

that terminating parental rights is “one of the most drastic actions that the state may take against its citizens” (p 35). The petitioner bears the burden of proving the respondent’s inability to benefit from such efforts by clear and convincing evidence. Under this standard, termination rulings of parental rights require evidence that it is substantially more likely than not that a parent is unfit to care for her child. In a similar case (*In re Melody L.*, 962 A.2d 81 (Conn. 2009)), Justice Schaller, concurring with the majority opinion to affirm termination, opined that the court should adopt a higher standard of review in cases concerning the termination of parental rights.

The impact of the child’s age in the development of attachment to a caregiver has long been highlighted. American Psychological Association *amicus* briefs filed in cases of adoption and parental fit based on sexual orientation (*In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002) and *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995)) emphasize research supporting that forming an attachment with a caregiver impacts a child’s subsequent development. Research in attachment theory is often cited in consideration of the healthy development of a child based on successful attachment with a caregiver during infancy and early childhood (Bowlby J: *A Secure Base: Parent-Child Attachment and Healthy Human Development*. . . . New York: Basic Books, 1988, pp 119–36). The trial court held that the possibility of eventual progress at effective parenting was not reasonable given Gabriella’s age-specific needs for healthy development.

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## Consideration of the Insanity Defense for a Client With a Mental Health History

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## The Supreme Judicial Court of Massachusetts Held That the Attorney’s Failure to Present an Insanity Defense Did Not Equate With Ineffective Assistance of Counsel

In *Commonwealth v. Lang*, 38 N.E.3d 262 (Mass. 2015), the Supreme Judicial Court of Massachusetts reviewed the case of a defendant convicted of first-degree murder who sought a new trial on three grounds: that the courtroom was closed to the public during empanelment of the jury; that trial counsel failed to investigate his mental health history and thereby deprived him of a criminal-responsibility (insanity) defense; and that the trial court erred in instructing the jury that they could find malice, consistent with first-degree murder, based on extreme atrocity or cruelty.

### Facts of the Case

On March 18, 2005, Francis Lang was asked to leave a Boston bar. When Mr. Lang refused to leave, he was approached by the victim and 2 others. A physical altercation ensued in which Mr. Lang stabbed the victim multiple times. The victim was pronounced dead the following morning.

In 2006, Mr. Lang was convicted of murder in the first degree in accordance with the theory of extreme atrocity and cruelty. Defense counsel argued that Mr. Lang’s actions, in accordance with witness testimony, were in self-defense and that mitigating circumstances rendered the killing no more than voluntary manslaughter. The trial judge had instructed the jury on first-degree murder, second-degree murder, manslaughter, heat of passion with reasonable provocation, heat of passion induced by sudden combat, self-defense, and alcohol intoxication’s effect on intent.

In 2009, Mr. Lang moved for a new trial on several grounds. First, he claimed his Sixth and Fourteenth Amendment rights to a public trial were violated when his sister was asked to leave the courtroom during the first day of jury empanelment. Second, he claimed the trial judge’s jury instruction was in error regarding extreme atrocity and cruelty, as evidenced by elements of malice.

Mr. Lang’s third assertion for mistrial, of most interest to forensic mental health professionals, was that his trial counsel had failed to investigate his psychiatric history, rendering him unable to make an informed decision on whether to pursue a criminal-responsibility defense. Mr. Lang had been released from federal prison 22 days before the stabbing. In

2001, he had been evaluated for competency to stand trial and was found to have bipolar disorder. Mental health professionals had described his behavior as impulsive and noted that he was not able to control it. His trial counsel was alerted to his psychiatric history but did not pursue the records, as he had not shown interest in a mental health defense. The defense team, including Mr. Lang himself, found the self-defense strategy the most viable, given it was supported by at least one witness. Further, it was a firmly held belief that the defense of lack of criminal responsibility is rarely successful.

In support of his motion for a new trial, Mr. Lang was evaluated by a neuropsychologist, who supported the motion for a new trial asserting that Mr. Lang was not criminally responsible for the killing because he “did not appreciate the wrongfulness of his conduct and could not conform his conduct to the requirements of the law” (*Lang*, p 271). He further described Mr. Lang as having multiple mental disorders. The Commonwealth’s expert, a forensic psychologist, also met with Mr. Lang and reviewed his records. She opined that Mr. Lang was criminally responsible based on the fact that there was no evidence of symptoms of mental illness before the crime or in the 7 months after his arrest. She further noted that although Mr. Lang had not taken his prescribed medications in the 22 days between his release from prison and the stabbing, it may take weeks and sometimes years for the return of symptoms, thereby invalidating this defense.

#### *Ruling and Reasoning*

All 5 justices unanimously affirmed the conviction and denied the motion for new trial. The judges agreed on the reasoning for rejecting Mr. Lang’s claim of ineffective counsel in regard to his right to a public trial and his claim that the trial judge erroneously instructed the jury. However, although the judges agreed on dismissing Mr. Lang’s third claim of ineffective counsel in not investigating his mental health history, they disagreed on the reasoning for dismissal.

Judges Hines and Duffly, in the first concurring opinion, held that defense counsel’s decision to defend the case solely on the grounds of self-defense was sound. The trial counsel was aware of the defendant’s mental health history but chose a self-defense case as there was witness testimony to support it. He was of the view that the criminal-responsibility defense was

rarely successful and that a self-defense case was likely to be more viable based on the facts of the case. Judge Hines opined “I do not believe that counsel is obligated to pursue a full scale mental evaluation in every case where the facts or the defendant’s background suggest only a hint of mental issue” (*Lang*, p 271). Judges Hines and Duffly denied the motion for a new trial on the grounds that the defense counsel’s decision to pursue self-defense over other defenses was not manifestly unreasonable.

Judge Lenk offered a divergent concurring opinion in denying Mr. Lang’s motion for a mistrial. Judges Gants and Cordy concurred with this opinion. Judge Lenk outlined the test for a defendant’s right to postconviction relief as to whether there was an error in the course of the trial and whether the error may have influenced the jury’s decision-making. Judge Lenk disagreed with the “manifestly unreasonable” standard put forth by Judge Hines. Judge Lenk opined that such a standard makes sense only if the defense counsel is fully informed when electing the defense strategy. Because the defense counsel did not investigate the extent of Mr. Lang’s mental health history, Judge Lenk asserted that he could not have made a fully informed decision to use one defense over the other and that electing a defense without investigating alternative strategies was manifestly unreasonable. However, in this case, Mr. Lang asserted that he would not have used a criminal-responsibility defense in the jury trial, nor would he if he were to be granted a new trial in the future. Therefore, although Judge Lenk considered the defense counsel’s failure to investigate Mr. Lang’s mental health history unreasonable and erroneous, this failure did not meet the standard for granting a mistrial, as Mr. Lang would not have used a criminal-responsibility defense, and thus such an investigation could not have influenced the decision of the jury.

#### *Discussion*

This case is of particular interest to forensic clinicians in the questions it raises pertaining to defense strategies used by individuals with a history of mental illness. First, is the contention that a defendant who is brought before the court with a psychiatric history should have that history investigated by defense counsel before a defense strategy is chosen. The justices were split on this question. Justice Hines determined that this was not an obligation that the defense counsel must pursue, particularly if an alternative

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.

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## 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