No. 22-6909

IN THE

Supreme Court of the United States

CURTIS LYNN FAUBER,

Petitioner,

v.

OAK SMITH, WARDEN,

Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

CUAUHTEMOC ORTEGA
Federal Public Defender
AJAY V. KUSNOOR*
JOHN S. CROUCHLEY
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Ajay_Kusnoor@fd.org

Attorneys for Petitioner
**Counsel of Record*

TABLE OF CONTENTS

Page

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Brecht v. Abrahamson,
507 U.S. 619 (1993) 2

Coleman v. Thompson,
501 U.S. 722 (1991) 2

Darden v. Wainwright,
477 U.S. 168 (1986) 1, 3, 6

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 1, 3, 6

Edwards v. Carpenter,
529 U.S. 446 (2000) 2

Hodge v. Hurley,
426 F.3d 368 (6th Cir. 2005) 6

Moore v. Morton,
255 F.3d 95 (3d Cir. 2001) 6

Napue v. Illinois,
360 U.S. 264 (1959) 4

Stermer v. Warren,
959 F.3d 704 (6th Cir. 2020) 6

Strickland v. Washington,
466 U.S. 668 (1984) 2

U.S. v. Young,
470 U.S. 1 (1985) 4

Federal Statute

28 U.S.C. § 2254(d) 5

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition ("BIO") asserts three arguments for denying Curtis Fauber's petition for writ of certiorari ("Pet."). First, he claims that the lower courts' application of a procedural bar to Fauber's prosecutorial misconduct claim renders that claim unreviewable. Second, he argues that Fauber's vouching claim fails on the merits. Third, he disputes the existence of a circuit split regarding the application of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Darden v. Wainwright*, 477 U.S. 168 (1986), two cases that prohibit prosecutorial misconduct at trial. Each argument is unavailing for the reasons stated below.

As Respondent correctly notes, the Ninth Circuit ruled that Fauber's vouching claim was procedurally defaulted because defense counsel failed to object to the prosecutor's use of Buckley's plea agreement. (BIO at 11.) Respondent contends that Fauber's petition "provides no basis" to conclude that his prosecutorial misconduct claim is reviewable in this Court. (BIO at 11.) This argument rests on willful blindness to this Court's case law.

Here, the Ninth Circuit denied *interrelated* ineffective assistance of counsel and prosecutorial misconduct claims. The prosecutor improperly vouched for Buckley by invoking the "truthful testimony" provisions of his

plea agreement, and trial counsel provided ineffective assistance by failing to object. The Ninth Circuit reached the merits of both claims, denying both on prejudice grounds. (Pet. at 17-19 (summarizing opinion).) It first denied the ineffective-assistance claim, finding Fauber failed to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), from trial counsel's failure to object. On the merits of Fauber's prosecutorial misconduct claim, the Ninth Circuit again held that the claim failed on prejudice grounds. "[F]or the same reasons that we rejected Fauber's ineffective assistance claim, the prosecution's reliance on Buckley's plea agreement did not exert a substantial and injurious effect on the jury [under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).]" (Petitioner's Appendix ("Pet. App.") 2 at 28.)

Critically, procedural default for failure to object is not an absolute bar to merits review, as Respondent suggests. As Respondent is no doubt aware, trial counsel's ineffectiveness supplies cause to excuse this default. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (ineffective assistance of counsel may constitute cause to excuse procedural default where it amounts to an independent constitutional violation); *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000) (same). Fauber's allegations of ineffective trial counsel constitute, by definition, a showing of cause and prejudice excusing any procedural default based on the underlying failure to object.

Just as Fauber's claims of ineffective assistance and prosecutorial misconduct are interrelated, so too was the Ninth Circuit's error in affirming the denial of relief on each claim. It bears repeating that the Ninth Circuit applied the same reasoning to each claim, reasoning that is at odds with this Court's clearly established law in *Darden* and *Donnelly*. (*See* Pet. at 19-27.) Certiorari review is appropriate because the Ninth Circuit's analysis of Fauber's interrelated claims conflicts with this Court's case law.

Respondent next contends that Fauber's vouching claim fails on the merits. In his petition for writ of certiorari, Fauber argued that the California Supreme Court and the Ninth Circuit's prejudice analysis makes a nullity of the prohibition against vouching by reasoning 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.) Respondent boldly recasts this language from the opinion as an assertion that "vouching will rarely be sufficiently prejudicial, on its own, to justify reversal of a conviction." (BIO at 14.) Here, Respondent dodges the crux of Fauber's argument, perhaps because this reasoning is indefensible on its own terms. Fauber is unaware of any Supreme Court case authorizing courts to turn a blind eye to blatant prosecutorial vouching based on the assumption that jurors believe prosecutors have already concluded their witnesses are telling the truth. In fact, this Court has done the

opposite—the Court has clearly held it is misconduct for a prosecutor to draw the jury's attention to his or her extra-record verification of a witness's credibility. *See U.S. v. Young*, 470 U.S. 1, 18 (1985) (vouching "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"). Speculation that jurors *always* assume prosecutors believe their witnesses are telling the truth based on out-of-court interviews drains this rule of its force. Such a presumption may also be flatly incorrect. *See Napue v. Illinois*, 360 U.S. 264, 270 (1959) ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.").

Respondent correctly notes that this Court "has consistently made clear that 'one moment in an extended trial' will rarely render a trial 'so fundamentally unfair as to deny . . . due process.'" (BIO at 14 (quoting *Donnelly*, 416 U.S. at 645).) But this principle has little bearing on Fauber's claims because the vouching at Fauber's trial was no fleeting instance of misconduct. Rather, the prosecutor made Buckley's plea agreement the centerpiece of his direct examination. And at closing argument, he informed

the jury that the plea agreement's "truthful testimony" provisions were the "main key" to Buckley's credibility. (Pet. at 7-8, 11.)

Like the Ninth Circuit, Respondent intones that "overwhelming evidence" of guilt supports Fauber's conviction, and like the Ninth Circuit, Respondent points to Rowan's testimony to support this assertion. (BIO at 12-14.) But, as the prosecutor conceded at trial, Fauber's conviction turned on whether the jury believed Buckley (not Rowan), and he conceded the jury could acquit Fauber if they did not believe Buckley. (Pet. App. 7 at 1.) That is because Buckley was the only percipient witness to testify about what happened at Urell's apartment the night that he died. And Rowan's testimony was facially inadequate to corroborate Buckley's account: Rowan was an accomplice, and the jury was instructed not to use one accomplice's testimony to corroborate another's. (Pet. at 23.) In response, Respondent asserts "that Rowan's testimony was corroborated—by both the physical evidence connecting Fauber to the offense and the statements that Fauber himself made to police." (BIO at 13, n.7.) Respondent again dodges the relevant question: he does not attempt to explain how Rowan's testimony could permissibly bolster Buckley's, given that they are both accomplices.

Finally, Fauber's petition explained that there is a Circuit split regarding the scope of the *Donnelly* line of cases under 28 U.S.C. § 2254(d)(1). (Pet. at 24-27.) Pointing to factual differences, Respondent distinguishes

precedent from the Third and Sixth Circuits (*Stermer v. Warren*, 959 F.3d 704 (6th Cir. 2020); *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005), and *Moore v. Morton*, 255 F.3d 95 (3d Cir. 2001)). But he misses the point of Fauber's argument. In these cases, the Third and Sixth Circuits weighed the *specificity* of curative instructions to assess the prejudice resulting from prosecutorial misconduct and trial counsel's failure to object. And they did so despite § 2254(d)'s limitation on relief. In contrast, in *Fauber*, the Ninth Circuit assumed that *generic* jury instructions were sufficient to cure the harm from case-pervasive misconduct, despite this Court's instructions in *Donnelly*.

Tellingly, Respondent's opposition does not address the Eleventh Circuit's approach to record-based prosecutorial misconduct claims under § 2254(d). As Fauber explained in his petition, the Eleventh Circuit has held that neither *Darden* nor *Donnelly* constitutes "clearly established federal law" for purposes of § 2254(d). (Pet. at 27 (citing *Reese v. Sec'y, Florida Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012)). While the Ninth Circuit stopped short of abandoning *Donnelly* and *Darden* in Fauber's case, its lax approach to prosecutorial misconduct cries out for this Court's intervention. Certiorari review is appropriate to clarify that federal habeas courts are obligated to apply *Darden* and *Donnelly* in conducting review under § 2254(d), in line with the Third and Sixth Circuit's case law.

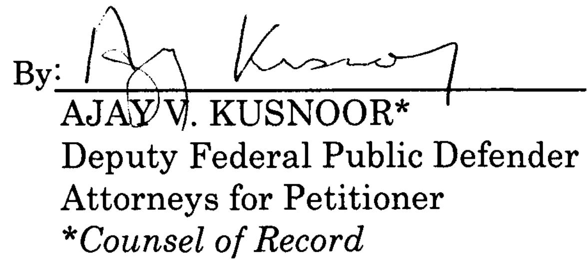
CONCLUSION

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

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: May 8, 2023

By: 
AJAY V. KUSNOOR*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

No. 22-6909

IN THE

Supreme Court of the United States

CURTIS LYNN FAUBER,

Petitioner,

v.

OAK SMITH, WARDEN,

Respondent.

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

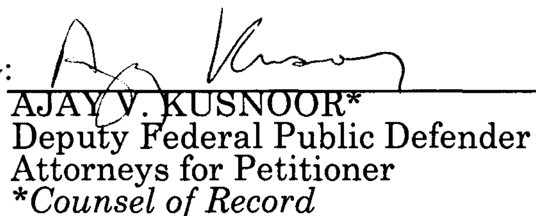
CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I certify that this reply is 7 pages and was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: May 8, 2023

By: 
AJAY V. KUSNOOR*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

No. 22-6909

IN THE

Supreme Court of the United States

CURTIS LYNN FAUBER,

Petitioner,

v.

OAK SMITH, WARDEN,

Respondent.

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

CERTIFICATE OF SERVICE

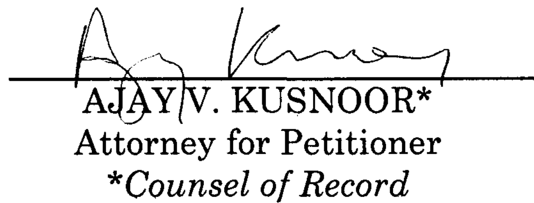
I, AJAY V. KUSNOOR, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), hereby certify that on May 8, 2023, a copy of **REPLY TO RESPONDENT'S BRIEF IN OPPOSITION** were mailed postage prepaid to:

The names and addresses of those served are as follows:

A. Scott Hayward
Office of the Attorney General
300 S. Spring Street
Suite 1702
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 2023.



AJAY V. KUSNOOR*
Attorney for Petitioner
**Counsel of Record*