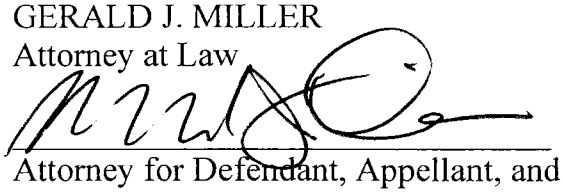
prosecutor must take the statute as he or she finds it, and that a prisoner scheduled for release on parole can continue to have his liberty deprived only upon a showing, beyond a reasonable doubt and by competent, admissible evidence, that each of those criteria were met.

CONCLUSION

The Evidence Code and basic evidentiary principles establish that an expert's testimony must be limited to matters of opinion; that he or she may opine only as to matters within the scope of their expertise and as to matters outside common knowledge; and that the expert cannot be used as a "channel" or other means to bring otherwise inadmissible evidence before a court or jury. Permitting an expert in an MDO proceeding to testify as to the "force or violence" criteria or the 90 day treatment requirement, or to rely on hearsay in doing so, violates each of those principles. As a result, and because the Court of Appeal's decision in this case is otherwise unsupportable, this Court should reverse that decision, and reverse the commitment order in this case.

DATED: July 12, 2013

GERALD J. MILLER
Attorney at Law



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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 9,266 words, according to the word count of the computer program used to prepare the brief.

DATED: July 12, 2013

GERALD J. MILLER
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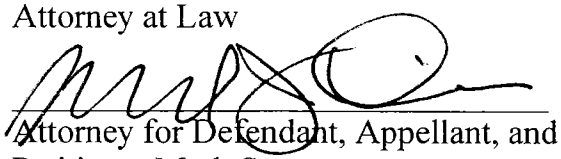

Attorney for Defendant, Appellant, and Petitioner Mark Stevens

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:

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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 July 12, 2013 at Agoura Hills, California.

GERALD J. MILLER