In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RICHARD LUCIO DEHOYOS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S034800

Orange County Superior Court Case No. C-77640
The Honorable Everett W. Dickey, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

As nine-year-old Nadia Puente walked home from her elementary school, Richard DeHoyos approached her in his car, and told her he was a teacher and needed some help with books. After using this ruse to get Nadia in his car, DeHoyos drove to a motel, where he raped, sodomized, and then killed Nadia. He then put her body in a trashcan and discarded her as if she were trash in a park in Los Angeles. DeHoyos then fled to San Antonio, Texas, where he was apprehended about a week after committing the crimes. DeHoyos admitted killing Nadia, but claimed he did not rape her, and that he sodomized her after she was dead in an effort to determine whether she was alive.

At trial, DeHoyos claimed he did not have the required mental state to commit the crimes due to mental illness, and presented numerous expert witnesses to testify as to evidence of his mental state. Nonetheless, DeHoyos was convicted. The same jury also found DeHoyos was sane at the time he committed the crimes during a sanity trial, and then recommended he be sentenced to death. DeHoyos raises numerous claims relating to the guilt phase, one issue relating to the sanity phase, and one issue relating to the penalty phase. None of his claims have merit.

STATEMENT OF THE CASE

On February 2, 1990, the Orange County District Attorney filed an information charging Richard DeHoyos with numerous crimes against Nadia Puente, including murder (Pen. Code, § 187, subd. (a) [Count 1]), kidnap to commit child molestation (Pen. Code, §207, subd. (b) [Count 2]), forcible rape (Pen. Code, § 261, subd. (2) [Count 3]), attempted forcible rape (Pen. Code, §§ 664/261, subd. (2) [Count 4]), sodomy (Pen. Code, § 286, subd. (c) [Count 5]), and committing a lewd and lascivious act on a person under the age of fourteen, and more than ten years younger than

DeHoyos (Pen. Code, § 288, subd. (a) [Count 6]). (1 CT 171-172.)[1] It was alleged the murder was committed under the following special circumstances: (1) while engaged in the commission of kidnapping (Pen. Code, § 190.2, subd. (a)(17)(ii)); (2) while engaged in the commission of rape (Pen. Code, § 190.2, subd. (a)(17)(iii)); (3) while engaged in the commission of attempted rape (Pen. Code, § 190.2, subd. (a)(17)(iii)); (4) while engaged in the commission of sodomy (Pen. Code, § 190.2, subd. (a)(17)(iv)) and (5) while engaged in the commission of performing a lewd and lascivious act upon a child under the age of fourteen (Pen. Code, § 190.2, subd. (a)(17)(v)). (1 CT 171-173.)

On February 2, 1990, DeHoyos pled not guilty and not guilty by reason of insanity. (1 CT (1st) 8, 215.) Trial commenced on July 24, 1991. (1 CT (1st) 369.) The jury found DeHoyos guilty of all counts, except Count 4 (attempted forcible rape), for which they found DeHoyos not guilty.[2] (2 CT (1st) 679-682; 3 CT (1st) 827-832.) The jury found the special circumstances to be true except the special circumstance that DeHoyos committed murder while engaged in the commission of attempted rape. (2 CT (1st) 682-683; 3 CT (1st) 833-837.) The same jury found DeHoyos was sane at the time he committed the crimes (3 CT (1st) 909-913), and determined the appropriate penalty to be death (3 CT (1st) 993). On April 30, 1992, prior to sentencing, the trial court granted DeHoyos'

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[1] There are two sets of Reporter's Transcripts and Clerk's Transcripts that have duplicate volume numbers based on the initial trial, and a subsequent retrial. Since most of the citations to the record will be to the retrial, Respondent will reference merely the volume and page number. When there is a citation to the first trial, it will be indicated as follows: Volume number RT (1st) page number.

[2] The jury was instructed that DeHoyos could not be convicted of both rape and attempted rape, thus the rape conviction mandated an acquittal on attempted rape. (28 RT 6545.)

motion for a new trial based on juror misconduct. (2 CT 174-198 [motion for new trial]; 2 CT 483 [minute order].)

Retrial commenced on February 17, 1993.[3] (3 CT 1131.) The jury found DeHoyos guilty of all remaining charges: first degree murder, kidnapping for child molestation, forcible rape, sodomy, and committing a lewd or lascivious act upon a child under 14. (4 CT 1505-1510; 30 RT 6945-6948.) The jury found all special circumstances true: that the murder was committed while engaged in kidnapping, rape, sodomy and while performing a lewd and lascivious act upon a child under 14. (4 CT 1510-1513; 30 RT 6948-6951.) On May 27, 1993, the jury found DeHoyos to be sane at the time he committed the crimes. (5 CT 1619-1632; 33 RT 8239-8243.) On June 14, 1993, the jury determined death was the appropriate penalty. (5 CT 1705, 1707-1708.) On August 27, 1993, the trial court denied DeHoyos's motion for new trial and for modification of the verdict under Penal Code sections 190.4, subdivision (7) and 1385. (5 CT 1792-1793.) The court sentenced DeHoyos to death for the murder. (5 CT 1794.) It also sentenced DeHoyos to 19 years as follows: 11 years for kidnapping for the purpose of child molestation (Count 2), 8 consecutive years for forcible rape (Count 3), 8 concurrent years for sodomy with a person under 14 with a 10 year age differential (Count 5), and 8 concurrent years for child molestation (Count 6). (5 CT 1793-1794; 35 RT 8812-8814.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

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[3] On January 25, 1993, the retrial actually began, however, based on jury misconduct that occurred during voir dire, the court dismissed the entire panel. (3 CT 824 [retrial began]; 1128-C [court dismissed jury panel].)

STATEMENT OF THE FACTS

A. Guilt Phase Prosecution Case-In-Chief

Nine year-old Nadia Puente lived with her parents on West Pomona Avenue in Santa Ana. (18 RT 3965.) On March 20, 1989, between 11:00 a.m. and 1:00 p.m., Nadia met with Jean Hanna, the assistant principal at Diamond Elementary School on West Edinger Street in Santa Ana, where Nadia went to school. Nadia was assisting Ms. Hanna in packaging candy for an Easter sale. (18 RT 3858-3859.) Nadia walked home from school after school let out at 2:16 p.m. (18 RT 3861; 3 CT 1295.)

As Nadia was walking home from school, DeHoyos pulled up in his car and told Nadia he was a teacher, that he was going to be transferred, and needed some help with school books. (3 CT 1295, 1299-1300.) Nadia agreed to help DeHoyos, and got into his car. (3 CT 1295.) As they drove by Nadia's house, she pointed it out to DeHoyos. (3 CT 1296-1297.) DeHoyos told Nadia that he was a friend of the Principal's. (3 CT 1299.) DeHoyos took Nadia to the Ha'Penny Inn in Santa Ana. (3 CT 1296.) Nadia believed that after she helped DeHoyos get his things together, he would take her home. (3 CT 1297.) Instead, DeHoyos raped and murdered Nadia. (3 CT 1297, 1301-1303, 1305.)

Sandra Cruz, another third grader at Diamond Elementary School, also walked home from school that day. (18 RT 3865, 3868.) As Sandra walked down Edinger Street, a gray car pulled up. The driver of the car said, "Excuse me," and called Sandra over to his car. (18 RT 3868, 3870.) There were three to five hard cover school books in the back seat of his car. (18 RT 3873, 3883.) He told Sandra he was a teacher and asked her to carry some books to nearby Carr Intermediate School. (18 RT 3682, 3870-3871.) Sandra did not believe the man was a teacher and told him her mom

was waiting for her and she had to go. (18 RT 3871.) The man then drove away. (18 RT 3872.)

The next day, Sandra and her mother told the assistant principal about the man in the gray car, and went to the police station to assist with a composite sketch. (18 RT 3876-3877.) Santa Ana police officer Ben Rodriguez interviewed Sandra Cruz, Armando Flores and Jose O'Campo the morning after Nadia's disappearance and murder at Diamond Elementary School. (18 RT 3893-3895.) Jose told Officer Rodriguez that he saw Nadia Puente talk to a man in a gray car with a stripe running down its side[4] the previous day on West Pomona Street. (18 RT 3897, 3899.) After a brief conversation, Nadia got into the gray car. (18 RT 3899.)

DeHoyos registered for a room at the Ha'Penny Inn in Santa Ana on March 20, 1989. (17 RT 3773-3774, 3784-3785.) DeHoyos checked out early from the motel. (17 RT 3759, 3767.)

Nadia's deceased body was discovered between 2:00 and 4:00 a.m. in a rusty, aluminum trash can in Griffith Park in Los Angeles. (17 RT 3747-3749; 4 CT 1323 [Exhibit 26 [photograph of rusty trashcan].) The trashcan and liner were taken from the laundry room at the Ha'Penny Inn. (18 RT 3852-3853, 3856.) Nadia was wrapped up in a blanket or bedspread that had been taken from the Ha'Penny Inn. (18 RT 3906 [Exhibit 21 (photograph of the bedspread)]; 3 CT 1306-1308.) Her hair and clothing were wet and the tips of her fingers were wrinkled. (17 RT 3811, 3828.) Nadia had abrasions and bruises on her right lower chest, left arm, upper back, on the front and back of both legs, the top of her head, the area around the base of her neck and her right eyebrow. (18 RT 3827, 3832.) The bruises on her legs included four on her right front leg, three on her

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[4] DeHoyos's silver Nissan had thin black molding around it. (3 CT 1286.)

front left leg, and two on the back of her left leg. (18 RT 3832.) The injuries were consistent with blunt impact, and could have been caused by fists or an instrumentality. (18 RT 3830.)

There were 11 fingerprints on the trash can liner. (18 RT 3939.) There was a preliminary match between a fingerprint found on the trash can liner and a fingerprint of DeHoyos's that was in a computerized law enforcement database. (18 RT 3978.) Later testing confirmed one of the fingerprints on the trash can liner matched DeHoyos's right ring fingerprint. (18 RT 3943-3945.)

Dr. Christopher Rogers, Deputy Medical Examiner for Los Angeles County, conducted the autopsy of Nadia. (17 RT 3786, 3795; 18 RT 3965.) Nadia's body was brought to the Los Angeles Coroner's office in the trash can that DeHoyos put her in after he murdered her. (17 RT 3797.) There was a 3/8 inch laceration, an abrasion and bruising in the entry area of Nadia's vagina. (17 RT 3803-3804.) There was bruising and a small abrasion in the area of her anus. (17 RT 3803.) There was bruising in the lining in the interior area of her vagina. (17 RT 3803.) There were injuries in the area of her rectum, including a few small petechial hemorrhages of the lining of the rectum. (17 RT 3803-3804.) The injuries in the area of Nadia's vagina were consistent with the insertion of an erect human penis. (17 RT 3804, 3826.) The injuries in the areas of the anus and rectum were also consistent with the forcible insertion of an erect human penis. (17 RT 3804, 3808.)

Nadia had bruises on her upper chest and her left arm. She also had petechial hemorrhages above her chest level. Based on his autopsy and these injuries, Dr. Rogers opined that Nadia died of asphyxia due to chest compression. (17 RT 3802.) If her oxygen was completely cut-off, Nadia would have died in five or six minutes from asphyxiation. If her oxygen was partially cut-off, it could have taken longer. (17 RT 3808.) A child's

bones are more flexible than an adult's, so it would have taken less force to compress Nadia and cause asphyxiation than it would for an adult. Had DeHoyos put pressure on Nadia's chest, it would prevent her chest from expanding and she could not breathe. She would not have received oxygen into her system, and her cells would have run out of oxygen and begun to die. Five or six minutes later her brain cells would have died. (17 RT 3809.) The injuries to Nadia's vaginal and rectal areas could have been caused by DeHoyos bending her over the edge of the bathtub. (17 RT 3811-3812.) Dr. Rogers opined that although Nadia's hair and clothing were wet, there was no clear indication she ingested fluid, and he could not tell whether drowning was a cause of death. (17 RT 3810-3811.)

After a person dies, there is no circulation so the blood vessels do not enlarge, thus there is no redness and swelling. (17 RT 3789-3790.) It appeared Nadia's injuries occurred before death based on Dr. Rogers's initial examination. (17 RT 3805.) Dr. Rogers confirmed his opinion by examining the vaginal, anal, and rectal tissue on a microscopic slide. The microscopic examination revealed the vaginal and anal injuries occurred prior to death because he could see bleeding underneath the surface. (17 RT 3805-3807.) There were no inflammatory cells and no hemosiderin (iron that appears in the cells after a period of bleeding and some time has elapsed), which indicated the bleeding occurred shortly prior to Nadia's death. (17 RT 3790-3791, 3805-3806.) Dr. Rogers was not able to determine whether or not the rectal injury occurred before or after Nadia's death. (17 RT 3806.)

San Antonio Police officer Valentine Lopez had information that DeHoyos was going to be looking for a job at the Taco Bell restaurant in San Antonio, and that he was wanted on a California warrant. (18 RT 3842-3843, 3849.) Officer Lopez arrested DeHoyos on April 1, 1989, at the Taco Bell in San Antonio. (18 RT 3843-3844.)

After receiving information that DeHoyos's car was parked at Los Angeles International Airport, Santa Ana Homicide Detective William Ehart located it. (18 RT 3912, 3914.) It was a brand new 1989 silver Nissan Sentra. (18 RT 3914.) Detective Ehart obtained a search warrant and had the car impounded. (18 RT 3913, 3915-3916.) There was laundry lint in the trunk of DeHoyos's car. (18 RT 3918.) There was also a March 24, 1989 edition of the Metro section of the Orange County Registrar in the car. (18 RT 3918-3919.)

On April 1, 1989, after being advised of and waiving his *Miranda*[5] rights, DeHoyos spoke with detectives. (18 RT 3952, 3954; 3 CT 1240.) An audiotape of DeHoyos's interview was played for the jury. (18 RT 3957, 3959 [Exhibits 42 (transcript) & 43 (audiotape)].) DeHoyos expressed surprise that he was arrested for murder, and said, "for murder! . . . what murder?" (3 CT 1240.) He asked the detectives, "who did I kill?" and told them he would take a lie detector test. (3 CT 1242.) He told them he was an honest person (3 CT 1271), a good citizen (3 CT 1289), had nothing to hide (3 CT 1270, 1289), was willing to participate in a lineup (3 CT 1271), vowed cooperation so they could "find out they got the wrong person" and "have myself cleared" (3 CT 1282), and protested his innocence. (3 CT 1282, 1285.)

DeHoyos told the detectives that he worked at Taco Bell in Santa Ana for about two months. (3 CT 1250.) On March 20, 1989, the Taco Bell manager, Mary Ann, called him at 6:30 or 6:45 a.m. and woke him up. (3 CT 1274.) He went to Taco Bell at 8:00 or 9:00 a.m. and quit because he was angry. (3 CT 1274.) DeHoyos then went back to Taco Bell to talk to Mary Ann around lunchtime, and apologized to her. (3 CT 1248-1249.)

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

DeHoyos told the detectives he checked into the Ha' Penny Inn because he was relocating. (3 CT 1243.) He had been living with some roommates but he had an argument and a scuffle with them, so he had to move out. (3 CT 1245.) He said he watched television in the motel for two to three hours. (3 CT 1260, 1275.) At about 5:00 p.m., he went to Taco Bell to hang out. (3 CT 1249, 1260, 1275.) He met up with a Mexican guy named Mark that he had worked with at Taco Bell. (3 CT 1245, 1250.) Mark was from England and was going to London the following day. (3 CT 1244, 1249.) They went to a club, Hoagy Barmichael, at about 9:00 p.m. (3 CT 1244-1245.) DeHoyos said he drank three bourbon and Cokes but did not drink too much because he was driving his Nissan. (3 CT 1252.) He left the club at about 2:30 a.m., and checked out of the motel. (3 CT 1252, 1259.) When he checked out of the motel, he gave the clerk his key and received a $10 deposit. (3 CT 1253.) He said he and a "hooker-type girl" he met at the club, Leticia, went to Leticia's house in the Midway area and had sex. (3 CT 1253, 1264.) DeHoyos said he left Leticia's house at 6:00 or 7:00 a.m. DeHoyos said he then went to the Huntington Beach pier, then to the movies, then to Taco Bell. (3 CT 1254.)

The detectives told DeHoyos that they knew he had been in the area near Diamond Elementary School, and DeHoyos explained that he had a post office box there, and he had gone to get his mail before he met up with Mark at Taco Bell. (3 CT 1276-1278.) The detectives then told him that he had picked up a little girl and took her to a motel room. DeHoyos said, "No, I didn't sir." (3 CT 1279.) DeHoyos said if there were any eyewitnesses, he wanted them to step forward because he was positive he did not pick up a girl. (3 CT 1280.) DeHoyos agreed to give saliva, hair and blood samples because, "I know I'm innocent." (3 CT 1281-1282.)

DeHoyos claimed the room he was in did not have a bedspread on it and that the bed was wet when he checked in. (3 CT 1287-1288.) When

the detectives told DeHoyos that the blanket Nadia was wrapped in and the trash can she was found in was from the Ha'Penny Inn, DeHoyos claimed it was just a "big coincidence." (3 CT 1290.) When the detectives told DeHoyos that his fingerprints were on the trash bag liner, DeHoyos claimed he dumped some trash because he was sorting things out (3 CT 1291), in spite of his earlier protestations that he did not go in the laundry room (3 CT 1262).

Finally, after the detectives told DeHoyos they were "absolutely positively" sure he killed Nadia, and asked him whether he meant to kill her, he admitted that he murdered her, but claimed it was "an accident." (3 CT 1291-1294.) DeHoyos then told the detectives that he was going to tell the truth and that he deserved to be "put away. Killed." He explained that he picked Nadia up about 2:30 at the corner near her house, and told her he was a teacher and needed some help with school books. Nadia agreed to help him, and got into his car. (3 CT 1295.) DeHoyos had already checked in to the Ha'Penny Inn, and took Nadia there. (3 CT 1295-1296.)

When they got to the motel, DeHoyos told Nadia to sort his belongings and put them in the drawers. (3 CT 1297.) DeHoyos said that he took a bath while Nadia was there. (3 CT 1300-1301.) DeHoyos claimed that it did not bother Nadia that a stranger was going to take a bath with her there. (3 CT 1309.) At some point, Nadia gave DeHoyos a towel, and he grabbed her hand and took her into the bathtub. Nadia started screaming, and DeHoyos told her to behave, and said he would not do anything to her. (3 CT 1303, 1309.) Then even though DeHoyos did not do anything, Nadia started screaming like she was afraid. Nadia asked to use the telephone, and DeHoyos told her it was not working. DeHoyos claimed he "got carried away when she freaked me out. Everybody, she was screaming" so he "just drowned her." (3 CT 1297, 1303.) He

explained he held her by her head and pushed her into the water. (3 CT 1303.) He held her underwater for 5 or 10 minutes. (3 CT 1305.)

DeHoyos said that when Nadia was in the motel room, that he wanted to "do something" but Nadia was too young. (3 CT 1300.) DeHoyos denied he had sex with Nadia, but then clarified that he did after she was dead. (3 CT 1297, 1301-1302.) DeHoyos explained that after Nadia was dead, he put her on the bed and took off her panties. (3 CT 1305.) He said he did not have vaginal sex, but had anal sex. (3 CT 1301-1302.) He said that he inserted one or two fingers into Nadia's vagina but "that's about it." (3 CT 1302.) He claimed her vagina "wasn't tight." (3 CT 1304.)

DeHoyos wrapped Nadia, who weighed 66 pounds and was 53 inches tall, up in the bedspread and "shoved" her in the trash can so no one would see him carry her out of the motel room. (3 CT 1306-1308; 17 RT 3825 [Nadia's height and weight].) DeHoyos dragged the trash can to his car, and put it in his trunk. DeHoyos drove out of the motel with the trunk sticking up. He drove down the block, then pulled over and "squashed it down" and "slammed" his trunk shut. DeHoyos drove to Griffith Park Observatory in Los Angeles. (3 CT 1308.) DeHoyos waited until it got dark, then backed his car up and left Nadia's dead body there, in the trash can. (3 CT 1307-1308.)

After checking out of the motel, DeHoyos said he went back home, and stayed there for a few days. (3 CT 1310.) He read the newspapers about Nadia's murder. (3 CT 1313.) DeHoyos knew his car matched the description of the car, and that he resembled the composite drawing. (3 CT 1314.) He picked up his $439 paycheck at Taco Bell on Friday, and went to San Antonio the next day. (3 CT 1246, 1310, 1315.) DeHoyos left Orange County because of the homicide and because he was "worried about myself," particularly that he resembled the composite and the car's description. (3 CT 1315-1316.)

DeHoyos claimed that the murder was not intentional, that it happened real fast, and that he was "not a murderer or nothing. It's just that . . . I'm not that kind of a person." (3 CT 1317, 1319.) DeHoyos also claimed that he knew they would find his fingerprints on the trash can. He was going to turn himself in, but the detectives found him first. (3 CT 1319.)

B. Guilt Phase Defense

In addition to presenting eight expert witnesses, DeHoyos presented testimony from two ex-wives, six former co-workers, a friend from the military, and some family members. The lay witnesses testified about his behavior in the years prior to committing the rape and murder of Nadia, and the expert witnesses testified about his mental state and problems with his brain. At the time of the offense, DeHoyos lived in Westminster in a two-bedroom apartment with five roommates. (19 RT 4215-4217.) DeHoyos paid weekly rent, which was paid up to March 24, 1989. (19 RT 4217-4218.)

1. Former Co-Workers

Sam Morrison worked with DeHoyos in 1982 for about a year in a telemarketing firm. (18 RT 4016-4017, 4022.) He described DeHoyos's odd behavior, including jumping on top of his desk and yelling in the phone. He said DeHoyos acted like a class clown to break up the monotony and make them laugh. (18 RT 4017.) He described DeHoyos as boastful about women. (18 RT 4019-4020.) DeHoyos used alcohol but not drugs. DeHoyos would use a big vase as a pitcher for margaritas, and drank about a pitcher and a half. (18 RT 4018.)

From November, 1988 to January, 1989, DeHoyos worked for Leonard Peterson in the warehouse of a carpet store in Costa Mesa. (25 RT 5464-5465.) Peterson believed DeHoyos lied on his application because he

said he had taught English in Central America, yet DeHoyos could not pronounce "comprehensive." (25 RT 5468-5469.)

Paul Shawhan worked with DeHoyos in 1989 at USA Aluminum. (18 RT 3990, 3993.) DeHoyos was a slower worker than the other employees. (18 RT 4010.) DeHoyos acted like a self-appointed police officer, and continually reported other employees "infractions." (18 RT 3993.) Shawhan eventually terminated DeHoyos because he got into a physical confrontation with another employee at the lunch truck, yelling and getting in the other employee's face. (18 RT 3993, 4006.) Although DeHoyos did not display any anger towards Shawhan and was always courteous to supervisors, during the confrontation with the other employee he was agitated, upset, anxious and angry. (18 RT 4001, 4005-4006.) Shawhan opined that DeHoyos had a bad temper. (18 RT 4007.) When Shawhan fired DeHoyos, DeHoyos said it was okay because he could get a job with either the Los Angeles Police or Sheriff. (18 RT 3995.)

Mary Ann Scott was the manager of Taco Bell and hired DeHoyos as her Assistant Manager. (19 RT 4228-4229.) He worked there two months or less. (19 RT 4248.) Norma Sandoval was another Assistant Manager at Taco Bell. (18 RT 4033.)

Sandoval testified DeHoyos got along pretty well with others and was patient. (18 RT 4040.) DeHoyos joked and talked about women and having sex. (18 RT 4036.) Once, while in the back room, DeHoyos touched Sandoval's shoulders, and she told him not to bother her. (18 RT 4044.) She saw him intoxicated with alcohol once when he stopped by Taco Bell at closing time. (18 RT 4037.) After he was fired, DeHoyos stopped by Taco Bell. (18 RT 4038, 4054.) He acted nervous and his breath smelled like alcohol. (18 RT 4049, 4055, 4063.)

Scott testified that although DeHoyos was slow, he did not have a problem learning how to do his job. (19 RT 4237.) DeHoyos was not

cleaning up properly so Scott talked to him many times and tried to help him because he wanted to succeed at his job. (19 RT 4235-4236.) He got upset when she corrected or criticized him. (19 RT 4241, 4244.)

Scott's supervisor, Dennis Burkhart, explained his "unusual" interaction with DeHoyos. Scott told Burkhart that DeHoyos needed to learn some other aspects of the restaurant. (19 RT 4260.) When Burkhart approached DeHoyos to talk about his job performance, DeHoyos became more upset than warranted. (19 RT 4263.) DeHoyos was perspiring, his eyes bulged out, his face was red and he glared at Burkhart. (19 RT 4264-4265, 4267.) DeHoyos seemed frustrated, as if he was boiling inside. (19 RT 4264.) He told Burkhart that Scott was just picking on him. (19 RT 4261.) Burkhart was scared that DeHoyos was going to physically assault him, so he just walked away. (19 RT 4267, 4284.)

The last day of DeHoyos's employment at Taco Bell, Scott called him at home about 6:30 or 7:00 a.m. (19 RT 4239-4240.) She was upset and told him to come to Taco Bell because it was a mess. (19 RT 4239.) He arrived at Taco Bell about ten minutes later and was angry. They got into a heated argument, with raised voices. (19 RT 4240.) She explained that he did not properly clean the ovens, the floors and the walk-in refrigerators. (19 RT 4241.) DeHoyos said Scott was always complaining. (19 RT 4240.) DeHoyos said that if he could not do the job the way Scott wanted, then "I guess I am out of here." Scott told him that was stupid, but DeHoyos angrily flung his keys into the office on the desk and stomped out the door. (19 RT 4242.) Scott followed DeHoyos into the parking lot and told him that if he wanted the job as bad as he told her he did, he should try harder to make it right. (19 RT 4249-4250.) Scott did not tell DeHoyos she was firing him. (19 RT 4249.) A few days later, DeHoyos came to Taco Bell for his paycheck all dressed up and said he was leaving California. (19 RT 4245.)

2. Former Wives

Gloria Lara met DeHoyos in high school in San Antonio when she was 14 or 15 years old. DeHoyos was a few years older than her. (19 RT 4375.) She married him in July, 1975, when she was 16 years old and they had a daughter together. (19 RT 4429, 4376; 34 RT 8452.) Lara described DeHoyos as quiet, sweet and nice, and said he did not fight at school. (19 FT 4395.) He did not use drugs or drink excessively. (19 RT 4421.)

DeHoyos was employed cleaning a veterinarian's office. Four days after they were married, Lara was at the veterinarian's office with DeHoyos. (19 RT 4378.) Lara spoke on the telephone to her friend, Sandra, and apparently DeHoyos believed she was talking to Sandra about a former boyfriend of Lara's. (19 RT 4380.) After they ate pizza, DeHoyos wanted to be intimate. (19 RT 4382, 4383.) Lara did not want to be intimate but DeHoyos kissed and fondled her. (19 RT 4384.) She was lying down on the floor, and DeHoyos tried to cover her face with a towel, and stabbed her in her upper stomach area. (19 RT 4384-4385, 4387, 4407.) DeHoyos seemed scared and surprised. (19 RT 4386-4387.) Lara begged DeHoyos to take her to the hospital, and they went outside and flagged down a car. (19 RT 4387.) Lara had surgery and was in the hospital for a few weeks. (19 RT 4387, 4392.) Although DeHoyos was arrested, Lara bailed him out of jail when she was released from the hospital, and "dropped charges" against him. (19 RT 4388-4389.) The stabbing incident left Lara with a scar that was more than a foot long. (19 RT 4391-4392.) Lara lived with DeHoyos for two more years. The only other time he was violent was when she left him; he was upset and pulled her hair. (19 RT 4389.)

In 1984, DeHoyos married Maria Esparza after a few months of dating. (25 RT 5621-5623.) They lived together from September, 1984, to

January, 1985. (25 RT 5623-5624.) One time DeHoyos came home, took items out of his backpack, and angrily tore things up. (25 RT 5635.)

DeHoyos's jealousy caused problems. (25 RT 5624.) At their wedding, Esparza's brother told DeHoyos to try and make Esparza happy. DeHoyos did not like the comment, and he got into a fight with his brother-in-law. (24 RT 5359; 25 RT 5627-5628.)

When Esparza was three months pregnant with DeHoyos's child, DeHoyos left Esparza after a fight and she never saw him again. (25 RT 5623, 5642, 5657.) DeHoyos was jealous and swore at Esparza. (25 RT 5625, 5630.) They fell in the bathroom, and he hit her chest with his knee and choked her. (25 RT 5625.) He had his hands around her throat and neck and told her he would kill her. (24 RT 5346-5348; 25 RT 5639-5641.) She started to lose consciousness. (25 RT 5640.) Esparza grabbed a spoon or fork and jabbed him, and hit him once in the face. He got up, called her a "bitch" and left. She called to DeHoyos, and he pushed her away and ran. (25 RT 5626.) DeHoyos's hands were shaking, his face turned yellow, and his eyes were big. (26 RT 5654-5655.) The next day, Esparza had bruises on her neck. (25 RT 5638.)

In 1989, DeHoyos called Lara and told her he was leaving California to come back to Texas to be near their daughter, Sandra.[6] He said he was waiting on an income tax refund check.[7] (19 RT 4429.) DeHoyos told Lara he had not had sex for a while. (19 RT 4433.) Lara and Sandra met DeHoyos at the airport in San Antonio, took him to Taco Bell (where

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[6] DeHoyos had not seen his daughter since 1981. (20 RT 4484.)

[7] DeHoyos presented evidence that his 1988 tax return, which could have been filed in January or February of 1989, was processed on April 10, 1989. He was sent a notification letter at that time that his tax liability was $21.00. (19 RT 4296, 4301.) His tax refund was offset to pay a child support liability. (19 RT 4296.)

DeHoyos asked about employment),[8] then took him back to the airport to meet his mother. (19 RT 4428, 4434-4435.)

While in San Antonio, DeHoyos called Lara from a club. He was enjoying himself and told Lara that it was "neat" in San Antonio and that "in California you could kill somebody and get away with it." (19 RT 4453.)

After DeHoyos was arrested, he called Lara from jail. She asked him why he was in jail and he responded that he had killed a little girl. (19 RT 4446-4447.) Lara asked DeHoyos how old the girl was, and DeHoyos told her she was nine. (19 RT 4447.) She asked him why he killed her and he said, "I don't know. She was getting out of hand." (19 RT 4449.) DeHoyos called Lara again and told her he had escaped from jail and asked her to come get him. She refused. (19 RT 4449.)

3. Former Military Roommate

A military roommate of DeHoyos's, Jerry Taylor, testified that DeHoyos displayed unusual behavior when he was corrected. (26 RT 5665.) For example, when DeHoyos's bunk was being inspected and the commander messed it up, DeHoyos yelled at the commander. In spite of the commander's command to stand "at ease," (be quiet and stand at attention) DeHoyos continued to yell back and speak his mind. (26 RT 5666, 5683.) Another time, a sergeant corrected DeHoyos's position, and DeHoyos said in a loud, disrespectful voice that he knew his job. The

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[8] Scott testified that the police contacted her and questioned her about a possible murder. They asked her to let them know if she heard any information about DeHoyos. She subsequently received a telephone call from someone in Texas who was inquiring about DeHoyos because he had applied for a job at a Taco Bell in San Antonio. Scott told the caller that DeHoyos did a good job because she wanted to get information to pass on to the police. She then called the police and relayed the information to them. (19 RT 4253-4255.)

sergeant said, "at ease," and other sergeants had to assist in calming DeHoyos down. (26 RT 5667.) In each of these incidents, DeHoyos was not listening and had a blank, distant stare. (26 RT 5668.)

4. Family Members

Although his mother testified DeHoyos did not have learning problems in school (20 RT 4644), his brother testified he did (20 RT 4492). He got into a lot of trouble; more than the other children. (20 RT 4491, 4498.) From when he was a child, DeHoyos was different from the other children. (20 RT 4642.) He was withdrawn, stubborn, would not listen to his parents, and would get angry and have tantrums. (20 RT 4624, 4628, 4643, 4645.) DeHoyos refused to do household chores. (20 RT 4652.)

DeHoyos's mother hit him with anything nearby, including a belt, a hangar, and a broomstick. (20 RT 4535, 4586-4587.) Mrs. DeHoyos admitted she had to discipline DeHoyos more than the other children, and that she had to hit him to "straighten him out." (20 RT 4649, 4951.)

When DeHoyos was 12 or 13, his family went to Mexico to visit a faith healer, or curandero, named Cruz Alvarez, about twice a month. (20 RT 4493, 4521, 4572, 4631, 4660.) The faith healer acted as a guide or advisor to the family. (20 RT 4494, 4661.) Alvarez told DeHoyos to behave and pay attention. (20 RT 4632.) On one of the visits, the other children stepped out of the room. DeHoyos was in the room with Alvarez and his parents. After about five minutes, DeHoyos ran out, and was red with bulging eyes. (20 RT 4555-4556.) DeHoyos later told his brother Lucio that they "made [him] see the good side and the bad side of hell." (20 RT 4567.)

One time DeHoyos became enraged with his mother when she asked him a question about why he did not wear certain clothes, and he pushed her against a closet and threw books at her. (20 RT 4652-4653.) Mrs. DeHoyos called the police. (20 RT 4653.) DeHoyos admitted to the

police that he hit his mother, but she said she did not want him to be arrested; she just wanted the police officer to scare him. (20 RT 4654.)

When his mother was six months pregnant, and DeHoyos was 17 years old, DeHoyos got into an argument with her. She was sweeping, and DeHoyos took the broom from her and tried to poke her in the stomach with the broomstick. (20 RT 4489, 4505, 4552-4553, 4655, 4655-4656.) James, one of his brothers, took the broom from DeHoyos. (20 RT 4553.) Alexander and Raymond, two other brothers, chased DeHoyos to get him away from their mother and wrestled him to the ground. (20 RT 4489, 4506, 4570.) DeHoyos was very angry and out of control. His eyes were bulging and lit up, his face was red, and he was cursing. (20 RT 4489-4490, 4553-4554, 4571.) They had to pin him down and hold him to calm him down. (20 RT 4490.) Their father then had DeHoyos by the arm, and DeHoyos picked up some gravel in the driveway and threw it towards his brothers, hitting the garage. (20 RT 4571.) After that incident, DeHoyos's father told him to leave the house. (20 RT 4514, 4571, 4638-4639, 4658.)

5. Expert Witnesses

Dr. Arthur Kowell, a neurophysiologist, conducted a Beam Electrical Activity Mapping (BEAM) scan on DeHoyos on September 17, 1992. (18 RT 4069, 4089; 19 RT 4169.) The BEAM scan measures the electrical response of the brain after a visual and an auditory stimulus is given. (18 RT 4086.) DeHoyos's electroencephalogram and auditory evoked response tests were normal. (18 RT 4074, 4076.) There were abnormalities, however, in a number of regions of the brain on the visual evoked response portion of the test. (18 RT 4079.) The areas of the brain that were abnormal were those involving the sensory motor strips; the parietal regions posteriourly (which involved a lot of integration of sensory processes and spatial relationships); the right temporal region (which is an area that has to

do with language, speech, memory and emotion); and the centro-parietal regions. (18 RT 4079-4080; 19 RT 4208.)

Dr. Monte Buchsbaum, a professor of psychiatry and a director and supervisor of positron emission tomography (PET) at Mt. Sinai School of Medicine, administered a PET scan to DeHoyos on June 5, 1991. (28 RT 6306, 6310, 6330.) A PET scan produces colored pictures of the brain in three-dimensions. (28 RT 6306.) It examines the metabolic activity to determine how actively the brain is using energy. (28 RT 6309.) If the brain has been injured, that area of the brain shows up as less colored activity. Similarly, drugs which affect the brain may change areas of the brain that have low metabolic function into areas that have high metabolic function. (28 RT 6309.)

Dr. Buchsbaum described the procedure to administer a PET scan. (28 RT 6311-6314.) DeHoyos's PET scan showed abnormality or damage on the right side of his brain. (28 RT 6316-6317.) There were abnormalities in the cingulated gyrus (the area of the brain that is involved in emotional behavior) and the frontal lobe (the area of the brain involved in planning and organization). (28 RT 6321, 6328.) Based on the PET scan, Dr. Buchsbaum would expect DeHoyos to have problems controlling his impulsivity and rage. (28 RT 6329.) He believed the damage existed for at least the last decade, and specifically on the date DeHoyos raped and murdered Nadia. (28 RT 6325-6326.)

Dr. Stephen Lottenberg, a nuclear medicine physician, testified about the PET scan that was administered to DeHoyos on June 5, 1991. (27 RT 5942-5943, 5995.) He explained that the PET scan is based on the injection of radioactive isotope, called fluorine deoxy glucose. It localizes in the brain for brain imaging. (27 RT 5943.) It measures how the brain cells take up glucose. (27 RT 5955.) Dr. Lottenberg described the process, which results in pictures taken of the brain. (27 RT 5945, 5947-5949.)

DeHoyos's PET scan showed an "abnormal study." (27 RT 5953.) The right sided structures had a decreased relative metabolic rate. The right superior frontal, medial frontal fusiform gyrus and midbrain region had decreased metabolic rate. The medial temporal regions had decreased metabolic rate in both the right and left sides. (27 RT 5956.) Dr. Lottenberg testified that he could not determine whether the test results would have been the same had the PET scan been administered on March 20, 1989 (the day DeHoyos kidnapped, raped, sodomized and murdered a child). (27 RT 5995.)

Dr. Paul Berg, a psychologist and Marriage, Family, and Child Counselor, evaluated DeHoyos on November 20, 1990 and December 12, 1992. (19 RT 4309-4310, 4317; 21 RT 4695-5696.) Dr. Berg was asked to do a general psychological profile and to determine whether DeHoyos was a sexual pedophile. (19 RT 4320-4321.) His general observations were that DeHoyos was strange in his thinking, said things that were loosely connected, and seemed anxious, and at times DeHoyos was confused, cooperative, and very self-centered. (19 RT 4325.) When he reinterviewed DeHoyos on December 10, 1992, DeHoyos was much more obviously disturbed, bizarre, paranoid and suspicious, his bragging behavior was more pronounced, and he had less control. (19 RT 4328, 4331; 21 RT 4695-4696.) He did not believe the changes were due to malingering, rather they were consistent with decompensation, which means coming apart under stress. (19 RT 4331.) Dr. Berg believed the jail exacerbated a preexisting condition. (21 RT 4969.)

Dr. Berg diagnosed DeHoyos as having schizophrenic disorder, major depression, alcohol abuse, and dependency. DeHoyos also had personality disorders, including paranoid personality and schizotypal personality. (21 RT 4913.)

Dr. Berg opined that on the day DeHoyos raped and murdered Nadia Puente, he had a mental illness—severe personality disorder, which is a lifelong disorder. DeHoyos's inability to sustain any kind of endurance either in relationships or employment was a sign of such mental illness. (21 RT 4697.)

Dr. Berg explained his opinion that on March 20, 1989, DeHoyos had a series of events that were stressors that he could not handle, including the confrontation with his manger, his perception that he was fired, his feeling he had to do something about it, his rage and wanting to kill Mary Ann Scott, his inability to earn money, and his attempt to obtain drugs to remediate how he was feeling. (21 RT 4700; 24 RT 5396-5398.) Further, DeHoyos's solicitation of Nadia into his car and taking her to a hotel room was pathological. DeHoyos sought her company because he was very desperate and depressed. DeHoyos's rage reaction was a sign of his inability to control himself. The sexual activity that occurred was extraordinarily bizarre and was "the idea only of a mentally ill person."[9] (21 RT 4702.) Dr. Berg testified he did not think DeHoyos knew he was killing a child; he thought he was killing Scott. (21 RT 4875.) Further, Dr. Berg believed that drugs and alcohol accelerated his decompensation and inability to make judgments and exercise control. (22 RT 4929.) Even without using drugs or alcohol, however, DeHoyos's mental illness could have affected his judgment that day. (24 RT 5389.) Dr. Berg explained that when Nadia went into the bathroom and saw DeHoyos naked, it reminded him of feeling humiliated and shamed by his mother, and

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[9] DeHoyos told Dr. Berg that he had sex with Puente as a method of finding out whether she was alive or feigning dead. (21 RT 4871-4872; 22 RT 4982.) Dr. Berg explained he did not have any basis to disbelieve DeHoyos's account of events. (21 RT 4703.)

"unfortunately became the consolidation of all of his life's feelings about women and how he related to them." (22 RT 4934.)

Although DeHoyos was able to stop himself from killing Scott at Taco Bell earlier that day because there were witnesses nearby, that was survival-oriented; not necessarily that DeHoyos was sane and rational. (21 RT 4781-4782.)

Dr. Berg testified that two days after murdering Nadia, DeHoyos went to Griffith Park with his friend Lorena Manual, and her two nieces, ages 7 and 11, but at that time DeHoyos was not suffering from the same set of circumstances that overcame him when he raped and murdered Puente. (21 RT 4772-4773, 4777; 23 RT 5172.) DeHoyos told Dr. Berg on the day he went to the park with Manual, he was "itching to have sex." (21 RT 4879.)

Clinical psychologist Jose LaCalle opined that on March 20, 1989, DeHoyos had a mental illness of organic personality syndrome, explosive type. (22 RT 5065-5066.) He also diagnosed him as having borderline personality disorder, severe (Axis II)[10] and organic impairment (Axis III).[11] (22 RT 5065-5066.) He believed the mental conditions were developed at birth or shortly thereafter. (22 RT 5067.) The mental illness interferes with the cognitive processes—the functioning of one's mind in perceiving reality, processing information, passing judgment, seeking suitable alternatives and making and executing decisions. (22 RT 5068.) He further opined that had DeHoyos not had the mental illness, he would not have raped and murdered Nadia. (22 RT 5071.)

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[10] In the sanity phase, Axis II was described as the diagnoses for personality disorders, personality traits, or developmental disorders such as mental retardation. (30 RT 7199.)

[11] In the sanity phase, Axis III was described as medical conditions or physical illnesses that are either the cause of or concomitant with or consequences of a patient's mental disorder as described in Axis I. (30 RT 7198-7199.)

Dr. Seawright Anderson, a psychiatrist, conducted a mental status examination on DeHoyos on August 3, 1991. (25 RT 5472, 5474, 5487.) He diagnosed DeHoyos as having a schizo-affective disorder with a history of polysubstance abuse involving alcohol, marijuana, cocaine and Quaaludes, and a history of multiple head injuries. (25 RT 5484.) He also believed DeHoyos had an organic personality disorder. (25 RT 5487.) He believed that on the date DeHoyos raped and murdered Nadia, he was under the influence of controlled substances. (25 RT 5521.) Although the schizo-affective disorder was a cause of his sexually assaulting Nadia, DeHoyos knew the difference between right and wrong when he killed her. (25 RT 5575, 5597-5598.)

Licensed clinical psychologist Susan Fossum examined DeHoyos in late 1992. (26 RT 5698, 5752.) She diagnosed DeHoyos with organic personality syndrome, explosive type, and chronic schizophrenia, paranoid type (Axis I)[12] (26 RT 5755, 5762); narcissistic personality disorder with features of borderline personality disorder and sociopathic personality disorder (Axis II)(26 RT 5672); and right frontal lobe dysfunction, right and left temporal lobe dysfunction and right parietal lobe dysfunction (Axis III)(26 RT 5765). She believed his judgment and insight were impaired. (26 RT 5756.) She believed DeHoyos had these diagnoses at the time he raped and murdered Nadia. (26 RT 5766; 27A RT 6077-6078; 27A RT 6127.) She further believed that DeHoyos's lies to Nadia related to his mental illnesses. (27A RT 6128.) He was unable to control his emotions, had poor self-monitoring, poor impulse control, poor judgment and had a poor ability to distinguish or perceive reality. (27A RT 6128-6129.) On

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[12] In the sanity phase, Axis 1 was described as consisting of clinical syndromes, that is, mental disorders that are clinically significant. (30 RT 7199.)

the morning of the rape and murder, DeHoyos started to decompensate because he was fired from him job, and Mary Ann Scott castigated and insulted him. (27A RT 6130, 6145-6146.) Dr. Fossum believed that DeHoyos sought the company of Nadia because in his confused, fearful and raging state he was losing control of himself and his personality structure was decompensating, so he "reached out for help." (27A RT 6157.)

The characteristics of organic personality syndrome explosive type are primarily frontal lobe damage to the brain, the part of the brain responsible for executive functions. The result is the inability to read social cues and exercise judgment and reasoning, or solve abstract problems. She explained that when there are rage reactions, the brain is unable to exercise normal controls in terms of stopping the response. (26 RT 5763.)

Schizophrenia involves a disturbance of consciousness, one of the primary features of which is the distortion of reality. (26 RT 5763.) It often involves intermittent hallucinations and delusions. (26 RT 5763-5764.) Narcissistic personality disorder involves a failure to develop in a healthy way, and in severe cases, becoming entirely dependent on external manifestations or reassurance of one's "okayness." (26 RT 5764.)

Dr. Fossum testified that under the best of circumstances, DeHoyos's reality testing was as poor or poorer than most hospitalized schizophrenics. In a decompensated state, his ability to control himself and to make rational judgment and to perceive reality correctly deteriorates. (27A RT 6132.)

Dr. Arnold Purisch, a clinical psychologist specializing in clinical neuropsychology, gave DeHoyos a comprehensive neuropsychological evaluation. (27A RT 6170, 6182.) He was asked to determine whether DeHoyos had any brain problems and what role, if any, they played in the crimes he committed. (27A RT 6182.) Dr. Purisch noted that although the BEAM and PET scans both showed abnormalities in the brain, the MRI and

EEG were both normal. (28 RT 6218.) He concluded that on the more sensitive tests, there were indications of problems. (28 RT 6219.)

His opinion was that DeHoyos suffered from organic personality syndrome, explosive type. It was organic because there was a neurological component in that there was a problem with his brain. The personality syndrome was where someone's personality becomes so rigid that it habitually creates difficulties interacting in the world. (28 RT 6294.) He opined this disorder was in existence when DeHoyos raped and murdered Nadia. (28 RT 6418.) He believed DeHoyos was under a great deal of stress and did not have the capacity to deliberate on his judgments. (28 RT 6501-19-6501-20.) However, he acknowledged that based on DeHoyos's many different versions of what happened on that date, he could not determine what his actual state of mind was. (28 RT 6501-3.)

Expert witnesses testified extensively to statements and history given to them by DeHoyos and his family, many of which were not admitted for their truth; rather just for the purpose of supporting the expert opinions. (19 RT 4335-4336.) Drs. Berg and LaCalle thus described DeHoyos's accounts of his abuse by his mother (which was denied by his mother, although she admitted she sometimes had to discipline DeHoyos harshly because he was unruly). Additionally, expert witnesses testified about his personality in that he was strange, odd, a loner, withdrawn, had a "flash temper" and was unable to make social relationships with other children; he was aversive to being touched from when he was two years old; his performance in school; his abuse of alcohol and illegal drugs; his inability to hold a job; his inability to remain in a physical locality for any period of time; violent fights, mainly because he was suspicious or jealous (including his violent attack on his wife); his inability to stay in the Army; eight separate head

injuries;[13] his relationships including living with at least ten women, being married a number of times, some of which were overlapping, siring a number of children; his intense need for being connected to women and having constant sex; his difficulty controlling women which would cause him to become upset, jealous and full of rage; and multiple incidents of rage and uncontrollable violence if contradicted or challenged. (19 RT 4337-4350; 22 RT 5019-5027; 5029-5033; 5035-5039, 5046; 24 RT 5350-5358; 27A 6186-6188; 28 RT 6211-6212.)

DeHoyos told his expert witnesses that his 16-year-old cousin seduced him when he was 11 years old. (24 RT 5408, 5428, 5429.) He then stole some of her underwear and bras as "souvenirs."[14] (24 RT 5429, 5432.) DeHoyos explained that this sexual contact opened his curiosity about sex, and he transferred that curiosity to his sister once his cousin lost interest in him. (24 RT 5432.)

When DeHoyos was 12 years old and his sister, Anna, was nine years old, and slept on the couch, DeHoyos would touch her in and around her genital area. DeHoyos threatened to kill their parents if Anna told anyone. When their mother became aware of it, she had Anna sleep in another room. (19 RT 4357; 21 RT 4898-4899; 22 RT 5082; 23 RT 5167-5169.) In spite of that, an incident with Dalila Flores (a 15 year old whom DeHoyos lured to a hotel room under the ruse of getting a Taco Bell job

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[13] In spite of his numerous alleged head injuries, DeHoyos represented to the Army that he had no history of head injuries or loss of consciousness. (24 RT 5313; 27 RT 5903, 5906, 5910-5911 [Exhibit 45—Enlistment questionnaire].)

[14] The prosecutor elicited information from Dr. LaCalle that DeHoyos told him he took Nadia's underwear out of the motel room with him after he had taken her underwear off of her body. (24 RT 5412.) He later found Nadia's underwear in his laundry, and threw them in a dumpster. (24 RT 5412-5413.)

application),[15] and the current offense, Drs. Berg and LaCalle opined DeHoyos was not a pedophile. (19 RT 4353; 21 RT 4900; 22 RT 5081-5086; 23 RT 5134, 5141, 5149.) A pedophile is defined as one over 16, who has an abnormal love of children sexually. (19 RT 4358; 21 RT 4900; 22 RT 5086.) DeHoyos did not have a persistent pattern of gratifying himself with young children, and instead was hypersexualized—extra sexually interested in women. (19 RT 4354.) Although DeHoyos had dependency traits, which are sometimes seen in individuals who become pedophiles, he otherwise did not have a history or findings to confirm an attraction to children. (19 RT 4355.)

Although DeHoyos told Drs. Berg and Fossum he had used drugs on the day he raped and murdered Nadia, he told another doctor that he had not used drugs. (21 RT 4783-4788; 24 RT 5387-5388; 27A RT 6078.) DeHoyos explained to Dr. Berg that he did not tell the police he was under the influence of drugs because he was afraid to admit to cocaine use. (21 RT 4858.) Dr. LaCalle believed DeHoyos had lied to various doctors and others about whether he used drugs on the day of the rape and murder. (23 RT 5118.)

Numerous experts administered tests to DeHoyos, many of which were repetitive. It is possible to have a learning effect that a subject acquires after taking a test repeatedly. (28 RT 6450.)

The Minnesota Multiphasic Personality Inventory (MMPI) was given to DeHoyos four different times, and each time it was invalid. (19 RT 4332; 21 RT 4805; 22 RT 5048.) Dr. LaCalle administered the MMPI to DeHoyos in June 1989. (22 RT 5048.) Dr. Berg administered it and DeHoyos admitted to all the symptoms and answered in such a chaotic way

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[15] Flores testified in rebuttal. The details regarding that incident are recounted in detail, *post*.

that Dr. Berg was not able to get any clinical information. (19 RT 4332; 21 RT 4805.) Dr. Purisch gave him the MMPI twice. (28 RT 6235-6236.) The first time, DeHoyos was given the test to complete on his own, and Dr. Purisch picked up the test a few weeks later. When the test results came back and were scored, it was determined the results were invalid. He considered the fact DeHoyos was malingering in completing the test. (28 RT 6237, 6448-6449.) Then Dr. Purisch made arrangements for DeHoyos to be observed while he completed the test. That test also came back invalid. There was a purposeful exaggeration of problems. (28 RT 6239.) There were two reasons for that: (1) that he was purposefully malingering—attempting to portray himself in a negative light so people would think he was crazy for the purpose of the litigation; and (2) he was truly troubled and may be exaggerating in a cry for help. (28 RT 6239-6240.)

The Millon Multiaxial Inventory (Millon) was administered to DeHoyos five times, and it was also invalid for the same reasons. Dr. Berg administered it twice, and again, DeHoyos answered in a chaotic way, admitting to all the symptoms. (19 RT 4332; 21 RT 4855.) Dr. LaCalle also gave it and the protocol was invalid. (22 RT 5049.) Dr. Purisch administered it twice, once to complete on his own and once while being observed, and those tests also came back invalid. (28 RT 6235-6237, 6239, 6448-6449.)

DeHoyos was given the Weschler Adult Intelligence Scaled Revised (WAIS-R) three times by three different experts. When Dr. LaCalle gave it, it showed DeHoyos's functional intelligence quotient (I.Q.) was 83, or dull normal. (22 RT 5049.) Dr. LaCalle believed the test result was negatively affected by the testing environment, so it would have been higher under better circumstances. (22 RT 5050.) Drs. Fossum and Purisch also administered the WAIS-R to DeHoyos, and shared data about

the results of the test. (26 RT 5808; 28 RT 6226-6227.) Dr. Fossum only gave DeHoyos the first part, which consisted of verbal subtests because she already had data about the test from Dr. Purisch. (26 RT 5809; 28 RT 6227.)

Drs. Fossum, LaCalle and Purisch administered the Rorschach Ink Blot test to DeHoyos, which is a measure of personality or emotional functioning. (28 RT 6240, 6287.) Dr. LaCalle believed it suggested some "unusual responses." (22 RT 5056.) Dr. Fossum administered it on January 9, 1993. (27A RT 6075.) She believed it was strongly confirmatory of the presence of schizophrenia and was evidence of an inability to grasp reality. (27A RT 6131.) She believed the Rorschach results would have been nearly the same, but worse, had he been tested on the day he raped and murdered Nadia, because the manifestations are exacerbated under periods of extreme stress. (27A RT 6133.)

Although there were some mistakes initially in scoring the test, Dr. Purisch believed the results indicated DeHoyos had the capacity to be overwhelmed by a number of feelings, and under such occasions, his ability to interpret reality was not intact. (27A RT 6180, 28 RT 6290.) However, when he was more structured and his emotions were not interacting, he had the capacity to deal with reality or perceive reality accurately. (28 RT 6290.) The results of the test showed egocentrism and narcissism and that his goals exceeded his grasp so he was in a state of constant frustration. (28 RT 6391-6292.) He tried to cover up being inept by acting macho and bragging about his accomplishments. (28 RT 6292.)

Dr. Berg administered the Reyes memory test, on which DeHoyos got a perfect score, and which did not indicate malingering. (19 RT 4333; 21 RT 4904.) On the tests to detect brain damage, the results were generally within normal limits. (19 RT 4332.) Dr. Berg testified he did not find any evidence of organic brain damage. (21 RT 4886.)

Although Dr. LaCalle gave numerous tests, he believed certain tests were invalid based on DeHoyos being in custody, and DeHoyos's perception that the way he answered the questions could affect what happened to him. (22 RT 5087-5088, 5090.) Dr. LaCalle gave a personality test called the 16-P.F. (Personality Factors), which was marginally valid. (22 RT 5051.) The results were statistically unusual, placing doubt on its validity. (22 RT 5061.) He administered the I.P.A.T. depression inventory and the I.P.A.T. anxiety inventory. DeHoyos scored 10 out of 10 on both tests, showing extreme anxiety and depression, but those findings were not consistent with Dr. LaCalle's clinical observations. (22 RT 5053-5054.) Thus, Dr. LaCalle believed the test results were a result of malingering. Dr. LaCalle administered a test called the S.A.C.K.S., or the sentence completion test. (22 RT 5054.) Dr. LaCalle placed DeHoyos in the 95th percentile for memory, which he described as "incredible." (22 RT 5057.) Dr. LaCalle administered three projective tests; the memory test which showed better than average recollection (22 RT 5063); the Bender, that looks for indications of neurological impairment, which was inconclusive (22 RT 5063-5064); and the Draw A Person (DAP) test, which showed DeHoyos had a below average mental age. (22 RT 5063.)

DeHoyos told Dr. LaCalle 14 different accounts of what happened when he murdered Nadia, which LaCalle thought was in part due to his limited recollection of the events and DeHoyos's attempt to fill in the gaps by creating information and manipulating information on his behalf. (22 RT 5075-5076; 24 RT 5294.) In spite of his limited recollection regarding the rape and murder, DeHoyos had a tremendous recollection of data, especially numerical data. (22 RT 5057-5058.) The reason DeHoyos needed a tablet to write down details about his job was because he had compulsive personality traits. (22 RT 5058-5059.)

Dr. Fossum administered the Wide Range Achievement Test Revised (WRAT-R), which involves spelling, reading and arithmetic. (26 RT 5813.) DeHoyos's scores on the WRAT-R were as high or higher than his intellectual capabilities would permit so she opined that he was using all of his intellectual resources compared to that available to him. (26 RT 5817.) She gave him the Bender Gestalt Visual Motor Gestalt Test, a screen for brain damage, particularly right parietal lobe damage. (26 RT 5820.) His performance was within normal limits for his level of intelligence. There were no problems in areas of visual motor coordination, visual memory, planning or organization. (26 RT 5825.) Dr. Fossum believed, based on the PET scan and her interviews of DeHoyos, he had brain damage. (26 RT 5842.) He had difficulty changing mental sets and interpreting proverbs or anything that was abstract and he was socially inappropriate, naïve, and lacked self-critical ability. (26 RT 5842-5843.) All these are functions of the frontal lobe. (26 RT 5842-5843.) She did not consider him to be smart. (26 RT 5819.)

Dr. Purisch administered 21 tests to DeHoyos, including many neuropsychological tests. (28 RT 6221, 6293.) The tests included an evaluation of DeHoyos's strength by having him squeeze a dynamometer, which registered how much pressure he exerted; the grooved pegboard test, which required placing pegs into corresponding holes; the finger localization test to determine how well he could take information in through a sense of touch; sensory and auditory fields tests; a visual processing test; the Rey Osterrieth Complex Figure test; the Token Test; the Boston Naming Test; the Controlled Oral Word Association test (to measure verbal influence); the Rey Auditory Verbal Learning test (to test memory); the Rey Visual Design Learning test; the Logical Memory test; and the Visual Reproduction test. (28 RT 6221-6226.)

Additionally, he administered intelligence tests, including the WAIS-R, the Performance Subtest (putting together blocks and puzzles and identifying and mixing pictures); the Wisconsin Card sorting test (measures cognitive flexibility); the Digit Span (recalling numbers in their exact order); the Visual Memory Span; Mental Control; the Trail Making test; the Stroop Color/Word test; and the Symbol Digit Modalities test. (28 RT 6227-6229, 6234.) He also administered personality tests to DeHoyos to find out if there were any emotional or psychiatric personality factors that might be contributing to his problems. (28 RT 6235.)

The results of the tests administered by Dr. Purisch indicated that DeHoyos had cognitive and other neuropsychological problems, which was consistent with impairment of his brain, particularly the right frontal portion of his brain. (28 RT 6272-6273, 6286.) He was 25% stronger with his right hand compared to his left hand, which suggested problems with the right side of his brain. (28 RT 6274.) He had problems misinterpreting details on his left side, which is from defects in the right side of his brain. (28 RT 6276.) The tests showed there was a failure to learn appropriately in school. He had deficiencies in vocabulary, comprehending normal social protocol, reasoning through everyday tasks, verbally abstracting similarities, sequencing information, social judgment, organizing information and in visual processing. (28 RT 6281, 6284.)

Even DeHoyos's own experts testified he was malingering. Although Dr. Berg did not diagnose DeHoyos as a malingerer, he did not rule it out. Dr. Berg found indications that could be considered malingering. (22 RT 4970.) Dr. Berg had information that DeHoyos barked like a dog in the courtroom because he wanted to appear crazy. (21 RT 4909.) That incident, along with shaving his head, and throwing counsel table over during the first trial were very suspect, and may or may not be consistent with malingering. (22 RT 4970.)

Dr. LaCalle concluded DeHoyos was malingering. (22 RT 5054; 23 RT 5212-5213, 5280.) DeHoyos learned from Dr. LaCalle that shaving his head would make him appear crazy, and Dr. LaCalle had information that DeHoyos shaved his head and eyebrows and engaged in bizarre behavior such as barking like a dog to appear crazy. (23 RT 5192, 5200, 5202, 5263-5264; 24 RT 5396.) In spite of DeHoyos's malingering, Dr. LaCalle had confidence in his expert opinions. (22 RT 5072-5703.)

Dr. Fossum testified that Dr. Conseulo Edwards, a psychiatrist that had recently retired and moved to Spain, had diagnosed DeHoyos as a malingerer. (24 RT 5371, 5375; 27A RT 6040.) Dr. Fossum believed DeHoyos wanted to appear "crazy." (27A RT 6124.) However, his narcissistic wish was to make himself appear sane, attractive and in a good light, which far overwhelmed his desire to behave in ways that would make him appear crazy. Also, he did not have the social judgment to malinger effectively. (27A RT 6125.) Although she wrote in her report that it was obvious DeHoyos was malingering, her diagnosis did not include malingering because the fact a person malingers from time to time does not mean that he does not have one or more mental illnesses. (27A RT 6124, 6126.)

Dr. Purisch testified there was no evidence DeHoyos was attempting to malinger in the neuropsychological testing. He gave all indications he wanted to perform in the testing and was highly motivated. (28 RT 6233.) Nevertheless, he diagnosed him as malingering in his report because there were many factors which pointed towards malingering. (28 RT 6469, 6501-12.)

C. Guilt Phase Rebuttal

Dalila Flores met DeHoyos at the Taco Bell in Westminster when she was a 15 year old high school student.[16] DeHoyos told Flores he was the manager, and asked her if she wanted a job. (28 RT 6501-68.) Flores, who was living with her parents, was looking for a job so she gave DeHoyos her name and telephone number. (28 RT 6501-69.) About a week later, DeHoyos called Flores and told her that he had an application that she could pick up at a Taco Bell in Midway City. (28 RT 6501-69-6501-70.)

When Flores met DeHoyos at the Midway City Taco Bell, he told her that she had to go with him to get the application at his apartment. DeHoyos took Flores to a motel after stopping at a store to buy wine coolers. (28 RT 6501-70-601-71.) Once at the motel, DeHoyos told Flores that he took "girls" to the motel and they would take naked pictures of him. They would then go to bed and "do a blow job." He asked Flores if she wanted to do the same thing the other "girls" did. Flores told him, "no." DeHoyos then asked Flores if she wanted him to take out a Playboy or Playgirl, and again she told him no. DeHoyos then pushed Flores on the bed and tried to kiss her. Flores pushed DeHoyos off of her, and held the wine cooler DeHoyos was drinking overhand in a closed fist and said, "hey mother fucker, if you touch me you are dead." She told him she had cousins who were in gangs, and they knew where she was, as did her brother and boyfriend. Flores was scared. (28 RT 6501-72, 6502-74, 6501-79, 6501-97-6501-98.)

Flores left the room and DeHoyos followed her. She told him she was going home. (28 RT 6501-76.) DeHoyos apologized, and they got in his

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[16] At the time of trial, Flores was nineteen years old and had a two and a half year old daughter and a fifteen month old son. (28 RT 6501-67, 6501-94.)

car. (28 RT 6501-103.) When they were about halfway back to Flores's house, she told him she wanted to get out of the car because she did not want DeHoyos to know where she lived. (28 RT 6501-77.)

D. Sanity Phase Defense Evidence

In addition to testifying to what happened the night he raped and murdered Nadia Puente, DeHoyos presented four expert witnesses, two of whom had already testified in the guilt phase. DeHoyos testified that he had worked twelve hours at Taco Bell in Westminster, and went to bed at 3:00 a.m. on March 20, 1989. (30 RT 6982.) He received a telephone call at 6:00 a.m. from Mary Ann Scott. (30 RT 6982-6983.)

DeHoyos drove to Taco Bell. When he got there, Scott hollered at him and grabbed him by his shoulder. (30 RT 6983-6984.) She showed him some grease that had not been cleaned up, and some streaks on the floor. (30 RT 6984-6985.) Scott told DeHoyos that he was hard headed and that she was going to have to replace him. Although Scott did not tell DeHoyos he was fired, he thought he was, so he threw his keys on the table and barged out of Taco Bell. He jumped in his car and backed up, burning rubber on his tires. Scott ran after DeHoyos and tried to stop him. (30 RT 6985.)

DeHoyos went to his apartment and grabbed some clothes. He then drove to a liquor store and bought a six-pack of beer. (30 RT 6985.) DeHoyos was upset because he thought the job at Taco Bell was the best job he would ever have, and that it was his final opportunity.[17] (30 RT 6987.) DeHoyos drank as he drove on the freeway at a high rate of speed. (80 RT 6986-6987.) DeHoyos wanted to hit the center divider and kill

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[17] On cross-examination, DeHoyos acknowledged that he applied for a job on March 22nd or 23rd at Naugles or Del Taco and was offered a job. (30 RT 7111.)

himself, but instead he crossed over four lanes and exited the freeway. He turned around and drove home in traffic, which took him about an hour and a half. (30 RT 6988.)

DeHoyos then went to a Laundromat and bought cocaine, speed, and Quaaludes from a drug dealer to "mellow out." (30 RT 6988-6989.) At about 11:00 a.m., DeHoyos checked into a motel. (30 RT 6990.) He had done a "few lines" and had been drinking. He was tired and drowsy. He did not want to go back home because he did not want to harm anyone in the house. (30 RT 6990.) While in the motel room, DeHoyos thought about how to get back at Scott. He did more cocaine, drank some beer, and "smoked a joint."[18] After about an hour, he drove back to Taco Bell. (30 RT 6993.) He saw Scott through the window and wanted to "get her," but there were too many people there. He then drove back to the motel room, where he thought about money. (30 RT 6994.)

DeHoyos went to the Santa Ana Post Office to see if his income tax refund check had arrived. His check was not there. (30 RT 6995.) After leaving the post office, DeHoyos walked across the street, and on the way to his car, talked to Nadia Puente. (30 RT 6997-6998.) He could not remember the conversation but thought Nadia asked him what time it was. (30 RT 6997-6998.) DeHoyos said Nadia looked older than she was, which is why he told Dr. Edwards that she looked 19-20 years old. (30 RT 7065.) DeHoyos first said he did not remember approaching Sandra Cruz, but later claimed he did not approach her. (30 RT 7022, 7138.)

Nadia got into DeHoyos's car and he took her to the motel. (30 RT 6998.) DeHoyos claimed he did not know why he took her to the motel,

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[18] DeHoyos explained that he did not tell Dr. Siegel the truth about using drugs and alcohol that day because Dr. Siegel was being rude to him and was a "total asshole." DeHoyos thought he was going to assault Dr. Siegel. (30 RT 6996, 7050.)

but that it was not to have sex with her. (30 RT 7002, 7018.) As they passed her house, Nadia pointed it out to DeHoyos. (30 RT 7000.) DeHoyos told Nadia he would bring her back home. (30 RT 7000.) As DeHoyos was getting his belongings out of the trunk, Nadia grabbed a box to help him. DeHoyos's belongings were all over inside the motel room; Nadia commented that it was a mess. Nadia began putting things away in the drawers and cleaning up the motel room. (30 RT 7001.)

DeHoyos testified he told Nadia he was tired and needed to take a bath, but that when he finished his bath and she finished cleaning up, he would take her home. DeHoyos took a bath, and snorted more cocaine while bathing. (30 RT 7002.) After about twenty minutes, DeHoyos was getting out of the bathtub and reached to get a towel. (30 RT 7002-7003.) Without knocking, Nadia opened the door and surprised him. He did not like that she saw him naked. He told her to hand him a towel. (30 RT 7003.) DeHoyos was angry about the way Nadia came in the bathroom, so he grabbed her. Nadia kicked him, which made him angrier, so he got her in a bear hug and told her he was going to punish her. (30 RT 7004, 7083.) They scuffled, and fell into the bathtub over its edge. (30 RT 7004-7005.) DeHoyos then fell on top of her, and stayed on top of her until she drowned in the full tub of water. DeHoyos claimed he did not have the power to get off of her, and also claimed he did not know why he stayed on top of her. (30 RT 7005.) He later claimed, however, that he held her under the water because he was angry. (30 RT 7085.) DeHoyos said that Nadia was saying in a loud tone of voice, "leave me alone. Let me go. You are hurting me." (30 RT 7087.) DeHoyos claimed he thought he had killed Scott. (30 RT 7103.)

DeHoyos rolled on the floor and got himself up by grabbing the sink. Nadia was not moving and was hanging over the edge of the bathtub. DeHoyos watched her slip her whole body into the water face down. He

turned off the lights and went into the living room where he sat in the chair for five to ten minutes, thinking. He then went back in the bathroom and turned on the light. He knew something was wrong. He grabbed the mattress off the bed and threw it on the floor. (30 RT 7006.) He went back into the bathroom, and Nadia was floating face down. He picked her up, took her to the living room and laid her on the mattress. He sat in the chair and looked at her. He described her as being blue and purple, and her face was all different colors. (30 RT 7007.) DeHoyos next claimed that Nadia had defecated and it smelled. He pulled down her underwear and wiped her with toilet paper "like wiping a baby with a diaper." (30 RT 7006-7007.) Nadia was not moving, and he wondered if she was dead or alive. He put her under a chair and put a picture from the wall over her to hide her, with the intention of leaving her there. (30 RT 7008.)

DeHoyos then took the picture off of Nadia and put her back on the mattress. He stared at her blue and purple face, which looked like she had been badly beaten. He did not know what to do. He said he was "thinking about doing something. She looked too young." He went in the bathroom and "started to play with [him]self" because he "couldn't do nothing in the condition [he] was." He explained, "[w]hen I drink and am on drugs I am no good in sex. I am week. [sic] I can't do nothing." (30 RT 7009.) He explained, he wanted to "get it up" so he could find out if she was alive. (30 RT 7009, 7095.) He testified he thought it was the only way to find out. DeHoyos then sodomized Nadia, and was "in and out real quick." He did not ejaculate. (30 RT 7010.) Although DeHoyos admitted sodomizing Nadia, he claimed he did not put his fingers in her vagina, and explained he was just trying to clean her up. (30 RT 7098-7099.) DeHoyos testified he thought sodomizing Nadia was the right thing to do to see if she was alive. (30 RT 7153.)

He figured out Nadia was dead and he was nervous, worried and scared.[19] He got dressed and took a walk outside for about twenty minutes. He stopped in the laundry area and saw a trashcan. He grabbed it and took it back to the room. He put the bedspread in the trashcan so Nadia would not get her skin dirty, and then put Nadia in the trash can. (30 RT 7011.) He put the lid on the trashcan and put his belongings in his car. He then dragged "the trashcan" from the room to his car, and put it in his trunk. He could not close his trunk, and it was flapping up and down, hitting the can. A guy honked and told him his trunk was open. (30 RT 7012.) DeHoyos pulled over and slammed the trunk down real hard, squishing the trashcan. He drove on the freeway towards Los Angeles and ended up at Griffith Park. (30 RT 7013.) He went to the observatory, then drove towards the Greek theatre. (30 RT 7013-7014.) DeHoyos opened the lid to the trashcan and thought maybe Nadia was alive. She was still blue and purple. He told her he was sorry to leave her there and that she would be found soon. He covered the trashcan with the lid and left Nadia in the trashcan in Griffith Park. (30 RT 7016.) DeHoyos left her there because he wanted her to be found before the ants or vultures got to her. (30 RT 7015.)

DeHoyos returned to his apartment and asked one of his roommates to come back to the motel with him to return the key. (30 RT 7016-7017.) After doing so, he dropped his roommate off, and went back to Taco Bell. (30 RT 7018.) Two days later, DeHoyos apologized to Scott, told her they were still friends, and that he forgave her. (30 RT 7115.) DeHoyos stayed in his apartment until the next Friday. (30 RT 7097.)

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[19] On cross-examination, DeHoyos testified he took her out of the motel because he thought she would wake up on the way and he would take her home. He explained she might "pop out of the can or something." He also testified he thought she was faking. (30 RT 7107.)

DeHoyos testified that he wanted to kill Scott, but did not want to kill Nadia. He was just angry and Nadia "happened to get in the way and I killer her." (30 RT 7018.) He also explained that he was angry until he drowned Nadia. (30 RT 7019.) He was angry because he was thinking about Scott and about Nadia walking in on him. (3 RT 7020.)

DeHoyos claimed he made up the story to the police that he told Nadia he was a teacher because they were scaring him and he thought that was what the police wanted to hear. (30 RT 7022, 7137.) He claimed that before the police turned the tape recorder on, they told him that he told Nadia that he was a teacher and needed help with some school books. (30 RT 7132.) He also lied to the police regarding his use of drugs. (30 RT 7026.) DeHoyos claimed the police said they were going to shoot him, and that he heard Detective Alvarado say he wanted to "shoot the bastard." (30 RT 7026, 7028, 7076, 7133.) DeHoyos said he was busy looking at their guns during the interview. (30 RT 7077.)

DeHoyos said he went to the motel room with Dalila Flores on March 24, 1989, after he killed Nadia. (30 RT 7040.) DeHoyos explained that he did not lie to Dalila Flores because he did in fact have a job application for her; she just never filled it out because she was tired and sleepy. (30 RT 7031, 7034.) DeHoyos denied asking Flores to take her clothes off, to take naked pictures, or asking for a "blow job." (30 RT 7033.)

Retired psychiatrist Consuelo Edwards opined DeHoyos was legally insane when he committed the crimes. (30 RT 7160-7161, 7166, 7232.) She explained that although DeHoyos was not legally insane in the beginning of the day, when he attacked Nadia he was in a fit of rage due to the conflict that arose between him and Nadia. (30 RT 7233-7234.) DeHoyos was incensed after having a conflict with Scott, and felt treated unfairly. (30 RT 7232.) There came a moment when his poor judgment took over and he flared up. (30 RT 7235.) She believed he did not know

the difference between right and wrong because he acted in an impulsive act of rage without considering what he was doing. She acknowledged that DeHoyos told her that he was attacking Nadia, and that he held Nadia down to stop her from screaming. (30 RT 7277.) She also acknowledged that DeHoyos knew and understood what he was doing when he took his clothes off to have sex with Nadia, and in putting her in the trashcan and taking her body out of the motel room. (30 RT 7357-7358.)

Dr. Edwards diagnosed DeHoyos in Axis I with organic personality disorder, explosive type, malingering, and polydrug abuse. (30 RT 7198.) Dr. Edwards' conclusion DeHoyos was malingering was based on his attempt to manipulate her from the first moment she introduced herself to him by DeHoyos complimenting her unduly and immediately. He tried to call her attention to the fact he was crazy and he pointed to times when he said that lay people told him he was schizophrenic. DeHoyos tried to impress Dr. Edwards with an illness that did not match the illness that she found in him. (30 RT 7191, 7195, 7255.) Dr. Edwards did not believe DeHoyos's statement to the police was forced, and she thought he was lying. (30 RT 7254.) She did not think DeHoyos was a reliable source of information, and she had to verify what he told her.[20] (30 RT 7259-7260.) Nevertheless, she found DeHoyos's account of having sex with Nadia after she was dead supported by his statement that he found her rectum loose "just as if she were a prostitute." She believed DeHoyos was expressing a genuine emotion, and the laxity would be based on her being dead or

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[20] DeHoyos told Dr. Edwards that he began vaginal intercourse with Nadia and his penis must have slipped into her rectum. (30 RT 7270.) He also told her he thought Nadia was 19 or 20 years old when he first approached her, but after looking at the autopsy report describing Nadia and a photograph of her, she believed it was "highly likely" DeHoyos was lying. (30 RT 7271-7172.)

unconscious, and also based on the fact the autopsy report did not indicate there was any swelling. (30 RT 7432-7433.)

Dr. Edwards diagnosed DeHoyos in Axis II as antisocial personality disorder, and narcissistic personality traits. He met all the criteria for antisocial personality disorder. (30 RT 7133, 7202, 7192; 31 RT 7460.) People with antisocial personality disorder have no conscience. (31 RT 7460.) DeHoyos's frontal lobe syndrome may have caused his antisocial personality disorder. (31 RT 7468.) DeHoyos had all the symptoms of conduct disorder, including that he was difficult for his mother to deal with, he was a runaway and a truant, his lack of attention to rules and regulations, and his fighting with siblings and peers. (30 RT 7203.) His conduct continued after age 15, and included an unstable work history, moving from place to place to live, multiple sexual liaisons, and failing to attend to his obligations such as providing for children he fathered. (30 RT 7203.) DeHoyos had a full blown narcissistic personality disorder because he was very grandiose and had an inflated sense of self-esteem. He was always right and disrespected the rights of others. (30 RT 7204.) DeHoyos's expressions of grandiosity were due to his absolute lack of judgment. (30 RT 7205.)

In Axis III, Dr. Edwards found DeHoyos had a frontal lobe syndrome, a temporal lobe syndrome and probably a limbic system syndrome. (30 RT 7199.) Dr. Edwards explained that even before ordering the PET scan, she knew he had damage to his frontal lobe based on his symptoms. (30 RT 7206-7207.) Dr. Edwards noted three wounds on DeHoyos's head, which she believed were all from the application of blunt force trauma. (30 RT 7223-7224.)

Dr. Edwards explained DeHoyos had an abnormal speech that was grossly overproductive and had an inappropriate affect to the content of the conversation in that his emotional expression was very poor, bland and

shallow. His thought processes were abnormal in that they were circumstantial, rambling and viscous. (30 RT 7173.) His thought content was abnormal because he presented with certain hallucinations, including chewing movements, indicating he had the flavor of food in his mouth. (30 RT 7174.) DeHoyos had an abnormal sense of the passage of time. (30 RT 7176.) His capacity to abstract was somewhat impaired, especially with his vocabulary. (30 RT 7179.) He did not perceive sounds with the same intensity or with the intensity he thought others around him perceived them. (30 RT 7185.)

Some of these impairments pointed to the presence of disturbed function in his temporal lobe. (30 RT 7175, 7185.) DeHoyos had a compulsion to pull his hair, which, combined with other symptoms, pointed to a temporal lobe dysfunction. (30 RT 7182.) In addition, certain reflective tests indicated a bilateral frontal lobe disorder. (30 RT 7181.)

In Axis IV, psychosocial stressors are considered, including current and enduring conditions. Here, they included DeHoyos being in jail and under prosecution, and in enduring stressors, his chaotic lifestyle or life experiences. In Axis V, the patient is assessed on global functioning from zero to 90, and Dr. Edwards found DeHoyos to be about 10-40. (30 RT 7200-7201.) The disorders DeHoyos had affected his behavior because he had very poor social and personal judgment, was paranoid and angry, and his poor judgment took over. (30 RT 7225-7226, 7235.)

Psychologist Jose LaCalle opined DeHoyos was legally insane during portions of the day on March 20, 1989, starting when he left Taco Bell and got into his car, and including when he killed Nadia. (31 RT 7504-7507, 7543.) DeHoyos was in a rage prompted by Nadia walking into the bathroom, and his ability to process information, make decisions and to execute proper decisions was severely impaired. (31 RT 7507-7508, 7515-7516.) DeHoyos knew he was grabbing Nadia, but could not understand

the nature of his action and its consequences, i.e., death. His judgment was also impaired to a point of not being able to distinguish right from wrong. (31 RT 7508.) Dr. LaCalle doubted whether DeHoyos knew he was killing a human being, although he acknowledged that DeHoyos knew he was grabbing a human being when he held Nadia's head underwater. (31 RT 7523, 7536.) DeHoyos knew putting Nadia's head underwater would stifle noises she was making. (31 RT 7537.) According to Dr. LaCalle, DeHoyos did not know it was wrong when he sodomized Nadia because his judgment was impaired due to his mental illness and was exacerbated by his rage. (31 RT 7456.)

After some time elapsed, DeHoyos calmed down, and his actions appeared to be legally sane. He was still under a mental defect, but his cognitive processes were functioning much better than they were under the rage. He began showing problem solving actions and fairly appropriate judgment, such as when he began preparing to dispose of Nadia's body. (31 RT 7514-7515.)

Psychologist Paul Berg also opined DeHoyos was legally insane when he committed the crimes because he was not able to appreciate the nature and quality of his act[21] so he did not have the knowledge that he was killing a young girl, rather, he believed he was killing Scott and that he did not know, in the moral sense, that it was wrong to do so. (30 RT 7549, 7551.) Dr. Berg explained that DeHoyos began the day under extraordinary stressful circumstances. He was beginning to deteriorate mentally, in terms of his thinking, judgment and controls and as the day progressed, the deterioration continued. (31 RT 7550.) DeHoyos was shocked and

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[21] Dr. Berg testified that while DeHoyos knew he was killing a human being, he did not "appreciate" it, which Dr. Berg believed was incorporated into the definition of legal insanity. (31 RT 7557-7558.)

surprised when Nadia came into the bathroom. He believed that Scott was coming after him, and he lost it mentally. (31 RT 7555.) Dr. Berg believed DeHoyos became legally insane when Nadia came into the bathroom, and the legal insanity ended when DeHoyos completed his sexual act with Nadia and he realized she was dead and that he had done something horrible to a minor child. (31 RT 7552.)

DeHoyos was able to engage in acts to avoid detection because by the time he realized what he had done, he was not insane, rather, he was shocked into the realization that he had done something horrible. (31 RT 7553.) DeHoyos's acts of trying to avoid detection and dispose of Nadia's body show DeHoyos had an awareness that what he did was wrong. (31 RT 7583.) He did not have guilt or remorse, but he had an awareness after the fact that society would judge what he did was wrong, and wanted to avoid punishment. (32 RT 7920-7922.)

Dr. Berg believed the interview with the police was coerced based on DeHoyos's reporting that he was intimidated, that he believed the police officers had weapons, and that they were standing or hovering over him; DeHoyos's previous problems with authority and feelings of inadequacy; and the remark overheard by DeHoyos of one of the officers that, "I would like to shoot that bastard."[22] (31 RT 7561, 7582, 7598.)

Lastly, forensic psychologist John Reid Meloy testified that he believed DeHoyos understood the nature and quality of his acts but that when he raped and murdered Nadia he was incapable of distinguishing right from wrong.[23] (32 RT 7614, 7629, 7634, 7639-7640.) He believed

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[22] The tape the jury heard, and the transcript they received of DeHoyos's interview, was redacted to take out this statement as well as some other statements. (31 RT 7584.)

[23] Dr. Meloy explained on cross-examination that DeHoyos understood the nature and quality of all his acts except his kidnap of Nadia

(continued...)

DeHoyos knew that he was drowning a human being and that the drowning would likely result in her death. Dr. Meloy believed that DeHoyos could not distinguish between right and wrong because DeHoyos told him, "I felt relieved. I was carrying out revenge. I had gotten even but had not done anything wrong." (32 RT 7634.) Additionally, DeHoyos had very poor reality testing and lacked the ability to distinguish internal fantasy from external reality. (32 RT 7642.)

Dr. Meloy believed DeHoyos did not have the ability to inhibit homicidal impulses. His only coping mechanism for his anger was to walk away. (32 RT 7635.) Here, DeHoyos was incapable of walking away from the situation, because of his homicidal anger. (32 RT 7637.) He "had no stops" and wanted to kill Nadia. (32 RT 7888.) Because his abnormal frontal lobes of his brain, he did not have inhibition. There was transference from the original experience of humiliation by his mother, to the humiliation by Scott, which then shifted to Nadia Puente when she saw him in the bathroom without his clothes on. (32 RT 7635.) Dr. Meloy believed when DeHoyos asked Nadia for a towel, he used a ruse or ploy to get her near the bathtub to physically get ahold of her. (32 RT 7883, 7885.) Although he was angry throughout the day, he was not in a homicidal rage until Nadia came into the bathroom. (32 RT 7752-7753.) According to Dr. Meloy, about thirty minutes after killing Nadia, DeHoyos was out of the homicidal rage. (32 RT 7638.) DeHoyos knew he had done something wrong when he stuffed Nadia's body into the trashcan. (32 RT 7731.)

Dr. Meloy opined DeHoyos did not intend to sexually assault Nadia, based on the lack of history of pedophilia or a sexual interest in children.

(...continued)
because, as to the kidnap, DeHoyos did not understand the consequences of the kidnap. (32 RT 7696-7697.)

(32 RT 7629-7630.) He believed DeHoyos sought Puente's attention and company to compensate for the humiliation that he experienced earlier in the day when he left his job at Taco Bell. (32 RT 7631.)

Dr. Meloy diagnosed DeHoyos on Axis I with organic personality syndrome. (32 RT 7624.) He noted DeHoyos was markedly suspicious and paranoid at times, had repeated episodes of aggression and grossly impaired social judgment and had organic problems localized in the right frontal area of his brain. (32 RT 7624-7625.)

Dr. Meloy's Axis II diagnosis was narcissistic personality disorder and antisocial personality disorder. (32 RT 7623.) DeHoyos met six of the twelve criteria for conduct disorder in a child (three are required for the diagnosis), and nine out of ten criteria as an adult. (32 RT 7625-7626.) The adult criteria included his lack of remorse, his failure to maintain a monogamous relationship for more than a year, his frequent and inconsistent and multiple work history, his consistent failure to follow social rules of behavior, his impulsivity, his failure to plan ahead and foresee the consequences of his actions, his irritability, his aggressiveness, and his failure to meet or honor financial obligations. (32 RT 7626-7626.) DeHoyos met six criteria for narcissistic personality disorder (five of nine criteria are required to make a diagnosis). (32 RT 7627.) DeHoyos's criteria included his grandiosity, his constant need for attention, particularly from females, a lack of empathy, a preoccupation with fantasies of success and beauty, a reaction to humiliation or criticism with feelings of humiliation and rage, and exploitation of other people for his own means. (32 RT 7627-7628.) Dr. Meloy explained that about one-third of people who have antisocial personality disorder are primary psychopaths. (32 RT 7628.) He administered the Hare Psychopathy checklist revised to DeHoyos. (32 RT 7620-7621.) DeHoyos scored 37 out of 40 points. The cutoff for being psychopathic is 30, with a standard error of measure of

about five. Dr. Meloy was 95 percent certain that DeHoyos was a primary psychopath. (32 RT 7628.)

Psychopathy is a constellation of traits, which clinically describe patterns of behavior. (32 RT 7803.) There are twenty traits of behavior to consider. (32 RT 7862.) The behaviors that DeHoyos exhibited were his glibness and superficial charm; grandiose sense of self-worth; a need for stimulation and proneness to boredom; pathological lying; conning and manipulation; lack of remorse or guilt; shallow affect or emotion; callousness and lack of empathy; poor behavioral controls; promiscuous sexual behavior; lack of realistic long-term goals; impulsivity; irresponsibility; failure to accept responsibility for his own actions; many short-term marital relationships; and "revocation of conditional release." (32 RT 7802.)

Dr. Meloy explained that DeHoyos was developing psychopathic character in latency age, and had some characteristics at 5 or 6 years old. At fifteen years old, he lacked the capacity to distinguish right from wrong. When the prosecutor asked him on cross examination whether he lacked the capacity to distinguish right from wrong at ten years old, Dr. Meloy explained that DeHoyos told him, "He was setting cats on fire." (32 RT 7811.)

As a psychopath, DeHoyos sought Nadia as an object to fulfill his narcissistic equilibrium that had been severely shaken earlier in the day. (32 RT 7632.) As a psychopath, DeHoyos had no internalized sense of value or generally accepted moral standards. His behavior was guided by pleasure seeking and avoidance of pain or punishment. Thus, Dr. Meloy did not feel that DeHoyos was capable of distinguishing between right and wrong when he committed the crimes against Nadia. (32 RT 7632.) Dr. Meloy further explained that as a psychopath, DeHoyos did not learn from punishment and did not have a conscience. (32 RT 7633.) Because

he did not have a conscience, he could not distinguish right from wrong. (32 RT 7660, 7776.) Additionally, as a psychopath, he did not have the capacity to look beyond an immediate event to measure it against what was acceptable, and did not experience anxiety or the potential for guilt.[24] (32 RT 7633.)

A fundamental characteristic of a psychopath is that there is nothing to inhibit violence when one is angry. (32 RT 7785.) Because DeHoyos was a psychopath, he did not look at Nadia as a meaningful human being and had no empathy for her (32 RT 7785.) Although psychopaths lie a lot, Dr. Meloy believed Nadia was dead when DeHoyos sexually assaulted her because he was very consistent in reporting that fact. (32 RT 7640.)

When the prosecutor was cross-examining Dr. Meloy about why he did not put information in his report that DeHoyos asked a minor (Dalila Flores) to take a picture of him, DeHoyos said,

> I don't even own a camera you stupid punk. Is it in evidence? Is it? Is it in evidence[?] ¶ I will fuck you up punk. I don't even have a fucking camera. I never had. I never have. He is accusing me of something that I never did. ¶ I never did nothing like that. What?

(32 RT 7893-7894.) The court then excused the jurors. After the jurors exited the courtroom, the court explained for the record that DeHoyos began shouting at the prosecutor, and stood up and advanced several steps towards him, and reached within five feet of him before being subdued by two deputy marshals. (32 RT 7894-7895.) When the jurors returned, the court explained that measures had been taken by the court[25] to ensure that

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[24] Dr. Meloy testified that when DeHoyos told him he felt guilty about committing his crimes, Dr. Meloy thought he was lying. (32 RT 7925.)

[25] After the outburst, DeHoyos agreed to be shackled. (32 RT 7898, 7903-7904.)

DeHoyos would not be able to leave his chair while court was in session without permission of the court. (32 RT 7907.) On re-direct examination, Dr. Meloy testified DeHoyos's outburst in court was consistent with his three diagnoses of DeHoyos because each refers to anger and aggressiveness. A criteria of organic personality disorder is frequent outbursts of anger or aggression; a criteria of narcissistic personality disorder is rage in response to criticism or humiliation; some criteria of antisocial personality disorder include irritability, anger, and impulsiveness. (33 RT 7986.)

E. Sanity Phase Prosecution Evidence

The prosecutor only presented one witness, Santa Ana police officer Gary Bruce, to rebut DeHoyos's claim that his statement to the police was coerced or forced. Officer Bruce testified that on May 1, 1989, he and Investigator Mike Alvarado traveled to San Antonio, Texas to serve an arrest warrant on DeHoyos, and interviewed him. (33 RT 8027.) They were both in plain clothes, and had removed their weapons and placed them in their briefcases. (33 RT 8029-8031.) They used two tape recorders to tape record the interview. (33 RT 8031.) One was a mini recorder that was in Officer Bruce's jacket pocket, and the other one was a larger size cassette recorder. (33 RT 8031-8032.)

After interviewing DeHoyos, the recorder in Officer Bruce's jacket pocket continued to run. They allowed DeHoyos to make a telephone call, which they recorded. (33 RT 8032.) Initially, Officer Bruce was standing next to DeHoyos when he made the telephone call, then he walked 20 to 25 feet away, where Investigator Alvarado was standing. (33 RT 8034.) When Investigator Alvarado made the statement that he wanted to "shoot the bastard," DeHoyos was talking on the telephone approximately 25 feet away. (33 RT 8033-8035.) The tape and its transcript containing the

statement were admitted into evidence. (33 RT 8033, 8056 [Exhibits 52(A)[tape] & 52(B)[transcript].].)

F. Penalty Phase Evidence In Aggravation

The prosecutor relied on the circumstances of the crime, including victim impact testimony of Nadia's mother; the incidents of violence admitted during the guilt phase against Gloria Lara and Maria Esparza; and DeHoyos's courtroom outburst during the sanity phase as its evidence in aggravation. (34 RT 8567-8568; 8602-8606, 8621-8623, 8625, 8632.)

Sara Puente, Nadia's mother, testified as to the impact on her of Nadia's murder. At the time of Nadia's murder, Mrs. Puente lived with her husband, her parents, her brother, and her five children in Santa Ana. (34 RT 8291-8292.) Nadia was in fourth grade at Diamond Elementary school. (34 RT 8292, 8297.)

Mrs. Puente was an elementary school substitute teacher. (34 RT 8295.) She was working when her mother called her, at 2:45 p.m., and told her Nadia was missing. (34 RT 8294.) She rushed home. She found out Nadia was killed when she overheard someone at her home say that Nadia's body had been found. (34 RT 8294.)

At the time of trial, Mrs. Puente worked at intermediate level schools. She changed to that level because Nadia would have been in eighth grade and she liked to see eighth grade girls. When she was asked how many children she had, for a while she answered she still had five: 4 boys and a girl in heaven. After some time, she told people she had four children. When asked whether she wanted to try to have a girl, she would respond that she has one but she is in a better place. (34 RT 8295-8296.)

Mrs. Puente thought of Nadia everyday and how when she looked in the mirror in the morning to get ready for work, Nadia used to tell her she was beautiful. Mrs. Puente had planned to teach Nadia how to put on makeup when Nadia grew up. (34 RT 8297.) Nadia told her mother that

when she grew up she wanted to be a teacher. (34 RT 8297.) A photograph of Nadia before she was murdered was admitted into evidence. (34 RT 8298 [Exhibit 54].)

G. Penalty Phase Defense Evidence

DeHoyos presented numerous family members and friends who testified that they wanted DeHoyos's life spared. He also presented the testimony of a sentencing consultant who testified DeHoyos would adjust well to a sentence of life in prison without the possibility of parole, and a psychiatrist who testified as to what factors he thought should be considered in sentencing.

Theodora Munoz DeHoyos, who lived in Panama, married DeHoyos in August, 1980. (34 RT 8306.) Theodora lived with DeHoyos for three years and they had two children together. (34 RT 8307-8308.) One day, DeHoyos left the house and never returned. (34 RT 8307.) Theodora testified DeHoyos was a nice person, was understanding, and behaved well towards her and her family. (34 RT 8307.) Theodora did not feel DeHoyos should be put to death because he was not a bad person, and at the time he committed the crimes, she believed he was "not well," "not normal," and "not on his five senses."[26] (34 RT 8310-8311.)

Ex-wife Gloria Lara,[27] and Sandra DeHoyos, Lara and DeHoyos's 16-year-old daughter, both testified. (34 RT 8542.) Lara and DeHoyos divorced in 1977, then she saw him again when Sandra was four or five. Lara did not see DeHoyos again until March, 1989. (34 RT 8543-8545.)

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[26] The prosecutor elicited from this witness, as well as other witnesses, that Dr. LaCalle told her that he was DeHoyos's doctor and that DeHoyos was not well. (34 RT 8322 [Theodora Munoz]; 8333 [Erundina Martinez]; 8358 [Rubin Dario Martinez]; 8552 [Gloria Lara].)

[27] In the penalty phase, Gloria Lara was sworn in as "Gloria Villa Real." (34 RT 8541.)

Lara testified that DeHoyos should get help, and that she knew he was "not all there." (34 RT 8550.) Lara believed the circumstances had affected Sandra and that Sandra thought about things that would never happen, such as dancing with her father. (34 RT 8548.) Sandra's first memory of DeHoyos was when she was in 7th grade. (34 RT 8554.) DeHoyos was nice and sweet to her, and since then they had corresponded by letter and telephone. (34 RT 8557.) The situation was hurtful for Sandra, and she felt sorry for everyone involved. (34 RT 8557-8558.) DeHoyos was Sandra's best friend, and she felt he was easy to talk to. (34 RT 8559.) Sandra wanted DeHoyos to go to prison for a little bit, then to get released. (34 RT 8558.) She loved him and wanted to communicate with him in person. (34 RT 8558.)

Some friends of DeHoyos's from Panama, Erundina Martinez, Edna Maritza Carrera, and Rubin Dario Martinez, testified that they knew DeHoyos when he lived near them in Panama. (34 RT 8324, 8331, 8338-8339, 8351.) They each testified that he should not be given the death penalty. (34 RT 8328, 8343, 8355.) Erundina Martinez's reason was that she did not believe in capital punishment and because she did not have any bad memories or ill feelings towards DeHoyos. (34 RT 8328, 8332-8333.) Carrera believed DeHoyos was a good person, was friendly, and a gentleman. (34 RT 8341.) She believed DeHoyos should live because she believed "consciously he didn't do it," "was not in his right mind" and was "not in his five senses." (34 RT 8341, 8343, 8348-8349.) She also told of an argument DeHoyos had in Panama in which someone threw a stone at his head, requiring stitches. (34 RT 8342-8343.) Rubin Martinez also explained that he was comfortable with DeHoyos around his daughters, and that DeHoyos was well liked, highly communicative, and left a good impression. (34 RT 8352, 8354.) He thought a life sentence was enough punishment. (34 RT 8355.)

DeHoyos's father, mother, and two of his brothers testified. His father, Lucio DeHoyos, Sr., testified that DeHoyos can be punished for what he did, but that he is sick, and has been so since he was born. (34 RT 8495-8596.) His mother, Martha DeHoyos, testified she was shocked when she found out what her son did, had been depressed about it, and was terribly hurt. (34 RT 8512, 8514, 8516.) Although she said she knew "the jury probably wants the death penalty for him," she did not think an ill person should be put to death, and believed he had to be sick to do what he had done. (34 RT 8517-8518.) She believed DeHoyos should be put in a hospital to get treatment. (34 RT 8517.)

Lucio DeHoyos Jr., DeHoyos's younger brother, also believed DeHoyos should be hospitalized. (34 RT 8498, 8501.) He did not believe anyone should be put to death, particularly when "there is a mental problem in the mind." (34 RT 8499, 8501.) He testified he loved DeHoyos, and recalled how DeHoyos was funny and clowned around when they were younger. (34 RT 8499-8500.) Alexander DeHoyos, another younger brother of DeHoyos, testified DeHoyos should not get the death penalty because he had done too many good things when he lived at home with his family, and he did not think DeHoyos meant to do what he did. (34 RT 8503, 8510.) He testified that DeHoyos's arrest had affected him, his mother and father. (34 RT 8504-8506.) He described playing outside with DeHoyos when they were younger, climbing trees, and how he helped DeHoyos with his school work. (34 RT 8510.)

Norman Morein, who had been a probation officer for five years, then worked as a correctional counselor in state prisons for twenty-five years, testified as a sentencing consultant. (34 RT 8361-8362.) Morein believed DeHoyos could adjust or adapt in prison were he to receive a sentence of life without the possibility of parole. (34 RT 8367.) On cross-examination, the prosecutor elicited information contained in the probation report that

DeHoyos got into a fight with another inmate and bit him on the nose, the left cheek, the left side of his head, and pulled out the inmate's hair with his teeth. Morein testified that the incident may indicate DeHoyos would have difficulties adjusting with other inmates, but it was not a sure indication that he would. Morein also acknowledged another incident where DeHoyos accused an inmate-worker of tampering with his food, and DeHoyos threw his food tray at the inmate and said, "If that worker comes near me again I will kill him." (34 RT 8391.) Morein also acknowledged he read and considered another incident that occurred on July 25, 1991, where DeHoyos struggled with a deputy while being escorted to court. After DeHoyos was placed in a holding cell, he began barking like a dog and stated, "You can't do this. Get your fucking oriental hands off me." DeHoyos then swung his hand chains against the wall, causing damage. (34 RT 8393-8394.) Regardless of this information, Morein believed DeHoyos would comply with orders of the guards. (34 RT 8395.)

Dr. William Logan, a psychiatrist, evaluated DeHoyos to evaluate his mental state at the time he committed the murder and to do a diagnostic assessment to determine factors that could be considered in sentencing. (34 RT 8419-8421.) Dr. Logan determined there were nine items that should be considered in sentencing DeHoyos, in that they had an impact on his behavior and life adjustment. (34 RT 8431-8432.) The factors were: (1) that when he was a child, DeHoyos suffered from physical abuse, had a very disturbed relationship with his mother, and witnessed violence at home; (2) that he was exposed to sexuality prematurely through some early sexual abuse as a young boy which later caused him to develop some very deviant sexual ideas; (3) that he was exposed to a number of odd religious beliefs in the form of a curandero or witch doctor, which had him perform a number of bizarre rituals involving such things as killing and slaughtering animals and odd or magical superstitious beliefs; (4) his physical deformity

in that his eyes were deviated outward; (5) his head injuries; (6) that he sniffed glue in childhood and then progressed to marijuana in adolescence and later use of cocaine, various sedatives and stimulants; (7) his paraphilia or abnormal sexual development; (8) his having psychotic phenomena during periods of stress; and (9) his functioning from early 1988 until committing the crimes had been much worse than in other times of his life. (34 RT 8433-8439.)

ARGUMENT

I. THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCUSE FIVE PROSPECTIVE JURORS WAS NOT BASED ON RACE NOR DISCRIMINATORY

DeHoyos claims his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and Article I, sections 7 and 16 of the California Constitution were violated because the prosecutor exercised peremptory challenges to five prospective jurors based on race. (AOB 82-83.) He argues the trial court failed to make a serious attempt to evaluate the prosecutor's explanations. (AOB 83, 107.) He contends a comparative analysis reveals the prosecutor's reasons for striking the prospective jurors were race based. (AOB 107.) The trial court properly denied DeHoyos's *Batson/Wheeler*[28] motion because the prosecutor excused the prospective jurors for race-neutral reasons. The trial court thoroughly explored the prosecutor's reasons for exercising peremptory challenges, and credited his reasons, which are supported by substantial evidence. Furthermore, a comparative analysis fails to show the prosecutor's use of peremptory challenges was based on race.

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[28] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258.

A. Jury Selection

On the 22nd day of jury selection,[29] DeHoyos made a *Batson/Wheeler* motion claiming the prosecutor was excusing prospective jurors who were in the psychiatric profession. (10 RT 2353.) The court denied the motion. It held people in the medical field are not a cognizable class, therefore, DeHoyos did not make a prima facia case of discrimination. (10 RT 2362.) The next day, DeHoyos again argued that the prosecutor was unlawfully excusing prospective jurors that had certain attitudes towards psychology, psychiatry and the death penalty. (11 RT 2602.) Again, the trial court denied DeHoyos's motion because DeHoyos did not make a prima facie case that the prosecutor was exercising his peremptory challenges in a discriminatory manner as those in the mental health field did not constitute a cognizable class. (11 RT 2602-2604.)

The following day, after the prosecutor excused prospective juror M.L., who was Hispanic, DeHoyos again made a *Batson/Wheeler* motion, contending the prosecutor unlawfully excused Black and Hispanic prospective jurors. (12 RT 2658-2659.) DeHoyos argued that the

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[29] Jury selection lasted two months, consisting of thirty court days, in part because the court conducted individual sequestered voir dire, pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (3 CT 1078-1081 [February 1, 1993]; 1084-1087 [February 2, 1993]; 1094-1096 [February 3, 1993]; 1099-1102 [February 4, 1993]; 1114-1117 [February 8, 1993]; 1124-1127 [February 9, 1993]; 1128A-C [February 10, 1993]; 1131-1134 [February 17, 1993]; 1135-1140 [February 18, 1993]; 1141-1147 [February 22, 1993]; 1148-1149 [February 23, 1993]; 1150-1155 [February 24, 1993]; 1156-1159 [March 1, 1993]; 1160-1164 [March 2, 1993]; 1165-1169 [March 3, 1993]; 1170-1173 [March 4, 1993]; 4 CT 1174-1177 [March 8, 1993]; 1178-1181 [March 9, 1993]; 1183-1186 [March 10, 1993]; 1187-1190 [March 11, 1993]; 1191-1194 [March 15, 1993]; 1195-1198 [March 16, 1993]; 1199-1202 [March 17, 1993]; 1203-1204 [March 18, 1993]; 1205-1206 [March 22, 1993]; 1208-1211 [March 23, 1993]; 1212-1215 [March 24, 1993]; 1216-1221 [March 25,1993]; 1222-1223 [March 29, 1993]; 1224-1227 [March 30, 1993].)

prosecutor had impermissibly excused the following prospective jurors: L.M. who was Black, E.V. and M.L. who were Hispanic, and R.M. who was both Black and Hispanic. (12 RT 2660.) The court took a recess, and when it returned, DeHoyos advised the court it also believed the prosecutor unlawfully excused prospective juror A.M.-F., who was "Latin American." (12 RT 2661.) The trial court noted that DeHoyos had also excused Black and Hispanic prospective jurors, namely, L.R., M.C., and N.J. (12 RT 2662.) The court stated that it was not passing on the ultimate question, and that there were minorities in the jury box which the prosecutor had passed on, but found a prima facie case had been made. (12 RT 2663.) The court later explained that it found a prima facie case because there were over a hundred prospective jurors excused for other than hardship, so it could not recollect all the responses given by the prospective jurors. (13 RT 2733.) Because the prosecutor exercised almost one-third of its peremptory challenges against Hispanic or Black jurors, the court found a prima facie case. (13 RT 2733.) The prosecutor requested clarification regarding whether the class included Blacks or Hispanics, and the court stated that it included all minority groups.[30] (12 RT 2665-2666.)

1. Prospective Juror L.M.

The next day, the prosecutor explained his reasons for excusing each of the minority jurors. L.M., a 42-year-old Black juror with a high school education, worked at K-Mart as an Office Associate. (11 Aug. CT 3596-

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[30] The prosecutor requested clarification as to which class the trial court found a prima facie case, particularly because he had only excluded one Black juror (juror R.M. was part Black, but he was also part Hispanic). (12 RT 2665.) The trial court did not seem to understand the prosecutor's request for clarification, or that the class is generally more specific, i.e., does not include both Blacks and Hispanics. This Court recently affirmed that "people of color" are not a cognizable group. (*People v. Davis* (2009) 46 Cal.4th 539, 583.)

3597, 3603.) During sequestered voir dire, L.M. stated that she felt that there were two sides to every story and she had to hear everything before she could pass judgment. (3 RT 704-706.) She did not believe there were any cases that she would always vote for death. (3 RT 707.) She had never made a decision that had to deal with life or death. (3 RT 709.)

When defense counsel asked L.M. whether she was a strong proponent of the death penalty, she said,

"No, not a strong follower of the death penalty, no." Defense counsel then asked for her reasons and she responded,

> I don't feel I have the—I have—I should say personally, say—the right to say everybody should die because of whatever crime or whatever it is that they have been accused of or convicted of and say that everybody should die for that reason because they broke the law of some sort.

(3 RT 710.) The prosecutor then asked what L.M.'s reaction was when she heard this was a death penalty case and she said, "I didn't form an opinion one way or the other about it." (3 RT 711.) She said it would not bother her if she were selected as a juror. (3 RT 712.) She said she could vote for death "in the right case," and there were certain crimes that merited the death penalty, otherwise "where are you going to put all these people" who commit violent crimes. (3 RT 713, 715.)

L.M. had never read anything about the death penalty. (3 RT 722.) She stated there was one incident she was discussing with some others "where it was a death, and I didn't feel it should have been." (3 RT 717, 723.) She did not remember what the case was about. (3 RT 718.) The prosecutor attempted to jog her memory by asking her if it could have been the Robert Alton Harris case, because Harris had been recently executed and it received a lot of media attention. L.M. said that did not ring a bell. (3 RT 724.) She did not have a feeling about whether the death penalty was used too often or not enough. (3 RT 719.) When asked how she would feel

if she were to serve on the jury, she said she would not say she was eager about it, but would do her civil duty, and in one respect, would look forward to it. (3 RT 721.)

When L.M. was asked whether someone close to her ever studied psychiatry or psychology, she said her son had, and that her daughter, who lived with her, was taking classes in psychology. (3 RT 659-660, 710.) L.M. said she never discussed any of her daughter's classwork with her. (3 RT 710.)

The prosecutor excused L.M. for a number of reasons. L.M. said that she was looking forward to sitting on a capital case, and was not apprehensive about it. The prosecutor was skeptical of someone who was looking forward to sitting on a capital case because of the enormity of the decision. (13 RT 2685-2685.) He thought someone who looked forward to it may have a specific reason or agenda to want to be picked as a juror. He stated he did not necessarily believe she had an agenda but it concerned him that she made such a statement. (13 RT 2685.) He also believed a juror who made such a statement may not fully and totally understand the gravity of the responsibility. (13 RT 2685.)

Additionally, the prosecutor was skeptical because L.M. said she had a college age daughter who lived at home with her, who was her only daughter, and L.M. had knowledge about her daughter's career plans but never talked to her about her classwork. (13 RT 2686-2687.) The prosecutor believed that based on his feeling L.M. wanted to serve on the jury, she may have known that if she had discussed psychology or psychology classes with her daughter it may have led to the exercise of a peremptory challenge. (13 RT 2687.)

Another reason the prosecutor exercised his peremptory challenge against L.M. was because she believed that there was a situation where the death penalty was imposed and it was the wrong decision, even though she

had never read anything about the death penalty. (13 RT 2687.) Then when the prosecutor asked L.M. whether she felt the death penalty was imposed too often or too seldom, she said she had no opinion, which concerned the prosecutor because L.M. had just taken the position that she believed it had been wrongly given in one case. (13 RT 2688.)

Defense counsel argued the prosecutor's reasons were not sufficient. Specifically, counsel argued that there were other jurors who wanted to get involved in the system, and said they would love to serve on the jury if it was a shorter trial. (13 RT 2712.) Counsel argued it was unreasonable to think that L.M. would talk to her daughter about her course work in college because she had her own job. (13 RT 2714.) As far as the death penalty, L.M. said she would follow the law and could vote for the death penalty.[31] (13 RT 2714.)

The court found the prosecutor's non-race related reasons for excusing L.M. were justified. (13 RT 2726.) The court found the prosecutor's reservations about L.M. were justified because she had not given any thought to this issue in the past. The court found that hard to believe, especially after L.M. was called to the jury box and heard voir dire of other potential jurors. (13 RT 2726.) The court believed L.M. was a little unconcerned about the responsibility of sitting on a capital case. (13 RT 2725.) The court found it significant that L.M. had never heard of the Robert Alton Harris case, which received "massive amounts" of publicity prior to his execution the previous year. (13 RT 2724.)

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[31] The trial court later explained that defense counsel was confused in that just because a juror is not disqualified under *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] does not mean the prosecutor cannot properly use a peremptory challenge to excuse jurors who were reluctant to impose the death penalty. (13 RT 2718-2719.)

2. Prospective Juror E.V.

E.V. was a 27 year-old meat cutter at a grocery store. (12 Aug. CT 4042.) He listed his racial/ethnic origin as "Spinish."[32] (12 Aug. CT 4049.) E.V.'s wife was a "checker" and he had a seven year-old son. (12 Aug. CT 4043-4044; 4 RT 931.) He attended one year of college at Orange Coast, where he studied Art. (12 Aug. CT 4043.) When asked to list his three favorite books that he read for pleasure, he listed one: "Hot V.W." (12 Aug. CT 4047.) During sequestered voir dire, he said that he did not have a problem with the death penalty. (4 RT 927.) He also indicated that he would not be in favor of abolishing the death penalty because otherwise people would get away with committing crimes. He did not feel there were some crimes that were so bad the perpetrator had given up his or her right to live in society. (4 RT 933.) He thought that he could vote for the death penalty if the crime was "just so bad" or "real brutal." (4 RT 934.)

The prosecutor was concerned with E.V. because he was 27 years-old, had been a meat cutter for six and a half years, and had a seven year-old son, so it appeared he had been involved in work and family responsibilities from a relatively young age. (13 RT 2689.) Based on E.V.'s one year of college, and that he listed "Hot V.W." as the book that he read for pleasure, the prosecutor believed E.V. did not have broad or sufficient life experience in terms of social contacts, work history, and experiencing different people and environments. (13 RT 2689-2691.) The prosecutor explained he was anticipating many expert witnesses, with some complex testimony. (13 RT 2689-2690.) The prosecutor was concerned based on E.V.'s educational background and exposure that he may not be able to critically analyze and evaluate the massive psychological and psychiatric testimony. The

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[32] E.V. was not Spanish speaking. (4 RT 885). His jury questionnaire had many spelling errors. (See 12 Aug. CT 4042-4049.)

prosecutor pointed out that E.V. was an Art major for a year, he listed no books other than "Hot V.W.," he listed his source of news as ABC News and did not read the newspaper. The prosecutor was concerned E.V. would be easily overwhelmed by the type and amount of testimony. (13 RT 2691.) The prosecutor was also concerned that E.V. did not feel some people had committed crimes that were so bad and aggravated that he or she has given up his or her right to live in society. (13 RT 2692.)

The court found the prosecutor's reasons for excusing E.V. were reasonable, and were not race-related. (13 RT 2728.) The court found E.V.'s responses supported the prosecutor's position that E.V. did not have many life experiences and did not appear to be a person who would grapple properly with the sanity phase issues. (13 RT 2726.) The court had made notes in its copy of E.V.'s questionnaire, noting numerous misspelled words, including that he did not even spell "Spanish" correctly. (13 RT 2726-2727.) The court notated "not too bright, but seems fair." On the questionnaire, where it asked the age and occupation of any working children, E.V. put down "age, seven; first grade. Occupation, meat cutter." The questionnaire was asking for an adult child's occupation, and E.V. wrote his own occupation "so he wasn't apparently able to follow" what was being asked. (13 RT 2727-2728.) E.V. also was responding to leading questions. He was initially confused about the penalty phase instructions, and it took some time before he understood what the court was talking about. (13 RT 2727.) Thus, the court concluded the prosecutor had a reasonable basis for concluding E.V. was not a strong person, and may be overwhelmed by all the mental health professionals that would be testifying. The court found the exercise of a peremptory challenge against E.V. was not race-related. (13 RT 2728.)

3. Prospective Juror A.M.-F.

Prospective juror A.M.-F. was a sales associate at Bullocks. (11 Aug. CT 3587.) He was 28 years-old. (7 RT 1620.) He listed his racial/ethnic origin as "Latin American."[33] (11 Aug. CT 3594.) He had a Bachelor of Arts in Psychology from California State Fullerton.[34] (11 Aug. CT 3588; 7 RT 1565.) When he started college he aspired to be a psychologist and took at least 25 psychology courses. (7 RT 1566.) He had classes where the MMPI and the Rorschach were studied. (7 RT 1734-1735.) Since leaving school, A.M.-F. had taken classes or seminars in Developmental Psychology. (11 Aug. CT 3588.) He was considering getting a master's degree in psychology. (7 RT 1733.)

About ten years earlier, A.M.-F. had two or three traffic tickets and he did not go to court. (7 RT 1568.) His driver's license was suspended, but he drove anyway. (7 RT 1568.) He was charged with driving on a suspended license. (11 Aug. CT 3591.) He pled guilty to a reduced charge of driving on an expired license and paid a fine. He got his license back about six months later. (7 RT 1568.)

A.M.-F. stated the last book he read for pleasure was Mein Kampf by Adolf Hitler. (11 Aug. CT 3592.)

Four years earlier, A.M.-F.'s sister was shot by a stranger while walking down the street. (11 Aug. CT 3592; 7 RT 1569.) His sister had a

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[33] A.M.-F. did not have an Hispanic surname, nor did he appear to be Hispanic; had it not been listed on his questionnaire, the prosecutor would not have known his race/ethnic origin. (13 RT 2693-2694.) The court also stated it would not have known A.M.-F. was Latin American had it not been listed in his questionnaire. (13 RT 2729.) In fact, DeHoyos initially did not include A.M.-F. in his *Batson/Wheeler* motion (12 RT 2661); it appeared more as an afterthought.

[34] A.M.-F. stated in voir dire that he went to Saddleback College in Mission Viejo (7 RT 1566), but in his questionnaire that he went to California State Fullerton (11 Aug. CT 3588).

chronic drug problem, and had been supporting her habit by committing burglaries and engaging in prostitution. She had been in prison, and was presently in custody. (11 Aug. CT 3595; 7 RT 1619, 1622.)

The prosecutor excused A.M.-F. because he was a psychology major, had taken 25 courses in psychology, recently took a post-graduate course in psychology, was considering obtaining his master's degree in psychology, and had taken classes regarding the MMPI. (13 RT 2694-2695.) The prosecutor felt A.M.-F. would have a predisposition towards accepting psychological testimony, and that during deliberations he would become a source of information for jurors who did not have a background in psychology. (13 RT 2694, 2696.)

Other reasons the prosecutor excused A.M.-F. included that his driver's license had been suspended, and he drove on it in spite of that so he violated a court order or DMV directive; the last book he read for pleasure was Mein Kampf; and his sister had been incarcerated in jail and prison. (13 RT 2694, 2696.)

Defense counsel argued that A.M.-F. was an acceptable juror. (13 RT 2699.) Counsel argued that a juror has a First Amendment right to read what he chooses, and because the prosecutor does not think a book is pleasurable does not mean a potential juror who reads that book is unworthy; that A.M.-F. made it clear he would not use his knowledge of the MMPI to be an advocate; that A.M.-F. satisfactorily answered the questions about his sister and it did not show he would not follow the law; and that the speeding tickets were minor and did not indicate that he would violate the law or a court order "to such a major degree." (13 RT 2696-2699.)

The court found the prosecutor's reasons for exercising a peremptory challenge against A.M.-F. were not based on his race. (13 RT 2729.) The court found that "clearly, there is a proper basis for use of a peremptory challenge." The court noted all the classes A.M.-F. took in psychology and

that he had administered the M.M.P.I., and found the prosecutor was justified in his fear that A.M.-F. might be predisposed to accept the testimony of psychologists. (13 RT 2728.)

4. Prospective Juror R.M.

R.M., a 37 year-old prospective juror that described his racial/ethnic origin as "Mex-Blk" was a retail manager at Cost Plus Imports. (11 Aug. CT 3644, 3651.) He attended two and a half years of college as a business/finance major, and one year at a technical college. (9 RT 2105-2107; 11 Aug. CT 3645.) His former brother-in-law molested his daughter, R.M.'s niece. (9 RT 2086; 11 Aug. CT 3650.) R.M. had worked for six years for the State of Arizona with handicapped children who lived in a group home. (9 RT 2103, 2105.)

During voir dire, R.M. stated he should not be a juror in this case "mainly dealing with the subject matter." He said he would have difficulty listening to the evidence and deciding whether the charges were true. (9 RT 2074.) The court asked him whether his "feelings [were] so strong about the charges that it would cause [him] to doubt whether he could be a fair juror in this case?" He answered,

> I believe so. It just be hard [sic] to put it out of my mind—just dealing with it now has been difficult.
>
> I think getting to that—being as honest as possible I don't think I would be able—I know I wouldn't be able to put it aside no matter what. I wouldn't be able to deal with it.

(9 RT 2075.) He had been thinking about it, and although he would be fair, he did not think he could deal with the subject matter, and be able to put it aside. (9 RT 2075.) The court asked whether there was something in his background that made him especially sensitive to the subject matter, and R.M. told the court there was. (9 RT 2076.)

The other jurors were excused, and although R.M. had never disclosed it to anyone else, R.M. disclosed to the court that he was molested when he was growing up by an adult family member for a number of years. (9 RT 2076-2077.) He thought he had put it behind him, but the subject matter in this case concerned him. (9 RT 2077.) R.M. did not know if, or how he would deal with it. R.M. believed the charges were "horrendous" and that he would be prejudiced by the photographs. (9 RT 2078.) R.M. believed he was a fair person, but did not know whether he would be able to put his experience aside or think straight. (9 RT 2078-2079.)

Upon further questioning by the prosecutor, R.M. stated he had a doubt whether he could be fair, which existed from the time he heard the charges. (9 RT 2079.) He said he had not been able to put his thoughts aside, and "honestly, I don't believe I can." His doubt had existed even when outside the courtroom, and had personally troubled him. (9 RT 2080.)

Defense counsel questioned R.M. and elicited that there would have to be a lot of evidence to prove that there was no way DeHoyos committed the crimes. In explaining his concern, he stated that, "my philosophy [is] human life is the most precious thing whether it is a child or adult." (9 RT 2081.) When questioned about a mental defense, R.M. said he thought "that people come in all stages . . . of mental illness." (9 RT 2082.) He believed insanity had a place in the criminal justice system. He would follow the law regarding that portion of the trial, and had no qualms about it. (9 RT 2083.) R.M. also had no concerns regarding the penalty phase. (9 RT 2083-2084.) He did not feel the crime itself would be so overwhelming that he could not follow the law regarding the penalty phase, or that a person committing such a crime should automatically receive the death penalty. (9 RT 2084.) He explained that if a person were mentally incapable, he should not be held accountable for it, other than being in a

mental institution until the court felt he was ready to go back into society. (9 RT 2085.) When asked about his original position regarding his inability to be fair, R.M. explained that he was an emotional person. It would be hard, and he did not know if he could be fair. (9 RT 2085, 2087.)

After the noon recess, the court asked whether R.M. had thought anymore about it, and R.M. said he believed he could be a fair and impartial juror, "but again, stipulating—just again, all my concern was just the subject matter." (9 RT 2090-2091.) He explained the concern was still there, but it was not as strong. (9 RT 2101.)

R.M. stated that although there was a place for the death penalty, he did not consider himself a strong advocate of it. (9 RT 2093.) When asked what in R.M.'s background supported his feelings that he could vote for a sentence of life without the possibility of parole, he said the way he was raised. He explained further: "My own philosophy is human life is the most precious thing there is. No matter what this person has done, and so forth." (9 RT 2097.) He reiterated, however, that he could vote to give someone the death penalty. (9 RT 2098, 2100.)

The prosecutor later explained that R.M. was very anxious and initially had concerns whether he could be fair. R.M. had a concerned and pained expression on his face, was uncomfortable, and emotionally upset. (13 RT 2699-2700.) He said he would have a difficult time putting the circumstances of this case out of his mind. (13 RT 2700.) R.M. then vacillated, so the prosecutor was concerned about whether R.M. would be able to make a definitive decision on the penalty, and to make a definite decision with respect to psychological and psychiatric testimony. (13 RT 2700.) R.M. described himself as emotional and had concerns about the photographs. (13 RT 2700.) R.M. had never disclosed his victimization to another adult, yet he seemed to resolve it in his own mind in a couple of

hours over lunch, even though it was something traumatic to him. (13 RT 2701.)

In addition, the prosecutor was concerned because R.M. stated he was not a strong advocate of the death penalty. (13 RT 2700.) The prosecutor was also concerned about R.M.'s statement that human life was the most precious thing, no matter what that person had done. Lastly, the prosecutor stated that he was surprised that R.M. had never had an occasion to call medical staff in the years he had worked with severely handicapped children. (13 RT 2702.)

Defense counsel argued that there was not enough information to know why R.M. would not have had the occasion to call medical staff when he was working with handicapped children. Counsel believed that R.M.'s comment about human life being precious should not eliminate him from being a juror. (13 RT 2703.) Defense counsel also noted that R.M.'s vacillation and personal and emotional characteristics that were manifested during voir dire was insignificant because many jurors had pained expression on their faces during voir dire, and many jurors vacillated from when they first were questioned. Also, many jurors did not have strong feelings for the death penalty, and R.M. said he would follow the law in spite of his personal feelings towards the death penalty. (13 RT 2704-2705.)

The court found the prosecutor did not base his peremptory challenge on any race-related factor. (13 RT 2731.) The court credited the prosecutor's reasons for excusing R.M. It noted R.M. vacillated quite a bit. (13 RT 2729.) He initially said he had serious doubts about whether he could be a fair juror, and that he honestly did not know how his feelings would affect his ultimate judgment. In the afternoon, he was more inclined to believe he could be fair, but still had some reservations. He told defense counsel that "human life [was] the most precious of [] anything, no matter

what this person had done." (13 RT 2730.) Based on that statement, and R.M.'s vacillation, the prosecutor was justified in using a peremptory challenge against him. (13 RT 2730-2731.)

5. Prospective Juror M.L.

M.L., a 22 year-old Hispanic prospective juror with a high school education, was an office assistant for the Orange County Health Care Agency. (11 Aug. CT 3545-3546, 3552.) She told the court she was having trouble with the charges, and had doubts about whether she could be fair. (11 RT 2606, 2608.) She thought she could be fair, but was not sure. (11 RT 2606.) Upon further questioning by the court, M.L. said she was feeling more comfortable. (11 RT 2610.) The court then excused the jurors for the day, and resumed questioning the next day. (11 RT 2611.) The next day, M.L. said she thought she could be fair. (12 RT 2614.)

When asked by defense counsel about her philosophy or feelings regarding the death penalty, she said she had never paid attention to it. She never thought she was going to be involved in such a case. (12 RT 2623.) At one point during voir dire, she explained, "I am not the person to say, 'no, he should die,' you know, because I –I am not that way. . . . I mean, when I really think about it, I don't think [giving the death penalty] is right either." (12 RT 2630-2631.) She explained she felt uncomfortable and uneasy. (12 RT 2632.) She then said she was not against the death penalty, and rated herself closer to a "ten" on a scale of one to ten, where ten was the strongest in support of the death penalty. (12 RT 2632-2633, 2637.)

When she was being questioned about whether she would have concerns as a new mother listening to victim impact testimony, M.L. said that she would not and explained that when M.L. was 14, her aunt lost a son, M.L.'s cousin, and she did not feel sorry for her aunt. (12 RT 2644-2645.) In spite of M.L.'s answer on the questionnaire that she or someone close to her had never been the victim of a crime (11 Aug. CT 3550), M.L.

said her cousin, who lived in San Diego and who she saw on weekends and during summer vacations, was in a gang fight. They noticed bruising and that he was swollen. He died of internal bleeding. By the time they took him to the hospital, it was too late. (12 RT 2645.) Her cousin had not mentioned the fight, and no one was ever charged in his death. (12 RT 2646.) When the prosecutor asked M.L. why she answered "no" to the question on the questionnaire, M.L. said she forgot about it because it was a long time ago, and she put it out of her mind. (12 RT 2649.)

Although M.L. stated on her questionnaire that neither she nor a friend or relative had been charged, arrested, indicted or convicted of any criminal offense, excluding minor traffic offenses (11 Aug. CT 3551), when the prosecutor asked M.L. if she knew anyone who had been arrested, she said her brother had been. She said her older brother got into a lot of trouble and had a lot of problems, and when she was young her father received phone calls at night to bail him out. (12 RT 2646.) She said his problems were due to drinking, and he may have spent a weekend or so in jail. (12 RT 2647.) When M.L. was asked why she answered in the questionnaire that no relative had been arrested, she said because it was minor—he was just drinking in public or making a scene so he just had to be arrested to sober up. (12 RT 2650.)

The prosecutor explained he had two primary reasons for excusing M.L. (13 RT 2705.) M.L. put under penalty of perjury in the questionnaire that no one close to her had been a victim of a crime, and had an additional chance to reveal it because she was asked whether after having listened to a few weeks of voir dire, there was anything she wanted to change in her questionnaire, yet a cousin that was close to her had been murdered. (13 RT 2705-2706.) The second primary reason was that M.L. answered that she did not know any relative that had been convicted of, charged with or arrested for any criminal offense other than minor traffic offenses, then

revealed that her brother had been arrested a number of times. Because she was fairly young, any failure of recollection was not understandable. The prosecutor felt M.L. may not have been paying attention to the process and to her responsibilities as a juror. He had a concern about whether she wanted to serve on the jury. (13 RT 2707.) Additionally, she stated at one point during jury selection that she believed it was not right to give the death penalty to a defendant. (13 RT 2708.)

Defense counsel argued that the prosecutor's argument "supports the need for diversity and cultural diversity in the selection of a jury." (13 RT 2709.) As far as the death of M.L.'s cousin, "in her culture that type of activity from younger persons or social activities is not a major issue." Because there was not an arrest or trial, it was not as important to M.L., so she did not put it on her questionnaire. Regarding M.L.'s brother, since there was no arrest, there was no reason to put it on the questionnaire. (13 RT 2710.) As far as her not thinking the death penalty was right, she said she could follow the law, and was probably just more candid than some other jurors. (13 RT 2711.) Defense counsel believed that the reason the prosecutor may have excused M.L. from the jury was because she knew what a curandero[35] was. (13 RT 2716, 2718.)

The court found the prosecutor's reasons for exercising a peremptory challenge against M.L. were not race-related. (13 RT 2732.) It noted that M.L. did not answer information in the questionnaire accurately regarding her cousin and her brother. She was young, therefore, the events would have been relatively recent, and it would hardly be something she would forget about when filling out the questionnaire. Also, she said at one point

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[35] As noted in the Statement of Facts, a curandero is a faith healer or witch doctor. DeHoyos's family took him to a curandero when he was growing up because they had problems with him. (20 RT 4521, 4631; 22 RT 5041-5042; 34 RT 8435.)

that she did not think it was right to give the death penalty. She then made a different statement and said it might be okay if he had taken someone's life. She vacillated and answered leading questions. (13 RT 2731.) The court thought it was strange that M.L. and her family did not think it was significant to report to authorities that her cousin was beaten up. It was justified to use a peremptory challenge on a prospective juror who the prosecutor believed had been concealing information on the questionnaire, even if she had an explanation for it. The court observed the prosecutor is not required to accept her explanation in deciding whether to use a peremptory challenge. (13 RT 2732.)

As it found all the prospective jurors were excused for race-neutral reasons, the court denied the *Batson/Wheeler* claim. It noted that the prosecutor tried the case previously, and had never deliberately misled the court about a matter of importance. During the previous trial against DeHoyos, the prosecutor did not use all of his peremptory challenges, and a Mexican-American sat on the jury. The court reasoned that if the prosecutor was setting out to remove all the Hispanics and Blacks from the jury, he would not have allowed that juror to sit on the previous jury. (13 RT 2734.) The court also noted that although DeHoyos was Hispanic, the victim was too. It thus concluded that it was unlikely the prosecutor was concerned with Hispanics unduly identifying with DeHoyos. (13 RT 2734-2735.) The court explained that the prosecutor questioned all of the challenged jurors at issue in depth and none of his examinations were perfunctory. The prosecutor had passed on the jury several times when minorities were in the jury box. Specifically, the prosecutor passed several times while prospective juror M.C. (who was Hispanic) and N.J. (who was Black) were in the jury box, both of whom were eventually excused peremptorily by the defense. (13 RT 2735.) Additionally, G.J., a Black prospective juror (who ultimately served as a juror) was currently in the

jury box. (12 RT 2672; 13 RT 2736; 11 Aug. CT 3447.) Thus, the court concluded the prosecutor did not use any of his peremptory challenges to exclude members of a racial group. (13 RT 2736.)

B. The Prosecutor's Use of Peremptory Challenges Was Race-Neutral

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277; *Batson v. Kentucky, supra*, 476 U.S. at pp. 79, 88; *People v. Davis, supra,* 46 Cal.4th at p. 539.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, citations omitted.) *Batson* provides a three-step process for a trial court to use in adjudicating claims of discriminatory use of peremptory challenges:

> '"'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.' " [Citation.]'

(*People v. Hamilton, supra*, 45 Cal.4th at p. 898, quoting *Snyder v. Louisiana* (2008) 552 U.S. 472 [128 S.Ct. 1203, 1207, 170 L.Ed.2d 175].) Excluding even a single juror for impermissible reasons under *Batson* and

Wheeler requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227, citing *People v. Silva* (2001) 25 Cal.4th 345, 386.)

In determining whether the defendant has shown purposeful discrimination, the critical question "is the persuasiveness of the prosecutor's justification for his peremptory strike." (*People v. Hamilton, supra*, 45 Cal.4th at p. 900, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 [123 S.Ct. 1029, 154 L.Ed.2d 931].)

> The credibility of a prosecutor's stated reasons 'can be measured by, among other factors . . . how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'

(*People v. Hamilton, supra*, 45 Cal.4th at p. 900, quoting *Miller-El v. Cockrell, supra*, 545 U.S. at p. 339.) The prosecutor's justification "need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*People v. Lenix* (2008) 44 Cal.4th 602, 613, quoting *People v. Arias* (1996) 13 Cal.4th 92, 136.)

Whether there was purposeful discrimination is a question of fact. (*People v. Hamilton, supra*, 45 Cal.4th at p. 900.) On appeal, a finding against purposeful racial discrimination is reviewed for substantial evidence. (*People v. Hamilton, supra*, 45 Cal.4th at p. 900; *People v. McDermott* (2002) 28 Cal.4th 946, 971.) So long as the court makes "a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." The court's ability to distinguish "bona fide reasons from sham excuses" is entitled to deference. (*People v. Huggins, supra*, 38 Cal.4th at p. 227; *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

With respect to a prosecutor's reasons for exercising a peremptory challenge, his explanation need not be persuasive, so long as the reason was not inherently discriminatory. (*Rice v. Collins* (2006) 546 U.S. 333, 338 [126 S.Ct. 969, 163 L.Ed.2d 824].) Indeed, it should be considered that the

choice to use a peremptory challenge is "subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 238 [125 S.Ct. 2317, 162 L.Ed.2d 196].) These principles should be considered in conjunction with the presumption that the prosecutor used peremptory challenges in a constitutional manner. (*People v. Morrison* (2005) 34 Cal.4th 698, 709.)

Comparative analysis is one form of evidence that may be considered on the issue of intentional discrimination. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.) A comparative juror analysis was conducted for the first time on appeal in *Miller-El v. Dretke, supra,* 545 U.S. 231 and *Snyder v. Louisiana, supra,* 552 U.S. 472 . In *Miller-El*, the Court conducted such an analysis, noting that if a prosecutor's proffered reasons for striking a minority juror applied to a similarly situated juror who was permitted to serve, that was evidence tending to prove purposeful discrimination. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 241.) In *Snyder*, the Court utilized a comparative juror analysis for the first time on direct appeal, but recognized that

> a retrospective comparison of jurors based upon a cold appellate record may be very misleading when alleged similarities were not raised at trial. In that situation, an appellate court must be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.

(*Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1211.)

In *People v. Lenix, supra*, 44 Cal.4th at p. 622, this Court held that comparative juror analysis is one form of relevant, circumstantial evidence that may be considered on the issue of intentional discrimination. This Court noted,

> Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied

upon by defendant and the record is adequate to permit the urged comparisons.

People v. Lenix, supra, 44 Cal.4th at p. 622

Like the United States Supreme Court in *Snyder*, this Court recognized the "inherent limitations" of conducting a comparative juror analysis on a cold appellate record. (*People v. Lenix, supra*, 44 Cal.4th at p. 622.) The most troubling aspect of conducting such an analysis on direct appeal is failing to give the prosecutor the "opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*Id.* at p. 623.) This is particularly true in light of the fact that experienced advocates may interpret the tone of the same answers in different ways and a prosecutor may be looking for a certain composition of the jury as a whole. (*Id.* at pp. 622-623.)

For those reasons, a comparative juror analysis is not treated the same when conducted in the trial court as opposed to the first time on appeal. "Defendants who wait until appeal to argue comparative analysis must be mindful that such evidence will be considered in view of the deference accorded to the trial court's ultimate finding of no discriminatory intent." (*People v. Lenix, supra*, 44 Cal.4th at p. 624.) Moreover, appellate review is "necessarily circumscribed. The reviewing court need not consider responses by striken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Ibid.*)

In order to discern the prosecutor's intent, all relevant evidence must be considered. A comparative juror analysis on its own will not be sufficient to overturn a trial court's factual findings. (*People v. Lenix, supra*, 44 Cal.4th at p. 626.) Rather, such an analysis is an additional form of evidence to be considered by the reviewing court. (*Ibid.*) Comparative juror analysis is merely a form of circumstantial evidence on the issue. (*People v. Lenix, supra*, 44 Cal.4th at p. 627.) The consideration of such

circumstantial evidence must be treated with care as information may be open to more than one reasonable deduction. If the evidence reasonably justifies the trial court's findings, even if it may be reconciled with a contrary finding, reversal is not warranted. (*People v. Lenix, supra*, 44 Cal.4th at pp. 627-628.)

Here, substantial evidence supported the trial court's decision to deny DeHoyos's motion. Moreover, the comparative analysis DeHoyos engages in on appeal fails to yield any evidence that the prosecutor exercised his peremptory challenges in an impermissible manner based on race.

C. A Comparative Analysis Does Not Show the Prosecutor Exercised His Peremptory Challenges for Impermissible Reasons Based on Race

A fair comparison of the record supports the trial court's findings that the prosecutor had legitimate race-neutral reasons for exercising his peremptory challenges. In doing a comparative analysis, DeHoyos breaks down each reason the prosecutor gave for the challenged jurors, and compares that reason alone to other seated jurors. Isolating each reason does not make for a fair comparison. One must evaluate all the reasons the prosecutor gave as to each of the prospective jurors. The prosecutor explained that his reasoning was not based on one particular factor; rather it was the cumulative effect or aspect of all the reasons given. (13 RT 2708-2708.) Reasons for exercising a peremptory challenge should be viewed in combination, as a party may decide to exercise a peremptory challenge for a variety of reasons, with no single characteristic being dispositive. (*People v. Ledesma* (2006) 39 Cal.4th 641, 678.) Thus, DeHoyos's comparative analysis fails at the onset because he does not compare similar jurors. It is only evidence tending to show purposeful discrimination if the prosecutor's proffered reason for striking a minority panelist applied just as well to an

otherwise *similar* non-minority juror who was permitted to serve. (*People v. Lewis* (2008) 43 Cal.4th 415, 472.)

Additionally, DeHoyos compares the challenged jurors not just to seated jurors, but also to jurors that were excused for other reasons, including by the defense. If the defense excused a juror before the prosecutor passed on that juror, it does not reveal anything about whether the prosecutor would have also excused that juror; therefore, it is not a useful tool for analysis. Nonetheless, a comparative analysis fails to show the prosecutor exercised his peremptory challenges in a discriminatory manner.

1. Prospective Juror L.M.

With the exception of prospective juror R.M. who was both Black and Hispanic (12 RT 2660), discussed *post*, L.M. was the only Black prospective juror that was excused, hardly comprising a pattern of discrimination.[36] DeHoyos excused prospective juror N.J., who stated in his questionnaire he was "Afro American." (11 Aug. CT 3430; 10 RT 2290.) The prosecutor had passed on the jurors in the jury box at the time DeHoyos used a peremptory challenge on N.J. who was black (10 RT 2290), thereby supporting the inference he would have had juror N.J. serve on the jury had DeHoyos not excused him. Furthermore, juror G.J., who served on the jury and was on the panel when DeHoyos made his

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[36] Although excluding even a single juror for impermissible reasons under *Batson/Wheeler* requires reversal (*People v. Huggins, supra*, 38 Cal.4th at p. 227), "as a practical matter . . . the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (*People v. Bell* (2007) 40 Cal.4th 582, 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111, emphasis original; internal quotations omitted.) Had the trial court not used an overbroad class that included Blacks and Hispanics, it is doubtful it would have found a prima facie case existed for the excusal of this one Black juror.

Batson/Wheeler motion, was Black. (12 RT 2672; 11 Aug. CT 3447.) The presence of minority jurors on the panel is an indication of a prosecutor's good faith in exercising his or her peremptory challenges. (*People v. Lewis, supra*, 43 Cal.4th at p. 480; *People v. Huggins, supra*, 38 Cal.4th at p. 236.)

Juror L.M. indicated she was not a strong proponent of the death penalty. (3 RT 710.) She also had discussed with others an occasion where she believed the death penalty was given, when she felt it should not have been given. (3 RT 717, 723.) The comparative analysis DeHoyos engages in ignores these factors, and focuses on other reasons given by the prosecutor for excusing L.M. As none of the other jurors made these two statements, which are legitimate race-neutral reasons for excusing a prospective juror, his analysis fails at the outset.

DeHoyos claims that the prosecutor's stated reasons for excusing L.M. were either implausible or contradicted by the record. He argues that with regard to the prosecutor's concern that L.M. looked forward to sitting on a capital case, the prosecutor "all but put words in her mouth." (AOB 107.) This assertion is belied by the record. Although the prosecutor asked whether L.M. was looking forward to sitting on a capital jury, he did not put words in her mouth—he merely asked her the question. She responded by saying, "in one respect, I guess, you could say yes." (3 RT 721.) DeHoyos contends that the comment only meant that she accepted the responsibility of jury service, and he categorizes other statements L.M. made that apparently show she would be a good juror. (AOB 109.) DeHoyos's interpretation of the prospective juror's intent in her statement is not relevant or helpful—what is at issue is whether the prosecutor excused the juror for race-neutral reasons. The prosecutor's reasons were not based on race, and were not pretextual. As the trial court noted, although counsel might have a different perception of the prospective

jurors, the issue is whether the juror was excused for a race-neutral reason. (13 RT 2726.) Furthermore, this Court does not examine the objective reasonableness of the prosecutor's stated reasons to excuse a prospective juror. Rather, "[t]he proper focus of a *Batson/Wheeler* inquiry is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." (*People v. Hamilton, supra*, 45 Cal.4th at p. 903, emphasis original.) "What matters is that the prosecutor's reason for exercising the peremptory challenge is legitimate." (*Ibid.*)

In support of his assertion, DeHoyos compares L.M.'s response that she would look forward to serving on the jury to the responses of prospective juror E.C. (AOB 109.) E.C. was excused by DeHoyos.[37] (9 RT 2028.) E.C. had served on three prior juries. (8 RT 1816-1817.) She said that she believed that it was an experience that everyone should have. (8 RT 1989.) When asked how she felt about the responsibility in this case, E.C. said, "I don't relish the thought but I believe I would be capable to follow the law and make a decision." (8 RT 1851.) She also explained it was an "awesome responsibility for anyone to sit through and come up with a decision that they really believe it's [sic] right." (8 RT 1884.) She also expressed that it would be difficult to look at graphic photographs but that she could handle it. (8 RT 1910-1911.) Thus, contrary to L.M., E.C. did not look forward to serving on a capital jury, and was very aware of the enormity of the decision. Her statement that, in general, everyone should sit as a juror, is not comparable to L.M.'s statements that she would look forward to sitting on this jury when considered in its proper context.

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[37] The prosecutor passed on the jury with E.C. in the jury box (9 RT 2028); therefore for purposes of a comparative analysis it is appropriate to infer that the prosecutor would not have excused E.C.

DeHoyos argues that the prosecutor's skepticism that L.M. did not discuss her daughter's classwork was absurd, implying that it was pretextual. (AOB 109.) Given the prosecutor's clear pattern of excusing any potential juror with any background in psychology, discussed in further detail *post*, and that L.M.'s daughter was taking psychology classes, it is not absurd that the prosecutor would be skeptical of L.M.'s statement that she did not discuss her classwork with her daughter, particularly when combined with the prosecutor's feeling that L.M. wanted to be on the jury. Furthermore, even if it were "conceivable" that L.M. did not discuss her daughter's classwork with her, as DeHoyos argues (AOB 109), it does not translate to an improper reason for exercising a peremptory challenge.

DeHoyos compares L.M.'s response that she did not discuss her daughter's classwork with her to a number of other jurors. (AOB 109-110.) None of the comparisons DeHoyos makes are helpful because they are not similar. DeHoyos misses the point that L.M.'s daughter was taking classes in psychology, a subject that the prosecutor was concerned about. Moreover, DeHoyos points to other jurors who knew someone in the legal field or profession and did not discuss their jobs with the prospective jurors—none of them are children of the jurors, and none of them live with the prospective jurors. Numerous prospective jurors had relatives or friends with whom they did not discuss their work; however, none of them were psychology students, and none of them were the juror's children. (AOB 109-110 [C.S. had a "good friend" who was a judge]; [R.D.'s sister-in-law was a court clerk];[G.J.'s brother was a prison guard in another state]; [G.P. was "acquainted" with two criminal attorneys]; [A.S. had "social relationships" with a police investigator and attorney]; [one of M.H.'s "best friends" was an attorney]; [M.W. had a friend who was a police officer]; [M.B.'s nephew worked in a juvenile facility].)

DeHoyos next questions the prosecutor's motive based on his statement that L.M. was not apprehensive about sitting on a capital case, combined with the prosecutor's concern she might not fully understand the gravity of her responsibility. DeHoyos merely points to another statement L.M. made where she acknowledged it was a "severe" case. (AOB 110.) Saying a death penalty is "severe" does not necessarily mean L.M. understood the enormity of the decision facing a juror. In fact, a contrary inference could reasonably be drawn from the statement.

DeHoyos takes issue with the trial court's analysis because it pointed to L.M.'s statement that she had never had to make any decision dealing with life or death, and compares this statement alone to those by non-minority jurors. (AOB 111.) However, the seated jurors that DeHoyos compares L.M. to were not similarly situated. For example, none of them had children who took psychology classes, stated that they would look forward to sitting on a capital case, or had an opinion that someone had been wrongly given the death penalty. Although T.B. had not faced a life or death decision, he explained that he was in the Navy during World War II. His job was making certain assignments, so he often thought about

> whether it was due to just chance that a person happened to be where they were when they got killed, because I was there or something like that. That's why—but I didn't know—knowingly, of course, put anybody there. I couldn't.

(14 RT 3098-3099.) Thus, while T.B. had not made any life or death decisions, he had certainly contemplated and thought about such decisions. Juror J.R. had been a juror before in a murder case prosecuted by the Orange County District Attorney in which she voted to convict someone.

(4 RT 939, 971.) Thus, the jurors that DeHoyos compares L.M. to were not similarly situated.[38]

Next, DeHoyos complains that the trial court came to inconsistent conclusions in that it stated that it found L.M. had not given much thought to the death penalty which suggested she was not sufficiently concerned with the responsibility she would face as a juror, yet it did not believe her statements that she had not heard about the Harris execution. (AOB 111.) L.M.'s statement that she did not have a feeling about whether the death penalty was used too often or not enough showed she had not given much thought to it. That is not inconsistent with the court finding that it was "doubtful" she did not remember anything about the Harris case. The prosecutor believed L.M. wanted to be on the jury, and was not being forthright about whether she discussed psychology classes with her daughter. The trial court could have believed, like the prosecutor, that although L.M. had not given much thought to the death penalty, she was not being forthright about not recalling the Harris case in the hope that she would not give a reason to be excused from the jury. This is a legitimate reason to excuse a juror. (See *People v. Lenix, supra,* 44 Cal.4th at p. 628 [prosecutor's excusal of prospective juror upheld because she was not completely forthcoming about an incident where she receive a traffic ticket and may harbor some resentment].) DeHoyos takes issue with the trial

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[38] Without any explanation or analysis, DeHoyos also refers to a third juror, and cites to the transcript where she said she had not made a life or death situation. (AOB 111, referring to 6 RT 1264.) It appears he is referring to prospective juror E.B., who was excused by DeHoyos (7 RT 1748) after the prosecutor had passed on her (6 RT 1550). E.B. is not comparable to L.M. because E.B. did not indicate she was not a strong follower of the death penalty, did not say she would look forward to serving as a juror, did not believe someone was wrongly given the death penalty and did not have a child taking psychology classes. (See 4 RT 1167-1168; 6 RT 1258-1267, 1333-1334, 1338-1340, 1348-1350, 1366-1368.)

court's factual findings. (AOB 115.) However, this Court must defer to the trial court's credibility determinations. (*People v. Stevens* (2007) 41 Cal.4th 182, 198.) The trial court expressed doubt about L.M.'s credibility and there is no reason not to give deference to that determination.

DeHoyos compares L.M. to White seated jurors who did not know about the execution of Harris, and/or had not previously considered the issue of capital punishment in any depth. (AOB 112-113.) None of these jurors, however, had children who took psychology classes, stated that they would look forward to sitting on a capital case, or had an opinion that someone had been wrongly given the death penalty. Moreover, even on this one aspect of L.M.'s voir dire responses, these jurors differed from L.M. Juror G.P. stated that he thought the death penalty was necessary in society and that "it is the ultimate penalty that anybody would have to face and, therefore, mandates the utmost serious consideration." (13 RT 2747.) Thus, although he did not "pay attention to things like that" in the media (13 RT 2751), G.P. understood the gravity of the responsibility, differentiating him from the prosecutor's concerns about L.M.

Juror J.R. said she stayed away from discussions with people about the death penalty, just like she did with politics and religion. (4 RT 964.) She explained that "everybody has their own opinion and are entitled to their own opinion, so I just stay clear." (4 RT 965.) Contrary to L.M., J.R. had an opinion, she just did not like to discuss it. Additionally, she explained that the prospect of sitting on the jury was "a responsibility. And again, after reading through what is expected of us and what a great responsibility that is, I would have no problem making that decision." (4 RT 966.) She also explained that she did not want to be personally responsible for giving the death penalty without understanding all of the facts. (4 RT 967-968.) Thus, unlike L.M., juror J.R. realized the gravity of the responsibility of being a juror on a capital case.

S.M. said she was somewhat nervous about the responsibility of sitting on a capital case, and being in the courtroom. (9 RT 2172.) She said she had not discussed the death penalty with anyone because it was a private matter. She said she had read a lot of books that had opinions for and against the death penalty. (9 RT 2173.) She stated there were certain circumstances in which the death penalty should be given, including when a child is involved, or where there is a kidnap or a molest. (9 RT 2174.) Thus, S.M. had an opinion about the death penalty, she just preferred not to discuss it. This is different than the statement made by L.M. that she did not have an opinion whether the death penalty was used too often or not enough. Moreover, S.M. stated she was nervous about the responsibility facing her as a juror, so unlike L.M. she realized the gravity of her responsibility.

In addition, other responses S.M. gave made her a desirable juror for the prosecution. For example, S.M. felt that psychiatry and psychology are inexact sciences, and it would be hard for her to give "fair weight" to mental health expert testimony. (9 RT 2177.) She had doubts whether a psychiatrist could go back and determine a person's state of mind from a few years earlier. (9 RT 2179.) She believed that there were certain crimes that were so serious that a person who commits them has forfeited his or her right to live in society. (9 RT 2186.)

DeHoyos compares L.M. to R.D. because R.D. stated that he did not follow or take an interest in any court trials. (AOB 113.) R.D. said he considered himself a strong advocate of the death penalty and had long believed that if somebody took a life, he or she should give their life. (13 RT 2982-2984, 2989.) He agreed, however, that he could put that belief aside and follow the law. (13 RT 2986, 3000.) Thus, R.D. had a definite opinion on the death penalty, which was far different than L.M.'s statement

that she had no opinion on whether the death penalty was imposed too often or not enough.

DeHoyos also compares L.M.'s response that she had not previously given a lot of thought to the death penalty, and had never heard of Harris to various prospective jurors who were never seated as jurors. (AOB 113.) Like the seated jurors, the prospective jurors are not comparable. DeHoyos compares L.M. to M.B. who had not thought about the death penalty since he had been on a jury panel in a capital case two years earlier. (AOB 113.) Although DeHoyos states M.B. was an alternate juror, he was actually excused by the defense. (17 RT 3633.) The comparison to M.B. has no value whatsoever. Although comparative analysis is an additional form of evidence to consider in assessing whether a prosecutor has excused prospective jurors based on their race (*People v. Lenix, supra*, 44 Cal.4th at p. 626), it has no evidentiary value in this instance. Defense counsel excused M.B., and at no time did the prosecutor pass on M.B. or indicate that M.B. would have been an acceptable juror. Comparing L.M. to M.B. and trying to draw an inference that the prosecutor excused L.M. for a particular reason that applied equally to M.B. is not a valid inference to draw: had defense counsel not excused M.B., perhaps the prosecutor would have. Comparing another prospective juror, who was not seated and who was excused by defense counsel, does not shed any light on the prosecutor's intent or thought process. Thus, in this instance, and the other instances in which DeHoyos attempts to compare prospective jurors who were not seated and were excused by the defense, is of no evidentiary value.[39]

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[39] There is some potential limited evidentiary value in those jurors who were excused by the defense after the prosecutor passed on those jurors because there is a basis for inferring the prosecutor felt those jurors

(continued...)

Nonetheless, comparing M.B. to L.M. does not show the prosecutor excused L.M. based on her race. Although M.B. had not thought about the death penalty since he was last on a jury panel four years earlier, he did not say he had never given much thought to it. (17 RT 3614-3615.) To the contrary, he said that when he was on the previous panel, he had to think about whether he could be objective about the death penalty and had reservations based on his religious beliefs about whether he could vote to give someone the death penalty. (17 RT 3611, 3620.) He thought about it and determined that he could do so. (17 RT 3611-3612.) When asked his position on the death penalty, he stated, "it has always been on a theoretical level. It is something you discuss in the Sunday school class but you don't really come to grips with it, do you? No." (17 RT 3618.) He also explained that while he had not thought about it in a few years, there were some cases where there had been vigils, and "you wouldn't catch me in one of those places, no" because he was not against capital punishment and did not believe in what those people believed in. (17 RT 3615.) He also explained that he had a "prejudice" regarding the criminally insane in that he thought they were released into the community too soon. (17 RT 3609.) Thus, while M.B. had not thought about the death penalty in a few years, he had thought about it, contemplated, and had feelings about it, which was far different than L.M.

Prospective juror E.C., who as noted *ante*, was excused by DeHoyos (9 RT 2028), said that she had not given the issue of the death penalty much thought, but believed there were cases where the death penalty "belonged" and other cases where it did not "belong." (8 RT 1856.) E.C. stated she

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were acceptable and he would not have excused them. Some of the prospective jurors DeHoyos uses in his comparative analysis are in this category.

must have read about cases involving the death penalty but could not think of them off the top of her head. (8 RT 1858-1859.) She stated she would usually hear the beginning of cases that were in the newspaper, but did not follow up because she would get over saturated. (8 RT 1859.) Thus, E.C. was aware of cases involving the death penalty, and had an opinion about the death penalty.

Prospective juror K.T., who was excused by DeHoyos after the prosecutor passed on the jury while she was in the jury box (8 RT 1952-1953), was married to a police officer. (12 Aug. CT 4002, 4004.) Although K.T. could not recall any recent cases in the news involving the death penalty, she heard about this case when Nadia first disappeared. (7 RT 1751, 1755.)

Prospective juror T.S. was excused by the defense after the prosecutor passed on the jury while he was in the jury box. (9 RT 2073.) When asked whether he had ever expressed an opinion about the death penalty, he stated he "got into [it]" with some friends and stated his opinion. (8 RT 1938.) He had heard of a case on the East Coast, that he believed was Ted Bundy, where the death penalty was imposed. (8 RT 1938.) He believed that in some cases the death penalty was "necessary." (8 RT 1930.) He explained that he did not watch the news very often because he worked the "second shift." (8 RT 1932-1933.)

Prospective juror C.F. was excused by DeHoyos after the prosecutor passed on the jury while he was in the jury box. (8 RT 1922-1923.) He stated that he had given a lot of thought to his ability to handle the responsibility of being a juror on a capital case in the previous few weeks. (7 RT 1781-1782.) C.F. had always supported the death penalty. (7 RT 1782.) He was aware of an execution in California in 1992 but could not remember anything about that case. (7 RT 1789.) With all the prospective jurors, they were not similarly situated as L.M. None of them had children

who took psychology classes, stated that they would look forward to sitting on a capital case, or had an opinion that someone had been wrongly given the death penalty.

Next, DeHoyos claims the prosecutor's reasons for excusing L.M. because she had never read anything about the death penalty and opined that the death penalty had been wrongly imposed in a particular case was undermined by the record. DeHoyos argues that the prosecutor's point was that L.M. contradicted herself by these statements and therefore lacked credibility, yet these statements were not inherently inconsistent. (AOB 113-114.) The prosecutor did not opine that L.M. was not credible on that point, or that it was inconsistent. He stated these as two separate reasons for excusing L.M. (13 RT 2687.) It is DeHoyos that implies the prosecutor drew the conclusion that L.M. contradicted herself and was not credible on that point. (AOB 113-114.) DeHoyos's assumption about the prosecutor's state of mind is belied by the record.

The prosecutor did, however, tie together L.M.'s statements that she had no opinion regarding whether the death penalty was imposed too seldom or too often to her statement that she believed the death penalty was wrongly imposed on one occasion. (13 RT 2688.) DeHoyos describes the prosecutor's reasoning as "similarly feeble" in that her lack of an opinion on the frequency of executions is consistent with not having read anything about the death penalty. (AOB 114.) The reason is not "feeble." Common sense and logic dictate that if someone believes a person is wrongly given the death penalty, it is given too often—at least one time too often. Thus, L.M.'s answers showed a lack of logic, or a lack of candor—either one of which is a justifiable reason to exercise a peremptory challenge.

DeHoyos concludes that the comparative analysis undermines the prosecutor's credibility. (AOB 114.) The trial court found that the prosecutor was credible, and did not use any of his peremptory challenges

to exclude members of a racial group. It observed that in trying this case previously, the prosecutor had never deliberately misled the court about a matter of importance; had passed on minority jurors in the previous trial and in this trial; and had questioned all the prospective jurors in depth. (13 RT 2734-736.)

> The best evidence of whether a race-neutral reason should be believed is often 'the demeanor of the attorney who exercises the challenge,' and 'evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.''

(*People v. Stevens, supra*, 41 Cal.4th at p. 198.)

Although he acknowledges L.M. admitted she was not a strong supporter of the death penalty, DeHoyos argues that there was nothing in voir dire of L.M. or her questionnaire that suggests she would not impose the death penalty where appropriate. (AOB 115.) Just because L.M. said she would impose the death penalty does not require the prosecutor to keep her on the jury in favor of other jurors, who may be stronger jurors or more desirable. Excusing a juror because she is not a strong advocate of the death penalty is race-neutral. (*People v. Davis, supra*, 46 Cal.4th at p. 584 [prosecutor's challenge was race-neutral because the prospective juror voiced strong opposition to the death penalty]; *People v. Ledesma, supra*, 39 Cal.4th at p. 678 [a juror's reluctance to impose the death penalty, even if insufficient to justify a challenge for cause, is a valid reason for a prosecutor to exercise a peremptory challenge]; see also *People v. Panah* (2005) 35 Cal.4th 395, 441 [permissible to excuse a prospective juror who expresses reservations about the death penalty even if he/she nonetheless says he/she could impose it].) Substantial evidence supports the prosecutor's reasons for excusing L.M. and the trial court's determination that the prosecutor's peremptory challenge was race-neutral.

2. Prospective Juror E.V.

The prosecutor also did not excuse any Hispanic jurors based on their race. There were seven prospective jurors who were Hispanic.[40] M.M. was Hispanic and sat on the jury. (11 Aug. CT 3659.) DeHoyos excused two Hispanic prospective jurors, M.C. and L.R.[41] (10 Aug. CT 3085 [questionnaire showing M.C. was Hispanic]; 12 Aug. CT 3839; 9 RT 2235 [M.C. excused]; 12 Aug. CT 3839 [questionnaire showing L.R. was Hispanic]; 5 RT 1136 [L.R. excused].) The four prospective jurors excused by the prosecutor were based on legitimate, race-neutral reasons.

DeHoyos asserts the prosecutor's stated reasons for excusing E.V. were contradicted by the record. DeHoyos claims that, contrary to the prosecutor's position, E.V.'s life experience was broad enough that he would have been a suitable juror. (AOB 116.) Excusing a juror because he did not have a broad life experience is a legitimate, race-neutral reason. (See *People v. Hamilton, supra*, 45 Cal.4th at pp. 903-904 [prosecutor legitimately excused juror who was young, unsophisticated and immature].) The prosecutor's reasons were not belied by the record, as E.V. had been a meat cutter and a father since he was 20 years old, was 27 at the time of voir dire, and the only book he read for pleasure was "Hot V.W." (13 RT 2689.) "[W]here a prosecutor's concern for a juror's ability to understand is supported by the record, it is a proper basis for challenge." (*People v. Turner* (1994) 8 Cal.4th 137, 169.) In addition to limited life experience,

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[40] This number includes R.M. who was both Black and Hispanic (12 RT 2660) and A.M.-F. who did not appear Hispanic, did not have a Hispanic surname, and would not be known to be Hispanic had he not put "Latin American" on his questionnaire (13 RT 2693-2694, 2729).

[41] The prosecutor accepted the panel while M.C. was sitting as a prospective juror. (8 RT 1921-1922.) L.R. was the second peremptory used by the defense; the prosecutor never had a chance to pass on her. (See 5 RT 1136-1137.)

E.V. did not read the newspaper, and had numerous words misspelled in his questionnaire.

DeHoyos also claims the prosecutor's reason of wanting broad life experience was belied by the record because the prosecutor did not want jurors with experience in the area of psychiatry, psychology and/or medicine. (AOB 116.) There is nothing inconsistent with desiring a jury that has broad life experience, but does not have an expertise in a particular area in which there will be testimony. Jurors who had experience in psychology or psychiatry may have been more inclined to accept the defense expert witness testimony.

DeHoyos's attempt at comparative analysis fails because the jurors whom he compares E.V. to are not similar. DeHoyos only compares E.V. to one seated juror, 67-year-old R.D. DeHoyos points out that R.D. only attended two years of high school and studied real estate in college, did not belong to any clubs or organizations, did not do any volunteer work, watched television almost every evening, and did not read books for pleasure. (AOB 117.) R.D. simply is not comparable. Besides having 40 more years of life experience,[42] R.D., who was widowed, had served in the Army. (10 Aug. CT 3192, 3194.) In addition, he had supervisory experience in his job as a produce manager. (10 Aug. CT 3192-3193.) He played golf and his hobby was photography. (10 Aug. CT 3193-3194.) He had two children, 42 and 45 years-old. (10 Aug. CT 3194.) Thus, R.D.'s life experience was much broader in terms of "social contacts, and experiencing different jobs, people, and environments." (13 RT 2689-2691 [prosecutor's explanation for excusing E.V.].)

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[42] The judge commented that the defense wanted young people on the jury (5 RT 1162); if nothing else, R.D.'s age puts him in a different category for purposes of comparative analysis.

The prosecutor was also concerned about E.V. because he did not read the newspaper, and only read "Hot V.W." (13 RT 2691.) R.D. stated he read the newspaper, specifically the Los Angeles Times. (10 Aug. CT 3197.) R.D. did not have numerous misspelled words in his questionnaire. Furthermore, R.D. was a desirable juror for the prosecution. R.D. said he considered himself a strong advocate of the death penalty and had long believed that if somebody took a life, they should give their life. (13 RT 2982-2984, 2989.) Thus, R.D. was not comparable to E.V. in many respects.

DeHoyos also compares E.V. to a number of jurors who were not seated. (AOB 117-118.) As noted *ante*, T.S. was excused by the defense after the prosecutor passed on the jury while he was in the jury box. (9 RT 2073.) T.S. was a 29 year-old factory worker. (12 Aug. CT 3872.) His prior employment consisted of auto parts sales, a machinist and a mechanic. (12 Aug. CT 3873.) His hobbies were weightlifting, bike riding, and shooting handguns. (12 Aug. CT 3874.) He wanted to be a police officer and had gone on a few ride-alongs with his neighbor, who was a police officer. (8 RT 1924-1925, 1932, 1935.) He thought it would be exciting to be a police officer. T.S. had a broader life experience than E.V. Moreover, T.S. had qualities that were favorable to the prosecution that may have offset his lack of life experience. As this Court has noted, a weakness in engaging in comparative analysis for the first time on appeal is that the prosecutor never had a chance to explain differences in jurors that may have appeared similar.[43] (*People v. Cruz* (2008) 44 Cal.4th 636, 659.)

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[43] DeHoyos complains that the prosecutor did not comment on T.S.'s list of favorite books. (AOB 117, fn. 40.) As there was no comparative juror analysis done in the trial court, there would be no reason for the prosecutor to remark on an excused juror.

> Voir dire is a process of risk assessment. . . . Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding.

(*People v. Lenix, supra*, 44 Cal.4th at p. 624.) In this case, DeHoyos claimed the police officers coerced his statement. A juror such as T.S., who had an interest in law enforcement, and who had gone on ride alongs would be more inclined to have a favorable view of the law enforcement officers in this case, which is likely the reason DeHoyos excused T.S. This quality would have offset any concern regarding T.S.'s life experience.

Prospective juror C.B. was excused by DeHoyos (5 RT 1369) after the prosecutor passed on the jury with him in the jury box. (5 RT 1137.) C.B. was 60 years old. (10 Aug. CT 3062.) He attended and received a bachelor's degree from the University of Dubuque, in Iowa in economics. (10 Aug. CT 3063.) He was retired after working as a store manager and buyer for J.C.Penney Co. for 34 years. (10 Aug. CT 3062.) He had served in the Navy for four years, and had been a clerk in a drug store and a grocery store. (10 Aug. CT 3063-3064.) He had attended retail related classes since leaving school. (10 Aug. CT 3063.) His hobbies and interests included sports, volunteer work, travel, and golf. (10 Aug. CT 3063-3064.) He volunteered with the homeless and in his church. (10 Aug. CT 3064.) He had three grown, college educated children. (10 Aug. CT 3064.) He read the Los Angeles Times. (10 Aug. CT 3067.) Despite these significant differences between C.B.'s life experience and E.V.'s, DeHoyos compares them because they both misspelled several words, and neither had studied psychiatry or psychology. (AOB 117.) These two prospective

jurors were not comparable because the vast differences in life experience between C.B. and E.V.

Prospective juror N.W. was excused by DeHoyos (6 RT 1549) after the prosecutor passed on the jury with her in the box. (5 RT 1137.) N.W. was a 37 year-old single mother of two girls. (12 Aug. CT 4059, 4061.) N.W. explained her husband left her and she went from a housewife into the working world, and had to struggle to raise her two kids. She believed that experience made her strong. (4 RT 916.) She worked for Bank of America as a loan processor. (12 Aug. CT 4059.) She had previously been a loan assumption processor and a foreclosure/bankruptcy officer. (12 Aug. CT 4060.) She was involved with her daughter's softball, and was hardly ever at her house. (5 RT 1031.) She read the Orange County Register. (12 Aug. CT 4064.) Unlike E.V., N.W. had a broad life experience. She was a single mother struggling to raise two kids, was involved in their softball, had various jobs, and read the newspaper. Thus, N.W. was not comparable to E.V.

The prosecutor passed on the jury with prospective juror C.A. in the jury box. (5 RT 1137.) DeHoyos excused her. (6 RT 1550.) C.A. was 43 years-old. (10 Aug. CT 2966.) She was a dental assistant until she had children. (10 Aug. CT 2966-2967.) She had six children, five of whom were girls, ranging in age from 21 to 4. (10 Aug. CT 2968; 6 RT 1241.) She was working towards getting a nursing degree. (10 Aug. CT 2967, 6 RT 1360, 1363.) In pursuing her nursing degree, she worked in a nursing home and in a hospital. (6 RT 1363.) C.A. stated that she sometimes read the Los Angeles Times. (10 Aug. CT 2971.) She read books for pleasure, including Tom Clancy's "Hunt for Red October," "The Firm," and "The Rising Sun." (10 Aug. CT 2971.) C.A.'s brother was a police officer, and she had two nephews and one niece who were police officers. (10 Aug. CT 2969.) Although C.A. had not worked very long outside the home, she had

broad life experiences. She was a stay-at-home mother, who was raising six children. In spite of the demands that would take, she was also pursuing her nursing degree. Thus, her life experience was not comparable to E.V.'s.

Lastly, DeHoyos compares E.V. to prospective juror S.S. (AOB 118.) DeHoyos excused S.S. before the prosecutor ever passed on S.S. (6 RT 1370), therefore, a comparative analysis is of no evidentiary value. Regardless, S.S. is not comparable to E.V. S.S. was a 33 year-old electrical technician. (12 Aug. CT 3904.) He had previous jobs at a trucking company, a rental car service, and a grocery store. (12 Aug. CT 3905.) He had a baby, and two daughters, ages 7 and 9. (12 Aug. CT 3906; 6 RT 1297.) He spent most of his time with family, playing softball, and bowling. (12 Aug. CT 3905.) He read the Orange County Register. (12 Aug. CT 3909.)

S.S. indicated he would have a difficult time being objective in the sanity phase. (6 RT 1292-1295.) He was troubled because his daughters, "and I just can't—maybe I just bring them into my feelings too much." (6 RT 1297.) He did not like the insanity defense and believed it was an excuse or "cop out." (6 RT 1302-1303, 1307.) However, he believed he could be a fair and impartial juror. (6 RT 1325.) S.S. did not think he would take into account if a defendant had a hard life as a child in a penalty phase because he still should know the difference between right and wrong, although when asked specifically he said he would follow the instructions of the court. (6 RT 1318-1320.)

S.S. had broader life experience than E.V., so they were not comparable. Furthermore, even if S.S. lacked life experience, it was offset by his views on the insanity defense, his sympathy for the victim that was his daughter's age, and his penalty phase views. (*People v. Lenix, supra*, 44 Cal.4th at p. 624 [the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance,

more or less desirable].) None of the jurors DeHoyos compares E.V. to were comparable. Therefore, his comparative analysis does not show the prosecutor exercised his peremptory challenges in an impermissible manner based on race.

Quoting from *People v. Snow* (1987) 44 Cal.3d 216, 223, DeHoyos claims E.V. was excused "'after giving routine, acceptable responses' to questions during voir dire, an indication of discriminatory use of peremptory challenges by the prosecution." (AOB 118.) In *People v. Snow*, the prosecutor failed to give any reasons for excusing the challenged prospective jurors, and the trial court expressed serious concerns that the prosecutor was impermissibly using some of his peremptory challenges against Black prospective jurors. (*People v. Snow, supra*, 44 Cal.4th at p. 226.) In contrast, here the prosecutor gave race-neutral, credible reasons for excusing E.V. Thus, *People v. Snow* does not support DeHoyos's position.

Thus, DeHoyos's comparison to other jurors and prospective jurors fails to show the prosecutor exercised his peremptory challenge against E.V. based on his race. To the contrary, it supports the prosecutor's race-neutral reasons for excusing E.V. Substantial evidence supports the prosecutor's reasons for excusing E.V. and the trial court's determination that the prosecutor's peremptory challenge was race-neutral.

3. Prospective Juror A.M.-F.

Next, DeHoyos compares prospective juror A.M.-F. to other seated and prospective White jurors to support his claim that A.M.-F. was improperly excused based on his race. A.M.-F. did not appear to be Hispanic and did not have a Hispanic surname. (13 RT 2693-2694, 2729.) To be tenable, DeHoyos's claim would require the prosecutor to have improperly excused A.M.-F. base on the fact he listed "Latin-American" for his racial/ethnic origin in his questionnaire. (11 Aug. CT 3594.)

Moreover, when DeHoyos first made his *Batson/Wheeler* motion alleging the prosecutor improperly excused Black and Hispanic jurors, he did not include A.M.-F. (12 RT 2660.) It was only after he returned from a break that he advised the court he also believed the prosecutor unlawfully excused A.M.-F. (12 RT 2661.) Notably, DeHoyos did not claim any impermissible racial basis when he articulated his first *Batson/Wheeler* claim regarding A.M.-F. (See, 10 RT 2361-2362 [claiming improperly excused base on background in psychology].) Engaging in comparative analysis does not show the prosecutor excused A.M.-F. based on his race; rather it shows he excused him for race-neutral reasons.

DeHoyos initially argues that the prosecutor's concern that A.M.-F. might be predisposed to accept defense mental health evidence based on his exposure to psychology is contradicted by the record. (AOB 119.) He argues that A.M.-F. was "presumably" the type of juror the prosecutor would have wanted to keep on the jury in light of his concern that jurors be able to understand technical mental health testimony, that A.M.-F. had not administered the MMPI, and that A.M.-F. said he would be a fair juror and would handle the responsibility of reaching a penalty verdict. (AOB 119-120.) Whether DeHoyos believes A.M.-F. would have been a good juror is not relevant. The question at the third stage of the *Batson* inquiry is "whether the defendant has shown purposeful discrimination." (*People v. Hamilton, supra*, 45 Cal.4th at p. 900, quoting *Miller-El v. Dretke, supra,* 545 U.S. at p. 277.) Contrary to DeHoyos's assertion, the record shows the prosecutor excused A.M.-F. based on race-neutral reasons, including his background in psychology.

At this juncture, DeHoyos is particularly hard pressed to credibly claim the prosecutor was not genuine when he said he did not want A.M.-F. as a juror because he might be predisposed to accept the defense mental health evidence. After the prosecutor excused prospective juror A.B., who

listed "Scandanavian [sic]/German" as her racial/ethnic origin (10 Aug. CT 3012), defense counsel made a *Batson/Wheeler* motion on the basis that the prosecutor was impermissibly exercising his peremptory challenges to excuse those in the psychiatric profession. (10 RT 2353-2363.) Defense counsel specifically referred to A.M.-F., and argued A.M.-F. was improperly excluded based on his background in psychology. (10 RT 2361-2362.) Moreover, he did not claim at that time that A.M.-F. was being improperly excused because of his race, making it apparent how disingenuous DeHoyos's argument is regarding the supposed lack of credibility of the prosecutor's explanation. (10 RT 2361-2362.)

Defense counsel again objected when the prosecutor excused prospective juror M.B., who was White (10 Aug. CT 3060), claiming it was improper to excuse potential jurors that have a psychology background. (11 RT 2499-2504.) After the prosecutor excused prospective juror L.M., who listed his racial/ethnic origin as "Irish/German" (11 Aug. CT 3576), defense counsel again argued that the prosecutor was improperly excusing those prospective jurors with certain beliefs and experiences, particularly those with backgrounds in psychology and/or medicine. (11 RT 2543-2546.) After the prosecutor exercised another peremptory challenge against E.O., who was White (12 Aug. CT 3741), defense counsel made another *Batson/Wheeler* motion, again arguing the prosecutor was improperly using his challenges against prospective jurors who had certain attitudes towards psychology and the death penalty, including again arguing that A.M.-F. was improperly excused because of his background in psychology. (11 RT 2602-2604.)

A few days later, after the prosecutor exercised a peremptory challenge against prospective juror M.W., who listed his racial/ethnic origin as Jewish (12 Aug. CT 4074), defense counsel again objected claiming DeHoyos's due process rights were being violated because M.W. had

experience in psychology. (13 RT 2928.) After the prosecutor exercised a peremptory challenge against White prospective juror J.L. (11 Aug. CT 3527), defense counsel objected that J.L. was improperly excused based on her having experience in psychology. (14 RT 3033-3034.) Prior to the prosecutor excusing White prospective juror K.S. (12 Aug. CT 3895), defense counsel preemptively objected, arguing it would be improper to excuse K.S. because K.S. had some background in psychology. (14 RT 3079-3080.)

Based on DeHoyos's adamant and continual objections that the prosecutor was improperly excusing those prospective jurors with a background in psychology, there is no support to his current argument that the record contradicts the prosecutor's stated concern that A.M.-F.'s exposure to the field of psychology might predispose him to accept mental health evidence presented by the defense. (AOB 119.)

DeHoyos's comparative analysis also fails to show the prosecutor excused A.M.-F. based on his race. DeHoyos compares A.M.-F. to five White prospective jurors, four of whom were seated as jurors, who had studied psychology or psychiatry but were not excused by the prosecutor. (AOB 120.) None of those jurors are comparable. As DeHoyos concedes, "none of these prospective jurors had studied psychology as intensively as A.M.-F." (AOB 120.) This alone puts them in a different category than A.M.-F. and renders the comparative analysis meaningless. Juror T.B. explained he was a physical education major in college, and the first two years are similar to "premed" so he took a mandatory class in psychology. He explained, "I can't tell you a thing about [psychiatry]." (14 RT 3089.) Juror G.P. said he "had a basic psychology class in college, and I had some management-type classes. I don't know if you really call those psychology classes." (13 RT 2758.) Juror D.H., a 67 year-old homemaker and grandmother, attended Whittier College for two years. (11 Aug. CT 3375-

3376.) She majored in psychology, and indicated she took a one year class in psychology. (11 Aug. CT 3376; 7 RT 1576.) When Juror C.S. was asked whether she took psychology courses, she said she took "just usual ones you take in college level, which is just sort of, you know, just show you what psychology is. That is all." (13 RT 2820.) When asked whether he had any training in the area of psychology, prospective juror D.B.[44] said, "No, other than one college course that was a requirement." (10 RT 2289.)

A prospective juror who majored in psychology, had studied the MMPI, and was considering a master's degree in psychology is far different than someone who took one or two basic classes, but did not have enough interest to pursue the field. Thus, A.M.-F. is not similarly situated to these other jurors and prospective juror. Moreover, none of the compared jurors had a sister in jail, who was a drug user, prostitute and felon, and none of them had failed to show up in court, lost their driver's license, and drove on a suspended license. Additionally, none of them had recently read Mein Kampf for pleasure.

Next, DeHoyos argues the prosecutor's claim that he excused A.M.-F. in part because his sister had been in and out of jail was undercut by the fact he did not excuse juror C.S., whose children had extensive histories of mental and legal problems. C.S.'s son was arrested for forging a parking permit and for being in a house where marijuana was used, and her daughter was convicted of embezzling money from her employer and for stealing Vicodin from a clinic where she worked. Both of C.S.'s children had ongoing mental health issues, including nervous breakdowns. (AOB 121.) C.S. is not similarly situated to A.M.-F. because C.S. did not have an

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[44] D.B. was excused by DeHoyos. (13 RT 2880.) The prosecutor had passed on the jury while D.B. was in the jury box. (10 RT 2290.)

extensive background and interest in psychology that included classes in the MMPI, and C.S. did not drive on a suspended driver's license.

In addition, the circumstances relating to C.S.'s children were different. Her son was arrested on campus for forging a parking permit while he was a student at University of California Santa Barbara in 1968. (13 RT 2785-2786.) While it was true her son was arrested in a house where marijuana was being used a few years later, all the people there testified that her son had not then or ever used marijuana, and he was not charged. (13 RT 2876, 2788.) In 1975 or 1976, C.S.'s daughter was divorced and was raising two boys without child support. She was young, and embezzled money. She spent some weekends in jail. (13 RT 2786-2787, 2789.) C.S. explained that her daughter made full restitution and had led a good life, was a good mom and a good person. (13 RT 2787-2788.) In addition, in 1988, C.S.'s daughter had back problems and became addicted to Vicodin. (13 RT 2787, 2789.) After her prescription expired, she took Vicodin from a clinic where she worked. (13 RT 2809.) She was not charged. (13 RT 2809-2810.) After both of these incidents, she went to a therapist. (13 RT 2789.) C.S.'s daughter also had a nervous breakdown a few years earlier when she was living in Montana, and her parents went and got her and she lived with them for about six months. Her son also had a nervous breakdown during the Vietnam War. (13 RT 2790.)

The criminal incidents involving C.S.'s children happened long before C.S. was a juror—they were not ongoing. C.S.'s children had become productive members of society. One was a medical technician and back office manager for doctors, and the other was an operations manager for an industrial manufacturing company. (12 Aug. CT 3914.) C.S. described her daughter as a "fine capable person today" (12 Aug. CT 3920) and was a "good mom and . . . a good person" (13 RT 2788). A.M.-F.'s sister had a chronic drug problem, and had been supporting her habit by committing

burglaries and engaging in prostitution. She had been in prison, and was in custody at the time of voir dire. (11 Aug. CT 3595; 7 RT 1619, 1622.) Thus, C.S. was not comparable to A.M.-F.

DeHoyos also isolates the prosecutor's reason that he excused A.M.-F. because he drove on a suspended license in spite of a court order or DMV directive, and compares it to two other jurors, one who had been convicted of driving under the influence, and one who had been arrested for possessing drugs. (AOB 121.) Again, these jurors are not comparable because they did not have an extensive background and interest in psychology that included classes in the MMPI, and they did not have a family member who was a drug user, burglar and prostitute, who was in and out of jail, nor had they recently read Mein Kampf for pleasure.

Even on this one issue the jurors are not comparable. Alternate juror D.T. was arrested for driving under the influence in 1976. (13 Aug. CT 4204.) He appeared one time, and paid a fine. (17 RT 3564.) Additionally, he was not arrested for "drugs" as DeHoyos contends. (AOB 121.) Rather, D.T. explained that he was a witness in a criminal case involving a "drug bust in Yosemite National Park" against three people who were strangers to him. (13 Aug. CT 4203; 17 RT 3562-3563.) Unlike A.M.-F., D.T. did not disobey any court order. The prosecutor did not state he excused A.M.-F. because he broke the law; he specifically said it was because he violated a court order or DMV directive. (13 RT 2694.) Thus, the comparative analysis does not support DeHoyos's claim that the prosecutor's reason for excusing A.M.-F. was pretextual.

Juror W.H. was arrested for driving under the influence in 1980. (11 Aug. CT 3397.) He explained that he had not had anything to drink for six months, but had gone to a ballgame with his older son and had a couple of drinks. When he was a half a block away from home, he hit a parked car. (7 RT 1768.) He was arrested and said he "deserved it." (7 RT 1768.) It

was resolved at the first court appearance, and he "went to school for . . . four weekends." He thought it was handled "very fairly." (7 RT 1769.) Thus, unlike A.M.-F., W.H. did not disobey any court order. He took responsibility for his actions. Again, the prosecutor did not excuse A.M.-F. because he broke the law; he specifically said it was because he violated a court order or DMV directive.

Thus, the comparative analysis fails to show the prosecutor excused A.M.-F. based on his race. Substantial evidence supports the prosecutor's reasons for excusing A.M.-F. and the trial court's determination that the prosecutor's peremptory challenge was race-neutral.

4. Prospective Juror R.M.

DeHoyos claims "[t]he prosecutor's stated reasons for excusing prospective juror R.M. amounted to an argument that he might not be fair and/or that he would not vote for the death penalty." DeHoyos then claims that R.M. put his initial concern aside and affirmed he could judge the case fairly. (AOB 122.) That DeHoyos believes R.M. would be a fair juror is not determinative, nor is it helpful. "[T]he question is not whether a different advocate would have assessed the risk differently, but whether this advocate was acting in a constitutionally prohibited way." (*People v. Lenix, supra*, 44 Cal.4th at p. 629.) R.M. repeatedly stated the subject matter was upsetting to him, and that he did not think he could be a fair juror.

> That a juror is equivocal about his or her ability to impose the death penalty is relevant to a challenge for cause, but does not undercut the race-neutral basis for a prosecutor's decision to excuse a prospective juror peremptorily.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 902.)

DeHoyos claims that the "prosecutor presumably would have wanted him as a juror, but for his race." (AOB 122.) While R.M. consistently

stated the subject matter would bother him and he did not think he could put his thoughts aside and be fair, he stated he was not a strong advocate of the death penalty (9 RT 2093); thus he was not a juror the prosecutor would have wanted. "Possibly contrary inferences do not undermine the genuineness of the prosecutor's explanation." (*People v. Lenix, supra*, 44 Cal.4th at p. 628.)

In explaining R.M. was not a strong advocate of the death penalty, the prosecutor relied on R.M.'s statement that human life is the most precious thing. DeHoyos claims "a careful reading" shows that R.M. was referring to the victim, not DeHoyos when he first expressed this belief. (AOB 122.) A careful reading shows that R.M. reiterated his feelings when asked about the death penalty. The prosecutor asked R.M. what in his background supported his feelings that he could vote for a sentence of life without the possibility of parole, and R.M. answered it was the way he was raised. He explained further: "My own philosophy is human life is the most precious thing there is. No matter what this person has done, and so forth." (9 RT 2097.) R.M. was clearly and unequivocally referring to his feelings about imposing the death penalty. Thus, the prosecutor did not mislead the court, and did not use this reason as a pretext to excuse R.M. because of his race. He excused R.M. because he was concerned about R.M.'s ability to vote in favor of the death penalty.

A comparative analysis does not assist DeHoyos or further his argument. None of the jurors or prospective jurors DeHoyos compares R.M. to were comparable. (AOB 123.) None of them had expressed the same concerns about being able to be fair; none of them had just revealed to the court for the first time that he or she had been molested; and none of them stated they were not a strong advocate of the death penalty and that "no matter what this person has done" . . . "human life is the most precious thing there is." (9 RT 2097.)

Juror T.B. believed that there were people that society should not have to "put up with." (14 RT 3101.) He also explained that if it were put to a vote, he would be reluctant to keep the death penalty because of his concern that someone who was innocent or "not entirely guilty" would be executed. "But in extreme cases, I really think that some people should be taken off the streets." (14 RT 3104.) In this case, where DeHoyos admitted he killed a nine year-old girl, the prosecutor would not be concerned with Juror T.B. He did not express a reluctance to vote in favor of the death penalty in the right case. It raises different concerns, not applicable in this case, than the concerns raised by R.M.

Although Juror J.R. said that she was not strongly in support of the death penalty, she explained that "without hearing all the facts and evidence and so forth, it is hard for me to make that determination. I think death should not be taken lightly, and I don't feel it is strictly up to me to make that decision." (4 RT 961-962.) As it would not be "strictly up to [her]" to make that decision, and she would be hearing the facts and evidence before making a decision in this case, it was not nearly as strong a statement as R.M.'s statement that not only is he not a strong supporter of the death penalty, but that "human life is the most precious thing there is. No matter what this person has done." (9 RT 2097.)

Juror W.S. said that "death is a very serious penalty and I would have to be positive beyond a reasonable doubt before I would even look at death as being a penalty." (9 RT 2014.) However, W.S. is not comparable to R.M. Juror W.S. previously sat as an alternate juror in a death penalty case. (9 RT 2008-2009.) W.S. said that he did not have any reservations about undertaking the responsibility of making the determination of whether DeHoyos should live or die. (9 RT 2017.) Thus, W.S. did not state he was not a strong advocate of the death penalty, nor did he state that human life was the most precious thing there is "no matter what this person has done."

Prospective juror R.S., who was excused by DeHoyos (13 RT 2766-2767) after the prosecutor passed on the jury with her in the jury box (9 RT 2198) explained that she does not take the death penalty lightly but she would vote to keep it in an election. (4 RT 823.) R.S. explained that it would be a difficult decision but she could probably do it. (4 RT 826.) She stated she was not a strong proponent of the death penalty. (4 RT 827.) However, if anyone did something to her children "or anything like that I would be very strong that way." (4 RT 827.) R.S. had two children, ages 3 ½ and 7 ½. (12 Aug. CT 3842.) Defense counsel asked: "So, basically of all the murders that qualify for the death penalty, you would say that child victims would be the ones that would require death?" R.S. answered, "yeah, and maybe some along the line like torture or something like that." (4 RT 828.) Defense counsel characterized R.S. as having "strong feelings on the death of a child." (4 RT 830.) Thus, while R.S. did not characterize herself as a strong supporter of the death penalty, she had strong feelings if the victim was a child, as in this case.

Thus, the comparison DeHoyos makes does not show the prosecutor exercised his peremptory challenges in a discriminatory manner. The trial court's ruling that the prosecutor excused R.M. for race-neutral reasons is supported by substantial evidence.

5. Prospective Juror M.L.

DeHoyos generally disagrees with the prosecutor's stated reasons for excusing M.L. (that she omitted crucial information in her questionnaire and indicated she had reservations about the death penalty), however, he does not compare M.L. to any specific jurors. In undertaking comparative analysis on appeal, "the reviewing court need not consider responses by striken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*People v. Cruz, supra*, 44 Cal.4th at p. 659, fn. 5, quoting *People v. Lenix, supra*, 44 Cal.4th at p.

624.) Thus, since DeHoyos does not compare M.L. to any specific jurors, this Court need not undertake a comparative analysis. To the extent DeHoyos references the comparison in the "previous section" to White jurors who expressed some resistance to the death penalty (AOB 125), the comparison is not a fair comparison for the same reasons explained *ante*. Moreover, none of the other jurors who had reservations about the death penalty omitted crucial information in the questionnaire, such as whether any family members had been arrested or victims.

DeHoyos argues that the record undercuts the prosecutor's argument that M.L.'s responses in the questionnaire suggested she was not paying close enough attention to the process or to her responsibilities in the case because she satisfactorily explained why she forgot to mention her cousin was murdered and her brother had been arrested. (AOB 124.) M.L.'s explanation of why she did not put crucial information in the questionnaire may have been convincing or sufficient for DeHoyos; however it does not undermine the genuineness of the prosecutor's contrary inference. (*People v. Lenix, supra*, 44 Cal.4th at p. 628.) The prosecutor believed M.L. was not forthcoming with the crucial information. The arrest of a prospective juror's close relative is a race-neutral reason for exclusion. (*People v. Panah, supra,* 35 Cal.4th at p. 442.) Failure to be completely forthcoming about information is a race-neutral reason for exclusion. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 628 [prospective juror's answers were equivocal which supported prosecutor's inference that prospective juror was not completely forthcoming about a traffic ticket and may have harbored some resentment towards law enforcement].) Thus, the trial court's finding that the prosecutor excused M.L. for race-neutral reasons was reasonable and is supported by substantial evidence.

Last, as to all five of the challenged jurors, DeHoyos attacks the trial court for failing to "discharge its duty to inquire into and carefully evaluate

the explanations offered by the prosecutor." (AOB 126, quoting *People v. Turner* (1986) 42 Cal.3d 711, 728.) In *Turner*, the prosecutor failed to sustain its burden of showing that three challenged prospective jurors were not excluded because of group bias. The prosecutor's reasons were either implausible or suggestive of bias. (*People v. Turner*, *supra*, 42 Cal.3d at pp. 727-728.) Nonetheless, the trial court merely listened to the prosecutor's reasons and denied the motion without comment, apparently accepting the reasons at face value. (*Id.* at p. 727.) Given the reasons the prosecutor gave, they demanded more inquiry on the part of the trial court "followed by a 'sincere and reasoned' effort by the court to evaluate their genuineness and sufficiency in light of all of the circumstances of the trial." (*Id.* at p. 728, quoting *People v. Hall* (1983) 35 Cal.3d 161, 167.) By contrast, here the trial court gave defense counsel a chance to respond to the prosecutor's reasons as to each prospective juror. (13 RT 2696-2699, 2703-2705, 2709-2714, 2716, 2718.) The court went through each prospective challenged juror, and independently weighed the prosecutor's reasons and the defense arguments. (13 RT 2724-2736.) The trial court made a sincere and reasoned effort to evaluate the genuineness of the prosecutor's reasons. The court explained the proper considerations including the dynamics of jury selection and how it can change during the process, and the meaning of things like body language and the mode of answering questions. (13 RT 2726.) It also explained other reasons why it found the prosecutor's explanations credible: the prosecutor had previously tried DeHoyos in its department and had never deliberately misled the court about any matter of importance; he did not exercise a peremptory challenge in the prior DeHoyos trial against a Mexican-American who sat as a juror; the victim in this case was Hispanic so it was unlikely the prosecutor was concerned with Hispanics unduly identifying with DeHoyos; none of the prosecutor's examinations were perfunctory; and the prosecutor passed on

the jury several times with minority prospective jurors the jury box. (13 RT 2734-2736.) Thus, the court carefully evaluated the prosecutor's explanations and those reasons are all reasonable and supported by substantial evidence.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING A QUESTION ON CROSS-EXAMINATION OF DR. SEAWRIGHT ANDERSON REGARDING WHETHER DEHOYOS KNEW THE DIFFERENCE BETWEEN RIGHT OR WRONG WHEN HE KILLED NADIA

DeHoyos argues the trial court prejudicially erred by allowing the prosecutor to cross-examine Dr. Seawright Anderson, one of DeHoyos's expert witnesses, about whether he believed DeHoyos knew the difference between right and wrong. (AOB 128.) DeHoyos claims admission of the testimony was irrelevant, misleading, and in violation of Penal Code sections 28 and 29, and further that it violated the Sixth, Eighth and Fourteenth Amendments to the Constitution. (AOB 128-131, 134-136.)

Cross-examination of Dr. Anderson regarding DeHoyos's thought process, including whether he knew the difference between right and wrong, was relevant and was not misleading. Any argument that it violated Penal Code sections 28 and 29 has been forfeited by DeHoyos's failure to object. Furthermore, it did not violate Penal Code sections 28 or 29 because it did not elicit testimony regarding whether DeHoyos had the mental state for the charged crimes. Nor did admission of the testimony violate DeHoyos's federal constitutional rights.

A. Dr. Anderson's Testimony

Psychiatrist Seawright Anderson testified that he diagnosed DeHoyos as having a schizo-affective disorder, a history of polysubstance abuse involving alcohol, marijuana, cocaine and Quaaludes and a history of multiple head injuries. (25 RT 5472, 5485, 5487.) He explained what

materials and data he relied upon to make his determination. (25 RT 5475-5479, 5482, 5485, 5488.) He testified he generally relies on information that patients give him, and was proficient in interviewing patients. (25 RT 5480, 5479.)

On cross-examination Dr. Anderson testified, without objection, that he was initially appointed under Penal Code section 1026 to determine DeHoyos's sanity. (25 RT 5488.) The purpose of his report was not to diagnose DeHoyos psychologically or psychiatrically as of the date of the murder, but to render an opinion regarding whether he was insane at the time of the crimes. To do so, he had to first diagnose him. (25 RT 5490.) He felt DeHoyos had permanent brain damage. (25 RT 5513.) Dr. Anderson testified he had been wrong less than five percent of the time in his forensic diagnoses. (25 RT 5515.)

Dr. Anderson did not believe everything DeHoyos told him during his interview and felt DeHoyos was using selective recall. (25 RT 5500-5502.) He felt DeHoyos did not have the ability to recall information because of the mental processes going on at that time. (25 RT 5502.) However, he also testified he did not feel DeHoyos was lying about his version of the facts; he thought it was a misconception of things going on, i.e., it was more unconsciously related. (25 RT 5541, 5546-5547.)

Based on DeHoyos's statement, Dr. Anderson opined DeHoyos was depressed and felt he lost everything he had. (25 RT 5509.) DeHoyos had episodes of crying and depression, and had trouble sleeping and suicidal thoughts. (25 RT 5570)

Dr. Anderson believed DeHoyos was suffering from a mental disorder when he took his bath. (25 RT 5544.) DeHoyos told him that he saw Scott in the bathroom and decided to kill her; that formed part of his opinion that DeHoyos knew what he was doing when he killed Nadia. (25 RT 5550.) DeHoyos told him that he saw a vision of drowning Nadia, and Dr.

Anderson believed DeHoyos. (25 RT 5554.) Dr. Anderson opined that the schizoaffective disorder influenced DeHoyos when he sexually assaulted Nadia because a symptom of schizoaffective disorder is having distortions in reality testing and decreased insight in judgment. His having sex with her to see if she was alive, as he claimed, was real distorted thinking. (25 RT 5575-5576.) He believed DeHoyos was telling him the truth about seeing Scott instead of Nadia in the bathroom because he was suffering from a misperception. DeHoyos was telling him the reality as to what he saw. (25 RT 5583.)

Dr. Anderson did not believe DeHoyos had a delusion when DeHoyos saw Nadia on that corner that day. (25 RT 5595.) He believed DeHoyos saw a little girl when he picked her up, drove her to the motel room, walked into the motel room, sexually assaulted her, and before he killed her. When he killed her, DeHoyos saw a little girl, "but not totally." "He still saw Mary, the face of Mary." (25 RT 5596.) He explained:

> So when he actually was killing her, he knew he was killing a person, but because of this extreme anger it just distorted his visual perception. . . . Yes, he knew it was a little girl, but he actually did not perceive her at the time of the act fully as a little girl. He knew he was killing someone.

(25 RT 5597.) The prosecutor then asked Dr. Anderson, "did you conclude that the defendant knew the difference between right and wrong when he killed Nadia Puente?" Defense counsel objected that it was irrelevant, immaterial and beyond the scope of the direct examination. (25 RT 5597-5598.) The trial court overruled the objection and Dr. Anderson answered, "Yes, sir, I feel—I feel at the time that—the fact that he did know the difference between right and wrong." (25 RT 5598.)

B. Cross-Examination About DeHoyos's Thought Process, Not Amounting to His Mental State, Was Proper; Any Claim of Statutory Violation Was Forfeited

DeHoyos objected solely on the basis that the question was irrelevant, immaterial, and beyond the scope of the direct examination. He did not object on the additional basis he now raises—that admission of the testimony violated Penal Code sections 28 and 29. Thus, his claim of statutory error has been forfeited by his failure to object. (*People v. Riggs* (2008) 44 Cal.4th 248, 324; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 113.)

Even had DeHoyos not forfeited his statutory claim, like his claims that the evidence was irrelevant and misleading, it is without merit. The testimony was relevant, not misleading, and did not violate the statutory proscriptions on mental health evidence.

A trial court's ruling on the admissibility of testimony is reviewed for abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 692.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish disputed material facts such as identity, intent, or motive. (*People v. Scheid* (1997) 16 Cal.4th 1, 13.)

Dr. Anderson testified that DeHoyos was suffering from a mental disorder when he took his bath. (25 RT 5544.) Dr. Anderson believed DeHoyos knew he was killing a person, and that it was a little girl, but did not actually perceive her at the time of the act "fully as a little girl." (25 RT 5597.) He also testified that he believed that DeHoyos saw Scott in the bathroom instead of Nadia because he was suffering from a misperception. (25 RT 5550, 5583.) Thus, because Dr. Anderson was testifying to what

DeHoyos was thinking and his mental processes at the time he killed Nadia, it was relevant for the prosecutor to ask him whether he believed DeHoyos knew right from wrong at the time to shed light on Dr. Anderson's opinion and testimony. In fact, it was very close to his prior unobjected to testimony that DeHoyos knew he was killing a little girl—clearly if he knew he was killing someone he would logically know whether it was wrong to do so. Moreover, there was nothing misleading about the prosecutor's questions, nor Dr. Anderson's response.

DeHoyos argues, however, that the testimony was irrelevant to the only issue raised at the guilt phase by his mental health evidence, i.e., whether he "actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought." (AOB 129-130.)

> '[I]t is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and reliability of the expert's opinion.'

(*People v. Loker* (2008) 44 Cal.4th 691, 739; *People v. Lancaster* (2007) 41 Cal.4th 50, 105.)

The question on cross-examination was relevant to explore Dr. Anderson's opinion regarding DeHoyos's mental state. Whether DeHoyos knew what he was doing, and whether he knew it was wrong, went directly to whether he premeditated and deliberated his rape and murder of Nadia Puente, or whether he did not form the specific intent because he was acting under an uncontrollable homicidal rage, as his attorneys argued. (29 RT 6746-6747; [defense closing argument that DeHoyos was in a trance-like state and did not come out of it until later]; 6761 [defense argument that it was a "rash impulse"]; 6781 [defense argument it was not premeditated and deliberated because it was a rash impulse and spontaneous]; 6782 [defense argument that DeHoyos "had no intentions of doing anything wrong in his value system" when he took

Nadia to the motel]; 6784 [defense argument his behavior in disposing of Nadia's body was the behavior of an irrational, mentally ill, stressed-out individual]; 6793 [defense argument that he did not premeditate or deliberate, instead he acted out of rage].) Thus, the question elicited relevant information that would shed light on DeHoyos's mental processes at the time he committed the crimes to show whether he had the required intent.

Whether DeHoyos knew what he was doing was right or wrong went directly to whether he had implied malice. The jury was instructed that malice is implied when (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (4 CT 1462; 30 RT 6866; [CALJIC No. 8.11].) Whether DeHoyos knew what he did was right or wrong directly pertained to whether he had "knowledge of the danger to, and with conscious disregard for, human life."

Whether DeHoyos knew what he was doing was right or wrong also went directly to whether he deliberated and premeditated the murder. The jury was instructed that "[i]f you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree" and that "[t]o constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill." (4 CT 1465-1466; 30 RT 6869-6870; [CALJIC No. 8.20].) Thus, whether DeHoyos knew what he

was doing was wrong went directly to whether he deliberated and premeditated the murder.

Nor was the question impermissible on statutory grounds. "Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial." (*People v. Vieira* (2005) 35 Cal.4th 264, 292, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 582, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Penal Code section 28 provides, in pertinent part:

> (a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Penal Code section 29 provides:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

These sections

> 'permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state.'

(*People v. Vieira, supra*, 35 Cal. at p. 292, quoting *People v. Coddington, supra*, 23 Cal.4th at p. 582, overruled on another point by *Price v. Superior Court, supra*, 25 Cal.4th at p. 1069, fn. 13.) Thus, evidence is admissible that a defendant suffers from a mental disease or defect, as well as evidence about that disease or defect. (*People v. Coddington, supra*, 23 Cal.4th at p. 583.)

In asking Dr. Anderson whether DeHoyos knew right from wrong when he killed Nadia Puente, the prosecutor was not eliciting evidence regarding whether or not DeHoyos had the mental capacity to form the specific intent required for murder, nor did it elicit evidence of whether DeHoyos actually harbored such a mental state. It merely elicited information from Dr. Anderson as to whether, factually, DeHoyos knew the difference between right and wrong when he killed Nadia. As the prosecutor did not elicit evidence regarding whether or not DeHoyos had the capacity to form such specific intent, or whether he actually harbored such intent, it was not in violation of the statutes. In other words, the question merely elicited facts about DeHoyos's mental state, but did not ask the expert to opine whether DeHoyos actually had the required intent.

DeHoyos claims that the testimony by Dr. Anderson could only be presented at the sanity phase. (AOB 130.) Whether a defendant can distinguish right from wrong during the commission of an offense is one of the tests for sanity if it is by reason of a mental disease or defect. (Pen. Code, § 25, subd. (b); *People v. Jablonski* (2006) 37 Cal.4th 774, 830-831.) However, the jury was not instructed on the test for insanity in the guilt phase so they would not apply the testimony elicited by the prosecutor's question in a legal context. Rather, they would interpret the response as determining a simple fact: whether DeHoyos knew what he was doing and whether it was wrong. In other words, the jury would interpret the testimony elicited by the question in its ordinary, layperson meaning, not in

a technical sense pertaining to an affirmative defense that they were not instructed on, nor called upon to consider.

Relying on *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364 and *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1477, DeHoyos argues the testimony was impermissible because it used terms synonymous with the mental states involved. (AOB 130-131.) DeHoyos's argument rests on the faulty premise that the terms "right" and "wrong" are synonymous with "deliberate" and "premeditated." Rather, the testimony was admissible, because it was relevant to whether DeHoyos had the required mental state, but the prosecutor did not use synonymous terms or otherwise elicit expert testimony that DeHoyos had the required mental state. As explained by the Court of Appeals in *People v. Nunn.*

> We conclude based on the language of *sections 28* and *29*, and the discussion in *Czahara*, that the sections allow the presentation of detailed expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted. . . .What the doctor could not do, and what the defense proposed he do here, was to conclude that appellant had acted impulsively, that is, without the intent to kill, that is, without express malice aforethought.

(*People v. Nunn, supra*, 50 Cal.App.4th at p. 1365, emphasis added.) Here, as explained above, Dr. Anderson's testimony was relevant to whether DeHoyos had the mental state when he acted, but he did not opine that DeHoyos had the required mental state.

Next, DeHoyos relies on *People v. Smithey* (1999) 20 Cal.4th 936, to support his position that Dr. Anderson's testimony was inadmissible. (AOB 131-132.) In *Smithey*, the prosecutor asked the defense expert specifically whether he could opine on the defendant's ability to form the intent to commit the crimes he was charged with committing. (*People v. Smithey, supra*, 20 Cal.4th at p. 959.) This Court held the prosecutor's question was improper. (*Id.* at p. 961.) However, the prosecutor's

questions about whether the defendant's actions indicated that he had impaired judgment were not inappropriate. (*Ibid.*) The facts in *Smithey* are not "instructive" as DeHoyos claims. (AOB 131.) Here, the prosecutor did not ask the clearly prohibited question of whether DeHoyos had the intent to commit the crimes. He merely explored whether DeHoyos knew what he was doing was wrong when he did it. As it was not error, the trial court did not admonish the jury or read them the text of Penal Code section 29, as DeHoyos now suggests would have been appropriate (AOB 132), and which was done in *Smithey*.

C. DeHoyos's Constitutional Rights Were Not Violated

DeHoyos also claims the ruling rendered his trial fundamentally unfair, deprived him of a state entitlement, and deprived him of his right to fair notice of the rules that govern trial, in violation of the Due Process Clause of the Fourteenth Amendment; that he was deprived of a meaningful opportunity to present a complete defense in violation of the Sixth and Fourteenth Amendments; and that it undermined the reliability of the guilt phase verdict in violation of the Eighth and Fourteenth Amendments to the Constitution. (AOB 134-136.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) Thus, "they are without merit for the same reasons that [DeHoyos's] state law claims" are without merit. (*Ibid.*) Further, even assuming erroneous admission, any constitutional error would also be harmless because, for the same reasons discussed below, there is no reasonable possibility of a different outcome absent the admission of the evidence.

D. If There Was Error, DeHoyos Was Not Prejudiced

Even if the trial court erred in allowing Dr. Anderson to answer this one question, DeHoyos was not prejudiced. Assuming the question was in

violation of Penal Codes section 28 and 29, it was a statutory error, which would require DeHoyos to show that it is reasonably probable a result more favorable would have resulted in the absence of the error. (*People v. Rundle* (2008) 43 Cal.4th 76, 134, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Even under the more onerous *Chapman* standard, which DeHoyos claims applies due to alleged constitutional violations (AOB 134-136), requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict, any error was harmless. (*People v. Robinson* (2005) 37 Cal.4th 592, 627 citing *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 708].)

The evidence was overwhelming that DeHoyos committed the crimes, and did so with the required intent. Rather than being in a homicidal rage as DeHoyos argued, the evidence showed DeHoyos acted deliberately and with premeditation in committing the kidnapping and rape. DeHoyos used a ruse that he was a teacher and that he needed help with some school books to get Nadia into his car. (3 CT 1295, 1299-1300.) He then drove her to the motel room. Although it is unknown exactly how events occurred in the motel room, it is known that he proceeded to rape and sodomize her. (17 RT 3803-3804; 3805-3807.) The evidence showed Nadia was beaten with his fists or an instrument, causing abrasions and bruises on her right lower chest, left arm, upper back, both legs, the top of her head, the area around the base of her neck and her right eyebrow. (18 RT 3827, 3830.) The evidence indicated that DeHoyos bent her over the bathtub, causing her to asphyxiate and die. (17 RT 3802, 3811-3812.) He then wrapped her wet body in a bedspread, stuffed it in a trashcan and discarded her in a Los Angeles park. (17 RT 3747-3749.) He then fled the area and went to San Antonio. (3 CT 1315-1316.)

DeHoyos's version of the facts, as told to the police, and through some of his mental health experts, was not credible. It was not credible that DeHoyos used a ruse to get Nadia into his car because he needed a companion. (21 RT 4867 [Dr. Berg]; 27A [Dr. Fossum opined he sought her company because he was confused, fearful and raging and reached out for help].) Rather, the only credible explanation for a grown man taking a girl he later rapes and sodomizes to a motel was that he did it with the intent to sexually assault her. It was not credible that a nine-year-old girl would sit in the motel room cleaning up a complete stranger's mess, while DeHoyos took a bath, and that she would then walk in the bathroom while he was bathing, as he claimed. (3 CT 1297, 1300-1301, 1308-1309; 21 RT 4868; 22 RT 4934.)

DeHoyos told inconsistent stories to his mental health experts. Dr. LaCalle noted that DeHoyos's account of what happened had been inconsistent, and explained that it was because DeHoyos did not know what happened or why it happened, and that he had some limited recollection of what happened, and tried to fill in the gaps by creating information, and manipulating information on his behalf. (22 RT 5075-5076.) DeHoyos gave Dr. LaCalle fourteen variations of what happened when he murdered Nadia. (24 RT 5294.) DeHoyos told some of his experts that he believed he was killing Mary Ann Scott (21 RT 4874-4875, 4877, 4879 [Dr. Berg]; 22 RT 4932-4933 [Dr. Berg]; 25 RT 5549 [Dr. Anderson]), even though he did not tell this account to the police when he was interviewed shortly after committing the crimes. He told Dr. LaCalle that he had "no idea" why he killed Nadia. (22 RT 5078.) The version he told to the police, which was much more credible, was that he killed Nadia because she started screaming and he did not want someone "coming from next door" and he would not be able to "explain all this[.]" (3 CT 1297, 1303, 1305.) Moreover, some of DeHoyos's experts opined he was malingering. (22 RT 4970, 4909 [Dr.

Berg opined he could be malingering and certain incidents were consistent with malingering] 5054; 23 RT 5212-5213, 5280 [Dr. LaCalle concluded he was malingering]; 27A RT 6040 [Dr. Fossum testified that Dr. Consuelo Edwards diagnosed DeHoyos as a malingerer]; 6124-6126 [Dr. Fossum wrote in her report that he was malingering]; 28 RT 6479-6480, 6488, 6501-12 [Dr. Purisch put in his report that he met the criteria for malingering, although he opined he did not malinger during testing].) DeHoyos admitted he lied, and some of his experts opined that he lied and/or was unreliable when reciting the facts of the crimes. (3 CT 1299 [DeHoyos's statement admitting he lied to Nadia]; 22 RT 5072-5073; 23 RT 5118 [Dr. LaCalle]; 26 RT 5780, 27A RT 6099 [Dr. Fossum]; 28 RT 6488, 6501-3. [Dr. Purisch].) Even one of his own experts, Dr. Berg, testified that many things DeHoyos told him about the incident were absurd, including his explanation for why he had sex with Nadia. (21 RT 4873; 22 RT 4921-4922.) Thus, DeHoyos's account of events was not credible, was unreliable and inconsistent.

On the other hand, DeHoyos's intent from his actions was clear. He approached Sandra Cruz, and when she did not get in his car, he approached Nadia Puente. DeHoyos's own expert, Dr. Berg, testified he was "hypersexed," in that he had extraordinary sexual needs that went beyond actual sexuality. (21 RT 4894.) Although DeHoyos claimed he did not intend to do "any harm to her," (3 CT 1300) that is not credible given his conduct in raping her, and in light of his sexual advances toward Dalila Flores in a motel room close in time to killing Nadia. (28 RT 6501-67-6501-72.) Thus, the evidence of DeHoyos's intent was clear and strong in contrast to the evidence relied upon by DeHoyos, which was contradicted and unreliable.

DeHoyos claims the testimony was prejudicial because it undermined Dr. Anderson's testimony that DeHoyos suffered from various mental

impairments, which DeHoyos relied on to support his theory he lacked the requisite mental states, and that the testimony would have confused the jury. (AOB 133.) However, Dr. Anderson had already testified that DeHoyos knew he was killing a human being, and that he knew what he was doing when he killed her. (25 RT 5550.) This testimony was not objected to, and it is not being raised as a claim of error. Logically, if DeHoyos knew what he was doing when he killed Nadia, the inference is that he knew it was wrong. Therefore, Dr. Anderson's further testimony that DeHoyos could distinguish right from wrong when he killed Nadia did not add any information that the jury did not already have.

Moreover, it was only one question, and a one sentence, brief answer. It was a lengthy trial. The prosecutor presented his case-in-chief in one day, and the defense presented its case over fourteen court days, lasting approximately three and a half weeks. (4 CT 1321-1326, 1328-1333, 1338-1348, 1350-1355, 1358-1359, 1365-1368.) The defense presented eight expert witnesses. Additionally, the prosecutor did not argue or rely on this testimony in closing argument. Not only did the prosecutor not argue this testimony to the jury, he cast doubt on Dr. Anderson's credibility by questioning his demeanor in that he was looking at the ceiling during his testimony instead of looking at the jurors. (29 RT 6708-6709.) Thus, even if it was error, DeHoyos was not prejudiced. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1165-1166 [admission of testimony harmless because the testimony was brief and prosecutor did not argue it in closing argument].)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING DR. FOSSUM TO BE CROSS-EXAMINED ABOUT HER FAILURE IN A PRIOR CASE TO PRESERVE A TAPE CONTAINING A DEFENDANT'S INTERVIEW

DeHoyos contends the trial court erred by allowing Dr. Fossum to be cross-examined about her handling of tape recorded interviews of the

defendant in *People v. Sturm*, a case in which Dr. Fossum testified as an expert witness. He argues that the prosecutor did not have a good faith belief that Dr. Fossum destroyed the tape recorded interviews, and that she knew she had a duty to turn over the records, therefore, the testimony was irrelevant. (AOB 137-142.) Dr. Fossum's destruction of evidence in another case, in the context of her failure to fully comply with the subpoena duces tecum in this case and failure to turn over notes of her interview with DeHoyos, went directly to her bias, and was therefore relevant. Even if the trial court erred in allowing such testimony, DeHoyos was not prejudiced.

A. The Cross-Examination of Dr. Fossum

During cross-examination of expert witness Dr. Fossum, the prosecutor elicited that he sent Dr. Fossum a subpoena duces tecum for records of her file in this case. (26 RT 5787-5788; 5804-5805 [Exhibit 44].) The prosecutor's name and telephone number were on the subpoena, and it indicated that if Dr. Fossum had any questions about the time or date to appear, to call him. (26 RT 5801-5802.) Dr. Fossum testified that she sent copies of all the requested records to the court. However, she explained that she did not send test materials, even though she was requested to do so by the subpoena. (26 RT 5788-5789.)

Although Dr. Fossum declared under penalty of perjury the records were a complete and true copy of all records pursuant to the subpoena (26 RT 5805-5806), she explained she sent a declaration with the subpoena, which consisted of a paragraph that explained that she had not sent certain equipment that she needed on a daily basis, and that no duplicate equipment was owned by her, but she could arrange for identical equipment to be viewed in a psychology office close to the court or that she could bring the equipment to court (26 RT 5802-5803). Dr. Fossum admitted that she did not send the booklet that accompanied the Rorschach test, the administration and scoring manual for the intelligence and achievement

tests, the administration and scoring manual for the Bender-Gestalt, the directions for administering the psychological tests, seven "case books" of materials sent to her by Sandberg Investigations,[45] which included DeHoyos's diary and his autobiography, and copies of all items shown to DeHoyos, including pictures. (26 RT 5792-5793, 5798-5799, 5839-5840; 27 RT 5861-5862, 5899-5900.) Dr. Fossum stated that she was "amazed" that the prosecutor was asking for her equipment that she used every day, and did not understand if he really wanted all of it. (26 RT 5791.) She explained she did not send certain test materials because she could not photocopy them, for example, puzzle parts or plastic blocks. She explained there would have been hundreds of pages for her to photocopy and that instead she had offered to allow the prosecutor to view the test materials in Orange County. (26 RT 5795.)

Although Dr. Fossum spoke to someone from the District Attorney's Office about the subpoena, she did not ask or discuss any questions about the voluminous records. (26 RT 5802.) Instead, Dr. Fossum spoke to Kristin Knowles of Sandberg Investigations about the subpoena. (26 RT 5799-5800.) Dr. Fossum testified she asked Knowles to call the prosecutor. (26 RT 5802.)

Dr. Fossum entered information into her laptop computer during her interview of DeHoyos, but did not print out a copy of any of the information. (27 RT 5848.) However, she "dropped down" the laptop onto a small disk, which she then loaded into her computer and transferred directly into her report. (27 RT 5848.) However, she only put in those materials that she thought were psychologically significant. (27 RT 5848-5849.) When the prosecutor asked Dr. Fossum if she re-used the disk, she

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[45] Sandberg Investigations was the defense investigations firm. (See 26 RT 5839-5840; 27 RT 5855.)

answered that she did not know, but that she usually placed the disks in a drawer where they would be available for later re-use. When asked why she did not send copies of the notes she took on her computer, she said, "I actually didn't think about it. I didn't think there was anything that wasn't in my report that was relevant to the case." (27 RT 5849.) When asked whether she decided what was relevant, she said, "No, I just didn't think about the disks." (27 RT 5849-5850.) The prosecutor then asked whether in a previous criminal case she tape-recorded the defendant's interviews and then destroyed the tapes. There was a defense objection that the prosecutor was seeking irrelevant and immaterial information. The prosecutor responded that it went to bias, and the court asked the parties to approach. (27 RT 5850.)

Outside the presence of the jury, the prosecutor explained that he talked to the prosecutor in the Sturm case, which was tried the previous year. (27 RT 5850.) The prosecutor explained to the court that in both cases Dr. Fossum took notes contemporaneous with a defendant's interview, and did not preserve the notes. (27 RT 5851-5852.) He argued the information was relevant if the notes had been deliberately destroyed. Here, he explained, Dr. Fossum only selectively preserved her raw notes. The court asked whether the prosecutor made an issue out of it in the Sturm case, and the prosecutor stated that he understood that Dr. Fossum admitted she had done so during her testimony. (27 RT 5852.)

The court stated it would only show bias if Dr. Fossum was made aware that she was depriving the prosecution of something they needed and then deliberately did it again that way. (27 RT 5852.) The prosecutor explained that in the Sturm case, it could have been inadvertent, but that here is another case within 18 months where the raw data was not sent pursuant to the subpoena. The defense explained that it was unfair to Dr. Fossum if she had not been told to preserve the disk or the tape. The court

said that the defense can cover that on redirect examination. (27 RT 5853.) The court stated it felt it was strange she did not comply with a subpoena, and also that she had recently deprived the prosecution of something they needed in another capital case. (27 RT 5853-5854.) The court also noted that Dr. Fossum was located in Sacramento, so in effect, by not bringing the disks, they were unavailable for trial. (27 RT 5854.) The court found that Dr. Fossum did not comply with the subpoena, and did not contact the prosecutor concerning any questions she had; instead she contacted the defense investigator. Defense counsel said that Dr. Fossum had indicated that the prosecutor in the Sturm case approved of the way she complied with the discovery request in that case. The court ruled that the questions go to her credibility and showed her bias. (27 RT 5855.)

The court reporter read back the question that had been objected to—whether in a previous criminal case Dr. Fossum tape-recorded the interviews and then destroyed the tapes (27 RT 5850), and she answered, "no." (27 RT 5856.) She further testified she did not know whether the tapes in the Sturm case were reused or not. She said she was asked for the tapes and sent copies of all the tapes she had in her possession to the Public Defender, who then sent them to the District Attorney's office. (27 RT 5857-5858.) She did not know whether the tapes she gave to the Public Defender constituted all of the tape recorded interviews; she had not reviewed them. (27 RT 5859, 5861.) She further explained that she attempted to locate the tape recordings, and she located those that were in her possession, but some of the tapes potentially could have been reused. (27 RT 5860.) Dr. Fossum explained that she testified in the Sturm trial that it was a possibility some of the tapes no longer existed. (27 RT 5859.)

On re-direct, Dr. Fossum explained that she had responded to a subpoena duces tecum from the prosecutor's office in a prior case, and used the same procedure. She explained that in that case, she wrote a letter

requesting that the prosecutor allow her to retain her equipment, which included all test apparatus and manuals for her daily use, and that she would either arrange for the identical equipment to be viewed in a local office of a psychologist or if requested she would bring the equipment to court on the day she was going to testify. In this trial, she did not receive any request from the prosecutor regarding her compliance with the subpoena. (27A RT 6147.)

B. The Cross-Examination Was Proper Because It Showed Dr. Fossum's Bias

Subject to certain limitations, all relevant evidence is admissible. (*People v. Williams* (2008) 43 Cal.4th 584, 633, citing Evid. Code, § 351; Cal. Const., art. I, § 28, subd. (d).) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish disputed material facts such as identity, intent, or motive. (*People v. Scheid, supra*, 16 Cal.4th at p. 13.)

> The 'existence or nonexistence of a bias, interest, or other motive' on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony (Evid. Code, §780, subd. (f)), and '"the credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called . . ."' (3 Witkin, Cal. Evid., [(4th ed. 2000)] Presentation at Trial, § 277, p. 349.)

(*People v. Williams, supra*, 43 Cal.4th at p. 634.) Additionally,

> 'it is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and reliability of the expert's opinion.'

(*People v. Loker, supra,* 44 Cal.4th at p. 739; *People v. Lancaster, supra,* 41 Cal.4th at p. 105; accord *People v. Hendricks* (1988) 44 Cal.3d 635, 642.)

"The trial court has considerable discretion in determining the relevance of evidence." (*People v. Williams, supra*, 43 Cal.4th at p. 634.) A trial court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion. (*People v. Watson, supra*, 43 Cal.4th at p. 692.) The trial court did not abuse its discretion in allowing the prosecutor to cross-examine Dr. Fossum on whether she had destroyed interview tapes of a defendant in a previous case. She admitted she did not turn over her raw notes of her interview with DeHoyos in spite of being requested to do so by subpoena duces tecum, and admitted that she may have reused the computer disks on which she had her notes. As the court noted, Dr. Fossum did not comply with the subpoena. (27 RT 5854-5855.) Her failure to comply with the subpoena supports a reasonable inference of bias. Further, her previous failure to preserve her raw notes of a defendant's interview, particularly because she had been recently cross-examined on such failure, showed her knowledge as to the import of the material when failing to preserve her raw notes regarding DeHoyos. It showed Dr. Fossum's "feeling of hostility towards the party against whom [s]he [was] called," i.e., the prosecutor. (*People v. Williams, supra*, 43 Cal.4th at p. 634.)

Moreover, "an expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1165, overruled on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) In *Zambrano*, the prosecutor cross-examined a defense prison expert about his opinion in a previous case that the defendant, who was convicted of four separate murders and six attempted murders, would adjust well to prison life. This Court held that

despite arguable differences in the two cases, they involved similar issues regarding the expert's views on prison adjustment. "The prosecutor was entitled to expose bias in the witness by showing his propensity to advocate for criminal defendants even in extreme cases." (*People v. Zambrano, supra,* 41 Cal.4th at pp. 1164-1165.) While here we have different facts, *Zambrano* is instructive. Dr. Fossum was properly cross-examined about her handling of her raw notes of an interview in a previous case to show she was biased in this case by failing to properly preserve and turn over her raw notes.

DeHoyos argues that Dr. Fossum's conduct in the Sturm case was relevant only if the prosecutor thought Dr. Fossum was aware that she was depriving the prosecution of something they needed and then did it again, and because the prosecutor did not have a good faith belief that Dr. Fossum actually destroyed any tapes in the Sturm case, such conduct was irrelevant. (AOB 141.) While it is true the trial court stated Dr. Fossum's conduct in the Sturm case would only show bias if Dr. Fossum was made aware that she was depriving the prosecution of something they needed and then deliberately did it again that way, the prosecutor made clear that he believed that Dr. Fossum admitted in the Sturm trial that she only selectively preserved her raw notes. (27 RT 5852.) In fact, Dr. Fossum admitted in this trial that she was questioned in the Sturm trial about whether she had preserved the tapes, and that it was a possibility some of the tapes no longer existed. (27 RT 5857, 5859.) Thus, Dr. Fossum admitted that she was cross-examined in Sturm about her failure to preserve her raw notes. Such admission clearly showed she was aware that this could become an issue; yet she did not preserve her raw notes in this case. This is exactly what the trial court said would "tend to show bias." (27 RT 5852; AOB 141.)

DeHoyos's claim that the prosecutor lacked a good faith belief that Dr. Fossum destroyed any of the tapes misses the point. The point was not whether the tapes were actually destroyed; the point was that she had not provided the tapes, had not properly preserved them, and knew that the prosecutor wanted the tapes by virtue of the cross-examination in Sturm. Yet, eighteen months later, Dr. Fossum took raw notes of DeHoyos's interview, failed to properly preserve them, and failed to turn them over as requested by subpoena.

DeHoyos also claims the prosecutor lacked a good faith belief that Dr. Fossum was aware that she was depriving the prosecution in the Sturm case of material to which it was entitled, and aware that she had a duty to turn over the computer disks, and points out that the prosecutor conceded that Dr. Fossum may have destroyed the tapes inadvertently. (AOB 141.) The relevance of the Sturm case was that Dr. Fossum was cross-examined about her failure to properly preserve the tapes, thus making her aware that it should have been done. Even if the tapes in the Sturm case were inadvertently destroyed, based on the Sturm prosecutor's cross-examination, Dr. Fossum became aware of the import of the tapes, and that they should have been preserved and turned over to the prosecutor in this case pursuant to the subpoena duces tecum.

In a footnote, DeHoyos claims the prosecutor's offer of proof failed to establish that Dr. Fossum's conduct in Sturm amounted to past misconduct, which would have been admissible to impeach her credibility. (AOB 141, fn. 46.) The cross-examination in Sturm did not show Dr. Fossum's past misconduct, nor was it admitted for such purpose. It showed that Dr. Fossum, through cross-examination, became aware of the import of preserving the interview tapes; thereby putting into context her failure to preserve her raw notes in this case, and failure to turn them over. Her

failure to preserve the raw notes, and failure to turn them over as required by the subpoena duces tecum, showed her bias.

C. DeHoyos's Constitutional Rights Were Not Violated

Nor were DeHoyos's constitutional rights to due process under the Sixth and Fourteenth Amendments, or his rights to a reliable, individual sentencing determination under the Eighth and Fourteenth Amendments violated, as he argues. (AOB 143-144.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince, supra,* 40 Cal.4th at p. 1229.) Thus, "they are without merit for the same reasons that [DeHoyos's] state law claims" are without merit. (*Ibid.*) Further, even assuming erroneous admission, any constitutional error would be harmless because, for the same reasons discussed below, there is no reasonable possibility of a different outcome absent the admission of the evidence.

D. DeHoyos Was Not Prejudiced By The Cross-Examination of Dr. Fossum

Even if the trial court erred in allowing the prosecutor to cross-examine Dr. Fossum about her handling of the Sturm case, DeHoyos was not prejudiced under either the *Watson* standard for state law error because it is not reasonably probable DeHoyos would have received a more favorable result, or the *Chapman* standard for constitutional error, requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. (*People v. Rundle, supra*, 43 Cal.4th at p. 134, overruled on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22, citing *People v. Watson, supra*, 46 Cal.2d at p. 836 [*Watson* standard for state law error]; *People v. Robinson, supra,* 37 Cal.4th at p. 627 citing *Chapman v. California, supra*, 386 U.S. at pp. 23-24 [*Chapman* standard for constitutional error].) As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a

nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state.

The evidence of Dr. Fossum's failure to preserve her raw notes in the Sturm case would not have made a difference in the outcome under any standard. Although Dr. Fossum admitted she failed to comply with the subpoena, she was able to give an explanation. Additionally, when asked whether she destroyed tapes of Sturm's recorded interview, Dr. Fossum said she had not. (27 RT 5850, 5856.) She said she did not know if the tapes were re-used or not, but admitted that they may have been. (27 RT 5857-5859.) Thus, although the prosecutor was able to ask the questions, the answers were benign—she did not destroy the tapes, and did not know whether the tapes had been reused. Given the benign nature of the testimony, the jury was not likely to completely discredit her testimony merely because she did not preserve raw notes and/or respond to the subpoena, especially when she had an explanation.

Additionally, Dr. Fossum was one of eight expert witnesses who testified, and her testimony was largely duplicative of the other expert witnesses. It is not likely the jury would discredit her testimony and her forensic diagnoses merely because she had failed in this case, and in a previous case, to preserve her raw notes.

Although DeHoyos admits Dr. Fossum's conclusions were "largely consistent" with the other expert witnesses, he argues she also reached other conclusions that were not reached by other expert witnesses—i.e., her diagnoses of schizophrenia of the paranoid type and narcissistic personality disorder with features of borderline personality disorder, and her explanation of how these mental illnesses contributed to DeHoyos's rapid disintegration of his cognitive processes so that he was confused and

consumed by rage at the time of the crime. (AOB 142.) This assertion is belied by the record.

Both Drs. Berg and Anderson also diagnosed DeHoyos as having a schizophrenic disorder. (21 RT 4912-4913 [Dr. Berg]; 25 RT 5485, 5558, 5575 [Dr. Anderson].) The defense also elicited during Dr. Fossum's testimony that the Orange County jail diagnosed DeHoyos with schizoaffective disorder. (26 RT 5575.) Dr. Berg further diagnosed DeHoyos as having a paranoid personality (21 RT 4913) and testified that DeHoyos's paranoia was implicit and present when he first interviewed him, but it was exacerbated by the second time he interviewed him (21 RT 4696-4697). Dr. LaCalle testified that a criteria for organic personality syndrome is suspiciousness or paranoid ideation, which applied to DeHoyos. (24 RT 5438, 5440.) Further, although it is not clear how Dr. Fossum's testimony that having a narcissistic personality disorder would benefit DeHoyos, this testimony was also duplicative of other witnesses. Both Drs. Berg and Purisch testified DeHoyos was a narcissist. (21 RT 4698 [Dr. Berg]; 28 RT 6291 [Dr. Purisch testified the test results showed DeHoyos's narcissism].) In addition, Dr. LaCalle diagnosed DeHoyos as having borderline personality disorder, severe. (22 RT 5065-5066.) Thus, all of Dr. Fossum's diagnoses were duplicative of other expert witnesses.

Dr. Fossum's testimony that DeHoyos's mental illness contributed to his rapid disintegration to the point he was consumed by rage and confused at the time of the crimes was also duplicative of other expert witness testimony. Dr. Berg testified that on the day he murdered and raped Nadia, DeHoyos had a number of stressors, including his confrontation with Scott, his perception he was fired, and his rage and wanting to kill Scott, which a normal person would have been able to handle, but which he testified DeHoyos could not. (21 RT 4700.) He explained the events that happened

with Scott were a prescription for upsetting DeHoyos's mental balance. (21 RT 4768.) DeHoyos taking Nadia to the motel room was a sign of his pathology and his rage reaction was a sign of his inability to control himself. (21 RT 4702.) Dr. LaCalle explained how the nature of DeHoyos's mental illness would interfere with his cognitive processes—the functioning of his mind in perceiving reality, processing information, passing judgment, seeking suitable, acceptable alternatives and making and executing decisions. (22 RT 5068.) Dr. LaCalle opined that had DeHoyos not had the mental illness, he would not have committed the acts on the victim. (22 RT 5071.) Dr. Purisch testified that on the date of the rape and murder of Nadia, DeHoyos was under a great deal of stress and did not have the capacity to deliberate on his judgments. (28 RT 6501-19.) Due to a number of stressors, DeHoyos was in a highly agitated state of mind, which would have been exacerbated if he took drugs and drank alcohol. When DeHoyos was overwhelmed by emotions, he could not think clearly, so that when Nadia walked into the bathroom, he was not capable of thinking through his actions. (28 RT 6501-20.) Thus, while these experts did not use the exact words that Dr. Fossum did, they all clearly conveyed to the jury the same point—that DeHoyos's mental illness, combined with his stress, made him unable to function properly.

Thus, Dr. Fossum's testimony was duplicative of other expert testimony. Moreover, the nature of the cross-examination questions, along with Dr. Fossum's answers, were rather benign. It is thus not remotely reasonable the jury would not have convicted DeHoyos if only they had not known about Dr. Fossum's failure to preserve her raw notes in the Sturm case.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DR. FOSSUM'S TESTIMONY ABOUT THE CAUSAL RELATIONSHIP BETWEEN LOSING A JOB AND COMMITTING MURDER

DeHoyos contends the trial court abused its discretion in excluding Dr. Fossum's proposed testimony "regarding the extent to which events in [DeHoyos's] workplace might have triggered or led to the instant offense." (AOB 145.) The trial court did not exclude testimony regarding whether the events in DeHoyos's workplace contributed to committing the rape and murder. Rather, the trial court only excluded Dr. Fossum's testimony in general that was based on studies about how getting fired affects people such that they commit homicides. The trial court properly excluded such testimony because Dr. Fossum lacked qualifications for such testimony, and it was not a proper subject for expert testimony. Thus, there was no error. Even if it was error to exclude such testimony, DeHoyos was not prejudiced.

A. Trial Court Ruling Regarding Dr. Fossum's Testimony

Dr. Fossum testified she was asked by the defense to analyze the extent to which events in DeHoyos's workplace might have triggered or led to the offense. (26 RT 5702.) The prosecutor objected to further questions based on a lack of qualifications and foundation, that it called for speculation, and that it was not proper expert testimony, as it was for the jury to decide. (26 RT 5702-5703, 5706.)

Dr. Fossum obtained her master's degree in Clinical Psychology from San Francisco State University in 1974. (26 RT 5712.) She received her doctorate in psychology in 1989 from the Fielding Institute. (26 RT 5703.) Dr. Fossum admitted that she had not published any papers or conducted any research with respect to the effect of the workplace environment on homicides. (26 RT 5703.)

Dr. Fossum explained there had been 72 or 73 workplace homicides since 1989, and very few psychologists came into contact with someone who was fired and killed someone the same day. (26 RT 5714, 5722.) However, psychologists can assess the psychosocial history and comment on the state of the individual's mind at the time he commits a wide range of behaviors. (26 RT 5722.) She had extensive work in clinical treatment with people who had experienced job loss and various forms of job trauma. (26 RT 5708-5710, 5736.) A number of her patients had employment issues and work stress. (26 RT 5710.) She had never interviewed someone who was fired or quit his job and then committed a homicide the same day other than DeHoyos. (26 RT 5712.)

Dr. Fossum wrote a letter to Kristen Knowles on August 9, 1992, in which Dr. Fossum explained she was not current on research on the issue of job loss and violence or murder. (26 RT 5713-5714.) She explained that she did not do research on the topic of reaction to job loss,

> 'for this I believe you need an experienced clinician. This clinician should, as in any forensic case, be familiar with any research that is relevant to the case and should be prepared to be examined and cross-examined on the research.'

(26 RT 5713.)

She explained her intent was to tell Knowles that she had a choice of selecting an expert witness who was an academician or a clinician. (26 RT 5714.)

The defense explained Dr. Fossum undertook to gather all printed data and research material on the issue of being fired then committing a homicide. (26 RT 5733.) She contacted the National Institute of Occupational Safety and Health (NIOSH), and asked them to do an international search on this subject so she could have the compendium of research literature available. (26 RT 5736-5737.) They gave her five articles, one of which was a newspaper article from the Wall Street Journal.

(26 RT 5737, 5741.) None of the articles were sufficiently pertinent, and were primarily about homicides in the workplace, or committed by people such as customers or individuals robbing a store. (26 RT 5737, 5742-5743.) She concluded there was virtually a dearth of formal empirical research in this area. (26 RT 5737.) None of the articles were about being fired and then committing violence against strangers at another location. (26 RT 5743-5744.)

Although Dr. Fossum had testified about ten to twelve times, she had "qualified" as an expert witness 50-75 times. (26 RT 5715-5716.) Dr. Fossum testified in the Sturm death penalty case in the penalty phase, and in that case the defendant's job loss was a "moderate factor." (26 RT 5715, 5719.) However, Sturm's job loss was not the critical aspect of Dr. Fossum's testimony. (26 RT 5716.) Other than in Sturm, Dr. Fossum had not testified as to the effect of job loss on a criminal act. (26 RT 5721.)

The court indicated it was reluctant to exclude any expert testimony offered by the defense, but had serious questions about whether the defense was asking Dr. Fossum something that was sufficiently beyond the common experience that the trier of fact really needed. The court also indicated it may be premature to address this because it did not know what exact questions were going to be asked of the witness. (26 RT 5725-5726.)

The court explained that the defense already had information in front of the jury in several ways that DeHoyos's anger toward Scott led up to the crime. The question here was whether or not there was a connection between his being fired and anger being directed against a stranger, at a remote location at a later time, sufficient to need the assistance of an expert to assist the jury with deciding whether or not DeHoyos's anger at Scott was what caused his acts. Absent some studies that had shown a relationship between a person's firing or workplace problems and committing violent acts against people at remote locations at another time,

the court believed Dr. Fossum would not be explaining anything that the jury could not figure out for themselves on the issue, mainly causation. (26 RT 5745.) Thus, the court ruled that with respect to the question of whether or not DeHoyos's job loss caused or triggered the homicidal act, it was not a proper subject of expert testimony under section 801 of the Evidence Code. (26 RT 5726-5727, 5731.) Jurors already knew enough about the importance of a job such that they would realize that job loss would be a significant factor in a person's mind. (26 RT 5723, 5727, 5731.) Thus, the court concluded the expert opinion would not be helpful to the jury.

Also, the court found Dr. Fossum was not qualified to link job loss to homicide. (26 RT 5727, 5731.) The court thought it significant that Dr. Fossum had no experience testifying to relating job loss to a criminal act. In the penalty trial of Sturm, it was different because so much is admissible under Penal Code section 190, subdivision (k). (26 RT 5729.) It ruled Dr. Fossum could, however, express an opinion about DeHoyos's state of mind at the time she interviewed him, and whether or not his state of mind would likely have been the same three years earlier. (26 RT 5746.)

During Dr. Fossum's testimony, she testified that the castigation by Scott triggered a decompensation of DeHoyos's narcissistic personality, which distinguished it from his actions in taking Dalila Flores to a motel room. (27A RT 6138-6139.) The prosecutor objected and asked the jury to be admonished to disregard the testimony in light of the court's previous ruling. (27A RT 6139.)

The court told the prosecutor that it believed he had misunderstood the court's ruling. (27A RT 6140.) The court clarified its ruling and told the parties that Dr. Fossum could testify that DeHoyos's job loss was a factor that contributed to his mental state, but could not testify in general based on studies about how getting fired affected people such that they

commit homicides. (27A RT 6140-6141.) The court explained that as a psychologist, Dr. Fossum could testify that losing a job was important. (27A RT 6141.) Dr. Fossum then explained that DeHoyos began to decompensate on the day he murdered Nadia based on being castigated by Scott. (27A RT 6145-6146.) She also testified that his belief that he was fired was also a factor. (27 RT 6146.)

B. The Trial Court Properly Limited Dr. Fossum's Testimony

A trial court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion. (*People v. Watson, supra,* 43 Cal.4th at p. 692.) "Expert opinion testimony is admissible only if it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*Ibid.*, quoting Evid. Code, § 801, subd. (a).) Furthermore, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (*Ibid.*, quoting Evid. Code, § 720, subd. (a).) "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement." (*Ibid.*, quoting *People v. Kelly* (1976) 17 Cal.3d 24, 39.)

The trial court properly limited Dr. Fossum's testimony. It ruled that Dr. Fossum could testify that DeHoyos's job loss was a factor that contributed to his mental state, and what his mental state was, but could not testify in general based on studies about how getting fired affects people such that they commit homicides. (27 RT 5746; 27A RT 6140-6141.) Dr. Fossum's proposed testimony that a job is important and the loss of a job would be significant was not "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Watson, supra*, 43 Cal.4th at p. 692; Evid. Code § 801, subd. (a).)

To the extent Dr. Fossum's testimony linked job loss to homicidal acts in general, the trial court properly found she did not have the qualifications. It is a rare occurrence for someone to get fired and commit a homicide that day. (26 RT 5722.) Dr. Fossum admitted she had not published any papers or conducted any research with respect to the effect of the workplace environment on homicides, and she had never interviewed someone who had been fired or quit his or her job and then committed a homicide other than DeHoyos. (26 RT 5703, 5712.) Dr. Fossum wrote a letter stating she was not current on the research pertaining to this issue. (26 RT 5714.) Although Dr. Fossum attempted to research the issue to be better qualified (26 RT 5733), she admitted the articles she found were not pertinent, and not relevant. (26 RT 5737, 5742-5743.)

The connection between job loss and homicide did not need expert testimony. The point that the defense was trying to make, and which they were allowed to make, was how DeHoyos reacted to his job loss. Dr. Fossum explained that as an expert witness, she can assess the psychosocial history and comment on the individual's mind at the time he commits a wide range of behaviors (26 RT 5722), and the trial court explicitly allowed her to do so (27A 6140-6141, 6145-6146). It is not clear what further testimony DeHoyos requested, or how it would have assisted his defense. DeHoyos claims that the testimony that was presented did not give the jury insight into the significance of one's job in shaping his self-esteem and sense of identity, and to the devastating psychic effect. (AOB 152-153.) However, the defense was allowed to present such evidence as it related to DeHoyos, and how it affected his self-esteem and sense of identity. (27A RT 6140-6141.)

DeHoyos also quarrels with the trial court's finding that Dr. Fossum was not qualified. In support of his argument, DeHoyos lists the factors which qualified Dr. Fossum, including her extensive training and clinical

experience in identifying and assessing stressors that affect the behavior of her patients, her evaluation of DeHoyos, and her testimony in the penalty phase of another capital case wherein she considered that defendant's job loss in assessing his psycho-social history. (AOB 153.) These factors go directly to her ability to testify to what the court allowed: that DeHoyos's job loss was a factor that contributed to his mental state, and as to his mental state. (27 RT 5746; 27A RT 6140-6141.) They did not go to her ability to testify in general based on studies about how getting fired affects people such that they commit homicides, which is all that the trial court excluded. (27A RT 6140-6141.) Thus, the trial court properly exercised its discretion in limiting Dr. Fossum's testimony.

DeHoyos claims the expert did not explain the psychological process through which DeHoyos re-directed his rage from Scott to Nadia. (AOB 153.) The trial court did not limit such testimony in its ruling. Any failure to present such testimony was not the result of the court's ruling.

C. DeHoyos's Constitutional Rights Were Not Violated

Nor were DeHoyos's constitutional rights to present witnesses or evidence in support of his defense under the Sixth and Fourteenth Amendments, or his rights to a reliable, individual sentencing determination under the Eighth and Fourteenth Amendments violated, as he argues. (AOB 154.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince, supra,* 40 Cal.4th at p. 1229.) Thus, "they are without merit for the same reasons that [DeHoyos's] state law claims" are without merit. (*Ibid.*) Further, even assuming erroneous admission, any constitutional error would also be harmless because, for the same reasons discussed below, there is no reasonable possibility of a different outcome absent the admission of the evidence.

D. Even If the Trial Court Erred, DeHoyos Was Not Prejudiced

DeHoyos was not prejudiced under the *Watson* standard for state law error because it is not reasonably probable DeHoyos would have received a more favorable result, nor under the *Chapman* standard for constitutional error, requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. (*People v. Rundle, supra,* 43 Cal.4th at p. 134, overruled on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22, citing *People v. Watson, supra,* 46 Cal.2d at pp. 818, 836 [*Watson* standard for state law error]; *People v. Robinson, supra,* 37 Cal.4th at p. 627 citing *Chapman v. California, supra,* 386 U.S. at pp. 23-24 [*Chapman* standard for constitutional error].) As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state.

Moreover, although DeHoyos was not allowed to present general testimony linking job loss to homicides, he was able to present, through Dr. Fossum and his other experts, how his job loss affected him. Thus, the evidence pertaining to him was in front of the jury. Dr. Berg testified that on the day DeHoyos raped and murdered Nadia, he did not have control. Dr. Berg explained there were a series of events that were stressors, including DeHoyos's confrontation at work and his perception he was fired. Dr. Berg explained a normal person would be able to handle those feelings, but not DeHoyos. (21 RT 4700.) Dr. Berg also explained that the events that happened with Scott were a prescription for upsetting DeHoyos's mental balance. (21 RT 4768.) Dr. LaCalle testified he believed the loss of DeHoyos's job played a relevant role in DeHoyos's behavior on the day DeHoyos raped and murdered Nadia. (24 RT 5396-5397.) Dr. LaCalle

explained that DeHoyos had fantasies of working his way up the ladder and becoming management. It was his "ticket to respect" in this country. When DeHoyos lost his job, "something broke inside of him." (24 RT 5397.) Dr. Anderson testified that DeHoyos was concerned about losing his car and job on the day he raped and murdered Nadia, and that he was deeply depressed and suicidal. (25 RT 5537, 5593.) Dr. Fossum testified that DeHoyos's decompensation on the day he raped and murdered Nadia was because the narcissistic insult earlier in the day by Scott, and that he believed he was fired from his job. (27A RT 6145-6146.) Dr. Purisch testified that DeHoyos losing his job was a significant stress and a contributing factor to his state of mind that resulted in his explosive behavior. (28 RT 6501-50.) Thus, the jury was well aware of how the experts believed DeHoyos's job loss affected him. Further testimony generally linking job loss to homicide would not have affected the outcome of the trial under either standard.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN SUSTAINING OBJECTIONS TO QUESTIONS THAT WERE VAGUE, AMBIGUOUS, SPECULATIVE AND IRRELEVANT OF DEHOYOS'S LAY WITNESSES ABOUT THEIR OPINIONS OF HIS MENTAL HEALTH

DeHoyos contends the trial court prejudicially erred because it sustained objections to questions he asked to three lay witnesses, all of which went to their opinion of his mental state. (AOB 156-161.) The trial court properly exercised its discretion in sustaining the prosecutor's objections to the questions, which were vague, ambiguous, called for speculation and called for irrelevant information. Moreover, the facts underlying the witnesses testimony were admitted. Thus, assuming error, DeHoyos was not prejudiced.

A. The Excluded Testimony

Paul Shawhan worked with DeHoyos in 1989 at USA Aluminum. (18 RT 3990, 3993.) Shawhan was asked whether he observed anything about DeHoyos or had conversations with him that were strange, abnormal, or different. The prosecutor objected that the question was vague and ambiguous, and the court sustained the objection. (18 RT 3990.) The parties approached at the defense request, and DeHoyos's attorney explained that a symptom of DeHoyos's mental illness is that he tends to be boastful, exaggerate, and tell untruths about things that were common knowledge to the average person. The court explained that it did not think a lay person could be asked if someone was "abnormal." It ruled the defense could ask whether something unusual was said, and the jury could decide its significance if it was something that was relayed to the expert witnesses. (18 RT 3991.)

Defense counsel then proceeded to ask Shawhan whether he observed DeHoyos do or say anything "unusual." Shawhan then explained that DeHoyos acted like a self-appointed police officer, and continually reported other employees "infractions." (18 RT 3993.) He testified DeHoyos was a slower worker than the other employees. (18 RT 4010.) Shawhan eventually terminated DeHoyos because he got into a physical confrontation with another employee at the lunch truck, yelling and getting in the other employee's face. (18 RT 3993, 4006.) Although DeHoyos did not display any anger towards Shawhan and was always courteous to supervisors, during the confrontation with the other employee he was agitated, upset, anxious and angry. (18 RT 4001, 4005-4006.) Shawhan opined that DeHoyos had a bad temper. (18 RT 4007.) When Shawhan fired DeHoyos, DeHoyos said it was okay because he could get a job with either the Los Angeles Police or Sheriff. (18 RT 3995.)

Sam Morrison worked with DeHoyos in 1982 for about a year in a telemarketing firm. (18 RT 4016-4017, 4022.) He described DeHoyos's odd behavior, including jumping on top of his desk and yelling in the phone. He said DeHoyos acted like a class clown to break up the monotony and make them laugh. (18 RT 4017.) DeHoyos used alcohol but not drugs. DeHoyos used a big vase as a pitcher for margaritas, and drank about a pitcher and a half. (18 RT 4018.) When Morrison was asked whether he had ever observed DeHoyos act "in that manner, impulsively," the prosecutor objected that the question called for speculation and that Morrison lacked the foundation to answer the question. The court sustained the objection. (18 RT 4019.) Defense counsel then asked whether Morrison observed anything unusual about DeHoyos, and he said that DeHoyos said he had a lot of women that sent him money from all over the world. (18 RT 4019-4020.) He also described DeHoyos as boastful about women. (18 RT 4020.)

Maria Esparza, who married DeHoyos after a few months of dating and had a child with him, testified that DeHoyos's jealousy caused problems. (25 RT 5621-5624.) One time DeHoyos came home, took items out of his backpack, and angrily tore things up. (25 RT 5635.)

When she was three months pregnant, DeHoyos became jealous and swore at Esparza. (25 RT 5625, 5630, 5657.) They fell in the bathroom, and DeHoyos hit Esparza's chest with his knee and choked her. (25 RT 5625.) He had his hands around her throat and neck and told her he would kill her. (24 RT 5346-5348; 25 RT 5639-5641.) She started to lose consciousness. (25 RT 5640.) Esparza grabbed a spoon or fork and jabbed him, and hit him once in the face. He got up, called her a "bitch" and left. She called to DeHoyos, and he pushed her away and ran. (25 RT 5626.) DeHoyos's hands were shaking, his face turned yellow, and his eyes were big. (26 RT 5654-5655.) The next day, Esparza had bruises on her neck.

(25 RT 5638.) DeHoyos left Esparza and she never saw him again. (25 RT 5642.)

At their wedding, Esparza's brother told DeHoyos to try to make Esparza happy. DeHoyos did not like the comment, and he got into a fight with his brother-in-law. (24 RT 5359; 25 RT 5627-5628.) Defense counsel asked Esparza to describe DeHoyos's behavior in the fight with her brother. She said that it was "a normal fight." Defense counsel then asked, "Was he out of control? Was he in control? Was he wild? Was he savage-acting?" The prosecutor objected that the question "called for speculation and out of control." Defense counsel added, "in her description, Your Honor." The court sustained the objection. Defense counsel then followed up and asked, "What did you observe about his behavior, ma'am, as far as control? In control or out of control?" The prosecutor again objected that the question called for speculation, and "no foundation as to his control of his own behavior." The court sustained the objection. (25 RT 5628.)

Defense counsel then elicited that DeHoyos did not fight anyone else during the time that Esparza knew him. Defense counsel asked Esparza whether she knew "the reason for Mr. DeHoyos' attack on you [] when you ended up in the bathroom?" The prosecutor objected that it called for speculation. The court stated that she could testify as to something that DeHoyos told her, and asked defense counsel if that was what he was asking. Defense counsel responded, "It wouldn't be offered for the truth, then. It would be offered for his state of mind at the time, Your Honor." The prosecutor stated he did not object to such statements that DeHoyos made, but objected to her testimony regarding her opinion as to the real reason. The court sustained the objection. (25 RT 5629.) Defense counsel then asked what DeHoyos said regarding why he attacked her, and Esparza said that DeHoyos was "ill-treating [her] because of his jealousy. And he was calling me 'bitch' and many things like that." (25 RT 5629-5630.)

Defense counsel subsequently asked Esparza if she knew whether DeHoyos ever attempted to commit suicide during their marriage. The prosecutor objected that there was no foundation for the question, and that it called for speculation. The trial court told defense counsel that he first needed to elicit acts, then it might allow Esparza to express an opinion depending on "what combination appears." (25 RT 5633.) Defense counsel then asked whether DeHoyos ever threatened to commit suicide during their marriage, and the trial court sustained the prosecutor's objection that it was irrelevant. (25 RT 5633-5634.)

B. The Trial Court Properly Excluded the Testimony of the Lay Witnesses Regarding DeHoyos's Mental State

A trial court's ruling on the admissibility of testimony is reviewed for abuse of discretion. (*People v. Watson, supra*, 43 Cal.4th at p. 692.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish disputed material facts such as identity, intent, or motive. (*People v. Scheid, supra,* 16 Cal.4th at p. 13.) Evidence Code section 800 provides that

> [i]f a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony.

In other words, lay opinion testimony is admissible only where "the concrete observations on which the opinion is based cannot otherwise be conveyed." (*People v. Hinton* (2006) 37 Cal.4th 839, 889, quoting *People v. Melton* (1988) 44 Cal.3d 713.) "Generally, a lay witness may not give an opinion about another's state of mind. However, a witness may testify

about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397.)

Here, the testimony was either not relevant, was speculative, or was improper lay witness testimony. Shawhan's characterization of DeHoyos's actions as "abnormal" was irrelevant—what was relevant was Shawhan's observations of what DeHoyos did. Furthermore, asking whether DeHoyos's actions or conversations were "abnormal" was vague, as it is not clear what standards Shawhan used to evaluate what was "normal." Also, whether DeHoyos acted or said things that were "abnormal" would not be an opinion that is rationally based on the perception of the witness, and helpful to a clear understanding of his testimony; thus it is impermissible lay opinion. (*People v. Hamilton, supra,* 45 Cal.4th at p. 929; Evid. Code, § 801; but see *People v. Manoogian* (1904) 141 Cal. 592, 595-598 [holding it was admissible for lay witnesses to testify regarding whether defendant was acting rationally or irrationally because it called for the result of the witness's observations].) The testimony regarding whether DeHoyos was "abnormal" was not such that "the concrete observations on which the opinion is based cannot otherwise be conveyed." (*People v. Hinton, supra,* 37 Cal.4th at p. 889, quoting *People v. Melton, supra,* 44 Cal.3d 713, 744.)

Similarly, Morrison's testimony about whether he ever saw DeHoyos act "impulsively" called for speculation in that he would not know what triggered DeHoyos's actions—whether his actions were based on impulse or rational thought. What is proper, and what was allowed, was for Morrison's description of DeHoyos's actions. The question to Morrison was also an improper lay opinion, as it would not be an opinion that was rationally based on the perception of the witness, and helpful to a clear understanding of the testimony. (*People v. Hamilton, supra*, 45 Cal.4th at p. 929; Evid. Code, § 801.)

Additionally, whether DeHoyos threatened to commit suicide when he was married to Esparza eight or nine years prior to raping and murdering Nadia did not lead logically, naturally, and by reasonable inference to establish disputed material facts, such as DeHoyos's intent; thus it was not relevant. Similarly, Esparza's descriptions of whether DeHoyos was "out of control" called for speculation. Esparza could properly describe DeHoyos's actions, and the jury could decide whether his actions were "out of control." Likewise, Esparza's testimony regarding why DeHoyos attacked her would be speculative. Esparza was allow to testify to anything DeHoyos told her about why he attacked her, but her testimony regarding his reasons for attacking her, other than what he told her, would necessarily be speculative.

C. DeHoyos's Constitutional Rights Were Not Violated

Nor were DeHoyos's constitutional rights to present witnesses or evidence in support of his defense under the Sixth and Fourteenth Amendments to the Constitution and Article I, section 15, of the California Constitution, or his right not to be convicted while he was insane under the Fourteenth Amendment to the Constitution and Article I, sections 7 and 17 of the California Constitution, or his rights to a reliable, individual sentencing determination under the Eighth and Fourteenth Amendments violated, as he argues. (AOB 168.) "Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince, supra,* 40 Cal.4th at p. 1229.) Thus, "they are without merit for the same reasons that [DeHoyos's] state law claims" are without merit. (*Ibid.*) Further, even assuming erroneous admission, any constitutional error is harmless because, for the same reasons discussed below, there is no reasonable possibility of a different outcome absent the admission of the evidence.

D. Even If the Trial Court Erred In Excluding the Testimony, DeHoyos Was Not Prejudiced

Even if the trial court erred in excluding the testimony, under either standard, DeHoyos was not prejudiced. Exclusion of the testimony, if error, was only state law error, and it is not reasonably probable DeHoyos would have received a more favorable result had the testimony been admitted. (*People v. Rundle, supra*, 43 Cal.4th at p. 134, overruled on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22, citing *People v. Watson, supra*, 46 Cal.2d at p. 836. Even under the *Chapman* standard for constitutional error, urged by DeHoyos (AOB 169), requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict, any error was harmless. *People v. Robinson, supra,* 37 Cal.4th at p. 627 citing *Chapman v. California, supra*, 386 U.S. at pp. 23-24.) As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state.

The excluded evidence would not have altered the outcome of the proceedings. DeHoyos still would have been convicted of the crimes, found sane, and given the death penalty even had Shawhan testified DeHoyos was "abnormal," Morrison testified he acted "impulsive," and Esparza testified he was "out of control," explained why she thought he attacked her, and testified that DeHoyos had threatened suicide.

Although Shawhan was not allowed to testify DeHoyos was "abnormal," he was allowed to testify to all of DeHoyos's actions that led Shawhan to conclude DeHoyos was "abnormal." (18 RT 3993-3994 [DeHoyos acted like a self-appointed police officer and continually reported other people's infractions; he got into a fight with another co-

worker and got into that worker's face]; 3995 [when Shawhan fired DeHoyos, DeHoyos said it was okay because he could get a job in law enforcement]; 4010 [DeHoyos was a slow worker]; 4007 [DeHoyos had a bad temper].) In his offer of proof as to why the testimony should be admitted, defense counsel explained that part of DeHoyos's mental illness was that he was grandiose, exaggerated, boastful and told untruths. The trial court did not exclude the underlying information DeHoyos attempted to elicit. (18 RT 3991.) Moreover, defense counsel rephrased the question and asked Shawhan whether he ever observed DeHoyos do anything "unusual." (18 RT 3993.) Shawhan explained the "unusual" things DeHoyos did. Thus, the jury had all the information, and it would not have made any difference if Shawhan characterized the information as "abnormal" instead of "unusual."

Additionally, although Morrison did not testify that DeHoyos was impulsive, that was clear from other witnesses testimony. Dr. LaCalle testified that DeHoyos had a history of "impulsive" decisions—sudden marriages, sudden departures from marriages, sudden joining of the Army, going AWOL, and returning to the Army and turning himself in. (22 RT 5021.) Dr. LaCalle also testified that he interviewed Erudina Martinez who told Dr. LaCalle that DeHoyos was impulsive and a little crazy. (24 RT 5355.) Dr. Fossum testified that she was told by Kristin Knowles about DeHoyos's impulsive control disorder. (27 RT 5875.) In addition, Dr. Fossum testified that DeHoyos had poor impulse control. (27A RT 6129.) Dr. Buchsbaum testified that he would expect someone with the type of brain damage that DeHoyos had to have problems controlling his impulsivity and rage. (28 RT 6329.)

Similarly, although Esparza did not testify that DeHoyos threatened suicide during their six month marriage in 1984 (25 RT 5623-5624), other witnesses established DeHoyos was suicidal at the time he raped and

murdered Nadia. Dr. Anderson testified that DeHoyos told him he spoke to Nadia about being suicidal because he lost his job and car. (25 RT 5540.) Dr. Anderson opined that DeHoyos was suicidal and deeply depressed on the day he raped and murdered Nadia. (25 RT 5593.) Although Esparza did not testify that DeHoyos was out of control when he got into a fight with her brother, the jury was well aware that DeHoyos had a bad temper and often lost control. Dr. Berg testified that DeHoyos was out of control when he attacked his first wife, Lara, and it was "another example of uncontrolled rage." (19 RT 4345.) Alexander DeHoyos testified that when DeHoyos attacked their mother, DeHoyos was "uncontrollable." (20 RT 4490.) Dr. Berg testified that DeHoyos's relationships were marked by an inability to control his temper, and his rage reaction with Nadia was a sign of his inability to control himself. (21 RT 4698, 4702.) Dr. LaCalle testified DeHoyos had multiple incidents of rage and uncontrollable violence, where he lost all rational control. (22 RT 4022.) Dr. LaCalle opined that DeHoyos had difficulties controlling his behavior because of his organic personality syndrome. (23 RT 5211.) Dr. Fossum testified she believed DeHoyos's brain injuries rendered him unable to exercise normal controls in terms of stopping a response. (26 RT 5763.) She also believed in a decompensated state, DeHoyos would be unable to control himself and make rational judgment. (27A RT 6132, 6157.)

Additionally, although Esparza was not able to testify to why DeHoyos attacked her, Dr. LaCalle explained why DeHoyos attacked Esparza. Specifically, Dr. LaCalle testified that it was because DeHoyos was jealous about Esparza working in a bar. (24 RT 5348.) Additionally, Esparza explained that her problems with DeHoyos were caused by his jealousy, and when discussing the fight in the bathroom, she explained that DeHoyos was jealous. (25 RT 5624, 5630.)

Thus, all the excluded testimony was before the jury from other witnesses or in slightly different forms. Given that, and the overwhelming evidence against DeHoyos, even if the trial court erred in excluding the testimony, DeHoyos was not prejudiced. DeHoyos argues, however, that the evidence was critical to show that DeHoyos's mental illness was genuine and longstanding. (AOB 167.) DeHoyos was not prohibited from showing his mental illness was genuine and longstanding. He was able to attempt to prove genuine longstanding mental illness through various family members, co-workers, ex-wives, and expert witnesses. The trial court's sustaining the objections to a few questions did not prohibit DeHoyos from presenting evidence of such mental illness.

VI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE PROCESS FOR APPOINTMENT OF EXPERT WITNESSES

DeHoyos contends the trial court prejudicially erred by giving the jury an instruction regarding the process for appointing expert witnesses because it unfairly highlighted the cost of prosecuting and defending DeHoyos, thereby injecting an improper consideration into the jury's deliberations. (AOB 170, 173-174.) Any error in giving the instruction was invited error, as DeHoyos requested the instruction, or at least forfeited, as DeHoyos failed to object to the instruction as given. Moreover, the instruction was a proper instruction because it was a correct statement of the law, and was necessary so the jurors would not be misled based on DeHoyos's questioning of his expert witnesses that implied his expert witnesses were unbiased and credible because they were appointed by the court. Even if there was error, it was harmless.

A. Relevant Facts

In his opening statement, defense counsel began by telling the jurors that since DeHoyos was arrested, "there has been an attempt *by the courts*

and by counsel, to find out what his mental state or mental problems might be." (17 RT 3724, emphasis added.) He then said,

> [t]he evidence will show in the guilt phase that a number of doctors appointed *by the court* have examined Richard DeHoyos and have tested Richard DeHoyos and they have performed such examinations in the psychology field as M.M.P.I. and other examinations or other tests.

(17 RT 3725, emphasis added.) In questioning of witnesses, numerous experts were asked and/or testified about being appointed or paid by the court.

Dr. Kowell testified his office made arrangements with "the court" to be paid. (18 RT 4069.) During cross-examination, he explained that he was sent certain records from "the court." (18 RT 4090.) Upon further cross-examination, he clarified that it was not sent "directly" by the court, and instead was sent by the defense investigators. (18 RT 4090.)

Dr. Berg testified that he was contacted by defense counsel to evaluate DeHoyos. (19 RT 4317.) On cross-examination, the prosecutor asked Dr. Berg about his testimony in the first trial, and asked him whether he had "testified that [he was] appointed by the court to conduct an examination with respect to Mr. DeHoyos."[46] (21 RT 4712-4713.) Dr. Berg said he did not recall whether he testified to that. (21 RT 4713.) Dr. Berg later explained that he was working for the defense team as a consultant in evaluating DeHoyos's state of mind. He explained, "I didn't mean to misrepresent that the court specifically asked me for an opinion. It is clear that I wrote the reports to the defense attorneys." (21 RT 4799.)

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[46] DeHoyos argues that in his direct examination, Dr. Berg did not testify that he had been appointed by the court. (AOB 175.) The prosecutor was not referring to his direct examination; rather he was referring to Dr. Berg's testimony in the first trial.

Dr. LaCalle testified he was appointed by the court to evaluate DeHoyos. Defense counsel then asked, "In particular, April 14th, 1989, were you appointed by the Central Orange County Municipal Court as a medical psychological expert in the case of Richard DeHoyos?" Dr. LaCalle answered, "that's my understanding." (22 RT 5015.) He explained he was on a panel of doctors in Orange County that the courts recognize and appoint for psychological evaluations. Defense counsel then asked him to tell about that panel, and the prosecutor objected. (22 RT 5004.) Defense counsel then said in front of the jury,

> I believe this gentleman is a member of the panel of doctors that have been reviewed by the courts and accepted by the courts to perform certain psychological evaluations on people charged with crimes here in Orange County. . . . I was just going to ask him how to explain how that panel was comprised and how did one get on that panel, and I think they review the qualifications.

(22 RT 5004-5005.) The court sustained the prosecutor's objection. (22 RT 5005.) Dr. LaCalle then explained that he had done about 1000 evaluations related to criminal activity, many of which were ordered by the court. (22 RT 5007-5008.) On cross-examination the prosecutor clarified Dr. LaCalle's testimony, and Dr. LaCalle agreed after reading the court order that he was appointed by the court for the defense. He explained that the court order said he was an expert for medical/psychological issues for the defense. (23 RT 5098.)

Dr. Anderson testified that he was requested by the Orange County Superior Court to evaluate DeHoyos. (25 RT 5472.) He explained further on cross-examination that he was appointed by the court under Penal Code section 1026, "which requires the court to appoint doctors when there has been a plea of not guilty by reason of insanity." (25 RT 5488.) On re-direct examination, he testified that he was appointed by a judge, not by the defense. (25 RT 5599.)

Dr. Fossum testified that she received some communication from the defense to assist in the presentation of their case, and was subsequently appointed by the Superior Court to act as a consultant. She explained she was issued an order from the court pertaining to the payment of her fees. (26 RT 5701.) The prosecutor asked her how much she had billed "whoever is paying" for her fees. Defense counsel objected to the words "whoever is paying" and stated "counsel knows the court pays for it." (26 RT 5771.) On cross-examination, Dr. Fossum testified that she was retained by defense counsel. (27A RT 6052-6053.)

Dr. Purisch testified he was appointed by the court at the defense request to evaluate DeHoyos. (27A RT 6180.) He also testified that he was paid by the court. (28 RT 6501-10.)

When the prosecutor asked Dr. Buchsbaum how much he had been paid for assisting the defense, defense counsel objected and stated "that assumes a fact not in evidence that he is assisting the defense. He has evaluated DeHoyos." (28 RT 6334.)

Defense counsel requested the court give a special instruction, which was given in the first trial, that explained the process for appointment of expert witnesses.[47] (4 CT 1371; 29 RT 6658; 3 CT (lst) 771.) The prosecutor also requested the instruction with a slight modification. (29 RT 6658; 4 CT 1413 [prosecutor's modified instruction].) The modification was minor and only clarified that the application was "submitted by defense attorneys," that the experts "have been asked by the defense to assist with the defense," and that the Court made its determination "based on the

[47] The parties referred to the instruction as the "page 29 instruction." (29 RT 6658.) The number "29" was written in the bottom right hand corner of the instruction. (3 CT (1st) 771; 4 CT 1413.) In the first trial, the trial court proposed the instruction and neither party objected to it. (12 RT (1st) 2964-2965.)

declarations submitted by the defense attorneys." (4 CT 1413.) Defense counsel objected to the modified language. (29 RT 6658.)

The prosecutor explained that he wanted the jury to understand that the court was approving the experts based on information provided by the defense, not based on an independent review by the court. (29 RT 6659.) He believed that it was misleading to create the impression for the jury that the witnesses were validated by the court. Defense counsel argued that there was scrutiny by the court as to the justification and costs of the experts, so the requests were not just granted based on a request by the defense. (29 RT 6662.)

The court "compromised" and gave an instruction that was similar to the one given in the first trial, with a slight modification. (29 RT 6672.) It explained that of the eight experts who testified for the defense in the guilt phase, only two were on the court's list of approved psychiatrists and psychologists, so the names were, in fact, submitted by defense counsel. (29 RT 6673.) The trial court believed some modification of the instruction was fair because the defense "took advantage of the fact that the court had appointed them, which was not really necessary" . . . "for whatever you can gain from that regarding the witness' credibility." (29 RT 6674, 6677.) The court thus gave the special instruction, which was the same as that requested by the defense and given in the first trial, except adding the italicized portion below:

> Under the law an indigent defendant (or his attorney) may apply to the Court for public funds to employ investigators, experts and others reasonably necessary for the preparation or presentation of the defense. For this purpose a defendant is 'indigent' if he does not have the financial means to secure those services himself. The application is confidential until disclosed by the defense before or during the trial. The purpose of this law is to ensure that an indigent defendant is not deprived of an effective defense because of his financial condition, since the

investigation and presentation of the prosecution is paid for with public funds.

The Court is involved in the [sic] reviewing and processing the application *submitted by the defense attorneys*, and in appointing the investigators, experts, and others *requested in the application*, only for the purpose of ensuring that the persons appointed are reasonably necessary for the preparation or presentation of the defense, and to monitor the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose.

Neither the approval of such a request, nor the appointment of such an investigator, expert, or other person by the Court to assist with the defense, should be taken by the jury as an indication that the Court has taken any position with respect to the credibility of such person when that person later testifies as a witness. It is for you, the jury, to determine the credibility if [sic] any such witness and the weight to be given to the testimony of such a witness.

(4 CT 1450, emphasis added.)

B. DeHoyos Cannot Complain on Appeal Because Any Error Is Invited Error or at a Minimum Is Forfeited Because of His Failure to Object

With the exception of the minor modification, DeHoyos requested the special instruction, that he now complains was improper and prejudicial. DeHoyos only objected to the language that was modified, which is not the subject of his claims of error on appeal. Thus, any error is invited and not cognizable on appeal. A defendant is barred from challenging instructions that were requested based on a conscious and deliberate tactical choice. (*People v. Harris, supra,* 43 Cal.4th at p. 1293.) Here, DeHoyos requested the special instruction based on a conscious and deliberate tactical choice.

DeHoyos claims that it is not invited error because counsel could have had no tactical purpose in requesting an instruction that injected improper considerations into the jury's deliberations. (AOB 173-174, fn. 57.) The instruction did not inject improper considerations into the jury's

deliberations. Furthermore, the instruction furthered the defense tactic showing that the court was somewhat involved in the process of hiring and funding experts. Counsel explained,

> the prosecution was making it appear that there was just a well or a bucket of money over here that the defense was just dipping into, and pay at will any expert that they wanted. And it made it appear as though the experts were influenced and testimony was influenced by this unending source of revenue.

(29 RT 6675-6676.) The instruction served counsel's tactic of showing the funds were reviewed by the court, and the fees were monitored, so the jury would infer the fees were reasonable.[48]

Even if DeHoyos did not request the instruction for tactical reasons, and it is not invited error, at a minimum any error was forfeited by DeHoyos's failure to object. Normally, a defendant forfeits errors regarding jury instructions by his or her failure to object at trial. An appellate court, however, may consider instructional errors if "substantial rights" of the defendant are affected. (Pen. Code, §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.) As DeHoyos did not object on the bases he now raises, and his substantial rights were not affected, he has forfeited his claim of error.

DeHoyos claims that by giving the instruction, the trial court injected improper considerations of expense into the trial, that it was not properly based on the evidence, and that it was misleading. (AOB 174-176.) DeHoyos, however, never objected on these grounds in the trial court.

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[48] Additionally, as this was a retrial and the instruction was given in the first trial, if counsel did not want the instruction given, he could have merely changed his questioning so he did not imply the witnesses were neutral because they were appointed by the court. This factor also shows it was a tactical decision to proceed with the questioning of witnesses, and to offer this instruction to counter the prosecutor's cross-examination of the witnesses about how much they were being paid as expert witnesses.

Since he did not bring these particular complaints to the trial court's attention, he has forfeited these claims on appeal, unless they affected his substantial rights. (*People v. Butler* (2009) 46 Cal.4th 847, 882, fn. 18.) As they did not affect his substantial rights, his claims are forfeited.

C. The Jury Instruction Was Proper Because It Was A Correct Statement of the Law and Properly Corrected Any Misperceptions DeHoyos Created

As DeHoyos concedes, the jury instruction was legally accurate. (AOB 172.) It was based on the language contained in Penal Code section 987.9, subdivision (a)[49] and closely tracked that statute. Thus, it was legally accurate. It was appropriate because DeHoyos, in questioning his witnesses, made a point to ask them if they were appointed by the court—thereby giving the impression that the court endorsed the witness to enhance the witness's credibility, and to show the lack of bias. This in turn caused the prosecutor to follow-up with questions asking more specifics about the appointment process, to accurately portray the court's role.

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[49] Penal Code section 987.9, subdivision (a) provides as follows:

> In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

DeHoyos focuses on the portions of the instruction that informed the jury that the purpose of the law was to ensure an indigent defendant was not deprived of an effective defense because of his financial condition; its explanation that the investigation and presentation of the prosecution was paid for with public funds; and that the court was involved only for the purpose of ensuring that the persons appointed were reasonably necessary for the preparation and presentation of the defense and to monitor the fees to ensure they were within the guidelines established by the Court.[50] (AOB 172-174.) He argues, based on *People v. Barraza* (1979) 23 Cal.3d 675, *People v. Gainer* (1977) 19 Cal.3d 835, and *People v. Hinton* (2004) 121 Cal.App.4th 655, 600, that the instruction injected irrelevant, impermissible considerations of cost into the jury deliberations. (AOB 174.)

The cases cited by DeHoyos all have to do with the impropriety of giving an "*Allen* charge" to a deadlocked jury. An *Allen* charge directs the minority jurors of a deadlocked jury to rethink their position in light of the majority's views and explains to the jurors that at some time the case must be decided. (*People v. Gainer, supra,* 19 Cal.3d at p. 845.) In *People v. Gainer, supra,* this Court held the portion of the instruction directed to minority jurors placed excessive and illegitimate pressures on jurors to acquiesce in a verdict. (*Id.* at pp. 850-851.) The portion of the instruction that the case must at some time be decided implied a mistrial would result in a retrial and was not legally accurate because the case would not necessarily be retried. (*Id.* at p. 851-852.) Although the trial court in

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[50] As noted *ante*, the portion of the instruction DeHoyos now complains of, which is italicized in the AOB at pages 160-161, was not objected to by DeHoyos, and was requested by him (4 CT 1371; 29 RT 6658). The modified language he objected to at trial is not the subject of his claim of error.

Gainer did not refer to the expense and inconvenience of a retrial, this Court also noted such language was also a common feature of an *Allen* charge, and that it was irrelevant to the issue of the defendant's guilt, and thus similarly impermissible. (*People v. Gainer, supra,* 19 Cal.3d at p. 852, fn. 16.)

In *People v. Barraza, supra,* 23 Cal.3d at p. 685, this Court discussed the trial court's reference to the expense and inconvenience of retrial when instructing a deadlocked jury. It noted that although the trial court did not link the added expense to a possible retrial, the link was obvious. It explained the troubling aspect was not so much the irrelevance of the expense

> as the additional pressure to decide thus created. Consideration of expense 'may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government.' . . . [and] augments the substantial, if subtle, pressure created by the improper instructions concerning the need for retrial.

(*People v. Barraza, supra,* 23 Cal.3d at p. 685.)

Here, the trial court did not give an *Allen* charge. The cases relied on by DeHoyos discussed a wholly different instruction, based on different circumstances. He has taken the language out of these cases for his assertion that the instruction about expert witnesses was improper. During deliberations, the expense and inconvenience of a retrial is not relevant. Here, however, the trial court instructed the jurors about how expert witnesses were paid because it became relevant based on counsel's questions of the witnesses. "The 'existence or nonexistence of a bias, interest, or other motive' on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony (Evid. Code, §780, subd. (f))." (*People v. Williams, supra*, 43 Cal.4th at p. 634.) Whether an expert witness is retained by a party "is relevant to possible bias and may be

considered by the jury in weighing the testimony of the expert." (*People v. Coddington, supra,* 23 Cal.4th at p. 582, overruled on another point by *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13.) DeHoyos attempted to lend credibility to his expert witnesses by asking them whether they were appointed by the court, instead of whether they were retained by DeHoyos. Such questions created a false impression. Thus, it was relevant to explain the process for judicial review and appointment of expert witnesses, so the jurors could properly assess the expert witnesses credibility.

Nor did the instruction have a coercive effect on the jurors, as claimed by DeHoyos and cautioned about in the cases discussing the *Allen* charge. (AOB 174.) The cases cited by DeHoyos were discussing how an *Allen* charge can be coercive to a deadlocked jury to reach a verdict. (See *People v. Gainer, supra*, 19 Cal.3d at pp. 849-850.) Here, the court's instruction would in no way "coerce" the jury to reach a verdict. The only thing the instruction did was explain the process of appointment so the jurors could assess the expert witnesses credibility. In fact, the instruction here specifically referenced the juror's job to determine the credibility of "any such witness and the weight to be given to the testimony of such a witness." (4 CT 1450; 30 RT 6860.) In other words, the instruction at issue here centered around, and was clearly for the purpose of, explaining the court's involvement with the expert witnesses for the purpose of facilitating the jurors assessment of the witnesses credibility.

DeHoyos also complains that the instruction was not supported by the facts because defense counsel did not repeatedly elicit testimony that the expert witnesses had been appointed by the court, thereby insinuating the court had validated their testimony. (AOB 175.) Not only did DeHoyos not object to the instruction based on this theory at trial, his claim is belied by the record. Defense counsel told the jurors as early as opening statement

that "a number of doctors [were] appointed by the court" to examine DeHoyos and perform tests on him so that "the courts" and "counsel" could "find out what his mental state or problems might be." (17 RT 3724-3725.) Drs. Kowell, Fossum and Purisch told the jury that they were being paid by the court. (18 RT 4069 [Kowell]; 26 RT 5701 [Fossum]; 27A RT 6501-10 [Purisch].) Dr. Kowell said he was sent records from the court. (18 RT 4090.) Drs. LaCalle, Fossum, and Purisch told the jury that they were appointed by the court to evaluate DeHoyos. (22 RT 5015 [LaCalle]; 26 RT 5701 [Fossum]; 27A RT 6180 [Purisch].) Defense counsel made a number of speaking objections, in front of the jury, where he gave the jury the impression the experts were appointed by the court. (22 RT 5004-5005 [he explained Dr. LaCalle was on a panel of doctors reviewed by the courts and accepted by the courts to conduct psychological evaluations for defendants]; 26 RT 5771 [he stated "counsel knows the court pays for [expert witness fees]"]; 28 RT 6334 [counsel argued it assumed a fact not in evidence that expert witness was assisting the defense; rather "[h]e has evaluated DeHoyos."].) Given the statements by defense counsel, and the expert testimony, there was an attempt to insinuate the expert witnesses had been appointed by the court. While the prosecutor may have clarified the mistaken impression that was left with the jury, the facts certainly supported an instruction explaining the testimony and the appointment process.

Next DeHoyos contends the instruction was misleading because the jury would have understood it to mean that the court must determine whether the ancillary personnel were reasonably necessary, but not that the court was also required to determine whether the funds were reasonably

necessary. (AOB 176.) DeHoyos's claim that the jury was misled is unsupported. The instruction specified that the court appoints personnel

> for the purpose of ensuring that the persons appointed are reasonably necessary for the preparation or presentation of the defense, *and to monitor the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose.*

(4 CT 1450, emphasis added.) The italicized language explains that the fees were monitored by the court.

DeHoyos argues, however, that the court did not explain the nature or the purpose of the guidelines referred to in the instruction, and that it followed that it was likely that the jury understood the instruction to mean an expert could not receive any fees unless the court had determined that his or her services were reasonably necessary. (AOB 176-177.) There was no request to advise the jurors about the guidelines, and it was unnecessary. The instruction explained the process for appointment of expert witnesses to put in context the questions asked of the witnesses about who appointed them. Further details on how the court decided the fees was not necessary.

Apparently DeHoyos's argument rests on an interpretation that Penal Code section 987.9 only requires the court to determine the reasonableness of the funds, and not the reasonableness of the request for appointment. (AOB 176-177.) Penal Code section 987.9 specifically provides that the court "shall rule on the reasonableness of the request." Thus, it is ruling on the reasonableness of the appointment, and the reasonableness of the funds.

Relying on *People v. Barraza,* DeHoyos concludes that the jurors "may have felt pressured to reach a verdict . . . simply to avoid the costs of a retrial." (AOB 177-178.) As explained *ante*, the cited passage from *Barraza*, and the holding, is in the context of an *Allen* instruction to a deadlocked jury. Such an instruction was perceived to have "efficiency as a

means of 'blasting' a verdict out of a deadlocked jury." (*People v. Gainer, supra*, 19 Cal.3d at p. 844.) Telling a deadlocked jury that they should continue to deliberate to avoid the costs of a retrial created undue pressure on minority jurors and a coercive effect on jurors concerned about the costs of government. (*People v. Barraza, supra*, 23 Cal.3d at p. 685.) Here, there is no similar concern about pressuring or coercing the jurors to reach a verdict. There was nothing coercive at all in the instruction. Additionally, as the instruction was proper and was not misleading or prejudicial, it did not deprive DeHoyos of his due process and fair trial rights as he contends. (AOB 179.)

D. DeHoyos Was Not Prejudiced By Any Error

Even if the claim is cognizable, and this Court finds the instruction was improper, DeHoyos was not prejudiced by any error. Under state law, instructional error is harmless if there is no reasonable probability the outcome of the defendant's trial would have been different had the jury been properly instructed. (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209, citing *People v. Flood* (1998) 18 Cal.4th 470, Cal. Const., Art. VI, §13, *People v. Watson, supra,* 46 Cal.2d at pp. 836-837.) Under federal law, the error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Cole, supra*, 33 Cal.4th at pp. 1208-1209, citing *Neder v. United States, supra,* 527 U.S. at pp. 8–16, 119 ; *Chapman v. California, supra*, 386 U.S. at pp. 23-24; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Flood, supra*, at pp. 502–504.) Any error was that of state law. Even under the more onerous *Chapman* standard for constitutional error, urged by DeHoyos (AOB 179), any error was harmless. As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed

her. He then stuffed her body into a trashcan and discarded her before fleeing the state.

The instruction did not focus on the costs of the defense; rather it also stated the prosecution was paid for with public funds. Nor did it state how much the trial, the retrial, the prosecution or the defense cost. It explained the purpose of the law that allowed an indigent defendant to employ investigators, experts and others for a criminal defense: to ensure an indigent defendant is not deprived of an effective defense because his financial condition.

DeHoyos claims it is "reasonably likely that the instruction led the jury to consider the costs expended in bringing appellant to trial, and to find him guilty simply to avoid the costs of a retrial." (AOB 179.) The claim that the jury would find DeHoyos guilty simply to avoid the costs of a retrial because of this instruction is untenable. The jury found DeHoyos guilty because he so plainly was guilty. He admitted he killed Nadia, and told an unreasonable story about sodomizing her after he killed her. His mental defense was not credible given his planning and sophistication in luring a school-age child into his car with a ruse that he was a teacher and his actions after committing the crime. He stuffed her body into a trashcan and discarded her as if she were trash, then fled the state. When confronted by the police, he lied and said he did not perpetrate the crime. Only when confronted with evidence that his fingerprint tied him to the crime did he admit that he killed Nadia. He then explained that he killed her to stop her from screaming by holding her head underwater for five to ten minutes, which showed his act was premeditated and deliberate. It was his actions that led to the jury finding him guilty; not this instruction explaining how expert witnesses were to be paid. Thus, any error in giving the instruction was harmless under either standard.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE LIMITED PURPOSE FOR ADMISSION OF THE UNCHARGED CRIMINAL ACTS AGAINST LARA AND ESPARZA AND DID NOT ERR BY FAILING TO FURTHER LIMIT THEIR TESTIMONY

DeHoyos contends the trial court committed prejudicial error by denying his request for a jury instruction limiting consideration of his prior acts of misconduct against Gloria Lara and Maria Esparza so the evidence would only be considered "to the extent that the expert witnesses relied upon the evidence." He claims the court's failure to so limit the evidence violated his constitutional rights to due process, to have a properly instructed jury find all the elements proven beyond a reasonable doubt, and to a fair and reliable trial under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 16 and 17 of the California Constitution. (AOB 181-182, 187-188.) DeHoyos never submitted an instruction to limit the evidence in the manner he now claims was error, so he has forfeited his claim of error. Even had he preserved his claim, it lacks merit, as the trial court properly limited the evidence so it would not be considered as propensity evidence. DeHoyos offered the evidence to show his lack of intent, thus it was proper for the jury to be instructed they could consider it to determine whether he possessed the necessary intent. It was not necessary, nor would it have been appropriate, to further limit the purpose for which the jury could consider the evidence. If there was error, however, DeHoyos was not prejudiced.

A. Relevant Facts

DeHoyos requested the series of jury instructions that inform the jury not to use other crimes evidence as propensity evidence, i.e., CALJIC Nos. 2.50 (Evidence of Other Crimes), 2.50.1 (Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence) and 2.50.2

(Definition Of Preponderance Of The Evidence). (4 CT 1371.) He then withdrew his request. (29 RT 6568.) The prosecutor requested them, however, to avoid the risk that the jurors would improperly use the testimony of Maria Esparza, Gloria Lara and Dalila Flores[51] as propensity evidence. (29 RT 6568-6569.) The court told defense counsel that it would consider any modification defense counsel requested. (26 RT 6571, 6578.) Counsel suggested the court add language to describe the evidence as "an act similar to those constituting a crime" instead of "crimes." (26 RT 6572.)

Defense counsel also pointed out the defense called the witnesses for the limited purpose of showing DeHoyos's mental defect. (29 RT 6578.) Counsel argued that since the defense brought in the evidence, they "should be allowed to have and request the limiting instruction." (29 RT 6579.) The court explained that the prosecution intended to use the evidence to prove DeHoyos's intent. (29 RT 6579-6580.) The parties then continued discussing whether the instruction should be modified in its reference to "crimes." (29 RT 6580-6592.)

Defense counsel then suggested adding language to the first sentence of CALJIC No. 2.50 that the evidence was admitted for the purpose of showing what the doctors relied on to evaluate DeHoyos's mental defect.[52] (29 RT 6581.) The prosecutor objected because that may have been the purpose the defense called Lara and Esparza, but the prosecutor called Flores and Sandra Cruz for other reasons. (29 RT 6582.) The court then decided to take out the standard language in CALJIC No. 2.50 that says,

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[51] The testimony of these witnesses is detailed in the Statement of Facts.

[52] The first sentence of CALJIC No. 2.50 states "[e]vidence has been introduced for the purpose of showing that the defendant committed [a crime][crimes] other than that for which [he][she] is on trial."

"[e]vidence has been introduced for the purpose of showing that the defendant committed [a crime][crimes] other than that for which [he][she] is on trial" and instead did not put the "purpose" the testimony was introduced. (29 RT 6582-6583; CALJIC No. 2.50.) Thus, the defense modification was adopted by the court. The court clarified as follows:

> [Prosecutor]: It is the defense request for this modification?
>
> The court: Yes. They are requesting modification, but only after objecting to the instruction in its entirety. Is that correct?
>
> [Defense counsel]: Yes.
>
> . . .
>
> The court: I have indicated I will give it over objection.
>
> So I was willing to modify it, as I have indicated, and I will do so.

(29 RT 6583.)

Further discussions about the instruction centered around whether defense counsel wanted to modify the language to put in "act" in addition to "crime" in describing the evidence. (29 RT 6585-6592.) The court modified the language to include a description of the evidence as "crimes or acts other than that for which he is on trial." (29 RT 6592.) DeHoyos never requested any further modification of the instruction. The trial court gave the instruction as follows:

> Evidence has been introduced which may show that the defendant committed crimes or acts other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

> The existence of the intent which is a necessary element of the crime charged; [or]
>
> The identity of the person who committed the crime, if any, of which the defendant is accused; [or]
>
> The defendant had knowledge or the means that might have been useful or necessary for the commission of the crime charged.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(4 CT 1426-1427; 30 RT 6842-6844.) The court also gave CALJIC No. 2.50.1 that instructed the jury that the other crime or other act evidence must be proved by a preponderance of the evidence (4 CT 1428; 30 RT 6844) and CALJIC No. 2.50.2 defining "preponderance of the evidence" (4 CT 1429; 30 RT 6844-6845).

In spite of the fact DeHoyos did not submit an instruction or propose language for the court to consider, he argues the trial court erred in failing to give a limiting instruction that the Lara and Esparza incidents could only be considered to the extent expert witnesses relied on them for their opinion of DeHoyos's mental defect. (AOB 185.) Although defense counsel initially stated the instruction should be limited in that it should explain the purpose the defense had in calling Lara and Esparza, the court explained that the prosecution intended to use the evidence for a different purpose. (29 RT 6579-6580.) Defense counsel seemed satisfied with that answer, and agreed that the court's modification addressed the issue by taking out the language in the first sentence of CALJIC No. 2.50 that described the

purpose for which the evidence was admitted. Defense counsel stated it was then only objecting to the instruction in its entirety.[53] (29 RT 6583.)

"A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) CALJIC No. 2.50 is a correct statement of the law. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005, fn. 9.) An appellate court, however, may consider instructional errors if "substantial rights" of the defendant are affected. (Pen. Code, §§ 1259, 1469; *People v. Prieto, supra,* 30 Cal.4th at p. 247.) DeHoyos's "substantial rights" were not affected. Moreover, as the court adopted both of DeHoyos's proposed modifications, and he did not submit or suggest any further modifications to the standard instruction, he has forfeited his claim of error. He clearly told the court, after it adopted his requested modifications, that he was then only objecting to the instruction in its entirety. (29 RT 6583.) Given DeHoyos did not propose an instruction, it is not clear from the record what a further instruction would have informed the jury. On appeal, he argues the requested instruction "was clear: the jury could consider the evidence regarding those incidents only to the extent it was relied upon by the expert witnesses as evidence of appellant's mental defect." (AOB 185.) DeHoyos's claim of clarity is belied by the record. There was never a clear request, other than those the court adopted, to modify the instructions. Even if DeHoyos properly preserved his claim, it fails on the merits.

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[53] DeHoyos does not challenge the necessity of giving the instructions on appeal, and agrees they were necessary. (AOB 185-186, fn. 64.) His claim is that the instruction should have been modified to further limit the evidence.

B. The Trial Court Properly Instructed the Jury to Limit Evidence of Other Acts or Crimes and Not to Use the Evidence as Propensity Evidence

DeHoyos's argument is that the evidence improperly allowed the jury to use his conduct against Lara and Esparza as substantive evidence, instead of limiting it to the bases of the expert witnesses opinions. (AOB 186.) As the trial court pointed out, and defense counsel agreed with, DeHoyos was using the evidence to show his lack of intent. (29 RT 6580.) Thus, the prosecution was entitled to use the evidence on the same issue: whether DeHoyos had the intent to rape, sodomize and murder Nadia. DeHoyos thus acknowledged it had a use broader than that which he now advocates.

At trial, DeHoyos wanted to use the evidence to show his impulsive reactions, and that he did not have the ability to control his behavior—which goes directly to his intent. (19 RT 4341, 4345, 4350 [Dr. Berg opined DeHoyos's attack on Lara was an example of uncontrollable rage and lack of control, and that he became "rageful" if he could not control women]; 21 RT 4698 [Dr. Berg opined DeHoyos's relationships with women were marked by an inability to control his temper and failure]; 4883 [Dr. Berg believed the incident with Lara was an incident of pathological temper and violence]; 22 RT 5022-5023 [Dr. LaCalle opined DeHoyos's attack on Lara and incidents of uncontrollable rage showed he lost all rational control]; 29 RT 6781, 6785 [defense closing argument that the murder was the same rash impulse that had been with him all his life just like when he stabbed Lara and choked Esparza].) In other words, the defense did not limit the use of the evidence to the reliability or basis of the expert witnesses opinions. The defense used it to show DeHoyos lacked the necessary intent. The prosecutor was entitled to argue a contrary interpretation of the evidence: that it showed his intent, his identity, or that he had the knowledge or the means that might have been useful or

necessary for the commission of the crime charged, which is what the jury was instructed.[54]

DeHoyos argues that because there was not a limiting instruction, the jury was more likely to consider the evidence as "propensity evidence or for some other improper purpose" and explains why propensity evidence is inadmissible. (AOB 186-187.) The evidence was not admitted to show DeHoyos's propensity. This contention by DeHoyos assumes the jury disregarded the instruction they were given, which specifically instructed the jury that the evidence was not to be considered by the jury to prove DeHoyos was a person of bad character or had a disposition to commit crimes. (4 CT 1426; 30 RT 6841-6842.) The jury is presumed to have understood and followed the court's instructions. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1005, fn. 9.)

Next DeHoyos argues the jury would have been "reasonably likely" to apply CALJIC No. 2.50, limiting the evidence, only to Flores, because she was called by the prosecutor, and not to the testimony of Lara and Esparza, who were called by the defense, because CALJIC No. 2.51 informed the jury that "the prosecution has the burden of proving the[] facts by a preponderance of the evidence." (AOB 187.) DeHoyos's interpretation of the instructions is not reasonable. Which party has the burden of proof (as explained by CALJIC No. 2.51) is a different concept than the purpose for admitting the evidence (as explained by CALJIC No. 2.50). Had the trial court not informed the jury that the prosecution had the burden of proof, DeHoyos would certainly have claimed that was error. The instructions in no way told the jury that the "other crimes or acts" evidence was only

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[54] The prosecutor argued the assault on Esparza showed DeHoyos's knowledge as to the means to accomplish his goal to sexually assault and kill Nadia. (29 RT 6823.) The prosecutor did not refer to the incident with Lara in his closing argument.

referring to Flores or that it only referred to evidence presented by the prosecution. It merely informed the jury that if they were to use the evidence, they must be satisfied that the prosecutor proved it by a preponderance of the evidence.

Likewise, DeHoyos's argument that the jurors would not have understood the testimony of Lara and Esparza constituted evidence of mental illness within the meaning of CALJIC No. 3.32 [evidence of mental disease—received for limited purpose], (AOB 187) is untenable.[55] Defense counsel argued the testimony of Lara and Esparza showed his mental illness. (29 RT 6744, 6476, 6747, 6750.) Counsel argued that such violence, along with his behavior towards his family, his co-workers, and in the military showed his longstanding mental illness. (29 RT 6744-6747, 6749-6750.) The evidence was received for the purpose of showing whether he had the intent to commit the rape, sodomy and murder—and DeHoyos used the evidence to argue he lacked the intent based on his mental illness.

C. DeHoyos Was Not Prejudiced

Even if the claim is cognizable, and this Court erred by failing to give an instruction further limiting the use of the evidence, DeHoyos was not prejudiced. Under state law, instructional error is harmless if there is no reasonable probability the outcome of the defendant's trial would have been different had the jury been properly instructed. (*People v. Cole, supra,* 33 Cal.4th at pp. 1208-1209, citing *People v. Flood, supra,* 18 Cal.4th at p.

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[55] This argument by DeHoyos is inconsistent with his argument that the evidence should have been limited "to the extent that the expert witnesses relied upon the evidence." (AOB 182.) In this sub-argument, he explicitly acknowledges that the evidence was intended by him to be used for a broader purpose: as evidence of his mental illness to show his lack of intent.

470, Cal. Const., Art. VI, §13, *People v. Watson, supra*, 46 Cal.2d at pp. 836-837.) Under federal law, the error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Cole, supra*, 33 Cal.4th at pp. 1208-1209, citing *Neder v. United States, supra,* 527 U.S. at pp. 8–16; *Chapman v. California, supra*, 386 U.S. at pp. 23-24; *People v. Sengpadychith, supra,* 26 Cal.4th at p. 324; *People v. Flood, supra*, 18 Cal.4th at pp. 502-504.) Any error was that of state law. Even under the more demanding *Chapman* standard for constitutional error, urged by DeHoyos (AOB 188), any error was harmless. As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state.

Even if the jury had been told that the evidence of his prior acts against two ex-wives was limited to the bases of the expert witnesses opinions, it would not have made a difference in the outcome. It was uncontested DeHoyos was the perpetrator of the crime against Nadia. The evidence was used primarily by defense counsel in his argument to support DeHoyos's theory that his mental illness prevented him from forming the intent to sodomize, rape and kill Nadia, and was only briefly referenced in the prosecutor's argument. The prosecutor did not refer to DeHoyos stabbing Lara at all, and argued that the assault on Esparza showed DeHoyos knew how to accomplish his goal of sexually assaulting and killing Nadia—something that was not contested. Given the heinous nature of the crimes, the evidence of DeHoyos stabbing Lara and choking Esparza were insignificant, and any failure to limit their use as suggested by DeHoyos did not result in prejudice.

VIII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT DEHOYOS REGISTERED FOR TWO GUESTS AT THE HA' PENNY INN

DeHoyos contends the trial court prejudicially erred by admitting hearsay evidence that DeHoyos registered for two guests at the Ha' Penny Inn, in violation of his rights to due process and to a reliable guilt and penalty determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 7, 15, 16 and 17 to the California Constitution. (AOB 189, 197.) The trial court properly exercised its discretion in allowing the testimony because it was admissible under two exceptions to the hearsay rule: that for admissions and that for business records. Even if admission of the testimony was error, DeHoyos was not prejudiced.

A. Relevant Facts

Vareen Kennelly was the office manager at the Ha' Penny Inn. (17 RT 3773.) Her husband, John Kennelly, was the general manager. (17 RT 3776.) Her son, Parley Kennelly, worked for them.[56] (17 RT 3774-3775.) Tom Nixon was the assistant manager. (17 RT 3756.) Mrs. Kennelly supervised the desk clerks and the front office procedures of the motel. (17 RT 3774.)

Nixon and Mrs. Kennelly both testified to the procedures for checking guests into the motel. The standard procedure when a guest checked into the motel was for the clerk to give the guest a registration card to fill out. (17 RT 3775.) The registration card contained the room rate, the tax, and the key deposit. (17 RT 3757.) The clerk would then get the card back and ask for state-issued identification with a photograph. The clerk verified the

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[56] Parley Kennelly did not testify. He was in the Navy at the time of trial. (17 RT 3779.)

driver's license number, the photograph, the address, and the signature of the guest. (17 RT 3757, 3774-3775.) The clerk would request payment, and would fill out a receipt. (17 RT 3775-3776.) The receipt was a triplicate. The guest received one copy and the motel kept the other two copies. (17 RT 3757.) The motel kept the registration card that the guest filled out. The motel kept a log containing the guest's name and how much he or she paid. (17 RT 3774.) The written records were kept in the ordinary course of the motel's business. (17 RT 3776.) Mrs. Kennelly testified the entries made on the records were generally made at or about the time the transactions occurred. (17 RT 3777, 3781.) She explained that there was no particular "provision" to find out how many people were going to be in a room "other than what the guest told us and if we could see anyone else obviously in the car."[57] (17 RT 3777.)

DeHoyos stipulated that he signed the registration documents and receipts from the Ha' Penny Inn. (17 RT 3784-3785.) Exhibit 6 was a copy of the receipt with Nixon's handwriting and initials on it. (17 RT 3758.) The receipt was prepared when the guest checked out. (17 RT 3759, 3770.) On the receipt, Nixon wrote how many people were registered for the room. (17 RT 3760.) Nixon testified that the receipt indicated two people were registered for the room. (17 RT 3765.)

Exhibit 7 was the registration card. Both Nixon and Parley Kennelly's handwriting were on the registration card. (17 RT 3766.) Nixon's writing showed the guest returned the key and received a $10 credit. (17 RT 3766-3767.) It also showed DeHoyos turned his key in and checked out early. (17 RT 3767.) The writing indicating how many guests

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[57] Nixon testified consistent with Mrs. Kennelly's testimony that there was no "provision" for documenting how many guests were in the room. (17 RT 3757.)

would be in the motel room was Parley's. (17 RT 3770.) Nixon testified he got the information for the receipt from the registration card. (17 RT 3771.)

Exhibit 8 was a receipt. Mrs. Kennelly testified the receipt was utilized when the motel room was paid for, which was normally when the guest checked in. Parley's handwriting was on the receipt. (17 RT 3778.)

DeHoyos objected to Nixon testifying to what the receipt said because it was hearsay. (17 RT 3759.) The court sustained the objection. The prosecutor informed the court that defense counsel had agreed to stipulate that the receipt was signed by DeHoyos. (17 RT 3761.) Outside the presence of the jury, defense counsel explained that he was objecting because it was not clear whether DeHoyos told Nixon that the room was for two people. (17 RT 3762.) The court ruled that it was an admission by DeHoyos if DeHoyos had an opportunity to read the document unless DeHoyos signed it prior to it being filled out. (17 RT 3763-3764.) Defense counsel argued the clerk may have had a practice of putting down that there was two people in a room, so it did not constitute an admission. The court overruled the objection. (17 RT 3764.) Nixon then explained the guest signed the receipt after the entries were made on the receipt. (17 RT 3767-3768.) The exhibits were admitted without further objection by the defense.[58] (18 RT 3963; 4 CT 1326.)

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[58] DeHoyos states that the prosecutor erroneously told the jury that they would have the exhibits in the jury room but that the documents themselves were not admitted. (AOB 200, fn. 71.) DeHoyos is mistaken. Although the trial court initially stated the receipt was not admissible, after the parties informed the court that they were stipulating that DeHoyos signed the motel documents, the court held they were admissible and they were admitted. (17 RT 3761, 3764; 4 CT 1326.)

B. The Trial Court Properly Admitted the Documents Under the Exception to the Hearsay Rule for Admissions and They Were Also Admissible as Business Records

"Hearsay is 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.'" (*People v. Lewis, supra,* 43 Cal.4th at p. 497, quoting Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (*People v. Lewis, supra*, 43 Cal.4th at p. 497.) A statement includes "oral or written verbal expression." (*Id.* at pp. 497-498.) A defendant's own hearsay statements are admissible. (*Id.* at p. 497; Evid. Code, § 1220.)

> A statement by someone other than the defendant is admissible as an adoptive admission if the defendant "with knowledge of the content thereof, has by words or other conduct manifested his adoption [of] or his belief in its truth."

(*People v. Lewis, supra*, 43 Cal.4th at p. 497 quoting Evid. Code, § 1221.)

A trial court's ruling on the admissibility of a hearsay statement is reviewed for an abuse of discretion. (*People v. Hovarter, supra,* 44 Cal.4th at pp. 1007-1008; *People v. Williams* (2006) 40 Cal.4th 287, 317.) The ruling "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Geier* (2007) 41 Cal.4th 555, 585.) The trial court's resolution of questions of fact underlying its determination are reviewed for substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) Here, the trial court properly exercised its discretion in admitting the motel documents, that were signed by DeHoyos, as admissions. By affixing his signature to the documents, he has manifested his adoption or his belief in their truth—the very purpose of a signature. Likewise, presumably he has knowledge of the contents of the

documents, otherwise, he would not be signing, and thereby attesting to them.

DeHoyos argues that the motel records did not constitute admissions because there was no evidence that he reviewed the records prior to signing them, or that he told someone that there would be two people in the motel room. (AOB 193.) This contention overlooks the testimony by Nixon that the entries were on the receipt prior to the guest signing it. (17 RT 3767-3768.) Given this testimony, it is a reasonable inference that DeHoyos reviewed the receipt before he signed it. Additionally, the evidence was that the motel clerk gave the guest a registration card to fill out (17 RT 3775), and that there was no particular provision to find out how many people were going to be in a room "other than what the guest told us" (17 RT 3777)—thus DeHoyos filled out the registration card that indicated the motel was rented for two guests.

DeHoyos argues that Nixon's testimony was inconsistent because he testified that there was no provision for documenting how many people rented a particular room, yet he subsequently testified that he had entered the number of people registered to DeHoyos's room on the receipt. (AOB 193.) Nixon explained that he received the information for the receipt (Exhibit 6) from the registration card (Exhibit 7.) (17 RT 3771.) Thus, his testimony is not inconsistent. While there was no "provision" for documenting how many people rented a particular room, he obtained the information for the receipt from the registration card, which indicated there were two guests in DeHoyos's room. Although Nixon testified that there was not "any provision made for documenting how many people the room was rented for" (17 RT 3757), Mrs. Kennelly testified the guest filled out the registration card and that the motel obtained that information from the guest. (17 RT 3775, 3777.) The question to Nixon about the "provision" for "documenting" the number of guests in a room was not worded very

well, and he likely interpreted it to be asking whether there was any verification or procedure regarding "documenting" how many people were renting the room. His answer of "no" could reasonably be interpreted to mean that, other than what the guest put on the registration card, there was no "provision" to "document" that number. In fact, when asked the same question, Mrs. Kennelly appeared to have interpreted the question the same way and answered "nothing, other than what the guest told us and if we could see anyone else obviously in the car." She explained that they wanted to know how many people were in a room because it cost more if there was more than one person in the room. (17 RT 3777.)

DeHoyos also claims that although Nixon documented that Parley Kennelly filled out the registration card indicating that DeHoyos registered for two guests, there was no evidence as to how or where Kennelly obtained that information (AOB 194.) That contention, however, overlooks the testimony by Mrs. Kennelly that the guest filled out the registration card, and that the way they determined how many guests were in a room was based on what the guest told them.[59] (17 RT 3775, 3777.)

DeHoyos relies on *People v. Maki* (1985) 39 Cal.3d 707 to support his position that the motel documents he signed were not adoptive admissions.

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[59] Nixon testified that the registration card had his own writing on it, and that of two other people, one of which was Parley Kennelly. He also indicated that the "2" for the number of guests was in Parley Kennelly's handwriting. (17 RT 3770.) However, the fact there is inconsistent testimony as to who filled out that portion of the document does not negate its admissibility. A trial court has broad discretion in determining whether a party has established foundational requirements for admissibility of evidence. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) "Its ruling on admissibility implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary." (*Ibid.*, citations omitted; Evid. Code, § 402, subd. (c).) "A reviewing court may overturn the trial court's exercise of discretion only upon a clear showing of abuse." (*Ibid.*, citations omitted.)

(AOB 194-195.) In *Maki*, this Court addressed whether a signed car rental invoice and an unsigned hotel receipt containing Maki's name on it were admissible as adoptive admissions. (*People v. Maki, supra*, 39 Cal.4th at pp. 709, 711.) There was no testimony about how the documents were prepared or their purpose. (*Id.* at p. 711.) This Court explained that for a document to be an adoptive admission, it needed to be shown that the declarant read over it and signed it after doing so. (*Id.* at p. 712.) "This prerequisite for introduction of such evidence may be provided by testimony of a person describing the circumstances surrounding the signing of the document." (*Id.* at p. 712.) Here, unlike in *Maki*, this prerequisite was met. Two employees of the motel testified to how the documents were prepared—and described the circumstances surrounding signing the document. (17 RT 3756-3760, 3765-3768, 3770, 3711, 3774-3778.) Nixon explained that the receipt was signed after it contained all the information on it. (17 RT 3767-3768.) Thus, *Maki* is distinguishable because here the motel employees described the circumstances surrounding the documents that DeHoyos signed.

The motel documents were also independently admissible under the business records exception. Although the court did not cite the business records exception as its basis for allowing admission of the documents, because they were independently admissible on this basis, its decision will not be disturbed on appeal. In other words, the court's decision is upheld if it was correct on any ground. (*People v. Horning* (2004) 34 Cal.4th 871, 898; *People v. Zapien* (1993) 4 Cal.4th 929, 976 ["a ruling or decision, itself correct in law will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."].)

A trial court has wide discretion in determining whether a party has laid an adequate foundation for a business record, and the court's decision will be reversed only if the court clearly abused its discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 978-979; accord, *People v. Jones* (1998) 17 Cal.4th 279, 308.) Evidence Code section 1271 states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Mrs. Kennelly testified the writings were made in the regular course of the motel's business. (17 RT 3776.) She also testified that the records were made at or about the time the transactions occurred. (17 RT 3777, 3781.) Two witnesses, Mrs. Kennelly and Nixon, testified as to the identity of the documents and their mode of preparation. (17 RT 3756-3760, 3765-3768, 3770, 3711, 3774-3778.) Based on their testimony, it is clear the sources of information and method and time of preparation were such as to indicate their trustworthiness.

DeHoyos claims that there was conflicting testimony concerning whether the guest or the motel clerk prepared the motel records, therefore, the documents were not trustworthy. (AOB 196-197.) Mrs. Kennelly testified that the guest filled out the registration form. (17 RT 3775.) Nixon testified that

> [f]irst, we would fill out a registration card. On the registration card would be the rate for the room, plus the tax and the $10 key

> deposit, which they would then receive back when they checked out.
>
> Then we filled out a receipt which was in triplicate, and they signed that and they got a copy and we got two copies.

(17 RT 3757.) Both witnesses, however, testified that the registration and receipt were filled out at the time of the event. The information on the registration form, including the driver's license number, the photograph, the address, and the guest's signature, was verified by the clerk by checking it against a driver's license or California identification card. (17 RT 3757, 3775.) Thus, steps were taken to verify the trustworthiness of the documents.

DeHoyos also claims there was a conflict in the testimony regarding how the motel documented the number of guests in the motel. (AOB 196.) As explained *ante*, although Nixon testified that there was not "any provision made for documenting how many people the room was rented for" (17 RT 3757), Mrs. Kennelly testified the guest filled out the registration card and that the motel obtained that information from the guest. (17 RT 3775, 3777.) This is not inconsistent, and does not show the documents were untrustworthy. The witnesses established the records were accurate to the extent the guest reliably told them how many guests would be in the room. Even if it was not clear which person actually wrote on the documents, that does not establish the records were not trustworthy. The records accurately reflected what room a guest stayed in, how much they paid for their room, and how many guests were in the room. Thus, the documents were also admissible under the business records exception to the hearsay rule.

C. Even If There Was Error, DeHoyos Was Not Prejudiced

Assuming the trial court erred in admitting the evidence, it was state law error, which would require DeHoyos to show that it is reasonably probable a result more favorable would have resulted in the absence of the error. (*People v. Rundle, supra,* 43 Cal.4th at p. 134, overruled on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.) Even under the *Chapman* standard, which DeHoyos claims applies due to his alleged constitutional violations (AOB 197-199), requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict, any error was harmless. (*People v. Robinson, supra,* 37 Cal.4th at p. 627 citing *Chapman v. California, supra*, 386 U.S. at pp. 23-24.) As described in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state. Had the jury not known that DeHoyos registered for two guests at the Ha' Penny Inn, DeHoyos would have still been found guilty of first degree murder with special circumstances. His planning and sophistication was shown by his ruse in telling Nadia that he was a teacher, and taking her to a motel. It was not questioned that DeHoyos had previously checked into a motel, before he took a 9 year-old girl who was a stranger to the motel.

Further dispelling the prejudice, Dr. Berg testified that DeHoyos told him he did not realize he checked into the motel for two guests. (21 RT 4756.) This testimony by Dr. Berg would negate any intent or argument that DeHoyos planned to bring someone to the motel.

Assuming DeHoyos preserved his constitutional claims by objecting solely on hearsay grounds (See *People v. Partida* (2005) 37 Cal.4th 428,

433-439), even under the more demanding *Chapman* standard, for the same reasons, any error was harmless beyond a reasonable doubt. (See *People v. Lewis, supra*, 43 Cal.4th at p. 500, fn. 23.) DeHoyos's crime was heinous, and it was committed against a young, innocent schoolgirl. He was convicted because of his actions in tricking Nadia into getting into his car as she walked home from elementary school, then taking her to the motel, and raping and sodomizing her; not because he checked into the motel earlier in the day for two people. Thus, even had the evidence been excluded, DeHoyos would have still been convicted of first degree murder with special circumstances, found sane, and sentenced to death. Thus, any error was harmless beyond a reasonable doubt.

In arguing he was prejudiced, DeHoyos points to the prosecutor's closing argument wherein he stated that "like a predator, he goes out to find a target." (AOB 199-200.) This argument would be the same regardless of whether DeHoyos registered for one or two guests in the motel. DeHoyos approached a school-age child near an elementary school and told her he was a teacher. When Sandra Cruz did not cede to DeHoyos's advances, he approached Nadia, who did. In referring to the motel documents, the damaging evidence was that DeHoyos checked into the motel earlier that day—which was not contested. That fact, along with the ruse to get a school-age girl into his car, showed his actions were not a product of sudden rage.

Nor was DeHoyos prejudiced in the penalty phase, as he claims. (AOB 200.) The aggravating factors were substantial, particularly the circumstances of the offense. The victim was a vulnerable child. The mitigating evidence was weak in comparison. DeHoyos's mental defense was conflicting and weak. Given the nature and circumstances of the crime, the jury would not have returned a different verdict had they not known DeHoyos registered for two guests at the motel.

IX. THE JURY WAS PROPERLY INSTRUCTED ON FIRST DEGREE FELONY MURDER

DeHoyos contends the trial court erred by instructing the jury on first degree felony murder because the information charged him only with one count of second degree malice murder in violation of Penal Code section 187,[60] instead of Penal Code section 189,[61] which defines first degree murder. He also argues the trial court lacked jurisdiction to try him for first degree murder based on the charges in the information. (AOB 203.) DeHoyos claims the trial court therefore violated his rights to due process, trial by jury, and his right to a fair and reliable capital guilt trial under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 16 and 17 of the California Constitution. (AOB 201-203, 208-209.) This Court has consistently rejected this

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[60] Penal Code section 187 is entitled "Murder defined" and provides, in pertinent part: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[61] Penal Code section 189 is entitled "Murder; degrees" and provides, in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

argument based on instructional error and lack of jurisdiction, and DeHoyos does not present any compelling reason to revisit this issue.

As DeHoyos acknowledges (AOB 204), this Court has rejected the arguments DeHoyos now makes. This Court has consistently held that "a defendant may be convicted of first degree murder even though the indictment or information charges only murder with malice in violation of section 187." (*People v. Friend* (2009) 47 Cal.4th 1, 54; *People v Bramit* (2009) 46 Cal.4th 1221, 1236-1237; *People v. Morgan* (2007) 42 Cal.4th 593, 616.) DeHoyos argues, however, that the rationale of these cases, which relied on *People v. Witt* (1915) 170 Cal. 104, has been undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441, which held that Penal Code section 189 was the statutory enactment of the first degree felony murder rule in California. (AOB 205-206.) This Court has also considered this argument and rejected it.

> *Dillon* held that section 189 is a codification of the first degree felony-murder rule. [Citation.] Because there is only a single statutory offense of first degree murder [Citation], defendant reasons that the relevant statute must be section 189, not section 187, which he construes as a definition of second degree murder. Defendant misreads both *Dillon* and the statutes. *Dillon* made it clear that section 189 serves *both* a degree-fixing function and the function of establishing the offense as first degree felony murder. [Citation.] It defines second degree murder as well as first degree murder. Section 187 also includes both degrees of murder in a more general formulation. [Citation.] Thus, an information charging murder in the terms of section 187 is 'sufficient to charge murder in any degree.' [Citation.]

(*People v. Bramit, supra*, 46 Cal.4th at pp. 1237-1238, quoting *People v. Harris* (2008) 43 Cal.4th 1269, 1294-1295, citations and footnote omitted; accord *People v. Morgan, supra,* 42 Cal.4th at p. 616.)

This Court has also rejected the premise underlying DeHoyos's argument—that felony murder and malice murder are two separate offenses. (AOB 206-207; *People v. Morgan, supra,* 42 Cal.4th at p. 616,

quoting *People v. Hughes* (2002) 27 Cal.4th 287, 370.) This Court, therefore, has rejected the "interrelated claims" that the trial court lacked jurisdiction to try DeHoyos for first degree murder and improperly instructed on the theories of first degree murder. (*People v. Morgan, supra*, 42 Cal.4th at p. 616; *People v. Carey, supra*, 41 Cal.4th at p. 132.)

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), DeHoyos contends premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts which increase the maximum penalty for the crime of murder, therefore those facts should have been charged in the information. (AOB 206.) This Court has also rejected this argument: "The *Apprendi* claim is illusory; the information included special circumstance allegations that fully supported the penalty verdict." (*People v. Bramit, supra,* 46 Cal.4th at p. 1238; *People v. Harris, supra,* 43 Cal.4th at p. 1295.) Thus, DeHoyos's claim is without merit.

X. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 4.01 IN THE SANITY PHASE

DeHoyos contends the trial court erred because it instructed the jury in the sanity phase with CALJIC No. 4.01 ("Effect of Verdict of Not Guilty By Reason of Insanity") but did not include his proposed modification to that instruction to delete any reference to outpatient treatment. He claims this error violated his rights to due process and a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 7 and 17 of the California Constitution. (AOB 210, 217-218.) The trial court properly instructed the jury with CALJIC No. 4.01 on the effect of a verdict of not guilty by reason of insanity. DeHoyos's proposed modification would have been misleading to the jury, therefore, the trial court properly refused it.

A. Relevant Facts

Both the prosecutor and DeHoyos requested the trial court instruct the jury with CALJIC No. 4.01. DeHoyos requested that the instruction be modified to delete the reference, italicized below, to "outpatient treatment." (33 RT 8070, 8095.) He argued that based on Penal Code section 1600 or 1604,[62] outpatient treatment was not available to DeHoyos.[63] (33 RT 8072.) CALJIC No. 4.01 provides as follows:

> A verdict of 'not guilty by reason of insanity' does not mean the defendant will be released from custody. Instead, he will remain in confinement while the courts determine whether he has fully recovered his sanity. If he has not, he will be placed in a hospital for the mentally disordered or other facility, *or in outpatient treatment*, depending upon the seriousness of his present mental illness.
>
> Moreover, he cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the

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[62] It appears counsel was referring to Penal Code section 1601, subdivision (a), which provides that

> [i]n the case of any person charged with and found . . . not guilty by reason of insanity of murder, . . . a violation of Section 207 . . . in which the victim suffers intentionally inflicted great bodily injury, . . . subdivision (a) of Section 261, . . . a violation of 288 . . . or any felony involving death, great bodily injury, or an act which poses a serious threat of bodily harm to another person, outpatient status under the title shall not be available until that person has actually been confined in a state hospital or other facility for 180 days or more after having been committed under the provisions of law specified in Section 1600.

[63] DeHoyos's argument was not legally correct because he could have been eligible for outpatient treatment after being confined to a state hospital for 180 days. (Pen. Code, § 1601, subd. (a).)

maximum period of imprisonment which could have been imposed had he been found guilty.

So that you will have no misunderstandings relating to a verdict of not guilty by reason of insanity, you have been informed as to the general scheme of our mental health laws relating to a defendant, insane at the time of his crimes. What happens to the defendant under these laws is not to be considered by you in determining whether the defendant was sane or insane at the time he committed his crimes. Do not speculate as to if, or when, the defendant will be found sane.

You are not to decide whether the defendant is now sane. You are to decide only whether the defendant was sane at the time he committed his crimes. If upon consideration of the evidence, you believe defendant was insane at the time he committed his crimes, you must assume that those officials charged with the operation of our mental health system will perform their duty in a correct and responsible manner, and that they will not release this defendant unless he can be safely returned into society.

It is a violation of your duty as jurors if you find the defendant sane at the time he committed his offenses because of a doubt that the Department of Mental Health or the courts will properly carry out their responsibilities.

The trial court noted the purpose of the instruction was so that jurors would not think that if they found him insane at the time he committed his crimes, he would be immediately released. (33 RT 8082.) The court believed it would be misleading to strike the language about outpatient treatment because it would inaccurately indicate that DeHoyos could not be removed from hospital placement until either he had recovered his sanity or served a maximum period of confinement. (33 RT 8082-8083.) It was also misleading to leave the language about outpatient treatment in the standard instruction, because DeHoyos could not be placed in outpatient treatment for at least six months. The court thus modified the first paragraph of the instruction, by adding the italicized language:

> A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, he will remain in confinement while the courts determine whether he has fully recovered his sanity. If he has not, he will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of his present mental illness *and the seriousness of the crime for which he has been convicted in the guilt phase of this trial.*

(5 CT 1601; 33 RT 8083, 8207-8208.) DeHoyos objected to the court's modification because it contained language about outpatient treatment, but otherwise requested the instruction. (33 RT 8086, 8095.)

B. The Trial Court Properly Modified the Instruction to Be a Correct Statement of the Law, and Properly Rejected DeHoyos's Suggested Modification as It Would Have Been Misleading to the Jury

Upon request by a defendant, a trial court is required to give CALJIC No. 4.01 in the sanity phase. (*People v. Kelly* (1992) 1 Cal.4th 495, 538, citing with approval *People v. Moore* (1985) 166 Cal.App.3d 540, 556.) Had the trial court deleted the language about outpatient treatment from the standard instruction, it would not have accurately stated the law. The instruction, as given, correctly stated the law. (*People v. Kelly, supra,* 1 Cal.4th at p. 538.) It was intended to aid the defense by instructing the jury not to find the defendant sane out of concern he would be improperly released from custody. (*Ibid.*) The trial court's modification was also correct because the treatment would be determined based in part on the seriousness of the crime for which DeHoyos was convicted in the guilt phase. Specifically, based on DeHoyos's crimes, he would not be eligible for outpatient treatment until he had been confined in a state hospital for 180 days. (Pen. Code, § 1601, subd. (a).) The trial court explained this concept to the jurors in a general sense because "[t]he jury can no more be concerned with the possible length of a defendant's commitment than with

the possible length of a prison term." (*People v. Dennis* (1985) 169 Cal.App.3d 1135, 1141, fn. 14; see also *People v. Moore, supra,* 166 Cal.App.3d at p. 556 ["barring unusual circumstances no other allusion should be made to the defendant's postverdict disposition."]

DeHoyos claims that the trial court's reasoning was flawed because telling the jurors that the seriousness of the crime is a factor to consider in determining treatment did not properly advise them of the law, because the law mandated inpatient treatment for 180 days or more. He also claims that the jurors would not have known that the crimes DeHoyos was convicted of were enumerated in Penal Code section 1601, mandating 180 days or more of inpatient treatment. (AOB 214.) The trial court accurately advised the jurors as to the consequences of a verdict of not guilty by reason of insanity. It need not further advise them with the length of a defendant's commitment. (*People v. Dennis, supra*, 169 Cal.App.3d at p. 1141, fn. 14.) Common sense would dictate that a convicted child murderer and rapist would be a serious category of crime, which would dictate longer inpatient treatment. DeHoyos's argument that it is speculative "that the jury may have surmised that the seriousness of [his] crimes made it unlikely he would be released immediately" (AOB 214) is untenable.

Another reason DeHoyos claims the trial court's analysis was flawed was because it dismissed his concern that the jurors would fear he would be released immediately if they were not told the law explicitly prohibited immediate release. (AOB 214.) The first sentence of the instruction specifically told the jurors that "[a] verdict of 'not guilty by reason of insanity' does not mean the defendant will be released from custody." (5 CT 1601; 33 RT 8207.) In addition, the modification given by the court effectively told the jurors that he would not be subject to immediate release because his placement in outpatient treatment depended "upon the seriousness of his present mental illness and the seriousness of the crime for

which he has been convicted in the guilt phase." As stated before, the crimes DeHoyos committed were as serious as they come. The jury knew they were sitting on a capital case. No reasonable juror would interpret the court's instruction as meaning it was possible that DeHoyos would be immediately released. In fact, a reasonable inference from the instruction is that DeHoyos would serve a substantial time in treatment (longer than 180 days) based on the "seriousness of the crime." Moreover, the instruction served its purpose, which was to aid the defense by instructing the jury "not to find the defendant sane out of concern he would be improperly released from custody." (*People v. Kelly, supra*, 1 Cal.4th at p. 538.)

DeHoyos also faults the trial court because it "incorrectly refused to modify the instruction on the ground that it did not want the jury to speculate as to whether the courts or Department of Mental Health would properly carry out their duties." (AOB 215.) DeHoyos misapprehends the court's analysis. The court explained that it did not want to

> get into the business of telling the jurors any more detail about the law in this case because the purpose of the instruction is to make it clear to them they are not to speculate on whether the court or the Department of Mental Health will properly carry out its responsibilitie[s]. And I think the way the instruction is worded makes that—accomplishes that purpose.

(33 RT 8085.) DeHoyos claims that the trial court's failure to modify the instruction "could only have encouraged uninformed speculation as to where [he] would be placed if he were to be found legally insane." (AOB 215.) DeHoyos's argument ignores the essence of the instruction. It told the jurors that he "would not be removed from his placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California" or until he served a period equal to the maximum period of confinement and that "[w]hat happens to the defendant under these laws is not to be considered by you in

determining whether the defendant was sane or insane at the time he committed his crimes. Do not speculate as to if, or when, the defendant will be found sane." (5 CT 1601-1602; 33 RT 8208-8209.) DeHoyos's argument that the instruction informing the jurors not to speculate as to when he will be determined to be sane, and not to consider what happens to him under the sanity laws encouraged uninformed speculation is untenable. Rather, the jury is presumed to have understood and followed the court's instructions. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1005, fn. 9.)

Lastly, DeHoyos argues that the trial court's failure to delete the reference to outpatient treatment resulted in the instruction failing to serve the purpose for which it was developed—telling the jury not to find him sane out of a concern that he would be improperly released from custody. (AOB 216-217.) First, contrary to DeHoyos's statement (AOB 216), the trial court did clarify the instruction to accurately state the law. Second, viewing the whole instruction, it clearly and explicitly told the jury not to find him sane out of a concern he would be improperly released from custody. It stated the verdict "does not mean the defendant will be released from custody." It explained he would remain in confinement until the courts determined whether he recovered his sanity; that he would be placed in a mental hospital or outpatient treatment depending on the mental illness and the seriousness of his crimes; that what happened to him was not to be considered by the jury in determining whether he was sane when he committed the crimes; that if they found he was insane, they were to assume the mental health system and officials would perform their duties in a correct and responsible manner; that they would not release him until he could be safely returned into society; and that it would be a violation of their duty to find him sane because they doubted the Department of Mental Health or the courts would properly carry out their responsibilities. (5 CT 1601-1602; 33 RT 8207-8210.)

Additionally, as the trial court properly instructed the jury on the effect of a verdict of not guilty by reason of insanity, DeHoyos's constitutional rights were not violated, as he claims. (AOB 217-218.) Because the claim has no merit, it "necessarily leads to rejection" of the constitutional arguments as well. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1050, fn. 4.)

C. DeHoyos Was Not Prejudiced

Even if the trial court erred in giving the instruction without deleting the reference to outpatient treatment, DeHoyos was not prejudiced. Any error was that of state law only, which would require DeHoyos to show that it is reasonably probable a result more favorable would have resulted in the absence of the error. (*People v. Rundle, supra*, 43 Cal.4th at p. 134, overruled on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.) Even under the heightened *Chapman* standard, which DeHoyos argues applies (AOB 219, fn. 84), requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict, any error was harmless. (*People v. Robinson, supra*, 37 Cal.4th at p. 627 citing *Chapman v. California, supra*, 386 U.S. at pp. 23-24.)

DeHoyos's mental health evidence and sanity phase evidence was conflicting and weak. The conflicting expert testimony showed how diagnosing insanity is not an exact science. Dr. Edwards explained that there was no published protocol to determine whether a person is insane. (31 RT 7458.) Dr. Meloy explained that the determination whether a psychopath can distinguish right from wrong is an individual subjective judgment of the doctor, based on the data, which explained why doctor's opinions differed. (32 RT 7870-7871.)

The diagnoses of DeHoyos in the sanity phase were conflicting and inconsistent. Dr. Edwards opined DeHoyos had organic personality

syndrome; several compulsions that could be described as impulse disorder, not otherwise specified; a history of attention deficit disorder with hyperactivity and probably polydrug abuse. (30 RT 7190, 7198.) Dr. Meloy diagnosed DeHoyos as having organic personality syndrome, explosive type; narcissistic personality disorder and antisocial personality disorder. (32 RT 7623.) Dr. Berg did not diagnose DeHoyos as having an organic personality disorder, explosive type because he did not meet the criteria. (31 RT 7565-7566.) Dr. Edwards disagreed with Dr. Fossum's diagnosis that DeHoyos was a paranoid schizophrenic. (31 RT 7384.)

The expert witness testimony was conflicting and inconsistent about whether DeHoyos was insane when he committed the crimes, and when his insanity began and ended. Dr. Edwards believed DeHoyos was legally insane at the time he committed the crimes. (30 RT 7232-7233.) He "might not" have been legally insane in the beginning of the day. (30 RT 7234.) She acknowledged, however, that he understood the quality of his act when he put Nadia's body in the trash can and put the lid on it. (31 RT 7348-7359.) Dr. LaCalle opined DeHoyos was insane during certain portions of the day on March 20, 1989. (31 RT 7504-7506.) His insanity began when he left Taco Bell and got into his car. (31 RT 7543.) He doubted whether DeHoyos knew he was killing a human being. (31 RT 7523.) Dr. Berg believed DeHoyos was legally insane when he committed the crimes. (31 RT 7549.) He believed DeHoyos became legally insane when Nadia supposedly came into the bathroom, although elements of it began before then. The insanity ended when he completed his sexual act with her and realized she was dead. (31 RT 7552.) He was disturbed but not legally insane when he picked up Nadia. (31 RT 7555.) Dr. Berg opined that DeHoyos knew "for the most part" that he was killing a human being, but did not "appreciate it" or know it was wrong. (31 RT 7556, 7558-7559.) Dr. Berg believed DeHoyos's story that he got upset because

Nadia saw him naked. (31 RT 7581.) Dr. Meloy opined DeHoyos understood the nature and quality of his act, and did not, therefore, meet the first prong of the insanity test. (32 RT 7629, 7634, 7639.) He did not, however, believe DeHoyos could distinguish right from wrong, so he met the second prong of the insanity test. (32 RT 7634, 7637, 7664.) Both Dr. Edwards and Dr. Meloy acknowledged that Drs. Logan and Peterson concluded DeHoyos was sane. (31 RT 7363; 32 RT 7871-7872.)

In addition, DeHoyos's sanity phase expert witnesses had to make numerous concessions that did not assist DeHoyos's defense. Dr. Edwards concluded DeHoyos was malingering, manipulative and lied. (30 RT 7191-7193, 7254-7255.) She testified lying was always with him "without any moral connotations," and that he did it all the time; it was almost second nature to him. (31 RT 7348, 7356.) Dr. Edwards found DeHoyos had all the requirements for antisocial personality disorder, and narcissistic personality traits. (30 RT 7192, 7199, 7202, 7204; 31 RT 7460.) Someone with antisocial personality disorder has no conscience and seeks self-gratification. (31 RT 7460.) DeHoyos believed he was always right and disrespected the rights of others. (30 RT 7204, 7224.)

According to Dr. Meloy, DeHoyos met six of the twelve criteria for antipersonality disorder for a child (including a history of cruelty to cats, stealing, truancy, running away from home and initiating physical fights). (32 RT 7625-7626.) As an adult, DeHoyos met 9 out of 10 criteria (including a lack of remorse, not sustaining a monogamous relationship, inconsistent work history, not following social rules of behavior, impulsivity, failure to plan ahead, failure to foresee the consequences of his actions, irritability, aggression, and failure to meet financial obligations). (32 RT 7262-7627.) For narcissistic personality disorder, one has to meet five of nine criteria; DeHoyos met six (including grandiosity, constant need for attention, lack of empathy, a preoccupation with fantasies of success

and beauty, a reaction to humiliation or criticism with rage, and exploitation of others and using others for his own means). (32 RT 7627-7628.)

Dr. Meloy was 95% certain DeHoyos was a primary psychopath. (32 RT 7628.) Psychopathy is a constellation of traits, including not having a conscience. Because of that psychopaths do not distinguish right from wrong. (32 RT 7660.) Dr. Meloy explained that psychopaths lie a lot and DeHoyos chronically lied. (32 RT 7640, 7706.) The behaviors, excluding criminal behavior that led Dr. Meloy to believe DeHoyos was a psychopath were his (1) glibness and superficial charm; (2) grandiose sense of self-worth; (3) need for stimulation and proneness to boredom; (4) pathological lying; (5) conning and manipulation; (6) lack of remorse or guilt; (7) shallow affect or emotion; (8) callousness and lack of empathy; (9) poor behavioral controls; (10) promiscuous behavior; (11) lack of realistic long-term goals; (12) impulsivity; (13) irresponsibility; (14) failure to accept responsibility for his own actions; (15) numerous short term marriages; and (16) "revocation of conditional release." (32 RT 7802.)

Dr. Meloy explained that DeHoyos never had an internalized pro-social value system, and lacked the capacity to distinguish right from wrong when he was 15 years old. When the prosecutor asked Dr. Meloy whether DeHoyos lacked such a value system at ten years old, Dr. Meloy responded, "He was setting cats on fire." (32 RT 7811.)

In addition to having conflicting and inconsistent testimony from his mental health experts, DeHoyos's sanity case was further weakened because he testified. In addition to telling an incredible story about what led to Nadia's murder, and his story that even his expert witness acknowledged was "grossly absurd," i.e., that he sodomized Nadia after she was dead to see if she was alive, he made numerous other statements that would not have assisted his defense. (30 RT 7003-7010, 7259.) He

testified he wanted to kill Mary Ann Scott and went back to Taco Bell that day to "get" her but there were too many people there who would have witnessed it. (30 RT 6993-6994, 7018.)

DeHoyos admitted he lied to the police but said it was because he was afraid of them because he heard Detective Alvarado say he wanted to "shoot the bastard." (30 RT 7026, 7028.) DeHoyos's version of the police interview, however, was not credible because although Detective Alvarado made that comment which was recorded, he did so when he was out of earshot of DeHoyos. (33 RT 8031-8035.) In addition, DeHoyos said he kept staring at the officer's guns (30 RT 7077), however that was not credible because Officer Bruce testified they were in plain clothes and not armed. (33 RT 8029-8030.)

DeHoyos testified he was upset when Nadia walked into the bathroom and he "just killed her" because he was angry. (30 RT 7082, 7085.) DeHoyos said that he did not put his fingers in Nadia's vagina, but in an offensive attempt to explain the physical evidence, he claimed he "was just trying to clean her." (30 RT 7098-7099.)

Moreover, DeHoyos had an angry outburst in front of the jurors in the sanity phase, which certainly did not inure to his benefit. When the prosecutor asked Dr. Meloy a question about whether DeHoyos took a picture of Dalila Flores, DeHoyos advanced towards the prosecutor and said,

> I don't even own a camera you stupid punk. Is it in evidence? Is it? Is it in evidence[?] ¶ I will fuck you up punk. I don't even have a fucking camera. I never had. I never have. He is accusing me of something that I never did. ¶ I never did nothing like that. What?

(32 RT 7893-7895.) Although Dr. Meloy opined that DeHoyos's courtroom outburst was consistent with his diagnoses, including his irritability, anger and impulsiveness due to his antisocial personality

disorder (33 RT 7986), surely this exchange did not assist DeHoyos's case or defense. It showed he was an angry, violent man but did not show he was insane.

The trial court came to the same conclusion about the weak mental health evidence. After the trial, it explained:

> [e]ven though it has been a hard proceeding for everyone, I feel, that counsel, did a fine job on both sides. As far as the defense is concerned you can only work with what you have. Obviously you did an excellent job of arraying a large group of mental health professionals to testify as to Mr. DeHoyos's mental health condition, which from his point, it looks like that was the best defense that you had and it was the right way to go.
>
> I think I have no quarrel with that approach by the defense, but I listened very carefully to all of the mental health professionals and there were a lot of inconsistency within and between the mental health professionals even on the fundamental questions, such as whether Mr. DeHoyos—when and where he became temporarily insane during the day in question and when he went out of temporary insanity.
>
> So in the final analysis I just didn't find myself finding that testimony convincing. That—that his mental problems were such that they were close to insanity or that those prevented him from any way knowing what he was doing with Nadia Puente. I think his problems are basically personality disorder.
>
> It is a tragedy that it had to lead to the death of an innocent child as it did. But I think the jury was fully justified in reaching the verdicts that they did and in rejecting the testimony of the mental health professional that his mental condition prevented him from entertaining the necessary mental state for the crimes involved.

(35 RT 8817-8818.)

Thus, contrary to DeHoyos's argument that the sanity phase evidence showing he was legally insane was "overwhelming" (AOB 219-228), it was conflicting, inconsistent, and weak. Moreover, the instruction achieved its purpose even with its reference to outpatient treatment. The instruction "is

intended to aid the defense by telling the jury not to find the defendant sane out of a concern that otherwise he would be improperly released from custody." (*People v. Kelly, supra,* 1 Cal.4th at p. 538; accord *People v. Coddington, supra,* 23 Cal.4th at p. 626, overruled on another point by *Price v. Superior Court, supra,* 25 Cal.4th at p. 1069, fn. 13.) The modification made by the trial court adding language that the seriousness of the crime was a factor in his treatment also inured to DeHoyos's benefit, as the crime was a capital case.

In his prejudice analysis, DeHoyos argues that it is reasonably likely the jury found DeHoyos sane out of fear that he could be released immediately. (AOB 227.) The jury was instructed not to do so. It was specifically told a verdict of "not guilty by reason of insanity" did not mean he would be released from custody and that it would be a violation of their duties if they found DeHoyos sane at the time he committed his offenses because of a doubt that the Department of Mental Health or the courts would properly carry out their responsibilities. (5 CT 1601; 33 RT 8207, 8209.) The jury is presumed to have understood and followed the court's instructions. (*People v. Hovarter, supra,* 44 Cal.4th at p. 1005, fn. 9.) DeHoyos also speculates that the jury may have found he was temporarily insane, but that he would manipulate the hospital officials to gain immediate release or that hospital officials would find he was restored to sanity and release him immediately. (AOB 227-228.) Given the court's instruction that the amount of time before he was released was based in part on the seriousness of the crime, DeHoyos's speculation is unfounded. Additionally, if the jurors found, as DeHoyos surmises could have happened, that he manipulated the expert witnesses and others, which leads to his conclusion that he would "manipulate hospital officials to gain an immediate release," (AOB 227-228), then it is unreasonable to believe they would have found his defense credible. In other words, if they thought he

manipulated his expert witnesses, the jurors would not have believed the expert witnesses, and they would not have found he was insane. Thus, given the weak and conflicting evidence of insanity and the favorable instruction which was to aid DeHoyos, reversal is not required under either standard.

XI. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT DID NOT MINIMIZE THE JURORS' SENSE OF RESPONSIBILITY REGARDING THE CAPITAL SENTENCING DECISION

DeHoyos argues the prosecutor's penalty phase closing argument minimized the jurors' sense of responsibility regarding the capital sentencing decision (*Caldwell* error) in violation of the Eighth and Fourteenth Amendments to the Constitution. (AOB 229-230.) The prosecutor's closing argument did not state or infer that the responsibility for determining the appropriateness of DeHoyos's sentence rested elsewhere. To the contrary, the prosecutor's argument made it clear that the sentencing determination rested exclusively with the jurors. Therefore, DeHoyos's constitutional rights were not violated.

A. The Prosecutor's Closing Argument

DeHoyos takes issue with the following portion of the prosecutor's closing argument[64] where the prosecutor discussed "sociological, philosophical considerations:"

> In the old days it used to be if someone stole my horse, I would go steal his horse. Or if someone assaulted my son, I might go

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[64] Although DeHoyos did not object on the grounds he now claims was error, this Court has held that in cases predating its decision in *People v. Cleveland* (2004) 32 Cal.4th 704, the no-forfeiture rule enunciated in *People v. Bittaker* (1989) 48 Cal.3d 1046, 1104, applies to *Caldwell* error. (*People v. Moon* (2005) 37 Cal.4th 1, 17-18.) Thus, his claim is cognizable on appeal.

assault his son. We are way, way past that time. And what happened, a long time ago, individuals basically handed over their rights, certain rights, to the government. And among those rights were the rights to seek redress for wrongs. And they said, '[w]e as individuals are going to let, in effect, society speak through our laws. We are going to have a set of laws.'

And just as if you had your car stolen and someone stole a car, you have an expectation, number one, that there is a law that would correct that wrong; number two, the person, if they were caught, would somehow be punished commensurate with that type of wrong. You have that expectation because you are part of that compact or that agreement. We all are. That's what it is, and we have the expectation that the laws in California will be carried out.

So, in effect—in effect, that agreement transfers these rights to the government. And the government has decided in this one case—in this one case in the State of California, we are going to take that right back and we are going to give it back to the people. And that's what you have, the right of punishment and sentencing in a capital-type case.

And it is because of that that your decision, whether it is life without the possibility of parole or the death penalty, is an expression—is an expression of society's attitude towards crimes. Because, if you think about it for a minute, the only way society can say anything about a crime, how they feel about it—good, bad or otherwise—is how? By punishment.

(AOB 229-230, quoting 34 RT 8660-8661.)

B. The Prosecutor's Argument in No Way Minimized the Jury's Sense of Responsibility

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, 323, 325-326 [105 S.Ct. 2633, 86 L.Ed.2d 231], the prosecutor argued that the jury should not view itself as determining whether the defendant would get the death penalty, because their decision would be automatically reviewed by the State Supreme Court. The United States Supreme Court held the prosecutor's comments sought to minimize the jury's sense of

responsibility for the appropriateness of a death sentence, which violated the Eighth Amendment's heightened need for reliability in such a determination. (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 340-341.)

Here, the prosecutor's comments did not in any way lead them to believe that they were not responsible for a death verdict. To the contrary, the prosecutor's point was that in a death penalty case, it is the jury, and not the government, who has the responsibility to determine the appropriate punishment. He explained that historically, individuals imposed punishment themselves, but then society handed those rights over to the government, and the government imposed appropriate punishments through its laws. He then explained that in a "capital-type" case, that determination is given back to the people, and the jurors were to make that decision. "No reasonable juror . . . would have been mistaken as to the jury's role as the arbiter of the defendant's fate." (*People v. Moon, supra,* 37 Cal.4th at p. 18, quoting *People v. Welch* (1999) 20 Cal.4th 701, 763.)

Moreover,

> [i]n determining whether *Caldwell* error has occurred, '[w]e do not reach our conclusion based on any single statement uttered by the prosecutor. Rather, we consider the instructions of the court and the arguments of both prosecutor and defense counsel.' [Citation.] We also must consider the prosecution's statements within the overall context of its closing argument. [Citation.].)

(*People v. Hinton, supra,* 37 Cal.4th at p. 905, quoting *People v. Young* (2005) 34 Cal.4th 1149, 1221.) Other comments of the prosecutor made it clear the jurors were responsible for the determination of whether DeHoyos received the death penalty. The prosecutor started his argument by telling the jury that, "as you know by now from our earlier comments both in jury selection and later, this is a most unique proceeding; in that this is the only type of case where a jury makes the sentencing decision. In other cases, sentencing is done by the court or the judge." (34 RT 8617.) The

prosecutor explained that the jurors needed to weigh the aggravating and mitigating circumstances and determine which penalty was justified and appropriate. (34 RT 8630-8631.) He explained that if the jurors concluded that DeHoyos was mentally ill and, "therefore, he should not be executed that is your right to do that too, obviously." (34 RT 8636.) Thus, the prosecutor's argument did not in any manner indicate the jury was not responsible for the sentencing determination; to the contrary, he made it clear they were ultimately and solely responsible for DeHoyos's sentence.

Although DeHoyos argues the prosecutor committed *Caldwell* error, he acknowledges the prosecutor did not explicitly tell the jurors that the responsibility for the sentencing decision lay elsewhere. (AOB 231.) Instead, his argument is that the prosecutor led the jurors to believe that their duty was "to carry out their roles as a proxy for 'society,' and in that capacity to formally reach the verdict (i.e., death) that 'society' had already mandated" and that therefore they were only to act as enforcers of the social contract. (AOB 231-232.) Although the prosecutor explained the jury's decision, "whether it is life without the possibility of parole or the death penalty," was an expression of society's attitudes towards the crimes, his comment was not error. (*People v. Ledesma, supra*, 39 Cal.4th at p. 741 [not improper for prosecutor to argue capital jury is conscience or representative of community]; see also *Caldwell v. Mississippi, supra*, 472 U.S. at p. 333 [A capital jury is asked to decide whether a defendant should receive the death penalty on behalf of the community].) Thus, the prosecutor's comment that the jury's determination was an expression about society's attitude toward the crimes was not improper.

C. DeHoyos Was Not Prejudiced by Any *Caldwell* Error

Even if the prosecutor somehow minimized the juror's sense of responsibility, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at pp. 23-24 .) As noted *ante*, the

prosecutor made it clear the jury was to make the sentencing decision. Moreover, the trial court properly instructed the jury as to what factors they were to consider in determining the appropriate penalty (CALJIC No. 8.85; 5 CT 1664-1665; 35 RT 8710-8712); that statements of the attorneys were not evidence (CALJIC No. 1.02; 5 CT 1673; 35 RT 8717-8718), that it was the jury's duty to determine which penalty shall be imposed on DeHoyos (life in prison without the possibility of parole or death), and that they were to assign the moral or sympathetic value to the various factors they deemed appropriate (CALJIC No. 8.88; 5 CT 1695-1696; 35 RT 8730-8733).

Had the prosecutor not made the argument that DeHoyos now claims was error, the outcome of the penalty phase would have been the same. As explained in Argument II, the evidence against DeHoyos was overwhelming. He used a ruse to get a nine-year-old girl into a motel room, then raped, sodomized, and killed her. He then stuffed her body into a trashcan and discarded her before fleeing the state. The jury recommended the death penalty because the heinous nature of the crime, not because of the prosecutor's closing argument.

XII. CALIFORNIA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Acknowledging this Court has previously rejected his contentions, DeHoyos argues, to preserve federal review, that California's capital sentencing scheme is unconstitutional. (AOB 235.) DeHoyos has not presented any compelling reason for this Court to revisit any of its previous rulings.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

DeHoyos claims Penal Code section 190.2, which enumerates what are special circumstances, is impermissibly broad, thereby making "almost all first degree murders" eligible for the death penalty, in violation of the

Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 235-236.) This Court has consistently rejected this claim. (*People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Harris* (2005) 37 Cal.4th 310, 365.) DeHoyos has not presented any reason to reconsider this issue.

B. Penal Code Section 190.3, Subdivision (a) Is Not Impermissibly Broad

DeHoyos argues that Penal Code section 190.3, subdivsion (a), allowing the jury to consider the "circumstances of the crime" as an aggravating factor is not sufficiently limited, thereby allowing prosecutors to argue every conceivable circumstance is an aggravating factor, even those that contradict each other from case to case, thereby violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 236-237.) This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; accord *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.) DeHoyos has not presented any reason to reconsider this issue, therefore, his claim should be rejected.

C. The Standard Penalty Phase Instructions Do Not Impermissibly Fail to Set Forth the Appropriate Burden of Proof

DeHoyos makes a number of claims that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. None of his contentions have merit.

1. There Is No Requirement the Jury Find Aggravating Factors Outweigh the Mitigating Factors Beyond a Reasonable Doubt

Citing *Apprendi v. New Jersey, supra*, 530 U.S. at p. 478, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556](*Ring*), *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), DeHoyos argues the jury needed to make factual findings beyond a reasonable doubt that (1) aggravating factors were present and (2) the aggravating factors were so substantial as to make death the appropriate punishment, and the failure to do so violated the Due Process Clause and the Eighth Amendment to the Constitution. (AOB 238-239.)

California's death penalty statute is constitutional, and this Court has determined that the United States Supreme Court decisions in *Apprendi* and *Ring* do not alter that conclusion.

As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not

> constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

In California "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto, supra*, 30 Cal.4th at p. 263.) The United States Supreme Court's decisions, including *Cunningham*, "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince, supra*, 40 Cal.4th at p. 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens, supra*, 41 Cal.4th at p. 212). Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham*. DeHoyos has not presented any reason to reconsider this issue.

2. There Is No Requirement to Instruct on the Burden of Proof or Its Absence

DeHoyos next contends that the jury should have been instructed that the state had the burden of persuasion on the existence of any factor in aggravation, and the appropriateness of the death penalty, and that there was a presumption that life without parole was an appropriate sentence, and the failure to do so violated his rights under the Sixth, Eighth and

Fourteenth Amendments to the Constitution. (AOB 240-241.) This Court, in previously rejecting DeHoyos's position, has explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process—such as burden of proof—are not necessary.'" (*People v. Lenart, supra*, 32 Cal.4th at p. 1136, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Nor is there a requirement that the jury be instructed that there is no burden of proof. (*People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104.)

3. There Is No Requirement the Jury Unanimously Determine Which Aggravating Factors They Relied Upon or That DeHoyos Engaged in Prior Unadjudicated Criminal Activity

DeHoyos contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury found either unanimously or by a majority which aggravating circumstances warranted the death penalty, and that he engaged in prior criminality. (AOB 240-243.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney* (2009) 47 Cal.4th 203, 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez, supra*, 47 Cal.4th at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor was DeHoyos's right to Equal Protection violated by not requiring unanimity on the presence of

aggravating factors. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

4. CALJIC No. 8.88 Is Not Impermissibly Vague and Ambiguous for Using the Word "Substantial"

DeHoyos contends the phrase "so substantial" in the instruction to the jury that their determination of penalty depended on whether the jurors were "persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole" (CALJIC No. 8.88) was impermissibly broad in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 243-244.) DeHoyos's contention is without merit. (*People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Bramit, supra,* 46 Cal.4th at p. 1249.)

5. CALJIC No. 8.88 Is Not Unconstitutional for Failing to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

DeHoyos contends CALJIC No. 8.88, informing the jurors that they can return a death verdict if the aggravating evidence "warrants" death violates the Eighth and Fourteenth Amendments to the Constitution because the correct inquiry is whether the death penalty is "appropriate," not whether it is "warranted." (AOB 244.) This contention lacks merit. (*People v. Rogers, supra,* 46 Cal.4th at p. 1179; *People v. Jackson* (2009) 45 Cal.4th 662, 701.)

6. The Instructions Were Not Constitutionally Deficient Because They Failed to Inform the Jurors That If Mitigation Outweighed Aggravation, They Must Return a Sentence of Life Without the Possibility of Parole

Although the instructions informed the jury the circumstances under which it could return a death verdict, DeHoyos contends the instructions

were deficient because they did not inform the jury of the converse—that if the mitigating circumstances outweigh the aggravating circumstances they must return a verdict of life without the possibility of parole. He claims the instructions therefore violated his right to due process. (AOB 245.) His claim is without merit. (*People v. Carrington, supra,* 47 Cal.4th at p. 199; *People v. Medina* (1995) 11 Cal.4th 694, 781-782.)

7. The Instructions Were Not Constitutionally Deficient For Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

DeHoyos contends his Sixth, Eighth and Fourteenth Amendment rights were violated because the penalty phase jury instructions did not set forth a burden of proof, and did not inform the jury they did not have to have unanimity regarding mitigating circumstances. (AOB 246.) The absence of any requirement of a burden of proof in the penalty phase instructions (except as to prior criminal acts) is not unconstitutional. (*People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Elliot, supra,* 37 Cal.4th at pp. 487-488.) Likewise, there was no requirement to inform the jury that they did not have to be unanimous in their findings of mitigating circumstances. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1317; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104.)

8. There Is No Requirement to Inform the Jury That There Is a Presumption of Life

DeHoyos claims the jury was constitutionally required to be instructed that there was a presumption of life imprisonment, and the failure to do so violated his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 247-248.) This Court has repeatedly rejected DeHoyos's argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the

guilt trial. (*People v. Abilez* (2007) 41 Cal.4th 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

D. Written Findings Are Not Constitutionally Required

DeHoyos claims the failure of the jury to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 248.) This Court has consistently rejected any claim that written findings are required by the jury as to aggravating factors. (*People v. Riggs, supra,* 44 Cal.4th at p. 329; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Cornwel, supra,* 37 Cal.4th at p. 105.)

E. The Instructions on Mitigating and Aggravating Factors Were Constitutional

Next, DeHoyos raises a number of claims regarding the instructions on mitigating and aggravating factors. Each contention has been previously rejected by this Court, and DeHoyos has not presented any compelling reason for this Court to revisit its holdings.

1. The Use of the Words "Extreme" and "Substantial" Is Constitutionally Permissible

DeHoyos contends the use of the words "extreme" and "substantial" in the list of mitigating factors (defining when mental or emotional disturbance, or the dominating influence of another, are mitigating factors) acted as barriers to the consideration of mitigation in violation of his Sixth, Eighth and Fourteenth Amendment rights to the Constitution. (AOB 249.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Parson* (2008) 44 Cal.4th 332, 369-370; *People v. Salcido* (2008) 44 Cal.4th 93, 168; *People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

2. There Is No Constitutional Requirement to Delete Inapplicable Sentencing Factors

DeHoyos next contends his constitutional rights were violated because the trial court failed to delete inapplicable sentencing factors in CALJIC No. 8.85, which describes what factors may be considered in mitigation or aggravation. (AOB 249-250.) The trial court is not required to delete the inapplicable sentencing factors. (*People v. Burney, supra*, 47 Cal.4th at p. 261; *People v. Bramit, supra,* 46 Cal.4th at p. 1248.)

3. There Is No Constitutional Requirement to Designate Which Factors Was Mitigating

DeHoyos contends the jury should have been advised which factors in CALJIC No. 8.85 were solely to be used as mitigators, and the trial court's failure to do so resulted in a violation of his Eighth and Fourteenth Amendment rights. (AOB 250-251.) CALJIC No. 8.85 is not unconstitutional for failing to inform the jury which factors can only be used as mitigating factors. (*People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Moon, supra,* 37 Cal.4th at p. 42.)

F. Intercase Proportionality Review Is Not Constitutionally Required

DeHoyos contends the failure to conduct intercase proportionality review violates the Sixth, Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner. (AOB 251.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell, supra*, 37 Cal.4th at p. 105; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

G. California's Capital Sentencing Sentencing Scheme Does Not Violate Equal Protection

DeHoyos argues California's capital sentencing scheme violates the Equal Protection Clause because it gives more procedural protections to non-capital defendants. As examples, DeHoyos complains that in capital cases there is no burden of proof, the jurors need not agree on what aggravating circumstances apply, and there are no written findings. (AOB 251-252.) As this Court has repeatedly and consistently held, equal protection does not "deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; accord *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Panah, supra,* 35 Cal.4th at p. 500.) This is because "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Thus, DeHoyos's argument is without merit.

H. California's Death Penalty Law Does Not Violate International Law

Lastly, DeHoyos contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 252.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Elliot, supra*, 37 Cal.4th at p. 488.)

XIII. AS DEHOYOS DID NOT HAVE A JURY FINDING ON FACTORS TO AUTHORIZE AN UPPER TERM SENTENCE ON HIS NONCAPITAL CRIMES, HIS SIXTH AMENDMENT RIGHTS WERE VIOLATED, HOWEVER, IMPOSITION OF THE UPPER TERM SENTENCES WAS HARMLESS; THE TRIAL COURT DID NOT ERR BY IMPOSING A CONSECUTIVE TERM

DeHoyos contends his sentence for the crimes other than the murder should be reduced to the middle term, and ordered served concurrently, because the trial court erred in relying on aggravating factors to impose the upper term and consecutive sentence, and because the determination was made on factors that were not found true beyond a reasonable doubt by a jury, thereby violating his rights under the Sixth and Fourteenth Amendments to the Constitution and Article I, section 16 of the California Constitution. (AOB 253-254.) Because the factors used by the court to impose the upper term were not determined by a jury, DeHoyos's Sixth Amendment right to a jury trial was violated, however, the violation was harmless. Furthermore, the trial court properly imposed a consecutive term.

A. DeHoyos's Sentence

In addition to being sentenced to death, DeHoyos was sentenced to a determinate sentence of 19 years in state prison. (35 RT 8814.) The determinate sentence was imposed as follows: the upper term of 11 years for kidnapping for the purpose of child molestation (Count 2), 8 consecutive years for forcible rape (Count 3), 8 concurrent years for sodomy with a person under 14 with a 10 year age differential (Count 5), and 8 concurrent years for child molestation (Count 6).[65] (5 CT 1793-1794; 35 RT 8812-8814.)

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[65] Although DeHoyos did not object to imposition of the determinate sentence, failure to do so does not forfeit his claims on appeal. (*People v.* (continued...)

The trial court explained the upper term sentence on Count 2 as follows:

> The court has selected the upper term in this case for that count because the aggravating circumstances that are present outweigh the mitigating circumstances.
>
> Although you have no criminal record, you have mental problems to a certain extent, which we have discussed. There is an early acknowledgement of guilt; nonetheless the aggravating circumstances, in the judgment of the court, outweighs the mitigating ones.
>
> Specifically, those aggravating circumstances being in particular the vulnerability of the victim. The fact that the crime was planned and premeditated by you and that you took advantage of a position of trust in order to perpetrate the offense.

(35 RT 8812-8813.)

The trial court explained the consecutive term on Count 3 as follows:

> The court is imposing sentence on that count under PC 667.6 subdivision (c) which permits full, separate and consecutive sentencing for forcible sex crimes, where the circumstances justify it.
>
> In addition to the matters that I have already stated, the court wants to insure that you are confined for the maximum time possible to state prison, if for any reason the death sentence . . . is overturned or commuted for any reason.
>
> In addition I find that it is proper to impose a consecutive sentence on the forcible rape after the kidnapping, because they occurred at different times and places and you had plenty of

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(...continued)
Sandoval (2007) 41 Cal.4th 825, 837, fn. 4 [failure to object does not forfeit Sixth Amendment claim raised prior to the United States Supreme Court's 2004 decision in *Blakely v. Washington*]; *People v. Stitely* (2005) 35 Cal.4th 514, 575 [failure to raise sentencing errors not forfeited if sentencing hearing predated *People v. Scott* (1994) 9 Cal.4th 331, 353, 357-358].)

> opportunity to think about what you were doing after you picked up Nadia Puente before you murdered her in the motel room.
>
> There were a number of occasions when you could have changed your mind and put an end to the events before it led to forcible rape and murder. So for those reasons I think the full consecutive sentence is justified.

(35 RT 8813-8814.)

The trial court did not state its reasons for imposing the upper term on Counts 3, 5 and 6. The trial court stayed the determinate sentence "pursuant to Penal Code [section] 654 pending the automatic appeal and execution of the sentence on Count 1; thereafter the sentence on those counts, the stay to become permanent." (35 RT 8815.)

B. DeHoyos's Sixth Amendment Rights Were Violated by Sentencing Him to the Upper Term

DeHoyos claims the imposition of the upper term on Counts 2, 3, 5 and 6 violated the Constitution under *Cunningham*, *Blakely* and *Apprendi*. (AOB 264-266.) Because DeHoyos was not given a jury trial on the aggravating facts that led to the upper term sentence, his Sixth Amendment rights were violated.[66] The United States Supreme Court held in *Cunningham* that "California's [Determinate Sentencing Law] does not comply with a defendant's right to a jury trial" and that the middle term was the maximum term that may be imposed on the basis of the jury's verdict alone. (*People v. Sandoval, supra,* 41 Cal.4th at pp. 825, 835-836.)

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[66] DeHoyos also claims the trial court erred by using factors to impose the upper term on Count 2 that were inapplicable, and for failing to state its reasons in imposing the upper term as to Counts 3, 5 and 6. (AOB 256-261.) Because Respondent is conceding it was error to impose the upper term based on *Cunningham*, which held the aggravating factors should have been determined by a jury, not a judge, it is not necessary to further address whether the judge committed error, as the facts supporting the upper term should not have been determined by a judge.

Because DeHoyos was given the upper term, without a jury finding of the aggravating facts used to impose the upper term, his right to a jury trial was violated by imposing the upper term on Counts 2, 3, 5 and 6.

C. The Error Was Harmless

The failure to give DeHoyos a jury trial on the aggravating circumstances was harmless. The denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman v. California, supra*, 368 U.S. at pp. 23-24, requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. (*People v. Sandoval, supra*, 41 Cal.4th at p. 838.) However, because the verdict on the charged offense is not at issue, "we must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper sentence." (*Ibid.*)

Here, the jury had determined death was the appropriate sentence for DeHoyos, so clearly they found his crimes aggravated, and would have found the aggravating circumstances to authorize the upper term. The probation listed as circumstances in aggravation that (1) the crime involved a high degree of cruelty, viciousness and callousness in that DeHoyos raped and sodomized the victim before killing her (Cal. Rules of Court, rule 421, subd. (a)(1)); (2) the victim was particularly vulnerable in that she was only nine years old, and DeHoyos told her he was a teacher and asked for her help, thus gaining her confidence (Cal. Rules of Court, rule 421, subd. (a)(3)); and (3) DeHoyos appeared to attempt to entice Sandra Cruz into his car by telling her he was a teacher shortly before kidnapping the victim, which showed his planning, sophistication and professionalism (Cal. Rules of Court, rule 421, subd. (a)(8)). (2 CT 520.) It listed as circumstances in mitigation that (1) DeHoyos claimed the victim initiated the contact with him and willingly went to the motel with him (Cal. Rules of Court, rule

423, subd. (a)(2)); (2) DeHoyos had an insignificant criminal record (Cal. Rules of Court, rule 423, subd. (b)(1)); and (3) DeHoyos claimed to be suffering from a mental condition that significantly reduced his culpability for the crimes (Cal. Rules of Court, rule 423, subd. (b)(2)). (2 CT 520-521.)

The jury heard, and rejected DeHoyos's mental health evidence, and found it did not mitigate his sentence for murder in that, in spite of the evidence he presented, they sentenced him to death. Likewise, they rejected his "claim" that Nadia willingly went to the motel with him, or else they likely would not have convicted him of kidnapping. His story that Nadia made contact with him was not credible, and likely not believed by the jurors, particularly in light of the evidence that DeHoyos initially approached Sandra Cruz. Thus, the only mitigating factor was that DeHoyos did not have a criminal record. This would not be enough to mitigate the crimes that DeHoyos committed, and their aggravating nature.

It is clear beyond a reasonable doubt that the jury would have found DeHoyos's crimes justified imposing the upper term sentence. DeHoyos's crimes were committed with a high degree of cruelty, viciousness and callousness. Taking a nine year old girl to a motel after school, raping and sodomizing her, then holding her head underwater to drown out her screams shows his cruelty, viciousness and callousness. His acts after raping and sodomizing her also showed his cruelty, viciousness and callousness. He stuffed her in a trash can like a piece of trash, drove her in the trunk of his car, and discarded her wet body. These facts show that, as to the underlying crimes, he exhibited a great deal of cruelty, viciousness and callousness.

In addition, the victim was particularly vulnerable. DeHoyos argues that it is improper in Count 2 to use Nadia's age to impose the upper term, because in the kidnap charge, an element of the offense was that she was

under 14 years old. (AOB 257-258.) Presumably DeHoyos's argument would also apply to Count 5 (sodomy with a person under 14 and with a 10 year age differential) and Count 6 (child molestation), because both of those crimes have as an element that the victim is a child. The argument would not apply to Count 3 (forcible rape). Moreover, Nadia was not just vulnerable based on her age. She was particularly vulnerable because she was a school child, walking home from school. School, and the short walk home, should be safe places for children. Instead, DeHoyos used the time and place (school getting out) as an opportunity to use a ruse to get a school child into his car, to a motel, and then sodomized and raped her. "Contrary to what defendant claims, a crime victim can be deemed vulnerable for reasons not based solely on age, including the victim's relationship with the defendant and his abuse of a position of trust." (*People v. Stitely, supra,* 35 Cal.4th at p. 575.) Additionally, DeHoyos's ruse to get Nadia in his car of telling her he was a teacher and needed her help, combined with his first attempt to get Sandra Cruz in his car, showed his planning, sophistication and professionalism in committing his crimes.

Relying on *People v. Sandoval, supra*, DeHoyos argues that the sentencing error was not harmless because, like in *Sandoval*, his level of personal culpability was "hotly contested." (AOB 273, citing *People v. Sandoval, supra*, 41 Cal.4th at p. 843.)[67] While in *Sandoval* the defendant's personal culpability was hotly contested at trial, the jury rejected the prosecution's view of the evidence, and found the defendant guilty of the lesser included offense of voluntary manslaughter, rather than murder. (*People v. Sandoval, supra*, 41 Cal.4th at pp. 841-843.) In contrast, here, the jury rejected the defense version of the evidence in the guilt phase, the sanity phase, and the penalty phase. The aggravating factors were

[67] The quotation DeHoyos relies on was at page 841, not 843.

significant, and the mitigating factors were weak. Had the issue been presented to the jury, it can be said beyond a reasonable doubt it would have authorized the upper term sentence for the noncapital crimes. This is made even clearer by the jury's rejection of DeHoyos's defense, claim of insanity, and request for a life sentence.

D. The Trial Court's Imposition of a Full Maximum Consecutive Term for Forcible Rape Was Proper

The trial court sentenced DeHoyos for the forcible rape under Penal Code section 667.6, subdivision (c) to a full, separate and consecutive sentence (instead of one-third of the middle term under Penal Code section 1170.1). Relying on *Apprendi*, *Blakely* and *Cunningham*, DeHoyos contends the trial court erred in sentencing him to a full consecutive term on Count 2, forcible rape, because it required judicial fact finding beyond what is implicit in an underlying jury verdict. (AOB 266-271.) DeHoyos's contention lacks merit "[b]ecause the *Cunningham/Black* rule does not apply to the sentencing choice to impose consecutive rather than concurrent sentences." (*People v. Wilson* (2008) 44 Cal.4th 758, 813.)

XIV. THERE WAS NO CUMULATIVE ERROR

Repeating his claims of error, DeHoyos next claims that the cumulative effect of errors in the guilt, sanity, and penalty phase undermine the confidence in the outcome, requiring reversal of his conviction, sanity verdict and death sentence. (AOB 274-281.) As there was no error, the can be no cumulative error. "[A]ny number of 'almost errors,' if not 'errors' cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Moreover, even assuming DeHoyos's claims constitute error, taken individually or together, these errors do not require reversal of his conviction. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [guilt phase instructional error did

not cumulatively deny defendant a fair trial and due process]; *People v. Cooper* (1991) 53 Cal.3d 771, 830 ["little error to accumulate"].) DeHoyos is entitled to a fair trial, but not a perfect trial. (*People v. Stewart* (2004) 33 Cal.4th 425, 522.) DeHoyos received a fair trial.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: February 11, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 70, 333 words.

Dated: February 11, 2010

Respectfully submitted,

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