defense has already been established and is sound. Justice Lenk, however, opined that the counsel's choice of strategy was unreasonable in its failure to examine the mental health history. He further stated that for defense counsel to make a fully informed decision about strategy, the defendant's mental health history requires examination, despite the potential weakness of the criminal-responsibility defense. As this history was not considered, the defense attorney would not be in a position to make a strategic choice regarding an alternative defense. The two divergent opinions were not further resolved, leaving the question open to further interpretation.

A second point of interest to forensic clinicians involves the judges' opinions on the likelihood of success of the criminal-responsibility defense. In the first concurring opinion, the judges accept as reasonable the defense attorney's assumption that the defense is seldom successful and that other strategies should be considered before choosing it. The three judges representing the second concurring opinion asserted that an informed decision on defense strategy could not be made in the case until all facets of the case, including a potential criminal-responsibility defense, had been considered carefully. Forensic clinicians, in educating attorneys and judges about mental health, and in striving to answer forensic questions in an objective manner, have an important role to play in a fair and appropriate use of the defense.

Disclosures of financial or other potential conflicts of interest: None.

# California Supreme Court Limits Scope of Expert Testimony in Postprison Civil Commitment Trials

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## Expert Witness Testimony May Not Be Used to Prove the Facts Underlying a Commitment Offense in a Postprison Civil Commitment Hearing

Contrary to the decision by the California 2nd District Court of Appeals in *People v. Miller*, 31 Cal. Rptr. 2d 423 (Cal. Ct. App. 1994), the California Supreme Court ruled in *People v. Stevens*, 362 P.3d 408 (Cal. 2015), that expert testimony may not be used to prove the underlying offense in a Mentally Disordered Offender (MDO) postprison civil-commitment hearing, because this would violate the rules of evidence. They reasoned that a mental health expert may not testify to the "force or violence" of an underlying offense in a situation that is not sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

### *Facts of the Case*

In 2009, Mark Stevens was convicted of petty theft with a prior theft-related conviction and was sentenced to 32 months in state prison by the San Diego County Superior Court. Before his parole day, while still in the custody of the California Department of Corrections and Rehabilitation (CDCR), Mr. Stevens was evaluated to determine whether he met criteria as an MDO. A chief psychiatrist from the CDCR certified to the Board of Parole that Mr. Stevens did meet the MDO criteria. An offender is eligible for commitment under the MDO Act if all of the following six factors are met: the prisoner has a severe mental disorder; the prisoner used force or violence in committing the underlying offense; the prisoner had a disorder that caused or was an aggravating factor in committing the offense; the disorder is not in remission or capable of being kept in remission in the absence of treatment; the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and because of the disorder, the prisoner poses a serious threat of physical harm to other people.

A certification hearing was held by the parole board. On March 2, 2012, the board concluded that the state had proven that Mr. Stevens met criteria for commitment as an MDO. Mr. Stevens requested a certification review trial to challenge the parole board's determination. He waived his right to a jury trial. A bench trial was held on April 24, 2012, in San Luis Obispo Superior Court, and the court opined that the state had proven that Mr. Stevens met MDO

commitment criteria. The trial court in this case relied on a psychologist's expert testimony to prove that the defendant met the six criteria of the MDO Act.

Mr. Stevens appealed to the California Second District Court of Appeals, arguing that the forensic psychologist was incorrectly allowed to comment on force or violence used in the underlying offense and that the psychologist's testimony about the crime was hearsay based on a probation report. Mr. Stevens also argued that a determination of whether "force or violence" was used in a crime should be left to the trier of fact to decide. The appeals court rejected these arguments and affirmed the trial court's decision, following the reasoning in *People v. Miller* 25 Cal. App.4th 913 (1994) that, "A qualified mental health professional may rely on a probation report to render an opinion whether a defendant is an MDO" (*Miller*, p 425).

Mr. Stevens then appealed to the California Supreme Court, arguing that the trial court allowed hearsay evidence to be used and that the expert witnessed was incorrectly allowed to testify in areas where expert opinion was not warranted. Mr. Stevens cited *People v. Baker* 139 Cal. Rptr. 3d 594 (Cal. Ct. App. 2012) from the Fourth District Court of Appeals of California. In the *Baker* decision, the court ruled that the sources that form the basis of an expert witness's opinion does not transform inadmissible evidence into independent proof of any facts. In *Baker*, the forensic psychologist testified that the underlying offense was an act that posed a risk of harm to others, basing his opinion on the defendant's probation report. The psychologist also testified that the defendant had been in treatment for 90 days and based this statement on the defendant's records. The state did not present any other evidence besides the expert testimony to satisfy the 90 days of treatment and underlying dangerous crime components of the MDO criteria. The *Baker* court ruled that these two requirements should be addressed by the underlying facts of the case and did not require expert testimony, as these subjects are not sufficiently beyond common experience that the opinion of an expert is needed to assist the trier of fact.

Mr. Stevens asked the California Supreme Court to reject the application of *People v. Miller* from the Second District Court of Appeals of California. In the *Miller* decision, the court ruled that even though a probation report may be inadmissible hearsay, an expert may still rely on that report at MDO proceedings. The appeals court affirmed the trial court's ruling.

### *Ruling and Reasoning*

The supreme court reversed the appellate court's decision and remanded the case for further review. The court offered that, in a commitment hearing under the MDO Act, the state may not prove the facts underlying the commitment offense through a mental health expert's opinion testimony.

The California Supreme Court sided with Mr. Stevens and ruled that a mental health expert's opinion testimony is not substantive independent proof that the defendant committed a qualifying offense for commitment. Because determination of a threat of force or violence during the qualifying offense is not beyond common experience, the expert witness should not have been allowed to give an opinion on the subject. The court found that only evidence put forward by the state in regard to the underlying offense was expert testimony, and therefore, that the defendant did not meet the criteria set forth by the MDO Act. The court added that the legislature is free to create exceptions to the rules of evidence but had not in this instance.

### *Discussion*

In this case, the California Supreme Court determined that testimony by a forensic psychologist during a postprison commitment trial that was used to establish that Mr. Stevens committed a dangerous offense overstepped the boundaries of allowable expert testimony, as expert knowledge was not necessary to determine this fact. This case follows the trend of *Daubert v Merrell Dow Pharmaceuticals*, *Inc.* 509 U.S. 579 (1993) and other cases that have sought to define and delimit the role of expert witnesses. The decision in *Daubert* relegated the job of "gatekeeper" to trial court judges by issuing guidelines for the determination of acceptable expert testimony. California, however, abides by the less stringent *Frye* standard of "general acceptance" in the scientific community. Both of these prior cases served to help standardize and ensure the quality of expert witnesses. In the current case, expert testimony was disallowed on the basis of the California Evidence Code, which limits expert witness testimony to matters "sufficiently beyond common experience" (Cal. Evid. Code § 801 (2015)).

The role of the expert witness in this case may have been placed under increased scrutiny because of the mixed civil and criminal status of the MDO hearing, which combines "rules of criminal discovery, as well as civil discovery" to "reduce costs" (Cal. Penal Code § 2966(b) (2015). Although it is a civil commitment procedure, the higher standard of proof of beyond a reasonable doubt is required. In *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Supreme Court determined that the minimum standard for civil commitment should be clear and convincing evidence, but expressed reservations that a higher standard of beyond a reasonable doubt might be difficult to prove, given the uncertainties of psychiatric medicine. In regard to the mixed criminal/civil nature of the current case, some scholars have opined that, in general, expert witnesses in civil cases undergo more scrutiny than those in criminal cases (Dwyer D: (Why) Are civil and criminal expert evidence different. *Tulsa L Rev* 43:381, 2007). The pressure of having to provide evidence beyond a reasonable doubt, as well as the potential increased scrutiny of being in a mixed criminal/civil process, may place additive pressure on mental health expert witnesses in Californian MDO hearings.

Overall, cases concerning the limitation of expert witness testimony highlight the ambivalence of courts toward expert witnesses. On the one hand, the expert witness serves the essential function of educating the court on topics outside the typical range of knowledge of the layperson. On the other hand, those who wield expert knowledge might be seen to hold undue sway over the opinions of jurors.

Disclosures of financial or other potential conflicts of interest: None.

# Threatening Statements and the Therapist-Client Privilege

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## There Is No "Threats Exception" in Minnesota that Allows a Therapist to Testify Regarding a Client's Threatening Statements Without His Consent

In *State v. Expose*, 872 N.W.2d 252 (Minn. 2015), Jerry Expose, Jr., was sentenced to 28 months in prison after being found guilty of making terroristic threats. The threats were made during an anger management therapy session and reported by his therapist. She was later called as a witness at his trial. Mr. Expose objected on the grounds that therapist–client privilege prohibited her testimony, and the district court overruled. Mr. Expose appealed his conviction, and the Court of Appeals of Minnesota agreed that the therapist's testimony was inadmissible and reversed Mr. Expose's conviction (*State v. Expose*, 849 N.W.2d 427 (Minn. Ct. App. 2014)). The Supreme Court of Minnesota affirmed, concluding that the court of appeals correctly applied the statute codifying therapist–client privilege when reviewing Mr. Expose's appeal.

### *Facts of the Case*

Mr. Expose was on probation for a child protection case involving his children. His probation required him to attend anger management therapy sessions. During one of these sessions, he became upset and made threatening statements to his therapist about a case manager involved in his child protection case. The therapist believed that the comments rose to the level of mandatory reporting due to being serious threats aimed at an identified person. She reported the threats to her supervisor, the identified case manager, and the police. Mr. Expose was then charged with one count of making terroristic threats.

At trial his therapist was called as a witness by the state and Mr. Expose objected to her testimony, arguing that since he had not consented, she could not break therapist–client privilege. His objection was denied, as the district court concluded that statements of imminent threat are an exception to the therapist–client privilege. Mr. Expose also objected to his case manager's testifying about what his therapist had reported to her, stating that it was inadmissible hearsay. This objection was also overruled and Mr. Expose was found guilty and sentenced to 28 months in prison.

Mr. Expose appealed his conviction on the grounds that the therapist–client privilege rendered his therapist's testimony inadmissible. The court of appeals agreed with Mr. Expose and reversed his conviction. They spoke to three matters, including whether Mr. Expose had made a timely objection,