

COPY

**SUPREME COURT COPY**

**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

**SUPREME COURT  
FILED**

**DEC 24 2015**

**Frank A. McGuire Clerk  
Deputy**

**RESPONDENT'S BRIEF**

KAMALA D. HARRIS  
Attorney General of California  
GERALD A. ENGLER  
Chief Assistant Attorney General  
RONALD S. MATTHIAS  
Senior Assistant Attorney General  
GLENN R. PRUDEN  
Supervising Deputy Attorney General  
ALICE B. LUSTRE  
Deputy Attorney General  
VICTORIA RATNIKOVA  
Deputy Attorney General  
State Bar No. 280386  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7004  
Telephone: (415) 703-5830  
Fax: (415) 703-1234  
Email: Victoria.Ratnikova@doj.ca.gov  
*Attorneys for Respondent*

**DEATH PENALTY**



## TABLE OF CONTENTS

	Page
Introduction.....	1
Statement of the Case .....	1
Statement of Facts.....	3
I.    Guilt phase .....	3
A.    Prosecution case .....	3
1.    Kathy Loreck goes missing .....	3
2.    Kathy is found .....	4
3.    The crime scene.....	5
4.    Kathy's injuries .....	6
5.    Witnesses observe Frazier at the crime scene .....	8
6.    Sex assault and DNA evidence .....	10
7.    Frazier's injuries after the killing .....	12
8.    Frazier confesses that he is the killer .....	15
9.    Frazier's interview with the police.....	15
B.    Defense case .....	16
II.   Penalty phase .....	19
A.    Prosecution case in aggravation .....	19
1.    Frazier's prior convictions and uncharged acts of violence .....	19
a.    Robbery of a convenience store .....	19
b.    Aggravated battery of an inmate with a razor blade .....	20
c.    Frazier pulls a knife on a friend, threatens the police, and terrorizes the friend at work .....	21
d.    Robbery of a gas station.....	22
2.    Victim impact evidence.....	23

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
B. Defense case in mitigation .....	24
1. Frazier’s family circumstances and childhood .....	24
2. Frazier’s mental health problems .....	28
a. Frazier’s mental health history .....	28
b. Defense experts’ evaluations of Frazier’s mental health .....	31
c. Expert opinions regarding Frazier’s mental condition on the day of the murder .....	37
3. Frazier’s risk of future violence .....	38
C. Prosecution rebuttal .....	40
Argument .....	41
I. The trial court did not abuse its discretion when it excused prospective Juror No. 111 for cause .....	41
A. Factual and procedural background .....	42
B. Applicable legal principles .....	47
C. Substantial evidence supports the trial court’s excusal of Juror No. 111 .....	48
D. Any error was harmless .....	59
II. The trial court did not erroneously deny Frazier his right to represent himself in the penalty phase .....	62
A. Factual and procedural background .....	63
1. Events preceding the first <i>Faretta</i> motion .....	63
2. The first <i>Faretta</i> motion .....	67
3. Subsequent <i>Faretta</i> and <i>Marsden</i> motions .....	69
B. Applicable legal principles .....	77

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
C. Self-representation is not an absolute constitutional right when a <i>Faretta</i> motion is untimely .....	78
D. The requests for self-representation were untimely .....	81
E. The requests were unsupported by the <i>Windham</i> factors .....	89
1. The quality of counsel's representation .....	89
2. Frazier's proclivity to substitute counsel .....	91
3. The reasons for the requests .....	92
4. Length and stage of the proceedings and disruption or delay .....	93
F. The requests for self-representation were equivocal.....	95
1. The first request.....	95
2. Subsequent requests .....	98
G. Any error was harmless .....	101
III. The trial court did not abuse its discretion in denying Frazier's post-penalty phase motion for self-representation .....	106
A. Factual and procedural background .....	106
B. The motion was untimely .....	111
C. The <i>Windham</i> factors support the trial court's ruling.....	114
1. The quality of counsel's representation .....	114
2. Frazier's proclivity to substitute counsel .....	115
3. The reasons for the request.....	115
4. Length and stage of the proceedings and disruption or delay .....	116
D. Any error was harmless .....	116

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
IV. The trial court properly instructed the jury with CALCRIM No. 372 .....	119
A. Factual and procedural background .....	119
B. Frazier has forfeited his challenges to the instruction .....	121
C. Standard of review.....	122
D. The evidence supported the instruction.....	123
E. The instruction did not unduly favor the prosecution, was not argumentative, and was necessary.....	124
F. The instruction is properly given where identity is conceded .....	129
G. The instruction did not allow the jury to make an improper inference.....	130
H. Any error was harmless.....	133
V. The trial court properly denied Frazier’s motion for individual sequestered voir dire.....	141
A. Factual and procedural background .....	141
B. Applicable legal principles .....	144
C. Death-qualification voir dire that is not sequestered does not violate capital defendants’ state and federal constitutional rights.....	145
D. The trial court properly exercised its discretion.....	147
E. Any error was harmless.....	148
VI. California’s death penalty law is constitutional .....	150
A. Penal Code section 190.2 is not impermissibly broad.....	150
B. Penal Code section 190.3, subdivision (a), did not violate Frazier’s constitutional rights.....	150

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
C.	The death penalty statute and accompanying jury instructions were not required to allocate a burden of proof.....151
1.	Frazier’s death sentence was not required to be premised on findings made beyond a reasonable doubt .....151
2.	Frazier’s death verdict was not required to be premised on unanimous jury findings.....152
a.	Aggravating factors .....152
b.	Unadjudicated criminal activity .....152
3.	CALJIC No. 8.88 did not cause the death penalty determination to turn on an impermissibly vague and ambiguous standard .....152
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 .....153
5.	The absence of a nonunanimity instruction regarding mitigating factors did not violate Frazier’s constitutional rights.....154
6.	The jury was properly not instructed on the presumption of life .....155
D.	That the jury was not required to make written findings regarding sentencing does not violate Frazier’s right to meaningful appellate review .....156
E.	The jury instructions on aggravating and mitigating factors are not unconstitutional.....156
1.	Use of restrictive adjectives in the list of potential mitigating factors.....156

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
2. The trial court's refusal to omit inapplicable sentencing factors .....	157
3. Differentiating between aggravating and mitigating factors.....	157
F. There is no constitutional requirement of intercase proportionality .....	157
G. California's capital sentencing scheme does not violate the equal protection clause .....	158
H. California's use of the death penalty does not violate the eighth and fourteenth amendments or international law .....	158
Conclusion .....	159



## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Adams v. Carroll</i> (9th Cir. 1989) 875 F.2d 1441 .....	100
<i>Adams v. Texas</i> (1980) 448 U.S. 38 .....	51, 53, 100, 101
<i>Brewer v. Williams</i> (1977) 430 U.S. 387 .....	78
<i>Bullington v. Missouri</i> (1981) 451 U.S. 430 .....	82, 83
<i>Chapman v. California</i> (1967) 386 U.S. 18 .....	<i>passim</i>
<i>Faretta v. California</i> (1975) 422 U.S. 806 .....	<i>passim</i>
<i>Gray v. Mississippi</i> (1987) 481 U.S. 648 .....	60, 62
<i>Hovey v. Superior Court</i> (1980) 28 Cal.3d 1 .....	<i>passim</i>
<i>Indiana v. Edwards</i> (2008) 554 U.S. 164 .....	79
<i>Lockhart v. McCree</i> (1986) 476 U.S. 162 .....	62
<i>Martinez v. Court of Appeal of Cal.</i> (2000) 528 U.S. 152 .....	79
<i>McKaskel v. Wiggins</i> (1989) 465 U.S. 168 .....	117
<i>Miranda v. Arizona</i> (1966) 384 U.S. 436 .....	15

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Morris v. Slappy</i> (1983) 461 U.S. 1 .....	80
<i>People v. Alfaro</i> (2007) 41 Cal.4th 1277 .....	146
<i>People v. Alvarez</i> (1996) 14 Cal.4th 155 .....	135
<i>People v. Alvarez</i> (2002) 27 Cal.4th 1161 .....	87
<i>People v. Asbury</i> (1985) 173 Cal.App.3d 362.....	121, 153, 155, 156
<i>People v. Avila</i> (2006) 38 Cal.4th 491 .....	57, 145, 147, 148
<i>People v. Bacigalupo</i> (1991) 1 Cal.4th 103 .....	126, 127, 128
<i>People v. Bacigalupo</i> (1993) 6 Cal.4th 457 .....	126
<i>People v. Barnum</i> (2003) 29 Cal.4th 1210 .....	93
<i>People v. Beames</i> (2007) 40 Cal.4th 907 .....	150
<i>People v. Bemore</i> (2000) 22 Cal.4th 809 .....	151
<i>People v. Bigelow</i> (1984) 37 Cal.3d 731.....	105
<i>People v. Blakeley</i> (2000) 23 Cal.4th 82 .....	104

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Bloom</i> (1989) 48 Cal.3d 1194.....	78, 81, 106, 114
<i>People v. Bonilla</i> (2007) 41 Cal.4th 313 .....	123, 128
<i>People v. Boyce</i> (2014) 59 Cal.4th 672 .....	97
<i>People v. Boyette</i> (2002) 29 Cal.4th 381 .....	132
<i>People v. Bradford</i> (1997) 15 Cal.4th 1229 .....	49, 88, 98
<i>People v. Bramit</i> (2009) 46 Cal.4th 1221 .....	151
<i>People v. Breaux</i> (1991) 1 Cal.4th 281 .....	153
<i>People v. Breverman</i> (1998) 19 Cal.4th 142 .....	133, 140
<i>People v. Brown</i> (1988) 46 Cal.3d 432.....	101, 104, 117, 148
<i>People v. Brown</i> (2004) 33 Cal.4th 382 .....	152
<i>People v. Bryant</i> (2014) 60 Cal.4th 335 .....	155
<i>People v. Burgener</i> (2003) 29 Cal.4th 833 .....	158
<i>People v. Burney</i> (2009) 47 Cal.4th 203 .....	130, 131, 157

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Capistrano</i> (2014) 59 Cal.4th 830 .....	55, 56, 58
<i>People v. Cash</i> (2002) 28 Cal.4th 703 .....	48
<i>People v. Chatman</i> (2006) 38 Cal.4th 344 .....	153
<i>People v. Clark</i> (1990) 50 Cal.3d 583.....	146
<i>People v. Cleveland</i> (2004) 32 Cal.4th 704 .....	118
<i>People v. Cook</i> (2006) 39 Cal.4th 566 .....	156, 157
<i>People v. Courts</i> (1985) 37 Cal.3d 784.....	106
<i>People v. Crandell</i> (1988) 46 Cal.3d 833.....	104, 105, 133, 138
<i>People v. Crayton</i> (2002) 28 Cal.4th 346 .....	104
<i>People v. Cummings</i> (1993) 4 Cal.4th 1233 .....	84
<i>People v. D’Arcy</i> (2010) 48 Cal.4th 257 .....	152
<i>People v. Demetrulias</i> (2006) 39 Cal.4th 1 .....	150, 159
<i>People v. Doolin</i> (2009) 45 Cal.4th 390 .....	78, 111

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Edwards</i> (2013) 57 Cal.4th 658 .....	157
<i>People v. Famalaro</i> (2011) 52 Cal.4th 1 .....	146, 158
<i>People v. Farnam</i> (2002) 28 Cal.4th 107 .....	118
<i>People v. Flood</i> (1998) 18 Cal.4th 470 .....	122, 139, 140
<i>People v. Franco</i> (2009) 180 Cal.App.4th 713.....	122
<i>People v. French</i> (2008) 43 Cal.4th 36 .....	121, 153, 155, 156
<i>People v. Gray</i> (2005) 37 Cal.4th 168 .....	<i>passim</i>
<i>People v. Griffin</i> (2004) 33 Cal.4th 1015 .....	134
<i>People v. Hale</i> (2012) 204 Cal.App.4th 961.....	134
<i>People v. Halvorsen</i> (2007) 42 Cal.4th 379 .....	78, 81
<i>People v. Hamilton</i> (1988) 45 Cal.3d 351.....	82, 83, 90, 111
<i>People v. Hardy</i> (1992) 2 Cal.4th 86 .....	78, 83, 94
<i>People v. Harris</i> (2005) 37 Cal.4th 310 .....	151, 158, 159

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>People v. Hawthorne</i> (1992) 4 Cal.4th 43 .....	151
<i>People v. Hayes</i> (1990) 52 Cal.3d 577.....	151
<i>People v. Hernandez Rios</i> (2007) 151 Cal.App.4th 1154.....	125
<i>People v. Herrera</i> (1980) 104 Cal.App.3d 167.....	93
<i>People v. Hodge</i> (1957) 147 Cal.App.2d 591.....	107
<i>People v. Howard</i> (2008) 42 Cal.4th 1000 .....	125, 132
<i>People v. Hudson</i> (2006) 38 Cal.4th 1002 .....	154
<i>People v. Hunter</i> (2011) 202 Cal.App.4th 261.....	139
<i>People v. Jackson</i> (1996) 13 Cal.4th 1164 .....	125, 131, 132
<i>People v. Jackson</i> (2009) 45 Cal.4th 662 .....	152, 153
<i>People v. Jandres</i> (2014) 226 Cal.App.4th 340.....	139
<i>People v. Jennings</i> (2010) 50 Cal.4th 616 .....	134
<i>People v. Johnson</i> (2015) 60 Cal.4th 966 .....	158

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Jones</i> (2012) 54 Cal.4th 1 .....	53
<i>People v. Jurado</i> (2006) 38 Cal.4th 72 .....	146
<i>People v. Kaurish</i> (1990) 52 Cal.3d 648.....	51, 52, 53, 54
<i>People v. Kirkpatrick</i> (1994) 7 Cal.4th 988 .....	78, 88, 89, 114
<i>People v. Lawley</i> (2002) 27 Cal.4th 102 .....	94, 95
<i>People v. Lewis</i> (2001) 25 Cal.4th 610 .....	135
<i>People v. Loker</i> (2008) 44 Cal.4th 691 .....	126, 131, 132
<i>People v. Lynch</i> (2010) 50 Cal.4th 693 .....	<i>passim</i>
<i>People v. Marsden</i> (1970) 2 Cal.3d 118.....	<i>passim</i>
<i>People v. Marshall</i> (1996) 13 Cal.4th 799 .....	90, 91, 114
<i>People v. Marshall</i> (1997) 15 Cal.4th 1 .....	<i>passim</i>
<i>People v. Mason</i> (2013) 218 Cal.App.4th 818.....	122
<i>People v. Maury</i> (2003) 30 Cal.4th 342 .....	155

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610 .....	<i>passim</i>
<i>People v. Medina</i> (1995) 11 Cal.4th 694 .....	154
<i>People v. Mendoza</i> (2000) 24 Cal.4th 130 .....	125, 131, 132
<i>People v. Meredith</i> (2009) 174 Cal.App.4th 1257.....	158
<i>People v. Miller</i> (2007) 153 Cal.App.4th 1015.....	111
<i>People v. Mincey</i> (1992) 2 Cal.4th 408 .....	125, 126, 127, 128
<i>People v. Moon</i> (2005) 37 Cal.4th 1 .....	<i>passim</i>
<i>People v. Moore</i> (2011) 51 Cal.4th 1104 .....	154, 155
<i>People v. Morgan</i> (2007) 42 Cal.4th 593 .....	125, 132
<i>People v. Nakahara</i> (2003) 30 Cal.4th 705 .....	126, 127, 128
<i>People v. Navarette</i> (2003) 30 Cal.4th 458 .....	150
<i>People v. Nicholson</i> (1994) 24 Cal.App.4th 584.....	101, 102, 103, 104
<i>People v. Ortiz</i> (1990) 51 Cal.3d 975.....	106



**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Perry</i> (2006) 38 Cal.4th 302 .....	157
<i>People v. Phillips</i> (2000) 22 Cal.4th 226 .....	155
<i>People v. Riccardi</i> (2012) 54 Cal.4th 758 .....	60, 61, 62
<i>People v. Riggs</i> (2008) 44 Cal.4th 248 .....	145
<i>People v. Rivers</i> (1993) 20 Cal.App.4th 1040.....	<i>passim</i>
<i>People v. Rogers</i> (2009) 46 Cal.4th 1136 .....	153
<i>People v. Sapp</i> (2003) 31 Cal.4th 240 .....	151
<i>People v. Schmeck</i> (2005) 37 Cal.4th 240 .....	50
<i>People v. Scott</i> (2001) 91 Cal.App.4th 1197.....	92, 115
<i>People v. Scott</i> (2011) 52 Cal.4th 452 .....	152
<i>People v. Smithey</i> (1999) 20 Cal.4th 936 .....	122, 130, 131
<i>People v. Stanley</i> (2006) 39 Cal.4th 913 .....	77, 150, 151, 152
<i>People v. Steele</i> (2002) 27 Cal.4th 1230 .....	112, 117

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>People v. Stewart</i> (2004) 33 Cal.4th 425 .....	51, 52, 53
<i>People v. Taylor</i> (2009) 47 Cal.4th 850 .....	77
<i>People v. Taylor</i> (2010) 48 Cal.4th 574 .....	48, 54
<i>People v. Tena</i> (2007) 156 Cal.App.4th 598.....	78
<i>People v. Thomas</i> (2011) 51 Cal.4th 449 .....	47, 51
<i>People v. Thornton</i> (2007) 41 Cal.4th 391 .....	130
<i>People v. Tully</i> (2012) 54 Cal.4th 952 .....	122, 153, 155, 156
<i>People v. Vieira</i> (2005) 35 Cal.4th 264 .....	149
<i>People v. Vines</i> (2011) 51 Cal.4th 830 .....	47, 48, 51
<i>People v. Virgil</i> (2011) 51 Cal.4th 1210 .....	122, 153, 155, 156
<i>People v. Waidla</i> (2000) 22 Cal.4th 690 .....	122
<i>People v. Watson</i> (1956) 46 Cal.2d 818.....	passim
<i>People v. Weaver</i> (2001) 26 Cal.4th 876 .....	157

**TABLE OF AUTHORITIES**  
**(continued)**

	Page
<i>People v. Williams</i> (1997) 16 Cal.4th 153 .....	157
<i>People v. Williams</i> (2013) 56 Cal.4th 165 .....	92, 118
<i>People v. Williams</i> (2013) 56 Cal.4th 630 .....	100
<i>People v. Windham</i> (1977) 19 Cal.3d 121.....	<i>passim</i>
<i>People v. Wright</i> (1988) 45 Cal.3d 1126.....	126, 127, 128
<i>Press-Enterprise Co. v. Superior Court</i> (1984) 464 U.S. 501 .....	147
<i>Pulley v. Harris</i> (1984) 465 U.S. 37 .....	158
<i>Ross v. Oklahoma</i> (1988) 487 U.S. 81 .....	61
<i>Stenson v. Lambert</i> (9th Cir. 2007) 504 F.3d 873.....	97
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275 .....	139
<i>United States v. Gonzalez-Lopez</i> (2006) 548 U.S. 140 .....	80
<i>Utrecht v. Brown</i> (2007) 551 U.S. 1 .....	<i>passim</i>
<i>Wainwright v. Witt</i> (1985) 469 U.S. 412 .....	47, 50, 56, 62

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>White v. Wheeler</i> (Dec. 14, 2015, No. 14-1372) __ U.S. __ [2015 WL 8546240].....	55
<i>Witherspoon v. Illinois</i> (1968) 391 U.S. 510 .....	47, 61
 <b>STATUTES</b>	
Code of Civil Procedure	
§ 223 .....	<i>passim</i>
 Penal Code	
§ 187 .....	1
§ 190.2 .....	150
§ 190.2, subd. (a)(17) .....	2
§ 190.2, subd. (a)(17)(C)&(D) .....	135
§ 190.3, subd. (a) .....	150
§ 261, subd. (a)(2) .....	1
§ 286, subd. (c)(2) .....	1
§ 654 .....	2
§ 987.9 .....	85
§ 1127c .....	123, 128
§ 1239 .....	2
§ 1259 .....	122
§ 4007 .....	<i>passim</i>
 <b>CONSTITUTIONAL PROVISIONS</b>	
California Constitution	
article I, § 16 .....	47
 United States Constitution	
Sixth Amendment.....	<i>passim</i>
Fourteenth Amendment.....	47, 79

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**OTHER AUTHORITIES**

California Jury Instructions, Criminal

No. 2.52 ..... *passim*

No. 8.85 ..... 156, 157

No. 8.88 ..... 152, 153, 154, 155

Judicial Council of California, Criminal Jury Instructions

No. 372 ..... *passim*



## 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 trail 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),<sup>1</sup> 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

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

circumstances (§ 190.2, subd. (a)(17)). (2 CT 336-338.)<sup>2</sup>

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.)

---

<sup>2</sup> 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.)<sup>3</sup> 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.

---

<sup>3</sup> 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.)<sup>4</sup> 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

---

<sup>4</sup> 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 as 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