No. 22-6909

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

At petitioner Curtis Fauber's trial for first-degree murder, the State introduced the plea agreement of Fauber's accomplice, Brian Buckley, who testified against Fauber at trial. Fauber argued on direct appeal that the introduction of Buckley's plea agreement violated his due process rights because, in Fauber's view, certain terms in the agreement had the effect of improperly "vouching" for Buckley's credibility. The California Supreme Court held that Fauber forfeited the claim by failing to object at trial and that he suffered no prejudice in any event. Fauber then renewed his vouching claim in federal habeas proceedings. The question presented is:

Whether the court of appeals properly affirmed the denial of federal habeas relief on the grounds that Fauber procedurally defaulted his vouching claim and that he did not suffer sufficient prejudice to warrant relief in any event.

PARTIES TO THE PROCEEDING

The petitioner is Curtis Lynn Fauber. The respondent is Oak Smith, Acting Warden of San Quentin State Prison.[1]

[1] This Court's docket currently lists Ronald Davis as the respondent. Because Davis is no longer the warden of San Quentin State Prison, the new acting warden, Oak Smith, should be automatically substituted.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Fauber v. Davis, No. 17-99001 (October 13, 2022) (denying petition for rehearing and rehearing en banc after affirming district court judgment) (this case below).

United States District Court for the Central District of California:

Fauber v. Davis, No. CV 95-6601-GW (May 10, 2017) (denying habeas petition) (this case below).

California Supreme Court:

In re Fauber, No. S134365 (July 25, 2012) (denying petition on state collateral review).

In re Fauber, No. S065139 (March 14, 2001) (denying petition on state collateral review).

In re Fauber, No. S030753 (August 16, 1995) (denying petition on state collateral review).

People v. Fauber, No. S005868 (June 18, 1992) (affirming judgment on state direct appeal).

California Superior Court, Ventura County:

People v. Fauber, No. CR 21927 (September 18, 1987) (entering judgment of conviction and sentence).

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STATEMENT

Petitioner Curtis Fauber was sentenced to death for his role in the 1986 murder of Tom Urell. Pet. App. 2, pp. 5-13. "[O]verwhelming evidence" at trial, *id.* at 44, showed that Fauber "bludgeoned Urell to death with the blunt side of an ax" in the course of stealing cocaine and other items from Urell's residence, *id.* at 5.

1. Fauber and Brian Buckley met in 1985 while serving in the Army. Pet. App. 6, p. 12. A year later, Fauber traveled from New Mexico to Ventura, California to stay with Buckley. *Id.* Fauber then met Jan Jarvis and Melville Rowan, neighbors of Buckley's, and the four began using drugs together. *Id.* On one occasion while they were all in Rowan's apartment, Jarvis mentioned that she had a former boyfriend, Tom Urell, who was a drug dealer. *Id.* Jarvis drew a map of the location of Urell's house, as well as the interior layout, and Buckley, Rowan, and Fauber discussed burglarizing the home. *Id.* All four drove by the house on one occasion, and Fauber and Buckley went twice more to "'scope [it] out.'" *Id.*

According to Buckley, who testified against Fauber at trial pursuant to a plea agreement, Pet. App. 6, pp. 12, 22-24, he and Fauber returned to Urell's house around midnight, several days after the initial drive-by, *id.* at pp. 12-13. Fauber had a sawed-off shotgun; Buckley had a .22 caliber handgun. *Id.* at p. 13. They also had gloves, duct tape, and bandanas and hats to cover their faces. *Id.* Fauber told Buckley that Fauber might have to kill Urell to keep him from being a witness. *Id.*

Both men entered Urell's home and went to the bedroom; Urell was sleeping, but he woke up as they approached him. Pet. App. 6, p. 13. Fauber used a fake Mexican accent and told Urell to lie on his stomach and not move. *Id.* Fauber taped Urell's wrists behind his back. *Id.* Urell told Fauber and Buckley to take whatever they wanted. *Id.* Fauber and Buckley searched the room and took cocaine paraphernalia, a small bag of cocaine, rolls of quarters, some silver dollars, a calculator, and a locked safe (which Urell said contained nothing valuable, and to which he did not know the combination). *Id.*

Fauber found an ax under the bed and used it to strike Urell on the back of the neck. Pet. App. 6, p. 13. Buckley heard a loud thud and a hissing noise come from Urell, who sounded like he was having trouble breathing. *Id.* Buckley went to the kitchen, and Fauber hit Urell with the ax a second time; the hissing was no longer audible. *Id.* When Fauber came to the kitchen, Buckley asked if Urell was dead; Fauber said he did not know. *Id.* Fauber then went back to the bedroom and Buckley heard two more hits. *Id.* Urell's dead body was later discovered by a friend. *Id.* at p. 14.

A subsequent autopsy showed that Urell "bore a series of four overlapping premortem blows from a rectangular object consistent with the blunt side of an ax." Pet. App. 6, p. 15. The county medical examiner "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." *Id.*

2. Fauber was later arrested, tried for the murder, convicted, and sentenced to death. Pet. App. 2, pp. 10-13. The State's principal witnesses at trial were Rowan and Buckley. *Id.* at p. 10. Rowan testified that he saw Fauber and Buckley return home late on the night of the murder in the victim's car, *id.* at 7; that Rowan "saw a safe in the back" of the car, *id.*; and that Fauber admitted to Rowan that "he had hit Urell with an ax and believed he had killed him," *id.* at p. 8. Buckley testified, in detail, about the murder and Fauber's role in it. *Id.* at p. 9. The State also introduced statements that Fauber himself made, as well as physical evidence connecting him to the murder: Fauber admitted to police "that Jarvis told him about Urell and that he scouted Urell's house with Jarvis, Rowan, and Buckley." *Id.* at p. 24. Physical evidence included a piece of a calling card registered to the victim that the police found in Fauber's wallet and a road atlas taken from the victim that the police found in the camper where Fauber lived. *Id.* at p. 10.

Both Rowan and Buckley testified pursuant to agreements with the State. Pet. App. 6, pp. 15-16. As relevant here, in exchange for his truthful testimony at Fauber's trial, the State allowed Buckley to plead guilty to and be sentenced for second-degree murder, rather than face a trial for first-degree murder with

special circumstances.[2] *Id.* at p. 16. Before Buckley's testimony, and then again during closing argument, the prosecutor read to the jury—without objection—the text of Buckley's plea agreement. *Id.* at p. 22. The agreement provided in relevant part: "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." *Id.* at pp. 22-23. The agreement also stated, "[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." *Id.* at p. 23 (internal quotation marks omitted).

After the jury found Fauber guilty of robbery, burglary, and first-degree murder, and found true the special circumstance allegations necessary to make Fauber eligible for the death penalty, Pet. App. 6, p. 11, the trial proceeded to the penalty phase. The prosecution presented evidence of two uncharged murders attributed to Fauber, as well as several additional violent attacks on Kim Dowdy, the estranged wife of one of the murder victims. *Id.* at pp. 45-49. Evidence showed, for example, that Fauber committed three violent attacks against Dowdy because Fauber was romantically interested in her but the

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[2] The plea agreement also required Buckley to testify at a separate trial for Christopher Caldwell, who assisted Fauber in murdering David Church; this murder was one of the uncharged homicides for which evidence was presented at the penalty phase. *See id.* at pp. 46-48; *infra* pp. 4-5 (discussing penalty phase).

relationship was not progressing to his satisfaction. *Id.* at pp. 48-49. Fauber threatened to kill her with a gun, choked her into unconsciousness, and held a knife to her throat. *Id.*

During the defense case in mitigation, a social anthropologist, as well as several of Fauber's siblings and friends, testified about Fauber's impoverished and traumatic childhood. Pet. App. 6, p. 50. A mental health expert also testified that there was a possibility that Fauber had organic brain damage. *Id.* at p. 51. And it was stipulated that Fauber was not violent while in jail prior to trial. *Id.* The jury returned a verdict of death. *Id.* at p. 12.

3. On direct appeal, the California Supreme Court affirmed Fauber's conviction and sentence. Pet. App. 6, pp. 1, 12, 78. Among several constitutional challenges, Fauber argued that the prosecutor improperly vouched for Buckley's credibility by reading the text of the plea agreement to the jury. *Id.* at p. 22. The California Supreme Court recognized that it is generally improper for prosecutors to "express a personal opinion or belief in a witness's credibility" because of the "danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial.'" *Id.* at p. 24 (internal quotation marks omitted). In Fauber's view, it was equivalent to "vouching," in violation of the Due Process Clause, for the prosecutor to read the portions of Buckley's plea agreement stating that Buckley would testify only if the prosecutor determined that he was telling the truth. *Id.*

The California Supreme Court first held that the claim was forfeited because "[d]efense counsel made no objection to the reading of the plea agreement" at trial. Pet. App. 6, p. 24. Under state-law forfeiture principles, that failure barred Fauber from "complaining about [the issue] on appeal." *Id.* (citing Cal. Evid. Code § 353). The court then explained that, even if the claim had been preserved, there was "no reversible error." *Id.* at p. 24; *see id.* at pp. 24-27. While the court "agree[d] that the plea agreement's reference to the [prosecutor's] preliminary determination of Buckley's credibility had little or no relevancy to Buckley's veracity at trial," and thus "should have been excised on a timely objection on the ground of irrelevancy" under state-law evidentiary rules, *id.* at pp. 24-25, the court concluded that any error "was harmless under the[] circumstances," *id.* at p. 25. As the court explained, any suggestion that the prosecution had based its credibility determination on "extrajudicial information" was, at most, "oblique[]." *Id.* "[C]ommon sense suggest[ed]" to the court 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." *Id.* The reading of Buckley's plea agreement "cut[] both ways" because it suggested to the jury, "not only an incentive to tell the truth," "but also a motive to testify as the prosecutor wishes." *Id.* And the jury instructions made clear that the jurors were "the sole judges of believability of a witness and the weight to be given to his testimony." *Id.* at p. 26; *see id.* ("We presume, in the absence of any contrary

indication in the record, that the jury understood and followed this instruction.").

Fauber also argued that the prosecutor's introduction of the plea agreement "made the trial court a monitor of Buckley's truthfulness, and thereby placed its prestige behind Buckley's testimony." Pet. App. 6, p. 25. Fauber emphasized that the agreement provided, "'[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.'" *Id.* As with the other portion of the plea agreement challenged by Fauber, the court concluded that this portion should have been excluded if there had been a timely objection on relevancy grounds. *Id*. at p. 26. Again, however, the court held that any error was not prejudicial: In the court's view, the "jury could not reasonably have understood Buckley's plea agreement to relieve it of the duty to decide . . . whether Buckley's testimony was truthful." *Id*. The jury instructions expressly directed jurors to make their own credibility determination. *Id.* And it was sufficiently clear in context that any determination by the trial court that Buckley testified untruthfully would be made "after [Fauber's] trial," not as part of Fauber's trial, in the event that "the prosecutor sought to repudiate its agreement with Buckley." *Id.*

4. Fauber renewed his due process challenge to the introduction of the Buckley plea agreement in a federal habeas petition.

a. In a 2002 order, the district court ruled that Fauber's objection was procedurally barred due to defense counsel's failure to object to the introduction of the plea agreement at trial. 12-SER-3229-3231.[3] In a subsequent order, the district court concluded that relief was likewise barred under the deferential standard of review governing federal habeas claims "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). *See* Pet. App. 4, pp. 13-17. As the court explained, "[t]he California Supreme Court was not objectively unreasonable" in concluding that Fauber failed to show prejudice from introduction of the Buckley plea agreement. *Id*. at p. 16. "Buckley's credibility," the court determined, was "supported by evidence introduced at trial, including many aspects of . . . Rowan's testimony." *Id.* "[I]n light of [such] corroborating evidence," the court held that it was reasonable for the California Supreme Court to conclude that the "admission of the plea agreement's credibility provisions . . . did not so infect the trial with unfairness as to violate due process." *Id.*

b. The court of appeals unanimously affirmed the district court's denial of Fauber's challenge to the introduction of Buckley's plea agreement. Pet. App. 2, p. 5.[4] The court first held that the challenge was procedurally barred

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[3] Fauber did not include this order in the petition appendices. The citation in the text is to the State's Supplemental Excerpts of Record filed in the court of appeals (docket number 17-99001).

[4] Judge Watford dissented with respect to a different claim. Pet. App. 2, pp. 48-61. Fauber does not raise that claim in this petition for a writ of certiorari.

based on trial counsel's failure to object. *Id.* at pp. 25-26. The court explained that it had "repeatedly recognized" the enforceability of California's contemporaneous-objection requirement. *Id.* at p. 26. And Fauber failed to demonstrate cause and prejudice to overcome his procedural default: Fauber raised his "cause and prejudice" argument for "the first time in his reply brief" before the court of appeals. *Id.* at p. 26. And while Fauber argued that ineffective assistance of trial counsel qualified as "cause" excusing the procedural default, he could not show "prejudice" because of "the State's extensive evidence that Fauber killed Urell." *Id.* at p. 27.

The court of appeals also concluded that, even if Fauber's challenge to the introduction of Buckley's plea agreement "[was] not procedurally defaulted," it would still fail. Pet. App. 2, p. 27. The prosecutor's recitation of the agreement did not, the court held, have a "'substantial and injurious effect or influence'" on the jury's verdict. *Id.* at p. 28 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).[5] The court of appeals emphasized, among other things, that the record showed that "the prosecutor focused heavily on the body of evidence that the jury had heard," as opposed to the terms of Buckley's plea agreement, *id.* at p. 20; that the trial court provided "repeated admonitions to jurors that they"

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[5] Fauber argued that the California Supreme Court's direct-appeal affirmance did not qualify as an adjudication "on the merits" for purposes of deference under Section 2254(d) because of "the California Supreme Court's reliance on a state law harmlessness standard." Pet. App. 2, p. 27. The court of appeals saw no "need [to] resolve this" question because Fauber's claim failed "under the standard in [*Brecht*]" in any event. *Id.*; *see generally Brown v. Davenport*, 142 S. Ct. 1510 (2022).

alone were responsible for "assess[ing] witness credibility," *id.* at p. 21; and that 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," *id.* at p. 22.

Fauber sought rehearing en banc, but the court denied his petition after no member of the court requested a response. Pet. App. 1.

ARGUMENT

Following the denial of his petition for federal habeas relief, Fauber seeks further review of his claim that the prosecutor improperly "vouch[ed]" for the credibility of Fauber's accomplice, Brian Buckley, who testified against Fauber at trial. Pet. 24. According to Fauber, the prosecutor attempted to "shore up" Buckley's credibility by reading to the jury certain terms in Buckley's plea agreement—in particular, terms stating that "Buckley had already submitted to an interview with the prosecutor to assess his credibility." Pet. 1. This Court should deny certiorari: As the court of appeals correctly held, Fauber procedurally defaulted his vouching claim by failing to raise it before the trial court. In any event, there was no reversible error because the prosecutor said nothing that "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." Pet. App. 2, p. 25 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Indeed, there was "overwhelming evidence of Fauber's depraved ax-murder killing of Urell." Pet. App. 2, p. 44. And contrary to Fauber's assertion, the court of appeal's fact-intensive decision does not conflict with several federal appellate decisions holding that habeas

relief was warranted in circumstances highly dissimilar from those at issue here.

1. Fauber procedurally defaulted his vouching claim, thereby barring further review on federal habeas. Pet. App. 2, p. 25. A federal court may not review a state prisoner's habeas claim if it was previously rejected by a state court on adequate and independent state law grounds, such as waiver or forfeiture. *Beard v. Kindler*, 558 U.S. 53, 55 (2009); *see, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). In this case, both the district court and court of appeals concluded that Fauber's vouching claim was procedurally barred because neither he nor defense counsel objected at trial when the prosecutor read Buckley's plea agreement to the jury. *Supra* pp. 7-8; *see, e.g.*, Pet. App. 2, pp. 25-26. Fauber provides no basis in his petition to conclude otherwise. Indeed, while the petition's background section briefly acknowledges the court of appeals' procedural-default holding, Pet. 19, the body of the petition fails entirely to address it. That alone provides a sufficient basis for denying certiorari.

2. Fauber's vouching claim also fails on the merits. "Vouching" occurs when a prosecutor expresses his personal opinion about the guilt of the defendant, thereby "convey[ing] the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges . . . ." *United States v. Young*, 470 U.S. 1, 18 (1985). While such statements are improper, they require reversal of a conviction only if they so "infect[] the trial with unfairness

as to make the resulting conviction a violation of due process." Pet. 3 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Consistent with that standard, the California Supreme Court rejected Fauber's vouching claim on direct appeal. As the court acknowledged, the prosecutor's decision to read Buckley's plea agreement to the jury—in particular, the portion of the agreement stating that "the District Attorney's office [had] assess[ed] [Buckley's] credibility," Pet. App. 6, p. 23—bore some resemblance to "vouching." *Id.* at pp. 24-25. But it did not rise to the level of reversible constitutional error. *Id.* at p. 24. Unlike typical "vouching," the reading of Buckley's plea agreement "cut[] both ways" because it suggested to the jury that Buckley had, "not only an incentive to tell the truth," "but also a motive to testify as the prosecutor wishe[d]." *Id.* at p. 25. And the mention of the prosecutor's credibility determination at most "obliquely" suggested that "extrajudicial information" had led the prosecutor to deem Buckley credible. *Id.* For those reasons, and because the jury instructions made clear that the jurors were "the sole judges of believability of a witness," *id.* at p. 26, the reading of Buckley's plea agreement was not so unfair or prejudicial as to violate due process.

For similar reasons, the court of appeals properly denied federal habeas relief. After concluding that Fauber's vouching claim was procedurally defaulted, the court went on to hold that the claim would fail even if it "were not procedurally defaulted" because Fauber suffered no prejudice. Pet. App. 2,

p. 27; *see id.* at pp. 20-22, 27-28.[6] The "evidence against Fauber was overwhelming," *id.* at p. 22; the "prosecutor focused heavily on the body of evidence that the jury had heard" *id.* at p. 20; and the trial court issued "repeated admonitions to jurors" that they alone "would assess witness credibility," *id.* at p. 21; *see supra* p. 9.[7]

The court of appeals also mentioned the "'common sense' consideration[] 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. 20 (quoting Pet. App. 2, pp. 20-21); *see supra* p. 6. In Fauber's view, this observation has "far-reaching implications," making "a nullity of [the] rule" against vouching. Pet. 20. That is incorrect. Far from holding that vouching is "*per se* harmless error," *id.*, the court of appeals simply recognized—as one of multiple grounds for rejecting Fauber's vouching claim—

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[6] As discussed above, *supra* p. 9, n.4, the court of appeals concluded that Fauber's claim fails under the harmless-error standard recognized in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See* Pet. App. 2, p. 27. That determination made it unnecessary for the court of appeals to address the State's argument that the deferential standard under Section 2254(d) bars federal habeas relief. *See id.* This Court, however, could not grant the relief that Fauber requests without applying Section 2254(d). *See* C.A. Answering Br. 58-59 (explaining why deference under Section 2254(d) applies to Fauber's vouching claim).

[7] Without citing any precedents, Fauber asserts that, in considering whether the evidence against him was "overwhelming," the court of appeals should have disregarded the testimony of Melville Rowan. Pet. 23. Rowan was an "accomplice" and, in Fauber's view, accomplice testimony "must be corroborated." *Id.* But Rowan's testimony *was* corroborated—by both the physical evidence connecting Fauber to the offense and the statements that Fauber himself made to police. Pet. App. 2, p. 24; *see supra* p. 3.

that vouching will rarely be sufficiently prejudicial, on its own, to justify reversal of a conviction, *see* Pet. App. 2, pp. 20-21. This Court has not suggested otherwise. To the contrary, it has consistently made clear that "one moment in an extended trial" will rarely render a trial "so fundamentally unfair as to deny . . . due process." *Donnelly*, 416 U.S. at 645; *see Darden*, 477 U.S. at 183.

Fauber contends the court of appeals decision is at odds with this Court's decision in *Donnelly*. Pet. 20-22. It is not. In *Donnelly*, the Court deemed two prosecutor remarks improper but non-prejudicial. 416 U.S. at 640-641. The Court emphasized, among other things, that the trial court's "curative instruction[s]" were sufficient to "mitigate" any effect of the improper remarks. *Id.* at 644. As discussed above, both the California Supreme Court and the federal court of appeals made a similar point in rejecting Fauber's vouching claim here. *Supra* pp. 6, 9; *see, e.g.*, Pet. App. 6, p. 26 ("We presume, in the absence of any contrary indication in the record, that the jury understood and followed [its] instruction[s].").

According to Fauber, *Donnelly* "clearly established" a rule that "*specific* curative instructions are required to ameliorate the harm" from prosecutorial misconduct. Pet. 20 (emphasis added). Fauber argues that the court of appeals misapplied that rule here because Fauber's jury received no curative instruction "specific" to the reading of Buckley's plea agreement. *Id.* at 23. But *Donnelly* established no rule requiring any particular degree of specificity in

jury instructions. *See* 416 U.S. at 643-645. The Court simply treated certain prosecutor remarks as non-prejudicial in light of the particular "circumstances of the case"—including, but not limited to, the jury instructions at issue. *Id.* at 648 n.23; *see id.* at 643-645. Similarly, here, the court of appeals deemed any improper vouching non-prejudicial based on a case-specific review of all relevant facts and circumstances. Pet. App. 2, pp. 20-22, 27-28. And the principal reason that the jury instructions at Fauber's trial did not specifically reference Buckley's plea agreement is that Fauber "fail[ed] to object" to the reading of that agreement. *Id.* at p. 25. In light of that failure, as well as the "overwhelming evidence" of Fauber's guilt and the additional considerations discussed above, *id.* at p. 22, there is no basis to set aside the lower courts' rejection of Fauber's vouching claim.

3. Finally, Fauber contends that the court of appeal's resolution of his vouching claim implicates "a circuit split regarding the scope of this Court's case law prohibiting improper prosecutorial argument." Pet. 24. Fauber cites three "decisions from the Sixth and Third Circuit," which, in his view, "stand[] in contrast" with the decision below because they "carefully review[ed] state-court decisions under § 2254(d)(1)." *Id.*; *see id.* at 24-27. Fauber is incorrect: in the cases that he invokes, the courts of appeals held that habeas relief was warranted in circumstances that bear little resemblance to those at issue here.

In *Stermer v. Warren*, 959 F.3d 704, 719-720 (6th Cir. 2020), the prosecutor "repeatedly" called the defendant a "liar"; "bolstered the testimony

of . . . witnesses"; "misstated facts and presented facts not in evidence"; and "injected race into the proceedings." In *Hodge v. Hurley*, 426 F.3d 368, 277-285 (6th Cir. 2005), the prosecutor repeatedly attacked the credibility of defense witnesses, *id.* at 377; improperly bolstered the credibility of key prosecution witnesses; misrepresented the evidence; and made a number of improper, derogatory comments about the defendant's character. And in *Moore v. Morton*, 255 F.3d 95, 99-101 (3d Cir. 2001), the prosecutor improperly argued that race was a factor in the defendant's choice of victim; that the defendant likely required sexual release at the time of the crime (a sexual assault) because his wife had just given birth and was sore from nursing; and that if the jurors did not believe the victim, they would be "perpetrat[ing] a worse assault on her" than the attacker, *id.* at 101. Whether or not federal habeas relief was warranted in those circumstances, the decisions in *Stermer*, *Hodge*, and *Moore* provide no basis for disturbing the court of appeal's case-specific judgment here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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