No. _____ (CAPITAL CASE)

IN THE

SUPREME COURT OF THE UNITED STATES

MICAH CROFFORD BROWN,

Petitioner,

v.

ERIC GUERRERO, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Whether reasonable jurists would disagree that a prosecutor violates a capital defendant's Fifth-Amendment right not to testify at the penalty phase by repeatedly telling the jury that the defendant deserved no mercy because he had not personally begged them for it—because he had not "throw[n] himself on his face in front of the jury and said I did it all, forgive me. It's my fault." ROA.8723.

PARTIES TO THE PROCEEDING

The Petitioner is Micah Crawford Brown. The Respondent is Eric Guerrero, the Director of Texas Department of Criminal Justice, Correctional Institutions Division. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

State v. Brown, Cause No. 27,742 (354th Judicial Dist. Ct., Hunt Cty., May 24, 2013, and Jun. 3, 2013) (conviction of capital murder and sentence of death at trial)

Brown v. State, No. AP-77,019, 2017 WL 5453765 (Tex. Crim. App. Sept. 16, 2015) (affirming conviction and sentence on direct appeal)

Ex parte Brown, No. WR-85,341-01, 2019 WL 4317041 (Sept. 11, 2019) (denying state post-conviction relief)

Brown v. Lumpkin, No. 3:19-CV-2301-L-BN, 2023 WL 158911 (N.D. Tex. Jan. 11, 2023) (adopting magistrate judge's report and recommendations and denying federal habeas relief, and denying certificate of appealability)

Brown v. Lumpkin, No. 23-70004 (5th Cir. Nov. 29, 2024) (unpublished) (denying certificate of appealability)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Micah Brown respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion denying Brown's motion for a certificate of appealability (COA) is attached as Appendix A. The United States District Judge's rulings on and adoption of the Magistrate Judge's findings, conclusions, and recommendations are attached as Appendix B. The findings, conclusions, and recommendation of the United States Magistrate Judge for the Northern District of Texas are attached as Appendix C. The Fifth Circuit's order denying motion for reconsideration is attached as Appendix D.

JURISDICTION

The Fifth Circuit denied Brown's motion for a certificate of appealability on October 18, 2024. App. A. Brown timely filed a motion for rehearing, which the Fifth Circuit re-styled a motion for reconsideration and denied on November 21, 2024. App. D. Brown filed an unopposed application for extension of time to file a petition for writ of certiorari on February 6, 2025. This Court granted that request, extending the time to file until March 21, 2025. Pursuant to that order, and Supreme Court Rule 30.1, this petition is filed timely. This Court has jurisdiction to review this petition under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part, that "[n]o person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution, Section 1, states, in pertinent part, that it is unconstitutional for "any State [to] deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV § 1.

28 U.S.C. § 2253(c)(2) states that "[a] certificate of appealability may issue … only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

Micah Brown was sentenced to death on June 3, 2011, for the murder of Stella "Doc" Ray, his ex-wife, in Greenville, Texas. ROA.8744. The capital indictment alleged the murder occurred in the course of committing obstruction, retaliation, or terroristic threat. ROA.18897.

Facts. Brown and Ray married in 2007, ROA.7967, and divorced in 2010. ROA.7972. The marriage bore two children—Colten, a boy, and Willow, a girl. ROA.7892. After the divorce, Ray planned to move with the children to Marshall, Texas, where she had accepted a teaching job. ROA.7517. A few weeks before her death, her other ex-husband, Tracy, moved into her home with her. ROA.7979-80.

Brown was distraught over the idea of his children moving, and he was jealous of Tracy. ROA.7932; ROA.7969-70. During a visit to Ray's home, Brown got into an argument with Tracy, which resulted in Tracy grabbing Brown and "chok[ing] him out." ROA.7981-82. That incident threw Brown into an emotional spiral: he stopped going to work, stopped sleeping, and became visibly depressed. ROA.7992-93; ROA.8225-27. He would stay up all night using methamphetamine and fishing. ROA 7992.

On July 16, 2011, Brown told Ray he was going to take his own life. ROA.7985. Ray called emergency services to request a welfare check. ROA.8063. Officers responded to Brown's residence and, seeing that he had a sawed-off shotgun, arrested him for possession of an illegal weapon. ROA.7660-61. He was released the following day. ROA.7957.

Three days later, Brown went to Ray's house to pick up their son for a visit. He and Ray got into an argument about the choking incident with Tracy, and Ray prevented Brown from taking their son as planned. ROA.7993-95. After Brown left, Ray filed a family violence report. ROA.7572-73. She told officers Brown had hit her and Colten. ROA.7475-77. Brown later admitted to "flicking" Ray's nose but denied hitting her or Colten. ROA.7996.

The next day, July 20, Brown decided to commit suicide.[1] ROA.8000-01. He went to Ray's home to see his children one last time, but no one was there. ROA.8004-

[1] The family violence report that Ray had filed the day before had not yet been assigned to an officer, nor had anyone, including Ray, told Brown that she had filed a report. ROA.7614; ROA.7997.

05. Brown entered the house to take Ray's stash of marijuana; he also took a shotgun. ROA.8005-07. He continued attempting to reach Ray so he could see his children before he killed himself. ROA.8003-04; ROA.8008. Ray did not answer his calls. ROA.8008. Brown sawed off the barrel of the shotgun he took from Ray's house so that he could use it to kill himself. ROA.8008.

That evening, Brown saw Ray's car drive by his house. ROA.8013-15. He followed in his car and signaled to Ray, who was on the phone, to pull over, which she did. ROA.8016-18. Brown approached Ray's car with Ray still in the driver's seat and asked several times, "Where are the kids?" ROA.7389; ROA.8016. As a police car pulled up behind them, Brown shot Ray with the shotgun he had taken from her house. ROA.8018-19. As Brown fled the scene, the responding officer found Ray in the driver's seat, shot in the head; Colten and Willow were in the back seat. ROA.7400-01.

Brown spent the rest of the night hiding from police. ROA.8029-34. The next morning, he went to a saddlery and asked an employee for a drink of water, ROA.8036-37; another employee called the police. ROA.7728. Brown was taken into custody peaceably. ROA.7736; ROA.7770.

Trial. Brown was indicted for capital murder. ROA.18897. He pleaded not guilty and testified in his own defense at the guilt-innocence phase of his trial. ROA.7963. He chose not to testify at the penalty phase.

In the State's final argument to the jury during the penalty phase, the prosecutor pointed to Brown's decision not to testify at sentencing as an argument against

him, repeatedly telling the jurors that Brown did not deserve their mercy because he did not take the stand and beg for it. The prosecutor told the jury:

> Ladies and gentlemen of the jury, mercy is given by God to those who show true repentance. Right? True repentance. Full unadulterated, unmitigated responsibility. I did it. It's my fault. I'm not blaming my family. I'm not blaming the victim. I'm not blaming society. I'm not blaming drugs. I did it. Please forgive me. Show me mercy, Lord. That's how mercy is given. That's how repentance occurs.
>
> Have you seen that from this Defendant? Absolutely not. So give him what he's asking for. That's what they want you to do when you go back there to make your decision. Think about that.
>
> …
>
> Who do we give life without parole to in a capital murder case? A defendant who throws himself at the mercy of the jury.[2]
>
> …
>
> A defendant throws himself on his face in front of the jury and said I did it all, forgive me. It's my fault.[3]
>
> …
>
> So it's my fault, only me. Blame me. Punish me for what I did. No one else, just me.
>
> That didn't happen and it's not going to happen in this case. …
>
> ROA.8721-8723.

In concluding, the prosecutor again argued that the jury should penalize Brown because he did not ask for redemption:

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[2] At this point, defense counsel objected, stating "[T]hat is not the standard and she is misstating the law. ROA.8722. The objection was overruled. ROA. 8723.

[3] Again, defense counsel objected and again the court overruled, telling the jury, "[W]hatever the attorneys say is not evidence. It's argument." ROA. 8723.

> Ladies and gentlemen, you don't give mercy to someone who hasn't asked for it, who hasn't asked for redemption, who hasn't admitted everything they've done. But you know what you give them? You give them justice under this law, man's law, your law.

ROA.8735.

Brown was sentenced to death. ROA.8166; ROA.8744. The Texas Court of Criminal Appeals (TCCA) affirmed the conviction and sentence. *Brown v. State*, No. AP-77,019, 2015 WL 5453765 (Tex. Crim. App. Sept. 16, 2015).

State Collateral Review. Prior to judgment becoming final, and while his direct appeal was pending, Brown filed an application for state habeas corpus relief. ROA.18908. On September 11, 2019, the TCCA denied relief. *Ex parte Brown*, No. WR-85,341-01, 2019 WL 4317041 (Sept. 11, 2019).

Federal Collateral Review. On September 11, 2020, Brown filed a petition for federal habeas relief under 28 U.S.C. § 2254, asserting eleven claims for relief. ROA.141. While his initial federal habeas petition was pending, Brown filed a motion pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), requesting that the court stay and hold in abeyance his federal habeas proceedings so he could return to state court to exhaust previously unexhausted claims, including his claim that the prosecutor had improperly commented on Brown's Fifth-Amendment right not to testify at sentencing. ROA.816. The district court, adopting the magistrate judge's entered findings, conclusions, and recommendation, denied the request. ROA.1010-11.

Six months later, the court, again accepting the magistrate's recommendation, denied Brown's request to amend his original petition, denied his request for an evidentiary hearing, denied his original petition, and denied a certificate of appealability

(COA). ROA.1869. On February 7, 2023, Brown filed a motion to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e). ROA.1875. The district court denied Brown's Rule 59(e) motion and denied a COA with respect to it. ROA.1911.

In the United States Court of Appeals for the Fifth Circuit, Brown requested a COA on three claims: (1) ineffective assistance of counsel for failure to investigate and present evidence of Brown's Autism Spectrum Disorder (ASD) during the guilt/innocence stage, in violation of the Sixth Amendment; (2) ineffective assistance of trial counsel for failure to investigate and present a complete mitigation case, including evidence of Brown's ASD, during the punishment stage, in violation of the Sixth Amendment; and (3) the prosecutor's statements during the sentencing stage of trial that the jury should not show mercy to Brown unless he asked for it, in violation of Brown's Fifth-Amendment right not to testify at sentencing.

On October 18, 2024, the Fifth Circuit denied Brown's request for a COA. Brown filed a motion for rehearing on November 8, 2024. The Fifth Circuit denied that motion on November 21.

REASONS FOR GRANTING THE PETITION

Brown's petition comes to this Court from the Court of Appeals' denial of his motion for a certificate of appealability (COA). Brown demonstrates the Fifth-Amendment question he presents in this petition is, by this Court's own assessment of an existing split among the circuits, debatable among fairminded jurists and thus meets the standard for granting a COA, virtually by definition.

A certificate of appealability "shall" issue when the defendant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this standard, a defendant must "show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This determination is a "threshold inquiry" that does not permit full consideration of the ultimate merits of the claim. *Id.* at 336–38.

Therefore, "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id*. (quotation and citation omitted). The "question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342. In a death penalty case, doubt must be resolved in favor of the petitioner. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

I. The Court should resolve a circuit split regarding whether a defendant's silence at sentencing is relevant to his remorse and therefore an appropriate subject for prosecutorial argument.

The Fifth Amendment guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (citation omitted). Before the

district court and court of appeals, Brown argued that the prosecutor in his case violated that principle when she exhorted the jurors to give Brown the death penalty because they had had not heard Brown's plea for mercy from his own lips.

The Fifth Circuit found that a COA was not warranted in this case. The court found that reasonable jurists would agree that the prosecutor's comments were not improper because they had neither the effect nor the intent of invoking Brown's right to silence. But, as this Court has recognized, reasonable jurists do not agree on either the relevance of a defendant's silence to the question of remorse or on whether statements such as those made here improperly invoke the right to silence. Because reasonable jurists would—and do—disagree, a certificate of appealability was required.

A. The prosector repeatedly commented on Brown's constitutionally protected right to remain silent at sentencing.

The Fifth Amendment forbids prosecutors from arguing to a jury that they can infer guilt from a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609 (1965). Although this Court has refused "to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned," *Estelle v. Smith*, 451 U.S. 454, 462–63 (1981), that does not mean that a capital defendant who testifies in the guilt-innocence phase has fully waived his Fifth Amendment protection after he has been found guilty and the sentencing phase begins. When a defendant testifies, "[t]he privilege is waived *for the matters to which the witness testifies*, and the scope of the 'waiver is determined by the scope of relevant cross-examination[.]'" *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (quoting *Brown v. United States*, 356 U.S. 148, 154–155

(1958) (emphasis added)). Therefore, even when a defendant admits to incriminating acts charged against him, he still has not waived his Fifth-Amendment privilege at sentencing. *See Mitchell*, 526 U.S. at 324-25.

Brown's desire for the jury's mercy, or whether he believed he deserved it, was not one of the matters on which the prosecution cross-examined him at the guilt-innocence phase. The prosecutor's closing-argument references what Brown had not said on that subject effectively punished him for exercising his right to stay silent about it at sentencing.

The facts and holding of *Lesko v. Lehman*, 925 F.2d 1527 (3rd Cir. 1991), speak directly to the concreteness of the constitutional violation here. In *Lesko*, the defendant presented mitigating evidence in part by taking the witness stand himself and giving "testimony of a biographical nature[.]" *Lesko*, 925 F.2d at 1533. At closing argument, the prosecutor attacked the defendant because, in his attempt to mitigate his penalty with his own testimony, the defendant had supposedly lacked the "'common decency to say I'm sorry for what I did.'" *Id.* at 1544. The Third Circuit held that, even though the defendant had chosen to testify at the sentencing phase, "the prosecutor's criticism of [the defendant's] failure to express remorse penalized the assertion of his fifth amendment [*sic*] privilege against self-incrimination, in violation of the rule in *Griffin v. California*." *Id.* at 1545.

B. This Court has recognized disagreement regarding the relevance of a defendant's silence to the question of remorse.

In *White v. Woodall*, this Court stated that *Mitchell*, cited above, left unresolved the question "'[w]hether silence bears upon the determination of a lack of remorse'" for purposes of sentencing. *White v. Woodall*, 572 U.S. 415, 421-22 (2014) (citation omitted). Justice Scalia, writing for the Court, noted that, while "[t]he Courts of Appeals have recognized that *Mitchell* left this unresolved[,] their diverging approaches to the question illustrate the possibility of fairminded disagreement." *Id.* at 422 n.3 (comparing *United States v. Caro*, 597 F.3d 608, 630 (4th Cir. 2010) (reasoning that "*Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the non-statutory aggravating factor of lack of remorse"), with *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008) (holding that "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse[,] which could be "properly considered at sentencing[.]") However, the Court found that the question whether remorselessness could be inferred from silence was still not before it in *White*, so the lower courts were left to their "fairminded disagreement."

The circuit split that the Court acknowledged in *White* persists. *See United States v. Schlesinger*, No. CR-18-2719 TUC RCC (BGM), 2021 WL 5579235, at *14 (D. Ariz. Nov. 29, 2021) (collecting cases on "whether silence bears upon the determination of a lack of remorse" and noting that "[t]he circuits are split on this issue"). Indeed, the Fifth Circuit recently described the constitutional status of drawing "an adverse inference from a defendant's silence" as a "difficult question." *United States*

v. Sepulveda, 64 F.4th 700, 711 (5th Cir. 2023); *see also Lesko v. Lehman*, discussed *supra*.

In this case, the Court of Appeals applied its settled, disjunctive, two-pronged test in reviewing the district court's decision. According to that test, a prosecutor violates the defendant's right not to testify if (1) the prosecutor's manifest intent was to comment on the defendant's silence or (2) the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. *United States v. Murra*, 879 F.3d 669, 683 (5th Cir. 2018) (setting forth standard). App. A at 11 (citing *Rhodes v. Davis*, 852 F.3d 422, 432-33 (5th Cir. 2017)).

Addressing the first prong, the Court of Appeals said that there is no manifest intent to comment on a defendant's silence "if there exists an 'equally plausible explanation for the remark[.]'" App. A at 12 (citing *United States v. Davis*, 609 F.3d 663, 685 (5th Cir. 2010)). Based on this criterion, the Court of Appeals reasoned that no COA should issue because "[m]ost persuasively, the prosecutor may have been referencing Brown's apparent lack of remorse for murdering his ex-wife as demonstrated by … the trial evidence[.]" App. A at 13. The Court of Appeals added that "[t]he prosecutor may also have been referencing the testimony of mitigation witnesses … who testified regarding the effect of Brown's drug dependency and the corrupting effect of the violent community in which he was raised."

Turning to the second prong—whether the jury would naturally and necessarily construe the remarks on Brown's failure to testify in the penalty phase—the

Court of Appeals relied on its reasoning in analyzing the first prong and added nothing. *See* App. A at 13-14. The Court of Appeals summarily stated that "[t]he jury could have construed the prosecutor's remarks as referencing Brown's apparent lack of remorse or the testimony of Brown's mitigation witnesses." *Id.* at 14.

C. Contrary to the Fifth Circuit's conclusion, and consistent with this Court's precedent, there is "fairminded disagreement" about the intent and effect of the prosecutor's argument.

The Fifth Circuit's touchstone for analyzing this claim is whether the prosecutor "'focused the jury's attention on the fact that the defendant[ ] did not testify[.]'" *Murra*, 879 F.3d at 683 (citation omitted). If it is reasonably debatable that she did, the Court of Appeals was incorrect to deny a certificate of appealability on this claim.

The Court of Appeals offered two alternatives for where the prosecutor might have been focusing the jury's attention: to Brown's apparent lack of remorse and to the testimony of mitigation witnesses. It is reasonably debatable whether the first is permissible under the Fifth Amendment. The second is not reasonable at all.

1. Lack of remorse is debatably an unconstitutional ground on which to deny Brown's COA.

If inferring an "apparent lack of remorse" from Brown's silence at the penalty phase is unconstitutional, it cannot be an "equally plausible explanation" for the prosecutor's repeated declarations that Brown deserved no mercy from the jury because he had never begged them for it. However, Brown does not have to win the merits of that constitutional argument here. Rather, he wins here because by this Court's own assessment in *White*, inferring remorselessness from silence is *debatably* unconstitutional. Because the constitutional status of inferring lack of remorse from silence is

reasonably debatable, the Court of Appeals could not deny Brown a certificate of appealability.

This Court itself has said as much, noting that the Courts of Appeals' "diverging approaches to the question illustrate the possibility of fairminded disagreement." *White*, 572 U.S. at 422 n.3. That possibility, according to this Court in *Miller-El*, 537 U.S. 322, 342 (2003), means the Court of Appeals had to issue a COA in this case: "The question [for a COA] is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342. Since at least 2014, when White was decided, the issue at the center of this case—indeed, the very question presented—is unresolved among various courts' "fairminded disagreement."

Because the test is a disjunctive one, the debatability of the first question should resolve this case. However, the court of appeals' resolution of the second inquiry was also incorrect. It found that no reasonable jurist would debate that the jury would "'naturally and necessarily construe [the prosecutor's remarks as a comment on the defendant's failure to testify[.]'" App. at 13 (citation omitted). But reasonable jurists have debated it in at least one similar case and come out the other way. Addressing a prosecutor's closing remark that the defendant had lacked the "common decency to say I'm sorry for what I did," the Third Circuit concluded that "the natural and necessary interpretation of these comments would be that [the defendant] had a moral or legal obligation to address the charges against him—indeed, to apologize for his crimes—during his penalty phase testimony, and that the jury could and should punish him for his failure to do so." *Lesko,* 925 F.2d at 1544.

This reasoning applies well to this case, especially considering the Third Circuit came to its "natural and necessary" interpretation even though the defendant in *Lesko* testified in his own mitigation case at the penalty phase. In that respect, this is a somewhat clearer or easier case than *Lesko*: Brown exercised his right not to testify at sentencing, so his silence was a more "natural and necessary" object of the jury's focus when they heard the prosecutor comment and what Brown had failed to say.

2. The "natural and necessary" focus of attention was on Brown's failure to speak at the penalty phase.

The Court of Appeals also speculated that the jury could have interpreted the prosecutor's remarks as focusing on the testimony of the friends and family members whom Brown called as mitigation witnesses. *See* App. A at 13-14. This supposed interpretation is, simply put, an impossible one. To see why, "we must examine the challenged prosecutorial remark in its trial context." *Lesko*, 925 F.2d at 1544 (citing *United States v. Robinson*, 485 U.S. 25, 31–33, (1988); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978)).

The prosecutor focused the jurors' attention on Brown's silence as soon as she began her rebuttal, and she re-focused their attention on Brown's silence as the last thing they would hear before they began deliberating. ROA.8721-22, 8735. First, the prosecutor summarized the theological view that "mercy is given by God to those who show true repentance" and described examples of very specific statements and behavior as "how repentance occurs." ROA.8721-22. Then she asked the jury, "Have you seen that from this Defendant? Absolutely not." *Id.* at 8722. That is an unmistakable

comment on Brown's absence from the witness stand during the penalty phase, and it set the tone for the prosecutor's repeated return to the question of mercy. Indeed, her argument came back to that initial theme at the end, culminating in a coda on Brown's silence: "you don't give mercy to someone who hasn't asked for it, who hasn't asked for redemption. Who hasn't admitted everything they've done." ROA 8735 (emphasis added).

Contrary to the Court of Appeals' suggestion that she might have been talking about the mitigation witnesses, the prosecutor's remarks were sharply pointed at one person: the defendant. She told the jury that their mercy depended on an illusory, extra-legal demand that only Brown could satisfy in a very specific way: Brown had to "thro[w] *himself* on *his* face in front of the jury and sa[y] *I* did it all, forgive *me*. It's *my* fault." ROA 8723 (emphasis added). The jury's attention naturally and necessarily would have turned to Brown's absence from the witness stand throughout the penalty phase when the prosecutor asked, "Have you seen that *from this Defendant*?" ROA 8722 (emphasis added). The Court of Appeals' speculation that these comments could have focused on what *other* witnesses had said flies directly against the prosecutor's explicit, blunt meaning: "[G]ive him what *he's* asking for." *Id.* (emphasis added).

In the face of the plain meaning of the prosecutor's remarks, the Court of Appeals' alternative interpretation is so implausible as to be unreasonable. It cannot ground the denial of a COA.

D. The prosecutor's emphasis on Brown's silence had a substantial and injurious influence on the outcome.

Reasonable jurists would also find the question of prejudice debatable. In *Darden v. Wainwright*, 477 U.S. 168, 182 (1986), this Court found a prosecutor's improper comments did not violate due process because the closing argument "did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as … the right to remain silent." The upshot of the Court's distinction in *Darden* is clear: improperly implicating the right to remain silent in closing argument can prejudice the right to a fair trial.

In this case, the Court of Appeals made no finding as to prejudice, ending its analysis after it concluded that Brown's Fifth Amendment claim lacked merit. The foregoing argument demonstrates that, under the appropriate COA standard, the court's determination was incorrect.

"With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative … to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *McCoy v. Louisiana*, 584 U.S. 414, 417-18 (2018). A defendant has the right to admit guilt, as Brown did, and still receive mercy at sentencing whether he asks (or begs) for it or not. In telling the jury repeatedly that mercy was available only to those who beg for it, the prosecutor violated the universally familiar "right to remain silent" that is so "embedded in our national culture" as to be sacrosanct. *Dickerson v. United States*, 530 U.S. 428, 443 (2001).

"When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013) (quoting *O'Neal v. McAninch* 513 U.S. 432, 436 (1995)); *see also Brecht v. Abramson*, 507 U.S. 619 (1993) (enunciating the "substantial and injurious" standard of review). "Several factors are relevant to this inquiry, including [1] whether the comments were 'extensive,' [2] whether 'an inference of guilt from silence [was] stressed to the jury as a basis for conviction,' and [3] whether 'there is evidence that could have supported acquittal.'" *Id.* at 278 (quoting *Anderson v. Nelson*, 390 U.S. 523, 523-24 (1968)). Each of these factors lean well in favor of finding substantial and injurious prejudice.

As to the first two factors, the trial transcript shows that the prosecutor's comments on Brown's failure to beg for mercy were not only extensive; they appeared at the beginning and end of the last argument the jury would hear before they retired to deliberate. Brown's failure to beg for mercy was, in other words, the prosecutor's primary theme for closing the State's case for death. The prosecutor emphasized Brown's silence to somewhat brutal effect, explicitly drawing the inference she wanted the jurors to take from it: she told them, "[G]ive him what he's asking for." ROA.8722.

As to the third factor, "whether 'there is evidence that could have supported acquittal,'" the Fifth Circuit has approached the question as a comparison of the cases for and against conviction. *Id.* at 278, 280-83. Here, where the case for conviction

meant a death sentence, the State's case was weak. The prosecution put on minimal evidence during the penalty phase. None of its witnesses offered testimony that spoke to the possibility that Brown would commit criminal acts of violence that would constitute a continuing threat to society (Texas' "first special issue" in death penalty cases). Brown did not have a lengthy criminal history or record of extraneous offenses. Although he had been in a downward emotional spiral in the weeks prior to the offense, the State offered little reliable evidence that Brown had acted violently prior to Ray's death. The State had relatively little evidence with which to convince the jury that it should answer the first special issue affirmatively, and on the second issue it relied on repeatedly violating Brown's right not to testify.

II. Because the court of appeals resolved the merits of this issue incorrectly, this Court should remand the case for a determination whether Brown should be granted a stay to exhaust it in state court.

During his State habeas process, Brown's counsel did not raise a claim that the prosecutor improperly commented on his right to remain silent. See ROA.289 (Brown's concession that claim was not exhausted). In seeking a COA in the Court of Appeals, Brown argued that the district court erred in denying his request for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), so that he could return to state court to exhaust the claim. ROA.816; see ROA.945 (magistrate's findings recommending denial of Rhines stay); ROA.1010-11 (order accepting recommendation). The Court of Appeals rejected that argument, based on application of only one of the three prongs of this Court's Rhine's analysis—whether the claim was meritless. App. A at 14; *see Rhines*, 544 U.S. at 277 (setting out three findings required to support stay).

Because, as Brown has demonstrated here, the Court of Appeals' ruling on the merits of the Fifth-Amendment claim was incorrect, this Court should remand for a full analysis under *Rhines*. Should the Court of Appeals find that Brown has satisfied the requirements of *Rhines*, it may stay the case for exhaustion of this claim. *See Gomez v. Dretke*, 422 F.3d 264, 266-268 (5th Cir. 2005) (to serve principles of judicial economy and federalism, courts of appeals may stay federal habeas cases to allow state courts the opportunity to address a petitioner's case in parallel state-court proceedings).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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