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

PETITON FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At Curtis Fauber's trial, the prosecution relied on the testimony of two accomplices to secure his conviction and death sentence. Sensing that his key witness, Brian Buckley, was likely to be discredited, the prosecutor introduced Buckley's plea agreement to shore up his credibility. The terms of the agreement made clear that: (1) Buckley had already submitted to an interview with the prosecutor to assess his credibility; (2) he would not be eligible for a plea bargain if the prosecutor determined he was lying; and (3) the trial judge presiding over Fauber's trial would monitor Buckley's truthfulness to resolve disputes as to his credibility. In closing, the prosecutor argued that the case turned on Buckley's testimony and his plea agreement was the "main key" to his credibility. This was flagrant vouching, yet trial counsel failed to object, and the trial court gave no curative instructions. Despite this alarming record of misconduct and ineffective assistance of counsel, the Ninth Circuit held that the California Supreme Court ("CSC") reasonably denied Fauber's vouching and ineffective assistance claims.

The question presented is: Did the Ninth Circuit's opinion create a conflict with this Court's decision in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), under which *specific* curative instructions are required to ameliorate the harm from pervasive prosecutorial misconduct?

PARTIES TO THE PROCEEDING

Curtis Lynn Fauber, Petitioner on review, was the appellant below.

Warden Ron Davis, Respondent on review, was the appellee below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Curtis Lynn Fauber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On August 5, 2022, the Ninth Circuit affirmed the district court's denial of habeas relief in a published opinion. (Pet. App. 2); *Fauber v. Davis*, 43 F.4th 987 (9th Cir. 2022). The district court denied habeas relief and entered judgment against Fauber in an unpublished opinion on December 13, 2016. (Pet. App. 3, 4.)

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Kagan granted a 30-day extension of the period for filing this petition to March 1, 2023. This petition is timely under Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

A. This Court's precedent forbids prosecutors from vouching for the credibility of witnesses.

A habeas petitioner is entitled to relief if prosecutorial misconduct "infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (same). It is improper for a prosecutor to express an opinion about a witness's credibility or the defendant's guilt. *United States v. Young*, 470 U.S. 1, 18-19 (1985); *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988). Clearly established federal law forbids such "vouching" for two reasons. First, "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Young*, 470 U.S. at 18. Second, the "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19 (citing *Berger v. United States*, 295 U.S. 78, 88-89 (1935).)

A reviewing court must assess the misconduct in light of the entire trial to determine if a defendant's due process rights were violated. Curative

instructions play a critical role in this analysis: a *specific* curative instruction may ameliorate the prejudice from misconduct. *Donnelly*, 416 U.S. at 640. However, "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect . . . ." *Id.* at 644.

B. AEDPA standards

Under AEDPA, a federal court may grant habeas relief if it determines that Fauber suffered a violation of his federal constitutional rights and that Fauber has satisfied 28 U.S.C. § 2254(d) with respect to claims adjudicated on the merits in state court. Section 2254(d) is satisfied if the state court's adjudication was either (1) contrary to, or an unreasonable application of, clearly established federal law, or (2) based on an unreasonable determination of the facts, in light of the state-court record.

Clearly established federal law refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

A state court decision is contrary to clearly established federal law if it applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts materially indistinguishable from those in a Supreme Court decision, yet arrives at a different result. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405 (2000).

A state-court decision is an unreasonable application of clearly established federal law if the court "correctly identifies the governing legal rule but applies it unreasonably to the facts" of the case. *Id.* at 407-08. This Court need not have applied a legal rule to a nearly identical fact pattern for the state court decision to be an unreasonable application of federal law because "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). A state-court decision can also be unreasonable under § 2254(d)(1) if it fails to give appropriate consideration and weight to the full body of available evidence. *Williams*, 529 U.S. at 397-98. Under the "unreasonable application" test, the relevant inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

A state-court summary denial is presumed to be an adjudication on the merits (although the presumption can be rebutted) and "the habeas petitioner's burden [under § 2254(d)] still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). In applying § 2254(d) to an unexplained state-court decision, a federal court must "determine what arguments or theories supported or . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of

this Court." *Id.* at 102. This Court, however, expressly cautioned against unfounded speculation when reviewing summary denials pursuant to § 2254(d). *Id.* at 99-100; *see id.* at 109 ("[C]ourts may not indulge *post hoc* rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions . . . ." (internal quotation marks omitted)); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (stating that review under § 2254(d) "focuses on what a state court knew and did"). Thus, a theory that "could have supported" the state court's decision must not be a "theoretical possibility," but must be based on the record before the state court. *See Richter*, 562 U.S. at 100.

II. PROCEEDINGS BELOW

A. Guilt-Phase Trial

In 1988, Fauber was prosecuted for the robbery and murder of Thomas Urell. (Pet. App. 2 at 5.) The prosecution's guilt-phase case rested largely on the testimony of two admitted accomplices: Mel Rowan and Brian Buckley. Fauber met Brian Buckley in military training in 1985. Both were discharged later that year. Buckley returned home to Ventura, California. Fauber, a New Mexico native, visited Buckley in Ventura in the summer of 1986. Mel Rowan and Janet Jarvis lived in the apartment next door to Buckley. Fauber and Buckley regularly used drugs with Rowan and Jarvis. Jarvis told Rowan, Buckley, and Fauber about a cocaine dealer she once dated, Tom Urell. She

drew a map showing the others where his house was located. The four hatched a plan to steal cocaine from Urell. (Pet. App. 2 at 6.) Urell was killed in the course of that robbery. Only one percipient witness to the killing, Buckley, testified at Fauber's trial.

1. Brian Buckley testified against Fauber in exchange for a reduced sentence in his own case.

Buckley was arrested in September 1986. (Pet. App. 6 at 15-16.) The prosecution charged Buckley with first-degree murder, robbery, and burglary counts. (Pet. App. 6 at 22.) Buckley entered into a plea agreement with the prosecution. In exchange for his "truthful" testimony against Fauber, the charges were reduced to a single count of second-degree murder. (Pet. App. 6 at 16, 22-23.)

The prosecutor read Buckley's entire plea agreement into the record at the start of Buckley's guilt-phase testimony and again in closing argument, drawing no objection from the defense. (Pet. App. 6 at 22, 24.) The following was set forth in the agreement:

- In exchange for reduced charge and sentence, Buckley must testify truthfully as a witness against Fauber and in any proceedings regarding Christopher Caldwell (an accomplice in a crime alleged at the penalty phase). (Pet. App. 6 at 22.)

- Before the agreement, Buckley must submit to an interview with the prosecutor to assess his credibility. If the prosecutor decides that Buckley is lying, then no agreement will be reached. (Pet. App. 6 at 22-23.)
- "[I]n the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judge who presides over these hearings." (Pet. App. 6 at 23.)

Buckley testified that he and Fauber carried out the robbery. They entered Urell's house through a window and found Urell in bed. Buckley held him at gunpoint while Fauber taped Urell's hands behind his back. They asked Urell for the combination to his safe, and he claimed not to know it. According to Buckley, Fauber found an ax under Urell's bed. Buckley saw Fauber swing the ax toward Urell, but did not see it make contact. He heard a thud, then heard Urell make a hissing noise. Buckley then went to the kitchen. He heard Fauber strike Urell again, and the hissing stopped. Fauber came to the kitchen to tell Buckley that he did not know if Urell was dead. Fauber returned to the bedroom, and Buckley heard more sounds, as if Fauber hit Urell again with the ax. Buckley stayed in the kitchen. He and Fauber then loaded the safe and other items taken from Urell's home into Urell's car, driving back to Buckley and Rowan's apartment building. (Pet. App. 6 at 13.)

2. After his arrest on a parole violation, Rowan came forward with evidence against Fauber.

Rowan was arrested on a parole violation in Texas in September 1986 and returned to the Texas Department of Corrections. Only then did he come forward with evidence against Fauber concerning the Urell robbery. The prosecution granted Rowan immunity in exchange for his testimony against Fauber. (Pet. App. 6 at 16.) Rowan never faced any charges for his role in the Urell murder.

At trial, Rowan recounted that Fauber and Buckley showed up at the apartment building with a safe, and he admitted he helped dispose of the proceeds from the robbery. He also claimed that Fauber admitted he hit Urell with an ax and might have killed him. (Pet. App. 6 at 14.)

3. The jury also heard Fauber's post-arrest statements regarding the planning of the Urell robbery.

Fauber was also arrested in September 1986. Upon arrest, police seized his wallet, which contained a piece cut from Urell's telephone calling card. Fauber waived his *Miranda* rights and made a statement to law enforcement. He said he remembered Jarvis telling him about a drug dealer and drawing a diagram of his house. He admitted to scoping out the drug dealer's house, along with Rowan, Buckley and Jarvis. (Pet. App. 6 at 16.)

4. A pathologist opined that Urell died from asphyxiation and that the cause of death may have been smothering with a pillow.

At the crime scene, Urell was face down, with his head on a pillow. (Pet. App. 6 at 14.) A medical examiner, Dr. Frederick Lovell, testified about the cause of Urell's death. He concluded Urell was struck with the blunt side of an ax. But he ultimately opined that asphyxia was the cause of death. (Pet. App. 6 at 15.)

Dr. Lovell posited competing theories about Urell's suffocation. First, spinal damage could have caused paralysis below the neck and interfered with Urell's ability to breathe. Second, pressure placed on the pillow on top of Urell's head could have caused his death. Third, suffocation may have occurred just by his head being against the pillow and immobile, and interference with the nerve mechanism that controls respiration could have prevented him from breathing. (Pet. App. 6 at 15.)

5. The sole defense witness recounted Buckley's admission that he placed a pillow over Urell's head.

The defense called one witness at the guilt phase: John Frisilone, an inmate at the Ventura County jail. He and Buckley were housed in the same block. Buckley told him that two handguns were involved in the Urell case, admitting that he had lied to the prosecutor about this fact. Buckley also told Frisilone that he placed a pillow over Urell's head because Urell was making

noises. Buckley told him that he believed the prosecutor had enough evidence to charge him with first degree murder and seek the death penalty. (Pet. App. 6 at 16.)

6. In closing, the prosecutor admitted his case turned on Buckley's credibility and argued that specific provisions in his plea agreement guaranteed his trustworthiness.

The prosecutor's closing argument emphasized the centrality of Buckley's credibility to his case against Fauber. He conceded that the jury could acquit Fauber if they found Buckley not to be credible. (Pet. App. 7 at 1.) To shore up Buckley's credibility, the prosecutor dwelled on the terms of his plea agreement. He repeatedly referred the jury to the provision in the plea agreement providing that the trial court was tasked with resolving disputes as to Buckley's truthfulness (Pet. App. 7 at 29-34), and suggested that this provision was the "main key" to Buckley's credibility. (Pet. App. 7 at 32.)

The jury found Fauber guilty on all charges.

B. Penalty-Phase Trial

In its case-in-chief, the prosecution sought to prove that Fauber was responsible for the homicides of Jack Dowdy, Jr. and David Church, both of which were unadjudicated. The prosecution also presented evidence of three

uncharged assaults against Kim Dowdy, Jack Dowdy's ex-wife. (Pet. App. 6 at 48-49.)

Dowdy, Fauber's close friend, disappeared in May 1986 in New Mexico. His body was never found. (Pet. App. 6 at 45-46.) Before his death, Dowdy's girlfriend heard Fauber argue with Dowdy and threaten Dowdy's ex-wife, Kim Dowdy. Dowdy's sister saw him arguing with Fauber, and Fauber later told her that he had threatened Dowdy with a pistol. (Pet. App. 6 at 46.)

David Church disappeared in the summer of 1986, after attending a party at Brian Buckley's apartment. His body was found in a canyon two months later. (Pet. App. 6 at 46-48.)

Brian Buckley testified again at the penalty phase. Buckley said that Fauber told him he had killed a man in New Mexico, and that he wanted Buckley to go back to New Mexico with him to rebury the body. (Pet. App. 6 at 47.) Buckley also testified about the night of Church's disappearance. According to Buckley, Church showed up drunk at Buckley's apartment, looking for cocaine. Buckley claimed that Fauber and Caldwell escorted Church out of the apartment. (Pet. App. 6 at 46.) When Caldwell and Fauber came back, Fauber said they had scared Church and slit his bike tires. They left the apartment, taking an ax handle with them. (Pet. App. 6 at 46.) A few days later, Fauber said they had to kill Church because he would have gone to the police if he did not get cocaine that night. (Pet. App. 6 at 47.) Fauber

later told Buckley he had to throw away the ax handle because it had blood on it. (Pet. App. 6 at 47.)

The defense called two witnesses who testified that they had contact with Church after the party at Buckley's apartment and after he was alleged to have been killed. (Pet. App. 6 at 50.) A defense witness, Pam Lester, also testified that at some point after Dowdy disappeared, a man came to her home and told her that he had seen Dowdy. (Pet. App. 6 at 46.)

The defense presented extensive evidence about Fauber's abusive upbringing, mental health struggles, and experiences of poverty and malnutrition as a young person. Only 7 of the 11 children in his family survived into adulthood. (Pet. App. 6 at 50.) Fauber's father "was verbally abusive and disciplined his children with razor straps, belts, and belt buckles." (Pet. App. 6 at 50.) A social anthropologist testified about conditions in Fauber's hometown in New Mexico, concluding that Fauber had "lived in extreme poverty and suffered abuse and neglect during his childhood." (Pet. App. 6 at 50.) A criminologist testified about the effect of life imprisonment on California prisoners. (Pet. App. 6 at 50.) Dr. Edward Grover, a psychologist, testified regarding his testing of Fauber, which could neither establish nor rule out the presence of an organic brain deficit. (Pet. App. 6 at 51.)

The jury returned a death verdict, and Fauber was sentenced to death.

C. Relevant State Appellate and Post-Conviction Proceedings

On direct appeal to the CSC, Fauber argued that the prosecutor improperly vouched for Buckley, in violation of his right to due process. The CSC denied the claim in a written decision. (Pet. App. 6 at 21-27.) The CSC held that the claim was procedurally barred because defense counsel failed to object. On the merits, the CSC agreed that the "plea agreement's reference to the district attorney's preliminary determination of Buckley's credibility had little or no relevance to Buckley's veracity at trial, other than to suggest that the prosecutor found him credible." (Pet. App. 6 at 25.) Thus, it should have been excised on a timely objection as to relevancy. (Pet. App. 6 at 25.) Applying the state-law test for harmless error under *People v. Watson*, 46 Cal. 2d 818 (1956), however, the CSC found the error to be harmless. According to the CSC, the prosecutor argued for Buckley's credibility based on the evidence at trial, not based on the extrajudicial content referenced in the plea agreement. The CSC speculated that a 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." (Pet. App. 6 at 25.) Finally, the CSC concluded that the plea agreement was double-edged: "it suggests not only an incentive to tell the

truth but also a motive to testify as the prosecutor wishes." (Pet. App. 6 at 25.)

The CSC also denied Fauber's related argument that the plea agreement made the trial court a monitor of Buckley's truthfulness, thereby placing its prestige behind Buckley's testimony. The CSC agreed that the plea agreement's provisions about the trial court's role in monitoring Buckley's truthfulness should have been omitted. This provision "did not *explicitly* state what was 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." (Pet. App. 6 at 26.) Had trial counsel objected on relevance grounds, the trial court should have granted the objection. But once again, the CSC found any error harmless, concluding that the jury could not reasonably have understood the agreement to relieve it of its duty to judge Buckley's credibility, nor could the jury have been misled by the prosecutor's argument. Here, the CSC cited the generic instruction given 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." (Pet. App. 6 at 26 (quoting CALJIC No. 2.20).) The CSC presumed that the jury understood and followed this standard instruction.

The CSC affirmed the judgment in its entirety.

On state habeas review, Fauber argued that trial counsel was ineffective for failing to object to the Buckley's plea agreement. In 1995, the CSC denied this claim on the merits in a summary order. (Pet. App. 5 at 1.)

D. Relevant Federal Proceedings

Fauber filed his federal habeas petition on May 20, 1997, after the passage of the Anti-Terrorism and Effective Death Penalty Act. The petition alleged that admission of Buckley's plea agreement and the prosecutor's repeated references to its truthfulness provisions constituted impermissible vouching, in violation of due process and other constitutional guarantees. The petition also alleged a related claim of ineffective assistance of trial counsel for failing to object to the plea agreement.

On May 10, 2017, the district court denied both claims in a written order, but certified both for appeal, along with an unrelated claim of error for exclusion of evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978). (Pet. App. 4 at 7-17, 26-27, 32.) The district court entered judgment against Fauber the same day. (Pet. App. 3 at 1-2.)

On appeal to the Ninth Circuit, Fauber argued that the prosecutor's repeated instances of vouching violated due process. He also argued his counsel was ineffective for failing to object. In his responsive briefing, the

Warden made no argument that counsel's performance was adequate; he defended the district court's decision on prejudice grounds alone.

In its opinion, the Ninth Circuit first considered Fauber's IAC claim. Because the Warden did not argue deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), the Ninth Circuit considered only whether Fauber showed prejudice from counsel's failure to object. (Pet. App. 2 at 19.) The court correctly noted that Fauber's claim was denied on the merits in a summary order, thus Fauber is only entitled to relief if he can show that the state court's decision was objectively unreasonable. (Pet. App. 2 at 20 (citing *v. Pinholster*, 563 U.S. at 187, and *Richter*, 562 U.S. at 98).)

Crediting the CSC's reasoning, the Ninth Circuit held that "common sense" dictates 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." (Pet. App. 2 at 20-21 (quoting *People v. Fauber*, 2 Cal. 4th 792, 822 (1992).) The court recast the prosecutor's comments as merely "reaffirm[ing] a point the jury would likely presume anyway." (Pet. App. 2 at 21.)

Pointing to the jury instructions, the Ninth Circuit held that "[j]urors were repeatedly told they were the 'sole judges' of whether a witness was believable," with guidance on "the factors they could consider in evaluating each witness's credibility, such as . . . motive, bias, and ability to remember

and communicate." (Pet. App. 2 at. 21.) Based on this generic set of instructions, the CSC could permissibly find it "[u]nlikely that jurors believed that someone other than them bore the responsibility for assessing Buckley's veracity." (Pet. App. 2 at 21.)

As he did in the CSC, Fauber challenged the prosecutor's use of a provision in the agreement that required the trial judge to determine whether Buckley testified truthfully. At no point was the jury told that such a determination would only occur after Fauber's trial, in the context of Buckley's own prosecution. Citing no cautionary instructions specific to this form of vouching, the Ninth Circuit credited the CSC's conclusion that jurors implicitly understood they were not to make such an improper inference. "[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." (Pet. App. 2 at 22 (quoting *Fauber*, 2 Cal. 4th at 823).)

The Ninth Circuit then concluded that the CSC could reasonably reject Fauber's IAC claim on prejudice grounds given the "overwhelming" evidence corroborating Buckley's testimony, outside of the plea agreement. (Pet. App. 2 at 22.) This included Rowan's testimony regarding the planning and execution of the robbery and his claim that Fauber admitted he struck Urell. The Ninth Circuit also pointed to Fauber's own admission to law enforcement that he conspired with Jarvis, Rowan, and Buckley to rob Urell. (Pet. App. 2

at 24.) Lastly, the court pointed to physical evidence connecting Fauber to Buckley. (Pet. App. 2 at 24.)

Turning to the underlying claim of prosecutorial misconduct for improper vouching, the Ninth Circuit found it to be procedurally defaulted based on the CSC's invocation of the contemporaneous objection rule, which is an adequate and independent state law ground. (Pet. App. 2 at 26.) The court rejected Fauber's argument that he could show cause and prejudice for the default based on his trial counsel's ineffectiveness, incorporating its previous analysis of Fauber's IAC claim. (Pet. App. 2 at 26-27.) Lastly, even if it were not defaulted, Fauber could not prevail because the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), "for the same reasons that Fauber's ineffective assistance claim" failed. (Pet. App. 2 at 28.)

The Ninth Circuit denied rehearing in an order dated October 31, 2022. (Pet. App. 1.)

III. REASONS FOR GRANTING THE WRIT

A. The Court should grant certiorari because the Ninth Circuit's decision flouts clearly established precedent concerning prosecutorial misconduct.

Under Rule 10(c), certiorari is appropriate if a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Here, the Ninth Circuit's decision in *Fauber* risks hollowing out this Court's clearly established case law

concerning prosecutorial misconduct and vouching. Certiorari is appropriate to protect the due process rights guaranteed by *Donnelly* and its progeny.

This Court has clearly established that prosecutors may not vouch for the credibility of witnesses or offer a personal opinion on a defendant's guilt. *Young*, 470 U.S. at 18-19; *Robinson*, 485 U.S. at 33 n.5. The *Fauber* decision makes a nullity of this rule. In upholding Fauber's conviction and sentence, both the CSC and the Ninth Circuit referenced "common sense" considerations 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." (Pet. App. 2 at 20-21 (quoting *Fauber*, 2 Cal. 4th at 822.) This language has far-reaching implications. Following this reasoning, there can be no recourse on appeal or habeas review if a prosecutor vouches for his principal witness at trial. That is because a reviewing court can *always* point to the "common sense" consideration that jurors have already assumed the prosecutor made a determination that his or her chief witness was credible. If these considerations are valid, then vouching is *per se* harmless error.

The *Fauber* decision likewise contravenes this Court's decision in *Donnelly*, which clearly established that *specific* curative instructions are required to ameliorate the harm from case-pervasive misconduct. *Donnelly* addressed a claim of prosecutorial misconduct premised on two brief remarks

during a lengthy closing argument. The first was an expression of the prosecutor's personal opinion as to the defendant's guilt. The second was a statement that defense counsel "said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." 416 U.S. at 640. Defense counsel objected, and the court gave a specific curative instruction that the jury must disregard the improper remarks:

> Now, in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' *There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.* [¶] *Consider the case as though no such statement was made.*

Id. at 641 (emphasis added).

This Court held that habeas relief was required only if the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process," an analysis that requires "examination of the entire proceedings." *Id.* at 643. The Court conducted this analysis with particular attention to the jury instructions. "The judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it." *Id.* at 644. These specific

instructions were adequate to cure the harm caused by the prosecutor's brief, improper remarks. But the Court cautioned that, under different circumstances, they would not suffice. "[S]ome occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect . . . ." *Id.* at 644.

To sum up, in *Donnelly*, the Court found no denial of due process because the prosecutor's remarks were: (1) ambiguous; (2) a brief moment in an extended trial; and (3) followed by specific disapproving instructions. In *Fauber*, the Ninth Circuit purported to apply this clearly established precedent, but it did so in name only. Here, the prosecutor's vouching was unambiguous: he argued that the "truthfulness" provisions of Buckley's plea agreement were the "main key" to his credibility. It is beyond debate that this was objectionable. The CSC acknowledged as much. (*See* Pet. App. 6 at 25-26.) The prosecutor read Buckley's plea agreement into the record at the start of Buckley's guilt-phase testimony, not in response to any comment by defense counsel. *Cf. Young*, 470 U.S. at 11-14 and *Darden*, 477 U.S. at 182 (no due process violation where improper comments were an "invited response" to a defense argument). And he made extensive use of this plea agreement throughout his guilt-phase closing argument. *See also Berger*, 295 U.S. at 89 ("pronounced and persistent" remarks can render a trial unfair).

Given this context, only a specific curative instruction stood any chance of ameliorating the prejudice to Fauber, but the jury received nothing of the kind. The trial court did, however, give the jurors a standard instruction 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." (Pet. App. 6 at 26 (quoting CALJIC No. 2.20).) This generic instruction, untethered from the specific misconduct at issue, did nothing to mitigate the prosecutor's repeated argument that Buckley's credibility was guaranteed by virtue of his plea agreement. Yet both the CSC and the Ninth Circuit cited it as proof that Fauber suffered no prejudice from the prosecutor's misconduct.

In denying this claim, the Ninth Circuit referenced "overwhelming" evidence corroborating Buckley's testimony, outside of the plea agreement. (Pet. App. 6 at 22.) Here, the Ninth Circuit focused on Rowan's testimony recounting Fauber's alleged confession. Neither the CSC nor the Ninth Circuit could reasonably rely on this testimony as corroborating evidence of Buckley's account of the Urell crime, in light of jury instructions cautioning against the use of accomplice testimony as corroboration. (Pet. App. 8 at 1, 3 (accomplice testimony must be corroborated, and "[t]he required corroboration . . . may not be supplied by the testimony of any . . . of his accomplices.")) What's more, Rowan was not a percipient witness to the

critical event here: the killing of Urell. He denied being present at the crime scene when this happened. This is why the prosecutor repeatedly told the jury that its verdict hinged on whether they believed Buckley. No reasonable court would find harmless error under these circumstances.

The *Fauber* decision sends a clear signal to prosecutors in the Ninth Circuit: vouching is *per se* harmless error, if it is even error at all. Likewise, under *Fauber*, trial courts need not remain vigilant for improper argument that might unfairly sway the jury against the defendant. That is because generic instructions will suffice to rectify any vouching, even if it is blatant and case-pervasive. This Court should grant certiorari to clarify that *Donnelly* and its progeny continue to prohibit impermissible vouching and that only specific curative instructions may ameliorate pervasive misconduct.

B. This case presents an opportune vehicle to resolve a circuit split regarding the scope of this Court's "clearly established federal law."

Granting certiorari will also resolve a circuit split regarding the scope of this Court's case law prohibiting improper prosecutorial argument. The Ninth Circuit's parsimonious approach to due process in *Fauber* stands in contrast to decisions from the Sixth and Third Circuit, both of which carefully review state-court decisions under § 2254(d)(1) using the factors identified in *Donnelly* and its progeny. At the other end of the spectrum, the Eleventh

Circuit has held there is no clearly established federal law supporting such claims.

In *Stermer v. Warren*, 959 F.3d 704 (6th Cir. 2020), the Sixth Circuit addressed a claim of prosecutorial misconduct in closing argument. "[T]he prosecutor repeatedly branded Stermer a liar, misrepresented her testimony, and disparaged her while bolstering other witnesses." *Id.* at 711. As in Fauber's case, trial counsel did not object. *Id.* at 735. As in Fauber's case, the State defended the judgment with reference to a generic jury instruction at trial. *Id.* (trial court instructed that "remarks by attorneys are not evidence.") The Sixth Circuit properly found this instruction was categorically insufficient to remedy the prosecutor's improper comments. "The completely generic instruction here, given before the start of trial, does not approach sufficiency under *Donnelly* and *Darden*." *Id.*

Likewise, in *Hodge v. Hurley*, the Sixth Circuit criticized a prosecutor for "repeatedly comment[ing] on the credibility of witnesses" throughout his closing argument. 426 F.3d 368, 377 (6th Cir. 2005). Citing *Young* and *Berger*, the Sixth Circuit held it was "patently improper" for the prosecutor to make such comments. *Id.* at 378. As in *Fauber*, trial counsel failed to object, and the trial court failed to give a specific curative instruction. These errors required relief under an IAC theory, and the state court acted unreasonably in reaching the opposite conclusion.

> We conclude that it was unreasonable for the state court to conclude that there was no reasonable probability that, *had proper objections been lodged (forcing the prosecutor to avoid repeating his improper arguments and suggesting to the court the need for specific curative instructions)*, the jury would have credited Hodge's testimony enough to create a reasonable doubt as to Hodge's guilt.

Id. at 388–89 (emphasis added).

The Third Circuit took a similarly faithful approach to *Donnelly* and *Darden* in *Moore v. Morton*, 255 F.3d 95 (3d Cir. 2001). There, a prosecutor made a number of inappropriate comments about the race of the victim, inviting the jury to convict the defendant based on racial bias. Unlike Fauber's trial, "the court specifically instructed the jury to disregard the prosecutor's remarks, declaring that such racial references were invalid." *Id.* at 115. The state appellate court held that this instruction remedied any prejudice from the improper, racist arguments. *Id.* The Third Circuit found the error to be incurable: the evidence against Morton was particularly weak. *Id.* at 119 (noting absence of "strong physical, circumstantial, testimonial, or corroborating identification evidence . . . .") Thus, even though the trial judge gave a specific curative instruction, Supreme Court law required habeas relief under § 2254(d)(1). After all, *Donnelly* made clear that "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect." 416 U.S. at 644.

Other Circuits, like the Ninth Circuit, have been less consistent in enforcing the due process rights guaranteed by *Donnelly* and its progeny. The Eleventh Circuit is an extreme example. According to the Eleventh Circuit, the *Darden-Donnelly* line of cases is not "clearly established federal law" for purposes of § 2254(d)(1) review. *See Reese v. Sec'y, Florida Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012) ("The Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process.")

State courts likewise fall short in enforcing *Donnelly* and *Darden*, even in the face of egregious misconduct. *See, e.g., Anthony v. Louisiana*, 143 S. Ct. 29 (2022) (Sotomayor, J., dissenting from denial of certiorari) (Louisiana appellate court erroneously found harmless error where grand jury prosecutor testified that he personally believed the state's witnesses were credible, that the defendant was guilty, and that extra-record evidence confirmed his guilt).

Fauber presents an ideal vehicle for resolving the dispute among the circuits about the scope of the *Darden-Donnelly* line of cases, particularly in the context of § 2254(d).

CONCLUSION

Based on the foregoing, Fauber respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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