No. _____

IN THE

Supreme Court of the United States

CURTIS LYNN FAUBER,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS LYNN FAUBER, Petitioner-Appellant, v. RONALD DAVIS, Warden, California State Prison at San Quentin, Respondent-Appellee.	No. 17-99001 D.C. No. 2:95-cv-06601-GW Central District of California, Los Angeles ORDER

Before: WATFORD, BRESS, and FORREST, Circuit Judges.

Judges Bress and Forrest voted to deny the petition for panel rehearing and rehearing en banc. Judge Watford voted to grant the petition.

The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. No. 82, is **DENIED**.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CURTIS LYNN FAUBER, *Petitioner-Appellant*, v. RONALD DAVIS, Warden, California State Prison at San Quentin, *Respondent-Appellee.*	No. 17-99001 D.C. No. 2:95-cv-06601-GW OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted January 24, 2022
Pasadena, California

Filed August 5, 2022

Before: Paul J. Watford, Daniel A. Bress, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Bress;
Dissent by Judge Watford

SUMMARY*

Habeas Corpus/Death Penalty

The panel affirmed the district court's judgment denying Curtis Fauber's habeas corpus petition challenging his murder conviction and death sentence.

The district court certified four claims for appeal.

Claims 10(a) and (c) and Claim 41(a)(1)(16) all concerned the prosecutor's alleged improper vouching for the credibility of witness Brian Buckley by reading to the jury the plea agreement in which Buckley agreed to testify against Fauber. In Claim 41(a)(1)(16), Fauber argued that trial counsel was ineffective for failing to object to the alleged vouching. The panel held that under Antiterrorism and Effective Death Penalty Act (AEDPA), the California Supreme Court's decision rejecting Fauber's ineffective assistance claim was not contrary to or an unreasonable application of clearly established law; the California Supreme Court could reasonably conclude that even if counsel acted deficiently, there was no prejudice. In Claims 10(a) and (c), Fauber argued that the alleged vouching, and the state court's allowance of the same, violated Fauber's due process rights. The panel held that Fauber procedurally defaulted his due process vouching claims, and that even if the due process claims were not procedurally defaulted, they would fail on the merits because the alleged vouching was harmless.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In Claim 28(c), Fauber argued that the state trial court improperly excluded his unaccepted plea offer as mitigating evidence at the penalty phase. The panel held that no clearly established federal constitutional law holds that an unaccepted plea offer qualifies as evidence in mitigation that must be admitted in a capital penalty proceeding. The panel held that regardless, Fauber cannot show prejudice. The panel wrote that given the extreme aggravating factors that the State put forward coupled with Fauber's already extensive but unsuccessful presentation of mitigating evidence, there is no basis to conclude that the jury would have reached a different result if it had considered Fauber's unaccepted plea.

The panel denied Fauber's request to expand the certificate of appealability to include four additional claims.

Dissenting in part, Judge Watford would grant Fauber's habeas petition as to the exclusion of the plea offer at the penalty phase. Noting that the prosecutor argued that Fauber must be executed because he was likely to kill again if sentenced to life in prison, Judge Watford wrote that the trial court's exclusion of the prior offer of a plea deal with a life sentence prevented Fauber from rebutting this claim, thereby violating clearly established federal law, an error that was not harmless.

COUNSEL

John S. Crouchley (argued) and Ajay V. Kusnoor, Deputy Federal Public Defenders; Cuauhtemoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Jonathan Matthew Krauss (argued), A. Scott Hayward, and Xiomara Costello, Deputy Attorneys General; James William Bilderback II and Dana M. Ali, Supervising Deputy Attorneys General; Lance W. Winters, Senior Assistant Attorney General; Gerald A. Engler, Chief Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, Los Angeles, California; for Respondent-Appellee.

OPINION

BRESS, Circuit Judge:

In 1988, a California jury sentenced Curtis Fauber to death for murdering Thomas Urell with an ax. The California Supreme Court affirmed Fauber's conviction and sentence on direct appeal and later denied his state habeas petition. Fauber now seeks federal habeas relief. He argues that the state prosecutor improperly vouched for a witness's credibility, that his attorney was ineffective in not objecting to the vouching, and that the state trial court, in the penalty phase, improperly excluded the prosecution's earlier plea offer to Fauber as claimed mitigating evidence.

We hold that Fauber's claims lack merit. The state court's decisions are not contrary to or an unreasonable application of clearly established federal law, 28 U.S.C. § 2254(d)(1), and one of Fauber's claims is procedurally defaulted. We affirm the judgment of the district court.

I

A

More than thirty years ago, Curtis Fauber and his friend Brian Buckley broke into Thomas Urell's home to steal drugs. When Urell woke up and discovered the intruders, Fauber bludgeoned Urell to death with the blunt side of an ax. Extensive evidence connected Fauber to the crime, including Buckley's testimony (which was corroborated in key parts by unindicted confederate Mel Rowan), Urell's autopsy, various pieces of physical evidence, and Fauber's own admissions. We now summarize the facts based on the record before us and the California Supreme Court's

decision on Fauber's direct appeal. *See People v. Fauber*, 831 P.2d 249 (Cal. 1992).

Fauber and Buckley met in the Army in January 1985. They became close friends, with Fauber visiting Buckley's family during breaks in service. In June 1985, the Army discharged Fauber and Buckley, and the two went to Buckley's mother's apartment in Ventura. After spending time in his home state of New Mexico, Fauber later returned to Ventura in the early summer of 1986 to stay with Buckley.

That summer, Fauber and Buckley regularly used drugs with Buckley's neighbors, Jan Jarvis and Mel Rowan. At one point, Jarvis mentioned that she had a former boyfriend named Thomas Urell who sold cocaine. Fauber was intrigued by the possibility of robbing Urell and asked where he lived. Jarvis drew a map showing the location and layout of Urell's house. The group talked about robbing the home and a week later, all four of them drove by Urell's house to scout it. Rowan told Fauber to "rip off" Urell immediately, but Fauber said: "No, we want to check it out for a few days." Buckley and Fauber surveilled the house two more times before the murder.

Approximately four days later, in the nighttime on July 16, 1986, Buckley and Fauber put their plan into motion. Fauber drove with Buckley to a store near Urell's home and parked his motorcycle there. They went to an adjacent beach and donned gloves, hats, and bandannas. Fauber carried a sawed-off shotgun. Fauber mentioned that he might have to kill Urell to prevent him from being a witness.

The two men walked to Urell's home and entered through a window. Buckley followed Fauber to the bedroom, where Jarvis had said the drugs would be located. They entered and found Urell sleeping in bed. As they

entered, Urell woke up. In a fake Mexican accent, Fauber said: "Don't move." Urell pleaded with Fauber not to hurt him and said they could take anything they wanted. Buckley held the shotgun, and Fauber forced Urell onto his stomach and taped his hands behind his back.

With Urell detained, Fauber and Buckley searched the residence and took assorted items, including a small amount of cocaine. They also found a locked safe. Urell said it had nothing valuable in it and that he did not know the combination. Fauber then found an ax under the bed. Fauber held the ax above Urell and, without warning, bludgeoned him in the back of the neck with the ax's blunt side. Buckley heard the blow and left the room as Urell began making a hissing noise. Seconds later, Fauber delivered a second blow, which silenced Urell.

Fauber met Buckley in the kitchen and suggested putting the safe in Urell's vehicle. When Buckley asked him whether Urell was dead, Fauber said he did not know. Fauber then returned to the bedroom and Buckley heard Fauber hit Urell several more times with the ax. Fauber and Buckley loaded the safe onto Urell's El Camino and drove to Buckley's apartment.

Upon arrival around 1:00 a.m., Fauber and Buckley went to Rowan's apartment to obtain a key to a basement storeroom. Rowan saw a safe in the back of Urell's El Camino and asked Fauber if Urell had been home during the burglary. Fauber responded that Urell had not been home. Fauber and Buckley took everything they had stolen from Urell's residence and put it in a trailer owned by Buckley's mother. They then left to dispose of Urell's El Camino over a cliff.

After returning to the apartment, Fauber and Buckley used Urell's cocaine. At this point, Rowan returned and pressed Fauber about Urell's whereabouts. Fauber then admitted that Urell had been home. He also admitted that he had hit Urell with an ax and believed he had killed him. Fauber told Rowan he had killed Urell because Urell saw his face, and Fauber "was not ready to leave Ventura yet." Fauber also acknowledged that Urell was struggling to breath when he left.

The next day, Fauber discovered how to open the safe. After emptying its contents, Fauber and Buckley took the safe to another town and dumped it near a lake because Rowan did not want it in his storeroom. The safe contained small amounts of jewelry, gold, and silver coins; Jarvis was directed to throw most of it away.

When Urell did not appear for work the next day, Urell's friend Ronald Siebold went to his home and found Urell's lifeless body lying face down with his hands taped behind his back and a pillow on his head. The police arrived ten minutes later. Sheriffs who responded to the call described the room as "ransacked"—with drawers thrown open and clothes turned out—consistent with a robbery. They found an ax standing upright at the foot of the bed. Another police detective found the remnants of narcotics paraphernalia.

The Chief Medical Examiner for Ventura County, Dr. Frederick Lovell, examined Urell's body at the scene. He confirmed that Urell had died roughly 14 to 22 hours earlier. He also observed that Urell's shoulders and chest had a blue hue, suggesting that his blood lacked sufficient oxygen when he died.

Dr. Lovell also conducted an autopsy. The autopsy demonstrated that Urell's hands had been tied behind his

back before he was killed. Blood splatter indicated that Urell had been struck repeatedly in the back of the neck. Wounds on Urell's lower left neck extending towards the skull evidenced closely grouped blows caused by a major force from a rectangular object. The wounds likely were struck from the same position and were consistent with the blunt side of an ax. The blows had prompted a "large amount of bleeding and hemorrhag[ing]," causing paralysis and limiting Urell's ability to breath. Urell also had a broken neck and "one bone was separated from the other where they're normally tied together by a series of very heavy, tough ligaments." Dr. Lovell concluded that based on the "heavy purple discoloration of the face and chest," the "extreme engorgement of the eyes" with bleeding under the skin, and the widespread hemorrhaging, Urell had died of either asphyxia or suffocation.

Over the next few weeks, police began to connect Fauber to the murder. On July 20, 1986, they found Urell's El Camino 125 feet off the side of a cliff. Then, on July 31, they found the door to Urell's safe at a nearby lake. Eventually, the police arrested Hal Simmon, an acquaintance of Fauber's, after discovering that Simmon had been using Urell's telephone calling card. Simmon told the police he had received the number from "Brian and Curtis" and described where they lived. This led authorities to Fauber and Buckley.

In September 1986, police arrested Buckley for a traffic violation. Buckley provided details about Urell's murder, believing the information would not be used against him. That same month, police arrested Rowan for a parole violation. Rowan admitted his involvement in the robbery and discussed the murder.

With the evidence mounting, the Ventura County police sent a warrant for Fauber's arrest to his hometown of Española, New Mexico. Española police arrested Fauber, and officers then flew to New Mexico to interview him and take possession of any incriminating property. Fauber waived his *Miranda* rights. He admitted to police that Jarvis had told him about someone who had a lot of drugs and had drawn him a diagram to help him commit the robbery. He recalled that he and Buckley followed Jarvis and Rowan as they drove past the house.

Police found a piece cut from Urell's calling card in Fauber's wallet. In a camper that Fauber used in Ventura, police also found a road atlas that belonged to Urell and that was stamped with the name of his employer.

B

On January 7, 1987, the Ventura County District Attorney (DA) charged Fauber with murder, robbery, and burglary, and filed a notice of intent to seek the death penalty. Fauber pleaded not guilty. In November 1987, police arrested Buckley in connection with Urell's murder. As part of his plea agreement for second-degree murder, Buckley agreed to testify against Fauber. The prosecution granted Rowan full immunity on the condition that he too testify against Fauber.

Fauber's trial began in mid-December 1987. The prosecution offered Rowan and Buckley as its principal witnesses. Both confirmed the details of the murder and Fauber's involvement. Relevant to Fauber's vouching and ineffective assistance of counsel claim, the prosecution read Buckley's plea agreement to the jury and utilized the plea agreement in the State's closing argument. We will discuss the facts relating to this issue in greater detail below in our

analysis of the vouching-related claims. The jury convicted Fauber of first-degree murder, robbery, and burglary. *Fauber*, 831 P.2d at 257.

C

The trial then moved to the penalty phase for a determination of whether Fauber should be sentenced to death. In this phase, the State presented evidence that Fauber took part in two uncharged killings, among other violent misdeeds.

The prosecution presented evidence that a few months before he returned to Ventura, Fauber murdered his longtime friend, Jack Dowdy, Jr., and threatened Jack's wife, Kim. Witnesses testified that Fauber had fallen in love with Kim and wanted her to move with him to Albuquerque. When Kim did not agree, Fauber resorted to threats and violence, pulling a gun on Jack, holding Kim at gunpoint, appearing at Kim's house unannounced and trying to choke her while she slept, and telling Jack that he had ruined Fauber's chances with Kim and that he would therefore kill her.

Around this time, Jack disappeared. Fauber found Kim and told her suggestively that Jack would not bother her anymore. A couple of days later, Fauber confronted Kim again and gave her an ultimatum: come with him or he would kill everyone in her house. He then put a knife to her throat until she agreed to leave with him. In the middle of May 1986, Kim's uncle Tony confronted Fauber and asked him to stop terrorizing his family. Fauber refused. Then, Fauber admitted to Tony that he killed Jack. Fauber also later told Buckley that "he had killed the husband of a girl named Kim because Kim was afraid of her husband, who had been a friend of [Fauber's]." Fauber asked Buckley to help him dig up the body and re-bury it so animals would not expose it.

At the penalty phase, the prosecution also presented evidence that Fauber murdered an acquaintance named David Church at a Memorial Day party at Buckley's apartment in 1986. According to witnesses, Church had appeared drunk at the party and demanded drugs. When Church threatened to go to the police, Fauber and his friend, Chris Caldwell, took Church away.

Police found Church's decomposed body in a creek bed months later. Buckley testified that Fauber told him he killed Church with an ax handle, that Church "was a hard guy to kill," and that he needed to get rid of the ax because it was covered in blood. Buckley testified that Caldwell had also told him about the killing. Another witness from the party, Pam McCormick, testified that she overheard a conversation in which Fauber discussed how to get rid of a body.

In response to the State's case in aggravation, Fauber's counsel presented mitigating evidence concerning Fauber's troubled childhood and possible mental instability, and to emphasize Fauber's positive qualities. It is uncontradicted that defense counsel called twenty-seven witnesses to testify on Fauber's behalf, including friends and family, a social anthropologist who had conducted an eight-month investigation into Fauber's upbringing, and a psychologist who administered intelligence and neuropsychological screening tests on Fauber.

At the penalty phase, Fauber also wanted to present evidence that the prosecution had initially made him a plea offer that would have allowed Fauber to avoid the death penalty in exchange for testifying against Caldwell and Buckley, and that Fauber refused the offer. The trial court disallowed this, finding that the plea agreement was "totally irrelevant" because it "does not relate to the defendant's

character, prior record or circumstance of the offense." The trial court's exclusion of Fauber's unaccepted plea agreement forms the basis for another assignment of error, and we will set forth more facts relating to this issue below in our analysis.

The jury sentenced Fauber to death.

D

The California Supreme Court affirmed Fauber's convictions and sentence on direct appeal, *People v. Fauber*, 831 P.2d 249 (Cal. 1992), and the United States Supreme Court denied certiorari. *Fauber v. California*, 507 U.S. 1007 (1993). In January 1993, Fauber filed a state habeas petition, which the California Supreme Court summarily denied on the merits.

Fauber filed his original federal habeas petition in May 1997, which the district court stayed so that Fauber could exhaust state post-conviction remedies. Fauber then filed a first amended federal habeas petition. Following a round of rulings by the district court, Fauber filed his operative second amended federal habeas petition in 2012.

In May 2017, the district court denied Fauber's petition. The district court then certified four claims for appeal:

> Claims 10(a), (c): whether the prosecutor improperly vouched for Buckley's credibility by reading Buckley's plea agreement to the jury.
>
> Claim 41(a)(1)(16): whether trial counsel was ineffective for failing to object to the alleged vouching.

> Claim 28(c): whether Fauber's plea offer was improperly excluded as mitigating evidence at the penalty phase.

In this court, Fauber presses all four certified claims and seeks a certificate of appealability on four additional claims.[1]

II

"We review a district court's denial of a 28 U.S.C. § 2254 petition de novo." *Bolin v. Davis*, 13 F.4th 797, 804 (9th Cir. 2021). But unless otherwise indicated below, we evaluate Fauber's claims under the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), because Fauber filed his federal habeas petition after AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, a federal habeas petitioner cannot obtain relief unless the state court's decision (1) is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) is "based on an unreasonable determination of the facts

[1] Fauber requests that we expand the certificate of appealability to include whether his counsel was ineffective in failing to present additional mitigating evidence and not further rebutting the prosecution's aggravating evidence; whether the district court should have granted a hearing on the destruction of certain physical evidence; and whether the cumulative effect of trial counsel's performance during the penalty phase warrants relief. We have carefully reviewed these assignments of error, including by ordering supplemental briefing. We now **DENY** Fauber's request to expand the certificate of appealability because he has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

To meet AEDPA's "'unreasonable application of' prong, a petitioner 'must show far more than that the state court's decision was merely wrong or even clear error.'" *Bolin*, 13 F.4th at 804 (quoting *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam)). The state court's application of federal law must stand unless it was "objectively unreasonable." *Bell v. Cone*, 535 U.S. 685, 698–99 (2002). To prevail, Fauber must demonstrate that the state court's decision "is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Kayer*, 141 S. Ct. at 523 (quoting *Harrington v. Richter*, 562 U.S. 86, 104 (2011)). "This is a challenging standard to meet." *Bolin*, 13 F.4th at 805.

III

We begin with Claims 10(a) and (c) and Claim 41(a)(1)(16), which all concern the prosecution's alleged vouching using Buckley's plea agreement, and defense counsel's alleged ineffectiveness in failing to object to the same. We hold that under AEDPA, the California Supreme Court's decision rejecting Fauber's ineffective assistance claim was not contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). We further hold that Fauber procedurally defaulted his due process vouching claims but that regardless, Fauber cannot show prejudicial error.

A

We first set forth the relevant facts and rulings relating to these claims. Buckley's plea agreement stated that prosecutors would conduct a preliminary interview with him

to assess his credibility. If the DA did not find Buckley credible, then Buckley's case would proceed to trial. The plea agreement provided that during Fauber's trial, the judge who heard Buckley's testimony would "make any necessary findings as to his truthfulness" for purposes of Buckley honoring his plea agreement, if there were a dispute between Buckley and the State. At Fauber's trial, and during the government's direct examination of Buckley, the prosecutor read the plea agreement to the jury and Buckley confirmed that he entered it. Defense counsel did not object.

The prosecution returned to Buckley in its closing argument. The prosecutor told jurors that Brian Buckley's credibility was the key to the case, stating at the outset: "If you don't believe anything he says, you'll probably acquit the defendant. If you believe some of what Brian Buckley says, you'll find the defendant guilty of robbery and burglary and felony murder. And if you believe most of what Brian Buckley says, you'll convict the defendant of everything."

Next, the prosecutor rhetorically asked the jury: "what would motivate Brian Buckley to frame somebody who was his good friend, his Army buddy, and in fact somebody who was his good friend into August at least?" The prosecutor told the jury to "remember that Brian Buckley has a motivation in this case to testify truthfully. And truth is not according to the DA, [or] to me. Truth is according to the Judge." The prosecution cited Buckley's plea agreement and said that "the most important part of that agreement is that if there is some dispute as to Brian Buckley's truthfulness, that dispute will be determined by the trier of fact, the Judge who hears the proceedings in which Brian Buckley testifies." Later, the prosecutor revisited this point and noted that the "main element" of Buckley's plea agreement was that he had to testify truthfully. The

prosecutor then read the agreement aloud, stopping to note that the trial judge's assessment of Buckley's candor was key to the plea agreement.

The prosecutor in closing argument emphasized record evidence that, in the State's view, showed that Buckley and Rowan were credible witnesses. The prosecutor argued that Buckley's testimony was credible because it was supported "in almost all the details" by Rowan's testimony. Further, the prosecution pointed out, Buckley's core testimony was confirmed by Fauber himself when he waived his *Miranda* rights and admitted that Jarvis drew him a map of Urell's house that Fauber then used to scope out Urell's residence.

The prosecutor at closing also underscored the importance of Fauber's confession to Rowan that he had killed Urell. The prosecutor read some of Rowan's more critical testimony aloud and argued that Fauber's admission to Rowan was consistent with the autopsy results. Rowan had testified that Fauber admitted he thought he killed Urell, and that Urell was "having a hard time" breathing. The autopsy found that Urell had died of either suffocation or asphyxiation.

Before the prosecution's case and during final instructions, the trial judge instructed jurors that they were the "sole judges" of witness credibility:

> Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness. In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

The trial judge also read an instruction that explained the factors jurors could use to evaluate witness credibility, including the witness's ability to remember and communicate, bias, motive, attitude, any prior inconsistent statements, and any admission of untruthfulness. As defense counsel would later do, during closing argument the prosecutor reminded jurors of their responsibility to assess witness credibility.

On direct appeal, the California Supreme Court rejected Fauber's vouching claim. *Fauber*, 831 P.2d at 264–66. It held that Fauber forfeited this claim because his counsel had not objected at trial. *Id.* at 264. Alternatively, the Court held that even if the claim were preserved, there was no reversible error. *Id.* The Court acknowledged that, upon a proper objection, the trial court should have excluded the portions of the plea deal suggesting that the district attorney or trial judge would need to find Buckley credible. *Id.* at 265.

But the Court found that any error was harmless. It explained that there was no prejudice because "[t]he prosecutor argued for Buckley's credibility based on the evidence adduced at trial, not on the strength of extrajudicial information obliquely referred to in the plea agreement." *Id.* Further, "common sense suggests" that the jury will assume that the prosecution had found Buckley credible, "else he would not be testifying." *Id.* For these and other reasons, "[t]he jury could not reasonably have understood Buckley's plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether Buckley's testimony was truthful." *Id.*

B

We turn first to Fauber's claim that his trial counsel provided constitutionally ineffective assistance under the

Sixth Amendment by not objecting to the prosecutor's reliance on Buckley's plea agreement. Fauber argues that, without the introduction of that agreement, jurors would not have found Buckley to be a credible witness, and that without Buckley's credible testimony, the jury would not have convicted him of Urell's murder or sentenced him to death.

The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), provides the governing framework for evaluating this claim. *See Bolin*, 13 F.4th at 804. To prove ineffective assistance, Fauber must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Richter*, 562 U.S. at 104. Because the State does not argue that counsel adequately performed, we will assume without deciding that counsel's performance was constitutionally deficient and limit our analysis to the prejudice component.

To show prejudice, Fauber must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different." *Strickland*, 466 U.S. at 694. This standard is "highly demanding." *Kayer*, 141 S. Ct. at 523 (quotations omitted). "A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result.'" *Id.* (quoting *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)); *see also Bolin*, 13 F.4th at 804. But under AEDPA, Fauber's showing is heightened. Given the AEDPA overlay, "the question is whether the state court reasonably could have concluded that the evidence of prejudice fell short of *Strickland*'s deferential standard." *Staten v. Davis*, 962 F.3d 487, 500 (9th Cir. 2020).

In this case, the California Supreme Court summarily denied Fauber's ineffective assistance claim on the merits.

AEDPA applies under these circumstances. *Cullen*, 563 U.S. at 187. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. As a result, we must determine "what arguments or theories . . . could have supported the state court's decision; and then [] ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102. We hold that the state court's rejection of Fauber's *Strickland* claim was not objectively unreasonable because the California Supreme Court could conclude that Fauber failed to establish *Strickland* prejudice.

1

To begin, the state court could reasonably conclude that the content and context of the alleged vouching makes it unlikely to have had any material impact on jurors. Indeed, that was what the California Supreme Court held on direct appeal when it addressed Fauber's underlying due process vouching claim (after first concluding it was procedurally defaulted). *Fauber*, 831 P.2d at 264–66. The record bears out the California Supreme Court's observation that at closing argument, the prosecutor focused heavily on the body of evidence that the jury had heard. *Id.* at 265. This included the testimony of Buckley and Rowan confirming the circumstances of Urell's murder and Fauber's role in it; Fauber admitting the murder to Rowan; Fauber's own incriminating statements to police; and various other evidence connecting Fauber to the crime.

In addition, the California Supreme Court could fairly reason, as it did on direct appeal, that "common sense" indicates that the jury "will usually assume . . . that the

prosecutor has at some point interviewed the principal witness and found his testimony believable, else he would not be testifying." *Fauber*, 831 P.2d at 265. That the prosecution to some extent reaffirmed a point the jury would likely presume anyway further reduces the prejudicial impact of the State utilizing Buckley's plea agreement at closing.

Any prejudice was further mitigated by the trial court's instructions to the jury—and reminders from both the prosecution and defense—that the jurors were the ultimate arbiters of witness credibility. Jurors were repeatedly told they were the "sole judges" of whether a witness was believable. The trial court further instructed the jury as to the factors they could consider in evaluating each witness's credibility, such as the witness's motive, bias, and ability to remember and communicate.

The repeated admonitions to jurors that they would assess witness credibility further reduces the prejudice associated with the alleged vouching. The California Supreme Court could permissibly conclude that the instructions made it unlikely that jurors believed that someone other than them bore the responsibility for assessing Buckley's veracity. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (applying "the almost invariable assumption of the law that jurors follow their instructions"); *United States v. Shaw*, 829 F.2d 714, 718 (9th Cir. 1987) (holding that vouching was harmless because the instructions "could only be taken by the jury to mean that the credibility of the witness was by no means established by the plea agreement, and that the issue was wholly open for the jury to decide").

Fauber relatedly takes issue with the prosecutor's statement that the trial judge would determine whether

Buckley had testified truthfully in the event of a dispute. He argues that this made the jury believe they had less responsibility to gauge Buckley's credibility. But the context of this statement belies this inference. The prosecutor raised Buckley's plea agreement to underscore that Buckley had an incentive to testify truthfully because the trial court would determine his credibility, in the event of a dispute. *Fauber*, 831 P.2d at 265. As the California Supreme Court validly reasoned on direct appeal, it was obviously "implicit . . . that the need for such a determination would arise, if at all, in connection with Buckley's sentencing, not in the process of trying [Fauber's] guilt or innocence." *Id.* at 265. In other words, "[t]he context of the remarks made it clear that determination would occur if the prosecutor sought to repudiate its agreement with Buckley after trial in defendant's case." *Id.* at 266.

2

The California Supreme Court could also reject Fauber's ineffective assistance claim because the evidence against Fauber was overwhelming, confirming Buckley's testimony and Fauber's guilt irrespective of the prosecution's reliance on Buckley's plea agreement. *Cullen*, 563 U.S. at 198 (holding that petitioner failed to show prejudice due to the extensive evidence that the prosecution presented); *United States v. Young*, 470 U.S. 1, 17–20 (1985) (prosecutorial vouching was harmless in light of the "overwhelming evidence" of guilt); *United States v. Lew*, 875 F.2d 219, 223–24 (9th Cir. 1989) (holding that government's vouching for two witnesses by eliciting testimony about the truthfulness requirements of their plea agreements did not rise to the level of plain error because "there was substantial evidence

against [the defendant] independent of the credibility of" the two witnesses).

To begin, Mel Rowan—testifying under full immunity—corroborated much of Buckley's testimony. Rowan, who was Buckley's neighbor and socialized with Fauber before and after the murder, confirmed the circumstances surrounding the crime. Rowan testified that Jarvis told Fauber and Buckley about Urell. He confirmed that Jarvis drew a map of Urell's house and a layout of the interior to help them commit the robbery. He told the jury that he drove by Urell's home with Fauber, Buckley, and Jarvis to scout it out. He testified that Fauber and Buckley spoke about committing the burglary. And he confirmed that Fauber had a sawed-off shotgun that night. Each of these details aligned with Buckley's testimony and Fauber's admissions after waiving his *Miranda* rights.

Rowan then corroborated what happened after the murder. He testified that Fauber and Buckley returned to the apartment at 1:00 a.m. and that he helped Fauber unload the safe from Urell's El Camino and move it into the storage area beneath the apartment. He recounted that Fauber managed to open part of the safe. And he noted that Fauber and Buckley disposed of the safe because Rowan did not want it in his storeroom. Rowan also testified that he told Fauber and Buckley to "get rid of [Urell's] El Camino," that Fauber and Buckley drove off with the vehicle, and that he did not see it again. Rowan's testimony matched Buckley's in each respect.

Perhaps most importantly, Rowan testified that Fauber murdered Urell and how he did it. Rowan testified that Fauber told him that Urell was home during the robbery. Then, when Rowan asked Fauber if he had hurt Urell, Fauber admitted that "he thought he'd killed him." Fauber said that

he had "hit him" and that Urell "was having a hard time" breathing. Fauber also told Rowan why he killed Urell: Urell saw his face, and Fauber "wasn't ready to leave Ventura yet." This matched Buckley's testimony that Fauber had killed Urell to prevent him from being a witness to the crime. And the autopsy also corroborated Rowan's testimony—showing that Urell was struck repeatedly with an object consistent with the blunt side of an ax, and that he died of asphyxiation or suffocation. Underscoring Rowan's importance at trial, the prosecutor's discussion of Rowan's testimony was among the last topics the jury heard before deliberating.

Other evidence also corroborates Buckley's testimony about the circumstances surrounding the crime. Fauber himself confirmed what happened before the murder when he waived his *Miranda* rights and admitted that Jarvis told him about Urell and that he scouted Urell's house with Jarvis, Rowan, and Buckley. And physical evidence connected Fauber to Urell, namely, Hal Simmon using Urell's telephone card number (Simmon said that Fauber gave it to him), Fauber having part of the calling card in his wallet, and Urell's road atlas being found in a camper that Fauber used.

* * *

In sum, the California Supreme Court could reasonably conclude that even if Fauber's counsel acted deficiently in failing to object to the prosecution's use of Buckley's plea agreement, there was no prejudice under *Strickland*. Fairminded jurists could determine that Fauber's counsel performing differently would not create a "substantial likelihood of a different result" than the one the jury reached. *Kayer*, 141 S. Ct. at 524 (quoting *Cullen*, 563 U.S. at 189).

C

We turn next to Claims 10(a) and 10(c), which share a factual nexus with Fauber's ineffective assistance allegations. Here Fauber argues that the prosecutor vouching for Buckley's credibility through his plea agreement, and the state trial court's allowance of the same, violated Fauber's due process rights under the Fourteenth Amendment. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'") (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Fauber's argument fails for two reasons: this claim is procedurally defaulted and Fauber cannot show prejudice even if the claim were preserved.

First, Fauber's claim is procedurally defaulted. We lack jurisdiction "when (1) a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quotations and alterations omitted). To qualify as independent, a state procedural rule must not "rest primarily on federal law, or . . . be interwoven with the federal law." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). "State rules count as adequate if they are firmly established and regularly followed." *Johnson v. Lee*, 578 U.S. 605, 606 (2016) (per curiam) (quotations omitted).

Here, the California Supreme Court held that Fauber procedurally defaulted his due process vouching claim by failing to object to the prosecutor reading Buckley's plea agreement to the jury. *Fauber*, 831 P.2d at 264. This holding rested on California's contemporaneous objection

rule. Under California law, a party must make a proper and timely objection at trial to preserve the argument on appeal. *See* Cal. Evid. Code. § 353; *People v. Ramos*, 15 Cal.4th 1133, 1171 (1997).

We have repeatedly recognized California's contemporaneous objection rule as "an adequate and independent state law ground" that forecloses our review. *See, e.g.*, *Zapien v. Davis*, 849 F.3d 787, 794 n.2 (9th Cir. 2015); *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011); *Inthavong v. Lamarque*, 420 F.3d 1055, 1058 (9th Cir. 2005); *Paulino v. Castro*, 371 F.3d 1083, 1092–93 (9th Cir. 2004). That remains the case even though the California Supreme Court also went on to address Fauber's claim on the merits. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

For the first time in his reply brief, Fauber argues that we should not find his due process vouching claim procedurally barred because he has shown cause and prejudice to excuse the default. While we could find this argument forfeited because Fauber did not raise it in his opening brief, *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992), the argument fails regardless.

We may review a state court decision that rests on an adequate and independent state ground when a party has shown cause for the forfeiture and prejudice flowing from it. *Walker*, 562 U.S. at 316. To show cause, a petitioner must point to "some objective factor external to the defense [that] impeded his adherence to the procedural rule." *United States v. Skurdal*, 341 F.3d 921, 925 (9th Cir. 2003) (quotations omitted). "An attorney error does not qualify as 'cause' to excuse a procedural default unless the error amounted to constitutionally ineffective assistance of counsel." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). Prejudice to excuse the

default "requires the petitioner to establish not merely that the errors at trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (quotations and alterations omitted).

Fauber cannot meet the "cause and prejudice" standard. To excuse his procedural default, Fauber points only to counsel's alleged ineffective assistance in failing to object to the prosecution's use of Buckley's plea agreement. But we have already explained that counsel's allegedly deficient performance did not rise to the level of a Sixth Amendment violation because Fauber cannot show prejudice. Given the State's extensive evidence showing that Fauber killed Urell, Fauber cannot demonstrate that the result of his trial would have been different had his counsel objected and successfully prevented the prosecution from relying upon Buckley's plea agreement. *United States v. Ratigan*, 351 F.3d 957, 965 (9th Cir. 2003) (holding that "[i]n order to excuse his procedural default, [petitioner] must show that counsel's performance was deficient and that the deficient performance prejudiced the defense") (quotations omitted).

Second, even if Fauber's due process claims were not procedurally defaulted, they would fail on the merits because, once again, the alleged vouching was harmless. The parties spar at length over whether, assuming we could get past the procedural default, AEDPA should apply to the California Supreme Court's alternative holding that Fauber's vouching claim failed for lack of prejudice, given the California Supreme Court's reliance on a state law harmlessness standard. We need not resolve this disagreement. Even without AEDPA, under the standard in

Brecht v. Abrahamson, 507 U.S. 619 (1993), Fauber cannot prevail.

Under *Brecht*, "habeas relief is only available if the constitutional error had a 'substantial and injurious effect or influence' on the jury verdict or trial court decision." *Jones v. Harrington*, 829 F.3d 1128, 1141 (9th Cir. 2016) (quoting *Brecht*, 507 U.S. at 623); *see also Davis v. Ayala*, 576 U.S. 257, 268 (2015). "If so, or if one is left in grave doubt, the conviction cannot stand." *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Here, for the same reasons that we rejected Fauber's ineffective assistance claim, the prosecution's reliance on Buckley' plea agreement did not exert a substantial and injurious effect on the jury. Therefore, Fauber's due process claims would fail even setting aside the unexcused procedural default.

IV

In Claim 28(c), Fauber argues that the state trial court improperly excluded his unaccepted plea offer as mitigating evidence at the penalty phase. We conclude that Fauber is not entitled to relief. No clearly established federal constitutional law holds that an unaccepted plea offer qualifies as evidence in mitigation that must be admitted in a capital penalty proceeding. Regardless, Fauber cannot show prejudice: given the extreme aggravating factors that the State put forward coupled with Fauber's already extensive but unsuccessful presentation of mitigating evidence, there is no basis to conclude that the jury would have reached a different result if it had considered Fauber's unaccepted plea.

A

We again begin with the relevant facts and rulings. At the penalty phase, Fauber wanted to present evidence that the prosecution had initially offered him a plea that would have allowed him to avoid the death penalty in exchange for testifying against Buckley and Caldwell, and that Fauber refused the offer. Fauber's counsel explained that he wanted to present Fauber's rejection of the plea deal as character evidence that demonstrated Fauber's loyalty to his friends. He also wanted to present the plea agreement itself as evidence that the district attorney "felt that [Fauber] was an appropriate [person] for life imprisonment rather than the gas chamber." The prosecutor moved to exclude any reference to the unaccepted plea.

The trial court found the evidence inadmissible under California Evidence Code § 352. Regarding the plea offer itself, the court concluded that it was "totally irrelevant" because it "does not relate to the defendant's character, prior record or circumstance of the offense." The court noted that such an agreement is "just the district attorney's position at one time for reasons known to the district attorney. It has no bearing on the defendant whatsoever." The trial court also excluded Fauber's rejection of the plea offer. Fauber rejecting the offer had "very low relevancy" and "very low probative value" as mitigating evidence of loyalty. Instead, the plea agreement threatened to confuse the jury and unduly prolong the trial.

At closing argument, the prosecution maintained that Fauber deserved the death penalty. The prosecution argued to the jury that "the only appropriate penalty in this case is the death penalty," stating, for example: "The defendant has demonstrated vividly that he is a man who, if given the opportunity, will kill again, maybe a prison guard, maybe an

inmate, maybe somebody that makes friends with him, somebody that annoys him."

On direct appeal, the California Supreme Court rejected Fauber's claim that the trial court erred in excluding from the penalty phase evidence about Fauber's unaccepted plea offer. *Fauber*, 831 P.2d at 288. The Court recognized that "a capital defendant must be allowed to present all relevant mitigating evidence to the jury." *Id.* (citing *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), and *Lockett v. Ohio*, 438 U.S. 586 (1978)). But at the same time, "the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." *Id.* (citing Cal. Evid. Code § 352). In this case, the California Supreme Court held, the trial court did not err in treating Fauber's refusal of a plea offer as inadmissible. *Id.*

The Court agreed with the trial court that Fauber's plea agreement provided no insight into his character and was "meaningless." *Id.* at 288. "Standing alone," the Court concluded, "[t]he fact that the offer was made, like the fact that it was refused," "sheds no light on [Fauber's] character and would likely mislead rather than assist the jury in its determination." *Id.* In particular, "such an offer may reflect leniency rather than a belief that the defendant is less culpable for the crime charged." *Id.*

Considering Fauber's rejection of the plea offer, the California Supreme Court further noted that "[t]o supply meaning to the bare fact of the refusal, additional inquiry regarding the underlying reasons would have been required." *Id.* But "[s]uch examination, as the trial court concluded, had the potential to mislead and confuse the jury." *Id.*

Justice Mosk wrote a separate concurrence on this issue. *Id.* at 296–97 (Mosk, J., concurring). He concluded that the trial court may have erred in excluding evidence of plea bargaining but that the evidence "would have added little, if anything, of marginal value. Therefore, any error could not have affected the outcome within any reasonable possibility, and must be held harmless beyond a reasonable doubt." *Id.* at 297.

B

Before us, Fauber renews his argument that the state court erred in excluding as supposed mitigating evidence the State's life-sentence plea offer and Fauber's rejection of it. On appeal, however, Fauber has adjusted his argument somewhat, maintaining that he was entitled to introduce this evidence in mitigation as a matter of due process to rebut the State's argument that he presented a future danger. The State argues that Fauber forfeited this argument by failing to raise it either before the state court or the district court.

It is certainly true that Fauber's theory at the very least reflects some degree of refinement from the argument he presented previously. In state court and before the district court, Fauber largely argued that the unaccepted plea was mitigating because it reflected positively on his character by showing his loyalty to his friends. Fauber maintained that the plea offer was "a matter in mitigation bearing upon the circumstances of the offense and the character of the Defendant herein." The state trial court and California Supreme Court appear to have reasonably understood Fauber's argument in those terms.

Before the state trial court, however, Fauber's counsel also stated that the plea offer was relevant because it reflected "the district attorney's attitude toward [Fauber] and

the offenses at some point prior to trial." And Fauber stated in his state court briefs that the plea offer showed the district attorney "felt that [Fauber] was an appropriate [person] for life imprisonment rather than the gas chamber," because "a prior offer of a life sentence . . . suggests that in the opinion of the prosecutor, the defendant's character is such that he should not be put to death." At least to this extent, Fauber preserved the argument he raises now. We thus turn to the merits of this claim.

C

1

In a series of decisions beginning with *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (plurality op.), *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), the Supreme Court established that in the capital sentencing context, and under the Eighth and Fourteenth Amendments, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). In this line of cases, the Supreme Court held that capital sentencers may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 455 U.S. at 110 (quoting *Lockett*, 438 U.S. at 604–05); *see also McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). In addition, "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," the "relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored." *Skipper*, 476 U.S. at 5 n.1.

The Supreme Court has also made clear, however, that these constitutional requirements do not render states incapable of placing any limits on what might qualify as mitigating evidence. *Lockett* affirmed that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n.12. Thus, state courts in penalty phase proceedings "'retain the traditional authority to decide that certain types of evidence may have insufficient probative value to justify their admission,'" and "they may enact reasonable rules governing whether specific pieces of evidence are admissible." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1038 (2022) (quoting *Skipper*, 476 U.S. at 11 (Powell, J., concurring in the judgment)). The Supreme Court has thus "expressly held that 'the Eighth Amendment does not deprive' a sovereign 'of its authority to set reasonable limits upon the evidence a capital defendant can submit, and control the manner in which it is submitted." *Id.* (quoting *Oregon v. Guzek*, 546 U.S. 517, 526 (2006)) (alterations omitted); *see also Stenson v. Lambert*, 504 F.3d 873, 891 (9th Cir. 2007) (holding under AEDPA that state court was not objectively unreasonable in excluding claimed mitigating evidence).

Fauber relies heavily on two of our cases, *Summerlin v. Schriro*, 427 F.3d 623, 640 (9th Cir. 2005) (en banc), and *Scott v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009) (per curiam), to argue that his unaccepted plea offer should qualify as mitigating evidence. In *Summerlin*, we held that capital defense counsel provided constitutionally deficient assistance of counsel by "utterly fail[ing] in his duty to investigate and develop potential mitigating evidence for presentation at the penalty phase." 427 F.3d at 631. In explaining why counsel's deficient performance caused

prejudice, we noted (among other things) that the prosecutor had initially offered the defendant a plea agreement that would have spared his life, but the offer was later withdrawn. *Id.* 640–41. We regarded the unentered plea agreement as supportive of *Strickland* prejudice because it showed that "this was not by any means a clear-cut death penalty case." *Id.* at 640.

Summerlin did not address whether the unaccepted plea offer was itself mitigating evidence that the sentencer was required to consider. But *Scott* did address it, although in a somewhat truncated fashion. In *Scott*, we held that the state court had relied on an inadequate procedural bar in denying a capital defendant's request for post-conviction relief. 567 F.3d at 576–77. In detailing the evidentiary proceedings that should take place on remand on the defendant's claim that his counsel provided ineffective assistance at the penalty phase, we specified areas of mitigating evidence that the court should evaluate. *Id.* 583–85. Relevant here, we noted that the prosecution had made a plea offer to the defendant, but that defense counsel had rejected it over the defendant's objection. *Id.* at 584. Citing *Summerlin*, we stated that "evidence of the plea offer could have been introduced during the sentencing phase as mitigation." *Id.* That was because "[t]he plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." *Id.* (citing *Summerlin*, 427 F.3d at 631).[2]

[2] In a parenthetical, *Scott* described *Summerlin* as "holding that evidence the prosecution offered to allow the defendant to plead guilty to second-degree murder and aggravated assault was mitigating evidence that could be admitted in the sentencing phase after the defendant had been found guilty of first-degree murder." *Scott*, 567 F.3d at 584 (citing *Summerlin*, 427 F.3d at 640). While *Scott* would bind us in an appropriate case, its description of *Summerlin* was not accurate.

Although supportive of *Fauber* in some sense, these cases do not govern here. *Summerlin* did not decide the same issue we now consider, 427 F.3d at 640–41, and neither case decided the issue under AEDPA's standard of review, *see Scott*, 567 F.3d at 584, 586 (no state court decision on the merits); *Summerlin*, 427 F.3d at 628–29 (habeas petition filed pre-AEDPA). Regardless of how close *Scott* or *Summerlin* might be to this case, the question before us is whether the California Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added).

And on this point, the Supreme Court has been clear: "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1). It therefore cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam); *see also, e.g.*, *Lopez v. Smith*, 574 U.S. 1, 4 (2014) (per curiam) ("We have emphasized, time and again, that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'"); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam) (holding that under AEDPA, circuit precedent may not be "used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that th[e] Court has not announced").

When we consider the only precedent that matters here—Supreme Court precedent—we cannot conclude that the state court's denial of relief was objectively unreasonable.

The reason is straightforward: the Supreme Court has never held that an unaccepted plea offer qualifies as constitutionally relevant mitigating evidence, whether to rebut future dangerousness or for any other allegedly mitigating reason. *See Hitchcock v. Sec'y, Florida Dep't of Corr.*, 745 F.3d 476, 482 (11th Cir. 2014) ("The Supreme Court has never held that a prosecutor's offer to take the death penalty off the table in return for a guilty plea is a mitigating circumstance."). Fauber relies on the general principle that states "cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty." *McCleskey*, 481 U.S. at 306. But for AEDPA purposes, that general principle is too general. And Fauber has not shown that the California Supreme Court unreasonably applied it.

The Supreme Court has repeatedly reminded lower courts applying AEDPA not to "fram[e] [Supreme Court] precedents at a high level of generality." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam); *see also Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022); *Woods v. Donald*, 575 U.S. 312, 318 (2015). Were the rule otherwise, lower courts "could transform even the most imaginative extension of existing case law into clearly established federal law," "collapsing the distinction between 'an unreasonable application of federal law' and what a lower court believes to be 'an *incorrect* or *erroneous* application of federal law." *Jackson*, 569 U.S. at 512 (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Such an approach "would defeat the substantial deference that AEDPA requires." *Id.*

Here, nothing in Supreme Court precedent establishes that an unaccepted plea offer reflects an "aspect of a defendant's character or record [or] any of the circumstances of the offense," such that a state court must treat it as

constitutionally relevant mitigating evidence. *Eddings*, 455 U.S. at 110. Even if the rule of *Lockett* could be extended in that manner, nothing in Supreme Court precedent mandated that extension. *See White v. Woodall*, 572 U.S. 415, 426 (2014) (holding that AEDPA "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error").

It would therefore not be objectively unreasonable for a state court to instead conclude that an unaccepted plea offer differs from the types of mitigating evidence classically treated as constitutionally relevant, such as cognitive limitations, *see e.g.*, *Smith v. Texas*, 543 U.S. 37, 44 (2004), an abusive upbringing, *see, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 525, 528 (2003); *Eddings*, 455 U.S. at 115; the circumstances of the offense, *see, e.g.*, *Parker v. Dugger*, 498 U.S. 308, 314 (1991); or positive character traits, *see, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 21 (2009) (per curiam). That is, given the various reasons that plea offers are made (and rejected), they could be regarded as not meaningfully tied to the defendant's "personal responsibility and moral guilt," *Enmund v. Florida*, 458 U.S. 782, 801 (1982), or "directly related to the personal culpability of the criminal defendant," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). A state court could thus conclude that introducing this evidence at the penalty phase is not consonant with the constitutional objectives of the penalty phase determination itself.

For these reasons, we respectfully disagree with our fine dissenting colleague that the alleged constitutional violation here is clearly established under AEDPA. The dissent asserts that because the Supreme Court has "adopted a broad rule" "requiring the admission of *any* relevant mitigating

evidence," it follows that the California Supreme Court's decision allowing the exclusion of the plea offer was contrary to clearly established federal law. But under AEDPA, when the Supreme Court sets forth rules that are "more general, . . . their meaning must emerge in application over the course of time." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

That is the case here. The Supreme Court has not categorized an unaccepted plea offer as constitutionally relevant mitigating evidence. *Skipper*, on which the dissent principally relies, did not address that issue. And consistent with the states' traditional authority to place limits on the admission of evidence that is insufficiently probative in mitigation, *Tsarnaev*, 142 S. Ct. at 1038; *Lockett*, 438 U.S. at 604 n.12, the California Supreme Court could reasonably regard an unaccepted plea as qualitatively different from other forms of evidence that have been regarded as constitutionally mitigating. The dissent's contrary position would violate AEDPA's precepts.

2

Further confirmation of this is found in the many cases that have held—contrary to our decision in *Scott*—that unaccepted plea offers do *not* qualify as mitigating evidence. As the Eleventh Circuit has recognized, "[e]vidence of a rejected plea offer for a lesser sentence . . . is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of his crime." *Hitchcock*, 745 F.3d at 483. Indeed, it appears that every other court besides our own has reached this conclusion. *See Wright v. Bell*, 619 F.3d 586, 600 (6th Cir. 2010); *Owens v. Guida*, 549 F.3d 399, 422 (6th Cir. 2008); *Bennett v. State*, 933 So. 2d 930, 953 (Miss. 2006); *Howard v. State*, 238 S.W.3d 24, 47 (Ark. 2006); *Neal v. Commonwealth*,

95 S.W.3d 843, 852–53 (Ky. 2003); *Wisehart v. State*, 693 N.E.2d 23, 64 (Ind. 1998); *Wiggins v. State*, 597 A.2d 1359, 1370 (Md. 1991), *reversed on other grounds by Wiggins v. Smith*, 539 U.S. 510 (2003); *Ross v. State*, 717 P.2d 117, 122 (Okla. Crim. App. 1986).

We do not cite these out-of-circuit lower court cases as reflective of clearly established law under § 2254(d)(1), but rather as demonstrating that fairminded jurists could reach the same conclusion that these many courts have. "[I]n the face of authority that is directly contrary" to our case law, "and in the absence of explicit direction from the Supreme Court," we "cannot hold" that the California Supreme Court's decision violates clearly established federal law. *Boyd v. Newland*, 467 F.3d 1139, 1152 (9th Cir. 2006) (amended op.); *see also Kessee v. Mendoza-Powers*, 574 F.3d 675, 679 (9th Cir. 2009) ("Because the Supreme Court has not given explicit direction and because the state court's interpretation is consistent with many other courts' interpretations, we cannot hold that the state court's interpretation was contrary to, or involved an unreasonable application of, Supreme Court precedent.").

Instead, cases like the Eleventh Circuit's decision in *Hitchcock* show how reasonable jurists could conclude that an unaccepted plea agreement is not constitutionally relevant mitigating evidence. *Hitchcock* held that a capital defendant's non-acceptance of a plea is "devoid of any moral significance" from a capital punishment perspective because Eighth Amendment mitigation is not "a matter of a particular prosecutor's willingness to bargain." 745 F.3d at 482. In particular, the Eleventh Circuit concluded:

> Such a plea offer does not by itself show that the prosecutor believed the defendant did not deserve the death penalty. A plea offer of a

> non-capital sentence in a capital case may simply reflect a desire to conserve prosecutorial resources, to spare the victim's family from a lengthy and emotionally draining trial, to spare them the possibility of protracted appeal and post-conviction proceedings (spanning in this case more than three decades), or to avoid any possibility, however slight, of an acquittal at trial.[3]

Id. at 483. And although it did not decide the question of constitutional relevance on this basis, the Eleventh Circuit pointed out that "requiring the admission of rejected plea offers as mitigating evidence in capital cases could have the pernicious effect of discouraging prosecutors from extending plea offers in the first place." *Id.* at 484 & n.2 (citing *Wright*, 619 F.3d at 600).

Other cases rejecting Fauber's argument have employed similar reasoning as *Hitchcock*. *See, e.g.*, *Wright*, 619 F.3d at 599–601; *Owens*, 549 F.3d at 419–22; *Neal*, 95 S.W.3d at 852–53. And applying AEDPA, the Sixth Circuit in *Wright* rejected Fauber's same argument in response to the defendant's contention that due process allowed him to utilize the unaccepted plea to rebut the prosecution's argument of future dangerousness. *See* 619 F.3d at 599–600 ("Although our opinion in *Owens* did not address the specific rebuttal argument that Wright has made before this court—that Wright should be allowed to present evidence of the alleged plea offer to rebut statements by the State at closing argument suggesting that Wright might pose a

[3] Indeed, as the dissent notes, the prosecutor told the trial court that it made the initial plea offer to Fauber because it "did not have enough evidence to convict Buckley and Rowan."

danger to other inmates if he received a life sentence rather than the death penalty—[*Owens*'s] determination that plea negotiations are not relevant evidence of mitigating circumstances is still relevant here."). As the Sixth Circuit explained, "nothing in the alleged plea offer constitutes relevant evidence that Wright would not pose a danger if given a life sentence." *Id.* at 601. That is because "[t]he existence of a plea offer might indicate only that the state believed its important interests in judicial efficiency and finality of judgments were sufficient to outweigh any potential risk associated with a life sentence, not that those risks did not exist." *Id.*

In sum, other than our decision in *Scott*, the cases that have addressed Fauber's argument side with the California Supreme Court's result and reasoning here. Although *Scott* took a different approach, we do not think the California Supreme Court was objectively unreasonable in resolving Fauber's claim like the majority of courts to have addressed the question. *See Hitchcock*, 745 F.3d at 483 ("We agree with the seven courts (we make it eight) on the majority side of this issue and not with the Ninth Circuit."). Under AEDPA—and until the Supreme Court speaks more specifically on this issue—we cannot say these many other courts were so obviously mistaken. For these same reasons, the dissent's attempt to discern clearly established law in Fauber's favor in the face of so much contrary precedent does not withstand scrutiny.

3

Finally, we note that the California Supreme Court offered a related rationale for holding that the trial court was not required to allow in evidence of Fauber's unaccepted plea: it would require ancillary evidentiary proceedings into "the underlying reasons" for the plea offer and its rejection,

which "had the potential to mislead and confuse the jury." *Fauber*, 831 P.2d at 288. On the facts of this case, that reasoning reflected a valid concern, and certainly was not contrary to or an unreasonable application of clearly established Supreme Court precedent. Indeed, the Supreme Court has recognized that even under *Lockett* and its progeny, evidence can be excluded based on state courts' "evenhanded application" of their evidentiary rules, *Skipper*, 476 U.S. at 6, which could include, in appropriate cases, the usual rules associated with balancing undue prejudice, jury confusion, and consumption of time against possible probative value, *see Fauber*, 831 P.2d at 287–88 (citing Cal. Evid. Code § 352).

These considerations were relevant here. When Fauber sought to have the unaccepted plea introduced, the prosecution asked for "a hearing with witnesses to actually establish the foundational basis" for the submission. The prosecutor explained that he had gone back through his files and located a letter showing that it was Fauber and his counsel who initially proposed a plea arrangement, but that Fauber then "got cold feet"—not because of loyalty towards his friends but "because he didn't want to plead to something that was going to put him in prison for the rest of his life."

The prosecutor further argued that if the trial court were considering allowing the plea offer into evidence, the prosecution would want to show that the offer was based on the State's knowledge of the facts when the offer was made, but that the record had "changed drastically" since that time (with the implication that a plea offer was no longer appropriate). To explore these various issues, the State believed that the prosecutor, defense counsel, and Fauber may all need to testify. It is not apparent Fauber was willing

to do so, which would have likely opened the door to potentially damaging cross-examination.[4]

In whichever way the proceedings would have unfolded in the trial court, it is apparent that introducing Fauber's unaccepted plea and his rejection of it was no straightforward evidentiary matter. That only contributes to our conclusion that the state court's rejection of Fauber's *Lockett* argument—a ruling that was broadly consistent with almost all case law on this issue—was not objectively unreasonable.

D

Even if the trial court's exclusion of the plea offer violated clearly established federal law, there is no basis to conclude that the result of the penalty phase would have been any different had the jury learned of the plea offer and Fauber's rejection of it. The California Supreme Court did not rule on this basis, and Fauber thus argues that AEDPA does not apply. The State does not respond on this point, and so we will evaluate this issue without AEDPA's deferential posture. The standard of review is ultimately immaterial, however, because the exclusion of the plea offer did not have a "substantial and injurious effect or influence" on the jury's decision. *Brecht*, 507 U.S. at 637.

[4] The dissent errs in claiming we have "vastly overstate[d] the complications that might have arisen from admitting the plea offer evidence in this case." Setting aside the fact that Fauber hardly presented his arguments to the state court in the nuanced way that the dissent now does, there is no basis for the dissent's assumption that the only evidence relevant to the State's initial plea offer would come from the prosecutor. Indeed, as we have noted, the prosecutor explained that it was Fauber and his attorney who had originally proposed the plea deal.

We will assume for purposes of our analysis here that Fauber could have used the unaccepted plea agreement to the maximum mitigating effect he claims. For reasons we have already discussed, it is doubtful this assumption is warranted: the prosecution was evidently poised to provide testimony about the circumstances surrounding Fauber's rejection of the plea agreement and how circumstances had changed since the State first discussed a plea offer with him. It seems entirely possible that introduction of the plea agreement could have been unhelpful to Fauber, or at the very least a mixed bag. But again, we will assume otherwise.

An error is harmless in this context when "there is overwhelming evidence of aggravating circumstances and [the] proffered mitigation evidence is limited or relatively minor." *Djerf v. Ryan*, 931 F.3d 870, 886 (9th Cir. 2019) (quotations omitted). Similarly, exclusion of evidence can be harmless when, in light of the mitigating evidence that was presented, the excluded evidence "would not have affected the balance of mitigating against aggravating circumstances." *Runningeagle v. Ryan*, 825 F.3d 970, 985 (9th Cir. 2016). All of this is true here.

As an initial matter, the State presented highly compelling aggravating circumstances. First and foremost, the jury had already heard overwhelming evidence of Fauber's depraved ax-murder killing of Urell, a man he had never met before. Fauber murdered Urell only to avoid being implicated in the burglary of Urell's home. And Fauber went through with the murder despite the victim being tied up and defenseless. Even after striking Urell multiple times and reducing his breathing to labored hissing and later silence, Fauber returned to Urell's room and struck him with the ax again. The highly disturbing autopsy results—which demonstrated that Fauber had broken Urell's

neck and ruptured tough neck ligaments with the blunt side of an ax—underscored the barbarity of the crime and the decidedness of Fauber's actions. The dissent's effort to minimize Fauber's crime as "not especially cruel or heinous" is thus unfounded. Indeed, the circumstances of Fauber's murder of Urell was "[t]he very first factor" in aggravation that the prosecution asked the jury to consider.

At the penalty phase, the State also demonstrated that Fauber had murdered two other people less than three months before killing Urell. Evidence that a capital defendant "had committed another murder" is "the most powerful imaginable aggravating evidence." *Wong*, 558 U.S. at 28 (quotations omitted). And, in this case, the State demonstrated that Fauber murdered not only multiple times but for varied reasons. The Urell murder showed Fauber's capacity for homicide during a violent felony. The circumstances surrounding Fauber's murders of David Church and Jack Dowdy, Jr., meanwhile, confirmed Fauber's propensity for nearly spontaneous acts of extreme violence (Church) as well as targeted, vendetta-style killing (Dowdy).

In the Church murder, Fauber participated in the slaying of an acquaintance merely to prevent the partygoer from reporting Fauber's drug use to the police. As with Urell, Fauber hit Church with an ax handle, commenting to Buckley that Church "was a hard guy to kill."

The Dowdy murder was uniquely alarming for its own reasons, given the series of violent events surrounding Dowdy's death. The victim was one of Fauber's longtime friends. *Fauber*, 831 P.2d at 276. Yet, Fauber repeatedly terrorized his wife and her family because he was romantically interested in her. *Id.* At different points, Fauber pulled a gun on Dowdy, held Kim at gunpoint

because she had hugged a friend, and threatened to "knock her off." *Id* at 276–79. One night, Kim woke up and found that Fauber had broken in and was attempting to strangle her. *Id.* Fauber admitted to multiple witnesses—Buckley, Kim's uncle, and Kim herself—that he killed Jack, whom he believed was preventing him from having a relationship with Kim. *Id.* at 279. After the murder, Fauber's violent conduct continued. He appeared at Kim's grandmother's home and ordered Kim to come with him at knifepoint or he would kill everyone in the house. *Id.* When later confronted by Kim's family, Fauber expressed no remorse. *Id.*[5]

Fauber's plea agreement and his rejection of it paled in comparison to the extensive aggravating evidence of Fauber's three murders and other violent actions.[6] But the unaccepted plea would have also added little to the robust case of mitigation that defense counsel put on. *Cf. Fauber*, 831 P.2d at 297 (Mosk, J., concurring) (explaining that the plea agreement "would have had added little, if anything, of marginal value"). In a substantially comprehensive

[5] The dissent attempts to minimize the aggravating evidence of Fauber killing Dowdy and Church on the theory that this evidence was relevant "primarily because [it] bore on Fauber's future dangerousness," and that if Fauber's unaccepted plea agreement had been introduced, the prosecution "might have decided to avoid making a future dangerousness argument altogether." But there is no basis for the dissent's speculation on this point. And regardless, the evidence of Fauber killing Dowdy and Church was highly relevant to Fauber's reprehensibility, in addition to his future dangerousness.

[6] Fauber argues that the jury struggled to reach a decision at the penalty phase because it submitted a note during deliberations that stated: "If the jury is hung as to the decision, does the life without possibility of parole prevail or does the penalty phase go over again?" But the reason and context for this note is unclear and it cannot overcome the clear import of the record evidence we have discussed above.

mitigation portrait, Fauber's counsel presented evidence of Fauber's troubled childhood, positive qualities, and possible mental instability. Several of Fauber's siblings and friends testified about his unfortunate upbringing, including his dysfunctional family life and the decrepit conditions of his childhood home. They told the jury that Fauber was the youngest of eleven children, only seven of whom survived to adulthood. Fauber's father was an unemployed alcoholic who was verbally abusive and disciplined the children with razor straps, belts, and buckles. Fauber did not finish high school. As a teenager, he was involved in a motorcycle accident that killed one of his brothers.

Counsel also presented two experts who testified about Fauber's background. Dr. Isabel Wright, Ph.D., conducted an eight-month investigation into Fauber's life. She testified based on her travels to Fauber's hometown and her interviews of his neighbors, the school nurse, a Sunday school teacher, a high school vice principal, a special education worker, two counselors, truant and welfare officers, and Fauber's friends, family, and acquaintances. Dr. Edward Grover, a psychologist, examined and ran tests on Fauber. Dr. Grover told the jury that Fauber had average intelligence and a possible organic brain deficit. Dr. Grover also informed the jury that Fauber "had impaired interpersonal skills and some difficulty keeping reality and fantasy separated." Fauber's friends testified that he was a good and caring person.

Although Fauber's mitigation presentation did not convince the jury, it was not without force. And the mitigating evidence that defense counsel did put on was far more powerful and probative of Fauber's character and culpability than the plea deal. We do not mean to suggest, as the dissent claims, that Fauber's mitigating evidence was

"persuasive." Given Fauber's penchant for ax-murder and violent assault, the aggravating factors here substantially outweighed the mitigating evidence that Fauber put forward. Instead, our point is that Fauber's mitigation presentation confirms that he put forward witnesses and experts who could shed light on his character and culpability in a way that the State's plea offer could not. Therefore, there is no reason to believe, as the dissent maintains, that evidence of the plea offer was "likely to tip the scales in favor of a life sentence."

In short, we conclude that any error in the refusal to admit the plea offer was harmless. *See Scott (Roger) v. Ryan*, 686 F.3d 1130, 1135 (9th Cir. 2012) (holding that "[e]ven considering the totality of mitigation evidence that Scott introduced at the district court on remand," including "evidence that the State once offered him a plea bargain," "we cannot say it would have made any difference in the outcome").

* * *

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

WATFORD, Circuit Judge, dissenting in part:

Before Curtis Fauber was tried for capital murder, the Ventura County District Attorney's office offered him a plea deal under which Fauber would be sentenced to life in prison without the possibility of parole, provided that he testified against co-conspirators Brian Buckley and Chris Caldwell. Fauber turned the offer down, went to trial, and was convicted. At the penalty phase of his trial, Fauber sought to introduce evidence of the plea offer to show that the

District Attorney's office did not believe the death penalty was required in his case. The trial court excluded the evidence on the ground that it had minimal relevance and posed a substantial risk of misleading the jury and prolonging the trial. During the penalty phase, the prosecutor argued that Fauber must be executed because he was likely to kill again if sentenced to life in prison. Due to the trial court's ruling, Fauber could not rebut this claim by pointing to the District Attorney's prior offer of a plea deal with a life sentence. This exclusion of relevant mitigating evidence violated clearly established federal law, and the error was not harmless. I would therefore grant Fauber's habeas petition as to the exclusion of the plea offer at the penalty phase.[1]

I

Before the start of the penalty phase, the prosecutor filed a motion in limine seeking to exclude any evidence related to the plea offer. In response, Fauber argued that the offer was relevant mitigating evidence that must be admitted under *Lockett v. Ohio*, 438 U.S. 586 (1978). He asserted two distinct theories of relevance: (1) the plea offer reflected the District Attorney's assessment of Fauber's character and the circumstances of his offense; and (2) Fauber's rejection of the plea offer showed the positive character trait of loyalty to his friends.

The state trial court dismissed the first theory out of hand, declaring that the offer itself was "totally irrelevant."

[1] I agree with the majority that Fauber is not entitled to relief on his ineffective assistance and due process vouching claims. Accordingly, I would not grant Fauber's habeas petition with respect to the guilt phase of his trial.

The court gave greater consideration to the second theory but ultimately ruled that Fauber's rejection of the plea offer was inadmissible under California Evidence Code § 352, which permits the exclusion of evidence when its probative value is substantially outweighed by the risk of delay, unfair prejudice, confusing the issues, or misleading the jury. In the court's view, this evidence could be admitted only if Fauber testified about his reasons for rejecting the offer, which would permit the prosecutor to explain his decision to make the offer in the first place. The court concluded that a mini-trial on the significance of Fauber's rejection of the plea offer risked confusing the issue and misleading the jury.

In both the California Supreme Court and his federal habeas petition, Fauber continued to press both theories of relevance. This appeal, however, involves only the first theory: that the prosecutor's offer of a plea deal for life in prison reflected an assessment of Fauber's character and the circumstances of his offense. As the majority recognizes, Fauber has refined his claim in presenting it to this court. He contends that the plea offer is specifically relevant to rebut the prosecutor's claim that Fauber would pose a danger to others if spared the death penalty. He is not arguing that plea offers are categorically admissible under *Lockett*. Rather, his contention is a more limited one—namely, that when a prosecutor explicitly urges the jury to impose a death sentence on the ground that the defendant will kill again if sentenced to life in prison, *Lockett* and its progeny clearly establish that plea offer evidence must be admitted to refute that claim. Although this argument is more precise than the one Fauber made in state court and before the federal district court, I agree with the majority that we must consider it on the merits.

II

Under the provision of the Antiterrorism and Effective Death Penalty Act (AEDPA) at issue here, a federal habeas court may grant relief only if the state court's decision was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). As noted above, the state trial court concluded that the plea offer itself—as opposed to Fauber's rejection of it—was entirely irrelevant. The California Supreme Court affirmed the exclusion of the plea offer evidence on direct appeal, finding "no violation of constitutional guarantees." *People v. Fauber*, 2 Cal. 4th 792, 856 (1992).

A

The Eighth and Fourteenth Amendments require that a capital defendant be permitted to introduce any relevant mitigating evidence during the penalty phase of his trial. This principle, first articulated by a plurality of the Supreme Court in *Lockett*, was clearly established by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). By the time of Fauber's trial in 1987, the Court had also clearly established that evidence showing that a defendant would not pose a danger if spared the death penalty must be admitted under *Lockett*. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). Here, the State's plea offer was evidence suggesting it had determined, at some point in the case, that Fauber was not so likely to kill again that he must be executed to prevent future violence.

The Supreme Court has held that the relevance of such evidence is "underscored" when the State "specifically relies on a prediction of future dangerousness in asking for the death penalty." *Skipper*, 476 U.S. at 5 n.1. In *Skipper*, the

state court refused to admit evidence from which the jury could infer that the defendant would not be violent in prison. *Id.* at 3. With this ruling in hand, the prosecutor then argued that the defendant would likely cause disciplinary problems and rape other inmates if he were sentenced to life in prison. *Id.* The Court held that the defendant's evidence must be deemed relevant and potentially mitigating and that its exclusion violated *Lockett*. *Id.* at 5.

In Fauber's case, the State's prediction was even more dire. During closing arguments, the prosecutor explicitly told the jury that Fauber was "a man who, if given the opportunity, will kill again." Just as in *Skipper*, the prosecutor argued that death was the only appropriate penalty after successfully excluding evidence that would have rebutted that very claim. And, as the Supreme Court recognized in *Skipper*, the manifest unfairness of this tactic confirms the relevance of the plea offer evidence.

The California Supreme Court concluded that Fauber's plea offer was not relevant mitigating evidence because the offer was "susceptible of numerous inferences" and did not unequivocally show that Fauber was not likely to be violent in prison. 2 Cal. 4th at 857. As a factual matter, the court was correct: The plea offer could have reflected an assessment of Fauber's future dangerousness, an attempt at leniency, or the prosecutor's reluctance to go to trial. But the mere fact that a jury could draw different inferences from a piece of evidence does not render it irrelevant. By the time of Fauber's direct appeal, the Supreme Court had clearly established that evidence is relevant under *Lockett* whenever it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *McKoy v. North Carolina*, 494 U.S. 433, 440

(1990) (internal quotation marks omitted). The State's willingness to offer a plea deal with a life sentence made it more probable that Fauber did not pose an unacceptably high risk of killing again in prison. And the plea offer evidence easily meets this low bar even if the offer was motivated primarily by other considerations.

B

The State offers three reasons why we should reject this conclusion and dismiss Fauber's claim. None of them are persuasive.

First, the State notes that Fauber cannot point to a Supreme Court decision specifically holding that plea offers are relevant mitigating evidence under *Lockett*. The majority opinion relies heavily on this argument, warning that we are not permitted to frame the Supreme Court's precedents at "a high level of generality." Maj. op. at 36 (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam)). But the Supreme Court has also instructed that AEDPA's demand for clearly established law can be satisfied by a general standard; the statute "does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal quotation marks omitted). This is particularly true when the Court has adopted a broad rule—such as requiring the admission of *any* relevant mitigating evidence—and there are potentially infinite forms that such evidence could take. Here, Fauber argues that evidence of a prior plea offer must be admitted when the prosecutor relies on a prediction of future dangerousness in arguing for the death penalty. He need not identify a Supreme Court decision addressing this narrow factual circumstance to prevail on his claim.

The majority recites a long list of mitigators that the Supreme Court has recognized under *Lockett*, pointing out that it does not include plea offer evidence. Maj. op. at 37. But the breadth of this list merely confirms that the *Lockett* rule is expansive and should not be applied rigidly in the AEDPA context. In fact, the only specific category of potentially mitigating evidence that the Supreme Court has held excludable under *Lockett* is evidence of "residual doubt" as to the defendant's guilt. *Oregon v. Guzek*, 546 U.S. 517, 523–27 (2006); *see also Franklin v. Lynaugh*, 487 U.S. 164, 172–73 (1988) (plurality opinion). As the Court pointed out in *Guzek*, such evidence is logically irrelevant to the sentencing-phase inquiry because the defendant's commission of the offense was already conclusively determined at the guilt phase. 546 U.S. at 526. The same cannot be said about the plea offer evidence in this case.

Second, the State argues that the plea offer is irrelevant because it represents only the opinion of the District Attorney's office. The State notes that a prosecutor is categorically prohibited from expressing the alternative view, that is, his personal belief that a defendant deserves the death penalty. Hence, the State reasons, the prosecutor's contrary view must be legally irrelevant.

The State's argument relies on a faulty premise. The rule prohibiting prosecutors from offering their personal view of a defendant's guilt rests on principles of fairness, not relevance. It was created to prevent prosecutors from invoking their authority and credibility to sway juries and obtain unreliable convictions, as both the Supreme Court and our court have recognized. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. McKoy*, 771 F.2d 1207, 1211–12 (9th Cir. 1985). We therefore cannot infer

from the prohibition against expressing personal views of guilt that the District Attorney's assessment of a defendant's potential future dangerousness is irrelevant to the jury's decision. To the contrary, it is entirely reasonable for a jury to expect that, when making charging decisions concerning the death penalty, a prosecutor will take into account the risk that a defendant will be violent in the future.

This is not to say that a plea offer must invariably be admitted in any capital case to show in general terms that "the prosecution believed that a death sentence was not warranted." *Hitchcock v. Secretary, Florida Department of Corrections*, 745 F.3d 476, 480 (11th Cir. 2014). Here, the offer was admissible for the specific purpose of showing the District Attorney's implicit evaluation of Fauber's future dangerousness. The prosecutor's prediction that Fauber would kill again if spared the death penalty put the issue squarely before the jury, and Fauber was entitled to present any relevant evidence that could rebut this argument.

Third, and finally, the State points out that other state and federal courts have held that plea offers are not relevant mitigating evidence. But only one of those cases addressed the argument presented here—that a plea offer is admissible to rebut a prosecutor's claim of future dangerousness. In *Wright v. Bell*, 619 F.3d 586 (6th Cir. 2010), the Sixth Circuit rejected this argument, concluding that "nothing in the alleged plea offer constitutes relevant evidence that Wright would not pose a danger if given a life sentence." *Id.* at 601. Instead, a plea offer "might indicate only that the state believed its important interests in judicial efficiency and finality of judgments were sufficient to outweigh any potential risk associated with a life sentence, not that those risks did not exist." *Id.* Like the California Supreme Court in Fauber's case, the Sixth Circuit erroneously concluded

that a piece of evidence is irrelevant simply because it is susceptible to multiple inferences. As discussed above, this reasoning is in clear conflict with the expansive definition of relevance that the Supreme Court established in *McKoy*. *See* 494 U.S. at 440.

In the two other federal circuit court decisions to address the admissibility of plea offers under *Lockett*, the defendants argued that the offers demonstrated the prosecutor's belief that their crimes did not deserve the death penalty, but they could not offer any more specific reason why the plea offers were relevant. *See Hitchcock*, 745 F.3d at 480; *Owens v. Guida*, 549 F.3d 399, 420 (6th Cir. 2008). Thus, we should not be surprised that the *Hitchcock* court saw no mitigating value in the mere fact that the defendant "would not have received a death sentence if only he had accepted the plea offer." 745 F.3d at 482. And even in that case, one judge cautioned against overreading the majority opinion. *See id.* at 488 (Wilson, J., concurring in the judgment) ("[E]ven if the Majority is correct about the irrelevance of plea negotiations in this case, such negotiations may be relevant for a host of other reasons that should be evaluated as they arise."). In *Owens*, the Sixth Circuit relied on the same flawed reasoning that appeared in *Wright*, holding that the plea offer was inadmissible because the record did not show whether the offer reflected a judgment that the defendant did not deserve death or, instead, merely a desire to conserve prosecutorial resources. 549 F.3d at 420.

The issue of future dangerousness appeared in only two of the cited state court decisions, and never in the context of a *Lockett* claim. In one case, the defendant argued that the prosecutor's prediction of future dangerousness amounted to misconduct. *See Wisehart v. State*, 693 N.E.2d 23, 60 (Ind. 1998). The other involved a challenge to the evidence

supporting the aggravating circumstance that the defendant constituted a continuing threat to society. *See Ross v. State*, 717 P.2d 117, 123 (Okla. Crim. App. 1986). In each case, the court's brief discussion of the plea offer evidence did not address whether the offer might have been relevant to rebut the prosecutor's future dangerousness argument. *See id.* at 122; *Wisehart*, 693 N.E.2d at 64.

The majority opinion contends that the exclusion of the plea offer evidence was a permissible application of California Evidence Code § 352. It suggests that admitting the evidence would have required testimony from the prosecutor, the defense attorney, and Fauber, and that these ancillary proceedings might have confused or misled the jury. Maj. op. 41–42.

I agree with the majority that *Lockett* does not prevent States from applying rules such as California Evidence Code § 352 during penalty-phase proceedings, but the majority vastly overstates the complications that might have arisen from admitting the plea offer evidence in this case. Recall that Fauber argued in the state trial court that both the plea offer itself and his rejection of it were relevant. Testimony from Fauber or his attorney would have been required only if the jury needed to know Fauber's reasons for *rejecting* the offer. The claim at issue in this appeal depends entirely on the prosecutor's decision to *make* the offer. The only additional evidence required would be testimony regarding his reasons for making the offer and later seeking the death penalty. As discussed further below, the plea offer evidence has significant probative value, and the California Supreme Court could not reasonably have determined that its value was substantially outweighed by the risk of confusion from the prosecutor's limited testimony.

III

If a petitioner establishes that the state court unreasonably applied clearly established federal law, a federal habeas court must determine whether the error was harmless. When the state court has not considered the harmlessness issue, AEDPA's deferential standard of review does not apply. Instead, the petitioner is entitled to relief if he can show that the exclusion had a "substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Because the California Supreme Court found no error in the exclusion of the plea offer evidence, it did not consider whether the error was harmless. Thus, only the *Brecht* standard applies to Fauber's claim. I would hold that the exclusion of the plea offer had a substantial and injurious effect on the jury's verdict and that Fauber is therefore entitled to relief.

The prosecutor's prediction that Fauber would kill again likely played a critical role in the jury's decision to impose the death penalty. Empirical research has shown that "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559–60 (1998). The majority places substantial weight on the other killings that the government sought to prove during the penalty phase. Maj. op. at 45–46. But those acts of violence—to the extent they were in fact proved—were relevant primarily because they bore on Fauber's future dangerousness. The prosecutor argued that Fauber had killed three people in as many months during the summer of 1986 and, in his closing argument, asked the jury to infer that Fauber would do so again. The plea offer evidence would have blunted this future dangerousness argument by suggesting that the

District Attorney's office did not believe Fauber actually posed so great a risk of future violence.

At a hearing outside the presence of the jury, the prosecutor explained that, at the time he made the offer to Fauber, the District Attorney's office did not have enough evidence to convict Buckley and Rowan. The prosecutor evidently believed that the benefit of securing Fauber's testimony against his co-conspirators outweighed the risk that Fauber would kill again. Presumably, the trial judge would have permitted the prosecutor to testify or introduce evidence of this calculus, and the jury could have decided how much weight to give to the plea offer. The prosecutor, at least, believed that the evidence would have damaged his case, as he repeatedly told the judge that it was "extremely prejudicial." The prosecutor was particularly concerned about appearing to be a hypocrite in front of the jury, and he might have decided to avoid making a future dangerousness argument altogether. Without that argument, the evidence related to the Church murder and the Dowdy disappearance loses much of its force.[2]

The remainder of the State's case in aggravation was far from overwhelming. The circumstances of the Urell murder did not make Fauber's case an obvious candidate for the

[2] Although the majority purports to give the plea offer evidence the full mitigating value that Fauber claims, it suggests that introduction of the plea offer evidence might have actually harmed Fauber's case because it would have exposed him to damaging cross-examination. Maj. op. 42–43. In doing so, the majority conflates the two theories of relevance that Fauber put forward before the trial court. This appeal involves only the claim that the plea offer itself, rather than Fauber's rejection of it, was relevant admissible evidence. Thus, there would be no need for Fauber to testify as to his reasons for rejecting the offer and no risk of cross-examination.

death penalty. Fauber's actions did not risk harming anyone other than his intended victim, and the crime, while violent, was not especially cruel or heinous. In fact, Urell's killing occupied only 11 transcript pages of the prosecutor's 64-page closing argument during the penalty phase.

On the other side of the equation, the State and the majority acknowledge that Fauber put on a robust case in mitigation. Maj. op. at 47–48. His trial counsel called three experts and over twenty character witnesses, many of whom testified to Fauber's good character and stated that they would stand by him even after his conviction. The majority contends that, because this mitigating evidence was so persuasive, the plea offer evidence was unlikely to have made a difference. The majority has it backwards: The strength of Fauber's case in mitigation supports his argument that exclusion of the plea offer evidence was prejudicial. If the balance between aggravating and mitigating factors was already close in the minds of the jurors, the addition of the plea offer evidence was more likely to tip the scales in favor of a life sentence.[3]

* * *

The California Supreme Court's decision affirming the exclusion of Fauber's plea offer evidence during the penalty phase involved an unreasonable application of clearly established federal law, and the error was not harmless under *Brecht*. Accordingly, I would reverse the district court's

[3] In fact, we have direct evidence from the jury that this case was a close call. During penalty-phase deliberations, the jurors submitted a note asking whether, if the jury hung, the penalty phase would be repeated or Fauber would instead receive a sentence of life in prison. At the very least, this evidence suggests that the jury was not immediately unanimous in its decision to impose the death penalty.

decision in part and grant Fauber's habeas petition as to his death sentence.

JS - 6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CURTIS LYNN FAUBER, Petitioner, v. RON DAVIS, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 95-6601 GW **DEATH PENALTY CASE** JUDGMENT

Pursuant to the Order Denying Second Amended Petition for Writ of Habeas Corpus issued simultaneously with this Judgment, IT IS HEREBY ORDERED AND ADJUDGED that the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody under Sentence of Death is denied, that Claims 50 and 55 are dismissed without prejudice, that all other claims are denied with prejudice, and that judgment is entered in favor of Respondent and against Petitioner. The Order constitutes final disposition of the Petition by the Court.

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The Clerk is ordered to enter this judgment.

IT IS SO ORDERED.

Dated: This 10th day of May, 2016.

GEORGE H. WU
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CURTIS LYNN FAUBER,

Petitioner,

v.

RON DAVIS, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 95-6601-GW

DEATH PENALTY CASE

ORDER DENYING SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

[Docket No. 304]

Claims 8-10, 22, 23, 28, 41(a)(1)(13-14 and 16-17), 41(a)(4), 41(b)(5)(74-75), and 62 of petitioner Curtis Lynn Fauber's Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody under Sentence of Death ("Pet.") are under submission. (*See* Dkt. 355 at 2.)[1] The Court informed the parties that unless it gave notice to the contrary, it would decide the claims on the existing briefing. (*Id.*) On March 17, 2017, Petitioner filed a Notice of Recent Authorities as to the claims. (*See* Dkt. 381.)

[1] Although the Court stated that Claims 41(a)(1)(18-21) also remained under submission (Dkt. 355 at 2), the Court had, in fact, denied those Claims in its November 2002 Order on Petitioner's Motion for Evidentiary Hearing (Dkt. 158 at 107-08), as set forth below. (*See infra* at 29.)

Because the facts of the case are set forth at length in the Court's November 20, 2002 Order on Petitioner's Motion for Evidentiary Hearing (Rea, J.) (Dkt. 158), they are repeated here only to the extent necessary for analysis of the claims. To fully understand the discussion of the issues in this Order, one should read the California Supreme Court's decision in *People v. Fauber*, 2 Cal. 4th 792 (1992), along with this Court's October 12, 2016 Order dismissing Claims 50 and 55 and denying Claims 2, 5-9, 11, 13, 14, 16-19, 20(b), 21, 26, 27(b), 29-36, 38-40, 41(a)(1)(13-15 and 17), 41(a)(2), 41(a)(4), 41(a)(6)(44), 41(b)(1-2), 41(b)(5)(72-73), 41(b)(6), 42, 46, 49, 51-54, 56, and 58-61. (Dkt. 344.)

As stated in the October 12, 2016 Order, Petitioner's claims are governed by 28 U.S.C. § 2254(d) as amended by the Antiterrorism and Effective Death Penalty Act of 1996. (Dkt. 344 at 2.) Because the United States Supreme Court has made clear that review under 28 U.S.C. § 2254(d) is limited to the record before the state court, the Court reconsiders the merits of the claims as to which the Court granted an evidentiary hearing in the November 20, 2002 Order. (Dkt. 158.)

I. Claims 8 and 41(a)(1)(17): Impeachment of Brian Buckley with Vehicular Assault

In Claim 8, Petitioner challenges the constitutionality of the trial court's ruling limiting the scope of Brian Buckley's cross-examination. (Pet. at 56-57.) The trial court ruled that Buckley could be cross-examined with evidence that he had once attempted a vehicular assault in a parking lot only if his testimony opened the door to such evidence. (*See id.* at 57); *see also Fauber*, 2 Cal. 4th at 830. Defense counsel argued the issue at trial. *See Fauber*, 2 Cal. 4th at 830. In Claim 8, however, Petitioner contends that the trial court should have allowed the evidence on a ground not raised at trial, namely, "that the fact that Buckley had never been prosecuted for the assault showed the willingness of the police and prosecutor to overlook his wrongdoings, which in turn showed Buckley's bias and willingness to testify for the prosecutor in the Urell case." *Id.* at 830-31; (Pet. at

57). Petitioner does not raise counsel's failure to make that argument as a basis for habeas relief. (*Compare* Pet. at 143 (Claim 41(a)(1)(17)) (arguing only that counsel should have impeached Buckley with the vehicular assault).)[2]

On direct appeal, the California Supreme Court held that because trial counsel did not raise that ground of admissibility at trial, the claim was procedurally defaulted. *Fauber*, 2 Cal. 4th at 831. The court went on to hold, as set forth below, that even if the claim were properly before it, it failed on the merits. *Id.*

This Court granted an evidentiary hearing to allow Petitioner to show cause and prejudice to excuse his procedural default, "subject to the requirement that [P]etitioner first show that the underlying claim[] would entitle him to relief." (Dkt. 158 at 152.) The Court now determines that no evidentiary hearing is required on the issues of cause and prejudice because the latter can be resolved on the existing record. Petitioner has, likewise, failed to show that the underlying claim would entitle him to relief.

The California Supreme Court held on direct appeal that:

> since the jury was well aware of the terms under which Buckley was testifying, and in particular of the differential between the sentences for first and second degree murder, the jury was perforce aware of Buckley's bias and willingness to testify for the prosecution. We are unpersuaded that evidence of the parking lot incident would have had a significant impact on the jury's assessment of Buckley's credibility.

Fauber, 2 Cal. 4th at 831. The California Supreme Court's decision that any trial error was constitutionally harmless is not objectively unreasonable. As the court

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[2] Section A of Claim 41 in the Amended Petition and Second Amended Petition is an introduction. Petitioner's claims for relief begin in section B. In its November 20, 2002 order, the Court referred to the claims in section B as 41(a), and the claims in section C as 41(b). For the sake of consistency, the Court uses the nomenclature of its November 20, 2002 order.

held, Buckley's bias toward and motivation for cooperating with the prosecution were amply demonstrated through his participation in the instant crimes and his plea agreement with the District Attorney. The state court reasonably concluded that any error by the trial court in preventing Petitioner from showing additional evidence of that bias and motivation was harmless. Petitioner could not, therefore, show prejudice from any ineffective assistance of counsel in failing to argue the issue in the way Petitioner now frames it, as necessary to excuse his procedural default. Claim 8 is, therefore, DENIED.

In addition, because Petitioner cannot show prejudice from any ineffective assistance of counsel in failing to impeach Buckley with the vehicular assault, Claim 41(a)(1)(17) is DENIED.

II. Claim 9: Inducements for Buckley's Testimony

In Claim 9, Petitioner alleges that the State "concealed and misrepresented the nature of the inducements offered" to Buckley in exchange for his testimony. (Pet. at 58.)[3]

First, Petitioner alleges that the prosecutor misled the jurors by telling them that even if Buckley "truthfully confessed to killing Urell on the stand, Buckley had nothing to fear from the prosecution." (Pet. at 58-59; *see* RT 3790-91.) Petitioner argues that if Buckley were to confess to killing Urell, the prosecution would follow the provisions of the plea agreement to request a finding by the trial judge that Buckley had testified falsely. (*Id.* at 59; *see* Pet. Ex. 197 ¶ 5.) Petitioner then alleges that "[i]f the court's finding was consistent with the credibility determination made by the State – *i.e.*, that Buckley was credible when

[3] Petitioner includes Melville Rowan in this statement, but fails to make any further allegations about Rowan in Claim 9. (*See* Pet. at 58-61.) To the extent Petitioner asserts the claim as to Rowan, it is denied as conclusory. *See Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) ("[Petitioner's] cursory and vague claim cannot support habeas relief."); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

implicating Fauber and not when he exonerated Fauber – the State would not only charge Buckley with perjury, but it would try him for first degree murder in Urell's death." (*Id.*)

Petitioner's argument cannot succeed, because it is premised on an erroneous finding by the trial judge. In Petitioner's hypothetical, Buckley "*truthfully* confesse[s] to killing Urell on the stand." (Pet. at 58-59 (emphasis added).) The trial judge goes on to find, however, that Buckley was "*not [credible]* when he exonerated Fauber" in his testimony. (*Id.* at 59 (emphasis added).) The California Supreme Court may have reasoned that Petitioner had no right to have the prosecutor inform the jury of the consequences of an erroneous ruling by the trial judge. *Cf. Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("A defendant has no entitlement to the luck of a lawless decisionmaker . . . ."). The court may have reasonably concluded that even if the agreement's credibility provisions should not have been admitted, the prosecution did not conceal or misrepresent the nature of the agreement. (*See* Pet. Ex. 197 ¶ 5; *infra* at 7-17.)

Second, Petitioner alleges that the prosecution failed to inform the jury that Buckley faced prosecution for the murder of David Church, a commercial burglary and the theft of two motorcycles, and the vehicular assault. (Pet. at 59-60.) Petitioner alleges that the prosecution "misled" the jury about these "inducements for Buckley to conform his testimony to the prosecution theory." (*Id.* at 60.) He further alleges that the prosecution withheld "the nature of [Buckley's] agreement with the State" from Petitioner. (*Id.*)

The California Supreme Court addressed this claim on direct appeal:

> Apart from the Urell matter, defendant contends, Buckley was subject to prosecution for his role in (1) a commercial burglary and theft of motorcycles, (2) an assault with a vehicle in a parking lot, and (3) the murder of David Church. If there was an agreement with the prosecutor regarding these episodes, defendant reasons, it was never disclosed to the jury; if there

was no such agreement, the jury never learned that Buckley had other incentives to testify against defendant.

The flaw in defendant's argument is the absence of evidence that Buckley in fact feared prosecution for the other offenses. Nothing in the record indicates that Buckley was ever charged in connection with any of these crimes, and there is insufficient evidence before us to warrant the belief that prosecution was a reasonable probability.

As to the motorcycle theft incident, Buckley admitted on cross-examination in the penalty phase that in the summer of 1986 he and Christopher Caldwell stole two motorcycles and that Caldwell was convicted of the offense, but that he himself was not charged. Defendant suggests no reason why his counsel could not have argued, at either phase of trial, that Buckley remained vulnerable to charges arising out of this incident. In any event, the record contains insufficient evidence to enable us to conclude that he feared prosecution.

As to the parking lot incident, the record indicates that during the guilt phase of trial, defense counsel was aware that Buckley had been accused of trying to run down an individual in a parking lot, but that nothing had come of the incident. The trial court properly refused to allow counsel to use the evidence to impeach Buckley's testimony by showing that he had a violent character, but permitted counsel to use it as impeachment in the event Buckley claimed to be a nonviolent person. Counsel did not bring up the subject . . . . As with the motorcycle incident, . . . the record lacks evidence from which we can confidently say Buckley could have been prosecuted.

Finally, as to the murder of David Church, the evidence does not support the conclusion that Buckley was subject to prosecution. Evidence at the penalty phase indicated that defendant and Caldwell removed Church from Buckley's apartment and killed him with an ax handle. Defendant cites drug use during Buckley's party and Buckley's desire to rid himself of an obnoxious gatecrasher as possible motives for murder. He also notes that the murder weapon belonged to

> Buckley. The inference is far from compelling, however, that Buckley had reason to fear prosecution for Church's killing. . . .
>
> The lack of evidence that Buckley either feared prosecution for other crimes or had some undisclosed agreement regarding those offenses leads us to conclude that defendant has failed to prove that the prosecutor misled the jury.

Fauber, 2 Cal. 4th at 824-25, 825 n.7 (internal citations and footnote omitted).

Petitioner does not explain how his claim satisfies 28 U.S.C. § 2254(d). He does not address how the California Supreme Court's decision was contrary to or an unreasonable application of federal law under § 2254(d)(1), or an unreasonable determination of the facts in light of the evidence under § 2254(d)(2). Petitioner does not address the decision on direct appeal in his Petition or Traverse. He did not move for an evidentiary hearing on the claim or file more than a cursory opposition to Respondent's motion for summary judgment. (*See* Opp. at 268-69 (relying on "flaws in California's review of habeas petitions [that] render[] its decisions unreasonable," the alleged invalidity of state procedural bars, and the allegations in the Petition "to explain why claim[] 9 [and twelve others] satisfy the requirements of the AEDPA, state claims upon which relief should be granted, and . . . entitle Fauber to factual development and/or habeas relief").) Because Petitioner fails to carry his burden of demonstrating the state court's decision to be unreasonable, Claim 9 is DENIED.

III. Claims 10(a)-(c) and 41(a)(1)(16): Buckley Plea Agreement and Vouching

A. Background and Allegations

At the beginning of Buckley's testimony and again in the prosecutor's guilt phase closing argument, the prosecutor read to the jury the terms of Buckley's plea agreement. *Fauber*, 2 Cal. 4th at 820; (*see also* RT 3307-10, 3787-90). The prosecutor also referred to the agreement in his guilt phase rebuttal and penalty

phase closing arguments. (RT 3839, 3846, 5545.) The agreement, memorialized in a letter from the prosecutor to Buckley's attorney, read:

> 1. Mr. Buckley is charged in the above-entitled complaint as follows:
>
> Count 1 - Murder of Thomas C. Urell on July 16, 1986, in violation of section 187 PC.
>
> Count 2 - Robbery of Thomas C. Urell on July 16, 1986, in violation of section 211 PC.
>
> Count 3 - Burglary of the residence of Thomas C. Urell on July 16, 1986, in violation of section 459 PC, within the meaning of sections 460.1, 462(2), and 667 PC.
>
> 2. The District Attorney's Office offers to move the court to declare the murder to be murder in the second degree. In turn, Mr. Buckley must testify truthfully as a witness against Curtis L. Fauber regarding Fauber's participation in and all other facts known to Mr. Buckley regarding the murders of Thomas A. [sic] Urell, David W. Church, and Jack D. Dowdy, Jr., and testify truthfully as a witness in any proceeding concerning Christopher A. Caldwell regarding Caldwell's participation in and all the other facts known to Mr. Buckley regarding the murder of David W. Church.
>
> 3. Before any agreement can be reached, Mr. Buckley must submit to a preliminary interview by members of the District Attorney's Office to assess his credibility. In the event that the District Attorney's Office decides that Mr. Buckley is not telling the truth, then no agreement will be reached, and the above-entitled case will proceed to trial. Any statements by Mr. Buckley during this preliminary interview, of course, will not be used against him in a subsequent trial.
>
> In the event that the District Attorney's Office decides that Mr. Buckley is telling the truth, the District Attorney's Office will enter into an agreement with itemized terms four through seven, as set out below.

4. Mr. Buckley will plead guilty to Count 1, in the above-entitled information. He will waive time for sentencing, and his sentencing will be continued until the completion of both the trial of Curtis L. Fauber and the preliminary hearing for Christopher A. Caldwell.

5. Mr. Buckley will make himself available, and will testify truthfully in any proceedings in the prosecution against Curtis L. Fauber for his participation in the murders of Thomas C. Urell, David W. Church, and Jack D. Dowdy, Jr., and in any proceedings in the prosecution against Christopher A. Caldwell for his participation in the murder of David W. Church. In the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judges who preside over these hearings.

6. Following the conclusion of the trial against Curtis L. Fauber, and the preliminary hearing against Christopher A. Caldwell, Mr. Buckley will be sentenced on case number CR-23005. If Mr. Buckley has complied with the terms of this agreement, as fully as possible as of that date, the District Attorney's Office will move the court to declare the murder to be murder in the second degree, and Mr. Buckley will be sentenced on that charge. At that time, the remaining counts will be dismissed. Mr. Buckley will remain obligated to testify in the remaining proceedings as specified above.

7. If, however, Mr. Buckley has not complied with the terms of this agreement, the District Attorney's Office will not be bound to move the court to declare the murder to be murder in the second degree, nor will the District Attorney's Office be bound to dismiss the other two counts. At that time, Mr. Buckley will be allowed to withdraw his plea, and case number CR-23005 will proceed to trial. As stated in item five, the trial judges who hear Mr. Buckley's testimony in the various proceedings will make and [sic] necessary findings as to his truthfulness.

This offer expires at the close of the Peoples' [sic] case in the trial against Curtis L. Fauber (approximately January 8, 1988).

(Pet. Ex. 197.)

In his guilt phase closing argument, the prosecutor informed the jury that "[a]t sentencing the crime will be reduced to second degree murder." (RT 3786.) By the terms of the agreement, the prosecution would only move for the crime to be reduced to second degree murder if the prosecution believed Buckley to have testified truthfully. In addition, the prosecutor told the jury that "[t]he most important part of that agreement is that if there is some dispute as to Brian Buckley's truthfulness, that dispute will be determined by the trier of fact, the Judge who hears the proceedings in which Brian Buckley testifies." (RT 3780-81; *see also id.* at 3787, 3790, 3803.) In his guilt phase rebuttal argument, the prosecutor asserted that defense counsel:

> did not go over the agreement itself with you and make some argument that this does not establish Brian Buckley's credibility.
>
> He did not address the point that the agreement requires that Brian Buckley testify truthfully, and that that truth would be determined by the judge who heard the proceedings, in this case Judge Bradley [presiding over Fauber's trial], if there was any dispute as to his credibility.

(*Id.* at 3839.)

Petitioner alleges that the arguments suggested to the jury that there was no dispute as to Buckley's credibility. (*See* Pet. at 62-63.) He argues that in emphasizing the terms of Buckley's plea agreement requiring his truthfulness, the prosecutor improperly vouched for Buckley's credibility, implying that both the prosecutor and the trial judge believed Buckley to have been truthful. (Pet. at 62-65, 66 (Claims 10(a) and (c)); *see also id.* at 65-66 (Claim 10(b) (alleging that the introduction of the plea agreement violated his Confrontation Clause rights)).) Petitioner further alleges that counsel provided ineffective assistance in failing to object to the admission of the plea agreement. (*Id.* at 143 (Claim 41(a)(1)(16)).)

The California Supreme Court rejected sections (a) and (c) of Claim 10 in a reasoned opinion on direct appeal. The court held that because trial counsel failed to object to the prosecutor's reading of the plea agreement, the claim was procedurally defaulted. *Fauber*, 2 Cal. 4th at 821. The court went on to hold, as set forth below, that even if the claim were properly before it, it failed on the merits. *Id.* The court summarily denied Petitioner's ineffective assistance claim on habeas review.

This Court granted an evidentiary hearing to allow Petitioner to show cause and prejudice to excuse his procedural default, "subject to the requirement that [P]etitioner first show that the underlying claim[] would entitle him to relief." (Dkt. 158 at 152; *see also* Lodg. Doc. C-1 Ex. A (declaration of trial counsel that "at the time of trial [he] was not aware of any legal grounds upon which [he] could object to [the credibility] portions of the Buckley plea letter" and that he "had no tactical reason for allowing [the prosecutor] to read the entire Buckley plea bargain into the record").)

The Court now determines on the basis of the state court record that Petitioner cannot show the underlying claim to entitle him to relief.

B. Decision on Direct Appeal

In assessing the merits of Petitioner's claim on direct appeal, the California Supreme Court explained:

> We agree that the plea agreement's reference to the district attorney's preliminary determination of Buckley's credibility had little or no relevancy to Buckley's veracity at trial, other than to suggest that the prosecutor found him credible. Thus, the reference should have been excised on a timely objection on the ground of irrelevancy.
>
> We conclude, however, that its presentation to the jury was harmless under these circumstances. The prosecutor argued for Buckley's credibility based on the evidence adduced at trial,

not on the strength of extrajudicial information obliquely referred to in the plea agreement. Moreover, common sense suggests that the jury will usually assume – without being told – that the prosecutor has at some point interviewed the principal witness and found his testimony believable, else he would not be testifying. We note, too, that the requirement that Buckley preliminarily satisfy the prosecutor as to his credibility cuts both ways: it suggests not only an incentive to tell the truth but also a motive to testify as the prosecutor wishes. Thus, even if defendant had preserved an objection to admission of the challenged portion of the Buckley plea agreement, we would decline to reverse his conviction.

Defendant further argues that the plea agreement made the trial court a monitor of Buckley's truthfulness, and thereby placed its prestige behind Buckley's testimony, by providing that '[i]n the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judges who preside over these hearings.' . . .

The provision detailing the judge's determination of Buckley's credibility in the event of any dispute arguably carried some slight potential for jury confusion, in that it did not explicitly state what is implicit within it: that the need for such a determination would arise, if at all, in connection with Buckley's sentencing, not in the process of trying defendant's guilt or innocence. For these reasons, had defendant objected to its admission, the trial court would have acted correctly in excluding it on a relevancy objection.

Nonetheless, we see no possibility that defendant was prejudiced by its admission. The jury could not reasonably have understood Buckley's plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether Buckley's testimony was truthful. Nor could the jury have been misled by prosecutorial argument. The prosecutor argued that Buckley had nothing to gain by lying because the trial court would make a determination of his credibility in the event of a dispute. The context of the remarks made it clear that

> determination would occur if the prosecutor sought to repudiate its agreement with Buckley after trial in defendant's case.
>
> Our conclusion is reinforced by the fact that the trial court instructed the jury, before the start of the prosecution's case and after closing argument, that '[e]very person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony.' We presume, in the absence of any contrary indication in the record, that the jury understood and followed this instruction. The prosecutor, in his opening statement, likewise emphasized the jurors' role as sole judges of credibility.

Fauber, 2 Cal. 4th at 822-24 (internal quotation, citations, and footnote omitted).

C. Legal Standard

"The clearly established Federal law relevant here is [the United States Supreme Court's] decision in *Darden v. Wainwright*, 477 U.S. 168 (1986), which explained that a prosecutor's improper comments will be held to violate the Constitution only if they so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam) (internal quotations omitted; internal citation edited). This Court assumes without deciding that applying *Darden* to a prosecutor's improper vouching for a witness by implying that the trial judge was monitoring the witness's credibility does not "extend that precedent . . . ." *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014).

In *United States v. Roberts*, 618 F.2d 530, 535-536 (9th Cir. 1980), the Ninth Circuit found prejudicial error on direct appeal where the prosecutor told the jury that a detective present at trial was monitoring the truthfulness of a witness, to ensure his compliance with his plea agreement. The Circuit provided guidance for retrial on the "introduction in evidence of the entire plea agreement and

prosecutorial use of the promise to testify truthfully," explaining:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.
>
> Conveying this message explicitly is improper vouching. We conclude that conveying it by implication is equally improper. . . .
>
> The prosecutor may not tell the jury that the government has confirmed a witness's credibility before using him. He should be no more able to indicate that the government has taken steps to compel the witness to be truthful. Both of these arguments involve improper vouching because they invite the jury to rely on the government's assessment that the witness is testifying truthfully.

Id. at 536 (internal citations omitted). The vouching is still more egregious where the prosecutor suggests to the jury that the trial court is satisfied with the truthfulness of the witness's testimony. *See United States v. Smith*, 962 F.2d 923, 933-34, 936 (9th Cir. 1992) ("Where the determination of a defendant's guilt or innocence hinges almost entirely on the credibility of a key prosecution witness, allowing a conviction to be obtained by a prosecutor's deliberately vouching for that witness on behalf of the court . . . pose[s] a clear threat to the integrity of judicial proceedings" and constitutes plain error).

Surveying its prior cases on the use of truthfulness provisions in plea agreements, the Ninth Circuit concluded that "we have no bright-line rule about when vouching will result in reversal" on direct appeal. *United States v. Necoechea,* 986 F.2d 1273, 1278 (9th Cir. 1993). The court considers many factors, including the prosecutor's references to information outside the record, to

personal opinion, to his capacity to monitor the witness's credibility, and to the court's capacity to do so; the extent to which the witness's credibility was attacked; and the importance of the witness's testimony. *Id.* The court in *Necoechea* found no plain error where the vouching, though uninvited, did not refer to any facts outside the record or express any personal opinion. *Id.* at 1278, 1280. The prosecutor's statement in *Necoechea* that the witness had agreed to testify truthfully did constitute vouching and did "mildly imply, as do all statements regarding truthfulness provisions, that the government can guarantee [the witness's] truthfulness." *Id.* at 1278. It did not, however, tell the jury that the government would be monitoring her truthfulness. *Id.*; *see also United States v. Ortiz*, 362 F.3d 1274, 1279 (9th Cir. 2004) (finding no plain error where prosecutor implied "that the court . . . can, has, and will monitor the witness's truthfulness" but did not refer to outside evidence or personal opinion, and the witness's testimony was corroborated).

D. Analysis

Fairminded jurists could disagree about the proper resolution of the claim. The fact that the prosecutor told the jury that Buckley's charge would be reduced to second degree murder signified the prosecutor's belief in Buckley's truthfulness and may well have influenced the jury's perception of his testimony. Petitioner does not appear to overstate the significance of Buckley's testimony at trial. (*See* Pet. at 66.) The prosecutor himself told the jury at the beginning of his guilt phase closing argument:

> I'm going to start out by just telling you up front that I think this is a single-issue case, whether or not you believe Brian Buckley. [¶] If you don't believe anything that he says, you'll probably acquit the defendant. If you believe some of what Brian Buckley says, you'll find the defendant guilty of robbery and burglary and felony murder. And if you believe most of

> what Brian Buckley says, you'll convict the defendant of everything.

(RT 3758.) The prosecutor's use of the plea agreement arguably added not only his own weight to Buckley's testimony, but the trial judge's as well. *See Smith*, 962 F.2d at 933-34, 936.

The possibility that "fairminded jurists could disagree on the correctness of the state court's decision" does not entitle Petitioner to habeas relief, however. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation omitted). The California Supreme Court was not objectively unreasonable in concluding that Petitioner could not show harm from the prosecutor's arguments or the admission of the plea agreement's provisions regarding the prosecutor's and judge's assessments of Buckley's credibility. It is true, as the prosecutor argued to the jury, that Buckley's credibility was supported by evidence introduced at trial, including many aspects of Melville Rowan's testimony, certain statements Petitioner made to investigators, and the locations of a stolen safe and a truck when recovered. (RT 3781, 3799, 3802.) A fairminded jurist could hold that in light of the corroborating evidence, the admission of the plea agreement's credibility provisions and the prosecutor's improper vouching did not so infect the trial with unfairness as to violate due process. *See Ortiz*, 362 F.3d at 1279.

Likewise, a fairminded jurist could conclude that Petitioner did not show a reasonable probability of a different outcome at trial had counsel objected to the introduction of the plea agreement provisions and to the prosecutor's improper arguments. Claim 41(a)(1)(16) is DENIED on that basis.

As to Claim 10(b), because the California Supreme Court may have reasonably found harmless any weight placed behind Buckley's testimony by the prosecutor's and trial judge's assessments of his credibility, it may similarly have found harmless the lack of confrontation of those assessments. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 653 (1993) ("Confrontation Clause violations are

subject to harmless-error review").

Claims 10(a), (b), and (c) and Claim 41(a)(1)(16) are, therefore, DENIED.

IV. Claim 10(d): Rowan Vouching

In Claim 10(d), Petitioner alleges that the prosecutor improperly vouched for Rowan's testimony by (1) misleading the jury about the inducements it offered to Rowan in exchange for his testimony (Pet. at 67); (2) arguing that because he had been granted immunity, Rowan had no motive to testify falsely (Opp. at 54); and (3) using an enlarged and highlighted portion of Rowan's preliminary hearing transcript as a visual aid during opening argument. (Pet. at 67-68.)

First, as to the prosecution's alleged misconduct regarding inducements offered to Rowan, Petitioner simply incorporates in Claim 10(d) the allegations made elsewhere in his Petition. (Pet. at 67 n.28.) The Court has rejected those allegations in Claims 6, 9, and 41(a)(1)(19), to the extent they were asserted, as conclusory. (*See* Dkt. 344 at 15; *see also* note 3, *supra*, and page 29, *infra*.)

Second, as to the prosecutor's arguments about Rowan's immunity, Petitioner faults the prosecutor for failing to "mention that Rowan was obliged to testify consistently with his preliminary examination testimony, under penalty of perjury." (Opp. at 55.) The California Supreme Court's rejection of Petitioner's argument was not contrary to or an unreasonable application of federal law. *See Fauber*, 2 Cal. 4th at 827-28; *cf. Smith*, 962 F.2d at 933 (holding that prosecutor improperly vouched for witness by assuring that the witness would be prosecuted for perjury if appropriate).

Third, as to Petitioner's argument regarding the visual aid, the California Supreme Court explained on direct appeal:

> Mel Rowan, testifying under a grant of immunity, provided significant corroborative evidence. While outlining Rowan's expected testimony during his opening statement, the prosecutor displayed a poster consisting of an enlarged page from the transcript of Rowan's preliminary hearing testimony

containing incriminating statements defendant made to Rowan. The prosecutor read aloud the following portion of Rowan's preliminary hearing testimony:

'As the conversation took place, Mel Rowan asked Curtis Fauber, "You didn't hurt him, did you?" And Curtis said, "I think I killed him." "Are you sure? You got to be kidding." "Yeah, I'm pretty sure." "Are you positive he's dead? Just don't tell me he's dead." And Fauber said, "Well, when I left, he was having a hard time breathing." "And I said, 'Well, why did you do it?' And he said, 'Well, he – he saw my face, and I'm not in any hurry to leave Ventura County.'"'

Defense counsel objected to the form of the poster, specifically to highlighting of some portions. He contended it took parts of Rowan's preliminary hearing testimony out of context and was prejudicial to defendant. The trial court ruled that the poster could be used as an illustrative aid in the prosecutor's opening statement.

Defendant contends the ruling constituted error because the poster 'preconditioned' the jury to believe Rowan's testimony. He also now advances the new ground that the poster contained hearsay and was for that additional reason improper. The error, he contends, violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

We find no error in the trial court's ruling, as use of the poster neither violated the rule against hearsay nor constituted any species of vouching. The purpose of the opening statement is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect. The use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate. Similarly, the illustrative use of an enlarged page of transcript was not improper, as Rowan ultimately testified consistently with the transcript. It is axiomatic that nothing the prosecutor says in an opening statement is evidence. Had the prosecutor, instead of preparing a poster, simply recited Rowan's preliminary hearing testimony in his opening statement to the

> jury, defendant could not urge a hearsay objection. Additionally, we cannot agree with defendant that the mere appearance of the poster could have been so 'official' that it caused the jury to prejudge Rowan's credibility.

Fauber, 2 Cal. 4th at 826-27 (internal quotation and citations omitted). Although Petitioner does not press his hearsay argument here, the state court's reasoning on that claim sheds light on its analysis of the vouching claim.

The court's conclusion that the prosecutor's use of the preliminary hearing testimony did not constitute vouching is not contrary to or an unreasonable application of federal law. *See United States v. Inzunza*, 638 F.3d 1006, 1024 (9th Cir. 2011) ("[Petitioner] contends that the government should not have argued that [the witness's] prior consistent statements bolstered his credibility because those statements were not admissible . . . . This argument conflates the standard for admissibility with the rule against vouching."). Petitioner has, likewise, not shown the use of the preliminary hearing testimony to have rendered his trial fundamentally unfair. *See Duncan v. Henry*, 513 U.S. 364, 366 (1995) (to be entitled to habeas review based on improper admission of evidence, petitioner must show that the evidence "was so inflammatory as to prevent a fair trial"); *Darden*, 477 U.S. at 181. The California Supreme Court correctly determined that Rowan gave consistent testimony at trial. Rowan testified:

> A. . . . I said, 'You're positive you didn't hurt him.' [¶] And he – he said, uh, 'No.' And I don't remember if it was right then or if I went back upstairs one more time and then came back down. [¶] But at any rate, then Curtis told me that, uh, he thought he'd killed him. [¶] And I said, 'You've' – 'you've got to be kidding me.' [¶] And, uh, Curtis said – and before – he didn't say anything. I said, 'Was he breathing?' I said, 'What did you do? Shoot him?' [¶] And Curtis said, 'No. I hit him.' And then I said – I was kind of relieved. I said, 'Well, then he was breathing; right?' [¶] And Curtis said,

> 'Yeah, but he was having a hard time.' [¶] And I said, 'Well, you better pray to God he lives.' And, uh – I guess that's pretty much about it. [¶] I'm a little confused, I guess.
>
> Q. Did you ask Curtis why he struck the man?
>
> A. Yeah. I said, 'Why' – 'Why? Why did you hit him?' [¶] He said, 'He saw my face.' [¶] I said, 'Were you wearing a mask?' [¶] And he said, 'Yeah.' [¶] And you know, it didn't make much sense, but – he said he wasn't ready to leave Ventura yet, 'cause I asked, 'Why? So what?' I said, 'So – so what?' you know. [¶] And he said, 'Well, I'm not' – 'I'm not ready to leave Ventura yet.'

(RT 3020-21; *cf.* Pet. at 68 (arguing only that Rowan's trial testimony was "far less emphatic" than his preliminary hearing testimony).) The effect of the preliminary hearing testimony was not fundamentally unfair in light of the evidence properly admitted at trial.

Claim 10(d) is, therefore, DENIED.

V. Claims 22, 23, and 41(b)(5)(74): Murder of David Church

In Claims 22 and 23, Petitioner alleges that the prosecution withheld exculpatory evidence and knowingly presented false evidence regarding Petitioner's involvement in the alleged murder of David Church. (Pet. at 97-103.) Petitioner further alleges that trial counsel provided ineffective assistance by failing to investigate and present the exculpatory evidence at issue, along with evidence of the criminal history of Christopher Caldwell. (*Id.* at 100, 159 (Claim 41(b)(5)(74)).)

The Court addressed Claims 22 and 23 at length in its November 2002 Order. There, the Court held:

> To support his theory that petitioner was involved in killing Church, the prosecutor relied on admissions petitioner allegedly made to Brian Buckley that he killed David Church

and statements made in Pam McCormick's presence during a conversation, in the early morning hours after the murder, between petitioner, Buckley and Caldwell that they had to get rid of the body. (RT 5516-17, 5520.)

In Claim 22, petitioner alleges that, in October of 1987, before petitioner's trial, the state obtained evidence from Michael Steven Smith, an inmate who shared a jail cell with Chris Caldwell on or about September 25, 1986, that Caldwell told Smith '"Laurie [Jansen]" drove Caldwell and Church to a remote location where Caldwell shot Church and then buried him.' (Pet. at 99.) Petitioner alleges that the prosecution 'disclosed a police report concerning Smith's statements, but concealed his identity without cause by redacting Smith's name throughout the report.' (*Id.* at 100.) Petitioner alleges the prosecution buried the report among 'thousands of pages of discovery' by stapling it between an innocuous unrelated laboratory report and a report concerning Buckley's jail booking. (*Id.*). . .

In Claim 23, petitioner refers to a March 22, 1997 declaration by Christopher Caldwell in which Caldwell states that 'while Church was being killed, [petitioner] was passed out in the back of the car' and that petitioner 'didn't have anything to do with Church's murder.' (Pet. Ex. 112 ¶ 8.) Petitioner contends that this newly discovered evidence conclusively establishes that petitioner did not murder David Church, thereby invalidating one of the aggravating circumstances upon which the jury based petitioner's death sentence. (Pet. at 102.) Petitioner says the prosecution violated due process when it relied on evidence implicating petitioner in the Church killing which it should have known was false. (*Id.*)

Even assuming that the evidence the prosecution presented in petitioner's trial on the Church murder was false, to be entitled to relief on that ground petitioner would also need to show a 'reasonable likelihood that the false testimony could have affected the judgment of the jury.' *Karis v. Calderon*, 283 F.3d 1117, 1126 (9th Cir. 2002). Similarly, a claim that the prosecution withheld evidence requires a finding of materiality,

under which petitioner must show 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). Finally, newly discovered evidence warrants a new trial only if it would probably produce a sentence other than death. *Cf. Jeffries v. Blodgett*, 5 F.3d 1180, 1187-88 (9th Cir. 1993).

Viewed under these standards, there is strong reason to conclude that neither claim 22 nor claim 23, standing alone, warrants an evidentiary hearing.

First, the Caldwell killing was only one of five acts of violence, in addition to the Urell murder itself, which the prosecution relied on as aggravating circumstances to support its conclusion that petitioner deserved the death penalty; the others being the killing of Jack Dowdy, Jr. and three assaults against Kim Dowdy. (RT 5495, 5523-25.) Assuming that Caldwell would so testify if given the opportunity, neither evidence that Caldwell 'alone' killed David Church nor evidence that, at the time of Church's death, petitioner was 'passed out' in the back seat of the car in which Caldwell and others transported Church to the place where they killed him substantially diminishes the aggravating weight of the Church murder in petitioner's penalty trial. It is undisputed that, whether or not he killed Church, petitioner admitted that he beat Church with an ax handle prior to Church's death. (*Id.* at 4907.) The jury, which received instructions on criminal assault and assault with a deadly weapon, could have treated petitioner's May 31, 1986 assault on Church as violent criminal activity and weighed it as an aggravating circumstance under these theories. (*Id.* at 5632, 5647-50.) Brian Buckley testified that petitioner admitted to him that he and Caldwell 'had to kill the guy' (*id.* at 4905), and petitioner was present when Pam McCormick overheard petitioner, Caldwell, and Buckley discuss disposing of Church's body (*id.* at 4841), which suggests that petitioner knowingly aided and abetted Church's murder, also a prosecution theory as to why the jury should treat Church's

> killing as an aggravating circumstance in petitioner's penalty trial. (*Id.* at 5632.) . . .
>
> Nevertheless, if combined with credible and convincing evidence establishing the falsity of other aggravating factors [such as evidence regarding the death of Jack Dowdy] . . . credible and convincing evidence that petitioner did not kill David Church might be enough to result in a life sentence.

(Dkt. 158 at 92-97 (n.21 omitted; n.22 reproduced as text) (internal citations edited; internal quotation omitted).)

In light of the Court's rejection of Petitioner's claims regarding the falsity of other aggravating evidence (including that of the alleged murder of Jack Dowdy) (*see, e.g.,* Dkt. 344 at 37-43, 53-54; *infra* at 23-26), the Court finds that there is not any reasonable likelihood that the jury's sentencing process could have been different absent any *Brady* or *Napue* error.

The Court finds no reasonable probability of a different penalty phase verdict had counsel presented this evidence, even in conjunction with evidence of Caldwell's criminal history. (*See* Pet. at 159 ¶ 74.) That portion of Claim 41(b)(5) does not entitle Petitioner to relief.

Claims 22, 23, and 41(b)(5)(74) are DENIED.

VI. Claim 28: Exclusion of Mitigating Evidence

A. Jack Dowdy's Statements to Jackie Sumner

1. Background and Allegations

In Claim 28(a), Petitioner alleges that the trial court erred by excluding testimony offered in mitigation from Jackie Sumner that: (1) Jack Dowdy had heard that his ex-wife, Kim Dowdy, had put out a contract on his life; (2) there was enmity between Jack and Kim; and (3) Jack was concerned about a looming custody and child-support battle with Kim over their infant son. (Pet. at 114-15.) Petitioner contends that the exclusion of the evidence violated his constitutional right to have the jury consider any evidence that might serve as a basis for a

sentence less than death. (Opp. at 108.) Petitioner argues that the prosecution did not establish that Dowdy had died and there was no physical or reliable circumstantial evidence to link Petitioner to Dowdy's disappearance. (*Id.*) Petitioner argues that had the jury heard the testimony from Sumner, there is a substantial probability that at least one juror would have found Petitioner's murder of Dowdy unproven and would not have sentenced Petitioner to death. (*Id.*)

On direct appeal, the California Supreme Court held that the trial court erred in excluding the evidence. *Fauber*, 2 Cal. 4th at 853-54. The court held that the evidence was properly admissible to show Dowdy's state of mind, "to suggest attitudes or beliefs that might have led Jack to choose to disappear without a trace." *Id.* at 854. The state court held that because trial counsel failed to argue that the testimony was admissible on that basis, Petitioner had waived the issue for appeal. *Id.* The court further held that Petitioner could not show prejudice to establish ineffective assistance of counsel in failing to make that argument. *Id.* at 855. The court concluded that "in light of the evidence that defendant in effect admitted to three witnesses his responsibility for Dowdy's death, it is not reasonably probable that a result more favorable to him would have resulted from presentation of the excluded testimony." *Id.*

2. Analysis

This Court does not reach the issue of whether Claim 28(a) is procedurally defaulted, because the Court concludes that it fails on the merits even afforded *de novo* review. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (judicial economy may favor resolving claims on grounds other than a procedural bar if "the procedural-bar issue involved complicated issues of state law"); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues . . . , so it may well make sense in some instances to proceed to the merits if the result will be the same.").

The erroneous exclusion of mitigating evidence is subject to harmless error analysis. *McKinney v. Ryan*, 813 F.3d 798, 821-22 (9th Cir. 2015) (en banc). Petitioner is entitled to relief if the error "'had substantial and injurious effect or influence in determining the jury's verdict,'" or if the court is left "'in grave doubt'" about that question. *Id.* at 822 (quoting *Brecht*, 507 U.S. at 623 and *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

Here, the Court is not left in grave doubt about whether the exclusion of Sumner's testimony had substantial and injurious effect or influence in determining the penalty phase verdict. The testimony from Kim Dowdy and Joseph Maestas that Petitioner said Jack Dowdy would not bother Kim any more (RT 4446) and said he had killed Bubs (*id.* at 4825), respectively, was significant (*cf.* Dkt. 344 at 39), as was the totality of the aggravating evidence introduced at trial. The Court sees no substantial and injurious effect or influence on the jury's penalty verdict from the exclusion of Sumner's testimony that Jack had heard that Kim put out a contract on his life, that there was enmity between Jack and Kim, and that Jack was concerned about a custody and child support dispute.

B. "Ted's" Statements to Pam Lester

In Claim 28(b), Petitioner alleges that the trial court violated his constitutional rights by excluding evidence from Pam Lester that a man named Ted reported seeing Dowdy after his disappearance. (Pet. at 115.) Petitioner alleges that the trial court sustained hearsay and relevancy objections to defense counsel's questions about what the man told Lester about Dowdy. (*Id.*) He alleges that had Lester been permitted to answer, she would have testified that Ted told her that he last saw Dowdy after his alleged disappearance. (*Id.*)

While the trial court did sustain an objection to the question, "What exactly did that person [Ted] tell you" (RT 4488), Lester had already testified that a man came to her home about two weeks after Dowdy's disappearance and told her he had seen Dowdy, and that she reported this information to the investigating

detective. (*Id.* at 4485-87.) The court overruled the prosecutor's objection to the question, "Did you ever hear from anyone that they had seen Mr. Dowdy." (*Id.* at 4485-86.) Lester was permitted to answer and did so. She went on to testify that she thought the man said his name was Ted. (*Id.* at 4488-89.)

Given that the evidence was already before the jury, the California Supreme Court's rejection of the claim was reasonable. *See Fauber*, 2 Cal. 4th at 855.

C. Evidence of Prosecutor's Plea Offer

Finally, Petitioner alleges that the trial court erred by excluding evidence of the plea agreement the prosecution offered him. Petitioner declined an offer from the prosecution to plead guilty to first degree murder and testify against Caldwell and Buckley in return for a sentence of life without possibility of parole. (CT 735; RT 4005; *compare* RT 5092-96.)

On direct appeal, the California Supreme Court held that in excluding the evidence, the trial court did not abuse its discretion and did not violate Petitioner's constitutional right to present all relevant mitigating evidence to the jury. *Fauber*, 2 Cal. 4th at 856. The court reasoned:

> The mere fact that defendant declined the plea offer could not have significantly helped the jury determine the appropriate penalty. [¶] To supply meaning to the bare fact of the refusal, additional inquiry regarding the underlying reasons would have been required. Such examination, as the trial court concluded, had the potential to mislead and confuse the jury.

Id. at 856-57 (footnote omitted); (*cf.* RT 5087-89, 5270, 5281-82).

The Ninth Circuit has held a "plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case." *Scott (Roger) v. Schriro*, 567 F.3d 573, 584 (9th Cir. 2009). A defendant may introduce evidence of a plea offer in mitigation. *Id.* On habeas review, the plea offer's mitigating effect must be determined in light of the totality of the aggravating evidence and the available mitigating evidence. *See Scott (Roger) v. Ryan*, 686 F.3d 1130, 1135

(9th Cir. 2012). A reviewing court may reasonably determine that evidence of the plea offer fails to show a likelihood of a more favorable penalty verdict. *See id.* (so holding after remand for evidentiary hearing on ineffective assistance of counsel in presenting mitigating evidence).

Here, the state court decided that evidence of the plea offer, standing alone, did not have mitigating value. Even assuming that that decision is contrary to or an unreasonable application of clearly established federal law, Petitioner's claim fails on *de novo* review. Considering the totality of the available mitigating evidence Petitioner now presents and the aggravating evidence presented at trial, the Court is not left in grave doubt about whether the exclusion of the plea offer had substantial and injurious effect or influence in determining the jury's penalty phase verdict. In light of the circumstances surrounding Urell's murder, the admissible aggravating evidence of the killings of Jack Dowdy and David Church, and the assaults on Kim Dowdy, the Court holds no grave doubt about the outcome of the penalty phase of trial.

Claim 28 is DENIED.

VII. Claim 41: Ineffective Assistance of Counsel

A. Claims 41(a)(1)(13-14) and 41(b)(5)(75)

In Claims 41(a)(1)(13-14), Petitioner alleges that trial counsel provided ineffective assistance as to the Urell charges by failing to investigate and to impeach prosecution witnesses with benefits the prosecution promised them and with their criminal histories. (Pet. at 142-43.) In Claim 41(b)(5)(75), Petitioner adds that counsel should have impeached Buckley with a paternity suit against him and an open container prosecution. (Opp. at 210-11 (citing, *inter alia*, Pet. Ex. 102 (reporting a "1/4 full 'Coors' can")).)

Petitioner's allegations are limited to witnesses Rowan and Buckley. (Opp. at 177.) He alleges that trial counsel failed to present evidence that Petitioner's prosecutor wrote to the Texas Board of Pardons and Parole on Rowan's behalf on

January 6, 1987 for consideration "in any future actions considering Mr. Rowan." (*Id.* at 178.) Even assuming counsel could have presented such impeachment evidence, the California Supreme Court may have reasonably determined that Petitioner failed to show prejudice from its absence. While Rowan's credibility at trial was important, Rowan admitted that he had been convicted of the felonies of delivery of a controlled substance and burglary of a habitation, was in violation of his Texas parole while living next to Petitioner, was using an assumed name to avoid being found, was then using drugs and sometimes selling speed, and had received immunity for his testimony in Petitioner's case. (RT 2983, 2985-86, 3035-40.) The state court may have reasonably determined that additional impeachment with potential benefits from the Texas Board of Pardons and Parole did not show a reasonable probability of a different outcome at trial. In addition, Petitioner's allegation that the district attorney "likely" provided or promised Rowan assistance in his ongoing felony charges at the time of Petitioner's trial is speculative and cannot show prejudice. (Opp. at 178.)

The Court addressed above Petitioner's allegations that trial counsel should have put before the jury that Buckley had been a suspect in a motorcycle theft and had attempted a vehicular assault. (*See supra* at 2-7.) In addition to finding a lack of prejudice, the California Supreme Court may have reasoned that trial counsel made a strategic decision to rely on Buckley's already significant impeachment on more serious criminal matters, rather than exploring the admitted, uncharged theft. *See Richter*, 562 U.S. at 109 ("There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." (internal quotation omitted)). That reasoning applies equally to Petitioner's allegations regarding the paternity suit and open container prosecution.

Claims 41(a)(1)(13-14) and 41(b)(5)(75) are, therefore, DENIED.

B. Claims 41(a)(1)(18-21)

The Court denied Claims 41(a)(1)(18-21) in its November 2002 Order as follows:

> [As to] allegations that counsel:
>
> (a) failed adequately to investigate and uncover the identity of an informant[,] (Am. Pet. at 169 [Claim 41(a)(1)(18)])[,] Petitioner does not state who the informant was, what information the informant provided, or how the actions of this unidentified informant prejudiced petitioner.
>
> (b) failed adequately to investigate, discover and present evidence of the inducements offered to Buckley and Rowan in exchange for their testimony[,] (Am. Pet. at 169-70 [Claim 41(a)(1)(19)])[,] [t]he claim does not identify what inducements the prosecution offered in exchange for their testimony.
>
> (c) failed [to] 'subject the prosecution's case to meaningful adversarial testing[,]' (Am. Pet. at 170 [Claim 41(a)(1)(20)] (citing *United States v. Cronic*, 466 U.S. 648 (1984)))[,] Petitioner does not explain what counsel failed to do.
>
> (d) failed to present a unified theory of defense, which petitioner contends is 'essential to the proper presentation of a capital case[,]' (Am. Pet. at 170 [Claim 41(a)(1)(21)])[,] . . . petitioner fails to identify how the 'unified defense' counsel should have presented differs from the defense actually presented or how counsel's deficiency prejudiced petitioner.
>
> Each of these sub-claims to claim 41A(1) is conclusory and is DENIED. *James*, 24 F.3d at 26.

(Dkt. 158 at 107-08 (internal citations edited); *see also id.* at 110-12 (rejecting Petitioner's arguments under *Cronic*); *supra* at 27-28 (rejecting on the merits allegations of Buckley's and Rowan's inducements).)

VIII. Claim 62: Cumulative Error

In Claim 62, Petitioner alleges that the cumulative effect of errors during the

guilt and penalty phases of trial requires relief from his conviction and sentence. (Pet. at 230.)

First, the Court finds no prejudice from any alleged ineffective assistance of counsel, considered cumulatively. (*See, e.g.*, Dkt. 158 at 97-98 (interviewing David Ruiz); Dkt. 344 at 5-11 (obtaining mental health assistance and raising competence to stand trial and to waive privilege against self-incrimination), 29-30 (objecting to prosecutor's reference to penalty phase in guilt phase opening argument), 30-32 (raising a double jeopardy defense), 57-59 (objecting to judge's remarks during voir dire about a "recommendation" of penalty), 74-76 (investigating and presenting evidence of Petitioner's mental illnesses), 76-83 (investigating and presenting mitigating evidence of Petitioner's substance abuse and life history), 84 (investigating and presenting evidence that David Church was alive after the night of the Buckley party); *supra* at 2-4 and 27-28 (impeaching Rowan and Buckley further), 7-17 (objecting to admission of Buckley's plea agreement), 20-23 (investigating and presenting exculpatory evidence regarding Church murder and Christopher Caldwell's criminal history).)

Second, considering any alleged prosecutorial misconduct cumulatively, the Court finds no reasonable likelihood that the misconduct could have affected the judgment of the jury. (*See, e.g.*, Dkt. 158 at 53-59 (interviewing Petitioner and effecting Petitioner's appearance at a hearing without counsel), 59-60 (interviewing Petitioner after misleading him to waive his *Miranda* rights), 83-90 (making personal attacks on defense counsel in argument), 97-98 (failing to disclose statement from David Ruiz); Dkt. 344 at 11-13 (interfering with attorney-client relationship), 29-30 (referring to penalty phase in guilt phase opening argument), 45-51 (arguing that God would judge Petitioner and could be merciful); *supra* at 7-17 (vouching for Buckley's credibility and introducing Buckley's plea agreement with credibility provisions), 17-20 (vouching for

Rowan's credibility with his preliminary hearing transcript), 20-23 (withholding exculpatory evidence and presenting false evidence regarding Church murder).)

Third, beyond the cumulative effect of any ineffective assistance of counsel and prosecutorial misconduct, "prejudice may result from the cumulative impact of multiple deficiencies." *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995). "[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (internal citation and quotation omitted). "[W]hile a defendant is entitled to a fair trial, he is not entitled to a perfect trial, 'for there are no perfect trials.'" *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991) (rejecting cumulative error claim based upon trial court errors) (quoting *Brown v. United States*, 411 U.S. 223, 231-32 (1973)).

Here, the California Supreme Court may have reasonably determined that any alleged errors at the guilt and penalty phases of Petitioner's trial, considered cumulatively with any ineffective assistance of counsel and prosecutorial misconduct, were harmless. (*See, e.g.*, Dkt. 158 at 45-51 (admission of Petitioner's statements to law enforcement absent voluntary waiver); Dkt. 344 at 28 (admission of photographs of Jack Dowdy), 35-37 (admission of Pam McCormick's testimony), 57-59 (trial court's remarks during voir dire about a "recommendation" of penalty), 72-74 (consideration of victims' families' statements in motion for modification of verdict); *supra* at 2-4 (limitation of Buckley's cross-examination), 7-17 (Confrontation Clause error as to Buckley's plea agreement), 23-25 (exclusion of mitigating evidence from Jackie Sumner), 26-27 (exclusion of mitigating evidence of Petitioner's plea offer).)

The California Supreme Court reasonably rejected Petitioner's claim of cumulative error. Claim 62 is DENIED.

IX. Order

Claims 8-10, 22, 23, 28, 41(a)(1)(13-14 and 16-17), 41(a)(4), 41(b)(5)(74-75), and 62 of Petitioner's Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody under Sentence of Death are DENIED. The Court hereby DENIES the Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody under Sentence of Death.

Pursuant to 28 U.S.C. § 2253(c)(2), the Court ISSUES a Certificate of Appealability as to Claim 28(c) and Claims 10(a), 10(c), and 41(a)(1)(16).

IT IS SO ORDERED.

Dated: May 10, 2017.

GEORGE H. WU
United States District Judge

3 of 8 DOCUMENTS

In re Curtis Lynn Fauber on Habeas Corpus.

S030753

SUPREME COURT OF CALIFORNIA

1995 Cal. LEXIS 4977

August 16, 1995, Decided

OPINION

[*1] Order was filed in the following matter denying petition for writ of habeas corpus.

Petition for writ of habeas corpus DENIED on the merits. The following claims additionally are denied as having been raised and rejected on appeal (*In re Waltreus (1965) 62 Cal.2d 218, 225)*: the claims that jurors engaged in misconduct by discussing personal anecdotes about drug use and the effects of drug use on the credibility of witnesses (*People v. Fauber (1992) 2 Cal.4th 792, 838-839)* and the claim that exclusion of hearing-impaired jurors denied petitioner a jury consisting of a representative cross-section of the community (*id. at pp. 816-817*). The claim that the trial court erred by referring to the Buckley plea agreement in the course of ruling on the automatic motion to modify the verdict additionally is denied as one that could have been raised on appeal. (*In re Dixon (1953) 41 Cal.2d 756, 759*.)

2 Cal.4th 792
831 P.2d 249, 9 Cal.Rptr.2d 24
(Cite as: 2 Cal.4th 792)
<KeyCite History>

THE PEOPLE, Plaintiff and Respondent,
v.
CURTIS LYNN FAUBER, Defendant and Appellant.

No. S005868.

Supreme Court of California

Jun 18, 1992.

SUMMARY

A jury convicted defendant of robbery (Pen. Code, § 211), burglary (Pen. Code, §§ 459, 460, 462, subd. (a), 667), and first degree murder (Pen. Code, § 187), finding true the special allegations that he intentionally committed the murder while engaged in the commission of the robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)), and that he personally used a deadly weapon, an ax, in committing the offenses (Pen. Code, § 12022, subd. (b)). Following a penalty trial, the jury returned a verdict of death. (Superior Court of Ventura County, No. CR21927, Robert C. Bradley, Judge.)

The Supreme Court affirmed. It held that defendant did not demonstrate a violation of his right to be tried by a representative cross-section of the community by exclusion of hearing-impaired potential jurors. The court held that the facts surrounding the case did not warrant a change of venue. It also held that the prosecutor did not mislead the jury as to the credibility of prosecution witnesses who were testifying pursuant to plea agreements or a grant of immunity. It held that the prosecution's failure to tape-record a prosecution witness's pretrial interview in its entirety did not constitute a deprivation of defendant's rights. The court further held that the prosecutor's closing argument concerning witness credibility was not improper. It held that the court's jury instructions concerning accomplices and accessories and intent to kill were not erroneous. The court also held that a juror's taking a cellular telephone into the deliberation room, another incident occurring in the deliberation room that could be construed as sexual harassment, and the jurors' relating anecdotes about drug use did not amount to juror misconduct justifying a new trial.

As to penalty phase issues, the court held that the trial court did not err in denying defendant's request to reopen voir dire prior to the penalty trial. It held that the jury was adequately apprised of its duty to determine the appropriate penalty. The court also held that there was no requirement that the jury reach a unanimous finding as to any unadjudicated crime offered in aggravation. It held that the trial court did not err in allowing evidence of ***793** defendant's unadjudicated crimes. It held that the trial court did not abuse its discretion in excluding evidence that defendant had refused a pretrial plea agreement. The court further held that the prosecutor's use of a chart of different types of murder during argument did not violate defendant's constitutional rights, since the prosecutor emphasized the jury's function in determining the appropriate penalty. It also held that defendant was not prejudiced by the court's refusal to give a lingering doubt instruction. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate opinion by Mosk, J., concurring in the judgment.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Jury § 30.5--Selection and Formation of Jury--Exclusion of Certain Persons and Classes--Hearing-impaired.

In a prosecution for capital homicide, defendant waived any denial of his right to a jury drawn from a representative cross-section of the community by

failing to object to the panel or move to quash the venire on that basis. Moreover, defendant could not have met his burden of showing that exclusion of hearing-impaired persons denied his right. He did not demonstrate that hearing- impaired persons constitute a distinctive group within the community. Although persons with hearing loss are competent to serve as jurors (Code Civ. Proc., § 203, subd. (a)(6)), he did not persuasively link that characteristic with the purposes of the fair cross-section requirement. Further, he failed to demonstrate that the representation of hearing-impaired persons in the venire was unreasonably small in proportion to the number of such persons in the community. He also failed to establish that the lack of hearing-impaired persons on the jury resulted from systematic exclusion.

(2) Jury § 30--Selection and Formation of Jury--Exclusion of Certain Persons and Classes--Establishing Prima Facie Violation of Defendant's Rights.

A criminal defendant is entitled to trial by an impartial jury drawn from a representative cross-section of the community. To establish a prima facie violation of the fair cross-section requirement, a defendant must show that: (1) the group allegedly excluded is a distinctive group in the community; (2) the group's representation in jury venires is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to the systematic exclusion of such persons in the jury selection process.

[See Cal.Jur.3d (Rev), Criminal Law, § 2990.] ***794**

(3a, 3b, 3c) Venue § 38--Criminal Cases--Change of Venue--Change Unnecessary.

In a capital homicide prosecution, the trial court did not err in denying defendant's motion to change venue. The case lacked the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation. Also, the county was the 13th largest county in the state. Venue changes are seldom granted from counties of such a large size; the larger the local population, the less likely it is that preconceptions about the case have become embedded in the public mind. The fact that death penalty trials were not very common in the county did not warrant a venue change. Further, the community status of the defendant and the victim did not suggest a change of venue should have been granted. Although defendant was reported as being a New Mexico resident, he failed to show that he was associated with any organization or group that aroused community hostility. The victim, although a longtime resident of a local city, was not prominent, and his death did not engender unusual emotion in the community. Finally, the record revealed that pretrial publicity had no prejudicial effect.

(4) Venue § 32--Criminal Cases--Change of Venue--Factors Considered.

In criminal prosecutions, a change of venue is warranted when it appears there is a reasonable likelihood that a fair and impartial trial cannot be held in the county (Pen. Code, § 1033, subd. (a)). The determination requires consideration of such factors as the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity.

(5) Venue § 46--Criminal Cases--Change of Venue--Review.

On appeal after a judgment following the denial of a change of venue, a criminal defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it was reasonably likely that a fair trial was not in fact had. The trial court's essentially factual determinations as to these factors will be sustained if supported by substantial evidence. The appellate court independently reviews the trial court's ultimate determination of the reasonable likelihood of an unfair trial.

(6) Venue § 31--Criminal Cases--Change of Venue--Prejudicial Publicity.

To warrant denial of a motion in a criminal trial for change of venue based on pretrial publicity, it is not necessary that jurors be ***795** totally ignorant of the facts and issues involved in the case. It is sufficient if the jurors can lay aside their impressions and opinions and render a verdict based on the evidence presented in court.

[Pretrial publicity in criminal case as ground for change of venue, note, 33 A.L.R.3d 17.]

(7a, 7b, 7c, 7d) Criminal Law § 657--Appellate Review--Harmless and Reversible Error--Evidence--Reading of Prosecution Witness's Plea Agreement.

In the guilt and penalty phases of a capital homicide prosecution, the reading to the jury of a prosecution witness's plea agreement did not constitute reversible error. The agreement allowed the witness to plead guilty to a certain offense if he testified truthfully against defendant. Although references in the agreement to the district attorney's determination of the witness's credibility should have been excised, its presentation to the jury was harmless. The prosecutor argued for the witness's credibility based on the evidence adduced at trial, not on the strength of extrajudicial information obliquely referred to in the plea agreement. Moreover, a jury will usually assume, without being told, that the prosecutor has at some point interviewed the principal witness and found his or her testimony believable, else the witness would not be testifying. Further, defendant was not prejudiced by a provision in the agreement that in the event of a dispute, the trial judge would determine the truthfulness of the witness's testimony. This provision implicitly referred to the sentencing of the witness, not the determination of defendant's guilt, and the trial court's instructions made clear that the jury was the sole judge of a witness's credibility.

(8) Criminal Law § 148.2--Preliminary Proceedings--Discovery--Witness's Plea Agreement.

The existence of a witness's plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. Indeed, when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility.

(9) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Comment on Witnesses--Credibility.

A prosecutor may not express a personal opinion or belief in a witness's credibility when there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial.

(10) Criminal Law § 244--Trial--Instructions--Credibility of Witnesses.

CALJIC No. 2.20 is not rendered improper by its statements ***796** that the jury may consider "[t]he existence or nonexistence of a bias, interest, or other motive" and "[t]he attitude of the witness toward this action or toward the giving of testimony." This instruction does not permit the jury to consider extrajudicial facts. Bias is simply another fact subject to proof.

(11) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Comment on Witnesses--Misleading Jury as to Prosecution Witness's Incentive to Testify.

In a capital homicide prosecution, the prosecutor did not mislead the jury as to a prosecution witness's incentive to testify. The prosecutor urged the jury to believe the witness because, under the terms of a plea agreement in which the witness would be allowed to plead guilty to a certain offense in exchange for truthful testimony against defendant, the witness had nothing to fear as long as he told the truth. Even if the plea agreement said nothing about other crimes of which the witness was suspected and failed to specify what, if any, arrangement the witness had with the prosecutor regarding those crimes, the record lacked conclusive evidence that the witness feared prosecution for these other crimes. Nothing in the record indicated that the witness was ever charged in connection with any of these crimes or had any agreement with the prosecutor regarding them, and there was insufficient evidence to warrant the belief that prosecution was a reasonable probability.

(12) Criminal Law § 522--Punishment--Penalty Trial--Argument--Prosecution Witness's Lack of Motive to Lie--Prosecutor's Thanking of Jury for Guilt Verdict.

In the penalty phase of a capital homicide prosecution, the prosecutor did not engage in improper argument by asserting that a prosecution witness testifying pursuant to a plea arrangement had no motive to lie. Testimony pursuant to a plea agreement conditioned on truthful testimony is not coerced or unreliable simply because a witness who recants his or her preliminary hearing testimony at trial is subject to perjury charges. Assuming the witness lied at the preliminary hearing, any pressure on the witness to repeat the lie at trial stems from his or her own conduct in giving perjured testimony, rather than the plea agreement. Thus, if the witness had lied in his guilt phase testimony, his motive to repeat the lie in the penalty phase would likewise be attributable to his own conduct, rather than the plea agreement. Also, at the start of the penalty phase, any error in the prosecutor's thanking the jury for its guilt phase verdict, thereby preconditioning the jury to believe the witness's penalty phase testimony, was cured by the court's admonition to the jury to disregard the statement.

(13) Criminal Law § 445--Argument and Conduct of Counsel--Prosecutor-- Opening Statement--Visual Aids--Poster of Prosecution *797 Witness's Preliminary Hearing Testimony.

In a capital homicide prosecution, the prosecutor's use, during his opening statement, of a poster consisting of an enlarged page from the transcript of a prosecution witness's preliminary hearing testimony containing incriminating statements defendant made to the witness neither violated the rule against hearsay nor constituted any species of vouching. The purpose of the opening statement is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force, and effect. The use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate. Similarly, the illustrative use of an enlarged page of transcript was not improper, as the witness ultimately testified consistently with the transcript. It is axiomatic that nothing the prosecutor says in an opening statement is evidence.

(14) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Closing Argument Misleading Jury About Prosecution Witness's Credibility.

In his closing argument during a capital homicide prosecution, the prosecutor did not mislead the jury about a prosecution witness's credibility by stating that the witness had received immunity from prosecution for his offenses for his testimony against defendant. Testimony pursuant to a plea agreement conditioned on truthful testimony is not coerced or unreliable simply because a witness who recants his or her preliminary hearing testimony at trial is subject to perjury charges. Moreover, the prosecutor fully disclosed the benefit the witness received. In any event, defense counsel was free to point out the possibility that the witness might have been subject to perjury charges if he testified inconsistently with his preliminary hearing testimony.

(15a, 15b) Criminal Law § 45.2--Rights of Accused--Fair Trial--Failure to Preserve Evidence--Failure to Tape-record Pretrial Interview of Prosecution Witness.

The prosecutor's refusal to allow recording of the entire pretrial interview of a prosecution witness did not constitute the denial of a capital homicide defendant's right to disclosure of all exculpatory evidence. Thus, the trial court did not err in denying defendant's motion to suppress the witness's testimony at trial. Although the untaped portions included indications of forgetfulness and hesitations, the trial court's finding that the substance of the taped portion of the witness's statement was similar to that of the untaped portion led to the inference that the untaped portion did not possess apparent, independent exculpatory value. Defendant demonstrated only that a record of the witness's unrecorded remarks might have helped *798 him attack the witness's credibility; consequently, he fell short of establishing materiality under the constitutional standard. In any event, defense counsel's cross-examination of the witness elicited numerous instances of difficulty in recollection, a fact he pointed out in closing argument, and evidence of the witness's hesitations was available through other witnesses.

(16) Criminal Law § 45--Rights of Accused--Fair Trial--Nondisclosure of Helpful Information.

The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

(17) Witnesses § 31--Examination of Witnesses--Cross- examination-- Restriction--Prosecution Witness.

In a capital homicide prosecution, the trial court did not improperly restrict the cross-examination of a prosecution witness concerning the witness's involvement in an assault. The trial court properly ruled the assault inadmissible if offered merely to establish a character trait of violence and thereby to invite the inference that the witness behaved violently on the occasion of the killing that was the subject of the prosecution. However, the court ruled that the assault could be used to impeach the witness's credibility depending on the content of his testimony. Thus, defense counsel was free to elicit from the witness testimony as to his nonviolent nature and then to introduce evidence of the assault as impeachment. He did not do so. In any event, the jury was aware of the witness's bias and willingness to testify for the prosecution since he testified under the terms of a plea agreement. Thus, the trial court's ruling on the scope of the witness's cross-examination did not deprive defendant of a trial by a fair and impartial jury, due process, or the right to confront witnesses Nor did it subject him to an arbitrarily or unreliably imposed sentence of death.

(18a, 18b) Criminal Law § 116--Rights of Accused--Competence of Defense Counsel--Failure to Attack Credibility of Prosecution Witness.

In a capital homicide prosecution, defendant was not rendered ineffective assistance of counsel by reason of counsel's failure to impeach a prosecution witness with his involvement in an unrelated assault. It was not reasonably probable a determination more favorable to defendant would have resulted had counsel brought the assault incident to the jury's attention. The jury was already aware of the terms under which the witness was testifying (pursuant to a plea agreement ***799** relating to the subject homicide), the witness was subjected to extensive cross-examination, and the probative value of the evidence counsel possessed was limited. Because the assault incident as related by counsel did not support an inference that the witness feared prosecution for that offense, the jury would not have formed a significantly different impression of the witness's credibility had defense counsel used it to impeach him.

(19) Criminal Law § 104--Rights of Accused--Competence of Defense Counsel-- Burden of Proof.

A criminal defendant claiming ineffective assistance of counsel has the burden of showing that counsel failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate. The defendant must also show that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings.

(20) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Comment on Witnesses--Reference to Defense Counsel's Failure to Address Issues Relating to Witnesses' Credibility.

In the guilt phase of a capital homicide prosecution, the prosecutor's closing argument comments did not constitute misconduct. The principle thrust of defense counsel's closing argument was that the jury should not credit the testimony of two prosecution witnesses who were also involved in the killing. In rebuttal the prosecutor argued that defense counsel had failed to address certain points the prosecutor made in urging the jury to believe these witnesses. Upon defense objection, the court determined that this was not proper rebuttal, since it focused on what defense counsel had not argued, rather than what he did argue. However, the court determined that there was no bad faith and that an admonishment was not necessary. The prosecutor's references to counsel's argument did not amount to a personal attack on defense counsel. The prosecutor did not accuse defense counsel of lying, but merely pointed out his omissions.

(21) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Comment on Witnesses--Defense Witness.

In the guilt phase of a capital homicide prosecution, the prosecutor's statement in closing argument concerning a defense witness did not lead the jury to suppose that the prosecutor knew, from extrajudicial evidence, how the witness obtained his information. Thus, the trial court's refusal to admonish the jury was not erroneous. The witness testified that while he was in jail he had met a certain prosecution witness who was involved in the killing and testified as to ***800** certain details of the killing that were told to hiim by the prosecution witness. Defense counsel argued that the witness must have learned these details from the prosecution witness, but the prosecutor stated that the witness read about the details in the newspaper. Upon objection, the court agreed with the defense that the witness had merely stated he had access to newspapers in jail, not that he had read about the details of the crime; however, the court determined that the record of the testimony would be dispositive. The exchange between court and counsel made it plain to the jury that the record of the witness's testimony would speak for itself.

(22a, 22b, 22c) Homicide § 87--Trial--Instructions--Participation in Offense--Denial of Requested Instruction That Witness Was Accomplice.

In a capital homicide prosecution, the trial court did not err in refusing defendant's requested instruction that a witness was an accomplice as a matter of law and that his testimony therefore required corroboration under Pen. Code, § 1111; rather, the court properly instructed the jury to decide the question. The record supported, but did not dictate, the conclusion that the witness acted with the requisite guilty knowledge and intent as is required for accomplice liability. Although the testimony indicated that the witness had participated in discussions preceding the burglary that resulted in the murder, had pointed out to defendant and another the location of the victim's residence, and had helped dispose of robbery proceeds, there was no suggestion that the witness had any prior knowledge as to the murder. Even as to the related burglary and robbery, the record did not compel a finding that the witness shared liability as an accomplice. In any event, even if the witness were an accomplice to the burglary and robbery, his testimony was adequately corroborated by the testimony of others.

(23) Criminal Law § 433--Evidence--Sufficiency--Accomplice Testimony-- Accessories--As Question for Jury.

Under Pen. Code, § 1111 (accomplice testimony against defendant must be corroborated), an accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. In order to be chargeable with the identical offense, the witness must be considered a principal under Pen. Code, § 31. An accessory, however, is not liable to prosecution for the identical offense, and so is not an accomplice. Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom. The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. ***801**

(24) Criminal Law § 436--Evidence--Sufficiency--Accomplice Testimony-- Corroboration.

For purposes of Pen. Code, § 1111 (accomplice testimony against defendant must be corroborated), corroborative evidence must come in by means of the testimony of a nonaccomplice witness. It need not corroborate every fact to which the accomplice testified or establish the corpus delicti of the charged crime. It is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. Corroborative evidence may be slight and entitled to little consideration when standing alone.

[See 3 Witkin, Cal. Evidence (3d ed. 1986) § 1764.]

(25) Homicide § 78--Trial--Instructions--Intent--Felony-murder Special Circumstance.

In a capital prosecution for a homicide that occurred before the California Supreme Court held that intent to kill was not a requirement for a felony- murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(17)), the trial court's instructions on intent (CALJIC No. 8.81.17) were not erroneous. The jury was instructed that to find the special circumstance, it had to find "that the defendant intended to kill a human being or intended to aid another in the killing of a human being." This did not permit a special circumstance finding if the jury merely believed that defendant intended to help another, such as by letting him into the victim's house, or by holding the other's gun while the other struck the victim with an ax. Moreover, the fact that the jury found defendant personally used an ax in committing the crimes suggested that it could not have so interpreted the instruction. Further, the court's instructions on liability for aiding and abetting did not have the effect of diminishing the jurors' appreciation of the intent requirement.

(26) Criminal Law § 48--Rights of Accused--Fair Trial--Presence at Trial-- Rereading of Testimony to Deliberating Jury.

In a capital homicide prosecution, defendant's absence while trial testimony was reread to the deliberating jury in the jury deliberation room did not deny defendant his right to a complete record of the proceedings (Pen. Code, § 190.9), his right to confront witnesses, or his right to competent assistance of counsel. Although the record contained no personal waiver of presence during the rereading, defendant failed to show that his absence in any way prejudiced him or resulted in the denial of a fair and impartial trial. Without such a showing, his absence from a rereading of testimony did not raise due process concerns. Also, without any prejudice, there was neither a denial of effective representation nor impairment of defendant's rights under U.S. Const., 8th Amend.

(27) Criminal Law § 460--New Trial--Grounds--Misconduct of Jury-- Cellular Telephone in Jury Room.

In a capital homicide prosecution, a juror's taking a cellular telephone into the jury deliberation ***802** room did not constitute prejudicial misconduct. Thus, the trial court did not err in denying defendant's motion for a new trial. The practice of taking a telephone into a jury deliberations room carries the obvious potential for mischief. However, no presumption of prejudice arose. The juror brought the telephone into the deliberation room only after he believed he had permission to do so, the phone was used to make personal business calls, and defendant offered no evidence to suggest either that the telephone was ever used for an improper purpose or that its presence distracted the jurors.

(28) Criminal Law § 460--New Trial--Grounds--Misconduct of Jury--Sexual Harassment Among Jurors.

In a capital homicide prosecution, the trial court did not err in denying defendant's motion for a new trial, which was made on the ground of sexual harassment occurring in the jury deliberation room. At the hearing on the new trial motion, a female juror testified that once, in the crowded deliberation room, a male juror placed a hand on her rib cage as he squeezed past her. She was wearing a cropped shirt, and his hand

accidently slipped underneath the shirt. She did not feel he had made a pass at her. She told a defense investigator she felt uncomfortable being alone in the room with the male juror, but she testified she would have felt uncomfortable being alone with any of the other jurors. This evidence failed to establish sexual harassment. Moreover, even if it did rise to the level of harassment, defendant failed to offer evidence indicating the incident might have interfered with the female juror's participation in deliberations.

(29) Criminal Law § 460--New Trial--Grounds--Misconduct of Jury--Jurors' Relating Personal Anecdotes Concerning Drug Use.

In a capital homicide prosecution, the trial court did not err in denying defendant's motion for a new trial, even though defendant submitted juror declarations concerning juror discussions of drug use. The declarations by two jurors stated that another juror commented on his son's past use of drugs and opined that the memory of some of the witnesses may have been affected by drug use; that another juror said he had used drugs in his youth; and that a third juror mentioned he had a family member who was an alcoholic. These comments did not show that the jurors relied on extrajudicial information relating to the issues pending before them. Defendant did not attempt to show how the jurors' statements regarding drug and alcohol use by family members might relate to any of the issues in this case. None of the cited statements therefore rose to the level of misconduct.

(30) Criminal Law § 520--Punishment--Penalty Trial--Reopening Jury Voir Dire.

In a capital homicide prosecution, the trial court did ***803** not err in denying defendant's motion to reopen jury voir dire prior to the penalty trial. Pen. Code, § 190.4, subd. (c), reflects the longstanding legislative preference for a single jury to determine both guilt and penalty. Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. Although at the time of the initial voir dire, defense counsel was unaware a coperpetrator would testify against defendant, defendant raised only speculation that some jurors may have entertained some hidden bias regarding the testimony of a coperpetrator or that they may have prejudged the issue of penalty. Thus, defendant failed to establish error, constitutional or otherwise. Also, there was no prosecutorial misconduct in the form of concealing the coperpetrator's status as a witness and thereby preventing appropriate voir dire prior to the guilt trial. The events known to defendant prior to the guilt trial were such that it was a realistic possibility that the coperpetrator would testify.

(31) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Court's Statement That Jurors Would "Recommend" Penalty.

In a capital homicide prosecution, the trial court's statement to some jurors prior to the penalty trial that they would make a "recommendation" as to the appropriate penalty did not deprive defendant of his constitutional right to a sentencing body fully apprised of its responsibility. A death sentence may not constitutionally rest on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's execution lies elsewhere. However, none of the jurors could have been under any misapprehension as to the nature of their duty. Portions of voir dire, the trial court's instructions, and arguments of counsel emphasized that the decision as to life or death was for the jury alone. Neither the prosecutor nor the trial court suggested that the jury's decision would be reviewed for correctness and appropriateness.

(32) Criminal Law § 523--Punishment--Penalty Trial--Instructions-- Unadjudicated Crimes Used in Aggravation.

In the penalty phase of a capital homicide prosecution, the trial court did not err in instructing the jury that each juror must make an individual determination whether the prosecution proved other unadjudicated criminal activity beyond a reasonable doubt before considering that activity in aggravation. Although defendant was entitled to a unanimous jury verdict in the final determination of penalty, the law does not require a unanimous finding as to any unadjudicated crime offered in aggravation. Neither the court's instruction nor the prosecutor's argument that it was unnecessary for the jurors to take a vote on each unadjudicated crime discouraged deliberation. ***804**

(33) Criminal Law § 520--Punishment--Penalty Trial--Necessity for Written Findings on Unadjudicated Crimes Used in Aggravation--Equal Protection:Constitutional Law § 90--Equal Protection--Differences in Classes.

In the penalty phase of a capital homicide prosecution, the trial court's refusal to require specific written findings on unadjudicated offenses used in aggravation did not violate defendant's right to equal protection. Although a defendant subject to the

imposition of a sentence enhancement under Pen. Code, § 12022.5, is entitled to such a finding, the capital defendant and the defendant subject to the § 12022.5 enhancement are not similarly situated. The defendant subject to § 12022.5 receives enhanced punishment for the use of a firearm in the commission of a crime; the capital defendant receives punishment not for the unadjudicated crimes but for the murder with special circumstances of which he or she has been found guilty.

(34) Criminal Law § 521--Punishment--Penalty Trial--Evidence--Unadjudicated Crimes--Sufficiency of Proof.

In the penalty phase of a capital homicide prosecution, the trial court did not err in admitting evidence of defendant's unadjudicated crimes, committed in New Mexico, to show prior violent criminal activity as an aggravating factor (Pen. Code, § 190.3, factor (b)). Pursuant to its discretionary powers, the court conducted hearings out of the jury's presence to determine whether the corpus delicti of two uncharged murders was amply established. The circumstantial evidence, together with witnesses' relation of defendant's incriminating statements, sufficed to permit admission of the evidence of the two murders. Also, the admission of the other-crimes evidence in the penalty phase did not deny defendant his rights to due process of law, to a speedy trial by a fair and impartial jury, to protection against an arbitrarily and unreliably imposed sentence of death, and to a trial by a jury of the vicinage of the New Mexico offenses. Nor did the procedures violate the constitutional prohibitions against double jeopardy and cruel and unusual punishment.

(35) Criminal Law § 521--Punishment--Penalty Trial--Evidence--Unadjudicated Crimes--Adoptive Admissions.

In the penalty phase of a capital homicide prosecution, the trial court did not err in relying on the doctrine of adoptive admissions in allowing testimony linking defendant to an unadjudicated murder. The court allowed a witness to testify that she heard three conversants, including defendant, speak of "getting rid of a body" and of other details of a homicide. For the adoptive admission exception to the hearsay rule (Evid. Code, § 1221) to apply, a direct accusation is not essential. The testimony ***805** indicated that defendant participated without demur in a private conversation during which the disposition of the victim's remains and his bicycle was discussed. The circumstances afforded defendant the opportunity to deny responsibility, to refuse to participate, or otherwise to dissociate himself from the planned activity; he did not do so. Also, it was reasonable to infer, from the witness's testimony that he participated in the conversation, that defendant heard the statements. Moreover, the court appropriately instructed the jury on adoptive admissions.

(36) Criminal Law § 521--Punishment--Penalty Trial--Evidence--Hearsay-- State of Mind Exception--Harmless Error.

In the penalty phase of a capital homicide prosecution, no reversible error resulted from the trial court's exclusion of statements of the wife of the victim of an unadjudicated murder attributed to defendant as an aggravating factor. A witness was prepared to testify that the victim and the wife were involved in a custody battle over their son, that there was enmity between the two, and that the wife had put a contract out on his life. Defendant contended on appeal that the proffered testimony was proof that the victim had voluntarily chosen to disappear. This testimony was not hearsay, but rather went to the victim's state of mind shortly before he disappeared. Therefore, it was admissible. However, defense counsel failed to raise this ground at trial, and thereby waived the issue. Moreover, there was no prejudice to defendant. In light of the evidence that defendant in effect admitted to three witnesses his responsibility for the victim's death, it was not reasonably probable that a result more favorable to him would have resulted from presentation of the excluded testimony.

(37) Criminal Law § 410--Evidence--Hearsay--Lack of Indicia of Reliability.

In the penalty phase of a capital homicide prosecution in which the prosecutor introduced evidence of an unadjudicated murder attributed to defendant, the trial court did not err in sustaining the prosecutor's hearsay and relevancy objections to questions aimed at eliciting the out-of-court statements of a man who claimed to have seen the victim of the unadjudicated murder after the victim's disappearance. A witness testified that about two weeks after the victim was last seen, a man calling himself Ted visited her. She described Ted, whom she had never before seen, in some detail, and stated she gave this information to a detective. When defense counsel asked the witness what exactly Ted told her, the trial court sustained the prosecutor's hearsay objection. The proffered testimony lacked indicia of reliability sufficient to compel its admission, especially in the absence of any showing as to Ted's identity or relationship to the victim. In any event, ***806** on cross-examination the witness stated she had

met a man who claimed to have seen the victim after his disappearance and that she had so informed a detective. Defense counsel thus succeeded in suggesting to the jury that, contrary to the prosecution's theory, the victim was still alive.

(38) Criminal Law § 521--Punishment--Penalty Trial--Evidence--Defendant's Refusal of Plea Offer.

In the penalty phase of a capital homicide prosecution, the trial court did not abuse its discretion in ruling inadmissible, under Evid. Code, § 352, evidence of defendant's refusal of a plea offer in exchange for his testimony against coperpetrators. Although a capital defendant must be allowed to present all relevant mitigating evidence to the jury, the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. As an indication of defendant's character, the evidence was meaningless. Also, even though the evidence could show loyalty to friends or ability to get along well in prison, it was also possible to infer less favorable characteristics from the evidence. Even if the evidence showed differences between defendant and the coperpetrators, penalty phase deliberations do not involve a comparison of coperpetrators or their sentences.

(39) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Multiple Counting of Aggravating Factors.

In the penalty phase of a capital homicide prosecution, the trial court's instructions concerning aggravating factors (CALJIC No. 8.84.1) did not improperly invite the jury to "multiple count" aggravating factors. A reasonable juror would not have considered the facts of the murder first as circumstances of the crime, second as special circumstances (Pen. Code, § 190.3, factor (a)), and third as instances of other criminal activity (Pen. Code, § 190.3, factor (b)). The instructions as a whole invited reasonable jurors neither to "weigh" each special circumstance twice nor to count the circumstances of the present crime under the other factors. Also, nothing in the prosecutor's arguments invited the jury to make improper use of the evidence. Further, the prosecutor's use of a chart, listing various types of murders for which the death penalty may or may not be appropriate, did not improperly imply that Pen. Code, § 190.3, factors are to be counted.

(40a, 40b) Criminal Law § 521--Punishment--Penalty Trial--Evidence-- Limiting Cross- examination of Defendant.

In the penalty ***807** phase of a capital homicide prosecution, the trial court did not err in denying defendant's motion to limit cross- examination of himself. Defendant wished to testify regarding his refusal of a pretrial plea offer in exchange for testifying against coperpetrators only if he could be shielded from cross-examination. The trial court ruled that if defendant so testified, then the prosecutor would be entitled to cross- examine defendant on his character traits of loyalty and helpfulness to his friends. An inference naturally and necessarily to be drawn from the fact of defendant's reluctance to testify against his friends was that he possessed these traits. Given the testimony that defendant and the victim of an uncharged murder attributed to defendant were longtime friends, the trial court properly ruled that the defendant could be cross-examined regarding matters bearing on his loyalty, helpfulness, or concern toward that victim, although he could not be cross- examined regarding the killing which was the subject of the prosecution.

(41) Criminal Law § 50--Rights of Accused--Fair Trial--Remaining Silent-- Limitation of Cross-examination of Defendant.

When a criminal defendant chooses to testify on his or her own behalf, the privilege against self-incrimination serves to prevent the prosecution from questioning the defendant upon the case generally, and in effect making the defendant its own witness. Such general compelled cross-examination would not only pose the cruel trilemma of self-accusation, perjury, or contempt; it would also penalize and thereby deter a defendant's assertion of the right to take the witness stand to explain or contradict a particular aspect of the case against him or her. The breadth of the waiver of the defendant's privilege is determined by the scope of the testimony he or she presents.

(42) Criminal Law § 520--Punishment--Penalty Trial--Requirement of Written Findings.

Written findings disclosing the reasons for the jury's penalty determination in a capital homicide prosecution are not required.

(43) Criminal Law § 522--Punishment--Penalty Trial--Argument--Taint of Guilt Phase Argument.

The prosecutor's guilt phase opening statement did not taint the jury's penalty determination in a capital homicide prosecution. Near the end of his opening

statement, after outlining what he expected the evidence to prove, the prosecutor said, "Based on that evidence, ladies and gentlemen, at the end of the guilt phase, I will ask you to find [defendant] guilty of first degree murder." The words "guilt phase" did not imply that there inevitably would be a penalty phase, and that the guilt phase was merely a formality. Defendant ***808** waived the point by failure to object. In any event, nothing in the prosecutor's statement remotely suggested that a verdict of guilt was a foregone conclusion, and, after voir dire, the jurors were well inured to the concept that the initial part of any capital case is called the guilt phase.

(44) Criminal Law § 522--Punishment--Penalty Trial--Argument--Prosecutor's Use of Chart.

In the penalty phase of a capital homicide prosecution, the prosecutor's use of a chart during closing argument did not violate defendant's constitutional rights. The chart set forth various statutory categories of murder, with a line separating those for which the death penalty is legally available, and listed aggravating and mitigating factors. The prosecutor drew a second line through the section of the chart depicting first degree murders with special circumstances, to separate cases in which he argued the death penalty would be appropriate from those in which it would be legally available but inappropriate. The use of a chart did not imply that scales and lines should be used in determining penalty, and that the process is one of numerical computation rather than evaluation and judgment. The prosecutor took care to avoid any such mechanistic approaches to the sentencing decision and emphasized the individual, subjective nature of the penalty determination.

(45) Criminal Law § 523--Punishment--Penalty Trial--Instructions-- Nonstatutory Aggravating Evidence.

In the penalty phase of a capital homicide prosecution, the jury was not improperly permitted to consider nonstatutory aggravating evidence. In relation to an uncharged crime, the jury was instructed that evidence was introduced to show that defendant assaulted and threatened a certain person with a gun and a knife. This did not allow a mere threat to be used in aggravation. The instruction required the jury to find that defendant both assaulted and threatened the person. Accordingly, the instructions could not have misled the jury into considering additional threatening conduct not amounting to a violation of a penal statute. Also, witnesses' testimony that they had heard the threats was not inadmissible hearsay. Since defendant's threats were admissions by a party, the hearsay rule would not require their exclusion (Evid. Code, § 1220). Moreover, the jury was instructed not to consider in aggravation any criminal conduct other than the enumerated assaults and murders adduced at trial.

(46) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Persons Other Than Defendant Involved in Crimes.

In the penalty phase of a capital homicide prosecution, the trial court did not err in instructing the jury with a modified version of CALJIC No. 2.11.5. As ***809** given, the instruction read, "There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the criminal activity which it is alleged that the defendant committed. You must not discuss or give any consideration as to why the other person is not being prosecuted or whether he has or will be prosecuted." This instruction did not mislead the jury into believing that it could not consider the fact that a witness was not being prosecuted for an uncharged killing, attributed to defendant as an aggravating factor, in assessing the witness's credibility. The instruction was directed at another person's involvement in the uncharged murder. For the jury to have been misled, it would have had to ignore the court's instructions on accomplice testimony and credibility, and to have disregarded counsel's efforts to discredit the witness in his closing argument.

(47) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Lingering Doubt as to Defendant's Guilt.

In the penalty phase of a capital homicide prosecution, no reversible error resulted from the trial court's refusing defendant's requested instruction on lingering doubt as to his guilt. The instruction is not constitutionally mandated. Also, even if the evidence justified the instruction, defendant was not prejudiced by its absence. Trial counsel did not argue that the jury should base its decision on any residual doubt as to defendant's guilt of the murder. In fact, counsel, perhaps mindful of the pitfalls of lingering doubt arguments, twice specifically stated that the issue had already been decided. Even so, without comment and without objection, he read the text of his proposed lingering doubt instruction to the jury. Under these circumstances, defendant would not have derived any additional benefit had the requested instruction been given.

(48) Criminal Law § 523--Punishment--Penalty Trial--Instructions--Special Instruction on Mitigating Factors.

In the penalty phase of a capital homicide prosecution, the trial court did not err in refusing defendant's requested special instruction on mitigating factors. Defendant requested a modification of CALJIC No. 8.84.1 to include factors defendant alleged applied specifically to his case. Instead the court instructed in the standard language of CALJIC No. 8.84.1 and added other pertinent instructions defendant requested. In large part the rejected instruction duplicated other instructions and was argumentative in that it merely highlighted certain aspects of the evidence without further illuminating the legal standards at issue. The instructions given adequately covered the defense theory and provided sufficient guidance to the jury.

(49) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict--Consideration of Probation Report***810** --Prejudice.

In ruling on defendant's automatic motion to modify the death verdict (Pen. Code, § 190.4, subd. (e)), the court's reading of probation report documents did not prejudice defendant. The trial court must decide the application for modification of the verdict on the basis of the evidence. This does not include the probation report. Consideration of the probation report or victim impact statements before ruling on the application for modification is, therefore, error. But even when the trial court has considered such extraneous information in ruling on the application, the reviewing court assumes there has been no improper influence on the court, absent specific evidence to the contrary. The court indicated its awareness of the statutory requirements. Although a remark concerning victim-impact evidence indicated a small quantum of improper influence, there was no reasonable possibility that the trial court's error affected its decision.

(50) Homicide § 101--Punishment--Death Penalty--Automatic Motion to Modify Death Verdict--Victim-Impact Evidence.

The broad holdings of two United States Supreme Court cases which prohibited victim-impact evidence in determining punishment in capital cases-since overruled as to the use of certain forms of victim-impact evidence recognized by those cases-do not extend to proceedings relating to the automatic application for modification of a verdict of death under Pen. Code, § 190.4, subd. (e).

(51) Homicide § 101--Punishment--Death Penalty--Disparate Treatment of Coperpetrators.

In a capital homicide prosecution, neither the disparity between defendant's sentence and a coperpetrator's, nor the fact that the coperpetrator testified pursuant to agreement, reflected an arbitrary application of the law. That the coperpetrator received a lesser sentence could not mitigate the gravity of defendant's wrongdoing. The jury heard the evidence of defendant's crimes and determined that, in light of his background and his role in the murder, death was the appropriate penalty. Defendant received the individualized consideration guaranteed him by U.S. Const., 8th Amend.

COUNSEL

L. Marshall Smith, under appointment by the Supreme Court, and Maureen DeMaio for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Edward T. Fogel, Jr., Assistant Attorney General, John R. Gorey, William T. Harter and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent. ***811**

PANELLI, J.

A jury convicted Curtis Lynn Fauber of robbery (Pen. Code, § 211), [FN1] burglary (§§ 459, 460, 462, subd. (a), 667) and first degree murder (§ 187), finding true the special allegations that he intentionally committed the murder while engaged in the commission of the robbery and burglary (§ 190.2, subd. (a)(17)) and that he personally used a deadly weapon (an ax) in committing the

offenses (§ 12022, subd. (b)). Following a penalty trial, the jury returned a verdict of death. This appeal is automatic. (§ 1239, subd. (b).)

FN1 Further unspecified statutory references are to the Penal Code.

The judgment is affirmed.

I. Guilt Phase Facts

A. *Prosecution Case*

Early in the summer of 1986, defendant travelled from New Mexico, where he had grown up, to Ventura to visit Brian Buckley, whom he had befriended in 1985 while both were serving in the Army. Buckley was living in his mother's apartment on Crimea Street. Defendant stayed either in the apartment or in a trailer, which Buckley's mother kept in the lot near the apartment.

While Buckley's mother was away on a trip to Illinois, defendant and Buckley socialized with Buckley's neighbors, Jan Jarvis and Mel Rowan. (Rowan, who had been convicted of delivery of a controlled substance and burglary of a habitation in Texas, and had violated his parole, was using the name "Tim Johnson" to escape detection by law enforcement authorities.) Jarvis, Rowan, Buckley, and defendant used drugs together.

In June or July 1986, defendant and Buckley visited Rowan's apartment, bringing a shotgun and a gram scale. Defendant borrowed a hacksaw and began to saw off the barrel of the shotgun. In the course of conversation, Jarvis mentioned she had a former boyfriend, named Tom Urell, who sold cocaine. Defendant or Buckley asked where he lived. She drew a map showing the location and layout of Urell's house and said he had a lot of cocaine in a safe. Buckley, Rowan, and defendant discussed burglarizing the house.

A week later, Rowan and Jarvis drove by Urell's beachfront house in Oxnard with defendant and Buckley, on a motorcycle, following. Rowan or ***812** Jarvis pointed out the house. Rowan told defendant to "rip off" Urell "now," but defendant said they wanted to check it out some more. They saw a Chevrolet El Camino pickup truck parked in Urell's driveway. At defendant's suggestion, he and Buckley twice returned to "scope out" the house.

Defendant did not testify at trial, and the only account of the murder was provided by the testimony of Brian Buckley. Between four days and one week after the initial drive-by,

defendant and Buckley went on defendant's motorcycle to Urell's house. It was about midnight. Defendant parked the motorcycle about half a block from the house. Defendant brought a backpack or bag containing a bandanna, gloves, a hat, and the shotgun he had been sawing at Rowan's apartment. Buckley brought a bag containing a .22-caliber pistol, a bandanna, gloves, and a knit stocking hat. One of them had a roll of duct tape. They walked down to the beach, donned hats, gloves and bandannas, and loaded their weapons. It was defendant's idea to bring the weapons and to wear the bandannas so that they would not be identified. Defendant told Buckley he might have to kill Urell to prevent him from being a witness.

They entered the house and defendant led the way to the bedroom. Urell, who was asleep in bed, woke when they approached. Using a false Mexican accent, defendant told Urell not to move. Urell told them to take anything they wanted and not to hurt him. Defendant directed Urell to lie on his stomach. While Buckley held the shotgun, defendant taped Urell's wrists behind his back. Defendant and Buckley searched the drawers in the room, and defendant asked Urell for the combination to the safe. Urell said he did not know the combination and the safe contained nothing valuable. Buckley found cocaine paraphernalia, rolls of quarters, and a few silver dollars in Urell's bedroom. He put these items in his bag. Defendant took a baggie of cocaine and a calculator.

Defendant found an ax under the bed and asked Urell what he was doing with it. Then he raised the ax, turned it in his hands, and hit Urell in the back of the neck. Buckley, who was holding the shotgun, heard the thud of the blow and a hissing sound coming from Urell as if he were having a hard time breathing. Buckley left the bedroom and went into the kitchen. Defendant hit Urell again and the hissing noise became quieter or stopped. Only a second or two elapsed between the first and second blows. Defendant may have hit Urell a third time while Buckley was in the kitchen. Defendant emerged from the bedroom. He and Buckley discussed putting the safe into Urell's pickup truck. Buckley asked defendant if Urell were dead. Defendant responded that he did not know. Defendant returned to the bedroom, and Buckley heard two more hits. ***813**

They loaded the safe onto the truck. Defendant drove back to Buckley's apartment, while Buckley drove defendant's motorcycle. Defendant knocked on Rowan's door about 1 a.m., asking for the key to the storeroom underneath the apartment.

Rowan gave it to him, got dressed, and went downstairs. He helped defendant unload the safe from the El Camino.

Defendant told Rowan that Urell had not been at home. Rowan returned to his apartment to talk to Jarvis. Later, Rowan went back downstairs and noticed the outer door of the safe was open. Defendant told him he had found the combination in a jewelry box. Buckley went to the trailer and was joined by defendant and Rowan. Buckley was putting a .22-caliber pistol and shotgun in the trailer and opening a briefcase that had been in the El Camino. Rowan asked if they had got any cocaine; defendant said they had not. Rowan again returned to his apartment.

Defendant and Buckley took everything into the trailer. Defendant then drove away in the El Camino, while Buckley left on defendant's motorcycle. Defendant disposed of the El Camino over a cliff in an area called "The Cross" and returned to the apartment on the motorcycle with Buckley.

Defendant began to try to open the inner door of the safe, but presently stopped due to the noise he was making. He and Buckley injected the cocaine they had found at Urell's house.

Rowan appeared and again asked if anyone had been at Urell's house. Eventually defendant admitted that Urell had been at home and that he thought he had killed him. He said he had hit Urell because Urell had seen his face, telling Rowan he was not ready to leave Ventura yet. Rowan advised defendant and Buckley to throw away everything except the cash.

The next day, defendant succeeded in opening the inner door of the safe. Inside were jewelry, old silver dollars, gold nuggets, and coin books. Rowan tore up the coin books and threw them away. Jarvis took the jewelry and gold and was directed to throw them away. Defendant and Buckley took the safe to Ojai and dumped it near Lake Matilija.

Urell's body was discovered by his friend, Ronald Siebold. Siebold found Urell lying on his bed, apparently dead, with his hands taped behind his back and a pillow on his head. Siebold yelled Urell's name, pulled the pillow off, and dialed 911.

The police arrived 10 minutes later. Urell's room appeared to have been ransacked. Leaning against the foot of the bed was a wooden-handled ax. A subsequent search of the house yielded narcotics paraphernalia. ***814**

Dr. Frederick Warren Lovell, the Chief Medical Examiner for Ventura County, examined the body at the scene at 7:54 p.m. on July 16, 1986. He estimated that death had occurred some 14 to 22 hours earlier. A subsequent autopsy showed that the neck bore a series of four overlapping premortem blows from a rectangular object consistent with the blunt side of an ax. The blows broke the victim's neck and caused paralysis that inhibited or possibly cut off his breathing. Dr. Lovell determined the cause of death to be asphyxia, caused in one of the following ways: (1) someone held a pillow over the victim's face for two to five minutes; (2) after the blows to the head, the victim was unable to move his head while lying face down and died of suffocation over the course of two to four minutes; or (3) the blows destroyed the nerve system that causes breathing.

On July 16, 1986, Buckley sold the silver dollars taken from Urell's house to a coin shop in Ventura, sharing the proceeds with defendant. Barbara Adams, employed by the shop, testified that she bought the silver dollars from Buckley, who showed military identification.

Urell was a construction supervisor employed by Bianco Corporation, located in Camarillo, and had been assigned an El Camino as a company car. He also had been assigned company credit cards, including a telephone card.

Only July 19, 1986, police searched the trailer belonging to Buckley's mother and found a book of maps stamped with Bianco Corporation's name and address.

On July 20, 1986, Paul Wolny found Urell's El Camino and reported his discovery to the police. The El Camino was impounded and found to be registered to Bianco Corporation.

Defendant gave a friend, Hal Simmon, the telephone calling card he had taken from Urell's briefcase. Simmon used the card 20 to 25 times. Simmon knew the card was stolen because he discovered the number was registered to a business. When police found Simmon in Tampa, Florida, in September or October 1986, they seized his address book, in which he had written the calling card number.

In September 1986, Buckley was arrested for a traffic violation and gave statements about the Urell killing with the understanding that they would not be used against him. In November 1987, Buckley was arrested for Urell's murder. The following month, the district

attorney's office agreed to move the court to declare the murder to be of the second degree if Buckley testified truthfully against defendant in the Urell case and against Christopher Caldwell in another case. On December 21, 1987, Buckley talked with ***815** a deputy district attorney and representatives of the sheriff's department regarding the case; a portion of the conversation was tape-recorded. On January 4, 1988, Buckley entered his plea of guilty of Urell's murder.

In September 1986, Rowan was arrested on a parole violation and talked to the police about the Urell case. Rowan was returned to the Texas Department of Corrections. Rowan testified against defendant under a grant of immunity.

Also in September 1986, defendant was arrested in Espanola, New Mexico, on a warrant issued out of Ventura County. At that time, police seized defendant's wallet, which contained, among other things, a piece cut from Urell's telephone calling card. Defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed 2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]) and was interviewed by Sergeant Larry Robertson. Defendant said he remembered Jarvis had told him about someone in Oxnard who had a lot of drugs; she drew a diagram of the man's house. Defendant said he and Buckley, on a motorcycle, followed her and Rowan as they drove past the house. According to defendant, Jarvis pointed it out and wanted him and Buckley to rip it off.

Sergeant Robertson and Detective Velasquez went to Buckley's mother's apartment in October 1986. She turned over to police a .22-caliber gun.

B. *Defense Case*

Attacking Buckley's credibility, the defense presented the testimony of John Frisilone, an inmate at the Ventura County jail, who testified that he was housed in a cell next to Buckley and talked to him through the cell vents. Frisilone testified that Buckley told him two handguns and a shotgun were involved, but that Buckley did not tell the prosecutor about the two handguns because he did not want his testimony doubted. Buckley also said he had placed the pillow over the victim's head because of the noises he was making. Frisilone also testified Buckley believed if he did not testify, the prosecutor had enough evidence to charge him with first degree murder and possibly seek the death penalty.

Frisilone had been convicted of four felonies, including forgery and grand theft. Frisilone testified he read newspapers in jail and had read about the Urell case. He had previously offered the district attorney's office information about other inmates in return for a more lenient sentence.

C. *Prosecution's Rebuttal*

Buckley denied telling Frisilone that he had placed a pillow on the victim's head. He testified Frisilone was known as a "rat" who would ***816** exchange information for a deal with the district attorney. An investigator and a deputy in the district attorney's office each testified about instances in which Frisilone had sought favorable treatment in return for information; after interviewing Frisilone, they did not use his information.

II. Jury and Venue Issues

A. *Exclusion of Hearing-impaired Juror*

(1a) Defendant contends he was denied his right to trial by a jury chosen from a representative cross-section of the community in that hearing- impaired individuals were systematically excluded from the jury panel because courtroom facilities made it impossible for such persons to serve as jurors. Defendant has failed to establish he is entitled to relief.

Although five prospective jurors who identified themselves as hearing-impaired were questioned and not excused due to the impairment, defendant claims systematic exclusion of hearing-impaired jurors due to the excusal of one prospective juror, who was unable to hear out of his left ear and suffered from Meniere's disease and vertigo, for which he took medication. After testing the prospective juror's ability to hear while seated in the jury box, the trial court declined to accept his hearing-impairment hardship excuse. However, defense counsel questioned whether it was practicable for the prospective juror to serve, and the trial court excused him.

(2) A criminal defendant is entitled to trial by an impartial jury drawn from a representative cross-section of the community. (*People v. Harris* (1984) 36 Cal.3d 36, 48 [201 Cal.Rptr. 782, 679 P.2d 433]; U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16.) To establish a prima facie violation of the fair cross- section requirement, a defendant must show that: (1) the group allegedly excluded is a "distinctive" group in the community; (2) the group's representation in jury venires is not fair and reasonable in relation to the number of such persons in the community; and (3) the under-representation is due to the systematic exclusion of such persons in the jury

selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364 [58 L.Ed.2d 579, 586-587, 99 S.Ct. 664].) (1b) Defendant did not object to the panel or move to quash the venire on the basis that he had been denied his right to a jury drawn from a representative cross-section of the community; accordingly, the point is waived. (*People v. Howard* (1992) 1 Cal.4th 1132, 1159 [5 Cal.Rptr.2d 268, 824 P.2d 1315]; Code Civ. Proc., § 225, subd. (a)(1); see former § 1060, repealed by Stats. 1988, ch. 1245, § 21, p. 4155.) Even if he had made a timely objection, however, he would not be entitled to relief because he has failed to meet his burden of establishing any of the elements of the *Duren* test. ***817**

First, he does not demonstrate that hearing-impaired persons constitute a "distinctive" group within the community. Although he notes the Legislature has recognized that persons with hearing loss are competent to serve as jurors (Code Civ. Proc., § 203, subd. (a)(6)), he does not persuasively link that characteristic with the purposes of the fair cross- section requirement. (*Lockhart v. McCree* (1986) 476 U.S. 162, 174-175 [90 L.Ed.2d 137, 148-149, 106 S.Ct. 1758].) Second, he fails to demonstrate that the representation of hearing-impaired persons in the venire was unreasonably small in proportion to the number of such persons in the community. Finally, he falls short of establishing that the lack of hearing-impaired persons on the jury resulted from systematic exclusion. He fails to address the five prospective jurors with hearing impairments who were not challenged on the basis of their impairments. Indeed, it was defense counsel who asked that the only identified hearing- impaired prospective juror to be seated in the jury box be excused. Defendant's claim that he was denied his right to a jury chosen from a representative cross- section of the community must fail.

B. *Denial of Motion for Change of Venue*

(3a) Defendant contends that the trial court erred in denying his motion for a change of venue based on pretrial publicity. The error, he contends, deprived him of his rights to due process, to a fair trial by an impartial jury, and to a penalty determination that is not arbitrary or unreliable, as guaranteed him by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution.

(4) Change of venue is warranted when it appears there is a reasonable likelihood that a fair and impartial trial cannot be held in the county. (§

1033, subd. (a).) The determination requires consideration of such factors as the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity. (5) "On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it was reasonably likely that a fair trial was not in fact had. The trial court's essentially factual determinations as to these factors will be sustained if supported by substantial evidence. We independently review the trial court's ultimate determination of the reasonable likelihood of an unfair trial. [Citations.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 807 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

(3b) Consideration of the gravity and nature of the offense does not compel the conclusion that venue should have been changed. Although ***818** defendant was charged with capital murder, the most serious of offenses, this case lacked "the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation." (*People v. Green* (1980) 27 Cal.3d 1, 46 [164 Cal.Rptr. 1, 609 P.2d 468].) We have often upheld denial of venue change in capital cases. (See, e.g., *People v. Edwards, supra,* 54 Cal.3d at pp. 806-809.)

The size and nature of the community do not support a venue change. The population of Ventura County in 1987 was 619,300, making it the 13th largest county in the state. (Cal. Statistical Abstract (27th ed. 1987) Dept. of Finance, sec. B, p. 20.) Venue changes are seldom granted from counties of such a large size; the larger the local population, the less likely it is that preconceptions about the case have become embedded in the public mind. (*People v. Balderas* (1985) 41 Cal.3d 144, 178 [222 Cal.Rptr. 184, 711 P.2d 480] [motion to change venue from Kern County, 14th largest in state, properly denied].) Defendant argues for a different conclusion because death penalty trials are not very common in Ventura County, and because Ventura is less urban in character than, for example, Los Angeles. We reject defendant's argument. (See *Odle v. Superior Court* (1982) 32 Cal.3d 932, 938 [187 Cal.Rptr. 455, 654 P.2d 225] [upholding denial of venue change from Contra Costa County, "as much suburban as rural"].) Although we

have observed that "the 'adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area' " (*People v. Harris* (1981) 28 Cal.3d 935, 949 [171 Cal.Rptr. 679, 623 P.2d 240], quoting *People v. Manson* (1976) 61 Cal.App.3d 102, 189 [132 Cal.Rptr. 265]), defendant fails to support his implicit contention that capital trials should be held exclusively in major metropolitan centers experienced in such cases.

The third and fourth factors, the community status of the defendant and the victim, do not suggest a change of venue should have been granted. Defendant makes much of the fact that he is, and was reported in local media as, a new Mexico resident. However, he fails to show that he was associated with any organization or group that aroused community hostility. (*People v. Adcox* (1988) 47 Cal.3d 207, 233 [253 Cal.Rptr. 55, 763 P.2d 906].) The victim, although a longtime resident of Oxnard, was not prominent, and his death did not engender unusual emotion in the community. (*People v. Balderas, supra,* 41 Cal.3d at p. 179.) One juror "knew of" Urell, but his "hazy" recollections of Urell dated back some 10 to 15 years. The juror stated that his knowledge of Urell would not affect his decision in the case. (See *People v. Ainsworth* (1988) 45 Cal.3d 984, 1002 [248 Cal.Rptr. 568, 755 P.2d 1017].) As defendant left that juror as an alternate on the jury, defendant apparently agreed. We are unable to conclude that the juror's ***819** vague knowledge of Urell made it unlikely that defendant would receive a fair trial in Ventura County.

The most significant factor in the venue determination, for purposes of this case, is the nature and extent of news coverage. In support of his venue change motion, trial counsel submitted seven newspaper articles and several transcripts of media news broadcasts covering November 11-13, 1987. [FN2] The articles and broadcasts discussed the crime, defendant's confession and the district attorney's decision to pursue the death penalty despite its suppression, and the arrest of Brian Buckley. Media coverage continued during trial, with cameras from local television stations present during the arraignment, preliminary examination, and portions of the trial. Additionally, Oxnard and Ventura newspapers obtained permission to use still cameras in the courtroom.

> FN2 Jury selection began on November 12, one day after the media coverage submitted by defendant began.

Posttrial review of the denial of a motion for change of venue is retrospective, taking into account prospective jurors' exposure to pretrial publicity as revealed in voir dire. (*People v. Harris, supra,* 28 Cal.3d at p. 949.) Our examination of the record persuades us that pretrial publicity had no prejudicial effect. Few of the 186 prospective jurors had any recollection of the media coverage. Of those who reported hearing or seeing coverage of the case, most had read only a headline or part of an article. Only two prospective jurors had heard about defendant's confession in the media; they were excused. [FN3] Of the 12 jurors who decided this case, 9 had heard nothing in the media. The remaining three jurors reported minimal exposure to media coverage. One said she saw an article, but on seeing the name of the case, she avoided reading it. Another said he read a part of an article, but stopped when he realized it was about this case. The remaining juror said he had read something about another person being implicated, but was unsure whether it was about the same case. In summary, the jurors' exposure to pretrial publicity in this case was considerably less than that found in other cases in which we have held venue change to be unnecessary. (See *People v. Howard, supra,* 1 Cal.4th at p. 1168.) (6) It is not necessary that jurors be totally ignorant of the facts and issues involved in the case; it is sufficient if they can lay aside their impressions and opinions and render a verdict based on the evidence presented in court. (*People v. Ainsworth, supra,* 45 Cal.3d at p. 1002.) (3c) Nothing in the record suggests the few jurors who had any exposure to pretrial publicity did not do so. Further, defendant used only 17 of his 26 available peremptory challenges to select the jury and expressed no ***820** dissatisfaction with the jury as selected. The failure to exhaust peremptories is a strong indication that "the jurors were fair, and that the defense itself so concluded." (*People v. Balderas, supra,* 41 Cal.3d at p. 180.)

> FN3 One additional prospective juror, likewise excused, stated he learned of defendant's confession from friends of the victim.

The record thus shows that pretrial publicity did not deny defendant his right to a fair and impartial jury. (*People v. Harris, supra,* 28 Cal.3d at p. 950.) Defendant's assertions of other constitutional error in the denial of his venue change motion must likewise fail.

III. Claims of Error Affecting Guilt Phase

A. *Testimony of Buckley and Rowan*

1. *Summary*

Defendant contends that the prosecutor and trial judge improperly vouched for the credibility of witnesses Buckley and Rowan and misled the jury about the inducements they received for their testimony. Their actions, he claims, violated various rights guaranteed him by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

2. *Admission of Buckley Plea Agreement*

At the outset of Brian Buckley's testimony, and again in closing argument, the prosecutor read to the jury the text of Buckley's plea agreement. We reproduce it in the margin. [FN4] (7a) Defendant contends that the agreement told the jury that the prosecutor and the judge were making all necessary ***821** findings regarding Buckley's credibility. This, he argues, improperly vouched for Buckley's credibility.

> FN4 " 'This letter is to memorialize the District Attorney's position on the above-numbered case against your client, Brian A. Buckley. It is based on our recent conversation regarding a possible agreement.
>
> " 'One, Mr. Buckley is charged in the above-entitled complaint as follows: Count 1, murder of Thomas C. Urell on July 16, 1986, in violation of Section 187 of the Penal Code.
>
> " 'Count 2, robbery of Thomas C. Urell on July 16, 1986, in violation of Section 211 of the Penal Code.
>
> " 'Count 3, burglary of the residence of Thomas C. Urell on July 16, 1986, in violation of Section 459 of the Penal Code within the meaning of Sections 460.1, 460(2) and 667 of the Penal Code.
>
> " 'Item two: The District Attorney's office offers to move the Court to declare the murder to be murder in the second degree. In turn, Mr. Buckley must testify truthfully as a witness against Curtis Fauber and testify truthfully as a witness in any proceedings concerning Christopher A.Caldwell.
>
> " 'Item three: Before any agreement can be reached, Mr. Buckley must submit to a preliminary interview by members of the District Attorney's office to assess his credibility.
>
> " 'In the event that the District Attorney's office decides that Mr. Buckley is not telling the

truth, then no agreement will be reached and the above-entitled case will proceed to trial.

" 'Any statements by Mr. Buckley during this preliminary interview, of course, will not be used against him in any subsequent trial.

" 'In the event that the District Attorney's office decides that Mr. Buckley is telling the truth, the District Attorney's office will enter into an agreement with itemized terms 4 through 7 as set out below.

" 'Item four: Mr. Buckley will plead guilty to Count 1 in the above- entitled information. He will waive time for sentencing, and his sentencing will be continued until the completion of both the trial of Curtis Fauber and the preliminary hearing for Christopher A. Caldwell.

" 'Mr. Buckley'-I'm sorry. 'Item five: Mr. Buckley will make himself available and will testify truthfully in any proceedings in the prosecution against Curtis L. Fauber and in any proceedings in the prosecution against Christopher A. Caldwell." 'In the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judges who preside over these hearings.

" 'Following the conclusion of the trial against Curtis L. Fauber and the preliminary hearing against Christopher A. Caldwell, Mr. Buckley will be sentenced on case number'-that's left blank.

" 'If Mr. Buckley has complied with the terms of this agreement as fully as possible as of that date, the District Attorney's office will move the Court to declare the murder to be murder in the second degree, and Mr. Buckley will be sentenced on that charge. At that time, the remaining counts will be dismissed.

" 'Mr. Buckley will remain obligated to testify in the remaining proceedings as specified above.

" 'Item seven: If, however'-if, however, Mr. Buckley has not complied with the terms of this agreement, the District Attorney's office will not be bound to move the Court to declare the murder to be murder in the second degree nor will the District Attorney's office be bound to dismiss the other counts.

" 'At that time, Mr. Buckley will be allowed to withdraw his

plea and case number'-left blank-'will proceed to trial.

" 'As stated in Item five, the trial judges will hear Mr. Buckley's testimony in the various proceedings, will make any necessary findings as to his truthfulness.

" 'This offer expires at the close of the People's case in the trial against Curtis L. Fauber, approximately January 8, 1988.' "

Defense counsel made no objection to the reading of the plea agreement. Accordingly, defendant may not complain about it on appeal. (Evid. Code, § 353.) Defendant suggests that for various reasons he should be relieved of the requirement of contemporaneous objection. He does not persuade us. Nonetheless, even if the claim were properly before us, we would find no reversible error.

(8) As defendant acknowledges, the existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense because it bears on the witness's credibility. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155 [31 L.Ed.2d 104, 108-109, 92 S.Ct. 763].) Indeed, we have held that "when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility." (*People v. Phillips* (1985) 41 Cal.3d 29, 47 [222 Cal.Rptr. 127, 711 P.2d 423].) ***822**

(7b) Defendant's objection is not to admission of the agreement per se, but to the failure to excise certain portions that he views as "vouching" for Buckley's credibility and as placing on the trial court rather than the jury the responsibility to determine whether Buckley was telling the truth.

Defendant first argues that reference to the district attorney's preliminary determination of Buckley's credibility as a condition of the plea agreement was improper because it implied the existence of information, known to the prosecutor but undisclosed to the jury, that proved Buckley was telling the truth. (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 536.) (9) Defendant correctly notes that a prosecutor may not express a personal opinion or belief in a witness's credibility when there is " 'substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial.' " (*People v. Adcox, supra,* 47 Cal.3d at p. 236 (quoting *People v. Bain* (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564)].) (7c) We agree that the plea agreement's reference to the

district attorney's preliminary determination of Buckley's credibility had little or no relevancy to Buckley's veracity at trial, other than to suggest that the prosecutor found him credible. Thus, the reference should have been excised on a timely objection on the ground of irrelevancy.

We conclude, however, that its presentation to the jury was harmless under these circumstances. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) The prosecutor argued for Buckley's credibility based on the evidence adduced at trial, not on the strength of extrajudicial information obliquely referred to in the plea agreement. Moreover, common sense suggests that the jury will usually assume-without being told-that the prosecutor has at some point interviewed the principal witness and found his testimony believable, else he would not be testifying. We note, too, that the requirement that Buckley preliminarily satisfy the prosecutor as to his credibility "cuts both ways": it suggests not only an incentive to tell the truth but also a motive to testify as the prosecutor wishes. (*United States v. Henderson* (4th Cir. 1983) 717 F.2d 135, 137.) Thus, even if defendant had preserved an objection to admission of the challenged portion of the Buckley plea agreement, we would decline to reverse his conviction.

Defendant further argues that the plea agreement made the trial court a monitor of Buckley's truthfulness, and thereby placed its prestige behind Buckley's testimony, by providing that "[i]n the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judges who preside over these hearings." He contends this provision caused the jury to feel a lesser responsibility to make an independent determination of Buckley's truthfulness. ***823**

Our decision in *People v. Phillips, supra,* 41 Cal.3d 29, requires full disclosure to the jury of any agreement bearing on the witness's credibility, including the consequences to the witness of failure to testify truthfully. Full disclosure is not necessarily synonymous with verbatim recitation, however. Portions of an agreement irrelevant to the credibility determination or potentially misleading to the jury should, on timely and specific request, be excluded. Here, it was crucial that the jury learn what would happen to Brian Buckley in the event he failed to testify truthfully in defendant's trial. But the precise mechanism whereby his truthfulness would be determined was not a matter for its

concern. The provision detailing the judge's determination of Buckley's credibility in the event of any dispute arguably carried some slight potential for jury confusion, in that it did not *explicitly* state what is implicit within it: that the need for such a determination would arise, if at all, in connection with Buckley's sentencing, not in the process of trying defendant's guilt or innocence. For these reasons, had defendant objected to its admission, the trial court would have acted correctly in excluding it on a relevancy objection.

Nonetheless, we see no possibility that defendant was prejudiced by its admission. The jury could not reasonably have understood Buckley's plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether Buckley's testimony was truthful. Nor could the jury have been misled by prosecutorial argument. The prosecutor argued that Buckley had nothing to gain by lying because the trial court would make a determination of his credibility in the event of a dispute. The context of the remarks made it clear that determination would occur if the prosecutor sought to repudiate its agreement with Buckley after trial in defendant's case.

Our conclusion is reinforced by the fact that the trial court instructed the jury, before the start of the prosecution's case and after closing argument, that "[e]very person who testifies under oath is a witness. (10)(See fn. 5.) You are the sole judges of the believability of a witness and the weight to be given to his testimony ...." [FN5] (CALJIC No. 2.20.) (7d) We presume, in the absence of any contrary indication in the record, that the jury understood and followed this instruction. (*People v. Modesto* (1963) 59 Cal.2d 722, 755 [31 Cal.Rptr. 225, 382 P.2d 33].) The prosecutor, in his opening statement, ***824** likewise emphasized the jurors' role as sole judges of credibility. In sum, the reading of Buckley's plea agreement did not constitute reversible error. [FN6]

> FN5 We reject the contention, raised in defendant's reply brief, that CALJIC No. 2.20 is improper because it states that the jury may consider "[t]he existence or nonexistence of a bias, interest, or other motive" and "[t]he attitude of the witness toward this action or toward the giving of testimony." Defendant argues that the instruction permits the jury to consider extrajudicial facts. However, bias is simply another fact subject to proof. We further reject his contention that CALJIC No. 2.20 was

faulty because it did not prevent the jury from relying on the prosecutor and the trial court to assess Buckley's credibility; as we concluded above, the plea agreement could not reasonably have led the jury into such reliance.

FN6 Defendant contends that the reading of Buckley's plea agreement tainted the penalty phase as well. Because the reading of the plea agreement in the guilt phase was not prejudicial, and because Buckley testified again pursuant to its terms at the penalty phase, it follows that the prosecutor's reference to it during penalty phase argument did not violate defendant's Eighth Amendment rights.

3. *Claim That Prosecutor Misrepresented Buckley's Immunity*

(11) Buckley's credibility was the most significant issue in the guilt phase of defendant's trial. The prosecutor urged the jury to believe Buckley because, under the terms of his plea agreement, he had nothing to fear as long as he told the truth. Defendant contends that the prosecutor misled the jury as to Buckley's incentives to testify because the plea agreement said nothing about other crimes of which Buckley was suspected and failed to specify what, if any, arrangement Buckley had with the prosecutor regarding those crimes. This, defendant contends, denied him his rights to due process of law, to protection from cruel and unusual punishment, to freedom from arbitrary and unreliable imposition of the death penalty, and to trial by a fair and impartial jury.

Apart from the Urell matter, defendant contends, Buckley was subject to prosecution for his role in (1) a commercial burglary and theft of motorcycles, (2) an assault with a vehicle in a parking lot, and (3) the murder of David Church. If there was an agreement with the prosecutor regarding these episodes, defendant reasons, it was never disclosed to the jury; if there was no such agreement, the jury never learned that Buckley had other incentives to testify against defendant.

The flaw in defendant's argument is the absence of evidence that Buckley in fact feared prosecution for the other offenses. Nothing in the record indicates that Buckley was ever charged in connection with any of these crimes, and there is insufficient evidence before us to warrant the belief that prosecution was a reasonable probability.

As to the motorcycle theft incident, Buckley admitted on cross-examination in the penalty phase that in the summer of 1986 he and Christopher Caldwell stole two motorcycles and that Caldwell was convicted of the offense, but that he himself was not charged. Defendant suggests no reason why his counsel could not have argued, at either phase of trial, that Buckley remained vulnerable to charges arising out of this incident. In any event, the record contains insufficient evidence to enable us to conclude that he feared prosecution. ***825**

As to the parking lot incident, the record indicates that during the guilt phase of trial, defense counsel was aware that Buckley had been accused of trying to run down an individual in a parking lot, but that nothing had come of the incident. The trial court properly refused to allow counsel to use the evidence to impeach Buckley's testimony by showing that he had a violent character (Evid. Code, § 787), but permitted counsel to use it as impeachment in the event Buckley claimed to be a nonviolent person. Counsel did not bring up the subject by asking Buckley whether he hated violence or was sickened by seeing Urell beaten, so no evidence of the automobile assault came before the jury. As with the motorcycle incident, defense counsel was not precluded from attempting to present the evidence and arguing that Buckley was subject to prosecution, and the record lacks evidence from which we can confidently say Buckley could have been prosecuted.

Finally, as to the murder of David Church, the evidence does not support the conclusion that Buckley was subject to prosecution. Evidence at the penalty phase indicated that defendant and Caldwell removed Church from Buckley's apartment and killed him with an ax handle. Defendant cites drug use during Buckley's party and Buckley's desire to rid himself of an obnoxious gatecrasher as possible motives for murder. He also notes that the murder weapon belonged to Buckley. The inference is far from compelling, however, that Buckley had reason to fear prosecution for Church's killing. [FN7] Defense counsel could have questioned Buckley during the guilt phase about his involvement in the Church murder, but for obvious tactical reasons chose not to do so.

> FN7 Defendant also observes that after testifying against Christopher Caldwell in the latter's preliminary hearing, Buckley refused to testify at Caldwell's trial, citing his Fifth Amendment privilege against self- incrimination. (*People v.*

Caldwell (Sept. 7, 1989) B036699 [nonpub. opn.].) Notably, however, before asserting his Fifth Amendment privilege, Buckley indicated his willingness to testify if his name could be kept out of the newspapers and elected to assert the privilege only after the trial court declined to issue a "gag order" to protect Buckley's privacy. The Court ofAppeal, in affirming Caldwell's conviction over a claim of error in the admission of Buckley's preliminary hearing testimony, concluded there was a possibility Buckley's testimony could have implicated him in the Church killing. We need not revisit the validity of Buckley's claim of privilege, however, since the record in the present case does not, as discussed above, support the conclusion that Buckley feared prosecution for Church's murder.

The lack of evidence that Buckley either feared prosecution for other crimes or had some undisclosed agreement regarding those offenses leads us to conclude that defendant has failed to prove that the prosecutor misled the jury. (12) (See fn. 8.) We also conclude-contrary to defendant's claim-that he was not denied due process, his rights of confrontation and cross-examination, his right to be protected against cruel and unusual punishment, ***826** his right to a reliable penalty determination, or his right to trial by a fair and impartial jury in the presentation of Buckley's plea agreement to the jury. [FN8]

FN8 Defendant also contends it was inaccurate to argue, as the prosecutor did at the penalty phase, that Buckley had no motive to lie, because Buckley would have been subject to perjury charges if he recanted any prior testimony. We rejected a similar argument in *People v. Allen* (1986) 42 Cal.3d 1222, 1254 [232 Cal.Rptr. 849, 729 P.2d 115], holding that trial testimony pursuant to a plea agreement conditioned on truthful testimony is not coerced or unreliable simply because a witness who recants his preliminary hearing testimony at trial is subject to perjury charges. Assuming the witness lied at the preliminary hearing, we reasoned, any pressure on the witness to repeat the lie at trial stemmed from his own conduct in giving perjured testimony, rather than the plea agreement. (*Ibid.*) Here, if Buckley had lied in his guilt

phase testimony, his motive to repeat the lie in the penalty phase would likewise be attributable to his own conduct, rather than the plea agreement. We also reject defendant's contention that, at the start of the penalty phase, the prosecutor "preconditioned" the jury to believe Buckley's penalty phase testimony by thanking the jury for its guilt phase verdict. Any potential harm resulting from the remark was cured by the court's admonition to the jury to disregard it.

4. *Use of Rowan Preliminary Hearing Transcript as Visual Aid to Prosecutor's Opening Statement*

Mel Rowan, testifying under a grant of immunity, provided significant corroborative evidence. While outlining Rowan's expected testimony during his opening statement, the prosecutor displayed a poster consisting of an enlarged page from the transcript of Rowan's preliminary hearing testimony containing incriminating statements defendant made to Rowan. The prosecutor read aloud the following portion of Rowan's preliminary hearing testimony:

"As the conversation took place, Mel Rowan asked Curtis Fauber, 'You didn't hurt him, did you?' And Curtis said, 'I think I killed him.' 'Are you sure? You got to be kidding.' 'Yeah, I'm pretty sure.' 'Are you positive he's dead? Just don't tell me he's dead.' And Fauber said, 'Well, when I left, he was having a hard time breathing.' 'And I said, "Well, why did you do it?" And he said, ' Well, he-he saw my face, and I'm not in any hurry to leave Ventura County.' "

Defense counsel objected to the form of the poster, specifically to highlighting of some portions. He contended it took parts of Rowan's preliminary hearing testimony out of context and was prejudicial to defendant. The trial court ruled that the poster could be used as an illustrative aid in the prosecutor's opening statement.

(13) Defendant contends the ruling constituted error because the poster "preconditioned" the jury to believe Rowan's testimony. He also now advances the new ground that the poster contained hearsay and was for that ***827** additional reason improper. The error, he contends, violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

We find no error in the trial court's ruling, as use of the poster neither

violated the rule against hearsay nor constituted any species of vouching. The purpose of the opening statement " 'is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect' [citation]. ..." (*People v. Green* (1956) 47 Cal.2d 209, 215 [302 P.2d 307].) The use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate. (*Ibid.*; *People v. Kirk* (1974) 43 Cal.App.3d 921, 929 [117 Cal.Rptr. 345].) Similarly, the illustrative use of an enlarged page of transcript was not improper, as Rowan ultimately testified consistently with the transcript. It is axiomatic that nothing the prosecutor says in an opening statement is evidence. Had the prosecutor, instead of preparing a poster, simply recited Rowan's preliminary hearing testimony in his opening statement to the jury, defendant could not urge a hearsay objection. Additionally, we cannot agree with defendant that the mere appearance of the poster could have been so "official" that it caused the jury to prejudge Rowan's credibility.

5. Claim That Prosecutor Misled Jury About Rowan's Credibility

(14) Defendant contends that the prosecutor improperly emphasized Rowan's immunity in his guilt phase argument. The prosecutor said, "Mel Rowan received immunity in this case. Mr. Farley [defense counsel] has told us that he has every motive to lie to you, but the fact remains that once Mel Rowan received that immunity, he could come up here and testify as to what happened during the course of those crimes and go completely protected from any prosecution." Defendant contends this argument was misleading because Rowan was obliged to testify consistently with his preliminary hearing testimony or risk prosecution for perjury.

For the same reasons we rejected this argument as applied to Brian Buckley, we reject it as to Mel Rowan. (See, *ante,* at p. 826, fn. 8.) (*People v. Allen, supra,* 42 Cal.3d at p. 1254.) Defendant relies on *People v. Morris* (1988) 46 Cal.3d 1 [249 Cal.Rptr. 119, 756 P.2d 843] for a contrary result, but that case is inapposite. In *Morris,* the prosecutor argued that the witness had received no benefit from testifying, and that the jury would have heard about it had any evidence of such a benefit existed. In fact, however, the witness had benefited from his preliminary hearing testimony, in that a parole violation and other charges had been favorably disposed of a year before trial. (*Id.* at p. 33.) We noted that the nondisclosure rendered the prosecutor's argument misleading. We

rejected the People's contention that ***828** the argument was accurate because the witness had received a benefit not for his trial testimony but for his preliminary hearing testimony: the witness, we noted, reasonably could have believed he owed an ongoing debt to the prosecution in return for his freedom. Here, by contrast, the prosecutor fully disclosed the benefit Rowan received. In any event, defense counsel was free to point out the possibility that Rowan might have been subject to perjury charges if he testified inconsistently with his preliminary hearing testimony.

B. *Prosecutor's Failure to Tape-record Buckley Interview*

Defendant unsuccessfully moved to suppress Buckley's testimony at trial, contending that the prosecutor's failure to tape-record an entire interview he conducted with Buckley interfered with defendant's access to information to be used for impeachment and cross-examination.

After Buckley entered into his plea agreement, Don Glynn, the prosecutor, conducted an interview with him. Present with Buckley and Glynn were Wiksell, Buckley's attorney; Jarosz, Buckley's investigator; district attorney investigator Troxel; Deputy Sheriff Rudd; and Ventura County Sheriff's Detective Odle. Fauber's defense counsel had previously requested that the interview be taped. Wiksell too wished to tape-record the entire interview. Glynn, however, wanted to leave unrecorded the first part of the interview and tape only a summary. In order to obtain a disposition for his client, Wiksell did not object. Buckley's interview lasted two and one-half or three hours. One and one-half hours were taped, according to the trial judge, who listened to the tape. [FN9]

> FN9 Wiksell testified that only the final one-quarter or one-third of the interview was taped.

Rudd, Odle, Troxel, and Glynn took notes of the interview; Troxel prepared a written report and destroyed his notes.

During the unrecorded part of the interview, Buckley was asked "broad" questions, which he answered in "narrative" form, according to Wiksell. On a number of occasions, Buckley was unable to remember clearly who made a statement, but after some conversation was able to attribute it to a particular person. At least one fact concerning Buckley's personal background was discussed during the initial part of the interview

but omitted during the taped portion: Buckley said he obtained a discharge from the Army by falsely stating he was a homosexual, but this statement does not appear in the recording. The taped portion of the interview was concise, lacking some of the hesitations evident in the unrecorded portion.

Defendant moved to suppress Buckley's testimony at trial, contending that the prosecutor's refusal to tape the entire interview interfered with his access ***829** to information to be used for impeachment and cross- examination. At the hearing on the motion, the trial court stated it had listened to the tape and read Troxel's summary and the notes taken by Odle and Rudd. Comparing the notes with the tape, the trial court concluded that the tape was not a "sanitized" version of the earlier portion of the interview; rather, it covered generally the same topics in the same chronological order. The trial court also found that, in not taping the initial portion of the interview, the prosecution had followed a reasonable investigation procedure. The court reasoned that since the prosecution has no duty to tape-record witness interviews, and the defense has no right to dictate the course of the prosecution's investigation, the prosecutor was not required to grant defense counsel's request to tape Buckley's entire interview.

(15a) Defendant characterizes the prosecutor's refusal to allow recording of the entire interview as a denial of his Fourteenth Amendment right to disclosure of all exculpatory evidence and as suppression of favorable evidence within the prohibition of *California v. Trombetta* (1984) 467 U.S. 479 [81 L.Ed.2d 413, 104 S.Ct. 2528]. Defendant also contends the prosecution did not act in good faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51 [102 L.Ed.2d 281, 109 S.Ct. 333].)

He first suggests that the prosecutor should have turned on the tape recorder, or permitted Buckley's counsel to do so, at the beginning of the interview simply because defense counsel's request was timely and not burdensome. He does not, and cannot, cite direct authority for that proposition.

Next, defendant contends that the prosecutor's actions were tantamount to willful suppression of evidence he knew would be helpful to the defense, and thus violated the rule of *United States v. Agurs* (1976) 427 U.S. 97, 111- 113 [49 L.Ed.2d 342, 354-355, 96 S.Ct. 2392].

We cannot agree with defendant that hesitations and difficulties of recollection in the unrecorded portion of the interview amount to material, substantial evidence, the loss of which deprived him of a fair trial. (*People v. Ruthford* (1975) 14 Cal.3d 399, 409 [121 Cal.Rptr. 261, 534 P.2d 1341, A.L.R.4th 3132].) (16) "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (*United States v. Agurs, supra,* 427 U.S. at pp. 109-110 [49 L.Ed.2d at p. 353].) To meet this standard of constitutional materiality, evidence must "both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable ***830** to obtain comparable evidence by other reasonably available means." (*California v. Trombetta, supra,* 467 U.S. at p. 489 [81 L.Ed.2d at p. 422].) (15b) Assuming, without deciding, that *Trombetta* applies in the context of a failure to tape-record a portion of an interview of a prosecution witness, we find no deprivation of material evidence. The trial court's finding that the substance of the taped and untaped portions of Buckley's statement was similar leads us to infer that the untaped portion did not possess apparent, independent exculpatory value. Defendant has essentially demonstrated only that a record of Buckley's unrecorded remarks might have helped him attack Buckley's credibility; consequently, he falls short of establishing materiality under the constitutional standard.

In any event, defense counsel's cross-examination of Buckley elicited numerous instances of difficulty in recollection, a fact he pointed out in closing argument. Moreover, evidence of Buckley's hesitations was available through the testimony of persons present during the interview.

We are unpersuaded that the loss of Buckley's untaped remarks resulted in error. [FN10]

> FN10 We also disagree with defendant's contention that the prosecution acted in bad faith in not taping the entire Buckley interview. The trial court found that the procedure employed in this investigation was reasonable, and the record supports that conclusion. Assuming, without deciding, that the rule of *Arizona v. Youngblood, supra,* 488 U.S. 51, applies to statements of material witnesses (see *People v. Valencia* (1990) 218 Cal.App.3d 808, 823 [267

Cal.Rptr. 257]), defendant has not established the necessary predicate for relief.

C. *Restriction on Cross-examination of Buckley; Ineffective Assistance of Counsel*

(17) Defendant argues that the trial court improperly restricted cross-examination of Brian Buckley concerning the latter's involvement in an assault with an automobile. Defense counsel argued that if Buckley were to testify that he had an aversion to violence, then counsel should be allowed to impeach him with evidence that he had once attempted to run down an individual in a parking lot. As noted above, the trial court properly ruled the assault inadmissible if offered merely to establish a character trait of violence and thereby to invite the inference that Buckley behaved violently on the occasion of the Urell killing. However, the court ruled that the assault could be used to impeach Buckley's credibility depending on the content of his testimony. Thus, defense counsel was free to elicit from Buckley testimony as to his nonviolent nature and then to introduce evidence of the assault as impeachment. He did not do so.

Defendant now urges that the fact that Buckley had never been prosecuted for the assault showed the willingness of the police and prosecutor to ***831** overlook his wrongdoings, which in turn showed Buckley's bias and willingness to testify for the prosecutor in the Urell case. He did not raise this ground of admissibility-which we find highly speculative in light of the paucity of evidence concerning the incident-at trial, and cannot be heard to do so for the first time on appeal. (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640 [108 Cal.Rptr. 585, 511 P.2d 33]; *People v. Frye* (1985) 166 Cal.App.3d 941, 950 [213 Cal.Rptr. 319].) In any event, since the jury was well aware of the terms under which Buckley was testifying, and in particular of the differential between the sentences for first and second degree murder, the jury was perforce aware of Buckley's bias and willingness to testify for the prosecution. We are unpersuaded that evidence of the parking lot incident would have had a significant impact on the jury's assessment of Buckley's credibility. (*People v. Belmontes* (1988) 45 Cal.3d 744, 781 [248 Cal.Rptr. 126, 755 P.2d 310] [citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (89 L.Ed.2d 674, 680, 106 S.Ct. 1431)].) We cannot agree, therefore, with defendant's belated assertions that the trial court's ruling on the scope of Buckley's cross-examination deprived defendant of a trial by a fair and impartial jury, due

process, or the right to confront witnesses, or that it subjected him to an arbitrarily or unreliably imposed sentence of death.

(18a) Defendant contends counsel's failure to bring evidence of the assault before the jury constituted ineffective representation. (19) A defendant claiming ineffective assistance of counsel has the burden of showing that counsel failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate. (*People v. Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) The defendant must also show that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 [233 Cal.Rptr. 404, 729 P.2d 839].) (18b) Defendant's ineffective- assistance claim fails because it is not reasonably probable a determination more favorable to him would have resulted had counsel brought the parking lot incident to the jury's attention. The jury was already aware of the terms under which Buckley was testifying, he was subjected to extensive cross-examination, and the probative value of the evidence counsel possessed was limited. As counsel explained it, "[Buckley] got angry at an individual down by Chuck E. Cheese and tried to run him down with a car and was a suspect in a hit and run. The guy was a transient so nothing ever came of it." Because the incident counsel related does not support an inference that Buckley feared prosecution, we are unpersuaded the jury would have formed a significantly different impression of Buckley's credibility had defense counsel used it to impeach him. ***832**

D. *Trial Court's Refusal to Admonish Jury Regarding Prosecutor's Guilt Phase Argument*

(20) Defendant contends that the prosecutor engaged in misconduct during closing argument, and that the trial court's refusal to admonish the jury to disregard it was error. We conclude that the prosecutor's comments were not misconduct, and consequently that no admonition was needed.

The principal thrust of defense counsel's closing argument was, of course, that the jury should not credit the testimony of Buckley and Rowan. He argued that each was more deeply involved in the Urell killing than he was willing to admit. He contended each had a selective memory of the events in question, and cited other reasons to disbelieve their testimony.

In rebuttal, the prosecutor argued that defense counsel had failed to address certain points the prosecutor had emphasized in urging the jury to believe Buckley and Rowan. Defense counsel objected, calling the prosecutor's comments a "personal attack." The trial court determined the comments were merely a rehash of the prosecutor's opening argument, directed to what defense counsel did *not* say, rather than what he *did* say, and thus were not proper rebuttal. The prosecutor acceded to the trial court's ruling. Later, the court declined to admonish the jury, saying "I attribute again no bad faith and I really don't feel that there was a whole lot of harm, if any ...."

We find it clear that the prosecutor's repeated reference to defense counsel's failure to address various points in no way amounted to a personal attack on defense counsel, but was in the nature of a rhetorical device. The prosecutor did not accuse defense counsel of lying or misleading the jury; he merely pointed out omissions from the latter's argument. It hardly need be said that the prosecutor is entitled to comment on the content of defense counsel's argument. Since there was no prosecutorial misconduct, there was no basis for an admonition to the jury.

(21) Defendant also contends the trial court should have admonished the jury to disregard a statement the prosecutor made concerning defense witness Frisilone. It will be recalled that Frisilone met Buckley in jail while the former was waiting to be sent to prison for the latest of his four felony convictions. Frisilone testified that Buckley said he had placed a pillow over Urell's head after defendant hit him with the ax. At trial, Buckley denied doing so. Defense counsel argued that Frisilone should be believed because he must have learned that detail from Buckley. The record reflects that the prosecutor countered: "He [defense counsel] asked us how do we know-or how did Frisilone know what happened in the courtroom? [¶] Well, he told us that he read it in the newspapers." Defense counsel made a speaking ***833** objection, arguing that although Frisilone testified he had access to newspapers in jail, he did not say he had read about what he testified to. The court stated that it shared defense counsel's recollection of the testimony, but that "the final word will be with the reporter, if the jury feels it's necessary for that portion of Mr. Frisilone's testimony to be read back." The prosecutor responded, perhaps inaccurately, that he "did not say that [Frisilone] read any particular item, but he had access to the newspapers as to this trial." Later, the

court declined to admonish the jury, finding the prosecutor had not acted in bad faith and no harm had been done.

We cannot accept defendant's contention that the jury was left to suppose the prosecutor somehow knew, from extrajudicial evidence, that Frisilone had based his testimony on what he read in the newspaper. The exchange between court and counsel made it plain to the jury that the record of Frisilone's testimony would speak for itself. The prosecutor's *implication* that Frisilone had fabricated his testimony from items reported in the paper was, however, a fair inference from the evidence. The trial court's refusal to admonish the jury was not erroneous.

E. *Refusal to Instruct That Rowan Was an Accomplice as a Matter of Law*

The trial court read a series of instructions on accomplice testimony, informing the jury that Brian Buckley was an accomplice as a matter of law and that his testimony required corroboration. [FN11] (CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.14, 3.16, 3.18.) Defense counsel requested that the jury be instructed Mel Rowan, too, was an accomplice as a matter of law. The trial court refused, instead instructing the jury to decide Rowan's status. (22a) This, defendant contends, was error.

> FN11 Section 1111 provides in part that "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

(23) Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) In order to be chargeable with the identical offense, the witness must be considered a principal under section 31. (*People v. Hoover* (1974) 12 Cal.3d 875, 879 [117 Cal.Rptr. 672, 528 P.2d 760].) That section defines principals to include "[a]ll persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission ...." (§ 31.) An accessory, however, is not liable to prosecution for ***834** the identical offense, and so is not an accomplice.

(*People v. Hoover, supra,* 12 Cal.3d at p. 879; § 32.) [FN12]

> FN12 Section 32 defines accessory as "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof ...."

Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn therefrom. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960 [127 Cal.Rptr. 135, 544 P.2d 1335].) The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. (*Id.* at p. 963.)

(22b) Although the testimony of both Rowan and Buckley indicated that Rowan participated in discussions preceding the burglary, pointed out to defendant and Buckley the location of the Urell residence and urged them either to "do it" at that moment or "blow it off," and helped dispose of the robbery proceeds, to say that the inferences from these facts are undisputed would be an overstatement. (*People v. Tewksbury, supra,* 15 Cal.3d at p. 960.) The record certainly supports, but does not dictate, the conclusion that Rowan acted with " 'guilty knowledge and intent with regard to the commission of the crime,' " as is required for accomplice liability. (*Ibid.* [quoting *People v. Duncan* (1960) 53 Cal.2d 803, 816 (3 Cal.Rptr. 351, 350 P.2d 103)].) As to the murder, there is no suggestion that Rowan had any prior knowledge; he expressed surprise when told of the killing. Even as to the burglary and robbery, the record does not compel a finding that Rowan shared liability as an accomplice. After the initial drive past Urell's residence, when Rowan urged defendant to "do it" or "blow it off," it is not clear that Rowan knew when, how, or even if a burglary would in fact take place. Thus, defendant failed to sustain his burden of establishing Rowan's liability as an accomplice as a matter of law, and the trial court properly instructed the jury to decide the question.

In any event, even if Rowan were an accomplice to the burglary and robbery, his testimony was adequately corroborated. (24) Corroborative evidence must come in by means of the testimony of a nonaccomplice witness. (*People v. Tewksbury, supra,*

15 Cal.3d at p. 958.) It need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d ***835** 213].) Corroborative evidence may be slight and entitled to little consideration when standing alone. (*Ibid.*; *People v. Wade* (1959) 53 Cal.2d 322, 329 [1 Cal.Rptr. 683, 348 P.2d 116].) (22c) Rowan's testimony was corroborated by (1) Hal Simmons's testimony that defendant gave him a telephone credit card number which was proved to have belonged to Urell and (2) Investigator Velasquez's testimony that a search of the camper, owned by Brian Buckley's mother and used by defendant, yielded a book of maps stamped with the name and address of Urell's employer.

F. *Special Circumstance Instruction on Intent to Kill*

(25) Defendant complains that the jury was erroneously instructed on the requirement of intent to kill in connection with the robbery and burglary special circumstances. In *People v. Anderson* (1987) 43 Cal.3d 1104, 1141- 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], we overruled our earlier decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862] and held that proof of intent to kill is not required under the provisions of section 190.2, subdivision (a)(17), when those provisions are read standing alone. When there is evidence from which the jury could find that defendant was an aider or abettor rather than the actual killer, however, the court must instruct the jury on intent to kill. (43 Cal.3d at pp. 1147, 1149-1150; § 190.2, subd. (b).) The murder in this case was committed after our decision in *Carlos* but before that in *Anderson*; consequently, the trial court had to instruct the jury that in order to find the special circumstance true it must find defendant intended to kill, whether it found he acted as a principal or as an aider or abettor. (*People v. Duncan* (1991) 53 Cal.3d 955, 973, fn. 4 [281 Cal.Rptr. 273, 810 P.2d 131].)

The jury was instructed that "To find the special circumstance referred to in these instructions as murder in the commission of robbery or burglary is true, it must be proved, one, that the murder was committed while the defendant was engaged in, was an accomplice or an aider and abettor in the commission of a robbery or burglary; two, that the defendant intended to kill a human being or

intended to aid another in the killing of a human being; three, that the murder was committed in order to carry out or advance the commission of the crimes of burglary or robbery or to facilitate the escape therefrom or to avoid detection." (CALJIC No. 8.81.17.) Defendant contends this instruction allowed the jury to find the special circumstance allegations true without clearly determining whether defendant intended to kill, and was therefore deficient. He interprets the instruction to permit a true finding if the jury merely believed defendant intended to help Buckley, such as by letting him into Urell's house, or holding his gun while Buckley struck Urell with the ax. ***836**

We do not believe there is a reasonable likelihood that the jury would have understood the instruction as defendant interprets it. (*Estelle v. McGuire* (1991) 502 U.S. ___, ___ 116 L.Ed.2d 385, 399, 112 S.Ct. 475.) In order to find true the special circumstance allegations, the jury had to find "that the defendant intended to kill a human being or intended to aid another in the killing of a human being." As defendant reads the instruction, the phrase "in the killing of a human being" is reduced to a parenthesis, or ignored. We have previously upheld a similar instruction in *People v. Warren* (1988) 45 Cal.3d 471, 486-488 [247 Cal.Rptr. 172, 754 P.2d 218], and subsequent cases (see, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 954-955 [4 Cal.Rptr.2d 765, 824 P.2d 571]). In essence, defendant's argument is a disagreement with *Warren*. He presents us, however, with no convincing reason to depart from that decision. [FN13]

> FN13 The fact that the jury found defendant personally used an ax in committing the crimes further suggests that it could not have interpreted the instruction in the way defendant claims. (§ 12022, subd. (b).)

Defendant contends that the instructions on liability for aiding and abetting further diminished the possibility that the jurors would appreciate the intent requirement for the special circumstance allegation, and that certain portions of the prosecutor's argument made that improper outcome more probable. To the contrary, we do not believe it reasonably likely that either the instruction on aiding and abetting or the argument would have had such an effect. His claims of error in the giving of the intent-to-kill and aiding-and-abetting instructions must, therefore, be rejected.

G. *Defendant's Absence From Rereading of Testimony*

(26) During its deliberations, the jury asked for a rereading of two pages of Mel Rowan's testimony. Defense counsel stipulated that the court reporter could enter the jury deliberation room with the transcript and read the two pages to the jury. The court reporter did so. Defendant was not present. He now contends this procedure deprived him of a complete record of the proceedings, in violation of section 190.9. [FN14] He further argues that trial counsel's stipulation denied him his rights of confrontation and representation by competent counsel. In his reply brief, he adds that he thereby lost his rights to meaningful appellate review of his death sentence and to be free from a death sentence arbitrarily and unreliably imposed.

> FN14 At the time of trial in this case, section 190.9 provided in relevant part as follows: "(a) In any case in which a death sentence may be imposed, all proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present." (Former § 190.9, Stats. 1987, ch. 468, § 1, pp. 1709-1710, amended by Stats. 1989, ch. 379, § 2.)

His contentions are without merit. Although the record contains no personal waiver of presence during the rereading, defendant has failed to show ***837** that his absence in any way prejudiced him or resulted in the denial of a fair and impartial trial. Unless defendant makes such a showing, his absence from a rereading of testimony does not raise due process concerns. (*People v. Ainsworth, supra,* 45 Cal.3d at p. 1021.) Finally, failing any prejudice, there can be neither a denial of effective representation nor impairment of Eighth Amendment rights. Defendant acknowledges these principles, but argues that he should be relieved of the burden of establishing prejudice. He articulates no persuasive reasons to reject our precedents.

H. *Alleged Juror Misconduct*

(27) Defendant argues that jury misconduct occurring in both phases of the trial deprived him of due process, a fair trial by an impartial jury, a unanimous verdict, and protection against arbitrary and unreliable imposition of a death judgment. The trial court rejected defendant's claims of prejudicial

misconduct in ruling on his motion for new trial. (§ 1181, subd. 3.) Our review of the record supports the trial court's determination.

Defendant's first claim of misconduct centers on the fact that during both phases of the trial, a juror brought a cellular telephone into the deliberation room. Before doing so, the juror sought permission from the bailiff, who approved the request in order to accommodate the juror's need to contact his office periodically. The bailiff testified he asked the trial judge before giving approval, although the judge did not recall the request. The juror used the telephone during recesses and breaks, mainly to make business calls. Two other jurors used the telephone, one to check on her child and the other to cancel an appointment. There was no indication that the case or any subject relating to it was ever discussed on the telephone.

At the outset, we express in no uncertain terms our disapproval of the practice of allowing a cellular telephone into the jury deliberation room. Such a practice carries with it obvious potential for mischief, against which section 1128 seeks to guard. [FN15]

> FN15 Section 1128 provides in relevant part, "After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring for deliberation, an officer must be sworn to keep them together for deliberation in some private and convenient place, and, during such deliberation, not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

That said, however, we do not find misconduct on these facts. The juror brought the telephone into the deliberation room only after he believed he had permission to do so, and defendant offers no evidence to suggest either ***838** that the telephone was ever used for an improper purpose or that its presence distracted jurors. No presumption of prejudice, therefore, arises. (See *People v. Holloway* (1990) 50 Cal.3d 1098, 1108 [269 Cal.Rptr. 530, 790 P.2d 1327].)

(28) Defendant next claims misconduct in the form of sexual harassment by a male juror of a female juror. At the hearing on the

new trial motion, the female juror testified that once, in the crowded deliberation room, a male juror placed a hand on her rib cage as he squeezed past her. She was wearing a cropped shirt, and his hand accidentally slipped underneath the shirt. She did not feel he had made a pass at her. She told a defense investigator she felt uncomfortable being alone in the room with the juror, but she testified she would have felt uncomfortable being alone with any of the others jurors. The evidence defendant offered entirely fails to establish sexual harassment. Even if it did rise to the level of harassment, defendant fails to cite any evidence indicating the incident might have interfered with the female juror's participation in deliberations.

(29) Finally, defendant contends that prejudicial misconduct occurred during deliberations when several jurors related personal anecdotes concerning drug use. Defendant submitted declarations by two jurors stating that another juror commented on his son's past use of drugs and opined that the memory of some of the witnesses may have been affected by drug use; that another juror said he had used drugs in his youth; and that a third juror mentioned he had a family member who was an alcoholic. These comments, defendant urges, showed that the jurors relied on extrajudicial information relating to the issues pending before them. He observes that drug use was a recurrent theme at trial, and that questions of witness credibility permeated the case. He contends he suffered prejudice if even a single juror used extrajudicial information regarding drug use and its effect on the ability to recall events.

We find defendant's argument unpersuasive. He does not attempt to show how the jurors' statements regarding drug and alcohol use by family members might relate to any of the issues in this case, and no connection is apparent. None of the cited statements therefore rises to the level of misconduct. "Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require ... [the jury] to be a ***839** laboratory, completely sterilized and freed from any external factors.' (*Rideau v. Louisiana* (1963) 373 U.S. 723, 733 [10 L.Ed.2d 663, 669, 83 S.Ct. 1417] (dis. opn. of Clark, J.).)"

(*People v. Marshall* (1990) 50 Cal.3d 907, 950 [269 Cal.Rptr. 269, 790 P.2d 676].) To say, for example, that the memory of some of the witnesses may have been affected by drugs is to say no more than the common knowledge that ingestion of drugs affects perception. Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room. Defendant does not persuade us that any of the jurors' statements could adversely have affected the verdict.

IV. Penalty Phase Evidence

A. *Prosecution Evidence*

The prosecution presented evidence that defendant had committed two additional murders and three assaults, all uncharged.

1. *Killing of Jack Dowdy, Jr.*

Jack Dowdy, Jr., was a longtime friend of defendant's. Dowdy married Kim Dowdy in 1984, became romantically involved with Pam Lester in 1985, and left his wife in February 1986 to live with Lester. Kim took care of their son.

On Sunday, May 11, 1986, at Dowdy's parents' home in Espanola, New Mexico, Lester overheard a conversation between defendant and Dowdy. Defendant accused Dowdy of ruining things for him because Dowdy had Kim's son with him, so Kim would not go with defendant to Albuquerque. Defendant said he was going to take Kim to Albuquerque and kill her the following afternoon. After this incident, Dowdy and Lester drove to Albuquerque, where Dowdy was to attend a union trade school for five days.

Dowdy had arranged to stay with his cousin, Jackie Sumner, from May 11 to May 15 while he attended school. Dowdy dropped Lester off at her mother's house in Albuquerque on the evening of May 11 and stayed with Sumner that night. On May 12, Dowdy attended school. He never returned to Sumner's house, where he had left two boxes of clothes, nor did he ever contact Lester again. On May 13, Lester found Dowdy's car parked at the Penguin Lounge, across from the union school. His school books were in the car. Lester had a key made for the car and drove it back to Espanola. Dowdy never finished school; he would have received $447.42 for attending five days' training.

Jane Davis, Jack Dowdy, Jr.'s, sister, had a close relationship with her brother. In April 1986 their grandfather died, and the family gathered at their ***840** father's house in Espanola. Defendant, Dowdy's best

friend, arrived; Dowdy left with him. Davis later saw defendant with Dowdy. The two men were arguing, and defendant stuck his hand in his left pocket, pulling it around to his front. Months earlier, Davis had seen defendant with a small pistol, which he said he was going to carry with him. After the incident at the funeral, Davis asked defendant if he had pulled a gun on Dowdy. Defendant replied that he had. Davis never heard from Dowdy after the Friday before he went to attend school in Albuquerque. He would have told her had he planned to leave the area for a long time. Only once before had Dowdy gone away-for three weeks-without telling anyone.

Two or three weeks after Dowdy disappeared, defendant told Davis he had tried to strangle Kim Dowdy with a bandanna because he had had a blackout.

After Dowdy's disappearance, a man called Ted told Lester that he had seen Dowdy. Lester gave the information to a detective.

2. *Killing of David Church*

Around Memorial Day, 1986, David Church and several of his friends attended a party at a ranch near Camarillo State Hospital. At 12:30 or 1 a.m., Church and three others (Fred Helmuth, Laurie Jansen, and Grace Medrano) left the ranch party and went to Brian Buckley's apartment. Buckley was having a party in honor of defendant's arrival. About six other people were in the apartment, including Pam "Alex" McCormick, Chris Caldwell, Grace's boyfriend, and defendant. Church and his friends discussed buying cocaine, and smoked some cocaine in a cigarette. After 30 minutes, Church, Jansen, and Helmuth left; Grace stayed overnight in the trailer with her boyfriend. Helmuth never heard from Church again.

Church later returned to Buckley's apartment on his bicycle. He appeared to be drunk and repeatedly tried to enter, demanding drugs. Defendant and Caldwell took Church outside, telling Buckley to go back into his apartment. Buckley complied. After a while, defendant and Caldwell came back inside. Defendant told Buckley they had slashed Church's bicycle tires and had so scared him that he was waiting at the bottom of the stairs. Defendant and Caldwell then left again, Caldwell taking the keys to Church's mother's car and an ax handle, defendant taking some cocaine. Buckley never saw Church again.

Several hours later, around daybreak, defendant and Caldwell returned to

Buckley's apartment. Pam McCormick, who had been sleeping in Buckley's bedroom after using a lot of cocaine, overheard a conversation among ***841** defendant, Caldwell, and Buckley. They talked about having to get rid of a body. They said something about ammonia and about throwing it in the ocean. They also talked about finding cocaine on his body and having to get rid of his bicycle.

Buckley testified that he saw defendant and Caldwell in the morning, four or five hours after they had left. He also saw a 10-speed bicycle with its tires slashed and its wheels removed. Defendant stated they had to get rid of the bicycle because the tires had been cut with his knife, and the police could trace the knife. Later, Caldwell or defendant said he had put the bicycle in a dumpster.

Two or three days later, defendant told Buckley they had to kill Church because he would have gone to the police if he did not get cocaine. Buckley told defendant Caldwell had already told him about the killing. Four or five days after the party, defendant and Caldwell spoke to Buckley, describing how hard Church was to kill. Still later, defendant said he had to throw away the ax handle because there was blood on the end of it. Defendant also talked about a killing in New Mexico, saying he had killed the husband of a girl named Kim because Kim was afraid of her husband, who had been a friend of defendant's. Defendant wanted Buckley to go back to New Mexico with him to dig up the body of the husband and rebury it so the animals would not get to it. Defendant told Buckley he could kill someone and have no conscience about it.

Eddie Denton Church, David Church's father, testified that David owned a blue 10-speed bicycle, a KHS Winner model, with thin tires and straight handlebars. He had purchased the bicycle for David from California International Cycles. The senior Church never saw his son after the Saturday of Memorial Day weekend in 1986.

On July 29, 1986, Daniel Berg was walking in a creekbed along Aliso Canyon Road. A strong odor drew his attention to a large pile of rocks. Berg uncovered a shoe, a pants leg, and the shoulder of a sweater, and called the sheriff's department. Sheriff's Sergeant Gary Backman investigated. The grave was a mound of rocks above a dry creek bottom off a dirt road in the canyon. Papers scattered near the grave included a Ventura County Medical Center identification card.

Dr. Frederick Warren Lovell inspected the grave site and subsequently performed an autopsy. The body was markedly decomposed, with the skin mummified and most of the face, muscle mass, and internal organs gone. In Dr. Lovell's opinion, the body had been in the canyon more than six weeks ***842** and less than ten months. He was unable to determine the cause of death. Dr. Lovell testified that a blunt-force blow to the skull sufficient to cause unconsciousness would not necessarily leave a recognizable mark or damage to the skull.

Dr. Lovell compared X-rays of the skull with an X-ray from the Ventura County Medical Center Hospital files for David Church. Distinctive patterns in both X- rays established that the body found in the canyon was that of David Church.

On August 7, 1986, Sergeant Backman recovered a blue 10-speed KHS Winner bicycle which had been found leaning against a fence near the intersection of Church and Ann Streets in Ventura County. The serial number of the bicycle matched that listed on the sales slip from International Cycles.

3. *Assaults on Kim Dowdy*

In March 1986, Kim Dowdy went with defendant and another couple from Espanola on a week-long motorcycle trip to California. They all shared sleeping quarters on the trip, but Kim testified she had no romantic involvement with defendant. On their return to Espanola, she moved her belongings into her aunt's house with defendant's assistance. A week later, he moved into a spare room in the same house. She testified to three separate assaults occurring after that time.

i. *Assault With Gun*

In mid-April 1986, defendant took Kim to a drive-in for a soda and then drove to another establishment so that she could use the restroom. As she came out of the restroom, she saw a male friend whom she had not seen in a long time. They hugged each other, and Kim got back into defendant's truck. Defendant drove to a motorcycle track in Arroyo Seco, pulled a gun on her, and told her that he would kill her because if he could not have her, no one would. She told no one about this assault because defendant threatened to harm her son.

ii. *Assault With Silk Belts*

One night at the end of April 1986, Kim was sleeping in her aunt's house. (She seldom slept there, generally

staying at her grandmother's instead.) That night she awoke to find defendant above her, pulling on three silk belts around her neck and trying to choke her. Kim believed she must have passed out because she later awoke and found she had wet the bed. ***843**

iii. *Assault With Knife*

One evening in the early part of May 1986, defendant came into Kim's grandmother's house. He tossed a set of car keys around and told her Jack wouldn't bother her any more.

A couple of days later, on May 14, 1986, defendant pulled up on his motorcycle at her grandmother's house, entered, and said Kim had to leave with him or he would kill everyone in the house. Defendant followed Kim into the kitchen, picked up a knife, and held it to her throat. She agreed to go with defendant because her grandmother and her son were in the house. She told her grandmother, in Spanish, to go to the flower shop at the front of the house and call her uncle, Tony Maestas. Her grandmother did so. Defendant and Kim left the house. Maestas ran out of the flower shop, demanding to know what was going on. Defendant jumped on his motorcycle and drove off. Kim and her uncle returned to her grandmother's house.

Defendant telephoned and arranged to meet Kim at a Burger King. She was accompanied by her uncle, who carried a gun for protection. Defendant approached their vehicle and told Kim to go inside the restaurant because he wanted to talk to Maestas. Defendant flipped his butterfly knife open and closed, then threw it on the passenger seat to indicate he was unarmed. Maestas told him his 81-year-old mother was scared to death of him and asked how he would feel if she dropped dead of fright of him coming over to terrorize her. Defendant replied he had no feelings and didn't care if she dropped dead. He said, "I even killed Bubs." (Jack Dowdy, Jr., was nicknamed Bubs.) Defendant went into the Burger King to talk to Kim. When they emerged, defendant ordered Kim to go to the back of her uncle's truck so that he could talk with Maestas. He told Maestas not to tell Kim anything of what he had told him, and that Maestas was the only one whom defendant had told about Bubs.

Defendant took his knife from Maestas's truck and left. Later that day, he moved out of Kim's aunt's house and admitted himself to the Veterans' Administration hospital.

B. *Defense Evidence*

The defense tried to cast doubt on the prosecution's evidence regarding the Church killing. Detective Ray Bustillos testified that Pam McCormick told him she overheard defendant and Brian Buckley talking about having dumped Church's body in the ocean. Linda Wade testified that she received a telephone call from David Church after he was supposed, according to the ***844** prosecution's theory, to have been killed; the call came in the early morning hours, Church's voice was slurred, and another person, David Ruiz, was also on the line. Tonya Bennett had known David Church for three years and testified that she saw him on June 17, 1986, although it was possible her sighting of him had actually been weeks earlier.

Numerous friends of defendant testified that he was loyal, caring, forgiving, and helpful, although Amy Koetter conceded defendant had admitted trying to kill Kim Dowdy.

Several of defendant's siblings and neighbors testified about conditions prevailing in the Fauber household while defendant was growing up. The Fauber family lived in Espanola, New Mexico, in a small, messy house lacking indoor plumbing. Defendant was the youngest of 11 children, 7 of whom survived into adulthood. Their father was unemployed and stayed in bed most of the time. He was verbally abusive and disciplined his children with razor straps, belts, and belt buckles. Defendant did not finish high school. Defendant and his brother Pete were involved in a motorcycle accident in which Pete was killed. After that, defendant became withdrawn. Following her husband's death, Mrs. Fauber married a man who drank heavily. Later, she divorced him and remarried.

Isabel Anne Wright, a social anthropologist, researched the community and school system of Espanola. She testified that defendant lived in extreme poverty and suffered abuse and neglect during his childhood. Also, he was unsettled by the family's moves and deaths. Espanola's unemployment rate was 20 percent.

John Irwin, a criminologist and former convict, testified about the effects of life imprisonment on convicted persons and on conditions of life in California prisons.

Edward Vann Grover, a psychologist, visited defendant in jail for three hours and reviewed hospital reports on defendant written after a motorcycle accident and after defendant's self-referral to the Veterans' Administration hospital. Dr. Grover also administered six

psychological tests. The tests disclosed that defendant was of average intelligence and had not been very involved in his schooling. They showed no neuropsychological deficits, central nervous system damage, or acquired cognitive deficit. One test indicated that defendant had impaired interpersonal skills and some difficulty keeping reality and fantasy separated. Dr. Grover thought there might be an organic brain deficit, but could not establish that. He could not rule it out, however, because the tests he administered would only show such a ***845** deficit 70 percent of the time. An electroencephalogram administered on May 2, 1986, showed defendant's brain wave patterns to be normal.

It was stipulated that, while an inmate at the Ventura County jail, defendant had not engaged in any acts of violence.

C. *Prosecution's Rebuttal*

The prosecution attempted to impeach Tonya Bennett's testimony that she had seen David Church after the night he was supposed to have been murdered. David Jamerson, Tonya's father, testified that his daughter often lied and exaggerated. He had only occasional contact with her and they did not enjoy a close relationship.

V. Claims of Error Affecting Penalty Phase

A. *Refusal to Reopen Voir Dire*

After the jury returned its verdict in the guilt phase of trial, but before the penalty trial began, defendant moved, under section 190.4, subdivision (c) [FN16] (hereafter section 190.4(c)), to reopen voir dire or for impanelment of a new jury for the penalty phase. Defense counsel stated he did not know, when the jury was selected, that Brian Buckley would be testifying against defendant. As a consequence, counsel contended, he had not had an adequate opportunity to question prospective jurors about bias associated with a coperpetrator's testimony. The trial court denied the motion, ruling that even if defense counsel would have conducted voir dire differently knowing that Buckley was to testify, any claim of prejudice was purely speculative and did not establish good cause for relief. (30) Defendant now contends the ruling denied him his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Federal Constitution. We conclude that the trial court did not err.

> FN16 Section 190.4, subdivision (c), provides in relevant part as follows: "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 ... the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes."

We have often observed that section 190.4(c) reflects the long-standing legislative preference for a single jury to determine both guilt and penalty. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 572 [286 Cal.Rptr. 628, 817 P.2d 893]; *People v. Taylor* (1990) 52 Cal.3d 719, 738 [276 Cal.Rptr. 391, 801 P.2d 1142]; *People v. Ainsworth, supra,* 45 Cal.3d at p. 1029; *People v. Gates* (1987) 43 Cal.3d 1168, 1199 [240 Cal.Rptr. 666, 743 P.2d 301].) Defendant ***846** suggests that the efficiency concerns in which this preference is (at least in part) rooted should have given way in his case, because reopening voir dire would not have consumed much time. His argument reflects a misunderstanding of our decisions applying section 190.4(c). Voir dire is not to be reopened on speculation that good cause to impanel a new jury may thereby be discovered; rather, a showing of good cause is a prerequisite to reopening. (*People v. Gates, supra,* 43 Cal.3d at p. 1199.) Defendant has raised only speculation that some jurors may have entertained some hidden bias regarding the testimony of a coperpetrator or that they may have prejudged the issue of penalty. He fails to establish error, constitutional or otherwise.

Defendant also complains that prosecutorial misconduct-in the form of concealment of Buckley's status as a witness-prevented defense counsel from conducting appropriate voir dire. We disagree. Although the trial court accepted, for purposes of argument, defense counsel's representation that he was "surprised" that Buckley became a prosecution witness, a review of the chronology of pertinent events lessens the weight that might otherwise be accorded to the trial court's statement. Buckley was arrested and arraigned before the conclusion of *Hovey* (*People v. Hovey* (1988) 44 Cal.3d 543 [244 Cal.Rptr. 121, 749 P.2d 776]) voir dire in defendant's case; Buckley's preliminary hearing was held before counsel began to question the first 12 seated jurors; and defense counsel acknowledged that he had heard, even before Buckley's arraignment, that the prosecution was going to offer to let Buckley plead guilty to second degree murder if he would testify against defendant. It is also noteworthy that,

shortly before the commencement of voir dire, the trial court granted defendant's motion to exclude his confession on the basis of *Miranda v. Arizona,* supra, 384 U.S. 436. Defendant points out that the prosecution moved to prevent him from calling Buckley as a witness in order to assert his Fifth Amendment privilege against self- incrimination in the presence of the jury, and that the motion remained pending until after the jury was seated. He also notes that Buckley signed his plea agreement on the day the prosecutor made his opening statement, although the prosecutor had not disclosed the existence of any negotiations with Buckley. However, in light of the other circumstances known to defense counsel, these facts cannot be deemed controlling. Nothing prevented defense counsel from conducting voir dire in light of what seems in hindsight to have been a realistic possibility that Buckley would testify against defendant. He may not now complain about his decision not to do so. [FN17]

> FN17 Appellate counsel suggests that trial counsel's failure to conduct voir dire in light of the Buckley plea bargain, if knowing, was ineffective assistance of counsel. Due to the entirely speculative nature of any detriment to defendant resulting from trial counsel's alleged shortcoming, he fails to show entitlement to relief. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 113 [270 Cal.Rptr. 817, 793 P.2d 23].)

B. *Trial Court's Statement That Jurors Would "Recommend" Penalty*

(31) Defendant contends he was deprived of due process, a fair and impartial jury, protection against cruel and unusual punishment, and a ***847** reliable penalty determination because the trial judge told six of the twelve jurors who decided the guilt and penalty phases, during individual *Hovey* voir dire, that they would be asked to make a "recommendation" as to the appropriate penalty. (All other jurors were told they would be asked to "determine" or "decide" the penalty.) He also contends that the word "determination" is itself insufficient to convey the ultimacy of the jury's task. We disagree.

A death sentence may not constitutionally rest on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's execution lies elsewhere. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [86 L.Ed.2d 231, 239-240, 105

S.Ct. 2633].) However, our review of the record establishes that none of the jurors could have been under any misapprehension as to the nature of their duty. Portions of *Hovey* voir dire not cited by defendant, the trial court's instructions, and arguments of counsel emphasized that the decision as to life or death was for the jury alone. Neither the prosecutor nor the trial court suggested that the jury's decision would be reviewed for correctness and appropriateness. We do not believe that the trial court's comments during *Hovey* voir dire could have had a greater impact on the jurors than its penalty phase instructions and the arguments of counsel. We also find no merit in defendant's contention that the word "determine" conveyed to the jurors the impression that their task was mediate rather than final. Webster's New International Dictionary (2d ed. 1957), at page 711, includes among the definitions of "determine" that of "to fix conclusively or authoritatively." Defendant was not deprived of his constitutional right to a sentencing body fully apprised of its weighty responsibility.

C. *Jury's Consideration of Unadjudicated Crimes Evidence*

1. *Summary*

Defendant contends that the way in which the jury considered evidence of previously unadjudicated crimes he allegedly committed violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. Specifically, he asserts that: (1) the jury should have been required to unanimously find each of the allegations of criminal activity true beyond a reasonable doubt before considering them in aggravation; and (2) the trial court erred in admitting evidence of the unadjudicated crimes without first finding beyond a reasonable doubt that defendant committed those crimes. ***848**

2. *Refusal to Require Jury to Make Findings Determining Whether Unadjudicated Crimes Were Proved Beyond Reasonable Doubt*

(32) Defense counsel argued that the jury should be instructed to deliberate and make findings as to each of the five unadjudicated crimes in evidence. The trial court disagreed, instructing that the determination whether to consider unadjudicated criminal activity as an aggravating circumstance is made individually by each juror. Defendant contends the court erred.

We have rejected defendant's argument in the past, and he does not persuade us to depart from our prior

decisions. Although defendant is entitled to a unanimous jury verdict in the final determination of penalty, the law does not require a unanimous finding as to any unadjudicated crime offered in aggravation. (*People v. Miranda* (1987) 44 Cal.3d 57, 99 [241 Cal.Rptr. 594, 744 P.2d 1127].) The trial court correctly instructed that each juror must make an individual determination whether the prosecution proved other criminal activity beyond a reasonable doubt before considering that activity in aggravation. (*Ibid.*; see *People v. Robertson* (1982) 33 Cal.3d 21, 53 [188 Cal.Rptr. 77, 655 P.2d 279].) Contrary to defendant's argument, neither the instruction nor the prosecutor's argument that it was unnecessary for the jurors to take a vote on each unadjudicated crime discouraged deliberation. Defendant argues that the jurors' tasks were complicated and difficult. Indeed, they were, as the deliberative processes in penalty trials not uncommonly are. But the jurors received the instructions necessary to ensure the reliability of their determination. Defendant contends he is denied meaningful appellate review of his sentence because we cannot know how the jury viewed the evidence. His argument proves too much; reviewing courts can never probe jurors' deliberations, but this inescapable fact does not vitiate the appellate process.

(33) For the first time in his reply brief, defendant makes the argument that the refusal to require specific written findings on unadjudicated offenses in the penalty phase violated his right to equal protection of the laws. A defendant subject to the imposition of a sentence enhancement under section 12022.5 is entitled to such a finding, he argues, while a capital defendant against whom unadjudicated offenses are alleged is not. He fails to recognize that the capital defendant and the defendant subject to the section 12022.5 enhancement are not similarly situated. The latter receives enhanced punishment for his use of a firearm in the commission of a crime; the former receives punishment not for the unadjudicated crimes but for the murder with special circumstances of which he has been found guilty. ***849**

3. *Sufficiency of Proof of Unadjudicated Murders*

(34) Defendant contends the trial court erred in admitting evidence of the Church and Dowdy killings to show prior violent criminal activity. (§ 190.3, factor (b).) His involvement in the killings was shown by circumstantial evidence and by his own admissions to Brian Buckley and Tony Maestas. He urges that the evidence should have been excluded because the prosecution did not first

prove beyond a reasonable doubt that defendant committed each crime. We disagree.

In *People v. Phillips, supra,* 41 Cal.3d 29, we observed that when the prosecution seeks to introduce evidence of other criminal activity in the penalty phase of trial, it may be advisable for the trial court to conduct a preliminary inquiry (out of the presence of the jury) to determine whether there is "substantial evidence to prove each element of the other criminal activity." (*Id.* at p. 72, fn. 25.) Such a procedure is strictly a matter of trial court discretion. The trial court in this case, in its discretion, conducted such a hearing, at which the corpus delicti of each killing was amply established.

As to the murder of David Church, evidence adduced at the *Phillips* hearing- which was largely similar to that later introduced before the jury- showed that during the early part of the summer of 1986, while defendant was staying at Brian Buckley's apartment, Buckley gave a party attended by defendant, Chris Caldwell, and others. Church was among a group of people who arrived at the party about 10 p.m. and stayed for 10 to 20 minutes. A half hour later, Church returned alone. Because he was drunk, Buckley did not want him around. Defendant, Buckley, and Caldwell took Church downstairs. At Caldwell's direction, Buckley then returned to the party. Fifteen minutes later, defendant and Caldwell reentered Buckley's apartment. Defendant said he had scared Church and slashed his bicycle tires with a knife. Caldwell took an ax handle and the keys to Buckley's mother's car and, with defendant, went downstairs. Buckley saw Church sitting at the bottom of the stairs. After midnight, he did not see Church again. The next morning, Buckley saw a 10-speed bicycle with slashed tires at the apartment. Defendant and Caldwell said they were going to get rid of the bicycle because defendant's knife could be traced from the slashes. By the third day after the party, the bicycle was gone. Three days after the party, defendant told Buckley that he and Caldwell had killed Church. Caldwell had already told Buckley that. A couple of days later, defendant, Caldwell, and Buckley had another conversation about the Church killing. Defendant said he hit Church across the head with the ax handle, that Church was "pretty tough." Caldwell told Buckley how hard Church was to kill. A week later, defendant and Buckley were standing outside Buckley's apartment. Defendant was holding ***850** the ax handle, stating that he had to throw it away because there was blood on it.

Fred Helmuth, a friend of David Church, testified that after the evening of the visit to Buckley's apartment, he never saw Church again.

Dr. Frederick Lovell testified that he examined human remains found under a mound of rocks in a riverbed in Aliso Canyon near Santa Paula on July 29, 1986. The body was decomposed, the little remaining skin being mummified. Dr. Lovell estimated that the deceased had been dead more than six weeks, to an upper limit of six to ten months. After performing an autopsy, Dr. Lovell was unable to determine the cause of death. A comparison study of X-rays established that the dead man was David Church.

Clearly, the proof adduced at the *Phillips* hearing (*supra,* 41 Cal.3d 29), apart from defendant's extrajudicial statements to Brian Buckley, created a reasonable inference that David Church died by criminal agency, and thus sufficed to permit the admission into evidence of those statements. (*People v. Towler* (1982) 31 Cal.3d 105, 115 [181 Cal.Rptr. 391, 641 P.2d 1253].) Just as clearly, the weight of the proof, including the statements, must be described as substantial. The trial court correctly allowed the evidence to go to the jury.

As to the killing of Jack Dowdy, Jr., the proof adduced at the *Phillips* hearing likewise sufficed to permit the introduction of defendant's extrajudicial admissions and to warrant presentation of the evidence to the jury. Dowdy's father testified that he never saw his son after the latter left for Albuquerque, where he was to attend a union- sponsored trade school. Kim Dowdy, whose marriage to Jack Dowdy had not been dissolved, testified about defendant's violently possessive behavior toward her. Jane Davis, Dowdy's sister, testified that after a family gathering she saw defendant make a motion toward Dowdy with his hand inside his pocket, where Ms. Davis knew defendant kept a gun. Pam Lester, Dowdy's girlfriend, overheard the victim and defendant talking about Kim Dowdy shortly before Dowdy's disappearance. Dowdy was supposed to call Lester after the first day of his trade school, but did not. Jackie Sumner, the cousin with whom Dowdy was staying while attending school, last saw him early on the morning of the first day of his classes; he never returned to her home to pick up his clothes. The trade school records showed that Dowdy attended his first scheduled day of a week of classes, but did not return thereafter. He would have received $447.42 for completing his classes.

Based on this evidence, the trial court did not err in admitting defendant's statements to Brian Buckley about his role in Dowdy's killing. That Dowdy ***851** was murdered was a reasonable inference from the evidence that he left his property behind and disappeared, without completing trade school and without ever contacting his girlfriend or the relatives with whom he enjoyed a close relationship. (See *People v. Johnson* (1991) 233 Cal.App.3d 425, 439- 442 [284 Cal.Rptr. 579] [to establish corpus delicti, evidence need not negate all possibilities of the victim's death by noncriminal agency or of the victim's continued existence].) The court also correctly concluded that the evidence of defendant's guilt, including his admissions to Buckley, his relationship with Kim Dowdy and his apparent assault on Jack Dowdy, was substantial enough to go to the jury. [FN18]

> FN18 There is no merit to defendant's unsupported contentions that the admission of other-crimes evidence in the penalty phase denied him his rights to due process of law, to a speedy trial by a fair and impartial jury, to protection against an arbitrarily and unreliably imposed sentence of death, and to a trial by a jury of the vicinage of the New Mexico offenses. Nor is there merit to his claim that the procedures employed in this trial violated the constitutional prohibitions against double jeopardy and cruel and unusual punishment.

D. *Adoptive Admissions*

(35) Defendant contends that the trial court erred in relying on the doctrine of adoptive admissions to admit testimony by Pamela McCormick linking him to the Church murder. [FN19] Over defense counsel's hearsay objections, the trial court allowed McCormick to testify that, on the morning after the party to which Church repeatedly had attempted to gain entrance, she was asleep in Brian Buckley's apartment until voices awakened her. Feigning sleep, she recognized three participants in the conversation: Chris Caldwell, Brian Buckley, and defendant. She heard them say that they had to "get rid of his body," something about ammonia, and something about finding a half-gram of cocaine on his body. She also heard them talk about having to get rid of his bicycle. She did not open her eyes during the conversation and could not identify which man made any of the statements she related. However, she heard defendant's voice, as well as Caldwell's and Buckley's, during the conversation.

FN19 The trial court rejected the prosecutor's alternative theory of admissibility-that the statements were made by coconspirators-because it concluded that the prosecution had failed to produce independent evidence of a conspiracy.

The adoptive admission exception to the hearsay rule is expressed in Evidence Code section 1221. That statute provides that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) A leading case explicating adoptive admissions is *People v. Preston* (1973) 9 Cal.3d 308 [107 Cal.Rptr. 300, 508 ***852** P.2d 300]. In *Preston,* we held that "[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*Id.* at pp. 313-314.)

Defendant contends that the statements McCormick related cannot properly come in as adoptive admissions because they were not accusatory statements and called for no particular reply. For the adoptive admission exception to apply, however, a direct accusation in so many words is not essential. In *Preston,* for example, the defendant was charged with the murders of the witness's mother and stepfather. The witness testified that she and the defendant, along with his coperpetrator, were in the defendant's room. The coperpetrator said to the witness, " 'Suzanne, we went down to your mother's trailer house, and we broke in, and as we were leaving, we had everything ready to go out, and they came in, and there was an accident and ... but they won't talk.' " (*People v. Preston, supra,* 9 Cal.3d at p. 314.) The defendant then looked at the witness and said, " 'There wasn't much money.' " (*Ibid.*) Although the statements were not accusatory on their face, we concluded they accused the defendant of being in the victims' trailer with the coperpetrator when the killings took place. We noted the statements were voluntarily made in the course of a private conversation in a private home. These circumstances

supported the inferences that the defendant heard and understood the statements and had the opportunity to deny them, and that he chose to remain silent except for an evasive and equivocal statement. They were, therefore, properly allowed as adoptive admissions. (See also *People v. Medina* (1990) 51 Cal.3d 870, 889-891 [274 Cal.Rptr. 849, 799 P.2d 1282] [silence and evasive statements by defendant in response to his sister's query why he shot victims were properly allowed in evidence as adoptive admissions, although conversation took place while defendant was in custody].)

Similarly, in this case the testimony indicated that defendant participated without demur in a private conversation during which the disposition of Church's remains and his bicycle was discussed. The circumstances afforded defendant the opportunity to deny responsibility, to refuse to participate, or otherwise to dissociate himself from the planned activity; he did not do so. Defendant complains that McCormick did not testify as to whether he actually heard the statements, but we find it entirely reasonable to infer that preliminary fact from her testimony that he participated in the conversation. This case is thus distinguishable from *People v. Lebell* (1979) 89 Cal.App.3d ***853** 772, 779-780 [152 Cal.Rptr. 840], on which defendant relies. In *Lebell,* a police officer testified about his telephone conversation with a murder suspect. The suspect called from Lebell's home and the officer heard Lebell's voice in the background while the suspect made his incriminating statements. The Court of Appeal held that the trial court erred in determining that Lebell's presence was sufficient to support a finding of adoptive admission. The preliminary facts-that Lebell heard the suspect's admissions, and that there was reason or opportunity to respond-were inadequately established. (*Id.* at p. 780.) The same cannot be said in this case. Defendant also notes that McCormick, who kept her eyes shut during the conversation, would have been unable to observe a silent response by defendant, such as a shocked look, that she was unable to tell which of the participants said what, and that she had ingested a lot of cocaine the preceding night. His observations go to the weight rather than the admissibility of her testimony. [FN20]

> FN20 Defendant also urges that, to the extent McCormick testified to statements that might have been made by Caldwell, he was denied his Sixth Amendment rights of confrontation and cross-

examination. Because defendant cannot identify any statement that McCormick attributed to Caldwell, his claim lacks merit.

Moreover, the court appropriately instructed the jury on adoptive admissions, warning it to view them with caution. [FN21] Contrary to defendant's assertion, the jury was not told to view the statements to which McCormick testified as admissions by defendant; rather, after defining adoptive admissions, the trial court instructed the jurors that they were the exclusive judges of whether an adopted admission was made and of its truth. Defendant argues that the trial court's instruction was deficient for failure to require the jury to consider whether there were admissions made that defendant could adopt. Examination of the instruction compels us to disagree.

> FN21 The trial court instructed the jury as follows: "A statement made by someone other than the defendant may be an adopted admission of the defendant. An adopted admission is a statement which the defendant, with knowledge of the content thereof, has by words or other conduct manifested his adoption or belief in the truth thereof. [¶] You are the exclusive judges as to whether an adopted admission was made and, if so, whether such admission is true in whole or in part. [¶] If you should find that the statement was not made, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true. [¶] Evidence of an adopted admission should be viewed with caution."

E. *Exclusion of Evidence*

1. *Summary*

Defendant contends the trial court erred prejudicially in excluding certain evidence at the penalty phase. He argues that Jackie Sumner should have been permitted to testify that Dowdy had confided in her that: (1) he had heard that Kim Dowdy had put out a contract on his life; (2) there was ***854** enmity between Kim and himself; and (3) he anticipated a custody battle over their infant son. He also argues that the trial court erred in sustaining the prosecutor's hearsay objection to a question asking Pam Lester whether an individual called "Ted" had told her he had seen Dowdy after the latter was supposed to have disappeared. Finally, defendant contends that the trial court erred in refusing to allow him to testify that he had refused an offer to plead guilty in exchange for a

sentence of life without possibility of parole. We consider each of these contentions separately.

2. *Dowdy's Statements to Sumner*

Dowdy spent the night before he disappeared with his cousin, Jackie Sumner, at her home in Albuquerque. On cross-examination, defense counsel asked Sumner if Dowdy had talked with her about a custody battle over his son. The trial court sustained hearsay and relevancy objections. To demonstrate relevancy, defense counsel made an offer of proof that Jack Dowdy had heard that Kim Dowdy put a contract out on his life, that there was a great deal of enmity between Jack and Kim Dowdy, and that Dowdy was concerned about a custody battle over his son. Regarding the hearsay objection, defense counsel offered the statements to impeach Kim Dowdy, who, he represented, had earlier testified that there was no problem between her and Jack and that they maintained a relationship because of their son. Finding the statements "unreliable," the trial court sustained the objection on both grounds advanced by the prosecutor.

(36) Defendant now contends that the statements were not hearsay, but rather went to Dowdy's state of mind shortly before he disappeared. We agree. The statements could not have been offered to prove that Kim Dowdy had in fact put a contract out on Jack, or that there was enmity between Jack and Kim, or that a custody battle was imminent; they were, however, relevant to suggest attitudes or beliefs that might have led Jack to choose to disappear without a trace. (See Evid. Code, § 1200, subd. (a).) As nonhearsay evidence relevant to a disputed issue (i.e., whether Dowdy was murdered or had voluntarily disappeared), it should have been admitted unless some other rule dictated its exclusion. (Evid. Code, § 351.) No such rule is suggested to us.

Defendant's trial counsel did not, however, specifically raise this ground of admissibility. In these circumstances he is precluded from complaining on appeal. (Evid. Code, § 354, subd. (a); *Lorenzana v. Superior Court, supra,* 9 Cal.3d at p. 640; *People v. Frye, supra,* 166 Cal.App.3d at p. 950.) Defendant also suggests his trial counsel's performance was in this respect constitutionally inadequate. (See *People v. Pope, supra,* 23 Cal.3d at p. 425.) We ***855** need not decide whether trial counsel was deficient, however, because defendant cannot in any event establish the prejudice requisite to relief. (*People v. Stankewitz, supra,* 51 Cal.3d at p. 113.) In light of the evidence that

defendant in effect admitted to three witnesses his responsibility for Dowdy's death, it is not reasonably probable that a result more favorable to him would have resulted from presentation of the excluded testimony.

3. *Pam Lester's Conversation With "Ted"*

(37) Defendant claims error in trial court rulings that sustained hearsay and relevancy objections to questions aimed at eliciting the out-of- court statements of a man who claimed to have seen Dowdy after the latter's disappearance. Asked "Did you ever hear from anyone that they had seen Mr. Dowdy?," Pam Lester responded in the affirmative. She testified that about two weeks after Dowdy was last seen, a man calling himself Ted visited her. She described Ted, whom she had never before seen, in some detail, and stated she gave this information to a detective. When defense counsel asked Lester what exactly Ted told her, the trial court sustained the prosecutor's hearsay objection.

Defendant does not deny that defense counsel's question called for hearsay, but contends he is entitled to a relaxation of the rules of evidence. We disagree. The proffered testimony lacks indicia of reliability sufficient to compel its admission under the authority of *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150], especially in the absence of any showing as to Ted's identity or relationship to Dowdy. Consequently, we find no error, constitutional or otherwise, in the trial court's ruling. In any event, on cross-examination Lester stated she had met a man who claimed to have seen Dowdy after his disappearance and that she had so informed a detective. Defense counsel thus succeeded in suggesting to the jury that, contrary to the prosecution's theory, Dowdy was still alive.

4. *Evidence of Plea Offer and Defendant's Refusal*

(38) Defendant urges the trial court erred in excluding evidence that the prosecutor had offered, and defendant had refused, the opportunity to plead guilty to murder and testify against Caldwell and Buckley in return for a sentence of life without possibility of parole.

Defense counsel sought to introduce evidence of defendant's refusal as mitigating character evidence showing loyalty to his friends. After a series of hearings, the trial court ruled the evidence inadmissible under Evidence Code section 352. The trial court reasoned that the low probative value of ***856** the evidence was

outweighed by the danger of its confusing and misleading the jury. The trial court also found a possibility of undue consumption of time.

We find no abuse of discretion and no violation of constitutional guarantees in the ruling. While it is true, as defendant contends, a capital defendant must be allowed to present all relevant mitigating evidence to the jury (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [90 L.Ed.2d 1, 6-7, 106 S.Ct. 1669]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 989- 990, 98 S.Ct. 2954]), the trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. (Evid. Code, § 352; see, e.g., *People v. Allen* (1986) 42 Cal.3d 1222, 1284-1285 [232 Cal.Rptr. 849, 729 P.2d 115].) The trial court's determination that defendant's refusal of a plea offer fell into the category of excludable evidence was not clearly wrong.

As an indication of defendant's character, the refusal in itself was meaningless. Defendant disputes this conclusion. Trial counsel argued that the mere fact of defendant's refusal tended to show that he was loyal to friends. Appellate counsel now suggests the evidence additionally showed that defendant would get along well in prison, that he believed in his own innocence, and that he was willing to trust the judicial system. [FN22] While it is true that any of the characteristics defendant posits *may* have been a factor in his refusal, it is also possible to infer other reasons not reflecting so favorably on defendant's character. The mere fact that defendant declined the plea offer could not have significantly helped the jury determine the appropriate penalty. [FN23] ***857**

FN22 He further asserts it provides some insight into the circumstances of the offense, but fails to explain how this might be so. Additionally, he contends his refusal points up the difference between his character and Buckley's. Penalty phase deliberations, however, do not involve a comparison of coperpetrators or their sentences. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1249 [255 Cal.Rptr. 569, 767 P.2d 1047] ["The focus in a penalty phase trial of a capital case is on the character and record of the individual offender."].)

FN23 Defendant compares his refusal of the prosecutor's plea

> offer with the prosecutor's refusal of defense witness Frisilone's offers to testify against defendants in other cases. He claims that if the latter was relevant to show Frisilone's bias (as the trial court instructed the jury) and was not excessively confusing when a limiting instruction was given, so too was defendant's refusal of the plea offer relevant to show his character, and not unduly confusing. The comparison is unpersuasive. The fact that a prosecutor denies a would-be witness the expected benefits of proprosecution testimony is relevant because the denial makes it more likely than otherwise would be the case that the witness will be biased against the prosecution. (Evid. Code, § 780, subd. (f).) The mere fact that a defendant refuses a plea offer is not similarly probative of any proposition related to mitigation.

To supply meaning to the bare fact of the refusal, additional inquiry regarding the underlying reasons would have been required. Such examination, as the trial court concluded, had the potential to mislead and confuse the jury. Consequently, we cannot agree that the trial court abused its discretion in excluding the evidence that defendant refused the plea offer.

Defendant contends that exclusion of the evidence was improper because his refusal of the plea offer was part of his "record" and "background," inasmuch as it happened and involved him. As such, he urges, it could not be excluded as cumulative. He reads too much into section 190.3, factor (k), in implying that a defendant is entitled to put before the jury evidence of every event that has ever happened to him.

Defendant also argues that the fact that the prosecution made the offer was relevant and admissible character evidence. We do not agree. The fact that the offer was made, like the fact that it was refused, is susceptible of numerous inferences. Standing alone, it sheds no light on defendant's character, and would likely mislead rather than assist the jury in its determination. As the People point out, such an offer may reflect leniency rather than a belief that the defendant is less culpable for the crime charged. Defendant notes that the prosecutor could have testified as to his reasons for making the offer. However, the trial court could, as it did, properly conclude that such testimony would have unduly prolonged the trial and drawn the jury's attention to issues

having no bearing on aggravating and mitigating factors.

Defendant asserts that the California Constitution favors allowing defendants to present evidence of plea offers, since plea bargains are disfavored. (See § 1192.7.) A rule allowing admission of rejected plea offers by which defendants in capital cases could have avoided the death penalty might indeed deter prosecutors from using threats of death penalty charges to coerce plea bargains. However, defendant cites no authority for the notion that such extrinsic policy concerns should inform the trial courts' rulings under Evidence Code section 352.

Defendant argues that in excluding the evidence of his refusal, the trial court erroneously placed on him the burden of producing evidence sufficient to persuade the jury to return a sentence other than death. His interpretation of the trial court's ruling is unsupported by the record.

F. *Claimed "Multiple Counting" of Aggravating Factors*

(39) Defendant complains that CALJIC No. 8.84.1, as read to the jury, invited improper "multiple counting" of the unitary course of conduct ***858** involved in his murder of Thomas Urell. He contends a reasonable juror would have considered the facts of the Urell murder first as circumstances of the crime, second as special circumstances (§ 190.3, factor (a)), and third as instances of other criminal activity (§ 190.3, factor (b)). He also argues a reasonable juror would have improperly "stacked" the robbery and burglary special circumstances of the Urell crime. These defects in the instruction, he contends, violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

We have rejected the same arguments in the past, holding that the instructions as a whole invite reasonable jurors neither to "weigh" each special circumstance twice (*People v. Melton* (1988) 44 Cal.3d 713, 768-769 [244 Cal.Rptr. 867, 750 P.2d 741]) nor to count the circumstances of the present crime under both factors (a) and (b) of section 190.3 (*People v. Bonin* (1988) 46 Cal.3d 659, 703 [250 Cal.Rptr. 687, 758 P.2d 1217]). This case is governed by our earlier decisions, since nothing in the prosecutor's arguments invited the jury to make the type of improper use of the Urell evidence that defendant suggests. [FN24]

FN24 We cannot agree with defendant that the prosecutor's

use of a chart, listing various types of murders for which the death penalty may or may not be appropriate, improperly implied that section 190.3 factors are to be counted. (See discussion, *post,* at p. 860 et seq.)

G. *Denial of Motion to Limit Cross-examination of Defendant*

(40a) Defendant contends the trial court erred in denying his motion to limit cross-examination of himself, at the penalty phase, to his reasons for his rejection of the plea bargain. Of course, since we have determined that evidence of the plea offer was properly excluded, this claim is largely moot. However, since defendant contends this ruling denied him his right to testify, we make the following observations.

Defendant wished to testify regarding his refusal of the offer only if he could be shielded from cross-examination. In response to the trial court's ruling that he would have to explain why he rejected the offer, defendant offered to testify that the offer was made, that he rejected it, and that there were three reasons for rejecting it: (1) that he did not want to stipulate to spending the rest of his life in prison without possibility of parole; (2) that he did not want to testify against people he considered to be his friends; and (3) that he would be extremely concerned about spending the rest of his life in state prison labelled an informant. The trial court ruled that if defendant so testified, then the prosecutor would be entitled to cross-examine defendant on his character traits of loyalty and helpfulness to his friends, including Jack Dowdy, Jr. Defendant did not testify, and now contends the trial court's ruling denied him his right to testify in his own defense. ***859**

(41) It is true, of course, that when a defendant chooses to testify on his own behalf, the privilege against self-incrimination serves " 'to prevent the prosecution from questioning [him] upon the case generally, and in effect making him its own witness.' " (*People v. Schader* (1969) 71 Cal.2d 761, 770 [80 Cal.Rptr. 1, 457 P.2d 841], quoting *People v. Gallagher* (1893) 100 Cal. 466, 475 [35 P.80]; Cal. Const., art. I, § 15; U.S. Const., Amends. V, XIV; see also Evid. Code, § 773, subd. (a).) "Such general compelled cross-examination would not only pose the same 'cruel trilemma of self- accusation, perjury or contempt' recognized in *Murphy v. Waterfront Com.,* [(1964)], 378 U.S. 52, 55 [12 L.Ed.2d 678, 681, 84 S.Ct. 1594]; it would also penalize and thereby deter a defendant's assertion of his right to take the witness stand to explain or contradict a particular

aspect of the case against him." (*People v. Schader, supra,* 71 Cal.2d at p. 770, fn. omitted.) As defendant asserts, the breadth of the waiver of his privilege is determined by the scope of the testimony he presents. (40b) Had he testified, as he proposed, regarding his reluctance to testify against his friends, the prosecution would have been entitled to introduce evidence through cross-examination that explained or refuted his statements or the inferences necessarily to be drawn from them, or that tended to overcome or qualify the effect of the testimony given on direct examination. (*Id.* at pp. 770-771.) An inference naturally and necessarily to be drawn from the fact of defendant's reluctance to testify against his friends is that he possessed traits of loyalty, helpfulness, or concern toward them. Given the testimony that defendant and Jack Dowdy were longtime friends, the trial court properly ruled that the defendant could be cross-examined regarding matters bearing on his loyalty, helpfulness, or concern toward Dowdy, although he could not be cross- examined regarding the Urell or Church killings.

H. *Lack of Requirement That Jury Return Written Findings*

(42) Defendant contends that the trial court's failure to require the jury to make written findings regarding the truth of the alleged aggravating circumstances and other determinations implicit in its sentencing choice violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. We reject his contention; written findings disclosing the reasons for the jury's penalty determination are not required. (*People v. Belmontes, supra,* 45 Cal.3d 744, 805; see also *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

I. *Prosecutor's Alleged Allusion to Penalty Phase During Guilt Phase Opening Statement*

(43) Defendant complains that impropriety in the prosecutor's guilt phase opening statement tainted the jury's penalty determination. Near the ***860** end of his statement, after outlining what he expected the evidence to prove, the prosecutor said: "Based on that evidence, ladies and gentlemen, at the end of the guilt phase, I will ask you to find Curtis Fauber guilty of first degree murder." Defendant asserts that the use of the words "guilt phase" implied that there inevitably would be a penalty phase, that the guilt phase was merely a

formality. Defendant waived the point by failure to object. (*People v. Green, supra,* 27 Cal.3d 1, 27.) In any event, we find it meritless. Nothing in the prosecutor's statement remotely suggested that a verdict of guilt was a foregone conclusion. And, after voir dire, the jurors were well inured to the concept that the initial part of any capital case is called the guilt phase.

J. *Prosecutor's Use of Chart During Penalty Phase Argument*

(44) Citing *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440], defendant contends his constitutional rights were violated by the prosecutor's use of a chart during penalty phase closing argument. [FN25] The chart graphically set forth the various statutory categories of murder, with a ***861** line separating those for which the death penalty is legally unavailable from those for which it is legally available, and listed aggravating and mitigating factors. The prosecutor drew a second line through the section of the chart depicting first degree murders with special circumstances, to separate cases in which he argued the death penalty would be appropriate from those in which it would be legally available but inappropriate.

FN25 The chart itself was not made a part of the record, and the parties could not prepare a settled statement regarding its contents because the trial judge never saw the chart. However, the prosecutor referred in some detail to its contents during his argument. The relevant portions of the argument are as follows:

> "Now, let me start with some guidelines. In 1977 and 1978, the People of the State of California voted that the death penalty was an appropriate penalty for some crimes. That initiative was later enacted into law and the law provides that the death penalty is appropriate for first degree murder with special circumstances. The law provides also that the death penalty is not appropriate for murders less than that. Second degree murder, for instance, is not appropriate for the death penalty. First degree murder without special circumstances does not have the death penalty available. Only murders committed with special circumstances.

"And those crimes have the death penalty available, but the law further provides that the death penalty is not always appropriate even for murders with special circumstances. For instance, I think you would all agree that a young man committing a robbery of a supermarket who panics when the clerk goes for a gun and kills the clerk, that that probably would not fall into the-into the type of crimes where the death penalty would be appropriate even though it's available.

"So to graphically demonstrate this, I have drawn a little chart here. And this line in the middle indicates that point at which the death penalty is available. All of the crimes above this line would be crimes where the death penalty is available. And it starts with murder special circumstances. Crimes below this line are crimes where the death penalty is not available. By law you could not impose the death penalty.

"First degree murder. Premeditated deliberate murder without special circumstances does not have the death penalty available. Second degree murder is a notch below that and the death penalty is not available for that crime.

"*Now, as I said, that even if the death penalty is available for murders with special circumstance, it's not always appropriate.* Now, I put that line up here somewhere, that all murders with special circumstances above this line, the death penalty is appropriate, and below this line it's not appropriate. And over here on the left I have drawn-I have written out aggravating factors pointing toward the top and mitigating factors pointing toward the bottom. "What the law wants you to do is to consider all of these aggravating factors and consider all these mitigating factors and subtract out the mitigating from the aggravating and see where you end up on this chart. *And if you find that the aggravating factors substantially outweigh the mitigating factors, then you may impose the death penalty. But again, even that's discretionary. You don't have to.*

"Now, I think that there are obviously people in history that are way up here on the chart way out of sight. Genghis Khan or Doctor Mengele or

somebody like that. But in this courtroom, you are to decide whether the death penalty is appropriate for Curtis Fauber and you are to consider the crimes-the crime that he was convicted of in the guilt phase, the circumstances of that crime. You are to consider the crimes that you heard about in the penalty phase if you find them true beyond a reasonable doubt, and you are to also consider all of this background about the defendant. *So you are making your decision based on the crime itself and the background of the defendant.*

"*Now, this line up here is obviously a very subjective thing. Each of you will have a different point in your mind where you feel that a particular defendant and a particular crime deserves the death penalty, that the death penalty is appropriate.* Not all of you will have that same point. But when we reach that point where all of you agree that a particular defendant with a particular background and a particular crime deserved the death penalty, then you will be speaking as the moral conscience of the community for that particular situation." (Italics added.)

The prosecutor argued that the jury's function was to consider the circumstances of the Urell crime, the other-crimes evidence adduced at the penalty phase if it believed such evidence proved defendant's guilt beyond a reasonable doubt, and the defendant's background. From all of that information, the prosecutor stated, the jury was to decide the appropriate penalty.

Defendant complains that the very use of a chart implied that scales and lines should be used in determining penalty, and that the process is one of numerical computation rather than evaluation and judgment. We disagree. Taking the argument as a whole, we find it readily apparent that the prosecutor took care to avoid any such mechanistic approaches to the sentencing decision. Over and over, he spoke of the necessity of considering all relevant factors. Repeatedly he emphasized the individual, subjective nature of the penalty determination. Defendant isolates the prosecutor's exhortation to "subtract out the mitigating from the aggravating and see where you end up on this chart," claiming the jury must have been misled. The language he cites, however, was immediately followed by reference to the standard embodied in section 190.3 ("And if you find that the aggravating factors

substantially outweigh the mitigating factors, then you may impose the death penalty.") and by a reminder that the law does not mandate ***862** the imposition of death ("But again, even that's discretionary. You don't have to."). The prosecutor's argument was not erroneous under *People v. Brown, supra,* 40 Cal.3d 512, or any other decision cited to us.

K. *Claimed Boyd Error*

(45) Defendant contends that the jury was improperly permitted to consider nonstatutory aggravating evidence. (*People v. Boyd* (1985) 38 Cal.3d 762, 775 [215 Cal.Rptr. 1, 700 P.2d 782].) The prosecutor alleged and presented evidence of three assaults by defendant on Kim Dowdy. The jury was instructed that "Evidence has been introduced for the purpose of showing that the defendant committed the following criminal activity:

"

. . . . . .

"(3) In April 1986, he did assault and threaten Kim Dowdy with a gun;

"

. . . . . .

"(5) On or about May 14, 1986, he did assault and threaten Kim Dowdy with a knife ..."

Defendant points out that, to be admissible under section 190.3, factor (b), evidence must show conduct that both violates a criminal statute and involves force or violence. (*People v. Belmontes, supra,* 45 Cal.3d 744 at pp. 808-809.) He complains these instructions required only a finding of threats to Kim Dowdy, not a violation of a penal statute. This, he urges, deprived him of protections under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Defendant misreads the instructions. Quite plainly, they contemplate a finding that defendant both assaulted *and* threatened Kim Dowdy. They did not allow mere threats to be considered in aggravation. The instructions recited the specific assaults alleged in aggravation, directing the jury not to consider any evidence of any criminal activity, other than that enumerated, as an aggravating factor. Accordingly, the instructions could not have misled the jury into considering additional threatening conduct not amounting to a violation of a penal statute.

Defendant also notes that the jury heard testimony by Tony Maestas, Kim Dowdy's uncle, relating defendant's threats against Kim and her family; he argues the testimony was hearsay and should have been excluded, and that trial counsel was

ineffective in not objecting to its admission. Further, he ***863** contends the instructions improperly told the jury to consider those threats as aggravating evidence. We reject the contentions. Since defendant's threats were admissions by a party, the hearsay rule would not require their exclusion. (Evid. Code, § 1220.) And, as noted above, the jury was instructed not to consider in aggravation any criminal conduct other than the enumerated assaults and murders.

L. *CALJIC No. 2.11.5*

(46) Defendant contends that the trial court erred in instructing the jury with a modified version of CALJIC No. 2.11.5 at the penalty phase. [FN26] As given, the instruction read as follows: "There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the criminal activity which it is alleged that the defendant committed. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted or whether he has or will be prosecuted." As the accompanying use note cautions, this instruction should not be given when the person to whom it refers is a witness; alternatively, a limiting instruction may be appropriate to eliminate any possible confusion as to which person is referred to. Defendant contends that the giving of this instruction was error, as it misled the jury into believing that it could not consider the fact that Buckley was not being prosecuted for the Church killing in assessing his credibility.

> FN26 Defendant also contends it was error to read CALJIC No. 2.11.5 to the jury at the guilt phase; however, a search of the record reveals that instruction was not given at the guilt phase.

We do not believe the jury could have been misled. The instruction was directed at Caldwell's involvement in the murder of David Church. To accept defendant's contention that the jury might have understood the instruction as applying to Buckley, we would have to find that it ignored the court's instructions on accomplice testimony and credibility, and disregarded counsel's efforts to discredit Buckley in his closing argument. (*People v. Belmontes, supra,* 45 Cal.3d at p. 783; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1218- 1219 [283 Cal.Rptr. 144, 812 P.2d 163].) Reading the instructions as a whole, we do not believe a reasonable juror would have understood them in the way defendant suggests.

M. *Refusal of Instructions Requested by Defense*

1. *Refusal of Instruction on Lingering Doubt*

(47) Citing *People v. Terry* (1964) 61 Cal.2d 137 [37 Cal.Rptr. 605, 390 P.2d 381], defendant proposed that the jury be instructed as follows: "Possible innocence is a mitigating factor which you may consider in determining ***864** the appropriate penalty in this case. You are permitted to demand a greater degree of certainty of guilt for the imposition of the death penalty. Therefore, any lingering doubt you may have concerning the guilt of the Defendant may be considered by you as a mitigating factor upon which to base a sentence less than death." The trial court refused to give the requested instruction, but commented that "this is appropriate argument." Defendant contends that the refusal to give his lingering doubt instruction violated his rights to due process of law, to protection against cruel and unusual punishment, to freedom from a death sentence that is arbitrarily and unreliably imposed, and to trial by a fair and impartial jury.

In *People v. Cox* (1991) 53 Cal.3d 618 [280 Cal.Rptr. 692, 809 P.2d 351], we concluded that while a defendant may not be precluded from offering evidence on or arguing the relevance of lingering doubt in mitigation at the penalty phase, neither the Eighth and Fourteenth Amendments to the federal Constitution nor the California Constitution require that the jury be instructed to consider residual doubt as to the extent of defendant's participation in the offense, except as statutorily provided. (53 Cal.3d at p. 677.) We noted that our holding in *People v. Terry, supra,* 61 Cal.2d 137, on which defendant here relies, neither imposed nor contemplated an obligation to instruct on lingering doubt. "*Terry* established no constitutional mandate to do so; and defendant offers no rationale for interpreting our state guaranties any more stringently than comparable federal provisions." (*People v. Cox, supra,* 53 Cal.3d at p. 678.) We did, however, observe that "[a]s a matter of statutory mandate, the court must charge the jury 'on any points of law pertinent to the issue, if requested' [citations]; thus, it may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20.) We rejected the defendant's proffered instruction in *Cox* because it erroneously prescribed that the jury evaluate lingering doubt in a particular manner. (*Ibid.*) Assuming for the sake of argument that defendant's proffered instruction

suffered no similar infirmity, we are still unable to conclude that the court's refusal to give the proffered instruction caused prejudice. Trial counsel did not argue that the jury should base its decision on any residual doubt as to defendant's guilt of the murder of Urell. In fact, counsel-perhaps mindful of the pitfalls of lingering doubt arguments (see *People v. Webster* (1991) 54 Cal.3d 411, 455 [285 Cal.Rptr. 31, 814 P.2d 1273] [" 'Lingering doubt' arguments are often unwise, for they risk antagonizing a jury that has already found defendant guilty."])-twice specifically stated that that issue had already been decided. Even so, without comment and without objection, he read the text of his proposed lingering doubt instruction to the jury. Under these circumstances, we do not believe defendant would have derived any additional benefit had the requested instruction been given. ***865**

2. *Refusal of Instruction on Specific Mitigating Facts.*

(48) Defendant contends the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution by refusing a special jury instruction he proffered. The instruction read as follows: "Defendant request [*sic*] that added to the mitigating factors in CALJIC 8.84.1: [¶] 1. Defendant's loving family ties. [¶] 2. Personal difficulties or deprivations. [¶] 3. His waiver of extradition to come to California to stand trial. [¶] 4. His caring and sensitivity towards his friends. [¶] 5. The absence of any criminal conduct prior to or after the incidences [*sic*] alleged in this trial." The trial court instead instructed the jury in the language of CALJIC No. 8.84.1. [FN27] The trial court also read the following instructions requested by defendant:

> FN27 Pertinent portions of CALJIC No. 8.84.1, as read to the jury in this case, provide as follows:
> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereinafter instructed.
> "You shall consider, take into account and be guided by the following factors, if applicable:
> "
> . . . . .
> "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect

of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

"You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle."

"Mercy, pity and sympathy for the defendant are proper considerations in determining the penalty in this case, should you find them to be warranted under the circumstances. [¶] Evidence of mitigating factors related solely to the defendant's background and character must be carefully weighed and may serve as a basis for a sentence less than death."

Although the court was not obliged to do so, it also read the following special instructions requested by defendant:

"In determining the penalty in this case, you are obligated to weigh and consider evidence that the defendant, quote, 'was a loving and helpful man in his relationships with his relatives and friends,' end quote. Such evidence is proper for your consideration as to whether or not you determine to spare the defendant's life."

The trial court did not err in refusing to give defendant's special instruction. In large part it duplicated other instructions given (*People v. Wright* (1988) 45 Cal.3d 1126, 1134 [248 Cal.Rptr. 600, 755 P.2d 1049]); it was also flawed in that it was argumentative, i.e., it merely highlighted certain aspects ***866** of the evidence without further illuminating the legal standards at issue (*People v. Howard* (1988) 44 Cal.3d 375, 442 [243 Cal.Rptr. 842, 749 P.2d 279]; see also *People v. Benson* (1990) 52 Cal.3d 754, 804-806 [276 Cal.Rptr. 827, 802 P.2d 330]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1276-1277 [270 Cal.Rptr. 451, 792 P.2d 251]). The instructions given, in our view, adequately covered the defense theory and provided sufficient guidance to the jury.

To the extent that defendant is complaining that inapplicable sentencing factors were not deleted from the jury instructions, we have already resolved that issue unfavorably to him. (*People v. Bell* (1989) 49 Cal.3d 502, 551 [262 Cal.Rptr. 1, 778 P.2d 129].)

N. *Automatic Application to Modify Verdict*

(49) Defendant urges his sentence be reversed because the trial court read

and considered materials outside the record before denying his automatic application to modify the verdict. (§ 190.4, subd. (e).) The record shows that the hearing on the application was held on May 16, 1988. The probation report had previously been filed. Although the trial court did not expressly state it had read the probation report before ruling on the application to modify the verdict, the record supports the inference that it had done so. The trial court had certainly read the letters attached to the report (most of which were written in support of defendant, although two had been submitted by a relative and friends of David Church).

The trial court must decide the application for modification of the verdict on the basis of the evidence-which, of course, does not include the probation report. (§ 190.4, subd. (e); *People v. Williams* (1988) 45 Cal.3d 1268, 1329 [248 Cal.Rptr. 834, 756 P.2d 221].) Consideration of the probation report or victim-impact statements before ruling on the application for modification is, therefore, error. (*People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892].) But even when the trial court has considered such extraneous information in ruling on the application, we assume there has been no improper influence on the court, absent specific evidence to the contrary. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 150 [2 Cal.Rptr.2d 335, 820 P.2d 559]; *People v. Adcox, supra,* 47 Cal.3d at p. 274.)

The record in this case demonstrates that the trial court's review of the extraneous information resulted in no prejudice to defendant. The court indicated through its remarks that it was well aware section 190.4, subdivision (e), required that the determination be based on the evidence and guided by the aggravating and mitigating circumstances referred to in section 190.3. ***867** From the court's statement of reasons for denying modification, we find it clear that the court gave greatest weight to the evidence of the Urell murder and the Church and Dowdy killings. Acknowledging the feelings expressed in the probation report and the letters from Church's relative and friends, the court said, "I'm persuaded by the evidence that I heard more than I am by letters from family members, comments from family members on the one side and letters in support of Mr. Fauber on the other." Defendant complains that this statement indicates the trial court was in fact influenced by the probation report and letters. Although the remark indicates some small quantum of improper influence,

we find no reasonable possibility that the trial court's error affected its decision. (*People v. Benson, supra,* 52 Cal.3d at p. 812.)

(50) Defendant complains that, even after the United States Supreme Court's decision in *Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 111 S.Ct. 2597], which overruled the bar to presentation of certain forms of victim-impact evidence at the penalty phase recognized in *Booth v. Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207], use of the opinions of victims' families regarding punishment in a verdict modification proceeding violates the Eighth Amendment. We disagree. Even if we were able to say, on this record, that the trial court "used" the opinions of the victims' families, "the broad holding of *Booth* and *Gathers* does not extend to proceedings relating to the application for modification of a verdict of death under section 190.4(e)." (*People v. Benson, supra,* 52 Cal.3d at p. 812.)

O. *Reliability of Penalty*

(51) Finally, defendant complains that the process by which he was sentenced to death was arbitrary and unreliable, violating the Eighth Amendment of the Federal Constitution. In essence, he argues that the prosecutor acted arbitrarily in seeking the death penalty against him rather than Brian Buckley, and that a conviction and sentence based largely on the bargained-for testimony of a coperpetrator is constitutionally unreliable and cannot stand. He also reiterates his claims that various errors occurring in both phases of trial undermined the validity of his sentence. We have rejected his claims of prejudicial error elsewhere in this opinion. We here reject defendant's contention that the disparity between his sentence and Buckley's, in itself, or the fact that Buckley testified pursuant to agreement, reflects an arbitrary application of the law. That Buckley received a lesser sentence cannot mitigate the gravity of defendant's wrongdoing. (*People v. Belmontes, supra,* 45 Cal.3d at pp. 811-812.) The jury in this case heard the evidence of defendant's crimes and determined that in light of his background and his ***868** role in the murder of Thomas Urell death was the appropriate penalty. He received the individualized consideration guaranteed him by the Eighth Amendment. We find no constitutional infirmity in the process by which his sentence was imposed.

Disposition

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.

I concur in the judgment. After review, I have found no reversible error or other defect.

I write separately because I believe that the trial court may have erred when it granted the People's motion to exclude evidence of plea bargaining at the penalty phase-specifically, evidence that they had offered, and defendant had rejected, an opportunity to plead guilty to first degree murder under special circumstances and receive a sentence of life imprisonment without possibility of parole in exchange for testimony against Brian Buckley and Christopher Caldwell. The court found the People's offer irrelevant in and of itself. By contrast, it found defendant's rejection relevant, but substantially more prejudicial than probative. In my view, each determination is open to question.

To begin with, the People's offer of the plea bargain is arguably relevant: it bears on the circumstances of the offense broadly defined. This conclusion is plainly consistent with the Eighth Amendment of the Federal Constitution. It appears practically compelled under Penal Code section 190.3. The statutory provision declares that evidence of the "circumstances" of the offense are admissible at the penalty phase. In *People v. Edwards* (1991) 54 Cal.3d 787, 833 [1 Cal.Rptr.2d 696, 819 P.2d 436], this court held that the scope of the term extends beyond the "immediate temporal and spatial" context of the crime to " '[t]hat which surrounds [it] materially, morally, or logically' ...." A plea bargain involving a crime must "logically surround" the crime. The proposition is virtually tautological: a disposition concerning an offense concerns the offense. To be sure, the evidence does not seem strongly relevant. But it does seem relevant to some degree.

Next, defendant's rejection of the plea bargain is arguably not substantially more prejudicial than probative. As the trial court itself recognized, the evidence is indeed relevant: in conjunction with testimony defendant proffered on his reasons for refusing the offer, it has some tendency to show his character for loyalty to those he considered his friends. Character, of course, ***869** is a material issue in mitigation under Penal Code section 190.3 (see, e.g., *People v. Boyd* (1985) 38 Cal.3d 762, 772-776 [215 Cal.Rptr. 1, 700 P.2d 782]) and the Eighth Amendment (see, e.g., *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [90 L.Ed.2d 1, 6-7, 106 S.Ct.

1669]). This evidence, too, does not seem strongly relevant. But neither does it appear particularly mischievous. Therefore, it cannot be deemed more prejudicial than probative-and certainly not substantially so.

Although the trial court may have erred under both California law and the United States Constitution when it granted the People's motion to exclude the evidence of plea bargaining, reversal would not be required. The actual-and proper-focus of the penalty phase was defendant and his capital crime. As noted, the evidence in question does not seem strongly relevant. Hence, it would have added little, if anything, of marginal value. Therefore, any error could not have affected the outcome within any reasonable possibility, and must be held harmless beyond a reasonable doubt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112, 820 P.2d 214] [stating the standards for prejudice for federal constitutional error and for state-law error bearing on penalty in a capital case].)

In conclusion, having found no reversible error or other defect, I concur in the judgment.

Appelant's petition for a rehearing was denied September 3, 1992. ***870**

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hear from the defense. And then the People have the -- again, the right to close the arguments, at which time they're limited to responding to basically what the defense position has been in their argument or his argument.

Are you ready, Mr. Glynn?

MR. GLYNN: Yes, your Honor.

THE COURT: Go ahead.

MR. GLYNN: Thank you.

OPENING ARGUMENT ON BEHALF OF THE PEOPLE

MR. GLYNN: Good morning, ladies and gentlemen.

THE JURORS: Morning.

MR. GLYNN: I'm going to start out by just telling you up front that I think this is a single-issue case, whether or not you believe Brian Buckley.

If you don't believe anything that he says, you'll probably acquit the defendant. If you believe some of what Brian Buckley says, you'll find the defendant guilty of robbery and burglary and felony murder. And if you believe most of what Brian Buckley says, you'll convict the defendant of everything.

But as you know, I have the burden of proving each of the elements of all of the crimes charged. And for that reason, I'm going to take a step-by-step approach and walk you through all of the law that I think is pertinent to this case and discuss the facts that apply to

that law.

Now, I've broken my argument up into three areas. I'm going to first talk about some general instructions that -- that everybody gets in every case, and I'll talk about some housekeeping rules that will make your life a little easier in deciding how to deliberate.

Then I'm going to discuss the crimes charged, the burglary, robbery and the felony murder. And then finally, I will get down to the special circumstances.

Now, to begin, I guess the best spot is to remind you of what your duties are as jurors and familiarize you with the first instruction. I'm not going to read the entire instruction, but starting in the middle, and I quote:

"As jurors, you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source.

"Your other duty is to apply the rules of law that the Court states to you to the facts as you determine them and in that way to arrive at your verdict.

"As jurors, you must not be influenced by pity for a defendant or prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

"Both the People and the defendant have

a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case and that you will reach a just verdict, regardless of what the consequences of such verdict may be."

Now, there's a number of things that you -- you can't consider, and we've talked about that. You've all promised me that you would not consider sympathy for the defendant in your deliberations and let that influence your verdict.

You're not to consider the appearance of the defendant, and you all told me during jury selection you would not do that.

And as an example on the other side, you're not to consider sympathy for the victim.

You may note that a live photograph of the victim was never introduced into evidence in this case because that's not relevant to any of the facts.

You promised me that the personalities of the attorneys would not enter into your deliberations, and you promised me that you would not engage in speculation or conjecture.

Bible references are not evidence and should not be considered in your deliberations.

And you'll get a -- an instruction that tells you not to consider penalty.

"In your deliberations, the subject of penalty or punishment is not to be discussed

or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance in this case."

I'm going to read you one more instruction here. This is an instruction that comes at the very end of a long group of instructions, and it sometimes gets swallowed up, and people don't -- don't hear it that clearly. But it talks about the attitude of the jurors when you enter into deliberations.

"The attitude and the conduct of jurors at the beginning of their deliberations are matters of considerable importance.

"It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote.

"When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position, even if shown that it is wrong."

So in other words, you really shouldn't go into the jury room and first thing, bang on the table and say, "I think he's guilty," or, "I think he's not guilty."

You've got a lot of evidence in this case. You've heard a lot of witnesses. And it's probably a good idea to kind of sort things out in your own minds before

you express how you intend to vote and have an opportunity to discuss the pros and cons and what something shows and what something doesn't show before you get down to that. And that way you don't back yourself into a corner that you might not be able to retreat from at a later time.

Now, you're going to hear a lot in the way of argument as to principals, aiders and abettors and accomplices. So it's probably a good idea now to give you you a few definitions as to what that means.

"The persons concerned in the commission of a crime who are regarded by law as principals in the crime and thus equally guilty thereof include the following:

"One: Those who directly and actively commit the act constituting the crime; and two, those who aid and abet the commission of the crime."

So in other words, the person who actually commits the crime is obviously guilty of the crime, and a person who aids and abets the commission of the crime is guilty.

"A person aids and abets the commission of a crime when he does the following:

"One, with knowledge of the unlawful purpose of the perpetrator; and two, with the intent or purpose of committing, encouraging or facilitating the commission of the offense

by act or advice, aids, promotes, encourages or instigates the commission of the crime."

So in other words, a person who has the knowledge that the perpetrator is going to commit the crime and has the intent to encourage that person in committing the crime and does so, either aids through act or advice, that person is an aider and abettor and equally guilty of the crime.

"A person need not be personally present to be guilty of a crime, but mere presence at the scene which does not itself assist the commission of the crime does not amount to aiding and abetting, and mere knowledge that a crime is being committed and failure to prevent it does not amount to aiding and abetting."

Now, you'll receive an instruction on an accomplice. I'll not going to read that, but I think you'll see that an accomplice and an aider and abettor are about the same thing. An accomplice is one who is subject to prosecution for the identical offense.

Now, why is that important? Well, you're going to get an instruction that tells you that Brian Buckley is an accomplice as a matter of law, and I don't think that comes as any surprise to you. He's clearly guilty of first degree felony murder, robbery and burglary.

You'll receive another instruction that it's

for you to decide whether Mel Rowan is an accomplice. You know, you have evidence that you can -- really that goes both ways, whether he had the intent to assist in the commission of the crime or whether he did not. That's something that you'll have to decide for yourself. And since I don't really think that that makes much difference, I'm not going to belabor that point.

"The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it entitled after examining it with care and caution and in light of all the other evidence in the case.

"The testimony of an accomplice must be corroborated. A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense."

So in other words, you can't -- if you find Mel Rowan is an accomplice, you cannot rely solely on the testimony of Mel Rowan and Brian Buckley in determining whether Curtis Fauber is guilty of the crimes charged. You must have some other piece of evidence that tends to connect Curtis Fauber to those crimes.

I'm going to read you the instruction that talks about corroboration of an accomplice.

"To corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the offense which, if believed by itself, and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense."

Well, listen to those words again: ". . . tends to connect the defendant with the commission of the offense.

"It is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged or that it corroborate every fact to which the accomplice testifies."

So all you need by way of corroboration is some small piece of evidence that tends to connect the defendant to the crime, and it doesn't have to prove each of the elements of the crime or each of the facts testified to by the accomplice.

Now, we have two such pieces of evidence. I'm going to show them to you now so that we can set that aside.

I have here Curtis Fauber's wallet that was seized from his person in New Mexico when he was arrested there.

And if you recall, Investigator Velasquez

examined this piece of credit card that was inside the wallet. They taped it to the front so that it wouldn't get lost, and it has the typed credit card number of Mr. Urell on the front. And if you pull up this piece of sticky tape, on the back you'll see the GTE telephone logo.

This is a piece of the original credit card that was issued to Mr. Urell. This was taken in the robbery. We know that. And this was found in the defendant's possession and connects him to that robbery/ burglary.

Now, in addition to that, you have the defendant's own statements. I'm not going to read this now because I'm going to read it to you later. But this was the statement that he made to Sergeant Robertson when he was interviewed in New Mexico.

He acknowledged that, in fact, Jan Jarvis had talked about the man on the beach, that Jan had pointed out the fellow's house, that Jan had drawn a map and, in fact, that Brian Buckley and Curtis Fauber had actually staked out the house.

So this testimony, although not conclusive by any means as to each of the elements of the crime, tends to connect the defendant with those crimes.

So the accomplice testimony, if you find that Mel Rowan is an accomplice, is certainly adequately corroborated as a matter of law.

Now, we're going to spend, I'm sure, both

Mr. Farley and myself, a lot of time talking about the credibility of witnesses, specifically Mel Rowan and Brian Buckley. And you'll get about three or four instructions that deal with credibility.

But before I get started, I thought it would be wise to read those salient points to you so you can see how to apply those to the witnesses as we go through.

"You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

"In determining the believability of a witness, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of that witness.

"You can consider the following" -- "any of the following:

"The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified; the ability of the witness to remember or to communicate any matter about which the witness has testified; the character and the quality of that testimony; the demeanor and the manner of the witness while testifying; the existence or nonexistence of bias, interest or other motive; evidence

of the existence or nonexistence of any fact testified by the witness; the attitude of the witness toward the action in which the testimony has been given; a statement made by the witness that is either consistent or inconsistent with the testimony of the witness; an admission of the witness of untruthfulness; the witness's prior conviction of a felony."

So going back to that opening phrase, you may consider anything that has a tendency in reason to prove or disprove the truthfulness of a witness.

Now, I have a couple of housekeeping things I want to bring to your attention before I go on to the law as it relates to burglary, robbery and murder.

The first thing is that all of the evidence received in this case -- I'm talking about the physical evidence, the photographs, the ax, the Thomas Guide, the wallet, all of those things will come to you into the jury room. You'll be able to look at all of those photographs and maps and diagrams yourself.

As you notice, we have a court reporter here and have had throughout the trial. So if any of you have some dispute as to what a witness said, you can ask the court reporter to come in and read back that portion of the testimony that you have a concern, or you can have the entire testimony read back to you.

I will make reference in my argument to

certain bits of testimony that witnesses have made, and I will try to remember to tell you what pages that is on so that you could jot that down if you find that you'd like to hear it again.

The jury instructions that the Judge reads you at the end of the case come in a stack about three-quarters of an inch high. I think there's over 60 jury instructions in this case. And not to hurt the Judge's feelings, it's really kind of boring; but he, as a matter of law, has to read them to you.

You don't have to take real accurate notes or any notes on the jury instructions because those, too, will come to you in the deliberation room. So if there's some jury instruction that you feel is particularly applicable and you'd like to know the exact words, you'll have that at your disposal in the jury room.

Now, the final thing, I would suggest to you that when you deliberate, that you start in pretty much the way that I've outlined here on my chart.

I would start by looking at the burglary charge and decide first whether that crime was committed, find whether the robbery was committed, whether the felony murder was committed and then make a determination whether the defendant, in fact, committed those crimes.

And then I would work on the special circumstance, first making a determination as to whether there is a special circumstance; and then finally a determination whether the defendant, in fact, was the

person guilty of the special circumstance.

Now, with that, I'm going to go into -- I'm going to go into some discussion of the crimes charged.

The first crime I'm going to discuss is burglary, and that has the following elements: We must prove that a person entered a residence and that at the time of the entry the person had the specific intent to steal and take away someone else's property and intended to permanently deprive the person of that property.

Now, that's a pretty easy one here. We know that that crime has been committed. Someone entered Mr. Urell's house.

We know from independent evidence that his safe was taken and that parts of that safe was later found up by Matilija Lake. Obviously, the person who took that safe had the intent to steal when they entered the house, and they had the intent to permanently deprive Mr. Urell of his property.

There's a couple of other elements that we have to discuss with respect to burglary. You're going to have to make a choice whether the burglary was of the first degree or of the second degree.

Burglary of the first degree requires that you find that the building entered was an inhabited residence. All other burglaries are second degree burglaries.

And I have a definition here of an inhabited dwelling.

"An inhabited dwelling is a structure which is occupied and customarily used as a dwelling, and the temporary absence of the occupants does not change its status."

Well, that's another easy one. Mr. Urell was not only the resident at the house that was entered, but he was in there asleep in his bed when this burglary went down. So that's fairly obvious that this is a first degree burglary that was committed.

I don't want to give that one yet. Okay.

Over here I have robbery, I hope. I seem to have lost a chart.

To prove the crime of robbery, we must prove five elements: That a person had possession of property of some value; that such property was taken from the person or his immediate presence; that such property was taken against the will of the person; that the taking was accomplished either by force or violence or fear or intimidation; and that the property was taken with the specific intent to permanently deprive that person of his property.

Now, disregarding proof as to who actually accomplished the robbery in this case, I think it's clear that a robbery was committed on Mr. Urell.

Mr. Urell had possession of some property, the safe; that it was clearly taken from his immediate presence, and the property was taken against his will. And the taking was accomplished by force or violence, and

it was taken with the intent to permanently deprive.

I think each of those elements really do not require much thought on anybody's part. We have proved beyond a reasonable doubt that Mr. Urell was the victim of a robbery.

Now, robbery also comes in two degrees: First degree and second degree.

Robbery of the first degree requires that the robbery take place in a residence. Again, we've already proved that element as part of the residential burglary. The robbery in this case was in Mr. Urell's bedroom. So this robbery was a first degree robbery.

Now, the next crime that I'm going to discuss is felony murder. Felony murder requires that a human being be killed, that the killing was unlawful and that the killing occurred during the commission of a burglary or a robbery.

The first two elements that a human being was killed are certainly proved and that the crime was unlawful. The opposite of that, a lawful killing, would be, perhaps, a killing in self-defense or a killing by a police officer in the course of his duty.

But in this case, we have the situation where a killing occurred during the commission of a robbery. We require the following: The unlawful killing of a human being, whether intentional, unintentional or accidental.

Accidental killings are felony murders if they occur during the course of a robbery.

So if you have an intentional, unintentional or accidental killing which occurs as a result of the commission or attempt to commit the crimes of robbery or burglary where there was in the mind of the perpetrator the intent to commit the robbery or the burglary, then you have felony murders.

--sr--

There doesn't have to be an intent to kill on the part of the perpetrator. The only intent required is the intent to commit the robbery or the burglary.

Now, we have the same situation over here, only as it applies to an aider and abettor. If a human being is killed by any one of several people engaged in a robbery or a burglary, all of the persons who either directly and actively commit the act constituting the crime, or with knowledge of the unlawful purpose of the perpetrator, and with the intent of committing, encouraging or facilitating the commission of the offense, promote, encourage or instigate, by act or advice, the commission of that crime, are guilty of first degree murder. That's a lot of words, but let me try and put that in perspective for you.

The aider and abettor in a burglary or a robbery is guilty of first degree murder if the perpetrator kills somebody, even if it's accidental. So let's just take our fact situation.

If two people went in to commit a robbery of Mr. Urell -- and let's just use letters. Party A accidently killed Mr. Urell, party B, who is aiding and abetting in the robbery, would be equally guilty of felony murder.

Now, clearly from the fact situation that we have here, the person or persons who went into Mr. Urell's house to commit the burglary-robbery are guilty of first degree felony murder. We do not require the intent to

kill. We require only the intent to permanently deprive the person of his property in the case of a robbery, or the intent to steal upon entry into the house, the intent for the burglary.

Now, let's take a moment and look at the facts that connect the defendant to this crime. Here is what we have.

We first have the defendant's own statement. I am going to read to you the statement made by the defendant to Sergeant Robertson when the defendant was arrested in New Mexico.

"Sergeant Robertson: On that burglary with you and Brian. This is kind of a tough one. You remember when Jan was telling you about the guy on the beach that dealt.

"Fauber. Some guy down in Oxnard. I think it was Oxnard.

"Robertson: What did she tell you about the guy?

"That he had drugs. That he had lots of drugs.

"Did she point out the house to you guys?

"Um-hum. She wanted to us rip it off.

"Do you remember when that was?

"I guess it was like a week before I

left.

"A week -- the week before you left?

"Robertson: You left on August 23rd, you said.

"Um-hum.

"Are you sure it wasn't the middle of July?

"I don't think so.

"Do you remember her drawing a diagram of his house?

"Yeah.

"Do you remember going -- do you remember following her and Tim over there? You and Brian were going on a bike?

"Fauber: Um-hum.

"Do you remember when you and Brian were on the beach watching?

"Yeah, we looked out."

So the defendant, in his statement to Sergeant Robertson, admitted the following: He admitted the conversation with Jan Jarvis when she talked about this fellow that she knew who dealt drugs. He admitted that Jan Jarvis had drawn a diagram of the house. He admitted that Jan had pointed out the house to himself and Brian, and he also admitted staking out the house, scoping the house, to use Brian Buckley's words.

We also have possession of the stolen credit card in the defendant's wallet when he was

arrested. That bit of physical evidence connects the defendant to the crime.

We have the testimony of Mel Rowan that agrees with the defendant's testimony regarding the conversation that preceded the stakeout of the house and the pointing out of the house, the conversation with Jan Jarvis, Mel Rowan, the defendant and Brian Buckley where Jan Jarvis talked about this man that dealt drugs and they discussed the possibility of burglarizing the man's house.

We have Mel Rowan's statements, Mel and Jan Jarvis in a car, Brian Buckley and the defendant on a motorcycle, went by the house and pointed out the house to the defendant -- to the defendant and Brian Buckley. We have Mel Rowan's testimony that on the night of the murder, the defendant and Brian Buckley arrived at his house with the victim's El Camino with the safe in the back. And we have the statements I will get to later made by the defendant to Mel Rowan. That connects the defendant to this crime.

We have the testimony of Brian Buckley, which I will of course go into in -- go into in detail in a little while, but that connects the defendant to the crime.

We had the Thomas guide, the map that was found in the trailer occupied by the defendant that was occupied from the time that he arrived at Brian Buckley's house in the beginning of June through the end

of August. And that Thomas guide was found in the trailer and identified as having come from Mr. Urell.

Now, let's superficially look at Brian Buckley's credibility with respect to his testimony that tne defendant was there. And I think you would all have to agree that based on the law that I have read to you so far regarding burglary, robbery and the felony murder, that if the defendant was there, he committed those crimes. If he was there, he was, at the very minimum, an aider and abettor in the robbery and the burglary and Mr. Urell clearly was killed during the course of those crimes.

So let's start by assuming that Brian Buckley lies about everything. Let's say that Brian Buckley lied about being with somebody when he committed those crimes that he testified about.

Now, the first thing that we should consider is the matter of transportation. If Brian Buckley had lied about being with anybody, he would have quite a bit of a problem as to transportation. He'd have to either drive his motorcycle there to Mr. Urell's house and pick it up later -- because remember, he drove back with the El Camino or -- or he'd have to walk quite some distance to Mr. Urell's house.

The next thing that we should consider is this issue of how Mr. Urell's hands were taped behind his back. If Brian Buckley went to the house alone armed, he would have had to have tied Mr. Urell's hands

with this tape behind his back unassisted. Now, this looks like a two hand job to me when you tape somebody's wrist in that manner. It's a rather neat job, and I don't think that we can expect that Brian Buckley was capable of holding a gun on Mr. Urell and taping his wrist at the same time. So it seems that that does not point to the supposition that Brian Buckley committed the burglary and the robbery alone.

Next we have the heavy safe. Now, all you have is the safe door, and you will have a chance to look at that in the jury room. But that's a very heavy door, and if you can visualize the safe that that goes with, you have got a fairly heavy piece of equipment there. It would be impossible for Brian Buckley to get that safe down the steps to the El Camino and lift it the two feet or so up the tailgate into the back of the El Camino. That is a two man job.

And, of course, I already mentioned recovery of whatever transportation Brian Buckley took to the scene. And then finally getting rid of the the El Camino alone, that it doesn't make sense that he would take that all the way up to The Cross and dump it over the side and then walk the several miles back to his own residence.

So I think you would have to agree that Brian Buckley was accompanied by somebody when he committed the burglary, robbery and felony murder at Mr. Urell's house. And I think you would also agree that

whoever accompanied Brian Buckley is equally guilty of burglary, robbery and felony murder.

Now, let's assume for a moment that the person who did go with Brian Buckley was not Curtis Fauber. Let's examine that in some detail and decide what sense that makes.

First we would have to decide what would motivate Brian Buckley to frame somebody who was his good friend, his Army buddy, and in fact somebody who was is good friend into August at least. Because we know from the testimony that Curtis Fauber stayed at Brian Buckley's house through the -- I think it was the 22nd of August, another month. There is no evidence at all that there is some deep seated animosity between Brian Buckley and Curtis Fauber, and there is no evidence that some third party was engaged in this crime.

And recall your instructions and your duty as a jury that to come to that conclusion would be to speculate, which is contrary to your -- your oath as a juror. There is no evidence that this is anything other than what it really is, one murderer giving up his accomplice for a lighter sentence.

Now, remember that Brian Buckley has a motivation in this case to testify truthfully. And truth is not according to the DA, to me. Truth is according to the Judge. I am going to -- I am going to read the -- the agreement to you later on, but the most

important part of that agreement is that if there is some dispute as to Brian Buckley's truthfulness, that dispute will be determined by the trier of fact, the Judge who hears the proceedings in which Brian Buckley testifies.

Now, we also know that -- we also know that Brian Buckley's testimony is consistent in almost all the details with Mel Rowan's testimony. It's consistent as to the conversation that preceded Jan Jarvis pointing out Urell's house, it's consistent with respect to Jan Jarvis pointing out the house, and these two facts are also consistent with the defendant's own statements. It's consistent -- it's consistent with the defendant and Brian Buckley arriving at Mel Rowan's house with the El Camino and the safe, and it's consistent into a lot of other particulars.

So for you to find the defendant not guilty of the burglary, the robbery and the felony murder, you would have to conclude that Mel Rowan and Brian Buckley had entered into some conspiracy and gotten their stories together to frame Curtis Fauber. And there is just simply no evidence to suggest such a thing.

I am now going to go into the crime of special circumstance and go over -- show you what is needed to be proved in that manner.

Special circumstance requires that three things be proved. First, that the murder was committed while the defendant was engaged in, was an accomplice,

or was an aider and abettor in the commission of a burglary or a robbery.

Second, that the defendant intended to kill a human being, or intended to aid another in the killing of a human being.

And third, that the murder was committed in order to carry out or advance the commission of the crimes of robbery or burglary. The special circumstance is not established if the robbery or burglary was merely incidental to the commission of the murder. For example, if the intent to take the money or property does not arise until after a fatal wound is inflicted, the murder is not in the perpetration of a robbery or a burglary.

Now let's go over each of those.

First, was the murder committed while the defendant was engaged in the commission of a robbery or a burglary?

Well, I think the facts are quite clear on that, that whoever committed this murder entered Mr. Urell's house for the purpose of robbing him, and that person in fact did take the safe from Mr. Urell's house.

Let me pass over the second one because that deals with intent.

Now, this is a -- the third requirement deals with the murder being committed in order to carry out or advance the crimes of robbery or burglary and not to be a -- not to be incidental to the murder. The type

of situation that this part of the instruction is geared to is a situation where somebody murders somebody that they know and they are trying to cover it up by making it look like a random robbery. So after they commit the murder they take the fellow's wallet as a cover-up.

But we don't have that situation here. In fact, the actual entry into Mr. Urell's house took place before the fatal wound was inflicted, and it's clear from the evidence, it's clear from the inferences, that the person entering the house entered with the intent to steal.

Now, let's go to the element number two, whether the person committing this crime intended to kill a human being. Before doing that I am going to discuss the three mechanisms of death that were described by Doctor Lovell.

The first mechanism involves a blow with an ax to the back of Mr. Urell's head followed by the head being pushed into a pillow causing suffocation. The blow of the ax did not have anything to do with the death itself, but preceded that. And we know from Doctor Lovell's testimony that the blow with the ax did precede death and he based that opinion because of the hemorrhaging.

The second mechanism of death, a blow with the ax causing spinal column shock resulting in inability of Mr. Urell to move his head causing suffocation.

The third mechanism, blow with an ax causing spinal column shock, causing loss of respiratory function. And if you recall, Doctor Lovell described an inability to use the muscles of your diaphragm and being unable to breathe, thus causing suffocation. So those are the three mechanisms of death that Doctor Lovell told us about.

Now, Mr. Farley beat up on Doctor Lovell a little bit, but he hasn't introduced any evidence to suggest that one of these three causes is the cause of death. We note that those are the three choices and we really don't know beyond a reasonable doubt which of the three was the actual cause of death. But let's look at this in a little more detail.

Now let me ask this question.

Is the person who swung the ax guilty of special circumstance?

Well, clearly if the mechanism of death was number two or number three, that's true, because the person who swung the ax had the intent to kill and, in fact, did kill.

But suppose we have number one. Well, you are going to have this ax in the jury room with you. It has a pretty heavy head. And I invite you to just hold it by the end and lift it up once and ask yourself if you hit somebody in the back of the neck with this ax, what would your intent be?

Would your intent be to give the victim

amnesia?

Your intent would be to kill.

Now, the person who swung that ax at the back of Mr. Urell's neck had the intent to kill, and that's what we need for element two. We do not have to answer the question as to what the mechanism of death is. We don't have to -- we don't have to have the person swinging the ax being the actual killer. We don't have to answer the question whether Mr. Urell later had his head pushed into the pillow by someone else and suffocated. The fact remains that the person who swung the ax clearly demonstrated an intent to kill, and is thus guilty of the special circumstance.

Is the Court going to take a break?

THE COURT: I was going to wait another 15 or 20 minutes, Mr. Glynn, but if you prefer to do it early, I will leave it up to you.

MR. GLYNN: This will be a good spot to break, your Honor.

THE COURT: We will take a morning recess, ladies and gentlemen. Little bit more than 15 minutes. We will make it 20 minutes after 10:00. Please be at the designated location at that time.

(Recess taken.)

THE COURT: All parties and the jury are present.

Go ahead, Mr. Glynn.

MR. GLYNN: Thank you, your Honor.

Ladies and gentlemen, where I left off was with the idea that whoever swung the ax is guilty of special circumstance. And the reasons that I gave would be that that act of swinging the ax, whether it be the actual cause of death or not, would clearly demonstrate the intent to kill.

Now, the next question that we have to answer is: Did Curtis Fauber swing that ax?

And more specifically, is Brian Buckley telling the truth?

So this gets us into the -- one of the major issues in the case, and that's the credibility of Brian Buckley.

Mr. Farley will probably argue to you that Brian Buckley is getting a good deal and it's not fair. But the evidence in this case -- and you have seen it now, and you have seen the jury instructions -- shows that Brian Buckley is guilty of first degree murder and nothing more. He has pled guilty to murder. At sentencing the crime will be reduced to second degree murder, he will be sentenced and he will do his time. And I think you all would have to agree that in order to get something you have to give something. And we needed Brian Buckley as a witness in this case.

But the fairness of Brian Buckley's deal is not an element of credibility, and that is really not something that you should consider. I am going to go

into the things that are pertinent to his credibility.

And let's talk about the deal. The main element of Brian Buckley's arrangement with the DA's office is that he testified truthfully. I read into the record the agreement that Brian Buckley entered into with the District Attorney's office and it's on pages 3307 through 3310. I would suggest that you probably will want to have it read to you during your deliberations, and I am going to go over portions of it now to emphasize certain points.

"This letter is to memorialize the District Attorney's position on the above numbered case against your client, Brian Buckley. It is based on on our recent conversations regarding a possible agreement.

"One: Mr. Buckley is charged in the above entitled complaint as follows:"

And I won't read that.

"Two: The District Attorney's office offers to move the Court to declare the murder to be murder in the second degree. In turn, Mr. Buckley must testify truthfully as a witness against Curtis Fauber and testify truthfully as a witness in any proceedings concerning Christopher Caldwell.

"Item three: Before any agreement can be reached, Mr. Buckley must submit to a

preliminary interview by members of the District Attorney's office to assess his credibility. In the event that the District Attorney's office decides that Mr. Buckley is not telling the truth, then no agreement will be reached and the above entitled case will proceed to trial.

Any statements by Mr. Buckley during this preliminary interview, of course, will not be used against him in any subsequent trial. In the event that the District Attorney's office decides that Mr. Buckley is telling the truth, the District Attorney's office will enter into an agreement with itemized terms four through seven.

"Item four: Mr. Buckley will plead guilty to Count I --" which was the murder "-- in the above entitled Information. He will waive time for sentencing and his sentencing will be continued until the completion of both the trial of Curtis Fauber and the preliminary hearing for Christopher Caldwell.

"Item five: Mr. Buckley will make himself available and will testify truthfully in any proceedings in the prosecution against Curtis Fauber and in any

proceedings in the prosecution against Caldwell."

Now, here is the main key to Mr. Buckley's credibility.

"In the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial Judge -- judges who preside over these hearings. Following the conclusion of the trial against Curtis Fauber and the preliminary hearing against Christopher Caldwell, Mr. Buckley will be sentenced on case number blank.

"If Mr. Buckley has complied with the terms of this agreement as fully as possible as of that date, the District Attorney's office will move the Court to declare the murder to be murder on second degree, and Mr. Buckley will be sentenced on that charge. At that time the remaining counts will be dismissed. Mr. Buckley Buckley will remain obligated to testify in the remaining proceedings as specified above.

"Item seven: If, however, Mr. Buckley has not complied with the terms of this agreement, the District Attorney's office will not be bound to move the Court to declare the murder to be murder in the second degree, nor will the District

Attorney's office be bound to dismiss the other counts. At that time Mr. Buckley will be allowed to withdraw his plea and the case will proceed to trial.

As stated in item five, the trial judges will hear -- who hear Mr. Buckley's testimony in the various proceedings will make any necessary findings as to his truthfulness."

And it talks about the offer expiring and signatures.

Now, the construction of that, ladies and gentlemen, once again, is that if there is any dispute as to credibility of Mr. Buckley, that's not determined by me. That's determined by the trial judge who hears Mr. Buckley's testimony. He has nothing to gain by lying and everything to gain by telling the truth.

Let's play out a scenario. Let's assume that I am an unscrupulous district attorney who has it in my heart to get Curtis Fauber regardless of what the truth is, and my perception of the truth is that Curtis Fauber is the person who swung the ax. Now, we make the deal with Mr. Buckley, and Mr. Buckley takes the stand. And let's assume that the truth is that Buckley was the killer.

So he takes the stand and he testifies that I, Brian Buckley, was the person who swung the ax and killed Mr. Urell and Curtis Fauber was just a bystander.

He was there to commit the burglary and the robbery, but he had nothing to do with the murder. I am furious and I say, "Okay. The deal is off. We are going to go after Brian Buckley for first degree murder."

Well, Brian Buckley is protected by this agreement, because the person who determines his credibility is the trial judge who heard his testimony. So if that scenario played itself out, the Judge would make the determination as to whether Mr. Buckley was telling the truth or not. And, in fact, this is what would happen if that were the truth.

Brian Buckley's deal would still be set in bronze. He would get his second degree murder, and he would assure that his friend, his Army buddy Curtis Fauber, was convicted of no more than first degree murder, nokt the special circumstance. So Brian Buckley ha not y lying, everything to lose by ly t he was the person who had co who had committed the special ci l would still cover him because his credibility is not determined by me. It's not truth according to the DA's office. It's truth according to the independent fair judge who present sides over the trial and here is Brian Buckley's testimony.

Now, in that instruction that I read to you about credibility of witnesses, you are told that you can consider the character and the quality of the testimony and the demeanor and the manner of the witness

He was there to commit the burglary and the robbery, but he had nothing to do with the murder. I am furious and I say, "Okay. The deal is off. We are going to go after Brian Buckley for first degree murder."

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Brian Buckley's deal would still be set in stone. He would get his second degree murder, and he would assure that his friend, his Army buddy Curtis Pauber, was convicted of no more than first degree murder, nokt the special circumstance. So Brian Buckley has nothing to gain by lying, everything to lose by lying. And if in fact he was the person who had committed the murder, who had committed the special circumstance, the deal would still cover him because his credibility is not determined by me. It's not truth according to the DA's office. It's truth according to the independent fair judge who present sides over the trial and here is Brian Buckley's testimony.

Now, in that instruction that I read to you about credibility of witnesses, you are told that you can consider the character and the quality of the testimony and the demeanor and the manner of the witness

while testifying. Brian Buckley comes across as a passive, remorseful follower. He gives details that, unless he were an extremely good actor, he could not manufacture. Let me remind you of some of those details.

The testimony about the Mexican accent, that Curtis Fauber disguised his voice so that Mr. Urell would not recognize him. And Mr. Urell in fact responded by calling Buckley and Fauber amigos. That's a detail that you don't manufacture.

And the testimony regarding the time when Fauber struck Mr. Urell with the ax. This is on 3345 if you want to go back and have it reread.

"Did you actually see the defendant strike Mr. Urell with the ax?

"I saw him swing down, and I don't know if I actually seen the contact. I been kind of pushing it out of my mind.

"Did you hear anything?

"I heard the thud of the hitting and then I heard Urell making like a hissing noise. Hard to breathe. And then I heard him hit him again and that like the noise stopped. The breathing. Like it was hard to breathe."

Now, ladies and gentlemen, those are the types of details that people don't make up. Those are the types of details that cry out that Brian Buckley is

telling you the truth.

He told us that it was Curtis Fauber's idea to scope out Mr. Urell's house. He told us that Curtis Fauber was the person who had the idea to take the bandanas and wear the masks and bring the gloves. And Curtis was the one that walked into the bedroom, led Brian into the bedroom. Curtis Fauber was the leader in this crime, and Brian Buckley was the follower. But Mr. Farley has demonstrated in cross-examination, far better than I can by asking the questions I did on direct, that Brian Buckley is a follower.

Now, you remember, Brian Buckley testified that he did not remember which edge of the ax hit Mr. Urell on the back of the neck. Mr. Farley got him to say, led him into saying that that was untruthful when he told the police that it was the blade when in fact he didn't know. Now let me read that portion to you. This is on page 3404.

"You have told us here that you saw him get hit once, or did you see him get hit once?

"I don't know. I have been trying to block that part out of my mind and I think I might have seen it.

"Remember in September of 1986 you told the police that you saw him get hit with the blade of the ax?

"Yeah. I said that.

"Okay. Was that true at that time?

"True that I said that?

"Was it true that you saw that when you told them that?

"He was turning it and I really just didn't know the way he was turning it.

"So, then, did you tell the police something you didn't know when you said that you saw him get hit with the blade of the ax?

"Yeah.

"Would you you consider that to be untruthful to the police in telling them something you didn't see?

"But I didn't -- but I did see him get hit by the ax.

"Did you see him get hit with the blunt end or the blade?

"That's what I wasn't sure.

"Did you tell the police the blade, if you know?

"Yes.

"All right. Was that untruthful to the police when you told them that?

"Yes."

Now, when somebody doesn't know something, you generally don't think that that's being untruthful by telling somebody that you did see it. It may be

negligent, but the way that he was led into that by Mr. Farley demonstrates that Curtis -- or that Brian Buckley is a follower. He was a follower on the night that this murder happened, and he has been a follower in this courtroom.

But that little bit of testimony regarding the acts tells us something else that I think is extremely important. If you took this ax and hit somebody in the back of the head with it, that would be embossed in your mind forever, and you would remember what edge of the ax you had used when you struck that person.

Brian Buckley is confused as to what edge of the ax hit Mr. Urell. He told you about the defendant holding the ax and twisting it a number of times before he held it up and struck Mr. Urell. But Brian Buckley does not remember which edge of the ax was used because of the twisting, because of his attempt to put it out of his mind. And, ladies and gentlemen, that further goes to demonstrate that Brian Buckley was not the person that struck Mr. Urell with the ax. If there was have any question in your mind, that further goes to demonstrate that.

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Now, there are inconsistencies in Brian Buckley's testimony.

"Discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon.

"It is a fact also that two persons witnessing an incident or a transaction often will see or hear it differently.

"Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing the evidence."

Now, let me point out a couple of the inconsistencies that come to mind.

We know that Curtis Fauber had the piece of telephone credit card in his wallet when he was arrested. Brian Buckley told us, however, that Curtis Fauber gave the piece of the credit card to Hal Simmon. I'm sure you remember that testimony.

That's an inconsistency. But is that an important inconsistency? Does it prove something or disprove something of any major importance to us?

Does it make us think, for instance, that Brian Buckley wasn't there or Curtis Fauber wasn't there when the murder happened?

Does it make us think, perhaps, that Curtis

Fauber and Brian Buckley did not drive the truck to Mel Rowan's apartment? Of course, it doesn't.

But you have to take each one of these inconsistencies and examine them in light of all the other evidence and decide does that discredit somebody's testimony or is it just simply a misrecollection of an event that happened 18 months ago.

There's discrepancy as to who pointed out Urell's house. Tim tells us that Jan did it. Brian Buckley said that he thought Tim was the driver of the car and Tim pointed it out.

And the defendant in his statement to Sergeant Robertson answers the question, "Did Jan point out the house?"

"Yeah."

Is there any question in anybody's mind that between the two, Jan and Tim, one of them pointed out Urell's house to Brian Buckley and to Curtis Fauber, and does this discrepancy discredit anybody's testimony?

There's some confusion as to whether Tim was in the driveway when Curtis and Brian arrived back at the apartment with the El Camino. Tim said that he was up in bed, and Brian seems to remember him being in the driveway but can't be sure.

Again, an innocent misrecollection, an important fact. But you would have to take each one of these discrepancies, each one of these inconsistencies and examine it in light of all the other evidence that you

have, the physical evidence, and compare the consistencies along with the inconsistencies to decide if that discredits somebody's testimony.

Now, no discussion of inconsistencies would be complete without saying something about John Frisilone.

Well, we know as a starter that Mr. Frisilone was convicted of grand theft in 1975 and 1986 and two forgeries in 1981, one in 1986. And he's awaiting shipment to prison, a three-year sentence, when he -- the maximum he could have received was four years and three months.

I think that I demonstrated that Mr. Frisilone is a professional jailhouse snitch, and he will do anything that he can to come up with some saleable testimony and perhaps sell it to further his own position, to make his own sentence better or to get some kind of an arrangement.

We know, too, that he was sentenced without any deals. And we know, too, that there are two motivations for Mr. Frisilone to fabricate testimony. One, of course, is irritation with the D.A.'s office for not going along with accepting him as a witness and providing him some kind of an arrangement on his sentence.

Mr. Kalish told us that he was trying to get the less important charge dismissed and the -- get county jail time instead of prison on the most important charge. So he's a little irritated with us.

But I think the most important thing, that

it's well known his reputation as a jailhouse snitch, and he's probably worried about going to prison with that reputation.

So here he has an opportunity to alleviate that problem and be able to say, "Hey, I helped a murderer. I testified for the defense in a murder trial."

The -- some of the things that Mr. Frisilone testified to don't make any sense, and you can look at that and consider that in determining his credibility.

For instance, he said that Brian Buckley said that they went with two handguns to Mr. Urell's house rather than a handgun and a shotgun.

Well, first you have to ask yourself what difference does that make, you know. Two handguns is just as deadly or the same as a handgun and a shotgun. In fact, one would probably argue that a shotgun is more -- or sawed-off shotgun is more dangerous.

We have the -- we have the corroborating testimony of Mel Rowan that Curtis Fauber sawed off the shotgun in Mel Rowan's kitchen, and we have the testimony of Rowan that Buckley and Rowan (sic) arrived back at the apartment with a handgun and a shotgun, and they put them both into the little cupboard in the trailer. So that's corroborated by Mel Rowan.

But it's one of those details that doesn't make a whole lot of difference. But why in the world would Brian Buckley come in here and say one thing and then tell Frisilone something else that really has no

particular significance?

It also doesn't make any sense that Brian Buckley would continue to talk to this guy about his case after Frisilone has already told him that Frisilone had testified contrary to what Buckley's testimony was the day before.

You recall now that Frisilone told us that he talked to Brian Buckley on Friday and that he told Brian Buckley that he had testified and what he had testified about.

And Brian Buckley came in and said that. "He told me that he testified that I was worried about the death penalty, and that's not true."

So you've got to think that Brian Buckley would have to be awfully stupid to continue to talk to him about anything if this guy is looking for some way of -- some notoriety of coming back in the courtroom and testifying against him.

But you know, even if you believe Mr. Frisilone, it doesn't particularly discredit Brian Buckley, because some of the statements that Mr. Frisilone says Brian made are completely consistent with what he's testified to and what we know the facts to be.

And listen to this: Frisilone asked him, "Why did you go to Urell's?" I think there was something in there about, "Why did you go there with a gun?" And Frisilone said that Brian Buckley said he would not have gone if he knew that somebody would get hurt.

That's entirely consistent with everything that we know, that Brian Buckley was a follower and did not go there with the idea of killing anybody.

Frisilone told us that Brian told him that he thought the blows had killed Urell. And I asked him, "Well, did he say who struck the blows?" And he said that Curtis Fauber struck the blows.

Now, that's consistent with everything that we know.

There is an inconsistency, the thing about the pillow. And that's an absolute inconsistency.

Brian Buckley says he never went back into that room after the first blow was struck, and he did not see a pillow on Mr. Urell's head nor did he put a pillow on Mr. Urell's head. And Frisilone says that Buckley told him that Buckley was the one who put the pillow on Mr. Urell's head.

Well, if you believe Frisilone, consider his testimony in light of the rest of this instruction:

"A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars."

So even if you do believe Frisilone -- and

I'm not suggesting you should. I think that it's been shown that he's not a credible witness. But even if you do believe Frisilone as to this one inconsistency, the probability of truth favors the rest of Brian Buckley's testimony.

Now, I hate to harp on this, but to further examine Brian Buckley's testimony, you would have to look at the consistencies all the way through. You would have to look at the consistencies between Brian Buckley's testimony and Curtis Fauber's statement to the police regarding the conversation about Mr. Urell selling dope, the house being pointed out, the drive-by and the stakeout.

You'd have to look at the consistency between Brian Buckley's testimony and the physical evidence that we have, where the safe was dumped, where the El Camino was dumped. You'd have to look at the consistency between the testimony of Brian Buckley and the testimony of Mel Rowan.

Details of the nature that people would not manufacture. The jewelry is an example of that. There was a small amount of jewelry that was taken out of the safe and given to Mel Rowan. The concern of waking up Brian Buckley's mother is a detail that somebody would not manufacture.

The opening of the safe, the manner in which the safe was opened up, those are all consistent.

Now, let's look a moment at Mel Rowan's

credibility. Mel Rowan has immunity. That deal was cast before he walked into this courtroom.

It's not the same with Brian Buckley. Brian Buckley, if he -- if he perjures himself, he does not testify truthfully, the deal is off if the Judge determines that he has testified untruthfully.

But Mel Rowan, once he gets immunity, he's covered. The only thing Mel Rowan has to worry about is perjury. He can come in and as long as he tells the truth, he is covered for any prosecution for anything disclosed by his testimony.

So if it -- if it were in Mel Rowan's mind, if it were true that somebody other than Curtis Fauber were involved in this crime, that would make no difference to Mel Rowan. If Mel Rowan himself were involved in more detail in this crime, that would make no difference, because he has immunity.

There is no motivation for Mel Rowan to lie about this, to manufacture these things about Curtis Fauber. There is no motivation for Mel Rowan to make up this elaborate story that he has given us and, in fact, must -- parts of the story are consistent with what we already know out of the mouth of Curtis Fauber.

But one of the most important things that Mel Rowan tells us is about the conversation when Curtis Fauber and Brian Buckley return with the El Camino. That starts on page 3019 and ends on page 3021, if you want to have that reread to you.

"What did you do after you talked to Jan?

"I went back downstairs.

"What happened that time?

"I asked Curtis if -- I said -- 'now, there's no one' -- 'no one was home; right?' And he said -- he told me there wasn't anyone home.

"I said that I did not believe -- 'Why would anybody leave a combination to a jewel- -- to a safe in a jewelry box?' And I said -- and then Curtis told me, 'Well, he was home.'

"And I said, 'You didn't hurt him, did you?'

"And Curtis said, 'No.'

"Then what happened?

"And I said, 'You're sure no one was hurt? No one was home?'

"And Curtis told me -- he told me, he said, 'Well, he was home.'

"And I said, 'You didn't hurt him?'

"And he said, oh, no, he didn't hurt him.

"And I said, 'You're positive you didn't hurt him?'

"And he said, 'No.'.

And I don't remember if it was right then or if I went back upstairs one more time and then came back down. But at any rate, then

Curtis told me that he thought he'd killed him.

"And I said, 'You' -- 'You've got to be kidding.'

"And Curtis said -- and before -- he didn't say anything.

"And I said, 'Was he breathing?' And I said, 'What did you do? Shoot him?'

And Curtis said, 'No. I hit him.'

And then I said -- I was kind of relieved. I said, 'Well, then he was breathing; right?'

And Curtis said, 'Yeah, but he was having a hard time.'"

Now, there's two things that give that statement a lot of credibility. First, there's no motive, no motivation on the part of Mel Rowan to make that up. The second is it's consistent with the testimony of Dr. Lovell as to the manner of death, suffocation.

We also have Brian Buckley's testimony that the defendant told Mel Rowan that something went wrong and they had to kill the man, that the man put up a fight.

So in summary, ladies and gentlemen, Brian Buckley has nothing to lose and everything to gain by telling the truth. Mel Rowan has no motivation to lie.

You have two independent witnesses providing you with evidence that Curtis Fauber was the man who swung the ax with the intent to kill, two independent witnesses. And for you to find Curtis Fauber not guilty of the

special circumstances, you would have to find that Mel Rowan and Brian Buckley together conspired to make up this elaborate, consistent testimony to make up all these things that you've heard in this courtroom.

The evidence, ladies and gentlemen, proves beyond a reasonable doubt that on July 16th, 1986, Curtis Fauber and Brian Buckley went to Mr. Urell's house to rob it, burglarize it; and they went in and they, in fact, did commit a robbery and a burglary. And while they were there, Curtis Fauber took this ax and with the intent to kill, struck Mr. Urell in the back of the head. And Mr. Urell suffocated.

As I said before, we don't have to answer the question as to how Mr. Urell died. All we have to do is decide that when Urell was struck in the back of the head with that ax, that Curtis Fauber had the intent to kill. And that fact is also proved beyond a reasonable doubt.

Thank you.

THE COURT: Thank you, Mr. Glynn.

Mr. Farley, do you want to take a few minutes to remove Mr. Glynn's exhibits or should we -- with the jury present or not present?

MR. FARLEY: Why don't you have them step out for a moment.

THE COURT: You can stretch a little bit, too, before the defense starts their argument, ladies and gentlemen, maybe just go back out in the hallway into the other room. We'll be ready to go in about five minutes or

so at the most.

(Recess.)

THE COURT: The jury has returned to the courtroom, and the parties are here also.

Mr. Farley.

MR. FARLEY: Yes. Thank you.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. FARLEY: Good morning.

THE JURORS: Morning.

MR. FARLEY: I know that during the voir dire process, which was a long process, I spent a lot of time asking each and every one of you, probably to the point of driving you to distraction, about individual opinion of each juror.

And each juror that I talked to, those who have been selected and those who were not selected, indicated to me that they thought the individual opinion of each juror was an extremely important part of our process.

Each of you promised to give your individual opinion. And I ask you now to complete that promise and, when you go into that jury room, to give Mr. Fauber and the State of California your individual opinion in this case, not one adopted, not one that is reached by popular

acclaim, but one that is your own. That's the way our system is designed, and that's the way our system works.

This case, in reality, turns upon the testimony of two witnesses, Mr. Rowan/Johnson and Mr. Buckley, because that's what you have before you. The rest of the evidence in this case, which I will talk about a little bit later on, is not sufficient to convict anyone of anything.

My request is, is that you look at the evidence in the case absent and without the testimony of Rowan/Johnson or Mr. Buckley and see if it is sufficient by way of corroboration to place Mr. Fauber in Mr. Urell's home swinging an ax.

If there is sufficient evidence to corroborate the testimony of Mr. Rowan/Johnson or Mr. Buckley, I submit to you that there is insufficient evidence to tie Mr. Fauber to this crime absent their testimony.

This case turns, really, upon whether or not you believe those two witnesses.

Another determination you're going to have to make is whether or not Mr. Rowan, also known as Johnson, was an accomplice in this case. And Mr. Glynn has read to you the law regarding the accomplice. I'm not going to do that. The Judge is going to read it to you again. You'll have the jury instruction when you go in the jury room, and you can read the law surrounding that of an accomplice.

I don't see how there can be a doubt in anyone's mind that Mr. Rowan, also known as Mr. Johnson, is an accomplice in this case. He set it up, he directed it, he pointed it out, he participated.

Now, whether you believe he participated before or after, that's for you to make a decision; but he did participate.

Interesting observation as to why someone would have the motive to lie when you're looking for immunity or when you're looking for a deal.

The observation is that you lied in the first place to get it, your immunity and your deal, and now you're stuck with the lie in order to keep your immunity or your deal. Just an observation I wish to have the jury think about.

You are the judges of the credibility of the witnesses. You are the sole judges. No one has that duty but you. You must decide who's been telling the truth in this courtroom as to whether or not Mr. Rowan/Johnson, who we know is a liar because he's already told us he lied to change his name to avoid being caught to go back to Texas because of a probation violation, and Mr. Buckley.

That is solely your responsibility.

I think or at least I hope during the process of my presentation to you here, my argument, whatever you want to call it, that I'll be able to persuade you that those two men are liars.

One of the things you're going to be asked to

look at -- and I believe this has already been read to you -- is the existence or nonexistence of a bias, interest or other motive by these individuals who have come in here to testify.

One of the other things you're going to be asked to consider is the ability of the witness to remember. And Mr. Buckley's testimony as well as Mr. Rowan Johnson's testimony was replete with, "I don't remember," "I can't recall," "I'm not sure," and all of those type of things.

Their memory was, in fact, selective.

Another thing you look at is whether a statement made by a witness is consistent or inconsistent with the testimony of the witness.

And if you just look between the two witnesses here, Rowan/Johnson and Buckley, they are inconsistent, one with the other, which I think belies the fact that was raised here earlier that they got together and cooked up a story.

Mr. Buckley says Mr. Rowan/Johnson was more heavily involved than Mr. Rowan/Johnson was willing to admit.

Mr. Buckley also is more heavily involved, according to Mr. Rowan/Johnson, than Mr. Buckley was willing to admit.

So it seems like if they are not telling the truth individually, they may not be telling the truth against each other. And the whole thing gets so involved

it's like running through a maze to determine who is telling the truth in what instance.

Just a few points, I think, that -- without going into all of the inconsistencies between the two, small things but probably important things because there is -- there are very many more.

One is the fact as to whether or not Mrs. Schoaf, the mother, was home at the time they came back with the safe, which places the time down as to whether or not -- or what time they arrived back at the house.

One of them says -- and I believe it's Rowan/Johnson -- says they did not want to wake his mom with the banking on the safe. And Mr. Buckley indicated that -- I believe in his testimony here that his mother was not home as of yet.

The time of arrival at the apartment becomes important when you look at what the coroner said about the amount -- or the time of death of the individual as to whether or not they were, in fact, there at the time of the death or not or whether or not they were even involved in that death.

Mr. Buckley wants you to believe that he did what Curtis Fauber wanted, that he was just a mere passive follower in this case.

Mr. Rowan/Johnson seems to contradict that. He tells us that Brian asked for directions to the house, Brian asked for a map, Brian asked to be shown where Mr. Urell lived, Brian did this, Brian did that.

Brian was ecstatic when he came home that evening, ecstatic. My God, isn't that a strange emotion? Isn't that a strange emotion to have? This, as he has been characterized here, passive, remorseful individual was ecstatic when he came home. God, how sad that is.

Then it goes on and on throughout their testimony between these two individuals, Rowan and Mr. Buckley.

One of the instructions you will be given also by the Court is that a witness willfully false in one material part of his testimony is to be distrusted in others.

I'm going to talk about Mr. Frisilone a few minutes later -- a few minutes from now. But I want to talk about Mr. Fauber -- I mean Mr. Buckley and Mr. Rowan right now.

If you find that in any part of their testimony, no matter how insignificant, they were willfully false, you must look at their testimony with distrust. That's what the law says. You must examine it with distrust. And if you find it to be truthful, then you can accept it.

But if you find it not to be truthful, then you must reject it. You must reject their testimony.

That becomes important when you examine their two stories as they tried to come in here and sit before you and tell you that Mr. Fauber was the one who has committed this crime. It becomes important. They must be

examined in that light.

If you find them to be willfully false in any portion of their testimony, you are requested to view the rest of it with distrust.

Mr. Glynn told you that Mr. Frisilone has been convicted of a felony. He's been convicted of a number of felonies.

He wants you to believe that he's a professional jailhouse snitch; that as a result of him being a professional jailhouse snitch, he sells his testimony in order to better his own position. Therefore, you should not believe Mr. Frisilone.

Now, when I asked Mr. Frisilone on the stand what it was that I gave -- what I could give him for his testimony, you all laughed when he responded, "A headache."

Now, if he's selling me this testimony for a headache, the man is not only an informer, he's a fool.

What is his motive for coming up here? The district attorney wants you to believe through three witnesses that he put on, two investigators and one deputy D.A., that because they received numerous phone calls, that he was trying to better his position. And if you'll please recall when he was questioned as to whether or not he did those things, his response was, "Yes." I'm talking about Mr. Frisilone now. He said that he has done that in the past. He has tried to better his own position by the sale of information.

So I don't know what those three witnesses were for except as I learned here this morning, they're here to show you that he is somehow irritated with the district attorney's office and as a result of that, he would take the stand in this courtroom, manufacture a story and lie.

That seems rather incredible. That seems rather incredible that he would do that because people didn't return his phone calls or didn't, for some reason, give him what he was looking for.

Where is the proof of that? There is no proof. You're asked to speculate that that's what happened. You're asked to speculate also that the reason he did it, because he wanted to counter some jailhouse snitch information that may be leaked out and thereby put him in some kind of jeopardy.

That again is speculation. Jurors are not supposed to speculate. Mr. Glynn told you that. You're not supposed to speculate.

What you need, ladies and gentlemen, is proof. Where is the proof that Mr. Frisilone did that? What is his reason for coming in here to testify as to what Buckley told him?

Well, there's one reason I can give you. Because it's what Buckley told him, and he thought it was important in this case and that's why he came in.

And while I'm talking about that, Mr. Buckley admitted part of the statements made to Mr. Frisilone. He

admitted the part about the credit card. He admitted that part, the telephone calling card, Mr. Buckley did, which at least lends some kind of truth to the fact that the conversation took place.

We also know that they were in a position to talk to one another. And we also know that the pillow, ladies and gentlemen, plays a very important part in this case.

Now, if Mr. Buckley had told anybody that he placed a pillow on somebody's head, would he have gotten his deal? Would he have gotten his murder in the second degree? Would he have gotten the right to ultimately walk the street?

Mr. Glynn is certain I'm going to stand up here and tell you that it's not fair what happened. Fair has got nothing to do with it here. It's got nothing to do with it. What's fair or not fair is not something for you to consider, so I'm not going to tell you that.

But I think there's a motive for Mr. Buckley to lie, just like there's a motive for Mr. Rowan to lie, to better their own positions, the same thing that Mr. Frisilone has been accused of doing.

And I don't think that's speculation. I don't think that's stretching the facts to reach that conclusion that they're not telling the truth. And if they're not telling the truth, your job gets harder and harder and harder, because if you believe what those two men said when they testified, your job is relatively easy.

It really is.

But as jurors, your duty is to examine the evidence without their testimony and then make a determination as to what they said and its truthfulness to see if it fits against Mr. Fauber who sits here.

I submit to you that Mr. Frisilone has not been shown here why he would have a motive to lie, the fact that he did lie and that I could give him anything for it besides the headache, and that's it.

I think Mr. Frisilone becomes more credible than the other two, that being Rowan and Buckley, because you know, we're talking about a jailhouse snitch, we talk about informants, we talk about whatever you want. A person given immunity is informing on another for a deal. A person given murder in the second degree is informing on someone else for a deal.

Mr. Frisilone got no deal. So I urge you to find that his testimony is truthful.

One of the things that jurors, I think, sometimes may be a little confused on are your duties in the courtroom, your duties in the jury room.

Your duty, ladies and gentlemen of the jury, is not to convict. Your duty is to examine the evidence in any criminal case with the principle of the innocence of the person accused in mind. Every bit of the evidence must be examined from that standpoint. You look at it first with the eye of seeing if it establishes innocence, all of the evidence.

Now, when you have reached the conclusion after looking at the evidence with that in mind and totally in mind and you can reach no other rational conclusion than that the individual is guilty, then -- then and only then can you find guilt under our standard of justice.

In other words, you don't become avenging angels, you don't become instruments of vengeance, you don't become anything that has to do with setting things right in society. You don't do any of that.

What you do is become something different, something apart, because we each have different roles to play in this setting. You become judges. You become judges of the facts, and you also judge whether the law that has been given to you by the Court fits these facts.

You are not any longer really part of the society as a whole. You become a judge just like Judge Bradley is a judge and may have to do things on occasion that he does not want to do because it's the law, and that's the oath that he took. You took the same oath, to be judges as jurors.

I have a duty in this courtroom, and at times I do things that I'm not happy with but that I have to do under my duty to my oath. And I'm sure the same thing happens to Mr. Glynn or to other district attorneys. Maybe it doesn't. I don't know. I'm sure it does.

That being the case, we must look at this case from the standpoint of the innocence of Mr. Fauber.

And the duty then falls upon the prosecutor to prove it beyond a reasonable doubt and to a moral certainty.

You must also make a finding as to whether or not there were accomplices in the case. And I think I mentioned this earlier, but I just saw my note on it again, and I will mention it again.

I believe there's been a concession that Mr. Buckley is an accomplice. I ask you to find that Mr. Rowan/Johnson is also an accomplice in this case, and I think he fits the definition.

An accomplice is one who is or was subject to prosecution for the identical offense charged against the defendant on trial.

To go back just briefly on their testimony again of Rowan and on Buckley, it seems like when they testified -- and I guess you heard all of the evidence also. I don't guess that. I know that. But I think an observation could be made that they were trying to minimize their involvement in this.

I know Mr. Buckley was because of something he said when he was questioned in 1986 about his involvement in this case

And I asked him when I was talking to him -- this is on page 3423. I noticed some of you taking down page numbers, 3423.

When I asked him if -- "Why did you tell Mr. Robertson" -- "Robertson that if it wasn't true?"

And his answer was, "I didn't want him to think that" -- "that I was involved in it. Also, I didn't think he would go through with what he did."

We clarified that. I said, "Mr. Robertson wouldn't go through with what he did?"

And his answer was, "No, that Curtis wouldn't go through with what he did."

"But you lied to Mr. Robertson, didn't you?"

And the answer to that was, "Yes."

Now, he didn't want Mr. Robertson to think bad of him. He didn't want Mr. Robertson to believe that he was, in fact, involved in this case in a heavy way.

Well, I think it's logical to infer that if he didn't want it to happen then, he didn't want it to happen when he talked to this man and made his deal for murder second. And I think it's logical to infer he doesn't want you people to think that he was involved as he was. And how involved was he? That's a determination for you people to make when you go back into the jury room.

Also, one of the important questions I asked Mr. Buckley was whether or not he placed a pillow over the head of Mr. Urell. The answer was, "No."

Where did Mr. Frisilone get that information? How did he know anything about the questions I asked Mr. Buckley? How did he know what was going on in this

courtroom? Where did he get the information from? There's no evidence before you that he got it from anyone else but Buckley. Buckley told him he placed a pillow on the head.

Now, that brings me to Dr. Lovell. And I was accused of beating up on Dr. Lovell, and I don't know. Maybe I did. Maybe I did.

But it seems to me that Mr. -- or Dr. Lovell was very hard to get a straight answer out of, very hard to get him to admit what he said before. He wanted to play cute. He wanted to play lawyer. He didn't want to be a doctor and testify here in this courtroom according to what he said before. He thought I was trying to trap him every time I asked him a question.

The truth of the matter is, ladies and gentlemen, no matter what he said in here, what he said at the first preliminary hearing was that his best reconstruction of the death of Mr. Urell occurred because someone placed a pillow over his head.

Then who placed the pillow over his head? How did the pillow get there?

There's been a lot of talk about this ax. One problem with this ax is that you have absolutely no proof before you that this ax that has been whacked up here on the table -- on the bar of your bench very dramatically, that has been paraded around this courtroom, is an ax that killed Mr. Urell.

There has been no evidence before you of

any blood. There's no evidence before you of any fingerprints. There's no evidence before you of anything that this ax is the instrument. Even Dr. Lovell couldn't say that this was the instrument, only something similar to this.

So based upon that, I don't think you can speculate.

And there's been no evidence of anyone who said that was the instrument of death. All we know is that Mr. Urell was hit with something.

But Dr. Lovell spent an awful lot of time trying to evade simple questions that would have required simple answers that could have just come out here and be given to you without any kind of a problem, but he wanted to play cute.

So if I beat up on him and you feel that that was unfair, then I'll apologize for it to you but not to Dr. Lovell, because I think the proof of what happened to Mr. Urell was in the first preliminary hearing on this case where the best reconstruction was the placing of the pillow over the head and no spinal cord damage and nothing else that pointed to his other two theories that he came in with in this case which happened to, perhaps, fit some of the facts that have been given here.

Where in the evidence is the physical evidence that places Mr. Fauber in the house committing the crime? Where is it except out of the mouth, again, of Buckley? And even Mr. Johnson, if he wasn't there, can't

say for sure that Mr. Buckley was there in the house.

Now, to corroborate the testimony of an accomplice, there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice tends to connect the defendant with the commission of the offense charged.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case -- that's what I indicated to you before. You've got to look at the evidence without the accomplice testimony first.

You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. And if there is not such independent evidence which tends to connect the defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

And if there is such independent evidence which you believe, the testimony of the accomplice is corroborated and as such, you can make your finding based upon that.

--sr--

And also it's important -- you will be instructed "The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence."

If you find that Mr. Rowan/Johnson is an accomplice, you can not use his testimony to be in conjunction with Mr. Buckley's testimony to corroborate Mr. Buckley or vice versa. And I think the concession has been made that Buckley's an accomplice, so perhaps you don't have to worry about that too much.

An accomplice, the definition of which will be given to you, is one who was actively involved in this crime. And the testimony of an accomplice, you will be instructed, ought to be viewed with distrust. Ought to be viewed with distrust. Which means, ladies and gentlemen of the jury, that you just can't arbitrarily discard the testimony, but you should give it the weight to which you find it to be entitled after examining with care and caution in the light of all the evidence in this case.

But it should be viewed with distrust. Which means that you look at that evidence with distrust. You just don't automatically accept it. You must look at it with distrust. It's your duty as a jury, as an individual juror, is to look at it with distrust and then make your determination. And I submit that looking at that kind of testimony with distrust is probably proper, especially when it is testimony that has been bought and paid for.

Especially when one person is given total immunity, bought and paid for his testimony as it comes in here. Because no matter what you call it, when you give immunity, when you give a plea bargain, when you give anything like that, it's a deal to bargain for testimony, and that's what it is. You can't call it anything else.

You know, they have a popular term now that they like to use. They like to call things sanitary landfills, see? And that makes it sound so nice. We have a sanitary landfill we are going to put in behind your house. I can recall when that was going to happen to me. Somebody wanted to put in a sanitary landfill and we went down and we talked about sanitary landfills. And I asked the man who was talking about it, "Isn't that a dump?"

He says, "Oh, no, no, no, no. That's a sanitary landfill."

I said, "Wait a minute. It's where trucks go and dump stuff, isn't that true?"

He said, "Yes."

I said, "Stuff that's being thrown away?"

He says, "Yes."

I said, "Well, it looks like a dump, smells like a dump, feels like a dump, it must be a dump."

Well, a deal is a deal and that's what happened here. It was a deal for testimony. That's why it should be viewed with distrust. That's why you should look at it with that in mind. They were selling, they were buying, they struck a bargain. That's what happened

here. That's why those testimony should be looked at with distrust.

You will also be given an instruction that "The requirement of corroboration of the testimony of an accomplice is based on the notion that the evidence of an accomplice should be viewed with care and caution because it is often given in the hope of expectation of leniency or immunity."

And isn't that what happened here?

Isn't that what happened here?

And you are asked to believe those two people who sold their testimony for leniency and immunity against Mr. Fauber. View it with distrust. If you believe it, your job is relatively simple.

I want to take a moment now and just talk to you about the way certain evidence can be viewed and how evidence is to be viewed I think which bolsters my argument as to the duties of a juror. And I think I may have some good news for you. I will be through before noon.

One of the instructions you are going to be given is sufficiency of circumstantial evidence, generally. This is only a part of the instruction. Only a part. You will be given the whole instruction.

The Court will tell you that also "If the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his

innocence, it is your duty to adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt."

Now, that is your duty as a juror, is to examine each piece of evidence and look at it. And if it's subject to two reasonable interpretations, you have only one responsibility -- or one duty, and that is to adopt that which points to the innocence of a person accused of a crime. That is your duty. If it is not subject to two reasonable interpretations, then you accept the interpretation that is reasonable. But if one points to guilt and the other points to innocence and they are both reasonable, you must adopt the one that points to innocence. That is our law. And that's what the responsibility of a juror and the duty of a juror is.

One instruction that the defense relies upon heavily, which is obviously -- why we rely upon it heavily is because it's the cornerstone of our whole system of criminal justice. And that is the one on reasonable doubt. I have talked about it briefly.

There is the instruction that will be given to you, that "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled -- entitled to a verdict of not guilty. This presumption places upon the state the burden of proving him guilty beyond a reasonable doubt."

And then they go on to define reasonable

doubt.

The important part of this instruction for the jury is "The state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel to an abiding conviction -- they feel an abiding conviction to a moral certainty of the truth of the charge."

That, ladies and gentlemen of the jury, is the state you have to be in before you can find a verdict of guilty in this case on any charge against Mr. Fauber who sits before you today.

Perhaps this chart may be of some assistance in determining where we stand as far as reasonable doubt is concerned and how we get to that abiding conviction and a moral certainty. I am not reading from any jury instructions now. I am reading from my own notes. You will not be read anything that comes from my lips at this time from the Court.

The law requires more than a mere probability of guilt. It requires that the jury be satisfied and convinced of guilt to a moral certainty and beyond a reasonable doubt. Therefore, if you are not convinced to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, but if you conclude notwithstanding that the defendant is probably guilty, you nevertheless must find the defendant not guilty. Very simply, if you think well, he probably did it, under the

law you cannot make the finding of guilt on probably guilt.

You are not to convict the defendant of the crime charged upon mere suspicion, however strong, nor are you to convict him simply because there may be some evidence in the case against him, not merely because there is or may be strong reasons to suspect that he is guilty. Before you can lawfully convict the defendant you must be convinced of his guilt to a moral certainty and beyond all reasonable doubt. Again, the reasonable doubt standard.

And we talk about here as far as suspicion is concerned, possibly, could be, might or may be, likely or probably. Evidence which raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence. It merely raises a possibility, and this is not sufficient basis for an inference of fact.

So we get to the strong suspicion. Again, we come over to the chart and we see where it points to a not guilty. Suspicion no matter how strong is not enough.

Now we come to clear and convincing evidence. Again, not guilty in the event you find the evidence to be clear and convincing. Clear and convincing evidence means clear, explicit and unequivocal. So clear as to leave no substantial doubt and sufficiently strong to demand the unhesitating ascent of every reasonable mind.

Perhaps one of the most confused instructions that we have -- and it's only given once by the Court.

Never more than once -- is the one on reasonable doubt and what reasonable doubt is.

MR. GLYNN: Excuse me, counsel.

May we approach the bench?

THE COURT: Excuse us, ladies and gentlemen.

(The following proceedings were held at the bench:)

MR. GLYNN: I am sorry to interrupt you, but I don't think that this comparison of clear and convincing evidence with the standard beyond a reasonable doubt is proper and I would object to -- I would object to them considering this -- this standard of whatever clear and convincing evidence means.

THE COURT: I --

MR. FARLEY: People versus Castro is the case I quoted from. That's the language in that case as to what that evidence is. That's what clear and convincing means.

MR. GLYNN: That always says it's below and beyond a reasonable doubt.

THE COURT: Well, it is, and I think that it's proper to draw comparisons between reasonable doubt and other standards of proof, and that's all I am getting from Mr. Farley's argument because I think that's the argument that he is making to the jury.

MR. GLYNN: Okay.

THE COURT: Setting up comparisons.

MR. GLYNN: All right.

(The following proceedings were held in open court in the presence and hearing of the jury:)

MR. FARLEY: Now, to get to the bottom line of all of this, and where the state of the case is now that it's going to be handed to you, and that is, before you can make a finding of guilty of Mr. Fauber, you must determine whether there is sufficient corroborating evidence in the case that beyond a reasonable doubt places Mr. Fauber guilty of the charges that he has been charged with. You must do that by not looking -- or not using, rather, the testimony of Rowan and of Buckley.

Then, and only then, do you look at the testimony of Rowan and Buckley, determine their truthfulness, whether or not they have any motive to lie, whether or not they have any motive to fabricate, to cover themselves, to make themselves other than what they really are and what they really did, and then based upon that, you then make your finding. And I say to you -- and I don't say this lightly or frivilously. But I say it just as a matter of fact.

If you find that Rowan and Buckley are worthy of belief, then I think your duty is spelled out for you very simply. You have no other alternative, because this is he what the evidence points to if you believe them. If you don't believe them, or if you think they have some reason to fabricate, to cover themselves, to lay it off on somebody else, which appears apparent from their

testimony -- especially Mr. Buckley, who did that before -- then I think -- then I think you have no other duty but to come back in here with a verdict of not guilty, no matter what your suspicion. And that's the hard part.

Do you see how hard that is?

My gosh, I heard all this evidence, I heard all this stuff. And I have a feeling.

Feelings are not good enough. You have got to have the evidence. You have got to look at it, you have got to evaluate it, you have got to make your determination based upon that. If you find Mr. Fauber to be guilty, that is your verdict. One that I doubt anybody could argue with. If you find Mr. Fauber to be not guilty, that is your verdict and again, one that I doubt anybody could argue with. But you 12, and perhaps the other two, are the only ones to make that decision. No one else.

We ask, based upon the state of the evidence as presented in this courtroom by this prosecutor, that you make a finding of not guilty because it has not been proven beyond a reasonable doubt and to a moral certainty, because of the lying testimony of Faub -- of Buckley and -- and Rowan, and as a result of that, we ask you to make that finding. Thank you.

THE COURT: Thank you, Mr. Farley.

Given the lateness of the morning, ladies and gentlemen, we will go ahead and recess now, come back this

afternoon and hear the closing argument and the Court's instructions. I want to emphasize the admonition because you have heard just about all you are going to hear. The only thing left is the information that will be given to you this afternoon. Also there is one other thing. There are the very important deliberations.

The point of all this is that I stress keeping an open mind about everything you have heard in the case and, of course, not discussing the case with anyone until the matter's finally submitted to you. We will back at the usual time, namely 1:30. Hope you have a nice lunch and see you at 1:30 this afternoon.

(The following proceedings were held in open court outside the presence and hearing of the jury:)

THE COURT: I would like to put one thing on the record. I have another thing that I will save for later on. I have got a concern about one of the instructions, but we will discuss that after Mr. Glynn's argument. He has got other things on his mind than to be concerned about what I foresee a potential problem with the instructions.

But in just the few minutes that we have remaining, I want to update the situation with Mr. Frisilone since that left somewhat open our comments this morning. Shortly before 10:00 I saw Mr. Wolf hand the bailiff a note and later on I got the note, and the note

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reads as follows. It's written in Mr. Wolf's hand.

Starts, "Re Frisilone. There is nothing that should cause an interruption of the trial. I need to check something out for him. I will advise the Court and counsel as and if necessary."

We haven't seen or heard from Mr. Wolf since then. After I got the note and during the recess I was informed by the bailiff that Mr. Frisilone, who was downstairs, was throwing a temper tantrum because he wanted to go back to the main jail, so we let Mr. Frisilone go back to the main jail.

Anything else that we need to discuss that can't wait until this afternoon after everything is in?

MR. FARLEY: I don't have anything.

MR. GLYNN: Nothing, your Honor.

THE COURT: Fine. 1:30.

(Lunch recess.)

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VENTURA, CALIFORNIA; THURSDAY, JANUARY 14, 1988;
1:33 P. M.

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THE COURT: People versus Fauber. The parties are present and the jurors are present.

Mr. Glynn?

MR. GLYNN: Thank you, your Honor.

CLOSING ARGUMENT ON BEHALF OF THE PEOPLE

MR. GLYNN: Good afternoon, ladies and gentlemen. I have good news and bad news. The good news is I think my closing will probably be less than 45 minutes, and the bad news is I don't have any charts to entertain you with as I fumble through them.

In his argument, Mr. Farley made a number of statements sound good but they are inconsistent with the law or inconsistent with the facts or they really don't prove anything one way or the other. And I am going to go through some of those points with you right now.

When he talked about the corroboration of an accomplice's testimony, I believe that you would come away with the feeling that that burden of corroboration is a lot higher than what it really is. I'd like to emphasize once again the level -- the burden of proof as to the corroboration of an accomplice.

All you need is some evidence that tends to connect the defendant with the commission of the offense charged. It is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged.

So you don't need something to line up with each element of each of the crimes charged. I pointed out to you in my opening argument that the posession of the credit card, the piece of the credit card, linked the defendant to the crime. That was something that belonged to Mr. Urell and it's the original or a part of the original card that was issued to him.

I also pointed out that the statements of the defendant regarding the conversation about Mr. Urell, the pointing out of the house, the fact that he was there when the map was drawn, the fact that they had scoped out or cased the house, that that corroborates the testimony of the accomplices. So you have those two pieces of evidence. They are by themselves enough to corroborate the accomplice testimony and you do not need very much to meet this standard.

Mr. Farley talked about the of manner of death, and for the most part ignored the instruction on special circumstance and what is required with respect to intent. He once again emphasized that Doctor Lovell's I guess best reconstruction was that the pillow was held over Mr. Urell's head. But he ignored the evidence of the striking of the back of the neck of Mr. Urell.

Now, I want to read the second element of the special circumstance again to you. We must prove that the defendant intended to kill a human being or intended to aid another in the killing of a human being.

Now, that does not require that the defendant be the actual killer. So by the very act of striking the back of Mr. Urell's neck with that heavy ax, that that in itself indicates the intent required by this special circumstance. And he doesn't have to be the actual killer, but as long as he had the intent to kill, that meets that requirement. And if Mr. Urell later died in some other manner, the intent is still shown and the -- the element is met as to that requirement.

Mr. Farley argued that the ax, this ax which was found at the scene of the crime, was never proved to be the actual murder weapon. Now, that's one of those arguments that first seems so obvious. I mean my golly, they find Mr. Urell at the scene, he has been hit with a -- with one instrument in the back of the head, this is found leaning up against the bed. You will see that in some of those photographs. That's the most logical conclusion.

But so what?

What does that prove that we have not gone so far as to do all of the things that he suggested?

Now, as to the fingerprints, I can answer that. I believe Mr. Buckley told us that they both used gloves, so you are not going to find fingerprints on

there.

But, what purpose would it serve to go into a lot of scientific evidence to prove something that is so obvious to everyone?

Mr. Farley argued that Mel Rowan is more involved in the crime than he would lead us to believe through his testimony, and that Brian Buckley is more involved in the crime than Buckley would lead us to believe through his testimony.

Well, Mel Rowan admitted to us that he was present when the conversation took place regarding Mr. Urell and being a dope dealer. He was present when they drove by and pointed out the house, he helped Curtis Fauber lift the safe out of the El Camino, he helped open the safe, he was -- he received jewelry from the safe, and there is some conflict as to whether or not he knew when they were going to commit the crime and there is some conflict as to whether he was waiting when they returned from the house. But Mr. Rowan, for the most part, has admitted a number of points of complicity in the crime.

Brian Buckley has certainly admitted all parts of the crime, and in fact has pled guilty to murder. So for Mr. Farley to say that they have tried to minimize their own involvement in the crime does not really -- does not really prove anything. And he has not cited any testimony to show that in fact that they have minimized their own involvement.

He asked us how do we know -- or how did

Frisilone know what happened in the courtroom?

Well, he told us that he read it in the newspapers.

MR. FARLEY: Objection, your Honor. That's an inaccurate statement of the evidence, that he read that thing about the pillow in the -- in the newspaper.

THE COURT: Well, he didn't say anything about the pillow, but I believe he was asked something to the effect that have you read the newspapers in the case and he commented well, hasn't everybody, or words to that effect. That's my recollection of the testimony.

MR. FARLEY: And also I believe the testimony went on that he doesn't receive the newspaper, but sometimes he has access to it. There was no evidence that came from Mr. Frisilone's mouth that he read about what he testified in this courtroom in a newspaper.

THE COURT: That's my recollection, but the final word will be with the reporter, if the jury feels it's necessary for that that portion of Mr. Frisilone's testimony to be read back.

MR. GLYNN: Well, my last statement was that he said that he read the newspaper and I did not say that he read any particular item, but he had access to the newspapers as to this trial.

The main thrust of Mr. Farley's argument has been the credibility of Brian Buckley and Mel Rowan. And that is certainly no surprise to any of us. He stated that -- that Brian Buckley had a motive to lie because of

his deal. And he is making it sound like Buckley is getting off, that he is walking away from this thing a free man. Brian Buckley will be sentenced on second degree murder at the end of all of these proceedings and will serve the term prescribed by law. He has not gotten away with anything and his deal was to plead to a lesser sentence so that he would be a witness against two other people. But he has not gotten away with anything.

Now, Mr. Farley has not answered a number of points that I brought up in my argument that established the credibility of Brian Buckley. Now, I am going to -- I am going to go over some of those.

Mr. Farley did not go over the agreement itself with you and make some argument that this does not establish Brian Buckley's credibility.

He did not address the point that the agreement requires that Brian Buckley testify truthfully, and that that truth would be determined by the judge who heard the proceedings, in this case Judge Bradley, if there was any dispute as to his credibility. Mr. Farley did not answer that.

Mr. Farley did not address the point that if Brian Buckley came in here and in fact were the person who had swung the ax or had killed Mr. Urell and stated that, stated that on the stand, that he would still be protected by that agreement if the Judge deemed that his testimony was truthful. And in fact, he would also be able to save his friend, Curtis Fauber. Mr. Farley did not address

that issue.

Mr. Farley did not address the consistencies between the defendant's statements to the police with Mel Rowan's testimony and with Brian Buckley's testimony. And I enumerated all of those things, the particulars about the conversation, about the drive by, about staking out the house, and I guess about Jan Jarvis drawing the map.

MR. FARLEY: Your Honor, may we approach the bench?

THE COURT: Yes.

MR. FARLEY: Thank you.

THE COURT: Excuse us, ladies and gentlemen.

(The following proceedings were held at the bench:)

MR. FARLEY: Your Honor, I object to this form of argument. This form of argument is a personal attack upon me. It's got nothing to do with the evidence that I raised. I believe it has been improper to base an argument upon the perhaps the disreputability or the fact that a defense lawyer is lying or attempt to mislead because that's -- his opening remarks were that I said something to them and misled them as far as the law was concerned.

That's not what I said. What I said was they must look at the evidence, determine if there is sufficient evidence without the accomplices. I believe at the end I said that if they believe the accomplices they had no choice but to make a finding of guilty.

Mr. Glynn is attempting to mislead this jury. I believe that is misconduct. I think also that his saying that I didn't refer to certain bits of evidence, that I did not properly rebut his argument, is not proper rebuttal. It's got nothing to do about what I did say. I choose what to say and want to say. I don't believe that he has --

MR. GLYNN: Keep your voice down, counsel.

MR. FARLEY: That what he has been arguing, that is proper argument. For him to stand up there --

MR. GLYNN: Your Honor, Mr. Farley's speaking in a loud voice so the jury can hear.

THE COURT: I don't think he is speaking in such a loud voice that the jury can hear.

MR. FARLEY: I don't believe it's proper argument for him to make the argument about everything I didn't say.

THE COURT: I think --

MR. FARLEY: As far as rebuttal is concerned --

THE COURT: I agree with that part. I don't necessarily agree with the first part. I think that you can talk about things that he said and didn't dispute them. I don't think you can go over things he didn't say. What you are doing is just rearguing your opening.

The point is, if you talk about everything that you said that he didn't say, you are just rehashing what you said in opening and I don't think that's proper rebuttal. You are to rebut the things that he discussed

in his argument, not rehash what he didn't say and you said earlier.

MR. GLYNN: Yeah. But his argument was that -- was to show that Mel Rowan and Brian Buckley were not credible and that's what I am trying to do, to show that they were credible, and that his arguments about their lack of credibility did not hold any logical order.

THE COURT: Well, why don't you do that without emphasizing that he didn't say this, he didn't say that, he being Mr. Farley. If you want to argue their credibility because he argued their lack of credibility, that's fine. But not under the guise that he didn't do it. Again, I think that to point out that maybe it's something -- that it's his job and that's something he should have done and he is not doing his job and he is disreputable and dishonest, I think you are basing too much of your rebuttal on Mr. Farley and not on the evidence.

MR. GLYNN: I will see if I can do that.

MR. FARLEY: And I object to that, your Honor, and request that he be cited for misconduct for doing so.

THE COURT: We will take that up later on.

MR. FARLEY: Thank you.

(The following proceedings were held in open court in the presence and hearing of the jury:)

MR. GLYNN: The statements by Curtis Fauber to the

police have no innocent meaning. Curtis Fauber told the police that he was present when a conversation took place when Jan Jarvis talked about a man in Oxnard who dealt cocaine and that Jan Jarvis drew a map and pointed out the house to Curtis Fauber, and Curtis Fauber told the police that he and Brian Buckley had staked out the house.

The defendant -- I am sorry. Brian Buckley and Mel Rowan made a number of statements in their testimony, or a few statements in their testimony that are inconsistent, but they are of a minor nature. It is not established how these minor inconsistencies tend to discredit the credibility -- tend to discredit these two witnesses.

There is a large consistency between Brian Buckley's testimony as to what happened at the Urell house when the defendant struck Mr. Urell in the back of the head with the ax. A consistency between that and Mel Rowan's testimony as to the statements made to him when they arrived back at the apartment with the El Camino and the safe when the defendant told Mel Rowan that he had killed Mr. Urell.

Now, Mr. Farley has emphasized some of the things that Mr. Frisilone told us, but the one thing that -- or the two things that are quite important are the statements made by Frisilone that in fact corroborate Brian Buckley's testimony. I have read those to you before, but I will read them again.

Mr. Frisilone said that Buckley told him that

he would not have gone to the Urell house if he knew anyone would get hurt, and he told him that Curtis Fauber struck the blows.

Now, Frisilone has testified to two areas that are completely consistent with Brian Buckley's testimony, and in fact corroborate that testimony. Mel Rowan received immunity in this case. Mr. Farley has told us that he has every motive to lie to you, but the fact remains that once Mel Rowan received that immunity, he could come up here and testify as to what happened during the course of those crimes and go completely protected from any prosecution. If Mel Rowan were more involved he could have freely testified to that and been completely protected by the law.

Now, why would Mel Rowan testify that the defendant said he killed Mr. Urell if that were not true?

What could be the motivation for that?

Mel Rowan has nothing to gain by that. He has his immunity when he walks into this courtroom and Curtis Fauber at one time was his friend.

What would be the motivation for making up that type of story?

There is no evidence to suggest that Mel Rowan and Brian Buckley fabricated this elaborate story that frames Curtis Fauber. And the reason is that it's true. Curtis Fauber committed those crimes. There was no fabrication and story by Mel Rowan, there was no fabrication of story by Brian Buckley. There was no

meeting by the two of them to make sure that all of these fine details that they both testified to that took place at the apartment on Crimea Street took place. They didn't have to get together to make sure that their stories matched because they were both there, Curtis Fauber was there, and everything happened as it was testified to in this courtroom.

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And the statements that that were made by the defendant to Mel Rowan actually took place. There was no need for Curtis Fauber -- I'm sorry -- for Brian Buckley and Mel Rowan to get together and make up some elaborate scheme.

You'd have to go back to the bottom line again of motivations and reasons for lying in this case.

Brian Buckley has a deal to have his charge reduced to second degree murder if he testifies truthfully. And again, that truthfulness will be determined by the Judge in the proceedings in which he testifies.

He has everything to lose if he lies in this case. He has nothing to gain by lying. He has much to gain by telling the truth.

And Mel Rowan is in the same boat. There is nothing to be gained for him to come in here and lie about Curtis Fauber's involvement in the murder.

I agree with Mr. Farley that if you believe Mel Rowan and Brian Buckley, your job will be fairly easy. And from all the evidence, the probability of truth favors their testimony.

The evidence shows, ladies and gentlemen, beyond a reasonable doubt, that Curtis Fauber burglarized and robbed Tom Urell; that he's guilty of felony murder and he's guilty of special circumstance because he had the intent to kill when he hit Mr. Urell in the back of the neck with that ax.

CALJIC 3.11 (1979 Revision)

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TESTIMONY OF ACCOMPLICE MUST BE CORROBORATED

Requested by People	✓	Given as Requested	✓	Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion		Ruby	

Judge

Print Date 4/79

3.11

A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

30

CALJIC 3.12 (1979 Revision)

SUFFICIENCY OF EVIDENCE TO CORROBORATE AN ACCOMPLICE

Requested by People	✓	Given as Requested	✓	Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion		RMY	

Judge

Print Date 4/79

3.12

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

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CALJIC 3.13 (1979 Revision)

ONE ACCOMPLICE MAY NOT CORROBORATE ANOTHER

Requested by People	✓	Given as Requested	✓	Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's Motion		RWY	

Judge

Print Date 4/79

3.13

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence. 32