In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ROBERT WARD FRAZIER,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S148863

Contra Costa County Superior Court Case No. 041700-6
The Honorable John C. Minney, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Robert Ward Frazier was convicted and sentenced to death after he beat Kathleen Louise Loreck (Kathy) on the head with a fencepost at least 10 times and forcibly raped and sodomized her on a popular walking trail in Contra Costa County. Kathy died in a hospital about two hours later from swelling and softening of her brain. In the hour leading up to the assault, Kathy took her usual lunchtime walk on the trial behind her work. Frazier watched her go by, retrieved a piece of angle iron fence post, waited for her to return, and attacked her as she spoke to her husband on the phone.

A police officer found Kathy in a secluded area on the side of the trail. She was nude from her navel to her calves, her face was completely covered in blood, her eyes pointed in different directions, and she bled from both ears. An autopsy revealed that Kathy suffered a 13-inch long skull fracture from her left ear to her right forehead, as well as chipping fractures, fractures to the base of the skull, and fractures to the petrous bone—one of the hardest bones in the body.

In addition to routine claims challenging the death penalty, Frazier alleges that the trial court erroneously excused a death-scrupled prospective juror, erroneously denied him his right to self-representation, improperly instructed the jury with a flight instruction, and erroneously denied his motion for individual sequestered voir dire. All of the claims fail.

STATEMENT OF THE CASE

On November 5, 2004, the Contra Costa County Grand Jury indicted Frazier for the murder (Pen. Code, § 187; count 1),[1] forcible rape (§ 261, subd. (a)(2); count 2), and forcible sodomy (§ 286, subd. (c)(2); count 3) of Kathy. The indictment further alleged two felony-murder special

[1] Further undesignated statutory references are to the Penal Code.

circumstances (§ 190.2, subd. (a)(17)). (2 CT 336-338.)[2]

On July 19, 2005, the prosecutor filed a notice of intention to seek the death penalty. (2 CT 353.)

On June 21, 2006, a jury found Frazier guilty of first degree murder, forcible rape, and forcible sodomy. The jury also found true both felony-murder special circumstance allegations. (6 CT 1616-1620, 1640-1641; 46 RT 9447-9451.)

On August 24, 2006, the jury imposed a sentence of death. (7 CT 2043; 58 RT 11670-11672.)

On December 15, 2006, the trial court denied Frazier's motion for a new trial and his automatic motion for modification of the death sentence. (8 RT 2263, 2277-2292; 58 RT 11809, 11833, 11842.) The court imposed the death penalty for the special circumstance murder. The court also imposed six consecutive years in prison for the rape and six years in prison for the sodomy to run concurrent with the term for rape. The court stayed the sentences for the sex offenses under section 654. (8 CT 2263-2264; 58 RT 11842.) The court then entered an order of commitment pending execution of Frazier's death sentence. (8 CT 2263-2266; 58 RT 11843-11844.)

The matter is before this Court on automatic appeal. (§ 1239.)

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[2] There are two sets of Clerk's Transcripts with overlapping volume numbers. The first set contains the regular clerk's transcripts on appeal. The second set contains jury questionnaires. We refer to the regular Clerk's Transcripts as "CT" and the jury questionnaire transcripts as "JQCT."

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

1. Kathy Loreck goes missing

On May 13, 2003, around 1:00 p.m., Kathy left her work at Systron Donner to take her regular lunchtime walk on the Contra Costa Canal Trail behind the Systron Donner building. (35 RT 7188-7189, 38 RT 7682-7686; 39 RT 7744-7747, 7750-7751; 41 RT 8163-8164; 44 RT 8792.) The trail consisted of a paved path near a canal that was lined with vegetation. (36 RT 7311, 7314-7316; 38 RT 7693-7694; 41 RT 8277.) Kathy was a fast walker who walked for exercise. (35 RT 7192; 39 RT 7746.) As Kathy walked, she spoke on her cell phone with Johannes Loreck, her new husband of two months who lived in Austria at the time. (35 RT 7186-7189; 44 RT 8792.) They discussed homelessness in Austria and the United States. (35 RT 7190-7193.) Kathy lowered her voice as she passed some homeless people on the trail because she did not want them to hear the conversation. (35 RT 7190.)[3] However, she did not laugh at homeless people or put them down. (35 RT 7192-7193.)

About 54 minutes into the phone call (44 RT 8792) and a few minutes after the couple moved on to a different topic (35 RT 7191), Johannes heard a low sigh, and when he called Kathy's name, she did not respond (35 RT 7193). Johannes called Kathy back several times but could not reach her. (35 RT 7194-7195.) Johannes grew very worried and called his father, Heinz Loreck, who also worked at Systron Donner. (35 RT 7195.) Johannes told Heinz what had happened and asked him to look for Kathy.

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[3] There were several homeless encampments in the area at any given time of year. (36 RT 7296.)

(35 RT 7195, 7213; 36 RT 7279.)

After speaking with Johannes, Heinz observed that Kathy's work shoes were still under her desk, indicating that she had not returned from her walk. (35 RT 7213.) Heinz proceeded to look for Kathy in the surrounding area, but could not find her. (35 RT 7213-7215, 7245; 36 RT 7279.) Heinz returned to Systron Donner and informed the company's general manager that Kathy was missing after her call with her husband broke off. The general manager called the police. (36 RT 7245-7246; 39 RT 7881-7883.)

2. Kathy is found

Around 3:00 p.m., Concord Police Officer Paul Borda received a dispatch regarding Kathy's disappearance and searched the trails in the Systron Donner area. (36 RT 7292-7293, 7300-7301.) He rode his motorcycle around the Canal Trail until he rounded a corner near a culvert and saw a red stain that he believed to be blood. (36 RT 7312-7313.) Officer Borda dismounted his bicycle and inspected the stain. The patterns in it led him to believe that it was a hair splatter bloodstain, as if someone had been dragged along the ground. (36 RT 7315.) Officer Borda followed the stain, and saw that the vegetation next to the asphalt trail looked like something large had been dragged across it. (36 RT 7315-7316.) It was apparent that the object had been dragged down the hill away from the paved trail. (36 RT 7316.) Officer Borda followed the drag marks down a dirt trail through a cut in a fence until he reached an area near a eucalyptus tree. (36 RT 7316-7317.) There, he saw Kathy lying near the bottom of the path about 12 feet from the tree. (36 RT 7317, 7319.)

Kathy's legs pointed toward Officer Borda. She had no clothing from her navel to her calves. Her legs were bent and she moved from side to side. (36 RT 7317-7318.) Her face was completely covered in blood and her hair was extremely matted. (36 RT 7138.) Officer Borda attempted to

determine Kathy's condition. (36 RT 7319.) Her breathing was labored and her pulse was rapid. Her eyes pointed in different directions and one of her eyelids would not close. (36 RT 7320-7321; 38 RT 7549-7550, 7670.) Officer Borda shone a flashlight into her eyes and noted very little constriction of the pupils. (36 RT 7321; 38 RT 7576-7577, 7671 .)

Officer Borda observed that Kathy's pantyhose had been pulled down to her lower calves, and her panties were off of one foot. She wore one tennis shoe, and her skirt was pulled up. (36 RT 7321-7322.) The garments on her upper body were twisted out of place. (36 RT 7321-7322.) Blood completely covered her face and upper chest and pooled beneath her head. (36 RT 7322.) She bled from both ears and had a very large gash on the right side of her scalp. (36 RT 7327-7328; 38 RT 7578.)

Kathy moaned, and it was obvious to Officer Borda that she was in great pain and agony. (36 RT 7323; 38 RT 7550.) She clenched her fists so tightly, her hands were ghostly white. (36 RT 7324; 38 RT 7549.) She continued to roll from side to side. (36 RT 7324; 38 RT 7549.) Officer Borda spoke to Kathy and she occasionally momentarily relaxed, then commenced moaning and moving again. (36 RT 7324-7325; 38 RT 7576.)[4] Officer Borda stayed with Kathy until medical personnel arrived. (36 RT 7326.)

3. The crime scene

While kneeling over Kathy, Officer Borda observed the crime scene. (36 RT 7327.) He saw a broken-off two-foot long piece of angle iron fence post next to a pool of blood close to the eucalyptus tree. (36 RT 7331.) Once medical personnel attended to Kathy, Officer Borda inspected the

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[4] Officer Borda later told a detective that even though Kathy sometimes stopped moving, he did not really think she heard him. (38 RT 7577, 7671.)

area more closely. He noted a compression in the leaves on the ground from Kathy's head. (36 RT 7332.) The angle iron appeared to have blood on it. (38 RT 7504.) Below that area, Officer Borda saw impressions in the dirt that looked like the result of Kathy's feet being pushed down. (36 RT 7332-7334.) There was another pool of blood approximately six feet to the left of the pool near the eucalyptus tree. (36 RT 7334-7335.) At least two other angle iron fence posts were affixed to the ground on the same side of the trail as the eucalyptus tree. (38 RT 7580, 7588.) One of the fence posts looked broken at the top. (39 RT 7847, 7856-7861, 7870-7872.)

The crime scene, including the paved path where the blood trail started, was different from adjacent sections of the Canal Trail. (38 RT 7535.) It was the area closest to the trail that was the most covered in camouflage where a person could take someone to assault them. There was also a hole in the fence at that location. (38 RT 7535.) It was possible to see the asphalt trail from the eucalyptus tree. (38 RT 7582-7583, 7589-7590.) However, it was not possible to see someone behind the eucalyptus tree from the asphalt trail. (38 RT 7583-7584.)

4. Kathy's injuries

Kathy died at the hospital at 4:45 p.m. (44 RT 8883-8884.) Forensic pathologist Dr. Brian Peterson performed the autopsy on her body. (41 RT 8166-8167, 8172-8173.) He determined that Kathy sustained blunt force injuries mostly to the back of her head and one injury near her right temple. (41 RT 8194.) In association with those injuries, she bled profusely inside the layers of the scalp. (41 RT 8194-8195.) A large 13-inch long skull fracture began just above the left ear and continued across the top of her head to her right forehead area. (41 RT 8195.) Associated with that fracture were some chipping fractures where the bone had been chipped away. There were also fractures in the base of the skull. (41 RT 8195.)

Kathy further sustained fractures on both sides of the petrous bone,

which connects with the inner ear. (41 RT 8195-8196, 8233.) Except for tooth enamel, this is the hardest bone in the human body. It takes a substantial amount of force to fracture it. (41 RT 8196.) The bleeding from Kathy's ears was consistent with this fracture. (41 RT 8227-8228.) All in all, Kathy sustained 10 lacerations that could have been caused by at least 10 separate blows to the head, maybe more. (41 RT 8197-8198.) The injuries spanned the entire back of Kathy's head from ear to ear. (41 RT 8232-8233.)

Along with the skull fractures and bleeding in the scalp, there was bleeding on the outer surface of Kathy's brain, including the sides, back, and underside. (41 RT 8196.) Kathy's brain also swelled and softened, causing Kathy's death at it put pressure on vital centers that controlled heartbeat and respiration. (41 RT 8197, 8201.)

Other injuries sustained by Kathy included a brush abrasion on the middle of her back, scratches and bruises on her legs, and abrasions and contusions to her hands and wrists, including an abrasion that could have been produced by the edge of the angle iron found at the scene of the crime. (41 RT 8200-8201, 8217-8226, 8262-8263.) Dr. Peterson opined that the injuries to Kathy's hands were defensive injuries. (41 RT 8209-8210, 8265.)

Dr. Peterson further opined that Kathy may or may not have been conscious when Officer Borda found her. (41 RT 8204-8206.) Her movement could have been the manifestation of random firing in her injured brain. (41 RT 8205, 8254.) He acknowledged that the ambulance report listed Kathy as unresponsive, a state beyond unconsciousness. (41 RT 8257-8258.) Nevertheless, at some point, Kathy's wounds would have caused her pain. (41 RT 8265, 8268-8269.)

According to Dr. Peterson, there was not enough blood on the paved trail to account for all the injuries to Kathy's head. Thus, it is likely that

Kathy was struck with the intention of disabling her and then taken to the secluded area by the eucalyptus tree. (41 RT 8208, 8252-8253.)

5. Witnesses observe Frazier at the crime scene

Frazier returned to California from Texas, where he had been working, in January 2003. (41 RT 8314-8315; 43 RT 8684.) He did not have a home of his own. (40 RT 8083; 41 RT 8316.) Instead, he stayed with friends, including his former boss Walter Backes and former coworker Debra Gardner. (40 RT 8036-8039, 8084-8085; 41 RT 8315-8316; 43 RT 8706, 8675, 8683.) At times, Frazier was homeless on the Canal Trail. (43 RT 8683.)

On the day of the murder, around 12:30 p.m., Kathy's coworker Gerald Merz took a walk on the Canal Trail and saw Frazier at a corner close to Systron Donner (38 RT 7682-7685, 7687-7688, 7704-7705.) Frazier looked extremely disheveled and was loitering. (38 RT 7689.) When Gerald walked by Frazier, Frazier put his sunglasses up on his head and grinned at him. Gerald thought Frazier acted strangely. (38 RT 7690; 39 RT 7727.)

Around 1:00 p.m., on his way back to work, Gerald saw Kathy walking away from Systron Donner on the trail. She talked on her cell phone and gave Gerald a smile and a wave as she walked by. (38 RT 7683-7686; 39 RT 7737.) Gerald kept walking for five to 10 minutes and saw Frazier directly across from the culvert, 10 feet down from where Gerald originally saw him. (38 RT 7691-7693; 39 RT 7728-7730.) Frazier held a zip-off jacket vertically against his chest and picked grass off it. (38 RT 7692; 39 RT 7738.) The jacket could have concealed the metal bar found at the crime scene. Kathy had passed Frazier by this time. (38 RT 7692-7693.)

A few days after the crime, Gerald returned to the trail. (39 RT 7740.) He saw the bloodstain on the asphalt about five feet or so from where he

had observed Frazier holding the jacket. (39 RT 7740-7741.)

On the day of the murder, Kathy's coworker Gregory Smyers ran on the Canal Trail. (39 RT 7750-7551.) In the beginning of his run, Gregory saw Frazier sitting on the side of the trail idly picking at the grass. (39 RT 7752-7755, 7758-7759.) On his way back, Gregory saw Frazier again more or less in the same area. (39 RT 7753, 7755-7756, 7761.) This time, however, Frazier stood at a fence near the culvert facing away from Gregory. (39 RT 7753, 7755-7756.) About 10 yards further down the trail, Gregory passed Kathy, who walked in the same direction that Gregory ran. (39 RT 7751, 7753, 7758, 7761.)[5] The direction Frazier faced as Gregory passed was consistent with Frazier looking down the trail towards Kathy. (39 RT 7765.)

Another one of Kathy's co-workers, Harry Angus Jr., also took a lunchtime walk on the Canal Trail that day. (39 RT 7767-7768.) Harry saw Frazier two times at the location of the bloodstain on the asphalt trail. (39 RT 7770, 7773-7776.) The second time was 10 to 15 minutes before 1:00 p.m. (39 RT 7770-7771.) Michael Lussier saw Frazier close to the culvert at around 12:15 p.m. (40 RT 8023-8025, 8027-8030.)

Bryan Gomez rode his bike on the trails near Systron Donner around 11:30 a.m. and saw Frazier by the culvert. (40 RT 7953, 7956-7957, 7959-7960, 7981, 7990, 7995-7996.) On his way back from the mountain bike trails to the paved path, Bryan saw Frazier again. (40 RT 7962.) Bryan stopped and Frazier approached him and asked for a cigarette. (40 RT 7692, 7964, 7990.) Bryan gave him one and smoked one himself. The two

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[5] Gregory initially testified that Frazier was no more than 50 yards away from Kathy when Gregory passed her. (39 RT 7753.) However, Gregory told the police that the distance between Kathy and Frazier was about 10 yards. (39 RT 7758.) Gregory acknowledged that his memory was fresher when he spoke with the police. (39 RT 7758.)

discussed Bryan's bike and Frazier's dirt bike. (40 RT 7964-7966.) Frazier told Bryan that he was waiting for a homeless person. (40 RT 7989, 7996.) After the conversation, Bryan gave Frazier another cigarette and a water bottle and left. (40 RT 7966, 7989.)

When Bryan later learned of the murder, he informed the police of his interaction with Frazier. (40 RT 7956, 7967.) Bryan then accompanied a detective to the location where he and Frazier had smoked the cigarettes and found two cigarette butts near the crime scene. (39 RT 7853-7854; 40 RT 7967-7968.)

6. Sex assault and DNA evidence

Dr. Peterson performed a sexual assault exam on Kathy. (41 RT 8174.) He examined her body under ultraviolet light, which causes semen to glow. (41 RT 8179.) He observed specks of fluid glowing on her left knee, right thigh, pubic bone, and lower abdomen. (41 RT 8179-8180.) Using a dissecting microscope, Dr. Peterson looked at Kathy's cervix and vagina and the outside of her anus. (41 RT 8186-8187, 8190, 8244.) He found no injuries. (41 RT 8186-8187, 8190, 8244, 8259.) Dr. Peterson testified that he had seen injuries in vaginas before, but not ones caused by a penis. A penis is not a good object with which to produce blunt force injuries, even to the anus. (41 RT 8190-8191.) People may have nonconsensual sex without being injured. (41 RT 8192.)

Dr. Peterson performed a rape kit by swabbing Kathy's mouth, vagina and rectum with four swabs each and creating rectal and vaginal smears. (41 RT 8174, 8182-8187, 8189; 44 RT 8841.) He swabbed about two inches inside the vagina about an inch or two inside the rectum. (41 RT 8187, 8189.) He created the smears by smearing a swab onto slides. (42 RT 8539.) The rape kit also contained one left nipple swab, one right nipple swab, one lower abdomen swab, one pubic hair swab, one right thigh swab, and one left knee swab. (44 RT 8841.)

Dr. Peterson opined that any sperm found two inches inside the vagina could have been placed there by an ejaculating penis or any other object that had sperm on it. However, sperm could not have simply dripped into the vagina from the outside of Kathy's body because fluids do not flow at right angles. (41 RT 8270.) Dr. Peterson was sure that he did not contaminate any of the swabs by accidentally sampling wrong areas. He was certain that whatever was on the swabs was inside Kathy. (41 RT 8265-8266.) Dr. Peterson acknowledged that the blows to Kathy's head could have occurred before any sex assault took place. (41 RT 8259.)

Forensic serologist Sherry Holes examined the rectal smear and found a low number of sperm with tails. (42 RT 8470, 8539, 8579-8580.) The vaginal smear also contained a low number of sperm, and some sperm still had tails. (42 RT 8579-8580; 44 RT 8821.) The presence of tails meant that ejaculation had occurred only a few hours before the swabs were collected. (42 RT 8515, 8539.) There was a low number of sperm on the vaginal, rectal, and thigh swabs. (42 RT 8541-8542, 8576-8578, 8580; 44 RT 8818.) Sherry opined that the low numbers of sperm did not rule out ejaculation because some individuals have low sperm count and fluids may drain out of the body. (42 RT 8577.) A vaginal swab tested positive for the protein P30, which cannot exist for very long in the vagina or rectum. (42 RT 8580-8581.) A rectal swab tested negative for P30. (42 RT 8580-8581.)

Sherry developed a DNA profile from the thigh and vaginal swabs. (42 RT 8540-8542.) She also developed a DNA profile from a cutting of a large, crusty semen stain found on Kathy's sweater (42 RT 8529-8531, 8534-8535) and the cigarette butts the police obtained with Bryan Gomez's assistance (42 RT 8554). Sherry compared the DNA profiles from the swabs, the sweater, and the cigarette butts, and determined they all came from the same male individual. (42 RT 8540-8542, 8554-8555.) Sherry compared this DNA profile with DNA profiles she developed from a

toothbrush Frazier had used during his stay at Debra Gardner's house and a blood sample the police obtained from Frazier. (41 RT 8324; 42 RT 8555-8558; 43 RT 8660.) The toothbrush had at least two other people's DNA on it, but the DNA profile developed from the swabs, sweater, and cigarette butts could be included as a source of DNA on the toothbrush. (42 RT 8557.) Frazier's DNA profile from the blood sample matched the profiles from the swabs, sweater, and cigarette butts. (42 RT 8554-8555, 8558, 8560-8561.) Frazier was also included as a potential source of DNA on the bloody angle iron found at the crime scene. (42 RT 8543, 8551.) Frazier's DNA profile is very rare. (42 RT 8561.)[6]

The semen stain on Kathy's sweater contained nucleated epithelial cells that originate in the linings of the mouth, urethra, vagina, and anus. (42 RT 8534, 8597.) The cells could have belonged to either Kathy or Frazier. (42 RT 8536, 8594, 8597.)

7. Frazier's injuries after the killing

Frazier stayed with Debra Gardner until May 11, 2003. (41 RT 8318, 8325-8328, 8348; 43 RT 8681-8682, 8741.) Thereafter, he periodically stayed with Walter Backes and Walter's wife, Mickey Jacobson, in exchange for doing yard work. (40 RT 8038, 8041, 8082-8087, 8096, 8106-8107, 8129-8131.)[7] On the day of the murder, Mickey saw Frazier leave in the morning on Walter's bicycle. (40 RT 8087-8088.) Mickey next saw Frazier between 5:00 and 6:00 p.m., when he walked through the front door as Mickey cooked dinner. (40 RT 8088-8089, 8110, 8131-8132; 43 RT 8734-8735.) Frazier looked very dirty and beaten up. He was

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[6] Forty-two separate individuals were all eliminated as potential perpetrators through DNA analysis. (39 RT 7812-7813, 7815; 42 RT 8563; 43 RT 8647-8648.)

[7] Mickey testified under the name "Margie," but she was known as Mickey. (40 RT 8101.)

scraped and bruised and had marks on his arms and many abrasions on his face, and he was bleeding. (40 RT 8089-8090, 8113-8114, 8131-8132; 43 RT 8735.) There was a lot of dried blood on him. (40 RT 8090-8091.) Mickey did not recall whether there was blood not associated with Frazier's wounds on his clothes. (40 RT 8138.)[8]

Mickey asked Frazier what happened, and he told her that he got into a fight over a cell phone after drinking a six-pack of beer with some guys in a park. (40 RT 8091, 8093; 43 RT 8735.) Mickey got Frazier a wet rag and he cleaned himself. As he cleaned up, the news broadcasted the murder. (40 RT 8091.)[9] Mickey was extremely upset, but Frazier reassured her that she should not be concerned. (40 RT 8092.) A couple of days later, Mickey noticed that Frazier became morose and quiet and spent time alone. (40 RT 8128-8129.)

Walter testified that at some point when Frazier was staying with him in May 2003, Frazier came home at 9:00 p.m. (40 RT 8040.) The next day, which was a day or two after the murder aired on television, Walter saw some scratch marks on Frazier's face and a bruise and swelling on Frazier's cheek. (40 RT 8041, 8077-8079.) It looked like Frazier had been in a fight. (40 RT 8073.) Even though Walter told the police that he did not recall seeing injuries on Frazier, Walter was certain he saw them at trial. (40 RT 8074; 43 RT 8711-8712.) He testified there was a small possibility that he was mistaken, but he did not think so. (40 RT 8074.)

Debra Gardner testified that on the day of the murder, Frazier was

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[8] No male DNA was detected on fingernail clippings obtained from Kathy's hands. (42 RT 8568-8569.) However, Kathy was found wearing a ring with the stone turned to the inside of the palm. (39 RT 7792-7793.) The ring was not swabbed for evidence. (43 RT 8768-8769.)

[9] The earliest news coverage of Kathy's murder aired at 10:00 p.m. on May 13, 2003. (46 RT 9275.)

waiting for her when she got home from work between 5:00 and 5:30 p.m. (41 RT 8318-8319.) He looked dirty, as if he had been sleeping on the trail. (41 RT 8319.) Frazier asked Debra if she had heard that a woman had been killed. (41 RT 8319-8320.) Debra did not notice any injuries on Frazier at that time, but she did not pay much attention to him. (41 RT 8320, 8340-8341, 8360, 8362.) Debra let Frazier use her shower. (41 RT 8320-8321.)

On a different day, Frazier showed up at Debra's house while her best friend Marie Zabbo was over and said he had been pruning trees at Walter's house. (41 RT 8322, 8341-8342.) He pulled up his shirt and showed the women scratches on his back, arms, and chest. (41 RT 8322-8323.) Debra asked Frazier if the tree had won because he was scratched so badly. (41 RT 8323, 8341-8342, 8358-8359.)

Marie corroborated Debra's account of Frazier's injuries. Marie testified that Frazier had cuts all over the front of his chest and there were some cuts on his face and back, though more on his neck than face. (41 RT 8366-8367, 8369-8370.) Later in her testimony, Marie could not positively say there were injuries on Frazier's face. (41 RT 8373.) Marie told the police that she saw Frazier with injuries two or three days after Debra asked him to leave. (43 RT 8694-8695, 8737, 8741-8742.) Marie also told the police that she saw Frazier at Debra's house on the day of the murder. She did not report seeing any injuries on Frazier that day. (43 RT 8694.)

Bryan Schmidt, Debra's daughter's former boyfriend, testified that Frazier came to Debra's house in the middle of May 2003 with a cut on his head or face. (41 RT 8379-8380, 8385.) Frazier had blood on his hands and said that he had gotten into a fight with someone at a BART station. (41 RT 8379-8380.) Frazier also had blood on his clothing. (41 RT 8380, 8385.) Bryan did not remember Frazier pulling up his shirt and showing scratches on his torso and back. (41 RT 8386.)

8. Frazier confesses that he is the killer

Frazier and Zachary Fitzsimmons-Wright were former coworkers. (41 RT 8283-8284.) Around the time Frazier lived with Walter, Frazier stayed at Zachary's house overnight two times. (41 RT 8289-8290.) The second time, while the two were drunk, Frazier told Zachary that he was the trailside killer or the Concord trail killer. (41 RT 8292-8293, 8305-8306, 8311.) Zachary did not know the case Frazier was referring to because he had not heard about Kathy yet and did not take what Frazier said seriously. (41 RT 8292-8294, 8310-8311.) Frazier said strange things from time to time, and Zachary shrugged off the statement as another "weird Robert Frazier comment." (41 RT 8306.) Zachary told the police about Frazier's statement after he was contacted by a detective. (41 RT 8307-8309; 43 RT 8719.) Zachary did not report the statement to the police earlier because he did not associate it with Kathy's murder and did not take it seriously. (41 RT 8310-8311, 43 RT 8722-8724.)

9. Frazier's interview with the police

The police located Frazier in Indiana sometime in late August to early September 2003. (43 RT 8636.)[10] Concord Police Sergeant Judith Moore and Detectives Michael Warnock and Michael Finney interviewed Frazier in Lake County Jail after he waived his *Miranda*[11] rights. (43 RT 8637-8638, 8636, 8726, 8752.) Frazier acknowledged that he had a conversation with a man on a bicycle who gave him a couple of cigarettes and a bottle of water on the Canal Trail on the day of the murder. (8 CT 2514-2515, 2522, 2533-2534, 2545-2546.) Frazier claimed that he left the trail when he and the man finished talking, though he did not remember whether he lingered

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[10] Frazier apparently planned to go to Indiana before the murder. (40 RT 8048-8049, 8118-8119; 41 RT 8339-8340; 43 RT 8712-8713.)

[11] *Miranda v. Arizona* (1966) 384 U.S. 436.

there for about five or ten minutes or left immediately. (8 CT 2542.) Frazier denied seeing Kathy on the trail, but said he saw a picture of her on the news. (8 CT 2530, 2542-2543.) Frazier avoided the trails after Kathy's death because he did not want to be affiliated with them in any way. (8 CT 2532.)

When the police asked Frazier to explain the DNA evidence found at the crime scene, Frazier said that he had urinated there. (8 CT 2543, 2545-2546, 2549; 43 RT 8643.) He denied raping Kathy, killing her, or meeting her. (8 CT 2556-2557.) He denied telling Zachary that he was the Concord trail killer. (8 CT 2561, 2556.)

When asked what Kathy looked like, Frazier said, "She had long hair, looked like it was brown, and freckles . . . ." (8 CT 2537.) Frazier's answer struck the officers as odd because the pictures of Kathy on the news did not show her freckles. (43 RT 8641.) They were visible only up close. (43 RT 8641.) When Sergeant Moore asked Frazier how he knew she had freckles, he claimed that they were visible on television. (8 CT 2552.) Sergeant Moore and Detective Finney pointed out that Kathy wore makeup and the only place her freckles were visible was on her body. (8 CT 2552.) Frazier reiterated that he remembered seeing the freckles on television but stated that he could be wrong. (8 CT 2552.)

Audio and video recordings of the interview were played for the jury. (43 RT 8762-8763, 8765; 44 RT 8789-8790; People's Exhs. 137 & 138.)

B. Defense Case

The defense conceded that the DNA found at the crime scene belonged to Frazier. (35 RT 7170 [defense opening statement].) However, the defense contested whether the DNA evidence proved the charges. (35 RT 7170, 7175-7176, 7183-7184 [defense opening statement].)

Defense expert Keith Inman, a forensic scientist in a private crime lab, examined the vaginal, rectal, and thigh swabs. (44 RT 8909, 8920.) He

determined that the vaginal swabs tested positive for blood and contained epithelial cells. (44 RT 8926, 8962, 8968-8969.) A rectal swab appeared to have soil and blood on it. (44 RT 8929-8930, 8969.) Consistent with the county crime lab reporters, there were more sperm on the rectal sample than the vaginal sample. (44 RT 8928-8929.) Almost all of the swabs examined by the county crime lab had some red or brownish-red, yellowish staining. (44 RT 8836, 8936.) Inman found P30 on both the rectal and vaginal swabs. (44 RT 8929.)

There was Betadine staining and blood staining on Kathy's lower abdomen. (44 RT 8940.) Inman opined that it was possible for Betadine or blood to drain into the vagina if there was a sufficient amount of fluid. (44 RT 8940.) Inman also testified that it is possible to contaminate vaginal or rectal swabs by picking up material from the exterior of those areas. (44 RT 8933-8937.)

Inman tested a sample of the semen stain on the sweater. (44 RT 8941-8943.) Both the sperm and nonsperm fractions of the stain belonged to Frazier. (44 RT 8943.) Inman acknowledged that Sherry Holes had found trace amounts of Kathy's DNA in the stain. (44 RT 8944, 8979.) He opined that the small amount of that DNA indicated it was background, and there would have been much greater concentrations if the stain had resulted from vaginal drainage. (44 RT 8943-8945.) Inman testified that if the stain had resulted from wiping after vaginal penetration, he would expect to find vaginal material from Kathy at levels greater than background. (44 RT 8945.) Inman opined that it was reasonable to infer from the rape kit evidence that the sexual assault did not involve penetration. However, he acknowledged that penetration also reasonably explained the evidence. (44 RT 8954-8955.) Inman agreed with Dr. Peterson that it was reasonable to conclude the sexual assault took place after Kathy was hit in the head. (44 RT 8953-8954.)

Forensic pathologist Dr. Paul Herrman testified that it is very easy to contaminate swabs, especially rectal swabs, with material from outside those openings. (44 RT 9001-9003.) Semen can drain from the vagina to the anus if a woman is lying on her back. (44 RT 9003, 9010.) Betadine could wash semen down from the abdomen. (44 RT 9011; 45 RT 9031.) Dr. Herrman opined that the absence of injury in the vagina and the presence of blood on a vaginal swab or smear suggested that the swab had been contaminated. (44 RT 9011-9012.) He further opined that the presence of soil indicated the rectal swab was contaminated. (44 RT 9011.) However, he conceded that blood and dirt could have been present on the assailant, and that if someone put something inside a woman's anus that was dirty, bloody, and leaking semen, one would expect to find dirt, blood, semen, and some epithelial cells on a rectal swab that had been properly taken. (45 RT 9042-9044.) He also conceded that if someone put something into a woman's vagina that was bloody and leaking semen, one would expect to find blood, semen, and epithelial cells on a vaginal swab that had been properly taken. (45 RT 9044.)

Dr. Herrman disagreed with Dr. Peterson's conclusions that Kathy sustained defensive injuries. (44 RT 8990-8991, 8995-8996.) Dr. Herrman opined that some of her injuries resulted from her being dragged. (44 RT 8991, 8996-8997.) He further opined that it was unlikely the abrasion Dr. Peterson believed was caused by the angle iron was actually caused by it given the minor nature of the injury. (44 RT 8991, 8997-8998.)

Dr. Herrman disagreed with Dr. Peterson that a penis could not inflict blunt force injuries. (44 RT 8997-8998.) According to Dr. Herrman, in cases of forcible rape, the insertion or attempted insertion of a penis could cause injury, and the most common area injured was the vaginal opening. (44 RT 8998-8999.) However, Dr. Herrman conceded that forcible rape could be accomplished without any evidence of injury, even if the victim

was awake and resisting. (44 RT 8999; 45 RT 9032.)

Finally, the defense presented evidence disputing Officer Borda's suggestion that Kathy was conscious when he found her. (44 RT 8852, 8869, 8880.)

II. PENALTY PHASE

A. Prosecution Case in Aggravation

1. Frazier's prior convictions and uncharged acts of violence

a. Robbery of a convenience store

On October 18, 1985, Rita Ann Bomher worked at the White Hen Pantry, a convenience store in Illinois. (49 RT 9920-9921.) Around 10:30 or 11:00 p.m., Frazier came into the store, walked behind the counter, and stood directly behind her. (49 RT 9921-9924.) He held a "black tire billy"—a round, heavy, wooden stick about two feet long with an iron cap on the end. (49 RT 9922-9923.) Frazier herded Rita into the back of the store, and she heard the bell signaling that someone else had come in. However, Frazier blocked her view so she could not see who it was. (44 RT 9923.) Rita heard both registers open at the same time. (49 RT 9925.)

Frazier seemed nervous and serious. (49 RT 9926, 9931.) At some point, he tried to shake Rita's hand. He said, "Hi. Just relax. This will be all over with," and "Don't do anything stupid and you won't get hurt." (49 RT 9927, 9931.) He then looked over Rita's shoulder to a wine rack and asked her to hand him a bottle of rosé. (49 RT 9927.) Rita complied. Frazier then looked to his confederates, said, "Stay here," to Rita, and turned to go. (49 RT 9927.) When Rita followed him, he turned around and stated, "I said stay there," while threatening her with the "tire billy." (49 RT 9927.) As soon as Frazier left the store, Rita called 911. (49 RT 9928-9929.)

The robbers took $250 from the registers, a lottery ticket box, and Rita's purse, which contained her wallet and identification. (49 RT 9929-9930.)

A certified copy of Frazier's robbery conviction was admitted into evidence. (8 CT 2343-2346; People's Exh. 154.)

b. Aggravated battery of an inmate with a razor blade

In early June 1986, Frazier and Richard Randall Sutton became acquainted at Shawnee Correctional Center, a prison in Illinois where Richard was serving a sentence for robbery. (50 RT 10098.) During the first two months of Richard's stay at Shawnee, he and Frazier occasionally worked out together. (50 RT 10099.) One day Richard told Frazier that he was not getting along with some inmates who belonged to a gang called the Latin Disciples. (50 RT 10100.) After that, the two ceased working out together and were not friendly anymore. (50 RT 10100-10101.) About three days later, Frazier attacked Richard in the prison gym with a razor blade. (50 RT 10101-10102.) Frazier caught Richard by surprise and cut him all the way down his face and underneath his chin. (50 RT 10100-10102.) Frazier assaulted Richard in front of guards. (50 RT 10102.)

Richard was transferred out of Shawnee as a result of the incident. (50 RT 10099.) Before the transfer, Richard saw Frazier in segregation. Frazier apologized for what happened and said that he had tried to cut Richard's jugular vein. (50 RT 10103, 10108-10109.) He claimed that "the Latin guys put him up to it." (50 RT 10103, 10108-10109.)

Richard testified that when someone is "put up to something" in prison, it means that something will happen to that person if he does not do as he is told. (50 RT 10103.) However, Frazier could have refused to attack Richard because there were only about 25 Latin Disciples at Shawnee, and the biggest one of them was small. (50 RT 10109.) Frazier

was not a pushover in prison and could bench press 300 pounds. (50 RT 10114.) Frazier made a name for himself with the attack. (50 RT 10103.)

A certified copy of Frazier's aggravated battery conviction was admitted into evidence. (8 CT 2347-2354; People's Exh. 155.)

c. Frazier pulls a knife on a friend, threatens the police, and terrorizes the friend at work

Frazier and Linda Van Dyck were coworkers at the Orland Park Carwash in Illinois. (49 RT 9932-9933, 9947.) Linda and Frazier became friends, and he occasionally came over to her apartment. (49 RT 9934, 9945.) On April 17, 1989, Linda socialized with two other friends and another coworker at her house. (49 RT 9934-9935.) Linda's children were asleep in another room. (49 RT 9934.) Around 9:30 or 9:45 p.m., Frazier came over to Linda's apartment. Linda told Frazier that she did not want him to stay that evening, but Frazier ignored her and sat down to watch television. (49 RT 9935, 9946.) Linda could tell that Frazier had been drinking. (49 RT 9935.)

A little while later, Linda got up to use the bathroom that was inside her bedroom. (49 RT 9935.) Frazier followed her into the room, grabbed her by her arms and shoulders, and tried to kiss her. (49 RT 9935-9936.) Linda pushed him off and said something to the effect of, "No, no, it's not happening." (49 RT 9936.) She pushed him out of the way and went back into the living room. (49 RT 9937.)

Later in the night, Linda asked Frazier to leave. In response, he pulled out a knife, held it close to her face, and said, "You don't want to mess with me." (49 RT 9939, 9948, 9952.) Linda was scared. Frazier's guitar was at her house, and she placed it outside the door of her apartment. When Frazier went to retrieve it, Linda locked him out. (49 RT 9940, 9948.) Frazier yelled in a threatening voice and angrily stomped and banged on the stairs. (49 RT 9940.)

Officer Anthony Farrell was dispatched to Linda's apartment building regarding the disturbance. (49 RT 9954-9955.) Officer Farrell saw Frazier on the side of the street. Frazier was agitated and angry. (49 9954-9955.) He pulled a knife from his back pocket and handed it to Officer Farrell, stating, "You better take this from me before I kill somebody with it," or "I will kill somebody with it." (49 RT 9955-9956.)

Officer Farrell interviewed Linda and her friends, then arrested Frazier. (49 RT 9956.) Frazier became very angry, agitated, and out of control. (49 RT 9956-9957.) He punched the walls and hurt himself at the police station. (49 RT 9957, 9959.) Frazier repeatedly threatened to slash Officer Farrell's and another officer's tires. (49 RT 9957.) On his court date, Frazier threatened Officer Farrell by saying, "I'm going to get you." (49 RT 9959-9960.) Officer Farrell believed that Frazier would try to harm him in some way. (49 RT 9960.) Frazier's case was dismissed, and he was prosecuted for a parole violation instead. (49 RT 9959-9961.)

A little over a month after Frazier threatened Linda with the knife, she was involved in another incident with him at work. (49 RT 9941.) She went to the bathroom, and when she tried to leave, Frazier and others held the door closed. (49 RT 9941, 9944, 9949-9950.) Frazier yelled in a threatening voice and said, "You better watch your back. Watch yourself." (49 RT 9942-9943.) Frazier's tone frightened Linda. (49 RT 9943.) When Frazier finally let go of the door, it opened very quickly and caught Linda's big toe, tearing the nail completely off her foot. (49 RT 9943.)

d. Robbery of a gas station

Tracy Lynn Murray worked at a gas station in Orland Park, Illinois. (49 RT 9963-9964, 9975.) Frazier often bought cigarettes at the station and talked to her. (49 RT 9965, 9970.) Around September 19 or 20, 1991, Frazier came to the station and remarked that it would be easy to rob. (49 RT 9964-9965, 9969.) Tracy thought Frazier was joking. (49 RT 9965.)

Frazier changed the subject but then picked up $150 that was sitting the counter and placed it in his pants. (49 RT 9965-9966.) Tracy said, "Come on. Not funny. Give me the money back." (49 RT 9966.) Nevertheless, Frazier sprayed mace inside the station and told Tracy to give him some time, then call the police and tell them that she had been robbed. (49 RT 9966.) Tracy refused to go along with Frazier's idea. (49 RT 9966.) Frazier then took the rest of the money out of the cash drawer and threw it into the car of a woman who had driven up to the station. (49 RT 9966.) After the woman left, Frazier stayed behind and continued to try to talk Tracy into going along with his plan. (49 RT 9966, 9973-9974.) As soon as Frazier left, Tracy called the police. (49 RT 9967.) Frazier stole $540 that night. (49 RT 9972.)

A certified copy of Frazier's conviction was admitted into evidence. (8 CT 2356-2359; People's Exh. 156.)

2. Victim impact evidence

Several members of Kathy's family testified for the prosecution. Kathy's younger brother William St. John described her funeral as "packed" full of sad people who loved her. (49 RT 10002, 10004.) William wondered how his family would survive without Kathy because she was such a big part of it. 49 RT 10006.) She always smiled and everyone who came in contact with her went away with a smile. (49 RT 10005-10006.) William would never get over Kathy's murder. (49 RT 10008.)

Kathy's father Paul Aiello testified that Kathy brought joy to many people. She was magnetic. (49 RT 10016-10017.) He could not stomach what happened to her. He had not gotten a good night's sleep for months. (49 RT 10016.)

Kathy's son Eric Lyon had a good relationship with her. (49 RT 10020.) He testified that Kathy's murder ripped away his innocence and

will probably do the same thing to his child when she is old enough to understand. (49 RT 10021-10022.)

After Kathy's death, Eric and his siblings suffered debilitating depression. Eric did not leave his house for a while and had to quit his job. (49 RT 10025-10026.) He did not trust anyone anymore. He went to therapy, but it did not help. (49 RT 10026.)

Kathy was a parent to all of Eric's friends and all of his siblings' friends. (49 RT 10026-10027.) Her death affected many people. (49 RT 10029.) Kathy never got to enjoy her grandchildren, and Eric will miss out on her guidance as he navigates parenthood. (49 RT 10030.)

B. Defense Case in Mitigation

1. Frazier's family circumstances and childhood

Frazier was born on July 6, 1964, to Barbara Tinsley, 15, and Lanny Frazier, 19. (50 RT 10145-10146, 10148.) After Frazier's birth, Barbara and Lanny moved in with Lanny's family consisting of Lanny's mother Betty, Lanny's father Bill, and Lanny's brother Glenn Frazier. (50 RT 10150, 10153; 51 RT 10402.) When Frazier was five to seven months old, Lanny divorced Barbara. (50 RT 10156-10157.) Barbara lost her job, and Betty and Bill told her they would take temporary custody of Frazier until she got back on her feet. (50 RT 10157; 51 RT 10404.) They asked her to sign papers and told her that she did not have to read what she signed. (50 RT 10157.)

Barbara moved in with her parents and soon met her second husband Larry Tinsley. (50 RT 10158; 51 RT 10403-10404.) She and had her new husband tried to gain custody of Frazier when he was a toddler. (50 RT 10160; 51 RT 10405.) However, Betty told Barbara that she had signed adoption papers, and that Frazier was now Betty's son. Betty told Barbara to leave and never come back. (50 RT 10160-10161; 51 RT 10405.)

Frazier grew up believing that his father Lanny and uncle Glenn were his brothers. (51 RT 10320.)

Dr. Stephen Seligman, a clinical psychologist and psychoanalyst (51 RT 10275-10276) reviewed interviews with Frazier's family members and Frazier's school records and psychological reports (51 RT 10295-10296). He testified some reports indicated that Betty was emotionally indifferent to Frazier, that she told Frazier he was a burden to her, and that she prioritized ordered discipline over emotions and emotional distress. (51 RT 10311-10312.) The records primarily indicated that Betty was not involved in Frazier's life during his childhood. (51 RT 10317.) However, the records also showed that she adopted him, clothed him, and cared for him. (51 RT 10312.) The records further suggested that Frazier and his adoptive father had an affectionate relationship. (51 RT 10319.) Bill shielded Frazier from Glenn and Lanny, who were emotionally threatening and verbally abusive. (51 RT 10319-10320.) Bill died when Frazier was about 13 years old. (51 RT 10431.)

Dr. Gretchen White, a psychologist, also reviewed Frazier's records. Additionally, she reviewed interviews conducted by investigators and conducted her own interviews with Frazier, his family members, and others. (51 RT 10389, 10394-10398.) Dr. White testified that Betty was an angry and unhappy woman who "carped at everyone in the house" and who had a very negative outlook on life and other people. (51 RT 10410.) However, Dr. White acknowledged that in some ways, Betty doted on Frazier and bought him things. (51 RT 10450.) Dr. White described Bill as "quiet and retiring." (51 RT 10410.) Lanny was in and out of the house. He was a "a drinker, a braggart, very argumentative, very mouthy." (51 RT 10410; 54 RT 10955.) Glenn had an "explosive temper." (51 RT 10410.)

According to Dr. White, Glenn described his family as being saddled with Lanny's mistake. (51 RT 10417; 54 RT 10956.) Indeed, Frazier was

repeatedly told that he was a burden throughout his childhood. (51 RT 10417.) On cross-examination, Dr. White acknowledged that Frazier was not told he was Lanny's mistake for the first 10 years of his life because he did not know he was adopted at that time. (52 RT 10557-10558.)

Frazier's childhood friend Jeff Triolo (51 RT 10326-10327) testified that Frazier complained about living in the Frazier household (51 RT 10331). According to Jeff, Betty told Frazier that she was "stuck" with him and she swore at him. (51 RT 10332.) Frazier was not loved and was told that he was a burden on the Fraziers. (51 RT 10332.) Frazier stayed at Jeff's house sometimes because he had no other place to go. (51 RT 10331.)

Jeff testified that Glenn called Frazier names, hit him, and embarrassed him when Frazier had people over. (51 RT 10332.) Glenn was scary and abusive to Frazier and Frazier's friends. (51 RT 10356.) Once, Glenn asked to take naked pictures of Jeff and Frazier. (51 RT 10337.)

At some point, Frazier told Jeff that Glenn had touched him inappropriately. Frazier was upset and crying. (51 RT 10355, 10363.)[12] He asked Jeff not to tell anyone. (51 RT 10355.) Jeff complied because he believed things would get worse for Frazier if he reported the touching. (51 RT 10355-10356.) Jeff admitted that when he and Frazier were kids, Frazier would sometimes make things up and lie. (51 RT 10363-10364.) Jeff also admitted that he wanted to help Frazier and considered Frazier to be a friend. (51 RT 10362.)

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[12] At a hearing shortly before his trial testimony, Jeff said Frazier told him that Glenn had only attempted to touch Frazier. (51 RT 10363.) When the prosecutor cross-examined Jeff regarding the inconsistency, Jeff explained that he meant to say Glenn had accomplished the touching. (51 RT 10363.) There were also discrepancies between Jeff's testimony at the hearing and his interview with a defense investigator, during which Jeff said that Glenn "was doing things" to Frazier. (55 RT 11173.)

While growing up in Betty's household, Frazier exhibited behavioral problems. Jane Winblad, Frazier's elementary school teacher, recalled that Frazier displayed attention-seeking and inappropriate behaviors, and that he required much structure and attention. (50 RT 10204.) He barked, crawled around, and made noises. (50 RT 10205; 51 RT 10428.) One time, he swung from a beam in a classroom and screamed, "Sex, sex, sex for everyone." (50 RT 10207-10208, 10219-10220.) Frazier's behavior caused him to be rejected by many other kids. (50 RT 10210.) Jane believed that Frazier did not have a support system at home. (50 RT 10212.) The school attempted to contact Frazier's parents about his behavior. Typically, they did not respond. (50 RT 10219.)

Frazier was "kind of hyper" and "kind of out there a little bit." (51 RT 10328.) He did not have many friends, and the kids at school called him Crazy Bob. (51 RT 10328.) Many kids teased Frazier, and many stayed away from him because he was weird. (51 RT 10329.) Jeff's parents did not want Jeff to hang out with Frazier. (51 RT 10329-10330.) Frazier roamed the streets and sometimes slept in a field or in a church. (51 RT 10330, 10333-10334.)

After Bill died, Frazier started sniffing gasoline. (51 RT 10334-10335, 10431-10432, 10433-10434.)[13] The problem persisted as Frazier got older. (51 RT 10335, 10433-10434.) He also drank to excess. (51 RT 10336, 10436.) He stole and was truant from school. (51 RT 10436.)

Dr. White opined that the treatment Frazier received in Betty's household rose to the level of child abuse. (51 RT 10425.) However, Frazier repeatedly told Dr. White that he was not molested or abused in his early childhood. (52 RT 10551-10552.) Dr. White acknowledged that to

[13] At one point in his testimony, Jeff insisted that Frazier sniffed gasoline in elementary school. (51 RT 10361-10362.)

some extent, she automatically assumed that the abuse occurred and Frazier was just unwilling to talk about it. (52 RT 10552.) Dr. White further acknowledged that the only source of information regarding Frazier's possible molestation was Jeff Triolo, and that no one at Frazier's schools ever claimed it happened. (52 RT 10552.) Dr. White conceded that she did not actually know whether Frazier was molested as no one saw it and Frazier denied it. (52 RT 10553.) Apart from Jeff's statements, there was no corroboration of molestation. (52 RT 10554.)

The defense contrasted Frazier's childhood with that of his half brother Larry Tinsley, Jr. (50 RT 10221-10222.) Larry testified that he grew up with his five siblings in Barbara and Larry Sr.'s house. (50 RT 10222.) Barbara was a caring mother who guided Larry Jr. and his siblings. (50 RT 10223.) Larry Sr. was a hard worker who taught Larry Jr. respect. (50 RT 10223.) The family was not financially well off, but was close and happy. (50 RT 10224, 10230.) No one in the house had issues with substance abuse. (50 RT 10224.) Barbara and Larry Sr. made sacrifices so Larry Jr. could go to college. (50 RT 10229.) When he was 12 or 13 years old, Larry Jr. met Frazier. (50 RT 10224.) Frazier was very welcoming, while Betty was not. (50 RT 10226.)

After the meeting, Barbara and Frazier spoke on the phone until the phone calls ended abruptly. (50 RT 10166.) The next time Barbara saw Frazier was when he was in his mid-20s. (50 RT 10190.) He did not seem like he was in trouble, and he never spoke ill of Betty. (50 RT 10190-10191.)

2. Frazier's mental health problems

a. Frazier's mental health history

In November 1979, when Frazier was 15 years old, he spent two weeks at Christ Hospital—an in-patient psychiatric facility—after he was

arrested and spoke of suicide. (50 RT 10243-10244; 51 RT 10438; 54 RT 11009-11010.) The hospital report stated that, while Frazier was not "floridly psychotic," he had loosened associations, problems with realistic thinking, emotional lability, and depression. (50 RT 10244; 51 RT 10439, 10441-10446.) He was described as "fragmented, easily distracted with a disturbed, inadequate sense of self." (50 RT 10244.) Frazier's "ego boundaries were poor and [his] impulse control was almost non-existent." (50 RT 10244; 51 RT 10441-10445.)

The hospital recommended that Frazier undergo long-term treatment in a setting where he could be given intensive psychotherapy and be placed on a medication regimen. (50 RT 10244-10245; 54 RT 11010.) The hospital treated Frazier with the antipsychotic medication Navane, to which he responded positively. (50 RT 10245; 51 RT 10438; 54 RT 11010.) Frazier left the hospital after two weeks because Betty could no longer afford his treatment. (50 RT 10245; 51 RT 10439; 54 RT 11010-11011.) The Christ Hospital report described Betty as sincere, caring, and overwrought by Frazier's behavior. (50 RT 10255-10256.)

Psychologist Kimberly Merrill interviewed Frazier at a juvenile detention center in April 1980. (50 RT 10236, 10241-10242, 10261.) Frazier was referred to her because he committed burglaries and other offenses in the course of breaking into garages in search of gasoline. (50 RT 10242-10243.) During the interview, Frazier behaved as if he were much younger than his 16 years. (50 RT 10245-10246.) Frazier said that he had seen Jesus Christ and his disciples on two separate occasions and that the devil had spoken to him. (50 RT 10247.) He claimed that his life was dominated by forces of good and evil. (50 RT 10247.) He displayed signs of psychosis such as relating things that he overheard other people say to himself. (50 RT 10248.)

Frazier had difficulty drawing a house, which much younger children

were capable of doing. (50 RT 10250.) Merrill testified this suggested that Frazier had sustained permanent brain damage from sniffing gasoline, but acknowledged that she could not corroborate this observation. (50 RT 10250-10251, 10263-10264.) Merrill concluded that Frazier displayed deterioration in thinking and reality testing. (50 RT 10251.) Merrill recommended long-term treatment involving psychotherapy and medication. (50 RT 10251.) Merrill opined that at the age of 16, Frazier's abilities to control his impulses, learn from experience, and understand and process information were impaired. (50 RT 10252.)

On cross-examination, Merrill conceded that she was unaware that other doctors had found Frazier's hallucinations to not be true hallucinations. (50 RT 10258.) She also conceded that she did not ask whether Frazier hallucinated while sniffing gasoline. (50 RT 10258-10259.) Merrill acknowledged that Frazier displayed average intelligence and benefitted more from his formal education than she would have expected given his hyperactivity and behavioral problems. (50 RT 10259.) Merrill did not analyze Frazier more recently to determine whether he had changed. (50 RT 10260.)

Frazier bounced around many different institutions but never received long-term residential treatment with psychiatric care and medication. (51 RT 10452.) He was diagnosed with many different psychiatric illnesses over a long period of time. (51 RT 10455.) He made frequent suicide attempts and gestures. (51 RT 10457.) For most of his 20s, Frazier was in and out of jails, hospitals, and prisons. (51 RT 10458.) However, from 1993 to 2003, Frazier never went to prison and spent a total of about five days in jail. (52 RT 10585-10586.) He had no convictions or mental health records from that time. (52 RT 10586; 55 RT 11150-11151.)

The most normal and successful period of Frazier's life was from 1998 to 2001, when he lived in an apartment in California with a girlfriend

named Dee King. He had fairly stable work. (51 RT 10460.) Frazier and Dee then moved to Texas for what he believed was a big promotion. (51 RT 10463.) However, things did not work out. Frazier was eventually fired, and Dee left him. (51 RT 10464.)[14] Thereafter, Frazier used crack cocaine and meth and drank alcohol. (51 RT 10464-10465.) The drugs likely amplified his psychiatric symptoms. (51 RT 10465.) When Frazier returned to California, he was depressed, defeated, and very different from before he left for Texas. (51 RT 10468-10469.)

b. Defense experts' evaluations of Frazier's mental health

Dr. Seligman testified as an expert in treating very young children up to three years old. (51 RT 10281.) He explained attachment theory as it relates to a caregiver's relationship with a baby during the baby's first few years of life. (51 RT 10283-10295.) Dr. Seligman described researcher Harry Harlow's studies of the ill effects infant monkeys suffered after being separated from their mothers. (51 RT 10285.) During this testimony, the defense played a video demonstrating Harlow's studies for the jury. (51 RT 10286-10287.)

Dr. Seligman also described the findings of Rene Spitz, who studied the effects of young children's separation form their parents. (50 RT 10287.) Spitz found that babies who were given adequate physical care did not do well unless they were also given the opportunity to develop a positive relationship with a person. Babies without this opportunity became listless, depressed, unresponsive, and ill. Some died despite not

[14] Frazier's romantic relationships were tumultuous. His relationship with a woman named Julie Steinbaugh involved mutual domestic violence and emotional and physical abuse. (55 RT 11082.) When another girlfriend refused Frazier's marriage proposal while they were in a car, he threw a two-by-four through the car window. (55 RT 11085-11086.)

having any physical ailments. (51 RT 10287.) A video illustrating Spitz's study was also played for the jury. (51 RT 10288-10291.)

According to Dr. Seligman, more recent studies confirmed Spitz's conclusions that positive relationships with caregivers have positive effects on the developing brain and predict functioning later in life. (51 RT 10293.) When a baby is separated from a nurturing caregiver or never has a nurturing caregiver, the baby may become listless, uninterested in other people, hard to comfort, and have a tendency to get mixed up and not trust communication. (51 RT 10294.) Over a period of time, the child becomes less able to regulate himself and make good decisions. (51 RT 10294-10295.) Long-term consequences include negative effects on relationships with others, more impulsivity, and less respect for other people. (51 RT 10295.)

Based on information provided to him by the defense team, Dr. Seligman opined that in the first few months of life, Frazier's biological mother was a nurturing caregiver. (51 RT 10296-10297.) His attachment to her was disrupted when she left. (51 RT 10297.) As a five-month-old, he did not have the resources to cope with the separation. (51 RT 10297-10298.) Frazier became starved for attention and did not have confidence in ordinary means of getting it. (51 RT 10298.) He would go to great lengths to get gasoline and sniff it to alter his inner state. (51 RT 10298-10299.) By contrast, Larry Jr. grew up consistent with a nurturing, loving attachment to a mother who stayed in his life. (51 RT 10299-10300.) Dr. Seligman opined that Frazier's separation from Barbara and problems with the Fraziers were important factors in his severe difficulties as a child. (51 RT 10300.)

On cross-examination, Dr. Seligman acknowledged that Frazier's problems came to the attention of the mental health system only after Frazier's adoptive father died, and the earliest of Frazier's mental health

records were from that time. (51 RT 10305-10306.) Frazier felt that his relationship with his adoptive father was nurturing and loving. (51 RT 10306, 10319.) Dr. Seligman conceded that some people who had been abandoned at an early age and who had serious problems had overcome them. (51 RT 10313.) He further conceded that there is no nexus between being adopted at five or seven months and wanting to rape, sodomize, and murder a woman. (51 RT 10314.)

Dr. White also examined Frazier's background from a psychological point of view. (51 RT 10392.) She opined that Frazier came from a dysfunctional family where he experienced psychological and physical abuse. (51 RT 10400-10401.) Frazier's family circumstances and a number of genetic factors increased Frazier's risk of developing psychological disorders. (51 RT 10400-10401.) Those genetic factors included Barbara's family's history of alcoholism, Lanny's substance abuse, Lanny's diagnosis of bipolar disorder, and Bill's likely affliction with bipolar disorder or at least psychothymia. (51 RT 10401-10402, 10407.) According to Dr. White, Frazier had 11 out of 12 risk factors that made it more likely he would have a detrimental adult outcome. (51 RT 10471.) On cross-examination, Dr. White conceded that eight out of the 12 risk factors included choices that Frazier made, such as using a weapon in a crime. (52 RT 10560.)

Dr. White opined that, even at the time of trial, Frazier did not have any real insight into his many psychiatric problems. (51 RT 10474-10475.) His thinking was fragmented and he was in denial. (51 RT 10475.) He did not want to discuss being molested, convicted, rejected and left. (51 RT 10476.) He did not complain or acknowledge his mistreatment in childhood. (51 RT 10476-10477.) Dr. White opined that Frazier had a diminished capacity to communicate, abstract from mistakes, learn from experience, and assist his attorneys in his defense. (51 RT 10479-10480;

52 RT 10569-10570.)

However, Dr. White acknowledged that Frazier knew right from wrong. (51 RT 10396.) She conceded that there were a lot of instances in Frazier's life in which he exhibited the ability to conform his behavior to social standards, including handling credit card information as part of his telemarketing jobs. (52 RT 10543-10544, 10574-10575, 10578-10579.) Dr. White acknowledged that Frazier had relationships with women who he did not rape and murder, and relationships with people who he did not beat or rob. (52 RT 10544.) Frazier ultimately understood that when he did bad things, bad things would happen to him. (52 RT 10544.)

Dr. White admitted that she found it difficult to support the death penalty and that she always testified for the defense in death penalty cases. (52 RT 10549-10550.) Dr. White was paid $32,000 by the defense for a month's work. (52 RT 10392, 10542.)

Dr. Douglas Tucker testified as an expert in forensic and clinical psychiatry specializing in the diagnosis and treatment of sexual offenders. (54 RT 10981-10982.) He met with Frazier five times for a total of about 12 hours and psychoanalyzed him. (54 RT 10983, 10988.) Dr. Tucker concluded that Frazier was "a very complex person" whose symptoms did "not fit nearly into a single one or two diagnostic categories." (54 RT 10990.) According to Dr. Tucker, Frazier suffered from a bipolar spectrum condition, a significant substance abuse problem, a significant set of personality issues and problems, and severe attention deficit hyperactivity disorder. (54 RT 10993.) Frazier had been diagnosed with schizophrenic episodes and atypical manic disorder. (54 RT 10998.) Frazier's grasp on reality was tenuous, he was grandiose and paranoid, and he projected his own reality onto things. (54 RT 10997-10998.) Frazier had brief, short-lived episodes of acute psychosis which resolved. (54 RT 11002.) Frazier did not believe that he had a mental disorder. (54 RT 11003-11004.) Dr.

Tucker opined that Frazier was in denial about what was really going on with him. (54 RT 11054.)

The Illinois Department of Mental Health and Department of Corrections diagnosed Frazier as a latent schizophrenic. (54 RT 11015-11016, 11019; 55 RT 11117.) However, this type of diagnosis no longer exists. (54 RT 11016, 11018.) Dr. Tucker conceded that Frazier did not have schizophrenia. (54 RT 11018.) Dr. Tucker concluded that Frazier did not suffer from a sexual disorder. (54 RT 11052-11053.)

According to Dr. Tucker, Frazier's behavioral pattern over the years was one of recurrent emotional explosiveness and impulsive outbursts. (55 RT 11101.) Based on controversial research, Dr. Tucker opined that Frazier displayed traits common to children who are sexually molested, including disturbances in his masculinity, inappropriate sexual comments and statements in elementary schools, and inappropriate touching of teachers. (55 RT 11113-11114.) Dr. Tucker acknowledged that it was worth thinking about and considering whether Jeff Triolo's testimony regarding Glenn touching Frazier was intended to help Frazier in some way. (55 RT 11174-11175.)

Dr. Tucker consulted with another expert, neuropsychologist Dr. Ruben Gur. (54 RT 11022-11023.) Dr. Tucker reviewed Dr. Gur's findings derived from cognitive testing of Frazier and scans of Frazier's brain. (54 RT 11026.) The scans revealed that Frazier's brain size was in the bottom fifth percentile of the population. (54 RT 11028, 11030-11031.) According to Dr. Gur, Betty's lack of nurture could have diminished the development of Frazier's brain. (54 RT 11035.) However, the developmental problem could also have originated in Frazier's mother's uterus or in the first year or so of Frazier's life. (54 RT 11033.) Dr. Tucker testified that there is a correlation between a small brain and a person's lack of awareness that he or she has psychotic disorder like schizophrenia. (54

RT 11036.)

Dr. Tucker reviewed a PET scan—which measures brain activity—of Frazier's brain and discussed the scan with Dr. Gur. (54 RT 11037-11039, 11040.) A comparison of Frazier's PET scan and a PET scan of a normal brain showed that Frazier's brain was less active. (54 RT 11041-11042.) Dr. Tucker could not explain the significance of these findings other than to say that "this is abnormal" and "evidence of some kind of brain abnormality, brain damage." (54 RT 11042.) Frazier's psychiatric symptoms suggested a dysfunction in the frontal lobe, but the PET scan illustrated diffused problems throughout the brain. (54 RT 11058-11059.) According to Dr. Tucker, Dr. Gur ran a computerized neurocognitive test on Frazier and found abnormalities. (54 RT 11045.)

Dr. Tucker admitted that pretty much everyone who is on death row for murder and rape had something wrong with them mentally. (55 RT 11142-11143.) Dr. Tucker conceded that MRI and PET scans could not be used to diagnose psychiatric disorders, and that the subject was controversial. (55 RT 11154-11155.) Dr. Tucker was not surprised to hear that the role of PET scans in evaluating head trauma had not been established. (55 RT 11154.) Dr. Tucker agreed with California and federal courts' determinations that brain scans were not reliable for diagnosing mental health problems. (55 RT 11155.) Dr. Tucker acknowledged that Dr. Gur based the majority of his opinion on the brain scans. (55 RT 11155-11156.) Dr. Tucker was not aware that as recently as two months before he testified in Frazier's case, a court had found that Dr. Gur's testimony regarding brain scans was "preposterous" and "illuminating of a lack of objectivity or impartiality on the part of Dr. Gur." (55 RT 11156.) Dr. Tucker was aware that a court had rebuked Dr. Gur for "improperly discounting or not giving appropriate weight to eyewitness testimony" in a death penalty case. (55 RT 11156.)

c. Expert opinions regarding Frazier's mental condition on the day of the murder

Based on eyewitness reports describing Frazier as hyperactive, pacing, and strange on the day of the murder, Dr. Tucker opined that it was likely Frazier experienced severe psychiatric symptoms on the Canal Trail. (55 RT 11127-11128.)[15] Frazier may have thought that Kathy was talking about him when she mentioned homelessness and experienced explosive rage. (55 RT 11130-11132.) He may have impulsively raped Kathy after she lost consciousness. (55 RT 11134.)

In the past, Frazier was not the type of person to hang out on a trail and assault someone. His attacks tended to consist of mood explosions rather than predatory assaults. (55 RT 11132.) Dr. Tucker did not see evidence of preplanning. (55 RT 11135.)

Dr. Tucker admitted that his opinion as to what happened on the trail that day was speculation. (55 RT 11134, 11141.) He also admitted that he was not aware of evidence that Frazier saw Kathy and then broke off a metal bar and waited for her at a specific location. (55 RT 11140-11141.) Dr. Tucker acknowledged that Frazier could control himself most of the time. (55 RT 11178-11179.) Dr. Tucker further acknowledged that Frazier displayed the ability to preplan when he (1) robbed a convenience store; (2) tried to convince a gas station attendant to steal money from the station; and (3) obtained a weapon and ambushed a fellow inmate. (55 RT 11194-

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[15] Dr. Tucker also testified that Frazier's use of crack cocaine could have precipitated his psychosis that day. (55 RT 11185-11186.) The evidence of drug use Dr. Tucker relied on included the reports of two eyewitnesses who claimed Frazier engaged in a drug transaction on the trail (55 RT 11185) and Frazier's friend's report that he found a crack pipe that apparently belonged to Frazier when Frazier stayed with him (55 RT 11125-11126, 11185). This evidence was not presented during the guilt phase.

11196.) The defense paid Dr. Tucker $60,000 to $70,000 for his work in Frazier's case. (54 RT 10982-10983.)

3. Frazier's risk of future violence

George DeTella, an expert on the Illinois Department of Corrections, reviewed Frazier's prison records and testified regarding Frazier's past level of dangerousness in the prison system. (52 RT 10623-10624, 10635-10636.) DeTella opined that the incident with Richard was not one of the more serious incidents during that period of time in the Illinois prison system. (52 RT 10642.) Assaults of that nature were commonplace and could have occurred on an almost daily basis. DeTella was surprised that Frazier was prosecuted for the offense. (52 RT 10642.)

Frazier had minor discipline problems that resulted in him being placed in segregation. (52 RT 10638.) DeTella opined that those problems would not have caused Frazier to appear on his "watch list"—a list of inmates who posed significant security threats. (52 RT 10648-10649.) Frazier's conduct mirrored that of "a thousand other individuals in the system at the same time." (52 RT 10649.) Frazier was impulsive, immature, and problematic, but DeTella did not consider him to be a major security risk. (52 RT 10658-10659.)

DeTella admitted that the report he read did not show the motivation for the attack on Richard or indicate that Frazier had tried to cut Richard's jugular vein. (52 RT 10653.) DeTella agreed that Frazier's conduct could have been "more like attempted murder." (52 RT 10653.) DeTella acknowledged that although Frazier asked to be placed in protective custody several times and expressed fear of certain gangs in some of those requests (52 RT 10636), nothing in the records substantiated Frazier's

claim that the assault on Richard was gang related (52 RT 10651-10652).[16] Frazier's requests to be placed in protective custody were denied because insufficient information supported such placement. (52 RT 10653-10654.)

DeTella conceded that during prior incarceration, Frazier assaulted staff and inmates several times. (52 RT 10654, 10656-10657.) Frazier was also written up several times for threatening staff. Referring to a lieutenant, Frazier said, "Bring him over here, and I'll snap his arm off." (52 RT 10657.) Frazier was transferred frequently because he did not adjust well. (52 RT 10659.)

Correctional consultant James Michael Esten testified as an expert in assessing an inmate's future dangerousness. (54 RT 10894, 10899-10900.) Esten testified that if an inmate is sentenced to life without parole, he will be housed in a maximum security prison. (54 RT 10900-10901.) According to Esten, there had been no escapes from maximum security prisons since the introduction of the lethal electrical fence that surrounds them. (54 RT 10903.) There are ongoing efforts to make the cells in those prisons more secure. (54 RT 10905.)

Esten met with Frazier and spent around 13 hours with him to assess his risk of future violence in a maximum security prison. (54 RT 10912.) Esten testified that Frazier had two violent incidents since he had been in custody in this case. Specifically, on the day of his arrival at the Martinez Detention Facility, he became noncompliant during a controlled rear wristlock. (54 RT 10912-10913.) He did not throw any punches, and no

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[16] Frazier suggests the prison records contained evidence that the assault on Richard was motivated by his fear of a gang because they indicated that Frazier requested protective custody on the ground that the Gangster Disciples were after him. (AOB 34.) However, that request was plainly unrelated to the incident with Richard. Frazier sought protection because he owed the Gangster Disciples money and could not pay. (52 RT 10654-10655.)

one got hurt. (54 RT 10913.) Two days later, Frazier informed a deputy that he was going on a hunger strike. (54 RT 10913-10914.) Frazier had a significant amount of write-ups in jail, which Esten described as "nuisance[s], bothersome, troublesome." (54 RT 10914.) Esten opined that Frazier did not present a future risk of danger to other inmates and staff. (54 RT 10915-10916, 10928.)

Esten acknowledged that even in maximum security prisons, there are many things made available to prisoners with which they can make weapons. (54 RT 10919.) Esten conceded that in Corcoran, a maximum security prison with a secure housing unit, there were about 300 assaults in 2004, 91 of which involved weapons. (54 RT 10920-10921.) Esten agreed that the most dangerous inmates are housed in maximum security prisons (54 RT 10921), and that prison is still a very dangerous place even though the system does as much as it can (54 RT 10923). Esten acknowledged that there are female correctional officers, and even though there would be "guns over their heads at all times," Frazier slit Richard's face in front of two guards. (54 RT 10930.)

C. Prosecution Rebuttal

Deputy Sheriff David Hartman testified that he worked in the administrative segregation module in Frazier's jail, the worst place in the facility. (55 RT 11295-11296.) Through his work, Deputy Hartman got to know Frazier over the course of 16 or 17 months. (55 RT 11296.) Deputy Hartman witnessed Frazier folding origami, which did not violate the jail's rules. (55 RT 11296-11297.) However, Frazier then used the origami as currency to purchase items from other inmates, which did violate the rules. (55 RT 11297.) Frazier continued to barter with the origami despite repeatedly being told to stop. (55 RT 11297.) Frazier had a price list for his products and ran a business called Bob's Discount Dungeon. (55 RT 11304-11305.) Frazier was not written up for making origami until he

began bartering with it. (55 RT 11304.)

Frazier was eventually housed with inmates with mental health issues because he did not get along with inmates in other parts of the jail. (55 RT 11298-11299.) Frazier was not a mental health patient in the jail. (55 RT 11299.) Frazier continued bartering origami and other paper products with the mentally ill inmates in exchange for food and commissary items that he was not allowed to have because he had lost those privileges. (55 RT 11299-11300.) One time, Frazier bartered a greeting card for a book of stamps with a mentally ill inmate. A book of stamps was worth about six dollars, and the inmate could have bought a greeting card at the commissary for around 40 cents or received free cards through a program. (55 RT 11300.)

In February 2006, Deputy Hartman had a conversation with Frazier about why he pursued origami in custody. (55 RT 11300.) Frazier said that his attorney had suggested he make origami so that if his case proceeded to the penalty phase, it would "show the jury a different side of him." (55 RT 11301-11302.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCUSED PROSPECTIVE JUROR NO. 111 FOR CAUSE

Frazier argues that the trial court improperly excused Juror No. 111 based on his views on the death penalty. (AOB 36-68.) Frazier's argument fails. The trial court reasonably found that Juror No. 111's views prevented or impaired his ability to properly weigh the aggravating and mitigating factors and impose capital punishment. The trial court's determination is owed deference and is binding on this Court. Furthermore, we respectfully ask this Court to hold that any error was harmless.

A. Factual and Procedural Background

Along with the other prospective jurors, Juror No. 111 completed a 51-page questionnaire. In the questionnaire, he stated that he would not have difficulty keeping an open mind until he heard the evidence, arguments, and instructions, but acknowledged he was "not confident [he] could recommend death in any scenario." (14 JQCT 4161.) In response to a question concerning his general feelings regarding the death penalty, Juror No. 111 stated, "I think it is not for human being[s] to judge whether someone should be killed. I am against it, but I will obey the law [and] instructions from the court." (14 JQCT 4176.) When asked whether he felt the death penalty was used too seldom or too often, Juror No. 111 stated, "Too often. I'd rather it not be used at all." (14 JQCT 4177.) Juror No. 111 expressed the hope that he would not be assigned to this case. (14 JQCT 4173.)

Juror No. 111 discussed this case with his wife over breakfast the morning he was called for jury duty. (14 JQCT 4174.) He indicated that his wife had served as a juror in a capital case in San Francisco in the early 1990s. (14 JQCT 4154.)

Later in the questionnaire, Juror No. 111 indicated that he would not, because of his beliefs about the death penalty, (1) refuse to find Frazier guilty of first degree murder just to prevent the penalty phase from taking place; (2) refuse to find the special circumstances true just to prevent the penalty phase from taking place; or (3) automatically refuse to vote in favor of the death penalty without considering aggravating and mitigating factors. (14 JQCT 4179-4180.) Juror No. 111 represented that he could set aside his personal feelings regarding what the law ought to be and follow the law as the court instructed. (14 JQCT 4182.) He stated he would not have difficulty being fair and impartial in considering the relevant aggravating and mitigating factors. (14 JQCT 4182-4184.) He did not belong to any

group that advocated the increased use or abolition of the death penalty. (14 JQCT 4177.)

During voir dire, Juror No. 111 acknowledged that his wife had served as a juror in a capital case. They were just dating at the time. (12 RT 2498.) When the case was over, Juror No. 111's wife did not wish to discuss it because it was disturbing and the judge told her not to talk about it. (12 RT 2498-2499.) Juror No. 111 did not press her for details "because [he] just saw her reaction and he respected her." (12 RT 2499.) When Juror No. 111 discussed the possibility of him being a juror in a capital case with his wife, she said, "You don't want to do it." (12 RT 2499.) Juror No. 111 claimed that his wife's prior service and feelings would not impact his ability to be fair and impartial. (12 RT 2499-2500.) However, when the prosecutor asked Juror No. 111 why he wrote in his questionnaire that he hoped he would not be assigned to this case, the juror responded that his wife told him to hope that he would not get on the jury. (12 RT 2502.)

The prosecutor explained to Juror No. 111 that the purpose of voir dire was to assess his appropriateness as a juror and reminded him of his obligation to obey the law despite his anti-death penalty stance if he were selected. (12 RT 2504.) Juror No. 111 responded:

> I'm trying to figure out under what situation—is it my choice to say whether or not death is appropriate or not? Because, in my opinion, I'm trying to come up with a scenario where I personally would think death would be appropriate, which would be something—I'm trying to come up with a scenario where that might be. If you think about, a bunch of children in a playground and a repeat offender, and you know someone that is so evil in my mind that there's just no hope of ever being able to contribute back to society in any way, shape, or form, I—then could I really think that death was appropriate? Personally? Yeah, I think maybe, you know.
>
> And what I think of as the majority of the scenarios, I just really have a hard time personally thinking that death is an appropriate penalty.

> Now, the question is how important is my personal opinion as to what's appropriate or not in a case like this. I don't know what all the instructions are going to be. I don't know what the—I don't know—I haven't been through it before. I don't know really where my personal opinions can amount to [*sic*]. So can I say to you, no, I will never consider voting for death? I—first of all, I don't think I can do it not having listened to any of the evidence, but I think it's very unlikely. There was a question before that said would you be leaning one way or the other, I'd be leaning towards life.

(12 RT 2505-2506.)

The prosecutor then asked, "Is it fair to say that . . . in almost all cases you would—or could not find it appropriate to impose the death penalty?" Juror No. 111 answered, "Yes." (12 RT 2506.) When asked whether he could impose the death penalty in a case where there was one murder, one rape, one sodomy, and the special circumstances that the murder was committed in the course of rape and sodomy, Juror No. 111 stated, "There's a chance, yes." (12 RT 2507.)

The prosecutor asked Juror No. 111 regarding the basis for his opposition to the death penalty and whether it was religious. (12 RT 2510.) Juror No. 111 responded:

> Yeah, I guess . . . I wouldn't associate it with religion. It's a belief. So, if you want to call it religion, I guess you can call it religion. I just don't feel like I could ever possibly having [*sic*] enough—I'm not sure how to put it.
>
> I mean—yeah, okay, call it religion like you say. It would preferably be something that God chooses whether someone should live or die as opposed to a human being making that choice for another human being.

(12 RT 2510.)

Juror No. 111 then stated that he did not think he would ever have enough wisdom or knowledge to feel qualified to impose the death penalty. (12 RT 2510-2511.) When the prosecutor pointed out the tension between

Juror No. 111's statement that he could "maybe impose the death penalty" and his statement that he would never have enough wisdom to do that, Juror No. 111 explained:

> So right now there's a conflict between my civic duty and what I believe. And so given a choice of how do I choose between those two things, it's kind of one of those things I'm hoping that I don't have to—it doesn't have to come down to that. If it does come down to that, my belief is that I will follow my civic duty because it's not—in that case, I guess I justify the decision based on the fact it's really not my moral choice, it's my choice based on evidence and my civic duty to do this, and it's not like I'm personally volunteering to go and decide whether someone should live or die.

(12 RT 2511.)

Later in the colloquy, the trial court analogized the determination of the appropriate penalty to a funnel and asked whether the funnel leading to the death penalty would be narrower for Juror No. 111 because of his reluctance to impose it, even if he found that the aggravating factors substantially outweighed the mitigating factors. (12 RT 2513.) The juror answered, "I guess, maybe the answer to your question is yes, because when I look at this case and the sum total of the charges that are on the table, I—I think that that is going to be very—it's going to be a very narrow funnel." (12 RT 2513.) The court then asked Juror No. 111 whether his opposition to the death penalty would interfere with his ability to consider either sentencing option. (12 RT 2514-2515.) Juror No. 111 responded that because of his beliefs, "the bar is going to be higher in terms of the need for substantial aggravating circumstances." (12 RT 2515.)

Defense counsel Eric Quandt questioned Juror No. 111 regarding the juror's struggle between his moral judgment and his civic duty. Juror No. 111 acknowledged it would be fair to say that his civic duty would trump his personal feelings. (12 RT 2517.) Juror No. 111 confirmed there was a chance he could impose the death penalty in a case where a repeat offender

killed multiple children in a playground and there was no hope of redemption. (12 RT 2517-2518.) With regard to the funnel analogy, Juror No. 111 acknowledged that aggravating factors could "reopen the funnel to some degree." (12 RT 2518.) Quandt then asked, "And it sounds to me like though you have—though it would be difficult, you can impose the death penalty in this case potentially?" (12 RT 2518-2519.) Juror No. 111 answered, "That's—that's right. I said that and that's what I believe. It's not that I can look at you and say I've done it before. If I've done it before, I can say with certainty yes, that's how I feel now." (12 RT 2519.)

The prosecutor challenged Juror No. 111 for cause. (12 RT 2585-2587.) The defense opposed the challenge (12 RT 2587-2589), but the trial court sustained it (12 RT 2591). The court interpreted Juror No. 111's statement that the bar would be higher for aggravating circumstances "to mean that the bar would be his personal beliefs which he had difficulty overcoming in considering the death penalty as a result." (12 RT 2591.) Based on Juror No. 111's answers in the questionnaire and during voir dire, the court found him to be "a man struggling with his ability to accept the doctrines of law we would explain to him, to think about the fact that he might be under law and doing his duty feel compelled to reach a decision by the weighing process and then be prevented from doing it because of his personal beliefs." (12 RT 2591.) The court concluded that Juror No. 111's personal beliefs would "result in him being unable to follow the law and impair his ability to accept the responsibilities for this case." (12 RT 2591.)

After the court announced its ruling, defense counsel Wendy Downing stated that she intended to file a writ petition challenging the decision. (12 RT 2592.)[17] She filed the petition for writ of mandate in *Frazier v. Superior Court* (A113790) on May 11, 2006, in the First District

[17] Two attorneys represented Frazier at trial.

Court of Appeal. On May 18, 2006, the Court of Appeal summarily denied the petition. (*Ibid.*; 34 RT 6898.)

B. Applicable Legal Principles

The state and federal Constitutions guarantee the right of a defendant to be tried by an impartial jury. (Cal. Const., art. I, § 16; U.S. Const., 6th & 14th Amends.) In accordance with this principle, "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttrecht v. Brown* (2007) 551 U.S. 1, 9, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) Nevertheless, "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttrecht*, at p. 9, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 416.) Thus, a prospective juror may properly be excused for cause if the juror's views on the death penalty "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt*, at p. 424.)

"'"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court."'" (*People v. Vines* (2011) 51 Cal.4th 830, 853.) "Because prospective jurors 'may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings' [citation], 'deference must be paid to the trial judge who sees and hears the juror' . . . ." (*People v. Thomas* (2011) 51 Cal.4th 449, 462.) "'A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] "[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the

death penalty, the trial court's determination as to his true state of mind is binding on an appellate court.'"'" (*People v. Gray* (2005) 37 Cal.4th 168, 193.)

C. Substantial Evidence Supports the Trial Court's Excusal of Juror No. 111

Jurors are properly excused for cause "because of their inability to 'temporarily set aside their own beliefs in deference to the rule of law'" as opposed to on the basis of their personal beliefs regarding the death penalty. (*People v. Taylor* (2010) 48 Cal.4th 574, 604.) "'"'There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . .'"'" (*People v. Vines*, *supra*, 51 Cal.4th at p. 853.) The determinant is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return the verdict of death *in the case before the juror*." (*People v. Cash* (2002) 28 Cal.4th 703, 719-720, internal quotation marks and citations omitted.)

Here, substantial evidence supports the trial court's conclusion that Juror No. 111 would be unable to temporarily set aside his personal beliefs about the death penalty such that he would be substantially impaired in the performance of his duties. Although Juror No. 111 stated that he could follow the law, keep an open mind, set aside his feelings about what the law ought to be, and not have difficulty being fair and impartial in considering the relevant aggravating and mitigating factors, he also expressed a great deal of ambivalence about his ability to impose the death penalty in the case before him. Both in his questionnaire and during voir dire, Juror No. 111 made it clear that he did not feel qualified to impose the death penalty because he was a human being who was insufficiently wise to choose who should live or die. (14 JQCT 4176; 12 RT 2510-2511.) When the

prosecutor explained to Juror No. 111 the purpose of voir dire and his duty to obey the law despite his personal views, the juror gave a long-winded and meandering response detailing a different, more egregious factual scenario involving the mass murder of children. He stated he could only "maybe" impose the death penalty in that scenario and acknowledged that, generally, he would "be leaning towards life." (12 RT 2505-2506; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1320 [jurors properly excused where they indicated they could impose the death penalty in specified, particularly extreme cases with more egregious facts than the case before them].) When the prosecutor asked the juror about his ability to impose the death penalty in a case similar to this one, the juror initially stated that there was only a "chance" he could do it. (12 RT 2507.) The juror confirmed that in almost all cases, he would not find it appropriate to impose the death penalty. (12 RT 2506.) When Quandt asked the juror whether he could potentially impose the death penalty in this case, Juror No. 111, hesitated (12 RT 2519 ["That's—that's right"]), stated that he believed he could do it, and then equivocated by expressing uncertainty as to whether he could do it without having done it before. (12 RT 2519.) Juror No. 111 also exhibited an aversion to the death penalty and the prospect of potentially having to serve as a juror in this case based on his wife's experience as a capital juror. (12 RT 2498-2499, 2502.) Juror No. 111's "assurances that he would consider imposing the death penalty and follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case . . . ." (*Uttrecht v. Brown*, *supra*, 551 U.S. at p. 18.)

Juror No. 111's struggle between his civic duty and his beliefs further supports the trial court's ruling. (12 RT 2511.) Even though the juror ultimately claimed he would perform his civic duty and set aside his beliefs (12 RT 2517), he acknowledged that because of his personal feelings, "the

bar is going to be higher in terms of the need for substantial aggravating circumstances" (12 RT 2515). Juror No. 111 made that acknowledgement in response to the court's question as to whether his opposition to the death penalty would interfere with his ability to consider either sentencing option. (12 RT 2514-2515.) The juror also indicated that his personal beliefs would make the "funnel" to a finding of death very narrow, even if he found that the aggravating factors substantially outweighed the mitigating factors. (12 RT 2513.) From these answers, the trial court could reasonably infer that Juror No. 111's beliefs would interfere with his ability to consider the death penalty as a reasonable possibility in this case. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 262 ["a prospective juror must be able to do more than simply consider imposing the death penalty at the penalty phase; he or she 'must be able to . . . consider imposing the death penalty *as a reasonable possibility*'"], abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)[18] Accordingly, the trial court properly exercised its broad discretion and excused him.

Moreover, given the equivocal and conflicting nature of Juror No.

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[18] Frazier suggests that the "proper question is whether a juror's ability to *impose* the death penalty is impaired," not whether the juror is able to *consider* the death penalty. (AOB 49, fn. 16.) He cites *Uttrecht v. Brown*, *supra*, 551 U.S. at page 10 in support of that contention. (AOB 49, fn. 16.) The portion of *Uttrecht* cited by Frazier does not support his suggestion because it discusses the factual background of the voir dire in that case, not the principles governing challenges for cause in the *Witherspoon-Witt* context. In any event, Frazier's distinction is without a difference. A juror is properly excused for cause whenever his views on the death penalty substantially impair the performance of his duties. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) As this Court has recognized, a juror's inability to consider the death penalty as a reasonable possibility satisfies the *Witt* standard. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 262.) This makes sense because if a juror cannot even consider imposing the death penalty as a reasonable possibility, then his or her ability to impose the death penalty is certainly impaired.

111's written and verbal answers, the trial court's determination is binding on this court. (*People v. Gray*, *supra*, 37 Cal.4th at p. 193.) This Court should defer to the trial court's determination for the additional reason that the trial judge saw and heard the juror. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 462.)

Frazier argues that "statements made by the prosecutor in support of his challenge to Juror No. 111 and the trial court's agreement with his reasoning in sustaining the challenge reveal the misapprehension by both the court and the prosecutor that the juror's statements were disqualifying." (AOB 46.) Frazier then proceeds to dissect the prosecutor's and trial court's characterizations of Juror No. 111's statements in an attempt to demonstrate that the court abused its discretion in excusing the juror. (AOB 46-47.) However, the intricacies of trial court's and prosecutor's characterizations of the evidence are immaterial to the question of whether the court properly sustained the challenge for cause. What matters is whether the trial court's ruling fell within the bounds of its broad discretion. (*People v. Vines*, *supra*, 51 Cal.4th at p. 853.) As discussed above, it did.

Frazier cites *People v. Stewart* (2004) 33 Cal.4th 425, 447 for the principle first articulated in *People v. Kaurish* (1990) 52 Cal.3d 648, 699 "'that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty.'" (AOB 51-52.) Frazier relies on *Adams v. Texas* (1980) 448 U.S. 38, 50-51 for the proposition that the court may not exclude jurors who take their responsibilities especially seriously or who acknowledge that they might be affected by their views on the death penalty. (AOB 50.) Frazier contends that under those standards, Juror No. 111's discussion of his struggle between his civic duty and morals, his

statement that his beliefs would cause him to impose a higher bar for aggravating circumstances, and his statement that the "funnel" to the death penalty would be narrow were insufficient to justify excusal. (AOB 49-53.) However, those cases do not support Frazier's contention.

In *Stewart*, shortly after the passage cited by Frazier, this Court provided an example of a death-scrupled juror who is not substantially impaired under *Kaurish*: a juror who has a conscientious opinion about the death penalty which would make it very difficult for him or her to impose it, and yet in response to follow-up questioning, "persuasively demonstrate[s] an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

Here, the trial court reasonably concluded that, unlike the conscientious juror described in *Stewart*, Juror No. 111 did not persuasively demonstrate an ability to properly engage in the weighing process and make a determination concerning the appropriateness of capital punishment after setting his feelings aside. By his evasive statement that "the bar is going to be higher" for aggravating factors in response to the question of whether his beliefs would interfere with his ability to consider either sentencing option, Juror No. 111 essentially conceded his beliefs would hinder his ability to return the verdict of death. (12 RT 2414-2515.) Juror No. 111's acknowledgement that for him, the "funnel" for imposing the death penalty in this case would be very narrow even if the aggravating factors substantially outweighed the mitigating factors underscored that his reservations would cause him to prejudge the case in favor of life. The statement also demonstrated that his beliefs would hamper the weighing process by preventing him from choosing capital punishment even if the weighing process indicated it was warranted. Thus, rather than merely

exhibiting a predisposition for a higher threshold before imposing the death penalty under *Stewart* and *Kaurish*, Juror No. 111 showed that he could not set aside his views and they would govern his decision.

Moreover, *Stewart* is inapposite because the jurors in that case were excused solely based on their brief responses in a questionnaire that did not provide an adequate basis for their dismissal. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 446-447 & fn. 12.) "Here, however, the court and both counsel subjected [Juror No. 111] to substantial oral examination, and the court was able to observe [Juror No. 111] during this process. Under such circumstances, a juror's conflicting or ambiguous answers may indeed give rise to the court's definite impression about the juror's qualifications, and its decision to excuse the juror deserves deference on appeal." (*People v. Jones* (2012) 54 Cal.4th 1, 44.)

In *Adams*, the trial court excluded jurors who "meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.'" (*Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50.) The high court held that the jurors "were [not] so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." (*Id.* at p. 51.)

Juror No. 111's answers to the death qualifying questions in this case are not analogous to the responses of the jurors in *Adams*. Unlike in *Adams*, Juror No. 111's answers suggested his beliefs would frustrate the state's legitimate efforts to administer the death penalty by impairing his ability to properly engage in the weighing process and impose capital punishment if it was appropriate.

Frazier faults the trial court for its statement later in voir dire that "the

appropriateness of the death vote, or the life vote, has to be made based on the weighing circumstances; that they're not free to add, under the guise of something that an individual feels is appropriate, some other consideration, like their personal predilection, their favoring of LWOP, their favoring of death." (AOB 52-53, 17 RT 3576.) He claims this statement shows that the court was operating under a misconception of the law when it excused Juror No. 111, and thus abused its discretion. (AOB 52-53.) However, the trial court's statement was accurate. As this Court has made clear, jurors are properly excused for cause "because of their inability to 'temporarily set aside their own beliefs in deference to the rule of law." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 604.) Thus, a capital juror may not consider his views on the death penalty as a factor in addition to the aggravating and mitigating factors set forth by law, even though a juror's beliefs may properly cause him to assign greater than average weight to the mitigating factors during the weighing process. (See *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) Accordingly, the trial court was not operating under a misconception as to the legal basis for its decision.[19]

Finally, Frazier attempts to circumvent the deference owed to the trial court by arguing that the record does not show the court based its decision on Juror No. 111's demeanor (AOB 54-58), and the juror's statements regarding his ability to impose the death penalty were not conflicting or ambiguous (AOB 59-65). Frazier's arguments are meritless.

The high court has recognized that "in determining whether the

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[19] Frazier's entire discussion of Juror No. 111's excusal frames the claim as turning on whether the trial court applied erroneous legal standards. This framework is incorrect. As discussed above, whether a trial court abused its discretion in the *Witherspoon-Witt* context where a juror was voir dired is determined by evaluating whether substantial evidence supports the court's ruling. (See *People v. Gray*, *supra*, 37 Cal.4th at p. 193.)

removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. [Citation.] Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttrecht v. Brown*, *supra*, 551 U.S. at p. 9.) The high court recently reiterated this requirement of deference in overturning a grant of habeas corpus relief stating, "Reviewing courts owe deference to a trial court's ruling on whether to strike a particular juror 'regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias.'" (*White v. Wheeler* (Dec. 14, 2015, No. 14-1372) __ U.S. __ [2015 WL 8546240] *3-4 ["The juror's confirmation that he was 'not absolutely certain whether [he] could realistically consider' the death penalty, [] was a reasonable basis for the trial judge to conclude that the juror was unable to give that penalty fair consideration"]).

This Court has recognized that *Uttrecht*'s deference principles apply where, as here, the trial court has had a chance to observe prospective jurors during voir dire, regardless of whether the record demonstrates that the trial court actually relied on demeanor in reaching its decision. Specifically, in *People v. Capistrano* (2014) 59 Cal.4th 830, 854-860, this Court upheld the excusal of several prospective jurors based on their answers during a brief, oral preliminary screening regarding their ability to impose the death penalty. A majority of this Court rejected the dissent's argument that *Uttrecht*'s deference principles did not apply "because trial court spent insufficient time questioning the individual prospective jurors to have drawn any conclusions regarding their demeanor or credibility."

(*Capistrano*, at p. 860.) This Court reasoned:

> Certainly the trial court could have conducted a fuller inquiry and the better practice is to do so. But the reviewing court applies the rule to the circumstances before it, not the circumstances it might have wished for. [Citation.] *The fact remains the trial court was present at the voir dire and we were not.* The dissent cites no authority for the proposition that the trial court must spend a certain amount of time, give certain explanations, ask certain questions, or make findings on the record in support of its determination before a reviewing court applies the rule of deference.

(*Ibid.*, emphasis added.)

Frazier attempts to demonstrate that *Capistrano* does not compel deference to the trial court in this case because in *Capistrano*, this Court "assumed" that the trial court's ruling rested on its assessment of the jurors' demeanor. Frazier maintains that in this case, "no such assumptions apply" because "the court did not make demeanor-based findings as to [Juror No. 111] when it had done so in the vast majority of its rulings on other *Witt* challenges." (AOB 57.)[20] Frazier's contentions are unavailing.

Frazier incorrectly frames the issue of deference as turning on whether the record shows that the trial court relied on demeanor in excusing the juror in question. *Capistrano* makes clear that whether the rule of deference applies is not determined by the existence or nonexistence of such evidence in the record. Indeed, *Capistrano* specifically states that trial courts are not required to make findings or other statements on the record before the rule of deference applies. (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 860.)

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[20] Frazier also contends that instead of demeanor, the trial court based its ruling "on its erroneous legal analysis of the prospective juror's statements." (AOB 54, 57.) As discussed above, the trial court's assessment of Juror No. 111's statements was correct in light of the relevant law.

Rather than evidence of reliance on demeanor, deference on appeal is conditioned on whether the trial court had the opportunity to observe the juror in question during voir dire because that opportunity provides the trial court with sensory information than the appellate court does not have. (See *People v. Avila* (2006) 38 Cal.4th 491, 529 ["'appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record'"].) Accordingly, it is irrelevant whether the record expressly shows that the trial court in this case relied on demeanor or that the trial court made express demeanor-based findings with regard to other jurors but not Juror No. 111. The fact that the trial court had the opportunity to observe Juror No. 111 during voir dire compels deference on appeal.

Frazier suggests that *Uttrecht* requires the record to show the trial court relied on a juror's demeanor before the rule of deference can apply. (AOB 57-58.) He maintains the high court in that case cited evidence in the record showing that demeanor was a ground for the trial court's decision to exclude the juror at issue. He relies on the following passage:

> We do not know anything about [the juror's] demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal. Nevertheless, the State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the *Witherspoon–Witt* rule. See *Darden* [*v. Wainwright* (1986)] 477 U.S. [168, 178] [] (emphasizing the defendant's failure to object and the judge's decision not to engage in further questioning as evidence of impairment).

(*Uttrecht v. Brown, supra*, 551 U.S. at pp. 17-18; AOB 57-58 & fn. 20.) Frazier's suggestion is unavailing.

Nowhere in *Uttrecht* did the high court condition deference to the trial court on evidence that the court in fact relied on demeanor in excusing a prospective juror. On the contrary, like this Court in *Capistrano*, the high court recognized that deference is appropriate where the trial court had the opportunity to observe the venire and the juror in question because that opportunity provides the trial court with more information than the appellate court has. (*Uttrecht v. Brown*, *supra*, 551 U.S. at p. 9 ["Leading treatises in the area make much of nonverbal communication"].) That the high court in *Uttrecht* supported its holding with evidence in the record that the trial court may have considered the demeanor of the juror at issue does not mean that the high court conditioned deference upon such evidence.[21]

In any event, the trial court and the parties in this case had a long discussion with Juror No. 111 about the death penalty. Thus, it is clear that they observed him for some time, and that his demeanor was part of the information the trial court implicitly considered in making its ruling. The trial court's remark that it considered its decision with regard to Juror No. 111 to be "a little more difficult" than the other *Witherspoon-Witt* challenges (12 RT 2589) supports the proposition that it relied on the juror's demeanor in interpreting his statements because it suggests the court likely considered all information available to it to aid its determination.

Frazier's argument that the trial court's ruling is not owed deference because Juror No. 111's answers were not conflicting and ambiguous is similarly unavailing. (AOB 59-65.) As discussed above, Juror No. 111's statements were conflicting and ambiguous. On the one hand, he purported to be able to set aside his personal beliefs and follow the law despite his

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[21] Frazier also cites *Uttrecht* for the proposition that a trial court's ruling may still be reversed where the record discloses no basis for a finding of substantial impairment. (AOB 58.) As discussed above, substantial evidence supports the trial court's finding in this case.

opposition to the death penalty. On the other hand, his answers indicated that he could not consider imposing the death penalty as a reasonable possibility, and that his beliefs would prevent him from properly engaging in the weighing process. Indeed, Juror No. 111 could not even directly answer the court's pointed question regarding whether his beliefs would prevent him from considering either sentencing option, resorting to the evasive response that the bar would be higher for aggravating circumstances. (12 RT 2515.) Juror No. 111 was unable to clearly identify whether his opposition to the death penalty was religious. (12 RT 2510.) Juror No. 111 also equivocated when defense counsel asked him if he could impose the death penalty in this case, initially answering affirmatively, but then qualifying the answer with a statement about how he was uncertain because he had never done it before. (12 RT 2519.)

Frazier contrasts this case with others in which this Court found the jurors' answers to be conflicting or ambiguous. (AOB 63-65.) However, that the jurors' responses in those cases were deemed to be conflicting or ambiguous does not mean that Juror No. 111's answers in this case are not properly characterized as such. It is also telling that Frazier does not compare Juror No. 111's responses to a single case involving a juror who was opposed to the death penalty but nonetheless unequivocally demonstrated that those views would not substantially impair his or her performance.

In sum, because substantial evidence supports the trial court's ruling, Frazier's claim fails. Additionally, this Court should defer to the trial court's factual determinations, which are binding on appeal in light of Juror No. 111's conflicting and ambiguous answers and the trial court's ability to observe Juror No. 111 during voir dire.

D. Any Error Was Harmless

Even if Juror No. 111 was erroneously excluded, the error was

harmless.

"The general rule is that, absent a showing of prejudice, an erroneous excusal of a prospective juror for cause does not mandate the reversal of judgment. This rule is based on the principle that a '[d]efendant has a right to jurors who are qualified and competent, not to any particular juror.'" (*People v. Riccardi* (2012) 54 Cal.4th 758, 783.) But, "under existing United States Supreme Court precedent, the erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty *automatically* compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*Ibid.*, citing *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667; see *Riccardi*, at p. 840 (conc. opn. of Cantil-Sakauye, C. J.).) *Witherspoon-Witt* violations require reversal of the penalty phase judgment only. The guilt phase verdicts remain unaffected. (See *Riccardi*, at p. 783; *Gray*, at p. 668.)

Here, even if Juror No. 111 was erroneously excused under *Witherspoon-Witt*, this Court should nevertheless affirm Frazier's death sentence. As the Chief Justice recognized in *People v. Riccardi*, *supra*, 54 Cal.4th at pages 840-846 (conc. opn. of Cantil-Sakauye, C.J.), in *Gray v. Mississippi*, *supra*, 481 U.S. at pages 665-666, the high court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. In *Gray*, a majority of the high court rejected only one of those theories: the contention than an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if it were assumed the prosecutor would have exercised a peremptory challenge against the death-scrupled prospective juror. As the Chief Justice's concurrence concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se

because the error affects the composition of the panel "'as a whole'" . . . by inscrutably altering how the peremptory challenges were exercised [citations]." (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) As the concurrence in *Riccardi* further recognized, the Supreme Court thereafter rejected the *Witherspoon-Witt* remedy in *Ross v. Oklahoma* (1988) 487 U.S. 81, as well as the rationale employed in *Gray*, as applied to an erroneously included pro-death juror, explaining that the Sixth Amendment was not implicated simply by the change in the mix of juror viewpoints (either death penalty supporters of skeptics) who were ultimately sworn. (*Riccardi*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding these observations, this Court "felt compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 845 (conc. opn. of Cantil-Sakauye, C.J.).) The People respectfully ask this Court to revisit this conclusion in light of the observation that in *Gray*, the state (as well as the dissent) had argued the error had no effect on the case. That is a "reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule goes only so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. The People, however, now ask this Court to do so. The appropriateness of harmless error analysis should take into account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44.)

Witherspoon protects capital defendants against the state's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Therefore, "'*Witherspoon* is not a ground for

challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, there is no cognizable prejudice simply in the absence of any viewpoint or any balance of viewpoints on the jury. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178.) As a result, any error in excluding Juror No. 111 because of the erroneous application of the *Witherspoon-Witt* standard results in purely "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)[22]

If this Court holds that harmless error analysis does not apply to the alleged *Witherspoon-Witt* violation, it should reverse Frazier's death judgment only. (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 783; *Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.)

II. THE TRIAL COURT DID NOT ERRONEOUSLY DENY FRAZIER HIS RIGHT TO REPRESENT HIMSELF IN THE PENALTY PHASE

Frazier argues that the trial court erroneously denied his requests to represent himself during the penalty phase. He maintains that (1) a defendant's right to self-representation is not dependent on the timing of the assertion; (2) this Court's interpretation of *Faretta*'s[23] timeliness requirement violates the federal Constitution; (3) his *Faretta* motions were timely, unequivocal, knowing, and intelligent; and (4) even if the motions

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[22] The People also note that because the prosecutor had one peremptory challenge remaining (34 RT 7044), it is likely that Juror No. 111 would have been stricken even if the trial court had not excused him for cause. Accordingly, Frazier would likely have been tried by the same jury even in the absence of the asserted *Witherspoon-Witt* violation.

[23] *Faretta v. California* (1975) 422 U.S. 806.

were untimely, the trial court abused its discretion in denying them. (AOB 69-143.) Frazier's arguments are meritless. This Court's interpretation of the timeliness requirement is constitutionally sound, and the trial court properly found that Frazier's requests for self-representation—made for the first time on the first day of the penalty phase—were untimely, unsupported by the *Windham*[24] factors, and equivocal.

A. Factual and Procedural Background

1. Events preceding the first *Faretta* motion

Jury selection commenced on March 27, 2006. (4 CT 1123.) On Wednesday, June 21, 2006, the jury returned its guilt phase verdicts. (6 CT 1616-1620, 1640-1641; 46 RT 9447-9451.) Immediately thereafter, in an in-camera hearing, defense counsel Downing informed the trial court that Frazier was considering representing himself. She asked the court to hold a hearing on this issue on Friday and to delay scheduling the penalty phase until that day. (46 RT 9456-9457.)

On June 23, 2006, the trial court scheduled the penalty phase to begin on July 31 after granting Downing's request for a continuance to allow her arm—which was in a cast—to heal. (47 RT 9469-9470, 9505-9506, 9508.) The court and parties discussed logistics, discovery, and the experts the defense expected to call. (47 RT 9476-9487.) At the end of the proceedings, Frazier said, "I think it's necessary to go on the record saying that although I'm not submitting a *Faretta* motion to the [c]ourt presently, I reserve my right to do so at a future time prior to the commencement of the penalty phase trial. And if I choose to do so it will be in both unequivocal [*sic*] and timely manner which will cause no significant delay, if any at all." (47 RT 9513.)

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[24] *People v. Windham* (1977) 19 Cal.3d 121.

On July 26, 2006, the trial court heard in limine motions. The defense sought to play for the jury videos illustrating attachment theory to support Dr. Seligman's testimony. (47 RT 9626-9631.) The defense also sought to play a video contrasting Frazier's family and upbringing with the family and upbringing of his half brother, Larry Tinsley. (47 RT 9631-9638.) During this discussion, Frazier interjected, "Your Honor, I object to this, and I'm putting in a motion to appoint new counsel." (47 RT 9632.) The court assured Frazier that it would take up his request as soon as Downing finished her presentation. (47 RT 9632.)

As Downing described Frazier's childhood, Frazier said, "Your Honor, I object again, and I move for a mistrial because my motion for appointment of counsel is not being heard." (47 RT 9635.) When the court stated that it wanted Frazier to hear all the evidence discussed by Downing, Frazier said, "I've heard it all before, sir." (47 RT 9635.) The court stated that it wished to listen to Downing so that it could have everything in mind when it listened to Frazier. Frazier responded that he would file a *Faretta* motion. (47 RT 9635.) The court reiterated that it would allow the parties to make their record before listening to Frazier. (47 RT 9635.) Frazier nevertheless demanded, "I'd like to represent myself from this point forward." (47 RT 9635-9636.) When the court assured Frazier that it would listen to his motion, Frazier moved for a mistrial. The court denied the motion. (47 RT 9636.)

Later in the proceedings, instead of making a *Faretta* motion, Frazier made a *Marsden*[25] motion. (47 RT 9639.) During an in-camera hearing on that motion, Frazier complained that Downing had worn a splint on her hand during the guilt phase. (47 RT 9643-9644.) Before closing argument, she was unable to write and take notes because she had a full cast on her

[25] *People v. Marsden* (1970) 2 Cal.3d 118.

arm. (47 RT 9644.) Frazier maintained that the cast changed counsels' presentation and rendered them ineffective. (47 RT 9644.)

Frazier further complained that the approach counsel wished to take in the penalty phase misrepresented him. He called counsels' strategy "cheap emotionalism." (47 RT 9644.) Frazier continued, "Basically just looking at my brother makes more money than me [*sic*] and for representing a video with babies in an orphanage as if one of them is me or something like that. I don't understand this. I haven't discussed it with them. I don't think that it's a good idea." (47 RT 9644-9645.)

In response to Frazier's complaints, Downing explained that the splint and cast on her arm did not change the defense's strategy or presentation. The entire defense team participated in preparing the opening and closing statements, and counsel received daily transcripts. (47 RT 9646.) With regard to the penalty phase evidence, Downing opined that she and Frazier simply disagreed on strategy. (47 RT 9647.) Defense counsel Quandt chimed in that Frazier was distracted by his issues with jail personnel, which were preventing him from making rational decisions. (47 RT 9647, 9650-9651.)

After counsels' input, Frazier insisted that the cast prevented Downing from using her abilities as an attorney. (47 RT 9655.) Frazier also explained that he did not file a *Faretta* motion because he hoped that the trial court would grant his *Marsden* motion. (47 RT 9656.)

The trial court denied the motion. (47 RT 9659.) The court reasoned that the guilt phase had ended about a month ago, and the penalty phase was scheduled to start next Monday, July 31 after the court had already granted a continuance to allow Downing's arm to heal. (47 RT 9656.) Additionally, disagreements between a defendant and counsel regarding trial tactics did not automatically warrant substitution of counsel. (47 RT 9657.) The court found that Downing was not impaired in her ability to

participate in the end of the guilt phase. Although she was unable to take adequate notes, she had the aid of co-counsel Quandt, daily transcripts of proceedings, and support staff. (47 RT 9657.)

As to the evidence counsel sought to present in the penalty phase, the court noted that they were entitled to their tactical strategy. (47 RT 9657-9658.) The court found that both counsel had used their time well and were ready to proceed on Frazier's behalf. (47 RT 9658.) The court added:

> It seems to me that based on what I've heard so far, and based on the fact that I know that they have communicated with you in a lot of these issues and continue to do so, I can't find a ground to grant this.
>
> I also have to add that this is late. I know you've told me in the past you don't intend to create any delay, so for and so on if I grant it, but the point is the cases have held that a death penalty trial is a continuous trial. We're now not only over the guilt phase, but we're on the virtually breaking dawn of the penalty phase, and therefore [the] motion is late to the point of being untimely in my opinion.

(47 RT 9658-9659.)

Frazier stated that he would not file a *Faretta* motion before conferring with counsel and asked the court not to discuss the penalty phase evidence in public until that time. During this colloquy, Frazier had difficulty articulating his point and asked Downing to help him. (47 RT 9659-9660.) Downing stated to the court, "He wants to talk to me about the evidence we intend to present. It may very well be that he's going to file a *Faretta* motion, and if he filed the *Faretta* motion and it's granted I'm assuming he would not present the evidence that we would present and, therefore, he doesn't want any of it mentioned on the public record at this point in time. Does that make sense?" (47 RT 9660.) Frazier chimed in, "That is what I want." (47 RT 9660.)

2. The first *Faretta* motion

On July 31, 2006, Frazier filed a *Faretta* motion stating that he intended to represent himself, the motion was timely because he made it as soon as he could, he understood the dangers of proceeding without counsel, and his decision was voluntary and intelligent. (6 CT 1873-1876.) Shortly before the trial court read preliminary instructions to the jury and the prosecutor presented his opening statement in the penalty phase, the court held an in-camera hearing on the motion. (6 CT 1866.)

The court stated that, despite Frazier's assertions to the contrary, his motion was untimely because the guilt phase and penalty phase were a unitary proceeding, and the penalty phase was about to begin. (48 RT 9792.) The court noted that (1) the jury had returned a guilty verdict over five weeks ago; (2) intervening motions—including a *Marsden* motion—had been filed; (3) that very morning preparations had been made for testimony to be taken; (4) the jury and alternates were assembled and waiting; (5) the prosecutor was about to begin his case; (6) and defense counsel had prepared opening exhibits and statements and provided a trial schedule. (48 RT 9793.) The court further noted that the penalty phase had to do with the extremely important issue of whether Frazier deserved life without parole or death. (48 RT 9793.)

Frazier countered that "promoting the theory that I'm a product of a dysfunctional family while projecting images of maternally-deprived apes is likely to be considered by the jury as pure monkey business rather than [a] mitigating factor," and maintained that the videos defense counsel sought to show did not accurately reflect how he was raised. (48 RT 9794-9795.) Instead of that evidence, Frazier wished to show how his "friends and loved ones [would] be affected if [the jury] decided to have [him] executed." (48 RT 9795.) Frazier claimed that if the court granted the motion, he did not "anticipate any delays or disruptions which will take this final phase

beyond the time frame that defense counsel has already estimated." (48 RT 9796.)

The court allowed defense counsel to comment on Frazier's remarks. (48 RT 9796.) Downing stated that out of the three penalty phases that she had tried in Contra Costa County, Frazier's was the most difficult and complex to prepare. Frazier suffered from organic brain dysfunction and substantial mental health issues that he was not able to present to the jury. (48 RT 9796-9796.) Downing opined that a "severe injustice" would be done without the mitigation evidence she intended to present. (48 RT 9797.) After outlining some more mitigation evidence, Downing noted that "[i]t would just be a tragedy for [Frazier] to proceed without counsel." (48 RT 9797-9800.) Frazier countered that if he was allowed to call his choice of witnesses, he would be able to effectively represent himself. (48 RT 9801.)

Based on Downing's representations as to Frazier's mental health, the court was not entirely convinced that Frazier was competent enough to assert his *Faretta* rights. (48 RT 9801-9802.) Additionally, the court found that Frazier did not make his motion within a reasonable time before trial. The court noted that it took five or six weeks to select a jury in this case and five or six weeks to try the guilt phase. There was also a five week interval before the penalty phase. Defense counsel had exhaustively prepared for that phase. (48 RT 9802.)

The court further found Frazier's request to be equivocal. (48 RT 9802-9803.) The court acknowledged that Frazier was angry and upset by some of the proposed evidence, but noted that Frazier had "skilled, competent, experienced counsel assessing the need to do certain things . . . ." (48 RT 9803.) The court also considered Downing's response to the motion, stating, "Ms. Downing has gone to some extent to indicate to me the devotion and intensity and work that she has done in your interest in this case and that they wish to proceed. That's fairly important." (48 RT

9803.) The court denied Frazier's request for self-representation. (48 RT 9804.)

Frazier moved for a mistrial, pointing out that he had informed the court of the possibility of a *Faretta* motion in June. He contended that he did not make the motion in passing anger or frustration and explained that he did not file the *Faretta* motion on the same day as the *Marsden* motion because he wanted to see what other evidence was going to be admitted. (48 RT 9804.) The court responded that in the past, Frazier had made it clear that he was not making a *Faretta* motion. Nor did Frazier bring a *Faretta* motion after the court denied his *Marsden* motion. (48 RT 9804.) The court disagreed with Frazier's assertion that a grant of pro. per. status would not delay or disrupt the case given the extensive preparation of his defense. (48 RT 9804.) The court opined that Frazier would inevitably face decisions that would require delaying proceedings and again denied the *Faretta* motion. (48 RT 9805.) Frazier again made a motion for mistrial, and the court denied the motion. (48 RT 9805.)

3. Subsequent *Faretta* and *Marsden* motions

On August 1, 2006, Frazier asked the court to reconsider his *Faretta* motion. He pointed out that he was the origin of the complicated issues defense counsel sought to present, and his strategy would not include such complicated issues, which he believed would only anger the jury. (49 RT 9917.) Frazier argued that his motion should be considered timely because he gave the court notice that he would likely file a *Faretta* motion weeks before the penalty phase, and ultimately filed the motion before the penalty phase commenced. Frazier asserted that his motion was not for purpose of delay and was unequivocal. (49 RT 9918.)

The court disagreed that Frazier's motion was timely, observing that "a notice of the likelihood of a motion at any stage in the proceeding is not the equivalent of making it by [*sic*] simply an indication that there's a good

chance it's going to be made." (49 RT 9919.) The trial court incorporated the remarks it had made in its prior ruling. (49 RT 9918.) The court found no grounds to reconsider the motion and denied the request for reconsideration. (49 RT 9919.) Frazier made a motion for mistrial, which the court also denied. (49 RT 9919.)

On August 3, 2006, Frazier reasserted his request for self-representation. He anticipated a delay of no more than 72 hours over the weekend during which there were no scheduled proceedings. (49 RT 10087, 10091.) Frazier further stated, "I would not object if the [c]ourt granted this motion with the condition that stand-by counsel participate in the trial proceedings so long as that participation does not seriously undermine the appearance before the jury that I'm representing myself." (49 RT 10087.) Frazier continued to dispute the mitigation evidence, including evidence of his sexual molestation by his uncle, his brain abnormality, and his failure to finish high school. (49 RT 10088.)

The trial court incorporated by reference the remarks it had made in ruling on Frazier's prior *Faretta* motions. (49 RT 10098.) The court acknowledged Frazier's estimated need for a delay and his offer to accept standby counsel. (49 RT 10089-10090.) The court observed that standby counsel—unless defense counsel served as standby counsel—would need time to prepare, and the court would have to find standby counsel. The court reiterated that Frazier's request was late in the proceedings, and Frazier was not equipped to take on the matters that would be presented. (49 RT 10090.) The court once again denied Frazier's *Faretta* motion. (49 RT 10091.) Frazier stated that he would accept his present counsel as standby counsel to take care of any delay. The court declined to change its mind. (49 RT 10091.)

On August 9, 2006, in a public session, Frazier reiterated his desire to proceed in pro. per. for the remainder of the penalty phase and claimed

there would be no delays. (51 RT 10271.) Frazier stated, "Just that I do believe it's my Sixth Amendment right to proceed pro per. I've been asking since July 31st, before this proceeding commenced, and the reasons that you denied that repeatedly has [*sic*] basically been because you said it would cause delays and it was ambivalent." (51 RT 10271-10271.) The court interjected, "And that it was late." (51 RT 10272.) Frazier responded, "Well, right. That it wasn't timely based on the delay it would cause." (51 RT 10272.) The court pointed out that timeliness and delay were separate, unrelated concepts. (51 RT 10272.) Frazier objected to the proceedings and the calling of the next witness and incorporated by reference his previous arguments. (51 RT 10272.) The trial court again denied Frazier's motion for the reasons it had previously stated. (51 RT 10272.) Frazier again moved for a mistrial. (51 RT 10272.) The court tacitly denied the motion. (51 RT 10272.)

The court summarized for the prosecutor that it had denied Frazier's prior *Faretta* motions because they were untimely, and, despite Frazier's promises of no delays, delay was inevitable based on the witness list and the expected professional witnesses. (51 RT 10273-10274.) The court had also found the requests to be equivocal. (51 RT 10274.)

Later that day, the bailiff seized a note that Frazier had written to the prosecutor during Jeff Triolo's testimony. The note stated, "Objection. No personal knowledge to sexual abuse by uncle." (51 RT 10377-10378, 10381.) Shortly thereafter, during an in-camera hearing, Frazier again asked the trial court to reconsider his *Faretta* motions. (51 RT 10379-10381.) Frazier claimed that he wrote the note because Jeff's testimony slandered Frazier's uncle, who never sexually abused Frazier. (51 RT 10381.) Frazier continued, "As far as the reliability goes and this repeated attempt to try and make me look like I'm suppressing some kind of childhood mental illness and their interpretation of everything is just going

to be viewed by the jury as nothing more than people trying to help me because they like me. And I could have avoided all of this. There would have been no delay. And now my life is on the line, and I'm more likely to get executed now with appointed counsel than if you would have granted my Sixth Amendment right in the first place." (51 RT 10381.) Frazier also expressed his displeasure with the prosecutor pointing out inconsistencies in Jeff's testimony. Frazier claimed that he had been prepared and ready to proceed in pro. per. when he made his earlier *Faretta* motions. (51 RT 10382.)

The trial court observed that Frazier again disagreed with counsel regarding strategy. The court was sure that counsel had previously disclosed their tactics to Frazier because he had mentioned those tactics from time to time. Frazier claimed that counsel had not informed him of their tactics. Nevertheless, the court denied the *Faretta* motion, observing that counsel provided him with competent representation, and the motion continued to be late. (51 RT 10382-10383.) Frazier moved for a mistrial, and the court denied the motion. (51 RT 10383-10384.)

On August 10, 2006, during an in-camera hearing, Frazier attempted to address the court. (52 RT 10514.) The court asked Frazier if he was making a further *Faretta* motion. (52 RT 10514.) Frazier responded, "In part, yes." (52 RT 10515.) After conferring with defense counsel, Frazier asked the court to grant him "conditional *Faretta* rights." (52 RT 10515-1517.) The court stated, "There is nothing in the law that provides conditional *Faretta* rights. If . . . you're seeking my permission to totally and completely represent yourself, I think you're entitled to make your case in that regard. Is that what you wish to do?" (52 RT 10517.) Frazier answered affirmatively. (52 RT 10518.)

The court allowed Frazier to bring up new points in support of his *Faretta* motion. Frazier recapped the August 3 proceedings. (52 RT

10518.) He then disputed Dr. Gretchen White's testimony and information that had been published to the jury during her testimony. (52 RT 10518-10519.) Frazier accused the court of not taking any action to ensure that sworn witnesses tell the truth. (52 RT 10519.) Frazier asked the court to allow him to give a statement to the jury without the assistance of appointed counsel. (52 RT 10519.) Frazier intended to recite the statement after all witnesses had testified and asked for one day following the conclusion of testimony to prepare it. (52 RT 10519.) Frazier claimed the statement would likely take no longer than 10 minutes to present on the day of closing arguments. (52 RT 10519-10520.)

The trial court responded that it could discern whether witnesses were telling the truth only by doing what the jury was doing—i.e., listening to and observing the witnesses and comparing their testimony. (52 RT 10520.) The court found that counsel was diligently pursuing mitigation, and Frazier's continued disagreement with counsels' presentation was not a ground for a *Faretta* motion. (52 RT 10520.) The court also informed Frazier that it would not allow him to make an uncross-examined statement to the jury. (52 RT 10521.) After Frazier expressed his belief that he was entitled to do so if he represented himself, the court corrected his misperception. It explained that Frazier would be allowed to argue his case at the end, but he could not simply pronounce evidence from the stand. (52 RT 10521.) The court denied Frazier's motion. (52 RT 10521.)

On August 14, 2006, Frazier made a "*Marsden* or *Faretta* motion" because during opening statements, defense counsel had represented that a witness named Kelly Ayres would testify in the penalty phase. However, counsel ultimately chose not to call the witness. (53 RT 10790.) After listening to defense counsels' tactical reasons for not calling the witness, the trial court denied the *Marsden* motion. (53 RT 10796.)

After the lunch recess, the court heard Frazier's *Faretta* motion. (53

RT 10797.) Frazier stated that he partially agreed with Quandt and a defense mitigation specialist that it would be best for him not to testify in the penalty phase. (53 RT 10797-10798.) However, Frazier complained that the issue of his testimony would have been "moot" if he were allowed to proceed in pro. per. with his appointed counsel as standby counsel. In that scenario, Frazier would not take the stand but would instead make closing arguments and not be subject to cross-examination. (53 RT 10797-10798.)

The trial court again denied Frazier's motion and incorporated its previous comments into its ruling. (53 RT 10798-10800.) The court stated that it had always found and continued to find that Frazier was making his motions "in a state of knowing and intelligent conduct." (53 RT 10799.) The court reiterated that Frazier's motion was untimely. (53 RT 10799.) The court observed that Frazier made the motion to achieve two tactical results: (1) to obtain advisory or standby counsel; and (2) to address the jury without being subject to cross-examination. (53 RT 10799.) The court acknowledged that Frazier could address the jury personally if he was in pro. per. as long as he was not testifying or presenting material not in evidence and making only permissible arguments. (53 RT 10799-10800.) However, the court again found Frazier's request to be equivocal because it was conditioned on appointed counsel's acceptance of advisory counsel status. The court also found the request to be extremely late because it was made almost at the end of the penalty phase.

On August 15, 2006, the court held an in-camera hearing with defense counsel and Frazier. Defense counsel informed the court that Frazier wished to testify against counsels' advice. Counsel sought to have Frazier testify before defense expert Dr. Tucker as a matter of trial tactics and because the defense expected to finish their case that day. However, Frazier claimed that he was not ready and wished to testify later. (54 RT

10881-10882.)

Frazier again made *Marsden* and *Faretta* motions. (54 RT 10885.) He claimed that defense counsels' attempts to discourage him from testifying forced him to take the stand without adequate preparation. (54 RT 10885.) Frazier asked the court to find that defense counsel rendered ineffective assistance. (54 RT 10885.) Frazier continued, "If the [c]ourt deems it necessary to appoint standby counsel if granting a *Faretta* motion, the defendant has no objection to whoever the [c]ourt appoints as such. Nor does the defendant request it as [] if seeking to retain advisory counsel." (54 RT 10885-10886.) Frazier highlighted his ability to draft motions and present arguments "in an intelligent and organized manner if given a reasonable time to prepare." (54 RT 10886.) Frazier claimed that his appointed counsel and the court underestimated his ability to effectively represent himself without causing unnecessary delays and without advisory counsel. (54 RT 10886.) Downing countered that she wished to have Frazier testify before Dr. Tucker so that Dr. Tucker could explain Frazier's testimony to the jury. (54 RT 10887.)

The trial court asked Frazier what he meant when he said he needed time to prepare. Frazier responded that he needed time to determine what he would say in closing argument. Frazier acknowledged that defense counsel were correct in their assessment that he would be subjected to "harsh cross-examination." (54 RT 10888.) As such, if his motions were denied, he would not testify. (54 RT 10888.) However, if he were allowed to proceed in pro. per., he was "confident that [he] could handle the one witness [he] [] intend[ed] to call as already scheduled for [that day] and be prepared for closing arguments by the morning of August 17, 2006 . . . ." (54 RT 10888-10889.)

The court asked Frazier whether it was correct in construing his comments as indicating that he had not yet decided to testify if his motions

were denied. Frazier responded, "[W]hat I'm saying is that, either I can do this pro[.] per and avoid going on the stand entirely, not being subject to cross-examination. Or if the [c]ourt would give me a chance to prepare for taking the stand, if counsel is still against letting me do it, it really shows that I'm not going to be afforded effective counsel because they . . . have in fact threw [*sic*] my right to testify into their strategy." (54 RT 10889-1890.)

The court observed that it did not get a clear answer to its question, but concluded that the request for self-representation was still late, and that Frazier's attempt to relieve appointed counsel and represent himself was equivocal because Frazier's tactical decisions depended on the court's ruling. (54 RT 10890.) The court stated, "[T]he essence of my understanding is that you are going to prepare one way if you have counsel and one way if you don't have counsel, which again I referred to as an equivocal motion in this regard." (54 RT 10890-10891.) The court also found that appointed counsel represented Frazier appropriately and denied the *Marsden* motion. (54 RT 10891.)

Ultimately, after a discussion with defense counsel, Frazier decided not to testify. Frazier stated, "I wouldn't make an unintelligent decision like that [Y]our Honor. The reason for my motion was to avoid that from happening [*sic*]." (54 RT 10892.)

On August 16, 2006, during an in-camera hearing towards the end of the mitigation case, Frazier read a statement to the court:

> Since my *Faretta* motions have been denied by the [c]ourt, and since my appointed counsel has not factored my right to testify into their defense strategy, I have very logical reasons to not take the stand. However, this decision is made under duress, which is augmented by an ultimatum the [c]ourt created when it denied my *Faretta* and *Marsden* motions, thus abandoning me to counsel who claim they would not be able to effectively represent me if I were to take the stand.

(55 RT 11239.)

The court disagreed that its actions legally compelled Frazier not to take the stand. (55 RT 11239.) The court reiterated that it had denied Frazier's motions for self-representation because they were equivocal and late. The court added, "So if this is construed by anybody as a renewed *Faretta* motion, it is denied." (55 RT 11240.)

B. Applicable Legal Principles

"'A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution.'" (*People v. Stanley* (2006) 39 Cal.4th 913, 931.) This right "applies at a capital penalty trial as well as in a trial of guilt." (*People v. Taylor* (2009) 47 Cal.4th 850, 865.) "'A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]'" (*Stanley*, at pp. 931-932.)[26]

In determining whether a defendant's motion for self-representation is unequivocal, the trial court "should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) "The high court has instructed that courts must draw every inference against supposing that the

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[26] Although the trial court initially expressed some ambivalence regarding Frazier's competence to waive counsel (48 RT 9801-9802), it later concluded that Frazier made his motions "in a state of knowing and intelligent conduct." (53 RT 10799.) The People do not challenge the trial court's ultimate conclusion that Frazier satisfied the first condition for granting his requests for self-representation. Because the trial court denied the requests on the grounds of untimeliness and equivocation, the People discuss only those prongs in our brief.

defendant wishes to waive the right to counsel." (*Ibid.*, citing *Brewer v. Williams* (1977) 430 U.S. 387, 404.) "[T]he defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Marshall*, at p. 23.) A request made "under the cloud of emotion may be denied." (*Id.* at p. 21.) "In assessing appellant's remarks, [this Court] is not bound by the [trial court's] responses, and [a trial court's] failure to make express findings on this matter does not oblige [this Court] to conclude that appellant's *Faretta* rights were infringed." (*People v. Tena* (2007) 156 Cal.App.4th 598, 607.)

"For the purpose of assessing the timeliness of a motion for self-representation, the guilt and penalty phases in a capital prosecution are not separate trials but parts of a single trial." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1006, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Accordingly, a motion made after the guilt phase verdicts have been returned is untimely. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 434; *People v. Hardy* (1992) 2 Cal.4th 86, 194.)

An untimely request for self-representation "is 'based on nonconstitutional grounds' [citation] and is addressed to the sound discretion of the trial court [citation]." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)

C. Self-Representation Is Not an Absolute Constitutional Right When a *Faretta* Motion Is Untimely

Frazier disputes the deeply rooted timeliness requirement set forth in *Windham*, arguing that "[i]nvocation of the constitutional right . . . identified in *Faretta* is not dependent on the timing of the assertion." (AOB 88.) He maintains that "[n]othing in the holding or rationale of

Faretta made the constitutional right of self-representation subject to a timeliness requirement," and challenges this Court's conclusion that an untimely *Faretta* request is based on nonconstitutional grounds. (AOB 88-92.) He claims, "*Faretta*'s clear constitutional doctrine is that a criminal defendant has a fundamental Sixth Amendment right to represent himself. [Citation.] This right can be denied only when its assertion will unjustifiably disrupt or obstruct trial." (AOB 93-94.) He further contends, "There is simply no basis in California for the right to self-representation other than a federal constitutional basis. [Citation.] And the Sixth Amendment right to represent oneself, which applies to the states through the Fourteenth Amendment, is not transmuted into a [nonconstitutional] right based on when in the proceedings it is asserted." (AOB 91.) Frazier's challenge to the timeliness requirement is unavailing.

"*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." (*Indiana v. Edwards* (2008) 554 U.S. 164, 171.) In accordance with this principle, the United States Supreme Court tacitly approved the timeliness limitation on the right to self-representation in *Martinez v. Court of Appeal of Cal.* (2000) 528 U.S. 152, 162 when it "observed that lower courts generally require a self-representation motion to be timely, a limitation that reflects that 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 722, abrogated on other grounds by *People v. McKinnon*, *supra*, 52 Cal.4th at pp. 636-643.)

The high court's observation illustrates that an untimely *Faretta* motion is no longer governed solely by a defendant's desire for self-representation. Rather, at that point, the defendant's interest gives way to the government's interest in the orderly administration of justice. *Windham*'s timeliness requirement balances those interests by "prevent[ing]

the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.'" (*People v. Lynch*, *supra*, 50 Cal.4th at p. 722.) The requirement is consistent with *Faretta*, in which "the high court's statement . . . that the defendant's motion was 'weeks before trial' implies a recognition that a motion that interferes with the orderly process of a trial may be denied." (*Id.* at p. 725; see also *People v. Windham*, *supra*, 19 Cal.3d at p. 130 [timeliness requirement does not conflict with *Faretta*'s rationale].)

Indeed, the *Faretta* court's ruling was limited to the timely circumstances of the request for self-representation in that case. (*Faretta v. California*, *supra*, 422 U.S. at p. 836 ["forcing Faretta, *under these circumstances*, to accept [counsel] against his will . . . deprived him of his constitutional right to conduct his own defense"] (emphasis added).) Contrary to Frazier's contentions (AOB 94), this fact is "constitutionally significant" because the request for self-representation in *Faretta* did not infringe on the government's right to the orderly administration of justice.

Moreover, "in the related context of the Sixth Amendment right to select counsel of one's choice . . . the high court has 'recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness [citation], and against the demands of its calendar.' ([*United States*] *v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152 []; see *Morris v. Slappy* (1983) 461 U.S. 1, 11 [] ["Trial judges necessarily require a great deal of latitude in scheduling trials"].) Thus, a trial court may 'make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.' ([] *Gonzalez-Lopez*, at p. 152 [].) [This Court] [has] perceive[d] no principled basis on which to deny a trial court the opportunity to similarly consider the needs of fairness and the demands of its calendar in ruling on a request for *self*-representation, or to accord the defendant seeking self-representation any greater liberty to do so than the

defendant seeking to select retained counsel." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 725.) Accordingly, the timeliness requirement is constitutionally sound.

That the timeliness requirement separates the absolute constitutional right to self-representation from a request conferred to the discretion of the trial court makes sense and is proper. "[U]nlike the right to be represented by counsel, the right of self-representation is not self-executing." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 20.) In delaying his *Faretta* motion until after trial has commenced, a defendant waives or forfeits his absolute constitutional right to self-representation. (*People v. Windham*, *supra*, 19 Cal.3d at p. 129; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) His right then becomes "based on case law (e.g. *People v. Windham*) . . . ." (*Rivers*, at p. 1050.)

Finally, Frazier applies the strict scrutiny test to *Windham*'s timeliness requirement because the requirement allegedly "established a rule that significantly interferes with the exercise of a fundamental constitutional right . . . ." (AOB 92.) Frazier's analysis is flawed.

The timeliness requirement does not interfere with the exercise of a fundamental right. Rather, as discussed above, the fundamental right ceases to exist—i.e., is waived or forfeited—if the defendant attempts to exercise it in an untimely manner. Accordingly, the strict scrutiny analysis is inapplicable here.

D. The Requests for Self-Representation Were Untimely

Frazier filed his first *Faretta* motion on the first day of the penalty trial. (6 CT 1873-11876.) As noted, a *Faretta* motion made after the guilt phase verdicts have been returned is untimely. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 434.) Accordingly, Frazier's requests "did not have a constitutional basis and [were] addressed to the trial court's discretion." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.)

Frazier disputes the validity of the unitary capital trial rule, arguing that it should not be used to determine the timeliness of his *Faretta* motions. (AOB 109-116.) According to Frazier, the true nature of a capital trial is not unitary, "but rather a bifurcated proceeding made up of two conceptually separate actions." (AOB 11.) He maintains, "Given the nature and purpose of the penalty phase, this Court's automatic application of the unitary-capital-trial rule to declare untimely any self-representation motion made after the guilt phase of a trial is unreasonable and unjustified. It renders the *Faretta* right illusory because in order for a capital defendant to exercise his constitutional right to self-representation at the penalty phase, a motion would have to be brought in a 'reasonable time' before the start of the guilt phase—a time at which there is no certainty a penalty trial will happen." (AOB 113-114, italics omitted.) Frazier relies on *Bullington v. Missouri* (1981) 451 U.S. 430 in support of his arguments. (AOB 111-112.) Frazier's arguments and reliance on *Bullington* are unavailing.

As Frazier acknowledges, this Court has previously rejected virtually identical challenges to the unitary capital trial rule. (AOB 110-112.) In *People v. Hamilton* (1988) 45 Cal.3d 351, 369 the defendant argued that his *Faretta* motion made in the midst of the jury's guilt phase deliberations was timely because "the penalty phase of a capital trial amounts in actuality to a separate trial, and [] he made his motion within a reasonable time prior to the commencement of that phase." This Court found the defendant's reasoning to be unsound:

> First, as even defendant acknowledges, the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial. Second and more important, the connection between the phases of a capital trial is substantial and not merely formal. For example, Penal Code section 190.4, subdivision (c), provides that as a general matter "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any

> plea of not guilty by reason of insanity pursuant to [Penal Code] Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied . . . ." Subdivision (d) of that same section declares that "In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase."

(*Ibid.*)

In *People v. Hardy*, *supra*, 2 Cal.4th at pages 193 through 194, the defendant challenged the *Hamilton* decision, arguing that *Hamilton* was inconsistent with *Bullington v. Missouri*, *supra*, 451 U.S. 430, in which the "high court ruled the double jeopardy clause of the federal Constitution precluded the prosecutor from seeking the death penalty on retrial because the Missouri 'presentence hearing,' apparently similar to our penalty phase, 'was itself a trial on the issue of punishment.'" This Court rejected the defendant's argument, stating:

> That the penalty phase of a capital trial may be a "separate trial" for purposes of the double jeopardy clause, however, does not necessarily require that we conclude Hardy's post-guilt-phase *Faretta* motion was made, "within a reasonable time prior to the commencement of trial." [Citation.] The high court in *Bullington* was swayed by the fact that, in the Missouri penalty phase, the jury was given a choice of only two verdicts [citation], that the hearing was governed by the reasonable doubt standard [citation], and that the jury's initial verdict of life was the functional equivalent of an "acquittal" for the defendant of the greater penalty [citation.] None of these considerations is particularly relevant to determining the timeliness of a *Faretta* motion.

(*Ibid.*)

Frazier does not provide compelling reasons for this Court to reconsider its prior decisions. Frazier's contentions that (1) the penalty

phase is "'more normative and less factual than the guilt phase'"; (2) the penalty phase is governed by different legal principles, rules, and categories of evidence; and (3) the mitigation case is different from the type of defense presented in the guilt phase do not negate this Court's rationale for concluding that the guilt and penalty phases are substantially connected parts of a single unitary trial. (AOB 112.)

Frazier maintains that the unitary capital trial rule is "problematic with regard to a defendant's ability to make an informed decision about self-representation at the penalty phase, especially one that is compelled by a fundamental disagreement about what mitigation evidence will be presented." (AOB 114.) He complains that "this Court requires a defendant in a capital case to decide whether to seek self-representation before he may have the basic information necessary to make that decision—before he knows whether he will agree or disagree with this attorneys' mitigation case." (AOB 114.) Frazier attempts to use his own case to illustrate his point. (AOB 114-115.) Frazier's arguments are meritless.

First, this Court has made clear that what a defendant knew or did not know before the start of trial is irrelevant to the timeliness inquiry. In *People v. Cummings* (1993) 4 Cal.4th 1233, 1319-1320, the defendant moved to represent himself after trial had commenced, claiming that counsel had not acted in his best interest when counsel advised him to admit robbery-related charges. On appeal, the defendant argued that the motion was timely because he made it as soon as he became aware of the circumstances surrounding counsel's conduct. (*Id.* at p. 1320.) This Court disagreed, stating, "Timeliness under *People v. Windham*, *supra*, 19 Cal.3d 121, is measured with respect to the time trial commences . . . ." (*Ibid.*)

Second, contrary to Frazier's assertions, this case illustrates why the unitary capital trial rule makes sense. The record strongly suggests that

Frazier had more than enough information to determine whether he would agree or disagree with this attorneys' mitigation case well before jury selection commenced on March 27, 2006. During the September 12, 2005, and January 31, 2006, in-camera hearings on defense counsels' application for funds under section 987.9, Downing discussed evidence of Frazier's alleged sexual abuse that was ultimately presented at the penalty phase. (1 RT 68, 211-212.) During a February 3, 2006, in-camera hearing, Downing discussed Frazier's alleged mental disorders and the fact that she intended to present them in the mitigation case. (1 RT 234-235.) During another in-camera section 987.9 hearing on March 16, 2006, Downing discussed additional mitigation evidence, including (1) her intention to contrast Frazier's life with that of his half brother, Larry Junior; (2) Frazier's habit of sniffing gasoline; (3) Frazier's alleged organic brain damage and scans that the defense intended to conduct to assess that damage; (4) and expert opinions regarding Frazier's correctional and institutional history in the Illinois. (3 RT 701-710.) Although Frazier was not present at these hearings, defense counsel made clear that they discussed their trial strategy with Frazier. (1 RT 235.) Accordingly, Frazier was likely well aware of the type of mitigation evidence defense counsel sought to present before the start of trial, yet waited until the first day of the penalty phase to request self-representation. The unitary capital trial rule serves to prevent precisely this type of dilatory conduct that interferes with the orderly administration of justice.

Frazier contends that his "request for self-representation was clearly prompted by the description by counsel of their proposed evidence at the July 26 hearing," during which Frazier said, "'I don't understand this. I haven't discussed it with them. I don't think it's a good idea.'" (AOB 115.) Frazier's contention suggests that the July 26 hearing was the first occasion that he learned of the mitigation evidence. Not so.

Frazier's statement regarding his lack of understanding was made with regard to evidence contrasting his life with that of his half brother, not all the mitigation evidence. (47 RT 9644-9645.) In any event, that statement is belied by (1) evidence that Frazier likely knew about the vast majority of the mitigation case before the start of trial—including counsels' intent to contrast his life with his half brother's life; (2) Frazier's statement earlier in the July 26 hearing that he had heard the mitigation evidence regarding his childhood before Downing summarized it for the trial court (47 RT 9635); and (3) the trial court's knowledge that defense counsel had communicated with Frazier regarding penalty phase trial tactics (47 RT 9658-9659).

Frazier next argues that this Court's "existing jurisprudence supports assessment of a motion for self-representation at the penalty phase by considering the totality of the circumstances under which the motion is made rather than under the automatic application of the unitary-capital-trial rule." (AOB 116.) Frazier relies on *Windham* and *Lynch* in support of his contention. He also claims that his motions were timely under *Windham* and *Lynch*. (AOB 116-125.) Frazier's arguments fail.

Neither *Windham* nor *Lynch* considered whether the guilt and penalty phases were part of a unitary proceeding or how timeliness is evaluated when a defendant makes his first *Faretta* motion on the first day of a penalty trial. *Lynch* specifically addressed *pretrial* motions for self-representation. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 714-728 [discussing what a trial court may consider "in determining whether a defendant's pretrial motion for self-representation is timely" and holding that *Faretta* motions made several weeks before pretrial motions and jury selection in a complex capital case were untimely].) Accordingly, those cases are inapposite insofar as Frazier attempts to use them to undermine the unitary capital trial rule and to argue that his motions were timely.

(*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["it is axiomatic that cases are not authority for propositions not considered"].)

Even if *Windham* and *Lynch* are construed as relevant to the timeliness of Frazier's penalty phase *Faretta* motions, they do not aid him. Frazier's requests for self-representation were not made a reasonable time prior to the commencement of the penalty phase. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128 & fn. 5.) Additionally, in *Windham*, this Court observed, "When the lateness of the request and even the necessity of a continuance *can be reasonably justified* the request should be granted." (*Id.* at p. 128, fn. 5, emphasis added.) Here, given the evidence of Frazier's awareness of counsels' mitigation case before the start of trial, there was no reasonable justification for him to have waited until the start of the penalty phase to seek self-representation.

In *Lynch*, this Court stated that "a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726.) Here, the penalty phase was about to begin and the prosecutor and defense counsel were ready to proceed. The case—a capital case involving the question of Frazier's life or death—was complex, with many witnesses for the prosecution's case in aggravation that Frazier would have had to cross-examine. There were also many earlier hearings and intervening motions during which Frazier could have asserted his self-representation rights. Accordingly, Frazier's motions were untimely under *Lynch*.

Finally, Frazier claims that his first motion was timely because he "made clear that he was fully prepared to present his straightforward

penalty phase case immediately and in the same amount of time allotted for trial counsel's case." (AOB 120.) However, timeliness is separate from the issue of whether delay might be expected to follow the granting of a motion for self-representation. (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1007 [disruption or delay is one of the *Windham* factors that trial courts consider in ruling upon untimely requests for self-representation].) Accordingly, Frazier's assertions did not negate the fact that his motions were untimely.

Furthermore, Frazier did not state that he was ready to immediately present his case. Frazier stated that he did not anticipate delays that would extend trial beyond the time frame estimated by defense counsel. (48 RT 9796.) Thus, he acknowledged that there could be delays, just not delays that would impact the date on which trial was scheduled to end. Indeed, given that Frazier's strategy differed from that of defense counsel, it is entirely likely that more pretrial issues would have arisen were he allowed to represent himself. Frazier also did not claim that he was ready to proceed with opening statements—which were scheduled to take place that day—or with cross-examination of prosecution witnesses after opening statements. Accordingly, the court reasonably concluded that delay would be inevitable. (48 RT 9805; 51 RT 10273-10274.)

Frazier's later suggestion to have appointed counsel serve as standby counsel did not alleviate the burden of any delay. (49 RT 10087, 10091; AOB 122.) As the trial court observed, it had no evidence before it that appointed counsel would agree to act as standby counsel (53 RT 10800), and any other standby counsel would have had to get up to speed on the case (49 RT 10089-10090). Moreover, "[w]hen a defendant chooses self-representation, he or she retains primary control over the conduct of the case, and consequently the role of advisory counsel is limited." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1368.) Frazier provided the trial court with no information regarding how any standby or advisory counsel—in his

or her limited capacity—would have been able to prevent delay resulting from Frazier's efforts to represent himself.

In sum, because Frazier sought self-representation for the first time on the first day of the penalty trial and lacked reasonable justification for the lateness of the request, his motion was untimely.

E. The Requests Were Unsupported by the *Windham* Factors

"In ruling on a midtrial motion for self-representation, the trial court is to consider 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1007, citing *People v. Windham*, *supra*, 19 Cal.3d at p. 128.) All of these factors weighed against granting Frazier's requests.

1. The quality of counsel's representation

The trial court expressed its opinion regarding the quality of defense counsels' advocacy. The court observed that Frazier had "skilled, competent, experienced counsel" (48 RT 9803; 51 RT 10382-10383) who had exhaustively prepared for the penalty phase (48 RT 9802) and were diligently pursuing mitigation (52 RT 10520; 51 RT 10382-10383). Nothing in the record contradicts these observations. Accordingly, this factor weighed against granting Frazier's requests.

Frazier argues that the relevance of the quality of counsels' representation "is questionable, but in a case such as the present one in which Frazier had such a profound disagreement with that his attorneys proposed to do, its legitimacy, if any, is even more diminished." (AOB 132.) He maintains that the "*Faretta* right is not intended to guarantee effective representation, but to ensure 'the inestimable free choice' with

regard to one's own defense." (AOB 132.) Frazier's arguments are meritless.

As noted, Frazier waived or forfeited his absolute "inestimable free choice" to represent himself when he failed to request self-representation in a timely manner. *Windham* made clear that in such a situation, courts consider the quality of counsel's representation and the other factors to determine whether there is a reasonable justification for the lateness of the request and the extent to which the orderly administration of justice would be obstructed. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Accordingly, the quality of counsel's representation is very relevant to a midtrial *Faretta* motion.

Frazier next contends that the court's observations regarding counsels' competence do not justify its denial of Frazier's request for self-representation because (1) the court compared counsels' performance with that of Frazier; (2) the court did not analyze how counsels' performance bore on the legitimacy of Frazier's request, and (3) the reason for Frazier's request was "to present a case for life that he felt would not anger the jury." (AOB 133-135.) Frazier's contentions are unavailing.

Although the trial court was concerned with Frazier's ability to represent himself (48 RT 9803; 49 RT 10089-10090)—and this factor was irrelevant to the issue before the court (*People v. Hamilton*, *supra*, 45 Cal.3d at p. 369)—it "does not undermine the soundness of [the court's] determination" (*ibid*). The trial court's observations of counsel's competence indicate that it implicitly considered that factor as indicative of the illegitimacy of Frazier's request and the lack of justification for its lateness. (See *People v. Marshall* (1996) 13 Cal.4th 799, 828.) As for the reason for Frazier's request, that is a separate factor. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) Accordingly, Frazier's wish to present a different case for life than counsel does not undermine the fact that the

quality of counsel's representation weighed against granting Frazier's untimely motions.

2. Frazier's proclivity to substitute counsel

The trial court did not expressly comment on Frazier's prior proclivity to substitute counsel, but the record supports the court's implicit consideration of this factor. (See *People v. Marshall*, *supra*, 13 Cal.4th at p. 828.) Frazier filed a *Marsden* motion before he filed his first *Faretta* motion (47 RT 9639), and his renewed *Faretta* requests were interspersed with more *Marsden* motions (53 RT 10790; 54 RT 10885). Accordingly, this factor weighed against granting Frazier's requests for self-representation.

Frazier contends that he did not demonstrate proclivity to substitute counsel because "[h]e did not attempt to replace counsel before bringing his motions at the penalty phase" and "sought substitute counsel at the penalty phase for the same reason he then sought self-representation—to solve his fundamental disagreement about the mitigation case." (AOB 135.) Frazier's contentions do not undermine the fact that he made a *Marsden* motion before making his first *Faretta* motion and continued to alternately make *Marsden* and *Faretta* motions throughout the penalty phase. Frazier's requests were also made in the alternative. Regardless of the problems Frazier was attempting to solve, these repetitive motions evinced a proclivity to substitute counsel.

Moreover, the types of problems Frazier sought to remedy changed over time. Initially, Frazier disagreed with the types of evidence appointed counsel sought to present. Later, Frazier sought to personally address the jury. That Frazier sought to substitute counsel for various reasons further supports his proclivity.

3. The reasons for the requests

With regard to the reasons for Frazier's requests, it is apparent that overall, he was motivated by his disagreement with counsels' trial tactics. (48 RT 9795; 49 RT 9917, 10088; 51 RT 10381; 52 RT 10518-10520; 53 RT 10797-10798; 54 RT 10885, 10888.) The trial court properly concluded that Frazier's continued disagreement with counsels' strategy constituted insufficient grounds for granting his untimely requests for self-representation. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206 ["Scott's main problem with counsel was a disagreement over trial tactics, which is 'an insufficient reason to grant an untimely *Faretta* request'"].)

Frazier disputes the trial court's characterization of his reasons for self-representation as disagreements about tactics, claiming that, "[h]is beliefs were genuine and firmly held." (AOB 130.) Frazier's distinction is without a difference. Frazier's beliefs, no matter how genuine and firmly held, were nevertheless beliefs about trial tactics. As such, they were an insufficient reason to grant his untimely *Faretta* request. (*People v. Scott*, *supra*, 91 Cal.App.4th at p. 1206.)

Frazier claims that the reasons for his requests weighed in favor of granting them because he sought to present a non-frivolous defense. (AOB 130.) Not so.

As Frazier acknowledges, he sought to present evidence of how his loved ones would be affected by his execution. (AOB 129; 48 RT 9795.) However, "'[t]he impact of a defendant's execution on his or her family may not be considered by the jury in mitigation.'" (*People v. Williams* (2013) 56 Cal.4th 165, 197.) In the penalty phase context, "what is ultimately relevant is a defendant's background and character—not the distress of his or her family." (*Id.* at p. 198, internal quotation marks omitted.) Accordingly, Frazier's proposed defense was impermissible.

Frazier also sought self-representation so that he could make uncross-

examined statements to the jury, essentially making up his own evidence. (52 RT 10519, 10521; 53 RT 10797-10799.) This tactic was also impermissible. When a defendant testifies in his own defense, he "relinquishe[s] his privilege against compelled self-incrimination with respect to cross-examination on matters within the scope of the narrative testimony he provided on direct examination, as well as on matters that impeach[] his credibility as a witness. [Citations.] That is true even [when] [a] defendant represent[s] himself." (*People v. Barnum* (2003) 29 Cal.4th 1210, 1227, fn. 3.) Accordingly, Frazier's reasons for seeking self-representation weighed against granting his motions. (Cf. *People v. Herrera* (1980) 104 Cal.App.3d 167, 174 [that defendant had a well considered defense was factor favorable to defendant's request to represent himself].)

4. Length and stage of the proceedings and disruption or delay

The trial court commented on "the length and stage of the proceedings" and disruption or delay which might be expected to result from the granting of the motions. The court noted that the jury had returned a guilty verdict five weeks before Frazier filed his first *Faretta* motion, the defense had filed intervening motions, Frazier had filed a *Marsden* motion, preparations had been made for testimony to be taken in the penalty phase, the jury and alternates were assembled and waiting, the prosecutor was about to begin his case, and defense counsel was prepared to proceed with opening statements. (48 RT 9793.) The court further observed that it took five to six weeks to select the jury, five or six weeks to try the guilt phase, and there was a five week interval before the start of the penalty phase. (48 RT 9802.) The court concluded that Frazier's requests were late and would cause inevitable delay. (48 RT 9802, 9805; 49; 10090; 51 RT 10273-10274, 10382-10383.) This Court should "interpret the trial

court's comments as meaning the trial had progressed too far to make a change, with all the delay such a change would engender. Such a decision was well within the trial court's broad discretion in ruling on a motion for self-representation which [was] not raised in a timely fashion." (*People v. Hardy*, *supra*, 2 Cal.4th at p. 196.)

Frazier contends that the factor of disruption or delay in proceedings weighed in his favor and contrasts his case with *People v. Lawley* (2002) 27 Cal.4th 102 in support of his contention. (AOB 131.) In *Lawley*, the defendant sought to terminate his pro. per. status and have advisory counsel appointed as defense counsel in the penalty phase. (*Lawley*, at pp. 148-151.) The trial court denied the request, and this Court concluded that the denial was proper. (*Id.* at p. 149.) In analyzing the length and stage of the proceedings and disruption or delay occasioned by the request, this Court reasoned:

> Significantly, defendant allowed two weeks to elapse, from the jury's guilt phase verdict to the very day set for the commencement of the penalty phase, without making his request for appointment of counsel, or even mentioning his intention to advisory counsel. The timing of the request thus strongly suggests, as the trial court found, an attempt to delay the trial. And Winston's appointment as counsel indeed would have necessitated substantial delay, which in turn would have thrown into doubt the jury's continued availability.

(*Id.* at pp. 150-151.)

Frazier maintains that unlike the defendant in *Lawley*, Frazier alerted the court and counsel that he was considering making a *Faretta* motion, "but waited to see what his attorneys' intentions were as far as penalty phase evidence." (AOB 131.) He claims those actions "are consistent with good faith, non-dilatory assertion of his Sixth Amendment right." (AOB 131.) *Lawley* undermines rather than supports Frazier's argument.

Although Frazier alerted the court and counsel that he might seek self-

representation, he only proceeded to actually do so almost five weeks later on the day the penalty phase was set to commence. Thus, as in *Lawley*, the timing of Frazier's requests suggests that he *did* attempt to delay trial. This conclusion is bolstered by strong evidence that Frazier was aware of the type of mitigation evidence appointed counsel sought to present before the guilt phase commenced.

Frazier argues that the length and stage of the proceedings weighed in favor of granting his *Faretta* motion because "[n]o witnesses had yet been called, and no continuance was needed." (AOB 136.) Frazier's argument is meritless. As noted above, a continuance would likely have been necessary because the penalty phase was about to start. The change in defense strategy would likely have raised discovery and other pretrial issues. Frazier also did not express readiness to proceed with opening statements and cross-examination of the prosecution witnesses. In any event, the trial court was well within its discretion in concluding that the proceedings had progressed too far to make a change.

Because all the *Windham* factors weighed against granting Frazier's *Faretta* motions, the trial court did not abuse its discretion in denying them.

F. The Requests for Self-Representation Were Equivocal

1. The first request

Contrary to Frazier's assertions (AOB 96-104), the trial court properly found that his initial request for self-representation was equivocal. On July 26, Frazier first sought to substitute counsel, then claimed he wanted to represent himself, and ultimately made a *Marsden* motion. (47 RT 9632-9639.) After the court denied the *Marsden* motion, Frazier wished to confer with counsel to determine whether he should file a *Faretta* motion and asked Downing for help in preventing the trial court from discussing penalty phase evidence in public. (47 RT 9659-9660.) This vacillation

between seeking substitution of counsel, self-representation, and the advice of appointed counsel suggests that, at that point, Frazier was ambivalent about representing himself and wished to retain the benefits of appointed counsel's legal advice.

When Frazier finally filed his first *Faretta* motion, his tone was hostile and emotional. He mockingly characterized a video and testimony regarding attachment theory that defense counsel sought to present as "pure monkey business." (48 RT 9794.) After Downing provided her input to the court, Frazier sarcastically said, "The way she described the probability statistics of my brain damage, I'm surprised I could have remembered anything she said, sir." (48 RT 9800-9801.) Frazier's awareness of the mitigation evidence long before making the motion, earlier ambivalence about relinquishing counsel's advice, and now hostile tone suggested that he made the *Faretta* request under a cloud of sudden emotion. Accordingly, the trial court properly found that Frazier's first *Faretta* motion was equivocal. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 21.) This finding was bolstered by Quandt's observation during the July 26 *Marsden* hearing that Frazier's issues with jail personnel prevented him from making rational decisions. (47 RT 9647, 9650-9651.)

Frazier suggests that his July 31 motion was not made under the cloud of emotion because he said so after the trial court denied his motion. (AOB 98, 103.) However, the court was not obligated to credit Frazier's assertions, which were undermined by his sarcastic comments regarding defense counsel's strategy. Nor did Frazier's subsequent "rapid and emphatic" motion for a mistrial give "the court further proof that he arrived at his decision in a deliberate and thoughtful manner . . . ." (AOB 98.) On the contrary, Frazier's mistrial motion was an obviously angry response to the court's denial of his *Faretta* motion. If anything, it underscored that Frazier's request to represent himself was made out of sudden anger and

not out of a true desire to represent himself.

Frazier contends his "request stands in sharp contrast to those found to make no assertion or an equivocal assertion of the right to self-representation" and contrasts this case with *Stenson v. Lambert* (9th Cir. 2007) 504 F.3d 873 and *People v. Boyce* (2014) 59 Cal.4th 672. (AOB 99-100.) The contention is unavailing. That the defendants in those cases were found to have either not asserted their right to self-representation or asserted that right equivocally does not mean that Frazier asserted the right unequivocally.

Frazier further argues that (1) he "did not seek self-representation as a means to a different, unrelated purpose," such as avoiding a court order; (2) his "request was not an impulsive or tangential comment that he failed to pursue"; and (3) his "request was not simply a hypothetical question or tentative musing about the possibility of self-representation." (AOB 100.) Frazier's arguments do not alter the conclusions that he did not wish to relinquish the advice of counsel after the denial of his *Marsden* motion and that his *Faretta* request was made out of anger and frustration rather than a genuine desire to represent himself.

Frazier maintains that "[h]e thought about whether to make a *Faretta* motion throughout the month-long hiatus between the guilt phase and the penalty phase, and he requested self-representation only when, during the in limine motions, it became clear that counsel would present the mitigation case he found offensive and after the court would not provide substitute counsel." (AOB 103-104.) Not so.

As discussed above, the record strongly suggests that Frazier was aware of the mitigation evidence counsel intended to present in the penalty phase before trial even started. Frazier's sudden anger on the brink of the penalty phase about that evidence underscores that his request was made under the cloud of emotion. The timing also suggests that he made the

motion to delay proceedings or frustrate the orderly administration of justice. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 23.)

Finally, Frazier attacks the manner in which the trial court exercised its discretion. Specifically, he claims that the court mischaracterized his complaints as satisfaction with trial counsel's performance. (AOB 101-102.) However, a close reading of the entire colloquy shows that the trial court was not implying that Frazier was satisfied with counsel's strategy. Rather, the court's words conveyed that it listened to Frazier's appraisal of counsel's strategy and found it to reflect anger and frustration rather than a genuine desire to represent himself. (48 RT 9802-9803.) As discussed above, the record supports the trial court's conclusion.

2. Subsequent requests

Frazier's subsequent *Faretta* motions reinforced the inference that he did not genuinely desire to represent himself. His August 1 request appeared to be similarly rooted in his sudden anger regarding defense counsel's latest representations to the jury—this time regarding his brain damage and his "teaching Kelly Ayers the secrets of family"—not a genuine desire to represent himself. (49 RT 9917.) On August 3, Frazier asked to represent himself and stated that he would not object to the participation of his counsel as standby counsel. (49 RT 10087, 10091.) Frazier's suggestion of involving standby counsel reflected ambiguity regarding whether he truly desired to represent himself, particularly where he requested that appointed counsel, whose strategy was the impetus for the *Faretta* motion, continue as standby counsel. The right to represent oneself and the right to counsel are mutually exclusive. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 20), and "[a] criminal defendant does not have a [constitutional] right to simultaneous self-representation and representation by counsel" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1368). Frazier's ready and willing acceptance of standby counsel was not an unequivocal

election to represent himself or a clear waiver of his right to counsel. (See *Marshall*, at p. 26 ["docket entries also reflected defendant's repeated request for advisory counsel while he was representing himself, indicating further ambivalence on his part about waiving the right to counsel"].)

On August 10, Frazier asked the court to grant him "conditional *Faretta* rights." (52 RT 10515-10517.) Although the trial court did not make any express findings as to whether this latest *Faretta* motion was equivocal, Frazier's request for "conditional" rights again exhibited ambiguity as to whether he wished to totally and completely represent himself. That Frazier answered affirmatively when the trial court later asked him if he wanted to completely represent himself does not alter the equivocal nature of Frazier's request because he still initiated it in an ambivalent manner.

On August 14, Frazier sought to represent himself and have appointed counsel serve as standby counsel. (53 RT 10797-10798.) On August 15, Frazier again asked to represent himself. He claimed that he was not seeking to retain advisory counsel but then stated that he would not object to the appointment of standby counsel. (54 RT 10885-10886.) For the reasons already discussed, Frazier's repeated suggestion of involving standby counsel showed that he did not unequivocally demand to represent himself or clearly waive his right to counsel. The trial court also correctly observed that the August 15 request was equivocal because Frazier's strategy regarding taking the stand depended on the court's ruling. (54 RT 10890-1092.) The request reflected Frazier's attempts to achieve a certain strategic outcome rather than a genuine desire to represent himself. (See *People v. Marshall*, *supra*, 15 Cal.4th at pp. 25-26 [*Faretta* request was equivocal where defendant sought self-representation as a means to avoid court order to supply blood and tissue samples].)

Frazier argues that his subsequent *Faretta* motions dispelled any

doubts about the seriousness of his original request to represent himself because "[h]e never wavered or reconsidered his position." (AOB 98-99.) On the contrary, as discussed above, Frazier wavered when he requested—or expressed willingness to accept—standby counsel.

Frazier maintains that "[h]e raised the possibility of accepting advisory counsel only after the court denied his request to represent himself and only as a way to address whatever concerns the court had about his going 'pro per.'" (AOB 107.) Regardless, Frazier's willingness to accept standby counsel and initiation of that idea showed that he was not staunchly dedicated to carrying his own defense unaided by counsel. His ready desire to compromise rendered his request equivocal.

Frazier next argues that his motions "were no more equivocal than those of the defendant in *Adams v. Carroll* [(9th Cir. 1989)] 875 F.2d 1441." (AOB 108.) In that case, the defendant sought to "represent himself if the only alternative was representation by [appointed counsel]." (*Adams*, at p. 1444.) The Ninth Circuit held that the defendant's requests were unequivocal, reasoning:

> Although his two self-representation requests were sandwiched around a request for counsel, this was not evidence of vacillation. To the contrary, each of these requests stemmed from one consistent position: Adams first requested to represent himself when his relationship with Carroll broke down. He later requested counsel, but with the express qualification that he did not want Carroll. When Carroll was reappointed, Adams again asked to represent himself. Throughout the period before trial, Adams repeatedly indicated his desire to represent himself if the only alternative was the appointment of Carroll. While his requests no doubt were *conditional*, they were not equivocal.

(*Id.* at pp. 1444-1445.) Frazier's reliance on *Adams* is unavailing.

First, "decisions by the federal courts of appeal are not binding on [this Court]." (*People v. Williams* (2013) 56 Cal.4th 630, 668.) Second, unlike in this case, the defendant in *Adams* did not make his motions under

the cloud of emotion, nor did he seek or express willingness to accept advisory counsel if allowed to proceed in pro. per. Third, the *Adams* motion was made pretrial, and did not involve a timeliness issue. Accordingly, *Adams* is distinguishable.

Finally, all of Frazier's arguments ignore the mandate that "courts must draw every inference against supposing that the defendant wishes to waive the right to counsel." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 23.) Because Frazier's *Faretta* motions were laced with evidence of equivocation, the trial court's rulings were correct. And, even if any of the motions were unequivocal, they were still properly denied as untimely and unsupported by the *Windham* factors.

G. Any Error Was Harmless

Even if the trial court erred in denying Frazier's requests for self-representation, any error was harmless. As discussed, none of Frazier's penalty phase *Faretta* motions were timely. "The erroneous denial of a *timely* motion for self-representation is an error of constitutional magnitude and is subject to a rule of per se reversal. [Citation.] The erroneous denial of an '*untimely*' motion is not." (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594.) An untimely motion for self-representation is evaluated under the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1050-1053.) Under that test, an error is harmless if it is not reasonably probable a result more favorable to the appealing party would have been reached in the absence of the alleged error. (*Watson*, at p. 836.)

Frazier maintains that state law errors at the penalty phase in a capital trial are evaluated under the standard articulated in *People v. Brown* (1988) 46 Cal.3d 432, 446-448. (AOB 138.) That standard asks whether there is a "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Brown*, at p. 448.)

The error was harmless under either standard.

The evidence in aggravation was strong. Frazier suffered several prior convictions and engaged in numerous acts of violence before he finally murdered Kathy. The manner in which he assaulted and violated her and left her to die a slow, painful death was nothing short of horrific. The testimony of Kathy's younger brother, father, and son portrayed her as a very sympathetic victim. By contrast, Frazier's desired case in mitigation was not only weak, but impermissible. As such, he would not have been allowed to present evidence of the impact of his execution on his loved ones or argue that theory during closing argument. Frazier would also not have been able to submit uncross-examined testimony as he wished. There is no evidence in the record suggesting that Frazier had any another mitigation strategy. Accordingly, it is not reasonably probable, and there is no realistic possibility, that the jury would have reached a different verdict had Frazier presented the case in mitigation himself. Because Frazier was not prejudiced by the alleged errors, his *Faretta* claim fails.

Frazier argues that the error requires reversal under the *Brown* or *Watson* standards. He analogizes this case to *People v. Nicholson*, *supra*, 24 Cal.App.4th 584 in support of his contention. (AOB 141.) In *Nicholson*, the Court of Appeal held that the erroneous denial of an untimely motion for self-representation was not harmless under *Watson*. The court reasoned:

> *Faretta* is based on the belief that the state may not constitutionally prevent a defendant from "controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant." [Citation.] Had Nicholson and Goldsberry been permitted to control their own fate, the evidence against them would have been no less overwhelming. But we simply cannot discount the fact that it might have been to their advantage to conduct voir dire and to present opening statements and closing arguments, thereby giving the jury an opportunity to hear from them (without the inconvenience of cross-examination). [Citations.]

> While it seems safe to say the defendants could not under any circumstances have been acquitted, they might have been able to avoid a true finding on the special circumstance allegation.
>
> Furthermore, the timing issue in this case is, as indicated at the outset, a close call. Had we taken the position that the motions were timely because trial had not commenced on August 4 and that it did not in fact begin until August 10, the erroneous denial of the motions would per se require reversal. All things considered, we cannot say the error was harmless.

(*Id.* at p. 595.)

Frazier claims that, like in *Nicholson*, there would have been "mitigating value" to his case if he had had a chance to address the jury himself. (AOB 142.) *Nicholson* does not aid Frazier.

Nicholson's reasoning that allowing the jury to hear from the defendants may have saved them from a true finding on the special circumstance allegation is inapplicable here because Frazier made his *Faretta* motion after the jury made its special circumstance findings. And, given the strength of the evidence in aggravation, "it seems safe to say that [Frazier] could not under any circumstances have [received a life verdict]." (*People v. Nicholson*, *supra*, 24 Cal.App.4th at p. 595.) Furthermore, the *Nicholson* court took the closeness of the timeliness issue into consideration. Here, Frazier's *Faretta* requests were extremely late.

Nicholson's reasoning is also of questionable validity because it misapplies the standard articulated in *Watson*. That standard "must necessarily be based upon reasonable probabilities rather than mere possibilities." (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.) A reasonable probability is more than a "mere *theoretical* possibility . . . ."

(*People v. Blakeley* (2000) 23 Cal.4th 82, 94.)[27] The *Nicholson* court appears to have based its decision on a theoretical possibility, rather than a reasonable probability, that the jury "might" not have found the special circumstance allegation true if the defendants had represented themselves. Moreover, because this theoretical possibility exists in any case where a trial court erroneously denies a *Faretta* motion, the *Nicholson* court essentially transformed the *Watson* test into a rule of per se reversal. The *Nicholson* court also improperly considered the timeliness of the motion—a fact that was irrelevant to the outcome of the proceeding in the absence of the error. Accordingly, *Nicholson*'s and Frazier's reasoning should be rejected.

Alternatively, Frazier contends that the alleged error was reversible per se and attempts to undermine the reasoning in *Rivers* to illustrate his point. (AOB 138.) Frazier's contentions fail.

In concluding that the *Watson* standard applied to an erroneous denial of an untimely *Faretta* motion, the *Rivers* court observed that "[b]y delaying his *Faretta* motion until virtually the end of proceedings, defendant waived, or forfeited his absolute constitutional right. His right was based on case law (e.g. *People v. Windham*) . . . ." (*People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1050.) The *Rivers* court also analogized the case before it to *People v. Crandell* (1988) 46 Cal.3d 833, abrogated on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365. (*Rivers*, at p. 1050.) In *Crandell*, the trial court failed to exercise its discretion with regard to a pro. per. defendant's request for advisory counsel. (*Crandell*, at p. 862.) This Court held that because it would not

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[27] Similarly, the *Brown* test requires more than a "'mere' or 'technical' possibility that an error might have affected a verdict" to trigger reversal. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

have been an abuse of discretion for the trial court to deny the defendant's request, "a rule of per se reversal [was] unnecessary and unwarranted." [Citation.] No federal constitutional right being implicated, the consequences of the error are properly assessed by employing the *Watson* harmless error standard." (*Id.* at pp. 864-965.)

Contrary to Frazier's assertions (AOB 139-140), *Crandell* supports the *Rivers* court's conclusion that prejudice resulting from the denial of an untimely *Faretta* motion is evaluated under *Watson.* As in *Crandell*, the erroneous denial of an untimely *Faretta* motion does not implicate a federal constitutional right.

Frazier argues that this case is more analogous to *People v. Bigelow* (1984) 37 Cal.3d 731. (AOB 140-141.) In *Bigelow*, this Court held that where a refusal to appoint advisory counsel to a pro. per. defendant would be an abuse of discretion, the rule of per se reversal applies because "an appellate court has no way to measure the prejudicial effect of [the] error." (*Id.* at pp. 744-745.) Frazier maintains that "[t]his is the correct rule [in the context of an untimely *Faretta* motion], and the rule set forth in *Rivers* is not." (AOB 141.)

Frazier is incorrect. Unlike in *Bigelow*, it is possible to assess the prejudicial effect of the allegedly erroneous denial of the *Faretta* motions here. Frazier explained the mitigation strategy he intended to employ, and it can easily be compared to the prosecutor's case in aggravation. Accordingly, Frazier's reliance on *Bigelow* fails.

Frazier next contends that "[e]ven if the right to self-representation is not unqualified if the request is untimely, the nature of the right itself is not altered by the juncture of the trial at which it is asserted. If the nature of the right has not changed, the type of harm analysis does not change despite the fact that the way to measure whether the error itself occurred may be different." (AOB 139-140.) Frazier is incorrect.

The nature of the right to self-representation *is* altered by the juncture of the trial. As discussed, when self-representation is requested a reasonable time before trial, it is an absolute Sixth Amendment right. When self-representation is requested in an untimely manner, it is no longer a constitutional right. (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.)

Frazier also relies on *People v. Courts* (1985) 37 Cal.3d 784 and *People v. Ortiz* (1990) 51 Cal.3d 975 for the proposition that error in this case is reversible per se. (AOB 141.) However, *Courts* and *Ortiz* involved defendants' *timely* requests for counsel of their own choosing. Accordingly, those cases are inapposite.

Finally, if this Court finds that any error was not harmless, because Frazier sought to represent himself solely in the penalty phase, only the death judgment should be reversed.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING FRAZIER'S POST-PENALTY PHASE MOTION FOR SELF-REPRESENTATION

Frazier argues that the trial court erred in denying his request for self-representation on the day of sentencing. (AOB 144 & fn. 37.) He claims he is entitled a new hearing on the automatic motion for modification of the death sentence and a new sentencing hearing. (AOB 159.) Frazier's claim is meritless because the motion was untimely, and the *Windham* factors support the court's ruling.

A. Factual and Procedural Background

On August 24, 2006, after the jury returned the death verdict, the trial court scheduled sentencing for October 27, 2006, at 8:30 a.m. (58 RT 11678.) Frazier did not seek self-representation at this time.

On October 20, 2006, the trial court advanced the date for sentencing to October 26. (58 RT 11682.) Defense counsel Downing informed the court that the she was conducting an investigation with regard to "new trial

issues and other motions." (58 RT 11683.)

On October 26, 2006, Downing asked to continue the sentencing hearing until December 15, at which time she would argue her motions. (58 RT 11690.) Downing also informed the court that Frazier wished to have a hearing under section 4007.[28] (58 RT 11693.) After the court and counsel settled scheduling matters, the court conducted the section 4007 hearing as Frazier requested. (58 RT 11700.) The hearing lasted the rest of the day and was continued for further proceedings until December 8, 2006. (58 RT 11741.)

On December 8, Frazier stated, "Your Honor, I'm going to be making a motion to proceed pro[.] per on this hearing." (58 RT 11750.) A little later in the proceedings Frazier stated, "According to PC 4007, I have the right to be present at this hearing and represented by counsel, which also means I have the right to waive that right. I no longer wish to be represented by counsel. I haven't been wanting to be represented by them

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[28] Under section 4007, "the sheriff may remove a prisoner to a California state prison 'for safekeeping' whenever there is reasonable ground to believe that he 'may be forcibly removed' from the county jail." (*People v. Hodge* (1957) 147 Cal.App.2d 591, 595.) Section 4007 provides, in part, "When there are reasonable grounds to believe that there is a prisoner in a county jail who is likely to be a threat to other persons in the facility or who is likely to cause substantial damage to the facility, the judge of the superior court may, on the request of the county sheriff and with the consent of the Director of Corrections, designate by written order the nearest state prison or correctional facility which would be able to secure confinement of the prisoner, subject to space available. The written order of the judge must be filed with the clerk of the court. The court shall immediately calendar the matter for a hearing to determine whether the order shall continue or be rescinded. The hearing shall be held within 48 hours of the initial order or the next judicial day, whichever occurs later." The trial court signed an order to transport Frazier to San Quentin under this statute on August 24, 2006, but did not hold a hearing until October 26. (58 RT 11712.)

since the beginning of the penalty phase, and there are very important issues that can be preserved in this hearing that I don't want to just let rot away with me." (58 RT 11756-11757.) The court asked Frazier whether he wished to make a further *Faretta* motion. (58 RT 11757.) Frazier answered affirmatively. (58 RT 11757.)

The court held an in-camera hearing on Frazier's request, interpreting it to be in the nature of a *Marsden* motion. (58 RT 11758, 11760.) The court asked Frazier to start with "the *Marsden* portion of this, the reasons that you would like me to relieve your present counsel." (58 RT 11761.) The court also observed that Frazier's request was late, and "[t]he only issues that [were] left for [it] to rule on [we]re the new trial motion filed by [Frazier's] lawyers[] [and] the automatic motion to reduce [the] [penalty and sentence] from death to life." (58 RT 11761.) Frazier responded that his motion was confined to the section 4007 hearing only. (58 RT 11761.)

After listening Frazier's complaints about counsels' performance, the court stated, "Having in mind all the material I've heard and read, I have really no dispute about their choice of the manner of representation. I know you have feelings to the contrary, but at this point, I'm denying the motion to relieve your counsel for purposes of the 4007 hearing." (58 RT 11773.) The court then asked Frazier, "Are you asking me to further address your desire to have them relieved for [*sic*] representation in the concluding aspects of this case next year, or are you limiting it to the 4007 hearing?" (58 RT 11773.) Frazier stated, "Well, I'm making an unequivocal request to proceed pro[.] per." (58 RT 11773.) The court told Frazier that it would get to that request in a moment, and concluded there were no grounds to relieve counsel under *Marsden* either with regard to the section 4007 hearing or the conclusion of the case. (58 RT 11773-11774.)

With regard to Frazier's *Faretta* request, the trial court again noted that it was made very late in the proceedings. (58 RT 11775.) The court

reminded Frazier that only the new trial motion and the automatic motion to modify the death verdict were left to be heard and gave him the floor. (58 RT 11775-11776.) Frazier responded, "I'm just of the opinion that I can get myself executed just as easily as they can. And I feel that I have enough knowledge about what I want to present in the 4007 hearing to proceed in a way that will be in accordance with the court rules, and I have a Sixth Amendment right to do that, and that's what I'm standing on." (58 RT 11776.) Frazier then complained about counsel's performance in the penalty phase and during the 4007 hearing. (58 RT 11777-11782.) Frazier claimed that his request was not untimely. (58 RT 11777.)

The trial court found Frazier's motion to be unequivocal, and made voluntarily, intelligently, and with knowledge of the risks and consequences of proceeding in pro. per. (58 RT 11788-11789.) Nevertheless, the court denied the motion because it did not deem Frazier capable of representing himself in the closing stages of the proceedings, and, more significantly, the motion was untimely. (58 RT 11790.) Frazier disputed the court's ruling, and again explained his reasons for seeking self-representation during the section 4007 hearing. (58 RT 11790-11791.) Frazier claimed that the court continuously violated his Sixth Amendment rights. The trial court responded, "All right. You have your record." (58 RT 11791.)

On December 15, 2006, the trial court summarized the order of business. First, the court would listen to the defense's motion for a new trial. (58 RT 11799.) Depending on the outcome of that motion, the court would take up the automatic motion to modify the death verdict. Depending on the outcome of the automatic motion, the court would read the probation report and proceed with sentencing. (58 RT 11799.) As the court began considering the motion for new trial, Frazier interjected, "Your Honor, I object to these proceedings, and I want to make a pro[.] per

motion. I don't even want this motion read until that hearing takes place." (58 RT 11801.) The trial court asked Frazier is he was making another motion to represent himself. Frazier answered affirmatively. (58 RT 11801.)

The court asked Frazier whether he wanted to advise it of anything it had not already heard. (58 RT 11801.) Frazier pointed out that, "[t]here is no requirement that a criminal defendant seeking to represent himself show that his or her appointed counsel is providing effective representation before self-representation may be permitted." (58 RT 11801.) Frazier also worried that the December 8 *Marsden* hearing led to the revelation of information that would be detrimental to his future appeal. (58 RT 11802.) The court explained to Frazier why it had conducted a *Marsden* inquiry and assured him that nothing that had taken place impinged on his confidentiality. (58 RT 11802-11803.)

With regard to Frazier's latest *Faretta* motion, the court denied it, stating:

> I have in mind all of the things that you've told me in the past and the reasons that you've given to me, and I have in mind last Friday's discussions as well. And it appearing that other than the law you cited to me, nothing new in the way of factual information has come. I'm not prepared to disturb or revisit the ruling that I made in the past except to respond to your question about the law, which is that at this stage of the proceedings, post-trial, post two trials, the call is discretionary with me, not an absolute right . . . as would be pretrial. And I incorporate the findings I made last time.

(58 RT 11804.)[29]

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[29] We do not dispute the trial court's incorporated findings from the December 8 hearing that Frazier's request for self-representation was unequivocal and made voluntarily, intelligently, and with knowledge of the risks and consequences of proceeding in pro. per. (58 RT 11788-11789.) Because the trial court denied the motion primarily on the ground of

(continued...)

B. The Motion Was Untimely

Frazier "challenges only the denial of [his] request to represent himself at the December 15, 2006[,] proceedings." (AOB 144 & fn. 37.) He claims that during those proceedings, he had an unconditional right to self-representation with regard to the automatic motion for modification of the death verdict and sentencing because his request was timely. (AOB 149-153.) Not so.

In *People v. Miller* (2007) 153 Cal.App.4th 1015, 1024, the Court of Appeal held that sentencing and trial are separate and distinct proceedings and that, "[m]uch as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior to the commencement of the sentencing hearing." This Court has not squarely decided how timeliness is to be determined with regard to a post-penalty phase request for self-representation. However, it has found a request for self-representation made on the day of sentencing to be "manifestly untimely." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454.)

Here, Frazier did not make his request for self-representation during the automatic motion and sentencing within a reasonable time before sentencing. Rather, like in *Doolin*, he made the request on the day of those proceedings—December 15, 2006. Accordingly, his request was untimely. That Frazier made his request mid-hearing also suggests that it was designed to halt the proceedings and create a delay. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 722 [the purpose of the timeliness requirement is

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(...continued)
untimeliness, the People address only this prong in our brief. That the trial court was also concerned with the irrelevant factor of Frazier's ability to represent himself (58 RT 11790) "does not undermine the soundness of [the court's] determination." (*People v. Hamilton*, *supra*, 45 Cal.3d at p. 369.)

"'to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice'"].)

Furthermore, it is questionable whether the automatic motion and imposition of the death sentence qualify as sentencing proceedings in the traditional sense. In ruling on an automatic motion to modify the death verdict, "the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) Thus, the motion appears to be collateral to sentencing—indeed, a continuation of the penalty trial itself. The same can be said for the trial court's imposition of the death sentence after deciding the automatic motion. Accordingly, Frazier's request appears to have also been untimely under the unitary capital trial rule.

Frazier again challenges the unitary capital trial rule. (AOB 153.) For the reasons already discussed, Frazier's challenge fails.

Frazier also claims that his *Faretta* motion was timely under *Windham* and *Lynch* because he moved to represent himself at the earliest opportunity on December 8, 2006. (AOB 154.) Frazier's claim fails.

First, December 8 was not the earliest opportunity that Frazier had to request self-representation at sentencing. The jury returned the death verdict on August 24. Frazier next appeared in court on October 26. (58 RT 11690.) He did not move to represent himself for any purpose at this time. Nor did he file a written *Faretta* motion with the court at any time, even though he could have done so while in prison. Indeed, Frazier was familiar with filing handwritten *Faretta* motions because he had filed one in the penalty phase. (6 CT 1873-1876.)

Second, even on December 8, Frazier did not move to represent himself for purposes of the automatic motion or sentencing. Rather, he

sought self-representation for purposes of the section 4007 hearing only. (58 RT 11761.) When the trial court attempted to confirm the scope of Frazier's request by asking whether it encompassed "the concluding aspects of this case" (58 RT 11773) and pointing out that the automatic motion and new trial motion had yet to be litigated (58 RT 11775-11776), Frazier vaguely answered that he was making an "unequivocal request to proceed pro[.] per[.]" (58 RT 11773) and that "[he] could get [him]self executed just as easily as they can (58 RT 11776)." He went on to state, however, that "I feel that I have enough knowledge about what I want to present in the 4007 hearing to proceed in a way that will be in accordance with the court rules, and I have a Sixth Amendment right to do that, and that's what I'm standing on." (58 RT 11776).

Contrary to Frazier's suggestions (AOB 156-157 & fn. 44), his vague and evasive comments did not constitute a request for self-representation during the automatic motion and sentencing. Frazier knew how to specifically ask for what he wanted. He presented specific arguments in favor of representing himself in the section 4007 hearing (58 RT 11776-11782) and during the penalty phase. That he did not specifically request self-representation during the automatic motion and sentencing in the face of the court's pointed questions showed that he did not seek it on December 8.[30] Because Frazier failed to (1) request self-representation at sentencing and for purposes of the automatic motion until those proceedings were about to take place; and (2) show reasonable cause for the almost four

[30] That the trial court denied the December 8 *Faretta* motion because it believed Frazier was incapable of representing himself in the "closing stages of these proceedings" (58 RT 11790) does not mean that Frazier's request encompassed all the remaining proceedings. Given the vagueness of Frazier's responses to the court's questions regarding the scope of the motion, it is apparent the court prophylactically covered all potential bases in making its ruling.

month delay, his request was untimely under *Windham* and *Lynch*. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [in determining whether a pretrial *Faretta* motion is timely, trial court properly considers whether "defendant had earlier opportunities to assert his right of self-representation"]; *People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5 ["a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself . . . without some showing of reasonable cause for the lateness of the request"].)

Frazier's untimely motion was "addressed to the sound discretion of the trial court." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1220.) As discussed below, the court reasonably denied it under the *Windham* factors.

C. The *Windham* Factors Support the Trial Court's Ruling

As noted, in ruling on an untimely *Faretta* motion, a trial court must consider the quality of counsel's representation, the defendant's proclivity for substituting counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that may be expected to result if the motion is granted. (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1007; *People v. Windham*, *supra*, 19 Cal.3d at p. 128.) As Frazier acknowledges (AOB 155), the trial court need not expressly address these factors in making its ruling. (*Windham*, at p. 129, fn. 6.) Here, although the court did not explicitly consider each *Windham* factor, the record reflects that it considered the factors implicitly. (*People v. Marshall*, *supra*, 13 Cal.4th at p. 828.)

1. The quality of counsel's representation

As discussed, the trial court found that appointed counsel provided Frazier with skilled representation in the penalty phase (48 RT 9802-9803; 52 RT 10520) and during the section 4007 hearing (58 RT 11773). Nothing in the record undermines these findings. Accordingly, this factor weighed

in favor of denying Frazier's motion.

Frazier again disputes the relevance and legitimacy of this factor to the analysis of an untimely *Faretta* request. (AOB 155-156.) For the reasons already discussed, Frazier's arguments are meritless.

2. Frazier's proclivity to substitute counsel

As noted, Frazier filed several *Marsden* motions interspersed with *Faretta* motions during the penalty phase. (47 RT 9639; 53 RT 10790; 54 RT 10885.) Accordingly, he displayed a proclivity to substitute counsel. For the reasons already discussed, Frazier's arguments to the contrary (AOB 156) fail.

3. The reasons for the request

Contrary to Frazier's assertions (AOB 155-156), he did not make his December 15 request for representation because he disagreed with counsel's proposed case in mitigation. Rather, he made the motion because he believed that a defendant seeking to represent himself was not required to show that appointed counsel provided effective representation. (58 RT 11801.) He was also concerned that the trial court's *Marsden* inquiry somehow compromised his confidentiality. (58 RT 11802-11803.) As discussed, the quality of counsel's representation is a factor that courts must consider in ruling on untimely *Faretta* requests. And, nothing about the trial court's *Marsden* inquiry compromised Frazier's confidentiality. Accordingly, Frazier's reasons did not justify the grant of his request for self-representation.

To the extent the trial court considered Frazier's dispute with appointed counsel regarding mitigation tactics when it stated, "I have in mind all of the things that you've told me in the past . . . ," as discussed above, this was "'an insufficient reason to grant an untimely *Faretta* request.'" (*People v. Scott*, *supra*, 91 Cal.App.4th at p. 1206.)

4. Length and stage of the proceedings and disruption or delay

Frazier made the request for self-representation at issue in the middle of the trial court's evaluation of the motion for new trial on the day of sentencing and consideration of the automatic motion almost four months after the jury returned the death verdict. Given the incredible lateness of the request and the absence of evidence that Frazier was prepared to proceed with the automatic motion and sentencing, the trial court correctly implicitly found that delay would have been inevitable. Accordingly, these factors also weighed in favor of denying Frazier's motion.

Frazier maintains that there was no threat of disruption or delay because (1) when he made his motion on December 8, the prosecutor did not attempt to show that granting the motion would delay the December 15 hearing; and (2) he "made the motion a week before the scheduled hearing, and he did not ask for a continuance or any other accommodation . . . ." (AOB 156-157.) Frazier's representations regarding the timing of his motion are inaccurate.

As discussed, Frazier's December 8 *Faretta* request was limited to the section 4007 hearing and did not encompass the automatic motion or sentencing. Accordingly, Frazier's December 8 motion has no bearing on whether his last minute request on December 15 would have caused delay.

Because all of the *Windham* factors support the trial court's ruling, Frazier's claim fails.

D. Any Error Was Harmless

Even if the trial court erred in denying Frazier's post-penalty phase request for self-representation, any error was harmless. As noted, the improper denial of an untimely motion for self-representation is evaluated for prejudice under the *Watson* test. (See *People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1050-1053.) Because state law errors pertaining to the

penalty phase in capital trial are evaluated under the *Brown* standard, that standard may apply to the alleged error at issue. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448.) The error was harmless under either standard.[31]

As noted, in ruling on an automatic motion for modification of a death verdict, the trial court must independently reweigh the aggravating and mitigating factors presented at trial and determine whether the evidence supports the death verdict. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1267.) Here, the evidence in aggravation was extremely strong. Defense counsel presented impassioned arguments about why, based on the mitigating factors, Frazier's death sentence should be modified. (58 RT 11809-11821.) No other meritorious arguments could have been made. Accordingly, there is no reasonable probability or realistic possibility that the trial court would have decided the automatic motion differently had it granted Frazier's *Faretta* request. (See *People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1052 ["not conceivable that defendant, representing himself, could have achieved a more favorable result" in a court trial on a prior conviction allegation where no defense other than that presented by counsel was "visible from the record"].)

Moreover, "[t]he United States Supreme Court has also pointed out that the 'core' of the *Faretta* right is the right 'to preserve actual control over the case [t]he [defendant] presents to *the jury*.' (*McKaskel v. Wiggins* (1989) 465 U.S. 168, 178 [], italics added.)" (*People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1052.) "[T]his right was not impacted in proceedings before the court." (*Id.* at p. 1053.)

Frazier maintains that if he had "been permitted to argue to the court

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[31] Frazier again argues that the alleged error requires automatic reversal. (AOB 158.) For the reasons already discussed, Frazier's argument fails.

the theory that he proposed to present as a case in mitigation—that his family and friends wanted him to live—there is a reasonable probability that the court would have seen the worth in Frazier's argument and granted the section 190.4 motion and imposed a sentence of LWOP rather than death." (AOB 158.) Not so.

The trial court could not have considered Frazier's proposed argument. The automatic motion permitted it to review only the mitigating and aggravating factors presented at the penalty trial, which did not include Frazier's proposed mitigation evidence. (*People v. Cleveland* (2004) 32 Cal.4th 704, 766 ["at the hearing on the modification motion, the court is limited to considering the evidence presented at the penalty trial"]; *People v. Farnam* (2002) 28 Cal.4th 107, 196 ["In ruling on a modification motion, a trial court must not consider extraneous material or facts not presented to the jury . . ."].) Additionally, as discussed, Frazier's theory of mitigation was impermissible. (*People v. Williams*, *supra*, 56 Cal.4th at pp. 197-198.)

Moreover, defense counsel made arguments similar to those proposed by Frazier. Quandt argued that killing Frazier would rip a hole in the fabric of society. (58 RT 11816.) Downing argued that killing Frazier would not be merciful to "those who would be left behind; his mother, Barb Tinsley; Larry Junior; Rick Tinsley; all his half-brothers and sisters; and his nieces and nephews who love him. All those people who love him so and know a Bob Frazier that is different from the Bob Frazier that was portrayed on the trail, different from the desperate man who appears before you today in court." (58 RT 11820.) Given that the trial court denied the automatic motion despite those arguments, there is no reasonable probability or realistic possibility the outcome would have been different had Frazier represented himself.

As to sentencing, Frazier addressed the court before it imposed judgment. (58 RT 11838-11841.) Accordingly, "[a]ny interference with

his right of self-representation at this stage was not substantial and not prejudicial." (*People v. Rivers*, *supra*, 20 Cal.App.4th at pp. 1052-1053.)

Because Frazier fails to demonstrate a reasonable probability or realistic possibility that the outcome of the automatic motion and sentencing would have been different had he represented himself, the judgment should stand.

Finally, if the alleged error was not harmless, the matter should be remanded only for new hearings on the automatic motion and sentencing. (AOB 159.)

IV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALCRIM NO. 372

Frazier contends the trial court erred in instructing the jury with CALCRIM No. 372—the flight instruction—because (1) there was insufficient evidence that his departure from the crime scene was motivated by a desire to avoid detection or apprehension; (2) the instruction unduly favored the prosecution, and was argumentative and unnecessary; (3) the instruction may not be given where identity is conceded; (4) the instruction allowed the jury to draw an impermissible inference; and (5) for those reasons, the instruction violated his state and federal constitutional rights. (AOB 161-168.) Frazier has forfeited his contentions because he did not raise them in the trial court. They are also meritless. The evidence supported the instruction, and this Court has repeatedly rejected Frazier's remaining arguments in the analogous context of CALCRIM No. 372's predecessor CALJIC No. 2.52. Furthermore, any error was harmless.

A. Factual and Procedural Background

At the guilt phase instructional conference, the prosecutor asked the trial court to instruct the jury on flight as evidence of consciousness of guilt with CALCRIM No. 372. (45 RT 9145-9146.) That instruction provides:

> If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.

(6 CT 1700; 46 RT 9292.) The prosecutor contended the evidence supported the instruction because Frazier was present at the crime scene before the crime, many witnesses came forward to be interviewed by the police after the crime, and Frazier was the only person who "took off" and did not speak with the authorities. (45 RT 9146.)

Defense counsel Downing objected to the instruction, arguing that it required "immediate" flight after the crime, and there was no evidence that Frazier left the scene immediately after assaulting Kathy. (45 RT 9146-9147, 9150.) Downing maintained that no one was there to see what Frazier did, and that the police did not discover Kathy's body until about an hour and a half later. (45 RT 9147.)

The prosecutor pointed out that it would be error not to give the instruction because it cautioned that evidence of flight was not enough, by itself, to support a finding of guilt, and he would be arguing consciousness of guilt based on flight to the jury. (45 RT 9149-9150.) The court took the matter under submission. (45 RT 9151.)

The next day, the court and the parties resumed their discussion. (45 RT 9233-9242.) The court observed that a reasonable argument could be made that Frazier fled "based on the fact that a crime was committed at or about a time he was seen in or about the area, and before the police arrived to start looking he's gone." (45 RT 9241-9242.) The court then expressed uncertainty as to how to read the word "immediately." (45 RT 9242.) The court proposed to give the instruction with the word "immediately" included, and invited Downing to argue her interpretation of the word the next day. (45 RT 9242.) Downing made no further argument, and the trial

court instructed the jury with CALCRIM No. 372. (6 CT 1700; 46 RT 9292.)

B. Frazier Has Forfeited His Challenges to the Instruction

"Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

The forfeiture rule applies when a defendant fails to object to a jury instruction at trial on the same grounds raised on appeal. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 365 [defendant forfeited claim that felony murder instructions were barred by collateral estoppel because it was not raised in the trial court even though he had objected to the instructions on grounds of insufficient evidence].) Here, although Frazier objected to CALCRIM No. 372 in the trial court on the ground that insufficient evidence showed he fled "immediately" after the crime, he did not challenge the instruction on any of the grounds urged on appeal. As such, his new challenges are forfeited.

That Frazier's new challenges allege violations of the state and federal Constitutions does not preserve them for appeal. "Constitutional claims raised for the first time on appeal are not subject to forfeiture only when 'the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to the court, had the additional legal consequence of violating the

Constitution." (*People v. Tully* (2012) 54 Cal.4th 952, 979-980; see also *People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [defendant's failure to object to instruction below forfeited claim on appeal that the instruction, combined with the prosecutor's closing argument, withdrew from the jury's consideration an essential element of the crime and special circumstance allegation].) Here, Frazier's constitutional arguments invoke facts and legal standards different from those the trial court was asked to apply. Accordingly, they are forfeited.

Nor are Frazier's challenges preserved because the instruction affected his substantial rights. (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 [challenges to jury instructions are not forfeited where the defendant's substantial rights are affected].) As discussed more fully below, the instruction was properly given, and any error was harmless. (See *People v. Mason* (2013) 218 Cal.App.4th 818, 824 [""[A]scertaining whether . . . instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was""]; *People v. Franco* (2009) 180 Cal.App.4th 713, 720 ["Instructional error affects a defendant's substantial rights if the error was prejudicial under the applicable standard for determining harmless error"].)

C. Standard of Review

This Court reviews claims of instructional error de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963, internal quotation marks and citations omitted.)

D. The Evidence Supported the Instruction

Frazier argues there was no factual basis for CALCRIM No. 372 because the evidence was "insufficient to show that [his] decision to leave [the crime scene] was motivated by a desire to avoid detection or apprehension for the killing." (AOB 161.) Frazier's argument fails because the evidence supported the instruction.

A flight instruction must be given sua sponte whenever the prosecution relies on flight as evidence of guilt. (§ 1127c; *People v. Bonilla* (2007) 41 Cal.4th 313, 328 [discussing CALCRIM No. 372's predecessor CALJIC No. 2.52].)[32] "'In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt."'" [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.' [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]" (*Bonilla*, at p. 328.)

Here, a jury could find that Frazier fled from the crime scene and infer consciousness of guilt. The evidence showed that numerous witnesses

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[32] CALJIC No. 2.52 provides:

> The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

observed Frazier near the scene shortly before the attack on Kathy. (38 RT 7682-7685, 7687-7688, 7691-7693, 7704-7705; 39 7728-7730, 7740-7741, 7752-7756, 7758-7759, 7770-7771, 7773-7776, 7853-7854; 40 RT 7953, 7956-7957, 7959-7960, 7962, 7981, 7990, 7995-7996, 8023-8025, 8027-8030.) Officer Borda discovered Kathy in a secluded location away from the paved trail. (36 RT 7316-7317, 7319.) DNA on Kathy's body and on the metal bar used to beat her identified Frazier as the person who took her to this hidden location. (42 RT 8543, 8551, 8554-8555, 8558, 8560-8561.) Frazier was not present at the crime scene when Officer Borda found Kathy about an hour and a half after the attack (36 RT 7292-7293, 7300-7301, 7319, 7327 [no indication that Frazier was present at the crime scene when Officer Borda assisted Kathy]; 38 RT 7612; 44 RT 8792). From Frazier's high visibility before the crime, clear intent to conceal the crime from view by dragging Kathy to a secluded area, and absence from the scene shortly after the crime, a jury could reasonably infer that Frazier left to avoid being observed or arrested.

Frazier contends the evidence was insufficient because it "showed only that [he] was not at the scene of the crime when the police officer arrived at least an hour and a half after the victim was assaulted." (AOB 161.) Frazier's contention ignores the myriad other pieces of evidence suggesting that he concealed the crime and then left the scene to continue concealing his involvement in it. Because the evidence supported the instruction, it was properly given.

E. The Instruction Did Not Unduly Favor the Prosecution, Was Not Argumentative, and Was Necessary

Frazier claims that CALCRIM No. 372 was an improper pinpoint instruction that "unduly favored the prosecution by highlighting and emphasizing the weight of a single piece of the prosecution's circumstantial evidence." (AOB 161.) Frazier's claim is meritless because, as he

concedes (AOB 161-162), this Court has repeatedly rejected similar challenges to CALJIC No. 2.52.

In *People v. Morgan* (2007) 42 Cal.4th 593, 621 this Court held that CALJIC No. 2.52 and other consciousness of guilt instructions did not unfairly highlight evidence favorable to the prosecution. Similarly, in *People v. Jackson* (1996) 13 Cal.4th 1164, 1224, this Court held that the instructions "did not improperly endorse the prosecution's theory . . . ." Indeed, rather than unduly favoring the prosecution, those instructions actually benefitted the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Ibid.*) In *People v. Howard* (2008) 42 Cal.4th 1000, 1021, this Court rejected the claim that CALJIC No. 2.52 was an improper pinpoint instruction, observing that it appropriately allows the jury to "'consider flight with all other proven facts, giving the fact of flight the weight the jury deems appropriate.'" (See also *People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

Frazier provides no reasoned basis for this Court to reconsider its prior decisions or distinguish them from this case. By parity of reasoning to those cases, this Court should reject Frazier's challenge to CALCRIM No. 372. (See *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159 [relying on this Court's rejections of challenges to CALJIC No. 2.52 to reject analogous challenges to CALCRIM No. 372].)

Frazier's claim that CALCRIM No. 372 was argumentative is similarly unavailing. (AOB 162.) An argumentative instruction is "'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) This Court has repeatedly found that CALJIC No. 2.52 is not argumentative. (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 180-181 ["The instruction is not argumentative"]; *People v. Howard*, *supra*, 42

Cal.4th at p. 1021 [same]; *People v. Loker* (2008) 44 Cal.4th 691, 706.) By parity of reasoning, CALCRIM No. 372 is not argumentative.

Frazier asks this Court to reconsider its prior decisions because "there is no discernible difference between the instructions this Court has upheld" and instructions this Court has deemed impermissible. (AOB 162.) Frazier also suggests that this Court unfairly upholds instructions that favor the prosecution and strikes down instructions "identical in structure" that favor the defense. (AOB 162-163.) In support of his arguments, Frazier compares the instructions deemed nonargumentative in *People v. Nakahara* (2003) 30 Cal.4th 705 and *People v. Bacigalupo* (1991) 1 Cal.4th 103 (*Bacigalupo I*) (judg. vacated and remanded on other grounds *sub nom. Bacigalupo v. California* (1992) 506 U.S. 802)[33] with the instructions deemed argumentative in *People v. Wright* (1988) 45 Cal.3d 1126 and *People v. Mincey*, *supra*, 2 Cal.4th 408. (AOB 162-163.) Frazier's reasoning fails because the instructions in *Nakahara* and *Bacigalupo I* are distinguishable from the instructions in *Wright* and *Mincey*.

In *Wright*, the special instruction at issue "list[ed] specific items of evidence introduced at trial, and would [have] advise[d] the jury that it may 'consider' such evidence in determining whether defendant [was] guilty beyond a reasonable doubt." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1135.) In *Mincey*, the two instructions at issue emphasized to the jury the possibility that the defendant's conduct was "'a misguided, irrational and totally unjustifiable attempt at discipline'" rather than premeditated murder or murder by means of torture. (*People v. Mincey*, *supra*, 2 Cal.4th at pp. 437 & fn. 5.) By contrast, the *Nakahara* instruction informed "the jury that

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[33] The opinion following remand did not discuss the instructional claims addressed in *Bacigalupo I*. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457 (*Bacigalupo II*).)

it could consider any false statements made by defendant as evidence of consciousness of his guilt of the charged offenses, although such conduct alone is insufficient to prove guilt, and its weight and significance, if any, are matters for the jury." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.) Similarly, in *Bacigalupo I*, the instructions at issue informed the jury that flight and false statements were not sufficient in themselves to establish guilt, but if proved, those facts could be considered as evidence tending to show consciousness of guilt. Both instructions stated that the weight and significance of those facts were up to the jury to determine. (*Bacigalupo I*, *supra*, 1 Cal.4th at pp. 127-128 & fn. 5.)

There are legitimate, "discernible difference[s]" between the instructions deemed nonargumentative in *Nakahara* and *Bacigalupo I* and the instructions deemed argumentative in *Wright* and *Mincey*. The instruction in *Wright* "'direct[ed] the attention of the jury to specific testimony and [told] the jury it may look to that testimony for the purpose of forming a reasonable doubt . . .'" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.) The instruction in *Mincey* invited the jury to "infer the existence of [defendant's] version of the facts, rather than his theory of defense." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437). Unlike the instructions in those cases, the instructions in *Nakahara* and *Bacigalupo I* did not invite the jury to infer the existence of the prosecution's version of facts or look to specific items of evidence to find guilt. They did not identify specific false statements or pieces of evidence suggesting flight, and did not tell the jury how it should evaluate those statements or evidence. Indeed, the instructions made clear that it was up to the jury to decide whether any false statements were made or flight occurred and to determine the weight and significance of those facts if they were proved. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713 [instruction stated that the weight and significance of false statements, "*if any*," were matters for the jury], emphasis added;

Bacigalupo I, *supra*, 1 Cal.4th at p. 128, fn. 5.) Thus, even though the instructions advised the jury "of inferences that could rationally be drawn from the evidence" (*Bacigalupo I*, at p. 128) they were not argumentative.

To the extent Frazier suggests that the instructions in *Nakahara* and *Bacigalupo I* were upheld because they favored the prosecution and not the defense, he is mistaken. The instructions in those cases benefitted the defense equally if not more than the prosecution because they cautioned the jury that it could not infer guilt solely from the highly incriminating circumstances of flight or false statements. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *Bacigalupo I*, *supra*, 1 Cal.4th at p. 128, fn. 5.) Thus, *Nakahara* and *Bacigalupo I* undermine the notion that this Court treats instructions differently depending on which side they favor.

Because *Nakahara*, *Bacigalupo I*, *Wright*, and *Mincey* illustrate that this Court rationally and appropriately differentiates between argumentative and nonargumentative instructions, this Court should decline Frazier's invitation to reconsider its prior holdings.

Finally, Frazier argues that, because the trial court instructed the jury with the standard circumstantial evidence instructions, CALCRIM No. 372 was repetitive and thus unnecessary. (AOB 163.) Frazier is incorrect. Nothing in the circumstantial evidence instructions advised the jury that it could infer consciousness of guilt from flight or cautioned the jury that it could not infer guilt from flight alone. (6 CT 1751, 1752, 1778; 46 RT 9282-9284, 9298-9299.) Accordingly, CALCRIM No. 372 was not repetitive. Moreover, the instruction was required by statute because the prosecutor relied on flight as evidence of guilt. (§ 1127c; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 328; 45 RT 9149-9150 [prosecutor represents to trial court that he will argue flight as evidence of guilt]; 46 RT 9320 [prosecutor discusses Frazier running away and concealing evidence by doing so during closing argument], 9403 [prosecutor discusses Frazier escaping crime

scene], 9404 [prosecutor discusses Frazier not coming forward the day of the crime].)

F. The Instruction Is Properly Given Where Identity Is Conceded

Frazier argues that CALCRIM No. 372 should not be given where, as here, identity is conceded. (AOB 164.) Frazier's argument fails for two reasons.

First, contrary to Frazier's contentions, the defense did not concede Frazier's identity as the killer. (AOB 164.) During closing argument, defense counsel Quandt stated:

> Now, more specifically, what the DA has to prove is whether or not Mr. Frazier was the assailant, and for that, they've given you overwhelming DNA evidence that his DNA was there at the time. And the issue is not whether or not that's his DNA or whether the probability statistics that you've heard means that he's guilty of all the crimes, the order, the intent and all the rest.
>
> *What the DNA evidence shows or asks you to consider is whether there's a reasonable explanation for his DNA to be there or there's not. If there was a reasonable explanation, of course, you'd have to find him not guilty.* But if there's no reasonable explanation, then, then your issues are about the what and the why, and that's what we're going to talk about.

(46 RT 9347-9348, emphasis added.) A little later, Quandt stated, "and I will explain to you why at the end of this that *if you find that he's the assailant*, at best, at best, you will find Mr. Frazier guilty of second-degree murder. (46 RT 9348-9349, emphasis added.) From Quandt's closing argument, it is apparent that the defense conceded only that the DNA found at the crime scene belonged to Frazier, not that Frazier was Kathy's killer.

Second, even if the defense had conceded that Frazier killed Kathy, it would still have been appropriate for the trial court to give the instruction. Because Frazier pleaded not guilty to all the charges, he put "in issue 'all of

the elements of the offenses.' [Citation.] Even if he [had] conceded at trial his guilt of some form of criminal homicide, 'the prosecution [would] still [have been] entitled to prove its case . . . .'" (*People v. Moon* (2005) 37 Cal.4th 1, 28.) The prosecution was required to prove guilt beyond a reasonable doubt and would have been "entitled to bolster its case . . . by presenting evidence of the defendant's consciousness of guilt.'" (*People v. Burney* (2009) 47 Cal.4th 203, 245; see also *People v. Thornton* (2007) 41 Cal.4th 391, 438 ["Instructions on consciousness of guilt are proper not only when identity is at issue, but also when 'the accused admits some or all of the charged conduct, merely disputing its criminal implications'"]; *People v. Smithey*, *supra*, 20 Cal.4th at p. 983 [rejecting claim that CALJIC No. 2.52 "should be given only when the identity of the perpetrator is disputed"].)

Frazier acknowledges that this Court has previously rejected his argument in the context of CALJIC No. 2.52. (AOB 164.) Because he provides no reasoned basis for this Court to reconsider its prior decisions or distinguish them from this case, this Court should reject the argument again.

G. The Instruction Did Not Allow the Jury to Make an Improper Inference

Frazier argues that CALCRIM No. 372 improperly permitted the jury to infer from flight his state of mind during the killing. (AOB 164-165.) He implies that the jury would have understood the instruction as being limited to that purpose with regard to the murder charge because he conceded he was guilty of murder, and only its degree, the sufficiency of the evidence of the sex offenses, and the truth of the special circumstance allegations were disputed at trial. (AOB 165.) He contends that while "consciousness-of-guilt evidence, such as flight, may bear on a defendant's state of mind after a killing, such evidence is not probative of his state of mind immediately prior to or during the killing." (AOB 165.) Frazier's

arguments are meritless.

It is not reasonably likely the jury would have interpreted the applicability of the instruction to the murder charge as being limited to the determination of his mental state during the killing. The issues in front of the jury were not as narrow as Frazier suggests. As discussed above, Frazier did not concede that he committed the murder. And, even if he had, the jury would still have had to evaluate whether the prosecutor proved his entire case beyond a reasonable doubt because Frazier pleaded not guilty to all the charges, thereby putting in issue all the elements of the all the offenses. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 28; *People v. Burney*, *supra*, 47 Cal.4th at p. 245.)

Moreover, even if Frazier's mental state during the killing was the principal disputed issue, this Court has previously rejected the claim that a flight instruction should not be given in such circumstances. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 982 [rejecting claim that CALJIC No. 2.52 should not be given "when the principal disputed issue is the defendant's mental state at the time of the crime"].)

In any event, regardless of what issues were disputed, CALCRIM No. 372 did not permit the jury to draw an improper permissive inference. "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 180.) "This test permits a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a consciousness of guilt." (*Ibid.*) CALCRIM No. 372 "'do[es] not address the defendant's mental state at the time of the offense and do[es] not direct or compel the drawing of impermissible inferences in regard hereto.'" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1224 [discussing CALJIC No. 2.52 and other consciousness of guilt instructions]; *People v. Loker*, *supra*,

44 Cal.4th at pp. 706-707 ["'We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his consciousness that he has committed some wrongdoing'"].)

Frazier concedes (AOB 166) that this Court has repeatedly rejected similar challenges to CALJIC No. 2.52 (see, e.g., *People v. Loker*, *supra*, 44 Cal.4th at pp. 706-707; *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1222-1224; *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 179-181). Nevertheless, he asks this Court to reconsider its prior decisions. (AOB 166.) Because Frazier provides no reasoned basis for his request, this Court should decline it.

Frazier next argues that the asserted flaws in CALCRIM No. 372 violated his state and federal constitutional rights and lowered the prosecution's burden of proof. (AOB 166-168.) Frazier's contentions fail because, like his other arguments, this Court has repeatedly rejected them in the analogous context of CALJIC No. 2.52. (See *People v. Mendoza*, *supra*, 24 Cal.4th at p. 181 [CALJIC No. 2.52 does not unconstitutionally lessen the prosecution's burden of proof]; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224 [same]; *People v. Morgan*, *supra*, 42 Cal.4th at p. 621 [consciousness of guilt instructions, including CALJIC No. 2.52, did not deprive defendant of "due process, equal protection, a fair jury trial, and a fair and reliable jury determination of guilt, special circumstances, and penalty"]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [consciousness of guilt instructions, including CALJIC No. 2.52, "were proper and . . . did not violate any of defendant's constitutional rights"].) Frazier offers no reasoned basis for this Court to reconsider its prior decisions or distinguish them from this case.

H. Any Error Was Harmless

Even if the trial court erred in instructing the jury with CALCRIM No. 372, the error was harmless.

When a trial court improperly instructs the jury, the error is harmless if "[i]t is not reasonably probable a verdict more favorable to defendant would have resulted had the instruction not been given." (*People v. Crandell*, *supra*, 46 Cal.3d at p. 870; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) In making that determination, "an appellate court may consider, among other things, whether the evidence supporting the existing judgment [was] so *relatively* strong, and the evidence supporting a different outcome [was] so *comparatively* weak, that there is no reasonable probability the [instruction] of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Here, the evidence supporting Frazier's guilt of forcible rape, forcible sodomy, and first degree murder under both the premeditation and deliberation and felony-murder theories was strong.[34]

With regard to premeditated murder, the evidence showed that Frazier (1) saw Kathy on the trail (38 RT 7683-7686, 7691-7693; 39 RT 7728-7730, 7737, 7751, 7753, 7758, 7761, 7765); (2) obtained a metal bar from nearby fencing (38 RT 7580, 7588, 7692-7693; 39 RT 7847, 7871-7872; 42 RT 8543, 8551 [Frazier's DNA on murder weapon]); (3) waited for Kathy to return (38 RT 7684-7686, 7691-7693 [testimony indicating that Kathy was alive when she passed the crime scene the first time and, like her coworkers, would have returned to the scene on her way back to work]; 39 RT 7728-7731, 7737 [same]); (4) concealed himself in the vegetation surrounding the crime scene (38 RT 7535, 7583-7584); (5) disabled Kathy by striking

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[34] The trial court instructed the jury on both types of first degree murder. (6 CT 1702-1706; 46 RT 9292-9296.)

her on the head (35 RT 7193; 36 RT 7315; 41 RT 8208, 8252-8253); (6) dragged her to a secluded area (36 RT 7315-7317, 7319), and (7) forcefully struck her on the head numerous times (41 RT 8197-8198), causing injuries from which she died (41 RT 8194-8197, 8201). Thus, the evidence overwhelmingly established that the killing "occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Jennings* (2010) 50 Cal.4th 616, 645 [defining premeditated and deliberate murder].)

With regard to forcible rape and sodomy, along with the facts discussed above, the evidence also showed that (1) Kathy was found lying on her back with her hose stripped down to her calves and her underwear off one foot (36 RT 7321-7322) with sperm and semen inside her vagina and anus (41 RT 8187-8189; 42 RT 8539, 8579-8580; 44 RT 8821); (2) the sperm and semen belonged to Frazier (42 RT 8540-8542, 8554-8555, 8558, 8560-8561), and (3) Kathy resisted Frazier's onslaught (39 RT 7792-7793 [Kathy was found wearing a ring with the stone turned to the inside of the palm]; 40 RT 8041, 8073, 8077-8079, 8089-8091, 8113-8114, 8131-8132; 41 RT 8379-8382, 8385 [injuries observed on Frazier around the time of the murder]). Thus, the evidence overwhelmingly established "sexual penetration accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027 [defining forcible rape], emphasis omitted; *People v. Hale* (2012) 204 Cal.App.4th 961, 978 ["As with forcible rape, the gravamen of the crime of forcible sodomy is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury"].)[35]

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[35] The sex crimes also supplied the motive for the murder, further cementing that it was premeditated. (See *People v. Jennings*, *supra*, 50 (continued...)

With regard to felony murder, the evidence discussed above overwhelmingly established that the entire attack was motivated by Frazier's desire to rape and sodomize Kathy, and that he murdered her during the commission of those felonies. (*People v. Lewis* (2001) 25 Cal.4th 610, 642 [to prove first degree felony murder, "the prosecution must establish that the defendant, either before or during the commission of the acts that caused the victim's death, had the specific intent to commit one of the listed felonies"]; *People v. Alvarez* (1996) 14 Cal.4th 155, 222 ["An unlawful killing is deemed to occur during the commission or attempted commission of an enumerated felony so long as the fatal blow is struck in its course, even if death does not then result"].) The same evidence also overwhelmingly established the existence of the special circumstance allegations—that Frazier killed Kathy while engaged in the commission of rape and sodomy. (§ 190.2, subd. (a)(17)(C)&(D).)

The evidence supporting a different outcome was comparatively weak. Although the defense theorized that Frazier killed Kathy without premeditation because he "snapped" when he heard her talking about homelessness on the phone (46 RT 9377-9379), this theory was belied by the fact that (1) Frazier had time to break off a metal bar that was located away from the trail before the attack (38 RT 7580, 7588, 7592-7593; 39 RT 7847, 7856-7861 7870-7872); and (2) Kathy was a fast walker who would have passed the crime scene long before Frazier succeeded in retrieving the metal bar if he did not do it in advance (35 RT 7192; 39 RT 7746).

Furthermore, there was no evidence that Kathy discussed

(...continued)
Cal.4th at p. 645 ["We normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing . . ."].)

homelessness within earshot of Frazier. On the contrary, given that (1) Kathy was a fast walker (35 RT 7192; 39 RT 7746); (2) she lowered her voice while discussing homelessness (35 RT 7190); (3) she was attacked a few minutes after she and her husband had moved onto a different topic (35 RT 7191); and (4) Frazier was in the immediate vicinity of the crime scene before the crime (38 RT 7682-7685, 7687-7688, 7691-7693, 7704-7705; 39 RT 7728-7730, 7752-7756, 7761, 7770, 7773-7776; 40 RT 7953, 7956-7957, 7959-7960, 7981, 7990, 7995-7996, 8023-8025, 8027-8030), the evidence suggested that Frazier did not hear Kathy say what the defense claimed provoked him because she was too far away.

The defense also attempted to show the absence of felony murder and the special circumstances by theorizing that Frazier did not form the intent to rape and sodomize Kathy until after he inflicted the blows to her head, and thus she was not killed "in the commission of" those felonies. (46 RT 9366-9383.) The defense disputed the prosecution's theory that the entire episode was sexually motivated by again suggesting that Frazier snapped when heard Kathy discuss homelessness, hit her on the head in a rush of rash impulsivity, and then formed the intent to rape and sodomize her after he finished hitting her. (46 RT 9366-9383.) However, as discussed above, the evidence more strongly showed that Frazier did not act rashly or impulsively but rather planned the attack when he first saw Kathy on the trail. That there was no evidence Frazier heard Kathy's conversation about homelessness and that he initially hit her only enough to disable her and then dragged her to a more secluded location through a hole in the fence cemented that the attack was motivated by his intent to rape and sodomize her rather than by explosive rage upon hearing an incendiary statement.

The defense further theorized that the prosecution failed to prove penetration for the rape and sodomy charges (46 RT 9348, 9364), focusing on (1) the absence of trauma to Kathy's genitals (46 RT 9351-9353); (2) a

defense expert's opinion that Kathy's epithelial cells were not present in the semen stain on her sweater as would be expected if the stain had resulted from a wipe after penetration (46 RT 9353-9355); and (3) testimony from defense experts that semen could have leaked into Kathy's anus and vagina from another part of her body and that the anal and vaginal swabs could have been contaminated (46 RT 9355-9359).

However, the defense's forensic pathologist conceded that someone could be forcibly raped without any evidence of injury, even where the victim was awake and resisting. (44 RT 8999; 45 RT 9032.) The other defense expert's conclusion that the epithelial cells in the sweater stain belonged solely to Frazier (44 RT 8943) was disputed by the prosecution's forensic serologist, who testified that those cells could have belonged to either Kathy or Frazier (42 RT 8536, 8594, 8597).

The evidence also did not show that Frazier's semen had leaked inside Kathy's anus and vagina from another part of her body. To the contrary, the evidence showed there was no such leakage because, as the prosecution's forensic pathologist testified, fluids do not flow at right angles. (41 RT 8270). Additionally, the sex assault exam showed only specs of semen glowing on Kathy's knee, thigh, pubic bone and lower abdomen. (41 RT 8179-8180.) Accordingly, there was not enough fluid to flow into Kathy's private parts and no semen close enough to those parts to suggest that it entered Kathy's body through leakage.

The defense experts' testimony that the anal and vaginal swabs could have been contaminated was speculation because they did not perform the rape kit. The person who actually performed the kit—the prosecution's forensic pathologist—was sure that he had not contaminated the swabs by sampling the wrong areas. (41 RT 8265-8266). There was also no semen found glowing on the outer surfaces of Kathy's vagina and anus. (41 RT 8179-8180.) Thus, the swabs could not have been contaminated even if the

prosecution's forensic pathologist did accidentally sample the outer surfaces of Kathy's private parts. With regard to the blood and soil found on the rape kit swabs, the defense's forensic pathologist conceded that Kathy's assailant could have deposited those substances inside her when he penetrated her at the dirty and bloody crime scene. (45 RT 9042-9044.)

Finally and most obviously, given the horrific circumstances of the attack, it is difficult to imagine how Frazier's ejaculate could have ended up inside and outside Kathy if he did not penetrate her. Indeed, nothing in the evidence reasonably suggested that Frazier climaxed at the crime scene because he only masturbated over her broken body after he had stripped her from the navel to her calves.

Because the evidence supporting the judgment was strong, and the evidence supporting a different outcome was comparatively weak, it is not reasonably probable the result of the trial would have been more favorable to Frazier had the trial court not instructed the jury with CALCRIM No. 372. Additionally, the evidence of flight was weak in relation to the rest of the evidence of Frazier's guilt. Thus, the jury's deliberations would not have been materially affected had the trial court not given the instruction.

Frazier argues that the alleged instructional error is reversible per se because it lowered the prosecution's burden of proof by allowing the jury to draw impermissible inferences regarding his mental state at the time of the killing. (AOB 165, 167-168.) Alternatively, Frazier claims the *Chapman*[36] standard for prejudice applies because the error violated his federal constitutional rights. (AOB 168.) Frazier is mistaken.

As discussed above, CALCRIM No. 372 did not lessen the burden of proof or violate Frazier's federal constitutional rights. Accordingly, the state standard for prejudice applies. (*People v. Crandell*, *supra*, 46 Cal.3d

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[36] *Chapman v. California*, *supra*, 386 U.S. at p. 24.

at p. 870.)

Even if the instruction had lessened the prosecution's burden by allowing the jury to make an improper inference, the error would not be reversible per se. As this Court has explained, "instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." (*People v. Flood*, *supra*, 18 Cal.4th at pp. 502-503.) Rather, "such an error, like the vast majority of other constitutional errors, falls within the broad category of trial error subject to *Chapman* review." (*Id.* at p. 503; see also *People v. Hunter* (2011) 202 Cal.App.4th 261, 274-278 [*Chapman* standard applied to instructional error that lightened the burden of proof]; *People v. Jandres* (2014) 226 Cal.App.4th 340, 359 ["jury instructions that relieve 'the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution,' and must be assessed under *Chapman*"].)

Frazier's reliance on *Sullivan v. Louisiana* (1993) 508 U.S. 275 for a contrary proposition is unavailing. (AOB 168.) In *Sullivan*, the trial court gave a constitutionally deficient reasonable doubt instruction. (*Sullivan*, at p. 278.) *Sullivan* explained that *Chapman* harmless error analysis could not be applied in that case because "the entire premise of *Chapman* review [was] simply absent. There being no jury verdict of guilty-beyond-a-reasonable doubt, the question of whether the *same* verdict of guilty-beyond-a-reasonable doubt would have been rendered absent the constitutional error [was] utterly meaningless. There [was] no *object*, so to speak, upon which harmless-error scrutiny [could] operate." (*Id.* at p. 280.)

Sullivan is inapposite because this case does not involve a

constitutionally deficient reasonable doubt instruction that undermined each finding underlying the verdict. Frazier's complaint is centered around one aspect of the numerous elements of the offenses at issue—his mental state. Thus, "the error [does] not affect the content of the record and does not impair [this Court's] ability to evaluate the error in light of the record." (*People v. Flood*, *supra*, 18 Cal.4th at p. 503.)

Under the *Chapman* standard, the alleged instructional error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) As discussed above, overwhelming evidence supported Frazier's guilt, and the evidence supporting a contrary outcome was weak in comparison. Additionally, the instruction could not have "tipped the balance for a wavering juror" (AOB 168) because the evidence of flight was weak in relation to the rest of the evidence of Frazier's guilt.

Frazier argues that the alleged error was not harmless even under the state standard for prejudice. (AOB 168.) He contends that "[t]he defense called into question the significance of the physical evidence as it related to proof of the degree of the murder, and the truth of the rape and sodomy charges and special circumstances. By permitting the jury to use the fact of Frazier's putative flight—evidence that bore no relation . . . to the disputed issue of the physical evidence—as evidence of guilt, there is a reasonable probability that the jurors used it to resolve any doubts they might have had in favor of the prosecution." (AOB 168-169.) Frazier's contentions fail for two reasons.

First, Frazier misapplies the state standard. The state test requires appellate courts to assess what a reasonable jury is "*likely* to have done in the *absence* of the error under consideration," not how a jury could have utilized the presence of that error. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177, emphasis added.)

Second, Frazier's contention concedes that the evidence of flight was

not as material as the rest of the evidence of his guilt. As such, it is not reasonably probable that it made a difference in the outcome.

V. THE TRIAL COURT PROPERLY DENIED FRAZIER'S MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

Frazier argues that the trial court erred in denying his motion for individual sequestered voir dire. (AOB 170.) He contends that Code of Civil Procedure section 223—which allows voir dire to take place in the presence of other jurors in death penalty cases—violates capital defendants' state and federal constitutional rights. (AOB 171-173.) He also maintains that the trial court failed to exercise its discretion because it did not consider whether group voir dire was "practicable." (AOB 173-175.) To the extent Frazier raises a constitutional claim distinct from his claim that the trial court failed to exercise its discretion under Code of Civil Procedure section 223, it is forfeited because he failed to object on that ground in the trial court. His constitutional claim is also meritless because group voir dire does not implicate capital defendants' constitutional rights. Furthermore, the trial court properly exercised its discretion in denying Frazier's motion, and any error was harmless.

A. Factual and Procedural Background

On February 2, 2006, the defense filed a motion for individual sequestered voir dire, arguing that it was necessary because the "[j]urors will need to be questioned about several sensitive issues (such as issues surrounding rape, sodomy, sex abuse, and alcohol and substance abuse), and the responses given will determine each juror's status as a case-by-case excludable." (2 CT 449-460.) The defense further maintained that the case had received extensive pretrial publicity (2 CT 454-455), and individual voir dire was more practical than group voir dire (2 CT 455-456).

The prosecution opposed the motion, observing that the issue had already been settled in a way that accommodated the defense's concerns.

The court had already indicated that the jurors would be voir dired in small groups, and that sequestered voir dire would be conducted if there was a reason to question the jurors in private. (3 CT 665.)

The trial court denied the motion, indicating that it would follow Code of Civil Procedure section 223 and Proposition 115 by beginning voir dire in open court. (3 RT 523, 525-526.) The court confirmed that it would conduct sequestered voir dire of jurors who wished to discuss something privately and jurors who required questioning regarding sensitive information, including pretrial publicity. (3 RT 523, 525-526.)

Before the first panel of prospective jurors was questioned, the defense renewed its motion for individual sequestered voir dire. (9 RT 1728-1729.) The court again denied it. The court explained:

> Well, you understand we're dealing with a law that commands group voir dire except where not practical. This is the antithesis of what you want me to do. And it says, and you all know this I'm sure, voir dire must occur in the presence of all other jurors where practical in all criminal cases including death penalty cases. So, there's no question that in each of these I'm going to be asking jurors about nonsensitive issues; time and things of that kind. And where they have particularly specified an issue. And whether somebody needs to take the stand or not.
>
> There are issues, it seems to me, that I cannot say are so sensitive that they must be taken individually. On the other hand, there are issues that need to be taken up to prevent poisoning the well, as you might put it.

(9 RT 1729.) The court again indicated that it would question the jurors in open court on general topics and take them into chambers to discuss sensitive issues. (9 RT 1730.)

In response, defense counsel Quandt contended that the court had discretion to conduct individual sequestered voir dire "where 75 percent of the people come in [*sic*] have already acknowledged that they have heard about the case . . . ." (9 RT 1730.) He pointed out that group voir dire was

also problematic because it allowed jurors to learn how to get excused for cause and how to avoid revealing biases to remain on the jury. (9 RT 1730.) The court countered:

> I mean, after all, the Legislature overruled *Hovey*[37] in fact, and handed us a new game, not a game in that sense of the word, but said you've got to start in public, all together. Fifteen at a time, I don't have room for 200, but I'm mandated to do that in public, which I think is practical to protect the public with [*sic*]. So that's where I'm going.

(9 RT 1731.)

Later in the jury selection proceedings, the trial court clarified which voir dire matters it would take up in chambers and which matters it would discuss in open court. The court stated:

> It's quite clear that neither side is entitled to *Hovey* automatically on death-qualifying questions, so I'm not telling you that I'm simply going to take every death-qualifying question into chambers. I may ask them a question or two about—if somebody says I could never impose, I will never impose the death penalty and so forth, I might ask them an introductory question or two about that topic, and if I feel that we're going into an area that might be deemed sort of personal to that juror or might tend to broaden the topic beyond the question they answer, I will indeed go into chambers.
>
> The proposition that overruled *Hovey* made that very clear that you're not entitled to *Hovey* voir dire on death-qualifying questions, per se. I have to make individual calls on them. And I don't think I put that to you very well when you asked me for directions earlier. So I will make individual judgments as I go through.

(9 RT 1754.)

Before voir dire the next day, Quandt revisited the motion and provided additional arguments for conducting individual sequestered voir

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[37] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

dire. He pointed out that 15 of the 19 jurors set to be questioned that day had heard about the case, and that the court would have to question each of those jurors regarding that fact in chambers. (10 RT 1894.) Quandt worried that the jurors would view the defense's repeated requests to go into chambers with suspicion. (10 RT 1895.) Quandt also opined that the jurors' time would be more efficiently spent if they were not constantly waiting for the court to conduct discussions in private. (10 RT 1895.) Quandt complained that the defense had paid for a jury consultant, and there was not enough room for the consultant in chambers. (10 RT 1894-1895.) Quandt again pointed out that the court had discretion under Code of Civil Procedure section 223, and urged the court to exercise it because 75 percent of the jurors to be questioned that day had already heard about the case. (10 RT 1895.)

The trial court observed that it had already accommodated the defense's request to conduct voir dire regarding pretrial publicity in chambers. (10 RT 1895.) It reiterated that Code of Civil Procedure 223 mandated that voir dire be conducted in open court to the extent that it is practical. The court found that the manner in which it had been conducting voir dire to be practical and in conformity with the law. (10 RT 1896.)

At no point in the proceedings did the defense object on the ground that Code of Civil Procedure section 223 was unconstitutional.

B. Applicable Legal Principles

In 1990, Proposition 115 added Code of Civil Procedure section 223 and abrogated *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, which had required individual sequestered voir dire during the death-qualifying portion of jury selection. (*People v. McKinnon*, *supra*, 52 Cal.4th at pp. 632-633.) Code of Civil Procedure section 223 provides, in pertinent part, that "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death

penalty cases."

"'Under Code of Civil Procedure section 223, the question of whether individual, sequestered voir dire should take place is entrusted to the trial court's discretion.'" (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 633.) Discretion is abused when the trial court's ruling falls "outside the bounds of reason." (*Id.* at p. 634.)

C. Death-Qualification Voir Dire That Is Not Sequestered Does Not Violate Capital Defendants' State and Federal Constitutional Rights

Frazier argues that restrictions on individual sequestered voir dire on death-qualifying issues—including those imposed by Code of Civil Procedure section 223—are "inconsistent with constitutional principles of jury impartiality." (AOB 172.) He maintains that in *Hovey*, this Court recognized that "exposure to the death qualification process creates a substantial risk that jurors will be more likely to sentence a defendant to death" (AOB 172), and contends that as such, disallowing individual sequestered voir dire on death qualification "violates a capital defendant's constitutional rights to due process, trial by an impartial jury, effective assistance of counsel, and a reliable sentencing determination." (AOB 171-173.) "To the extent [Frazier] on appeal raises a federal constitutional claim distinct from his claim that the trial court [failed to exercise its discretion under Code of Civil Procedure section 223], he forfeited this claim by failing to identify that ground in his objections to the trial court." (*People v. Riggs* (2008) 44 Cal.4th 248, 292.) "To the extent [his] constitutional claim is merely a gloss on the objection raised at trial, it is preserved, but is without merit" (*ibid.*) because group voir dire in capital cases does not implicate, let alone violate, capital defendants' constitutional rights.

In *People v. Avila*, *supra*, 38 Cal.4th at page 559, this Court explained

that it "adopted the rule in *Hovey* pursuant to [its] supervisory authority over California criminal procedure and not under constitutional compulsion." Thus, there is no constitutional right to individual sequestered voir dire of prospective jurors in a capital case. (*People v. Famalaro* (2011) 52 Cal.4th 1, 34 ["Individual sequestered jury selection is not constitutionally required"]; *People v. Jurado* (2006) 38 Cal.4th 72, 101 ["Insofar as defendant contends that the federal Constitution requires sequestered death-qualification voir dire of *every* prospective juror in a capital case, the claim has been frequently rejected by this court and is without merit"].) In accordance with these principles, this Court has repeatedly rejected the contention that any restrictions on individual sequestered voir dire on death qualifying issues "violates a defendant's rights to an impartial jury, to a reliable death sentence, and to the effective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 633 [and cases cited therein].) Additionally, *Hovey*'s conclusion that exposure to the death-qualification process creates a risk of predisposing jurors to the death penalty has been undermined by this Court's later decisions holding "that questions designed to ensure that a jury is death-penalty qualified do not result in a jury that is death-penalty oriented." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Clark* (1990) 50 Cal.3d 583, 597 ["we reject . . . the argument that questions properly asked of prospective jurors during [the death qualification] process predispose those jurors who are selected to vote for imposition of the death penalty"].) Accordingly, Frazier's claim fails.

Frazier acknowledges that his arguments have been frequently rejected by this Court. (AOB 171, fn. 46.) Because he provides no reasoned basis for reconsidering this Court's prior decisions or distinguishing them from this case, his arguments should again be rejected.

D. The Trial Court Properly Exercised Its Discretion

Frazier argues that the trial court failed to exercise its discretion when it denied his motion for individual sequestered voir dire because it did not consider whether group voir dire was "practicable." (AOB 173-175.) Frazier's argument is meritless.

Contrary to Frazier's assertions (AOB 174), the record shows that the trial court exercised its discretion. The court recognized that individual sequestered death qualification was no longer required in capital cases (3 RT 523, 525-526), and stated that it would question jurors regarding issues that were not sensitive in open court. (9 RT 1729-1730.) The court agreed to conduct individual sequestered voir dire of jurors who wished to discuss something privately and jurors who needed to be questioned regarding sensitive information. (3 RT 523, 525-526.) The court stated that it would ask introductory death-qualifying questions in open court, and would go into chambers as needed. (9 RT 1754.) The court expressly stated that it would make "individual calls" and judgments regarding death-qualifying questions. (9 RT 1754.) The court concluded that commencing questioning in open court was practical to protect the public's interests (9 RT 1731). (*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 508-510 [voir dire is part of the trial and subject to the press's and public's right to open proceedings].) The court found that the manner in which it chose to conduct voir dire to be practical and in conformity with the law. (10 RT 1896.)

The court's exercise of discretion was reasonable. "Although the court denied defense requests to conduct the entire death-qualification voir dire individually, it allowed for 'some private sequestered voir dire as to some jurors because of some information they ha[d] about the case or for some other reason.'" (*People v. Avila, supra*, 38 Cal.4th at p. 559-560.) Indeed, many jurors were individually questioned in chambers regarding

death-qualifying topics. (See, e.g., 10 RT 1940-1944, 1946-1951, 2064-2065, 2113-2114; 11 RT 2194-2198, 2204, 2257, 2271-2272, 2315-2317; 12 RT 2428-2433, 2541; 14 RT 2935-2944, 2976-2978, 3001-3007; 16 RT 3227-3228, 3243-3244, 3246; 17 RT 3473, 3513-3519; 18 RT 3680-3683, 3766-3767; 20 RT 3984-3988; 21 RT 4173-4174, 4177-4179, 4209-4210, 4355-4356; 22 RT 4463, 4626-4628; 23 RT 4672-4677; 24 RT 4792-4794, 4822-4831, 4901-4902; 25 RT 4977-4979, 4982-4983, 5004-5006, 5011-5014, 5016-5017, 5066-5067, 5104-5105, 5123-5127.) The court also properly "recognized its obligation to comply with section 223 of the Code of Civil Procedure." (*Avila*, at p. 560.) Accordingly, the court did not abuse its discretion in denying Frazier's motion. (See *id.* at pp. 559-560).

E. Any Error Was Harmless

Even had the trial court erred in not conducting individual sequestered voir dire on death-qualifying topics, any error was harmless.

Code of Civil Procedure section 223 provides, in relevant part, that "[t]he trial court's exercise of its discretion in the manner in which voir dire is conducted . . . shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." Because the alleged abuse of discretion in this case bears on the penalty phase, whether a "miscarriage of justice" resulted should be evaluated under the "reasonable possibility" standard of *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448. Here, there is no reasonable possibility that the jury would have returned a verdict other than death had the trial court conducted individual sequestered voir dire because there is no evidence that group voir dire biased the jury in favor of the death penalty.[38]

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[38] Frazier suggests that the *Chapman* standard for prejudice applies. (AOB 175.) Frazier is incorrect. As discussed, above, the failure to

(continued...)

Frazier contends that "[t]he group voir dire procedure employed by the trial court created a substantial risk that [he] was tried by jurors who were not forthright and revealing of their true feelings and attitudes toward the death penalty [citation], and who had become 'desensitized to the intimidating duty' of determining whether [he] should live or die [citation] because of their 'repeated exposure to the idea of taking a life' [citation]." (AOB 176.) Therefore, Frazier maintains, the voir dire procedure "denied [him] the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that [he] was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process." (AOB 176.) Frazier contentions are unavailing.

Frazier's arguments are premised on *Hovey*'s conclusion that group death-qualification predisposes jurors to favor the death penalty. (AOB 176.) However, as discussed above, *Hovey* has been abrogated by Proposition 115, and its reasoning has been undermined by later case law acknowledging that the death qualification process does not result in a death-penalty oriented jury. Accordingly, there is no "substantial risk" that Frazier was tried by desensitized jurors who were not forthright in revealing their attitudes about the death penalty.

Furthermore, at most, Frazier's argument identifies potential rather than actual bias, which is not a basis for reversal. (See *People v. Vieira* (2005) 35 Cal.4th 264, 289 ["The possibility that prospective jurors may have been answering questions in a manner they believed the court wanted

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(...continued)
conduct individual sequestered death-qualification voir dire does not implicate the federal Constitution. In any event, any error is harmless under the *Chapman* standard for the same reason that it is harmless under the *Brown* standard.

to hear [during group death-qualification voir dire] identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment"].) Frazier also does not "describe any specific example of how questioning prospective jurors in the presence of other jurors prevented him from uncovering juror bias. Accordingly, he has not established prejudice" (*People v. Navarette* (2003) 30 Cal.4th 458, 490), and his death sentence should stand.[39]

VI. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Frazier asserts a number of challenges to California's death penalty statute, though he acknowledges that this Court has consistently rejected them. (AOB 178.) We briefly address the specific claims below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Frazier argues that Penal Code section 190.2 is constitutionally defective because it fails to properly narrow the class of death-eligible defendants. (AOB 178-179.) This Court has repeatedly rejected such claims, and Frazier provides no reasoned basis for reconsidering those decisions or distinguishing them from this case. (See, e.g., *People v. Beames* (2007) 40 Cal.4th 907, 933-934; *People v. Stanley*, *supra*, 39 Cal.4th at p. 968 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].)

B. Penal Code Section 190.3, Subdivision (a), Did Not Violate Frazier's Constitutional Rights

Frazier contends that Penal Code section 190.3, subdivision (a), fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. (AOB 179-180.) This Court has repeatedly rejected such claims, and Frazier provides no reasoned

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[39] Frazier does not suggest that the guilt phase was affected by the asserted error or that his convictions should be reversed.

basis for reconsidering those decisions or distinguishing them from this case. (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1248 [and cases cited therein]; *People v. Stanley*, *supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein].)

C. The Death Penalty Statute and Accompanying Jury Instructions Were Not Required to Allocate a Burden of Proof

1. Frazier's death sentence was not required to be premised on findings made beyond a reasonable doubt

Frazier argues that the federal Constitution requires that aggravating factors be found beyond a reasonable doubt to outweigh mitigating factors, and that the jury find, beyond a reasonable doubt, that death is the appropriate penalty. (AOB 181-183.)

This Court has repeatedly rejected the claim that allocating a burden of proof is constitutionally required in penalty determinations. "'Because the determination of penalty is essentially moral and normative [citation], and therefore different from the determination of guilt,' the federal Constitution does not require the prosecution to bear the burden of proof or burden of persuasion at the penalty phase." (*People v. Sapp* (2003) 31 Cal.4th 240, 317, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are not subject to burden of proof quantification because they are "'moral and normative, not factual'"].) Frazier provides no reasoned basis for reconsidering this Court's prior decisions or distinguishing them from this case.

2. Frazier's death verdict was not required to be premised on unanimous jury findings

a. Aggravating factors

Frazier argues that California's death penalty statute is constitutionally defective because it fails to require juror unanimity on the existence of aggravating factors. (AOB 183-184.) However, this Court has repeatedly rejected this claim, and Frazier provides no persuasive reason to reexamine it. (See, e.g., *People v. Jackson* (2009) 45 Cal.4th 662, 701 [and cases cited therein]; *People v. Stanley*, *supra*, 39 Cal.4th at p. 963 [and cases cited therein]; *People v. Brown* (2004) 33 Cal.4th 382, 402 ["Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2002) 530 U.S. 466 . . . and *Ring v. Arizona* (2002) 536 U.S. 584 . . . have not altered our conclusions regarding burden of proof or juror unanimity"].)

b. Unadjudicated criminal activity

Frazier maintains that "[t]he jury was instructed that unanimity was not required before unadjudicated criminal activity could be considered in aggravation. [Citation.] Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor" violates the federal Constitution. (AOB 184.) Frazier's contention fails.

This Court has repeatedly held there is no requirement that a jury unanimously agree as to each instance of unadjudicated criminal activity before considering it. (See, e.g., *People v. Scott* (2011) 52 Cal.4th 452, 497 [and cases cited therein]; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308 [and cases cited therein].) Frazier provides no reasoned basis for this Court to reconsider its prior decisions or distinguish them from this case.

3. CALJIC No. 8.88 did not cause the death penalty determination to turn on an impermissibly vague and ambiguous standard

Frazier takes issue with CALJIC No. 8.88 (AOB 185-186), which

instructs the jury that to return a verdict of death, each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" (7 CT 2087; 57 RT 11490). Frazier maintains that "[t]he phrase 'so substantial' is an impermissibly broad phrase" that "violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless." (AOB 185.) Frazier's claim is forfeited because he did not raise it in the trial court. (*People v. French*, *supra*, 43 Cal.4th at p. 46; *People v. Asbury*, *supra*, 173 Cal.App.3d at p. 365; *People v. Tully*, *supra*, 54 Cal.4th at pp. 979-980; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.) It is also meritless. This Court has repeatedly rejected such claims, and Frazier provides no reasoned basis for reconsidering those decisions or distinguishing them from this case. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 409 [and cases cited therein]; *People v. Jackson*, *supra*, 45 Cal.4th at pp. 701-702 [and cases cited therein]; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316 & fn. 14.)

4. CALJIC No. 8.88 properly did not instruct the jury that it was required to sentence Frazier to life without parole if it determined that mitigating factors outweighed aggravating factors

Frazier contends that CALJIC No. 8.88 violated his due process rights because it did not instruct the jury that it was required to sentence Frazier to life without parole if it determined that mitigating factors outweighed aggravating factors. (AOB 186.) Frazier's contention lacks merit because this Court has consistently rejected such claims. (See, e.g., *People v. Jackson*, *supra*, 45 Cal.4th at pp. 701-702 [and cases cited therein]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179 [and cases cited therein]; *People v. Moon*, *supra*, 37 Cal.4th at p. 42.)

Frazier argues this Court's prior decisions conflict with due process principles and "with numerous cases disapproving instructions that

emphasize the prosecution theory of the case while ignoring or minimizing the defense theory." (AOB 186-187.) Frazier's argument fails.

CALJIC No. 8.88 does not emphasize the prosecution's theory of the case or "tilt[] the balance of forces in favor of the accuser and against the accused." (AOB 186-187.) The instruction indicates "that a death verdict could be entered only if aggravating circumstances outweighed mitigating ones." (*People v. Medina* (1995) 11 Cal.4th 694, 781-782.) By conditioning the death verdict on a finding that factors in aggravation outweigh factors in mitigation, the instruction implicitly informs the jury that it cannot reach that verdict if it determines that mitigating factors outweigh aggravating factors. Moreover, "[t]here is no right to parity of jury instructions, as [Frazier] appears to imply in his arguments; both parties simply have the right to instructions that properly explain the law." (*People v. Moore* (2011) 51 Cal.4th 1104, 1140.) Because Frazier fails to provide a persuasive reason for reconsidering this Court's prior decisions, his claim should be rejected.

5. The absence of a nonunanimity instruction regarding mitigating factors did not violate Frazier's constitutional rights

Frazier argues that the penalty phase instructions violated the Sixth, Eighth, and Fourteenth Amendments because they did not inform the jury that its findings with regard to mitigating factors need not be unanimous. (AOB 187-188.) He maintains that the jury was instructed that unanimity was required to acquit him in the guilt phase and, "[i]n the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors." (AOB 187.) Frazier's contention is forfeited because he did not raise it in the trial court. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["'Generally, a party may not complain on appeal that an

instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language'"].) It is also meritless. This Court has consistently rejected such claims, and Frazier provides no reasoned basis for reconsidering those decisions or distinguishing them from this case. (See, e.g., *People v. Bryant* (2014) 60 Cal.4th 335, 457; *People v. Moore*, *supra*, 51 Cal.4th at p. 1140; *People v. Phillips* (2000) 22 Cal.4th 226, 239.)

6. The jury was properly not instructed on the presumption of life

Frazier contends that "[t]he trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated [his] right to due process of law, his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner, and his right to equal protection of the laws." (AOB 188.) Frazier's contention is forfeited because he did not raise it in the trial court. (*People v. French*, *supra*, 43 Cal.4th at p. 46; *People v. Asbury*, *supra*, 173 Cal.App.3d at p. 365; *People v. Tully*, *supra*, 54 Cal.4th at pp. 979-980; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.) It also fails on the merits.

This Court has consistently held that CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Maury* (2003) 30 Cal.4th 342, 440 [and cases cited therein].) Indeed, "[b]ecause the appropriate penalty is not presumed and is a question for each individual juror, no presumption exists in favor of life or death in determining penalty in a capital case." (*Maury* at p. 440.) Frazier provides no reasoned basis specific to his case for reconsidering this Court's prior decisions or distinguishing them from this case.

Frazier maintains that a presumption of life is constitutionally

required because other sections of his brief demonstrate that "this state's death penalty law is remarkably deficient in the protections needed to insure [*sic*] the consistent and reliable imposition of capital punishment." (AOB 188-189.) However, as Frazier concedes (AOB 178) and our brief demonstrates, this Court has previously rejected each and every one of Frazier's challenges to California's death penalty scheme. Accordingly, California's death penalty scheme is not deficient, and a presumption of life is not constitutionally required.

D. That the Jury Was Not Required to Make Written Findings Regarding Sentencing Does Not Violate Frazier's Right to Meaningful Appellate Review

Frazier asserts that the California death penalty law violates the Sixth, Eighth, and Fourteenth Amendments as well as his right to meaningful appellate review because it does not require written findings regarding sentencing. (AOB 189.) This claim has previously been rejected by this Court, and Frazier offers nothing specific to his case that would justify a departure from that holding. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 619 [and cases cited therein].)

E. The Jury Instructions on Aggravating and Mitigating Factors Are Not Unconstitutional

1. Use of restrictive adjectives in the list of potential mitigating factors

Frazier argues that the inclusion of qualifying adjectives such as "extreme" and "substantial" with respect to various sentencing factors renders CALJIC No. 8.85 unconstitutional. (AOB 189.) Frazier's contention is forfeited because he did not raise it in the trial court. (*People v. French*, *supra*, 43 Cal.4th at p. 46; *People v. Asbury*, *supra*, 173 Cal.App.3d at p. 365; *People v. Tully*, *supra*, 54 Cal.4th at pp. 979-980; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.) It is also meritless because

this Court has previously rejected it. (See, e.g., *People v. Perry* (2006) 38 Cal.4th 302, 319 [and cases cited therein]; *People v. Moon*, *supra*, 37 Cal.4th at p. 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993.) Frazier provides no reasoned basis for reconsidering this Court's prior decisions or distinguishing them from this case.

2. The trial court's refusal to omit inapplicable sentencing factors

Frazier asserts that the trial court's refusal to omit inapplicable sentencing factors from CALJIC No. 8.85 violated his constitutional rights. (AOB 190.) This claim has previously been rejected by this Court, and Frazier offers nothing specific to his case that would justify a departure from that holding. (See, e.g., *People v. Cook*, *supra*, 39 Cal.4th at p. 618.)

3. Differentiating between aggravating and mitigating factors

Frazier contends that CALJIC No. 8.85 is unconstitutional because it does not indicate which sentencing factors are aggravating, which are mitigating, and which could be either aggravating or mitigating. (AOB 190-191.)

This Court has previously rejected this argument. (See, e.g., *People v. Edwards* (2013) 57 Cal.4th 658, 766; *People v. Burney*, *supra*, 47 Cal.4th at pp. 260-261; *People v. Moon*, *supra*, 37 Cal.4th at p. 41, citing *People v. Williams* (1997) 16 Cal.4th 153, 268-269.) Frazier provides nothing specific to his case that would justify reconsidering this Court's prior decisions or distinguishing them from this case.

F. There Is No Constitutional Requirement of Intercase Proportionality

Frazier asserts that California's capital sentencing statute is unconstitutional because it does not require intercase proportionality review. (AOB 191.) This claim has previously been rejected by this Court, and

Frazier offers nothing specific to his case that would justify a departure from that holding. (See, e.g., *People v. Famalaro*, *supra*, 52 Cal.4th at p. 44; *People v. Harris*, *supra*, 37 Cal.4th at p. 366; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [proportionality review not constitutionally required].)

G. California's Capital Sentencing Scheme Does Not Violate the Equal Protection Clause

Frazier asserts that the California death penalty statute violates the Equal Protection Clause because it does not require a specific burden of proof or unanimous, written findings for aggravating circumstances. (AOB 191-192.) Frazier's claim is forfeited because it was not raised in the trial court. (See *People v. Burgener* (2003) 29 Cal.4th 833, 860, fn. 3 [defendant's failure to object on equal protection grounds to the trial court's practice of supplementing jury panels waived claim on appeal]; *People v. Meredith* (2009) 174 Cal.App.4th 1257, 1262-1263 [compelling defendant to go to trial wearing jail clothing violates his constitutional rights to a fair trial, due process, and equal protection, but "this claim of error may be forfeited by defendant's failure to timely object or otherwise bring the matter to the trial court's attention"].) It is also meritless because it has previously been rejected by this Court. (See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997 [and cases cited therein]; *People v. Harris*, *supra*, 37 Cal.4th at p. 366 [and cases cited therein].) Frazier offers nothing specific to his case that would justify a departure from this Court's prior decisions.

H. California's Use of the Death Penalty Does Not Violate the Eighth and Fourteenth Amendments or International Law

Frazier contends that California's use of the death penalty violates international law and the Eighth and Fourteenth Amendments. (AOB 192.) This Court has repeatedly rejected such claims, and Frazier offers nothing

specific to his case that would warrant a reversal of that position. (See, e.g., *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 43-44 [and cases cited therein]; *People v. Harris*, *supra*, 37 Cal.4th at p. 366 [and cases cited therein].)

CONCLUSION

Accordingly, the People respectfully request that the judgment be affirmed.

Dated: December 24, 2015

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 50,331 words.

Dated: December 24, 2015

KAMALA D. HARRIS
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VICTORIA RATNIKOVA
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Frazier***

No.: **S148863**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 24, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 24, 2015, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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