No. 24-6841

IN THE

Supreme Court of the United States

MICAH BROWN,
Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Should this Court grant certiorari to review the Fifth Circuit's denial of a certificate of appealability (COA) and its affirmance of the denial of a stay regarding Petitioner Micah Brown's prosecutorial misconduct claim—that the prosecutor violated his Fifth Amendment right not to testify because the prosecutor's closing statements amounted to commentary on his failure to testify during sentencing—where there is no relevant circuit split for this Court to resolve, the claim is procedurally defaulted, and the claim is meritless because the prosecutor did not comment on Brown's failure to testify and because the prosecutor's argument had no effect on the jury's verdict?

LIST OF PROCEEDINGS

State v. Brown, Cause No. 27,742 (354th Judicial Dist. Ct., Hunt County, Tex.) (convicted of capital murder May 24, 2013, and sentenced to death June 3, 2013)

Brown v. State, No. AP-77,019, 2015 WL 5453765 (Tex. Crim. App. Sept. 16, 2015) (not designated for publication) (affirming conviction and death sentence)

Ex parte Brown, No. WR-85,341-01, 2019 WL 4317041 (Tex. Crim. App. Sept. 11, 2019) (denying state habeas application)

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

Brown v. Lumpkin, No. 23-70004, 2024 WL 5484989 (5th Cir. Oct. 18, 2024) (unpublished) (denying certificate of appealability)

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INTRODUCTION

Petitioner Micah Brown raised his prosecutorial misconduct claim—"that the prosecution improperly commented on his failure to testify at the punishment phase of trial"—for the first time in his federal habeas petition. Pet. App. 90a. The district court denied his claim on the merits after a de novo review, finding that "none of the prosecution's punishment phase jury arguments can rationally be construed or interpreted as either (1) manifesting an intent to comment on Brown's failure to testify at the punishment phase of trial or (2) naturally and necessarily a comment on Brown's failure to testify," and "no rational jury could have construed any of the prosecution's punishment phase closing jury arguments as a comment on Brown's failure to testify at the punishment phase of trial." Pet. App. 90a, 95a–96a. Brown then filed a motion for a COA in the Fifth Circuit, which the court denied, finding that: (1) reasonable jurists could not conclude that the prosecutor's manifest intent was to focus on Brown's decision not to testify at sentencing, and (2) reasonable jurists would not debate whether the only way the jury could construe the prosecutor's comments were as a commentary on Brown's choice not to testify. Pet. App. 13a–14a.

Brown now reframes his issue to this Court—"whether a defendant's silence at sentencing is relevant to his remorse and therefore an appropriate subject for prosecutorial argument"—in an attempt to establish a circuit split, which Brown asks this Court to resolve in his favor. Pet. Cert. 8–9. However, regarding the true issue at hand—whether the prosecutor commented on Brown's silence—no genuine split of

authority exists, and the Fifth Circuit properly denied Brown's claim in accordance with this Court's clearly established precedent. Therefore, Brown presents nothing more than an argument that the Fifth Circuit misapplied a properly stated rule, which is an insufficient basis for this Court's review. *See* Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Additionally, Brown's prosecutorial misconduct claim is unexhausted and procedurally defaulted. Brown makes no effort in his petition to this Court to meet *Coleman*'s[1] cause-and-prejudice standard to excuse his default. Pet. Cert. 19–20. Rather, he argues that the Fifth Circuit improperly denied him a COA regarding his motion for a *Rhines*[2] stay because the court applied only one of the three prongs of the *Rhines* analysis—whether Brown's claim is potentially meritorious. *Id.* But the district court properly resolved the other two prongs, and that analysis has not been reversed or undone by a higher court. And as demonstrated below, Brown's claim is meritless.

Therefore, Brown's petition does not demonstrate any special or important reason for this Court to review the lower court's decision. Accordingly, Brown's complaints do not warrant certiorari review.

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[1] *Coleman v. Thompson*, 501 U.S. 722 (1991).

[2] *Rhines v. Weber*, 544 U.S. 269 (2005).

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) extensively summarized the facts of the crime as follows:

> In July 2011, [Brown's] ex-wife, Stella Ray, was living in her house in Greenville with their two children, two-year-old Willow and three-year-old Colten. She also resided with Wesley Williams, her fourteen-year-old son fathered by her first husband, Tracy Williams. Ray planned to begin new employment in another town, and [Brown] testified that he was concerned about his ability to see Willow and Colten on a regular basis when Ray moved away. However, he testified that, when Ray found her new job, she told [Brown] that he "would be going with her."
>
> Wesley testified that Ray and his father, Williams, had been divorced for many years, but they remained friends. He also testified that, at some point in July, Ray allowed Williams to stay at their house because Williams "had nowhere else to go." [Brown] testified that, when [Brown] was married to Ray, Williams caused problems in [Brown's] relationship with Ray. He also testified that he and Ray maintained a sexual relationship after they divorced in 2010, but that Ray became "cold" and "distant" towards him when Williams moved in. [Brown's] mother, Brenda Crofford, testified that [Brown] became "very upset" when Williams moved in. Wesley testified that about a week before the instant offense, [Brown] started coming to Ray's house in the early morning hours and "banging on windows and doors." When [Brown] did this, they "[i]gnored him until he left."
>
> On July 15, [Brown] came to Ray's house to pick up Willow and Colten. Wesley testified that [Brown] entered the house without knocking and argued with Ray. [Brown] also walked past Williams twice and "hit him with his shoulder real hard." Ray and Williams asked [Brown] to leave, but he refused. Wesley testified that Williams and [Brown] "wound up getting into a fight" when [Brown] walked by Williams, stepped on his foot, and "put his shoulder in him" a third time. [Brown] and Williams were "grabbing each other," and Wesley thought that Williams was choking [Brown] at one point. [Brown] testified that Williams "grabbed [him] in the choke hold and choked [him] out." Eventually, Williams forced [Brown] outside and locked the door. Wesley testified that [Brown] then "acted like he was about to mess with

[Williams'] truck," so Williams walked outside and told him to leave. [Brown] got into his car and left. Williams thereafter left Ray's house and went to stay with his brother in Louisiana.

[Brown] testified that he went home after fighting with Williams and called the police. Officer Randy Gray of the Greenville Police Department testified that he spoke with [Brown] at his home, and [Brown] declined to file charges. Gray testified that Ray had also called the police, but at her request no charges were filed.

[Brown] testified that on July 16, he had a phone conversation with Ray in which he told her that he was going to kill himself. Ray called the police, and Officer Gray again went to [Brown's] house. [Brown] testified that he knew that Ray had called the police after their phone conversation. He told Gray he was not really suicidal and he only said that to make Ray feel guilty. While Gray was at [Brown's] residence, he observed a black bag on the floor which contained a loaded sawed-off shotgun and ammunition.[3] Gray arrested [Brown] for possession of a prohibited weapon. In the living room, Gray saw glass pipes commonly used to smoke methamphetamine. [Brown] also had a small amount of marijuana in his pocket at the time of his arrest. Gray, however, did not charge [Brown] with possession of drugs or drug paraphernalia.

When [Brown] was released from jail on July 17, his neighbor, Loren Homerstead, asked him why the police had been at his house on the previous day. Homerstead testified that [Brown] told her that Ray called the police and had him arrested because she thought he was suicidal. Homerstead testified that she tried to calm [Brown] and reassure him that Ray would continue to let him see his children.

[Brown] testified that he returned to Ray's house on July 19 to pick up Willow and Colten. He admitted that he used methamphetamines the previous night, but he denied drinking alcohol that day. Wesley, however, testified that [Brown] was "drunk" when he came to their house. [Brown] testified that after he put Colten in his car, he argued with Ray "about when [Williams] was there in the past and [Ray] not doing anything to . . . stop [Williams] from choking [Brown]." [Brown] testified that Ray said [Brown] was "too mad," and she removed Colten from his car. [Brown] testified that while Ray was holding Colten,

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3 [Brown] testified that he sawed off his shotgun because he was angry at Williams and he planned "to go back and get him with it." [Footnotes in original, under different numbering].

he "flicked her nose" twice, and then he got into his car and left. [Brown] denied punching Ray in the eye, but Wesley testified that Ray and Colten "both had a black eye" after the incident.

Ray thereafter called the police and made a report of family violence.[4] Wesley testified that the police came to their house that night. [Brown], however, testified that he spoke to Ray later that night and she did not tell him that she had called the police. Photographs from Ray's camera which depicted her face after the incident were introduced into evidence at trial.

[Brown] testified that he returned to Ray's house on the morning of July 20, and she let him come inside for about 20 minutes to see his children. After he left, he climbed a tree in an isolated field, where he drank alcohol most of the day and tried to get the courage to hang himself. He had been using methamphetamines and drinking alcohol and was agitated and paranoid because he had not slept in three days. He called and texted Ray throughout the day, but she did not respond. Ray's mother, Donna Ray, testified that [Brown] called her around 7:00 p.m. and said that he was looking for Ray and his children.

[Brown] testified that, when he "ran out of alcohol," he returned to Ray's house. The door was unlocked, and no one was home. He went inside and took a basket containing marijuana and Ray's camera. He also took Wesley's shotgun from his room. He left Ray's house, stopped at a gas station to buy more alcohol, and returned home around 8:00 p.m. [Brown] then sawed off Wesley's shotgun "so [Brown] could reach the trigger and still point it at [his own] head." He continued to call and text Ray, asking how their children were and what they were doing. Ray did not respond. [Brown] then decided he would return to the tree and shoot himself. He testified that he saw Ray drive past his house as he was placing the shotgun in his car. He tried to call her again, but she did not answer. He testified, "I thought she was looking for me so I jumped in [my car] to chase her down, flag her down so I could ask her where the kids [were]."

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[4] Investigator Felicia White of the Greenville Police Department testified that, at the time of Ray's murder on July 20, there was a pending family-violence case in the system regarding the incident on July 19, with [Brown] listed as the perpetrator. She testified that part of the allegations involved injury to a child, Colten. White acknowledged that she did not contact [Brown] on July 20 about the family-violence incident because the case had not yet been assigned to her.

[Brown] testified that he was flashing his lights and driving next to Ray, asking her to roll down her window and tell him where their children were. When they eventually stopped, [Brown] pulled his car next to hers and saw that she was talking on the phone. He testified that he felt "[h]urt and angry" because she had her phone and was not answering his calls. [Brown] had his window down and was yelling at Ray when he saw a police car behind him with its lights on. At that point, he "stuck the shotgun out the window and pulled the trigger," deliberately aiming for Ray's head. He denied that he shot Ray because she called the police. He testified he "lost [his] mind" because he was angry that Ray had not responded to his calls and texts asking about his children. He testified that he did not know that Willow and Colten were in the back seat of Ray's car when he shot her because her car windows were tinted and he did not have a clear view into the vehicle. As he drove away after shooting Ray, [Brown] assumed that she was fatally wounded because he observed in his rearview mirror that her car "started rolling forward." On cross-examination, [Brown] acknowledged that he believed it was Ray's fault that he shot her. He explained that Ray "pushed [him] to a limit to where [he] took her life[.]"

The evidence showed that Ray was making a 9-1-1 call when she was shot. Heather Doty, a dispatcher for the Greenville Police Department, testified that she received Ray's call around 10:20 p.m. A recording of the call was admitted into evidence and played for the jury. During the call, Ray reported that her ex-husband was following her down Sayle Street, flashing his lights at her and trying to get her to pull over, and that she was afraid that he was going to run into her car. She said that she had been "driving around . . . looking for [her] son" when she saw [Brown] "in the neighborhood," and he started following her. She explained that [Brown] had been harassing her and that she had already filed a police report against him when he punched her in the eye the previous night. She stated, "I told him I was calling the police. So he knows I'm talking to ya'll." At one point during the call, Ray said that [Brown] had "cornered [her] in" and was yelling, "Where are the kids." Doty heard children in the car, and she told Ray that a police officer was on the way. When Doty asked Ray if she saw an officer, Ray responded, "Yeah, there's lights."

Officer Gregory Hughes responded to the scene and pulled up behind two vehicles parked parallel to each other in the north lane on Sayle Street. Ray's car was next to the curb, and [Brown's] car was on her driver's side. Hughes heard a gunshot, then [Brown] drove away and Ray's car "began to roll." Ray's car veered to the right and ran into the curb. When Hughes exited his car and approached Ray's vehicle, he

"found a bullet hole through the driver's window and the driver was shot." The doors were locked, and two small children were in the back seat. Another officer who arrived at the scene pushed through the broken side window so they could unlock the doors. Hughes testified that Ray was unresponsive and appeared to have "a bullet wound in the head." Howard Roberson, a passerby who had witnessed [Brown] driving away from the scene, obtained [Brown's] license-plate number and gave it to Hughes. Ray died at the scene. The medical examiner testified that Ray's cause of death was "a shotgun wound to the head." The shot entered her left cheek and exited "on the back of the right [side of the] head."

[Brown] testified that after he left the scene, he called Ray's mother, Donna, and said: "I just shot [Ray] in the head, she's dead, you shouldn't have lied to me about my kids." [Brown] also texted Homerstead: "I shot her in head bitch is dead TOLD her not to fuck with my kids."[5] He called Williams and left him a voicemail stating "she's dead" and, "I shot her in the head, which is what I had intended for you." He added, "I'll probably be dead soon. Otherwise, you're a dead man." He also left Williams a second voicemail in which he threatened Williams and his brothers. Donna testified that [Brown] called her again later that night and said, "See, I told you."

[Brown] testified that he also called his mother, Crofford, and told her that he had shot Ray. In an interview with Investigator Felicia White of the Greenville Police Department, Crofford recounted what [Brown] told her about what had happened before the shooting. According to Crofford, [Brown] said that Ray told him, "Micah, I'm calling the police." [Brown] said that he told Ray, "I know you are," and "I see the police."

[Brown] testified that he backed his car into a grove of trees, where he hid for a few hours. He then knocked out his headlights and drove on Highway 69 until he ran out of gasoline. He went to a house and asked for gasoline, then he "took off on foot" when that proved unsuccessful. He put on a vest and brought his flashlight, shotgun, ammunition, and pocket knives, which were items he thought he needed to "survive in the wilderness." Officer Perry Sandlin testified that [Brown's] abandoned car was located on County Road 1033 at 3:30 or 4:00 a.m. on July 21, with an empty shotgun-shell box on the ground

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5 Homerstead testified that she called the police after receiving [Brown's] text message. When questioned by the prosecutor, she acknowledged that she also told police that [Brown] said, "It's true I did it, I'm not dead yet, going to go, DPS are all over me."

nearby. Investigator White testified that Ray's camera, which contained the photographs that Ray took on July 19, was recovered from the back seat of [Brown's] car.[6]

[Brown] testified that he walked along some railroad tracks, where he lost his cell phone. When he heard helicopters, he got into a pond to avoid "being located by the infrared." He came upon a vacant house and hid in it for a while. Eventually, he went "next door" to Cactus Saddlery, a business located about five to six miles north of Greenville on Highway 69.

Cactus Saddlery employee Efrain Girardot testified that he encountered [Brown] outside the building at around 6:00 a.m. on July 21. [Brown] walked towards Girardot carrying a shotgun and a knife, and he asked him for water and to use the phone. Girardot told [Brown] to put his weapons down, and [Brown] laid them on the ground in the parking lot. When they went inside the building, Girardot offered [Brown] water and let him use the phone in his office. Girardot testified that [Brown] called his mother and told her that he was tired and he wanted her to pick him up. Another employee, Gary Magennis, called the police when Girardot made him aware that [Brown] had a gun. Girardot went outside with [Brown] and sat with him while [Brown] smoked a cigarette. Meanwhile, Magennis picked up [Brown's] weapons and ran towards the SWAT team that had arrived at the front gate. [Brown] then walked towards the SWAT team with his hands up. He complied when he was told to get on the ground, and he was handcuffed and taken into custody.

Investigators White and Jamie Fuller conducted a videotaped interview of [Brown] at the Greenville Police Department on July 21. [Brown] told them that, before the offense, he had unsuccessfully called Ray to ask about his children. He saw Ray drive by his house, so he "jumped in [his] truck and tried to stop her and chase her down," but "she wouldn't stop." He stated, "And, obviously, I could tell she called-was up with the police on the phone." When he "finally got [Ray] to pull over," he asked her to roll down her window and tell him where the children were. He stated, "[S]he didn't do it. And I saw the police lights pulling up behind me, so I just—I shot her." [Brown] said that he was angry at Ray because she planned to move away with the children, allowed Williams to stay at her house, and failed to stop Williams from fighting with him and choking him. He explained, "There's a number of things like that that added up," and "I lost it." While questioning

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[6] In her interview with White, Crofford said that [Brown] told her that "he had [Ray's] camera" in his vehicle and "was looking at the pictures."

[Brown] about his actions after the shooting, White asked, "Was there any point in time where you planned on killing yourself or having the cops shoot you or shoot at them?" [Brown] answered that he "was going to fire, like, a warning shot just to, I guess, [commit] suicide by cop."

While in jail on July 22, [Brown] agreed to be interviewed by a reporter from a news station in the Dallas/Fort Worth area. During the televised interview, [Brown] admitted that he murdered Ray because he "wanted her dead." He stated that when he was following Ray and trying to get her to stop, "she was on the phone" and he "figured it was with the police." He added:

> I finally got her to pull over, just trying to convince her, just tell me where are my kids, and she never would say. I saw the police and then the lights in my rearview mirror, so I just pulled the gun—gun out and shot her . . . It was kinda—it was just spur of the moment. I always told her, you know, if anybody ever tries to come between me and my kids, that I would kill someone over that. I didn't do anything to deserve her not to tell me where they are or anything, and I meant it when I said it. I just got so mad that I did it.

When the reporter asked [Brown] if he knew his children were in the back seat, he said that he looked but did not see them. He said, "I would have never done that in front of them." The reporter asked, "So you regret that you killed her in front of your kids, but you don't regret that you killed her[?]" [Brown] answered, "No."

[Brown] told the reporter that "a lot of things built up inside of [him]," like the fact that Ray let Williams stay with her, she did nothing to stop Williams from choking [Brown], and she planned to move away with their children on "August 1st." He stated, "It just drove me crazy, I guess, not being able to see my kids." When [Brown] acknowledged that he had been suicidal, the reporter asked him why he felt that way. [Brown] answered:

> I've been suicidal in the past. And the only two things that, you know, I'm still here is my kids and they're about to be taken away from me.
>
> The other—the other problem, I want to say was I wanted to go hunting and she called the police on me saying I was suicidal. And they came in the house and they found

> a sawed off shotgun. So that's a felony. So I can't—I wasn't able to go hunting anymore.
>
> Anyways, I can't be around my kids. I can't do—I mean, the two things—the reason I was stripped away from me and—

The reporter later asked [Brown], "Is there anything else you want to say?" [Brown] added:

> And then, like I said, I guess I just—I went crazy. I couldn't stand the fact of, you know, only being able to see my kids four days a month. And [I] just don't know how it went from calling the cops on me and this and that from she was going to take me with her if she found—when she found a job and moved off.

[Brown] also described his involvement in the offense and demonstrated a lack of remorse in a letter he wrote to a fellow jail inmate. [Brown] testified that "Casper" was an inmate in a neighboring cell who asked him what happened. In the letter, [Brown] recited in part that Ray was moving away, that she let Williams move in, that he and Williams fought, that he felt suicidal, and that Ray stopped answering his calls. With regard to the instant offense, he explained:

> I chased her down and made her pull over. She wouldn't look at me and she was on the phone. I knew it was the cops and for some reason when I saw the red and blues behind me I put the shot gun [sic] out the window and blew her head off. Clean off.

He stated in the letter, "I still don't regret it one bit." He added, "To be honest, I would do the same to [Williams] if I had the chance." [Brown] also instructed Casper to "flush" the letter after reading it.

Brown v. State, No. AP-77,019, 2015 WL 5453765, at *1–6 (Tex. Crim. App. Sept. 16, 2015) (footnotes in original and footnotes omitted).

II. Facts Pertaining to Punishment

The United States Magistrate Judge summarized the evidence presented during the punishment phase as follows:

1. Prosecution's Evidence

The prosecution called Ray's father, who described her death as an unbelievable loss for their family. [ROA.8186–89.[7]] A friend of Ray testified that Tracy Williams and Ray's children spent the night of the murder in a shelter waiting for word that Brown had been arrested. [ROA.8190–8202]. Ray's sister testified that Ray was a quiet and sensitive person and a good mother whose efforts to obtain her doctorate in English literature were delayed by her pregnancies with her children with Brown but who earned her doctorate in December 2010. [ROA.8202–11].

2. Defense's Evidence

Brown's sister testified that Brown was loved by everyone when he was a child because he made everyone laugh and later grew into an incredible father. [ROA.8213–22]. Brown's biological father testified that he was afraid Brown was suicidal, so he visited Brown's residence the day of the murder and found Brown asleep; that Brown was unsuccessful in drug rehab; and that Brown was not a mean-spirited teenager. [ROA.8223–34]. Brown's mother testified that Brown was full of joy as a child, that Brown never got into trouble at school, and that, while she never saw Brown use drugs, she was aware he had gone into rehab for alcohol abuse. [ROA.8234–41]. All three expressed shock at learning that Brown had shot Ray. Brown's uncle described Brown as a funny teenager who cracked jokes and counseled him that drugs were bad. [ROA.8353–57].

A licensed professional counselor who had counseled Brown in jail testified that Brown suffered from anxiety and depression and experienced a sincere religious conversion; that Brown had been using methamphetamine for three to four days and was suicidal before Ray's murder; that Brown had worked through his depression and anxiety while in jail; that he believed that Brown was sincerely remorseful for his offense; and that he had not seen any sociopathic qualities in Brown. [ROA.8247–74]. A minister who had visited Brown in jail testified that Brown was polite, friendly, respectful and remorseful. [ROA.8338–52]. Both admitted during cross-examination that Brown's aggressive demeanor during his televised post-arrest interview was very different from his demeanor when they counseled him.

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[7] "ROA" refers to the record on appeal filed in the court below. The Director has replaced the district court's record citations with the correlating citation to the ROA.

> The Hunt County Sheriff, the assistant jail administrator, and a Sheriff's Department Lieutenant all testified that Brown had not caused any problems during his pretrial detention and had displayed a calm, polite, cooperative demeanor. [ROA.8275–89, 8316–38]. A childhood friend and neighbor of Brown testified that Brown saved her from choking by using the Heimlich maneuver when she was nine years old. [ROA.8291–99]. A former Hunt County Jail inmate and his wife each testified that Brown helped him deal with depression during his stay at that facility and that both of them thereafter maintained contact with Brown. [ROA.8300–16].
>
> Dr. Paula Lundberg-Love, an expert in psychology and pharmacology, testified about the effects of addiction on the brain and behavior, including how addiction lowers the impulse control of an addict and causes irritability and delusional thinking; that methamphetamine reduces reflective thinking, leads to irritability, and tends toward impulsivity; that addiction is a disease of relapse that is never fully cured; that, while there are genetic factors at play in addiction, childhood stressors play a prominent role by impairing brain circuitry; that Brown had a history of multiple childhood stressors, including post-traumatic stress disorder, depression, anxiety, divorce, substance abuse beginning at age twelve, and sexual abuse at age twelve; that cocaine and methamphetamine abuse tend to lead toward violence and criminal behavior; that Brown had no history of violence except when taking methamphetamine; and that Brown was not impulsive except when on drugs. [ROA.8357–8462].
>
> Clinical and forensic psychologist Dr. Mark Cunningham testified that Brown suffered from multiple adverse transgenerational developmental factors, including lack of parental nurturing, mood disorder, family dysfunction, delayed growth, chronic psychosocial immaturity, Attention Deficit Hyperactivity Disorder ("ADHD"), childhood physical, verbal, and emotional abuse, childhood sexual abuse (of both Brown and other family members), teenage alcohol abuse, teen peer harassment, and significant hereditary predisposition for substance abuse and mood disorder; that these adverse factors led to Brown's substance abuse, addiction, depression, anxiety, and feelings of powerlessness; that Brown's drug addiction caused his marriage to come apart; and that, despite all of this, there was very little likelihood that Brown would exhibit serious violence if incarcerated. [ROA.8469–8661].

Pet. App. 31a–34a.

III. Course of Proceedings

Brown was indicted, convicted, and sentenced to death in the 354th Judicial District Court of Hunt County, Texas, for murdering Stella Michelle Ray (Ray) during the course of committing or attempting to commit obstruction, retaliation, or terroristic threat. ROA.18897, 18905. The CCA affirmed Brown's conviction and sentence on direct appeal. *Brown v. State*, 2015 WL 5453765, at *14.

Brown filed a state application for a writ of habeas corpus. ROA.18908–19031. Following an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that relief be denied. ROA.24483–538. The CCA issued an order adopting the trial court's findings and conclusions and, based on those findings and its own review, denied Brown habeas relief. *Ex parte Brown*, WR-85,341-01, 2019 WL 4317041, at *1 (Tex. Crim. App. Sept. 11, 2019) (not designated for publication); ROA.24639–24641.

Brown then filed a habeas petition in federal district court under 28 U.S.C. § 2254. ROA.141–333. The Director answered, ROA.526–725, and Brown replied, ROA.746–796. Almost one month after filing his reply, Brown filed a motion for a stay and abeyance pursuant to *Rhines*, so that he could return to state court to exhaust his previously unexhausted claims. ROA.816–836. The district court denied Brown's motion and adopted the Magistrate Judge's findings, conclusions, and recommendation, recommending that the court deny Brown's motion for a *Rhines* stay because:

> [Brown] delayed in filing his motion; he has failed to satisfy the standard for obtaining a stay of this proceedings to return to state court to litigate

> any unexhausted claims; he failed to establish good cause for his failure to exhaust these claims; his unexhausted claims are meritless; and many claims that he now asserts in this proceeding are substantially similar to those previously presented to and denied by the state court.

ROA 1010–11. Thereafter, the district court accepted the magistrate judge's findings, conclusions, and recommendation—that the court deny Brown's federal habeas petition—and denied Brown's petition, his request for an evidentiary hearing, his motion for leave to file an amended petition, and a COA. Pet. App. 16a–18a. Following the denial of his federal habeas petition, Brown filed a motion to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e). ROA.1875–1882. The district court denied the motion and denied a COA with respect to Brown's Rule 59(e) motion. ROA.1911–1928.

Brown filed a motion for a COA in the Fifth Circuit, which the court denied on all claims. Pet. App. 1a–14a. The Fifth Circuit also affirmed the district court's denial of a *Rhines* stay. Pet. App. 14a. He then filed a motion for reconsideration, which the Fifth Circuit also denied. Pet. App. 213a. Brown now seeks certiorari review of the Fifth Circuit's decision as it relates to his prosecutorial misconduct claim.

REASONS FOR DENYING THE WRIT

The question that Brown presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Furthermore, there is no automatic entitlement to appeal in federal habeas corpus. *Miller-El v. Cockrell*,

537 U.S. 322, 335 (2003). As a jurisdictional prerequisite to obtaining appellate review, a petitioner is required to first obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). In determining whether to issue a COA, a court must consider whether the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The COA standard:

> . . . is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

Buck v. Davis, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 327); *see also Slack*, 529 U.S. at 484.

Nevertheless, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Under § 2254(d), a federal court may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the relevant constitutional claim by the state court, (1) "'was contrary to' federal law then clearly established in the holdings of" the Supreme Court; or (2) "'involved an unreasonable application of'" clearly established Supreme Court precedent; or (3) "'was based on an unreasonable determination of the facts' in light

of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)). The Court has emphasized § 2254(d)'s demanding standard, stating:

> [u]nder § 2254(d), a habeas 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. . . . It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable.

Richter, 562 U.S. at 102 (emphasis added); *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (If "[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination." (quotation marks and citation omitted)).

The Court has noted that "[i]f this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Here, Brown's petition presents no compelling reasons, important questions of law, or genuine conflicts among the circuit courts to justify this Court's exercise of its certiorari jurisdiction. Brown's petition should be denied.

I. There Is No Genuine Circuit Split Warranting this Court's Review.

Brown argues that there is a circuit split regarding whether a defendant's silence is relevant to the issue of remorse and therefore is an appropriate subject for prosecutorial argument. Pet. Cert. 8. According to Brown, because there is a recognized circuit split, reasonable jurists would disagree on the issue and the Fifth Circuit should have granted his motion for a COA. *Id*. at 7. But because Brown relies on an inapposite and illusory split, his petition should be denied.

During trial, Brown testified at the guilt-innocence phase but not the sentencing phase. Trial counsel in her closing argument at sentencing made an appeal to the jury for mercy. *See* Pet. App. 90a–91a. During rebuttal closing argument, the prosecutor argued in part:

> 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 in 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.
>
> . . .
>
> A defendant throws himself on his face in front of the jury and said I did it all, forgive me. It's my fault.
>
> . . .

> 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 . . .
>
> . . .
>
> 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.8721–35.

According to Brown, the prosecutor's statements amounted to commentary on his exercise of his Fifth Amendment right to silence. Pet. Cert. 15. Under Brown's view, because the State did not cross-examine Brown on his remorse (or lack thereof), and he did not take the stand during sentencing, any comments on his lack of remorse or silence at sentencing were impermissible. Pet. Cert. 10; *see Mitchell v. United States*, 526 U.S. 314, 321 (1999) ("The 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." (emphasis added) (quotation omitted)).

To support his argument, Brown cites to *Lesko v. Lehman*, 925 F.2d 1527 (3rd Cir. 1991). In *Lesko*, the defendant took the stand during sentencing and solely testified to his deprived childhood and family background. *Id.* at 1540. He did not testify to the charges against him, nor was he cross-examined by the prosecution. *Id.* In closing, the prosecution stated:

> John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I

> don't want you to put me to death, but I'm not even going to say that I'm sorry.

Lesko, 925 F.2d at 1540. As it relates to this comment, the Third Circuit reasoned "that a criminal defendant does not completely waive the [F]ifth [A]mendment privilege by testifying solely on collateral or preliminary matters." *Id.* at 1543 (citing *Griffin v. California*, 380 U.S. 609 (1965)) (citations omitted). Under the Third Circuit's analysis, because the defendant had a Fifth Amendment right to silence at the punishment phase of his trial and because his testimony pertained *only* to mitigating factors—which were considered collateral to the charges against him—the prosecution was forbidden from commenting on the defendant's failure to testify concerning the merits of the charges against him. *Id.* at 1542. Brown argues his case amounts to the same violation found in *Lesko* because the prosecution commented on his lack of remorse even though he did not specifically testify about his remorse, and he did not testify during sentencing. Pet. Cert. 10.

To further support his circuit split argument and/or his argument that fairminded jurists could disagree on the issue, Brown cites to *White v. Woodall*, 572 U.S. 415, 422 n.3 (2014) (citation omitted). Pet. Cert. 11. In *White*, this Court recognized it is unresolved "[w]hether silence bears upon the determination of a lack of remorse" for purposes of sentencing. 572 U.S. at 421–422 (internal quotation omitted). According to Brown, the prosecutor's rebuttal closing argument was necessarily a comment on his silence at sentencing because it was an inference of his lack of remorse based on that silence. Pet. Cert. 11–16. Brown's argument therefore is that because it is unresolved whether silence bears upon the determination of a

lack of remorse, the Fifth Circuit should have granted him a COA. However, the question of whether silence bears upon the determination of a lack of remorse was not the basis of the Fifth Circuit's denial of a COA.

In its analysis of Brown's claim, the Fifth Circuit correctly noted that the Fifth Amendment forbids prosecutors from commenting on a defendant's choice not to testify. Pet. App. 11a (citing *United States v. Bohuchot*, 625 F.3d 892, 901 (5th Cir. 2010)). To determine whether the prosecutor's remarks amounted to a violation of Brown's right not to testify, the court applied its settled, two-pronged test, asking "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." Pet. App. 11a (citing *Rhoades v. Davis*, 852 F.3d 422, 432–33 (5th Cir. 2017)). As to the first prong, a prosecutor does not have the "manifest intent" of commenting on a defendant's silence if there is an "equally plausible explanation for the remark." Pet. App. 12a–13a (citing *United States v. Davis*, 609 F.3d 663, 685 (5th Cir. 2010)). As to the second prong, it is not enough if a jury possibly or even probably would view the challenged remark as a comment on the defendant's silence; the question is whether the only way the remark could be construed would be as a comment on the defendant's silence. Pet. App. 13a–14a (citing *Davis*, 609 F.3d at 685).

Regarding the first prong, the Fifth Circuit concluded that the prosecutor may have been referencing trial evidence, most notably: (1) Brown's testimony during the guilt-innocence stage that Ray was responsible for her own death; (2) Brown's

statement to a reporter that he did not regret killing Ray; and (3) Brown's phone call to Ray's mother informing her that he killed Ray. Pet. App. 13a. And consequently, "reasonable jurists could not conclude that the prosecutor's manifest intent was to focus on Brown's decision not to testify during the sentencing phase of the trial." Pet. App. 13a. For the second prong, the court similarly concluded that reasonable jurists would not debate whether the only way to construe the prosecutor's remarks were as a commentary on Brown's silence because the "jury could have construed the prosecutors remarks as referencing Brown's apparent lack of remorse or the testimony of Brown's mitigation witnesses." Pet. App. 13a–14a.

Brown presents no circuit caselaw contrary to the Fifth Circuit's analysis.[8] In fact, the vast majority of circuits have adopted similar—if not identical—analyses when deciphering whether a prosecutor's statements amount to an unconstitutional comment on a defendant's failure to testify. That is, they look to whether it was the prosecutor's manifest intent to comment on a defendant's silence or whether the jury naturally and necessarily construed it as a comment on the defendant's silence.[9]

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[8] Even if Brown identified a relevant split, he points only to the Third Circuit for support. But a one-to-one split is inadequate to warrant this Court's attention because "a bit of disagreement is an inevitable part of our legal system." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 392–93 (2022) (Breyer, J., dissenting); *see Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Statement of Sotomayor, J., respecting the denial of certiorari) ("The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review.").

[9] *See, e.g., Taylor v. Medeiros*, 983 F.3d 566, 576 (1st Cir. 2020) ("A prosecutor's statements violate the Fifth Amendment if the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." (quotation omitted)); *United States v. Rosario*, 652 F. App'x 38, 40 (2d Cir. 2016) ("The test governing whether a prosecutor's statements amount to an improper comment on the accused's silence in violation of the Fifth Amendment looks at the statements in context and examines whether they naturally and necessarily would be

Therefore, as it pertains to the true issue at hand—whether the State's statements amounted to commentary on Brown's failure to testify during sentencing—there is no circuit split warranting the Supreme Court's review. And while Brown now attempts to reframe the issue as whether the prosecutor improperly inferred a lack of remorse based on his silence at punishment, his claim should not be considered by this Court because he did not squarely present the same arguments below. *See Sims v. Apfel*, 530 U.S. 103, 109 (2000) ("Ordinarily an appellate court does not give consideration to issues not raised below." (quotation omitted)). Furthermore, the resolution of Brown's alleged circuit split would likely require this Court to announce a new rule. *Teague v. Lane*, 489 U.S. 288, 301 (1989) ("[A]case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (emphasis in original)). But this Court has

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interpreted by the jury as a comment on the defendant's failure to testify." (citation omitted)); *United States v. Brennan*, 326 F.3d 176, 187 (3d Cir. 2003) ("A remark is directed at a defendant's silence when the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." (quotations omitted)); *United States v. Rand*, 835 F.3d 451, 466 (4th Cir. 2016) ("We ask, [w]as the language used manifestly intended to be, or was it of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" (quotation omitted)); *United States v. Mietus*, 237 F.3d 866, 871–72 (7th Cir. 2001) ("[I]ndirect requests to draw adverse inferences from the defendant's silence violate the Fifth Amendment only if (1) the prosecutor manifestly intended to refer the defendant's silence or (2) a jury would naturally and necessarily take the remark for a comment on the defendant's silence." (quotation omitted)); *Herrin v. United States*, 349 F.3d 544, 546 (8th Cir. 2003) (same); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1132 (9th Cir. 2005) ("A prosecutor's comment is impermissible if it is manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." (quotations omitted)); *Hamilton v. Mullin*, 436 F.3d 1181, 1187–88 (10th Cir. 2006) ("[T]he question is whether the language used by the prosecutor was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." (quotations omitted)); *United States v. Flanders*, 752 F.3d 1317, 1334 (11th Cir. 2014) (same).

held that "[u]nder *Teague*, new rules will not be applied or announced in cases on collateral review . . ." *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (citing *Teague*, 489 U.S. at 311–313). And similarly, even if the Court resolved Brown's constitutional question in his favor, Brown would not receive the benefit of the new rule on remand because "federal habeas corpus petitioners may not avail themselves of new rules of criminal procedure . . ."[10] *Beard v. Banks*, 542 U.S. 406, 408 (2004). Consequently, certiorari review should be denied.

II. Brown's Prosecutorial Misconduct Claim is Unexhausted and Procedurally Defaulted.

Brown concedes that his prosecutorial misconduct claim is unexhausted because he failed to raise it in his state court proceedings. Pet. Cert. 19; ROA 289 (federal habeas petition). Consequently, his claim is procedurally defaulted because if he filed a subsequent state habeas application to exhaust his claim, it would ultimately be dismissed for abuse of the writ. *Beatty v. Stephens*, 759 F.3d 455, 465 (5th Cir. 2014) ("Because Beatty did not raise the claim in the Texas court in his initial state habeas application, the claim would now be procedurally barred in

[10] "*Teague*'s bar on retroactive application of new rules of constitutional criminal procedure has two exceptions." *Beard v. Banks*, 542 U.S. 406, 416 (2004). The bar does not apply to: (1) "rules forbidding punishment of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense", or (2) "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 416–17 (citing *Penry*, 492 U.S. at 330, and *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997)) (internal quotations omitted). But "the Court stated that it was unlikely that additional watershed rules would emerge." *Edwards v. Vannoy*, 593 U.S. 255, 267 (2021) (quoting *Teague*, 489 U.S. at 313) (internal quotations omitted). "And since *Teague*, the Court has often reiterated that it is unlikely that any such rules have yet to emerge." *Id.* (quoting *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (internal quotations omitted). Accordingly, even if the Court announced a new rule in Brown's favor, it would not fall into either of *Teague*'s two exceptions.

Texas."). Therefore, Brown is barred from obtaining habeas relief based on his prosecutorial misconduct claim. 28 U.S.C. § 2254(b)(1); *Davila v. Davis*, 582 U.S. 521, 527 (2017) ("a federal court may not review federal claims that were procedurally defaulted in state court . . ."); *Coleman*, 501 U.S. at 735 n.1 ("[t]here is a procedural default for purposes of federal habeas" when a "petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.").

The Director argued that Brown's claim is procedurally defaulted in his response to Brown's federal habeas petition. ROA.676–678. The Magistrate Judge noted in the findings, conclusions, and recommendation, that Brown's prosecutorial misconduct claim is unexhausted. Pet. App. 90a. The court, however, declined to address the Director's procedural argument, and instead dismissed Brown's claim on the merits. Pet. App. 17a. The Director again argued that Brown's claim is procedurally defaulted in his response in opposition to Brown's application for a COA, but because the Fifth Circuit found that Brown's claim lacked merit, the court did not consider whether it would have survived procedural default. Pet. App. 14a.

"Together, exhaustion and procedural default promote federal-state comity. Exhaustion affords States an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights, and procedural default protects against the significant harm to the States that results from the failure of federal courts to respect state procedural rules." *Shinn v. Ramirez*, 596 U.S. 366, 378–79 (2022) (citations and

quotation marks omitted). "Out of respect for finality, comity, and the orderly administration of justice, federal courts may excuse procedural default only if a prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Id.* (citations and internal quotation marks omitted).

Brown makes no effort to satisfy *Coleman*'s cause-and-prejudice standard to excuse his procedural default in his petition to this Court. Pet. Cert. 19–20. And similarly, Brown failed to argue cause and prejudice in the courts below. ROA.276–77 (federal habeas petition), 756–58, 779–82 (Brown's reply to the Director's response); *see* Mot. for COA 45–49, *Brown v. Lumpkin*, No. 23-70004 (5th Cir. Dec. 11, 2023), ECF No. 32. Brown instead argued that his failure to exhaust should be excused because (1) he filed a motion for a *Rhines* stay which, if granted, would allow him to exhaust his claim in state court, and (2) his state habeas counsel was ineffective and therefore "it is not entirely clear that the state court would refuse to hear his claim."[11] ROA.775, 779–80. But, as discussed below in Section IV, the district court properly denied Brown's motion for a *Rhines* stay. And the CCA has declined to extend ineffectiveness of state habeas counsel as a basis for consideration of a subsequent state writ on the merits. *Sandoval Mendoza v. Lumpkin*, 81 F.4th 461,

[11] Brown also attempted to argue in his motion for a *Rhines* stay that his failure to exhaust his prosecutorial misconduct claim was excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), because both trial and state habeas counsel were ineffective for failing to raise it in state court. ROA.824. However, as explained in Section IV below, the *Martinez* and *Trevino* exception applies only to "a single claim—ineffective assistance of trial counsel"; it does not apply to claims of prosecutorial misconduct. *Davila*, 582 U.S. at 524.

482 (5th Cir. 2023) (citing *Ex parte Graves*, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002)).

Therefore, because Brown's prosecutorial misconduct claim is unexhausted and procedurally defaulted, and Brown fails to argue, much less show, cause and prejudice, certiorari review should be denied. *Gray v. Netherland*, 518 U.S. 152, 165 (1996) (citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992) ("If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it.")).

III. The Fifth Circuit Correctly Denied a COA for Brown's Prosecutorial Misconduct Claim.

In denying a COA on Brown's prosecutorial misconduct claim, the Fifth Circuit applied its settled, two-prong test for determining whether a prosecutor's comments amount to a constitutional violation, which is "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." Pet. App. 11a (citing *Rhoades*, 852 F.3d at 432–33). The Fifth Circuit concluded that: (1) reasonable jurists could not conclude that the prosecutor's manifest intent was to focus on Brown's decision not to testify at sentencing; and (2) reasonable jurists could not debate whether the only way the jury could construe the prosecutor's remarks were as a commentary on Brown's choice not to testify at sentencing. Pet. App. 13a–14a. Brown now argues that the Fifth Circuit erred in denying him a COA because "there is 'fairminded disagreement' about the intent and effect of the prosecutor's argument," and "[t]he prosecutor's emphasis on

Brown's silence had a substantial and injurious influence on the outcome" of his trial. Pet. Cert. 13–19. However, the Fifth Circuit correctly denied Brown a COA regarding his prosecutorial misconduct claim, and the Fifth Circuit's determination complies with this Court's precedent.

The Fifth Amendment prohibits a prosecutor from making a comment on a defendant's failure to testify. *Griffin*, 380 U.S. 609. The ordinary test for determining whether a prosecutor's statements amount to an unconstitutional comment on a defendant's failure to testify is "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence."[12] *Rhoades*, 852 F.3d at 432–33 (quoting *Bohuchot*, 625 F.3d at 901). "The prosecutor's intent is not manifest if there is some other, equally plausible explanation for the remark." *Davis*, 609 F.3d at 685 (quoting *United States v. Grosz*, 76 F.3d 1318, 1326 (5th Cir. 1996)). "As for whether a jury would naturally and necessarily construe a remark as a comment on the defendant's failure to testify, the question is not whether the jury could possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so." *Id.* (internal quotations omitted). And when reviewing a claim such as Brown's, the prosecutorial comments "must be viewed within the context of the trial in which they [were] made." *United States v. Waguespack*, 935 F.3d 322, 334 (5th Cir. 2019)

[12] Almost all circuits apply a similar, if not the same, test for determining whether a prosecutor's statements amount to an unconstitutional comment on a defendant's failure to testify. *See supra* note 10.

(internal quotations omitted). Moreover, under Texas law, jury argument is proper if it falls "within one of the following categories: (1) summary of the evidence; (2) reasonable deduction from the evidence; (3) in response to argument of opposing counsel; and (4) plea for law enforcement." *Ward v. Dretke*, 420 F.3d 479, 497 (5th Cir. 2005) (internal quotations omitted).

A. Reasonable jurists would not debate whether the prosecutor's manifest intent was to focus on Brown's decision not to testify at sentencing.

The Fifth Circuit determined that "because equal, if not more, plausible explanations for the prosecutor's closing remarks exist, reasonable jurists could not conclude that the prosecutor's manifest intent" was to focus on Brown's silence at sentencing. Pet. App. 13a. Brown claims that the court "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." Pet. Cert. 13. He then argues that "it is reasonably debatable whether [focusing the jury's attention to Brown's lack of remorse] is permissible under the Fifth Amendment" because "[i]f 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" comments. *Id.*

Brown's argument is misguided, however, because the court did not determine that the prosecutor may have been referencing Brown's lack of remorse from his silence, but rather that "the prosecutor may have been referencing Brown's apparent lack of remorse . . . as demonstrated by" particular pieces of trial evidence. Pet. App.

13a. Brown fails to show that the prosecutor's comments were not referencing his lack of remorse as demonstrated from the trial evidence. Instead, he repeats his circuit split argument and concludes that "[b]ecause the constitutional status of inferring lack of remorse from silence is debatable, the Court of Appeals could not deny Brown" a COA. Pet. Cert. 13–14. But the record reflects, as the lower courts found, that the prosecutor's manifest intent was not to comment on Brown's silence at all, rather it was to reference his apparent lack of remorse as demonstrated during the guilt-innocence phase of his trial. The Fifth Circuit's conclusion was plainly correct.

First, the evidence presented at the guilt-innocence phase of Brown's trial clearly indicate Brown's lack of remorse for killing Ray. After the murder, Brown taunted Ray's mother about Ray's death, ROA.7515–16, and when he was interviewed after his arrest, he did not ask about the children and expressed no remorse for shooting Ray. ROA.7546–47. Brown later wrote a fellow inmate about how he "blew her head clean off. Clean off." ROA.7571. Brown also told a reporter that he did not regret killing Ray and only regretted killing her in front of her kids. ROA.9676. And most notably, even at the time of trial, Brown testified that Ray's murder was her own fault. ROA.8050. The evidence from the guilt-innocence phase of trial was admitted for the jury's consideration during punishment. ROA.8211–12; Pet. App. 95a.

Second, the prosecutor's punishment phase comments regarding Brown's lack of remorse were clearly referencing the abovementioned guilt-innocence evidence. The prosecutor began his closing argument for future dangerousness by focusing on

Brown's lack of regret with specific references to evidence presented at the guilt-innocence phase. The prosecutor told the jury:

> The bragging about after murdering [Ray], to call Tracy and to call Donna and to call Shane Thomas absolutely indicates future danger. No remorse, no concern whatsoever about what he had just done or these people that were near and dear to [Ray's] heart, none at all. It shows future danger.
>
> The Defendant doesn't regret killing [Ray]. I mean, that kind of ties into anything. You hear about Alcoholics Anonymous or Narcotics Anonymous or anything if you're going to get help. All right. If you're going to move on to the next stage and make it better, what's the first thing you do? You accept that you have a problem and you admit that you have a problem. And the Defendant has yet to admit that, to show any regret for shooting [Ray] in the face with a 20 gauge. He did say that he regretted it for his children. But as to the crime itself, that has never occurred. It shows future danger.
>
> . . . .
>
> You know what you can count on. You can count on the facts. You can count on the evidence that you've heard to know that he is a future danger. You look at that Channel 11 interview, you look at Felicia's interview and you look at the Defendant's eyes, you look at his face, you look at his responses, you listen to his responses. His entire countenance suggests nothing more than he is dangerous.

ROA.8688–89, 8691.

The prosecutor also referenced the guilt-innocence evidence demonstrating Brown's lack of remorse to support that there was not sufficient mitigating evidence to warrant a sentence of life imprisonment rather than death. The prosecutor said:

> Okay. You're going to look at all the evidence, everything that you heard just as we discussed from the beginning to end, all of the evidence. If you look at the second part of that, including the circumstances of the offense, what are the circumstances of the offense? That he chased her down Sayle Street, forced her to pull over and shot her in the face with a shotgun in front of her kids and then drove away. And you heard a lot of talk about suicide by cop or wanting to do this or wanting to do that.

> The fact of the matter is he ran and he intended to hide. Those are the circumstances of this offense. And the phone calls that were made to Donna, particularly Donna. Who calls the mother of anyone and says, "I did it. I killed her." And calls back, I mean, seriously think about the mindset after that call. Calls back and says, "I told you so." It's unbelievable, absolutely unbelievable. But those are the circumstances of this offense.

ROA.8691–92.

Then, during the defense's closing, counsel asserted:

> Now, they say he's shown no remorse, no evidence of remorse. Really? Did they forget about Morris Beene, who's a counselor and pastor? Did they forget about Pastor Hammock? Morris has been meeting with Micah once a week pretty much continuously since October of 2011. He's a counselor and a pastor. He's used to dealing with people who may be trying to snow him.
>
> What did he tell you? He thought Micah Brown was sincere. He had no doubt that Micah Brown was sincere in his regret for what he'd done and that he had changed. Pastor Hammock said the same thing.

ROA.8708.[13]

In response, during the State's closing rebuttal argument, the prosecutor argued, in sum, that "Mercy is given by God to those who show true repentance . . . Have you seen that from this Defendant? Absolutely not. So give him what he's asking for." ROA.8721–8722; *see supra* Section I (full excerpt of the prosecutor's remarks Brown takes issue with). While Brown argues that these comments were focused on

[13] To the extent Brown argues the prosecutor's references to "mercy" were improper, the prosecutor's statements were permissible responses to defense counsel's argument during closing, in which she explicitly argued and asked for mercy from the jury. ROA.8720–21 (defense counsel during closing: "We all know mercy isn't earned, mercy isn't deserved. That's why it's mercy. It wouldn't be mercy if you []earned it or deserved it . . . What did Shakespeare tell us about justice and mercy? Mercy is an attribute of God himself. And earthly powers show themselves like God when mercy seasons justice. Therefore, though justice be thy plea, consider this. In the course of justice, none of us should see salvation.").

Brown's failure to testify at sentencing, the more plausible explanation for the prosecutor's statements was to summarize the evidence of remorselessness—that the prosecutor already emphasized in his closing argument—or to reasonably deduce from the evidence that Brown lacked remorse. Accordingly, Brown cannot establish that the prosecutor's manifest intent in making the arguments was to comment on Brown's decision not to testify during punishment. *Davis*, 609 F.3d at 685.

B. Reasonable jurists would not debate whether the only way to construe the prosecutor's remarks were as a commentary on Brown's decision not to testify at sentencing

Brown also contends that "the 'natural and necessary' focus of attention was on Brown's failure to speak at the penalty phase" because 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." Pet. Cert. 15. However, the prosecutor's arguments were clearly a response to the above contention that Brown showed remorse. Brown fails to point to any statement in which the prosecutor specifically remarked on his failure to testify at punishment. *See Davis*, 609 F.3d at 685. Rather, in the context of Brown's trial—during which he testified at guilt-innocence, evidence showed his lack of remorse, and defense counsel argued about remorse and mercy prior to the prosecutor's remarks—Brown cannot show that the character of the remarks was such that the jury necessarily construed it as a comment on his decision not to testify at punishment.

Finally, Brown argues that the prosecutor's comments had a substantial and injurious effect on the outcome of his trial. Pet. Cert. 17–18 (citing *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013), and *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). But Brown fails here too because the prosecutor's comments made up only a minor portion of her rebuttal closing argument during punishment, *see* ROA.8721–23, 8735, and during the argument, the court reminded the jury that they are the ones that decide the issues and that whatever the attorneys say is not evidence, but merely argument. ROA.8723. Furthermore, the aggravating evidence in Brown's case was overwhelming. Brown's two children were in the car when he murdered their mother, and Brown used Ray's son's shotgun as his weapon. ROA.7400, 8058. And as already discussed, Brown taunted Ray's mother about killing her son, he bragged to a fellow inmate about "[blowing] her head off", he told a reporter that he did not regret killing Ray, and he testified, at his own trial, that Ray's murder was her own fault. *See supra* Section III(A). Therefore, Brown cannot show that the prosecutor's limited comments "had [a] substantial and injurious effect or influence in determining the jury's verdict," and his claim is without merit. *Brecht*, 507 U.S. at 637.

Consequently, Brown fails to establish that the prosecutor's comments were improper or that he was harmed by any of the prosecutor's comments, and his prosecutorial misconduct claim is meritless. Therefore, no reasonable jurist could debate the district court's denial of his claim, and the Fifth Circuit correctly denied Brown a COA.

IV. The Fifth Circuit Correctly Affirmed the Denial of Brown's Motion for a *Rhines* Stay.

Brown concludes his petition by asking this Court to remand the case to the Fifth Circuit for a full analysis under *Rhines* because the Fifth Circuit rejected his argument based on only one of the three prongs of this Court's *Rhines* analysis. Pet. Cert. 19. The Fifth Circuit stated that because it concluded that Brown's prosecutorial misconduct claim was meritless, it need not reach the other two prongs of the *Rhines* analysis, and therefore "the district court did not abuse its discretion in denying the motion for a *Rhines* stay." Pet. App. 14a. The Fifth Circuit appropriately declined to grant a futile stay.

A "stay and abeyance should be available only in *limited* circumstances." *Rhines*, 544 U.S. at 277 (emphasis added). Specifically, when an inmate can prove (1) good cause for the failure to exhaust, (2) the claim is not plainly meritless, and (3) that the request is not for purposes of delay. *Id.* at 277–78. First, the Fifth Circuit's denial of a COA regarding Brown's motion for a *Rhines* stay was correct because, as explained above, Brown's claim is meritless. *See* Pet. App. 14a. Second, notwithstanding the merits of Brown's unexhausted claim, the district court *did* resolve the other two prongs, and that analysis has not been reversed or undone by a higher court. Specifically, the district court first addressed delay, finding that that:

> Brown waited almost a year after he filed his original federal habeas corpus petition to request a stay to permit him to return to state court and exhaust state remedies on his allegedly unexhausted claims. The appropriate time to seek a stay and abeyance for unexhausted claims was when Brown's federal habeas counsel became aware of the need to assert his unexhausted claims – prior to or contemporaneous with the

> filing of Brown's original petition, not eleven months later after Respondent responded on the merits and Brown replied.

ROA.955. Accordingly, the court concluded that this factor did not weigh in Brown's favor. *Id.* And while Brown argued in his motion for a COA to the Fifth Circuit, that reasonable jurists would disagree as to whether his request was for the purpose of delay because the district court based its finding of untimeliness solely on the length of time between the filing of his petition and the filing of his motion, when "[t]here is no established time limit for filing a motion seeking a stay for exhaustion purposes . . ." he did not present the court with an alternative reason or explanation for his delay.[14] Mot. for COA 49, *Brown v. Lumpkin*, No. 23-70004 (5th Cir. Dec. 11, 2023), ECF No. 32. Rather, Brown offered only the conclusory assertion that he "did not engage in abusive litigation tactics or intentional delay." *Id*. at 49.

The district court then addressed whether Brown had good cause for his failure to exhaust his claims, finding that Brown did "not provide a rational, much less a convincing, explanation for his failure to exhaust his state remedies on all his claims for federal habeas relief during his state habeas corpus proceeding." ROA.956. In his motion for a *Rhines* stay, Brown argued that he had good cause for his failure to exhaust his claims because "[u]nder *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), failure to exhaust claims is excused when both trial and state habeas counsel were ineffective for failing to raise them." ROA.824.

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[14] Brown argued in his motion for a COA that "[r]easonable jurists would debate whether the district court should have granted Brown the opportunity to exhaust his claim," however, the proper standard when reviewing a denial of a *Rhines* stay is abuse of discretion. *Tong v. Lumpkin*, 90 F.4th 857, 862 (5th Cir. 2024) (citing *Young v. Stephens*, 795 F.3d 484, 495 (5th Cir. 2015).

However, the district court correctly noted that Brown's reliance on *Martinez* and *Trevino* was misplaced. ROA.957; *Davila*, 582 U.S. at 528–530 (expressly declining to extend the holdings in *Martinez* and *Trevino* beyond claims of ineffective assistance of trial counsel). The court concluded that:

> Those two opinions do not authorize a federal habeas petitioner who argued in his state habeas corpus proceeding that his state trial counsel rendered ineffective assistance by failing to object to allegedly improper prosecutorial jury argument (which argument the state habeas court concluded to be unobjectionable under applicable state and federal law) to obtain de novo review in a federal habeas court of otherwise unexhausted due process . . . claims attacking the propriety of the same prosecutorial jury argument. To hold otherwise would disregard the congressional intent underlying the Anti-Terrorism and Effective Death Penalty Act."

ROA.959.[15] And the Fifth Circuit would likely conclude the same because it recently made clear that the actions of state habeas counsel do not constitute good cause under *Rhines*. *Tong*, 90 F.4th at 863 (rejecting petitioner's argument that ineffective assistance of habeas counsel should serve as "good cause" under *Rhines*) (citing *Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010), *abrogated on other grounds by Thomas v. Lumpkin,* 995 F.3d 432, 440 (5th Cir. 2021)). Therefore, the Fifth Circuit properly affirmed the denial of Brown's motion for a *Rhines* stay, and certiorari review should be denied.

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[15] Brown raised in his state habeas application a claim of ineffective assistance of trial counsel (IATC) for failing to object to the prosecutor's jury argument that commented on Brown's failure to testify at the punishment phase of trial. *See* Pet. App. 87a-89a. The state habeas court found, among other things, that "the record supported the prosecution's comments arguing that Brown had failed to demonstrate remorse for his offence", and "the prosecution's comments concerning Brown's lack of remorse were a fair response to the arguments of defense counsel." Pet. App. 88a–89a. The CCA adopted the state habeas court's findings and conclusions and denied Brown's IATC claim on the merits. ROA.24641.

CONCLUSION

For the foregoing reasons, the Fifth Circuit correctly denied a COA as to Brown's prosecutorial misconduct claim and affirmed the denial of his motion for a *Rhines* stay. Brown's petition for a writ of certiorari should be denied.

Respectfully submitted,

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