No. 24-6841 (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

REPLY TO BRIEF IN OPPOSITION

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I. The Fifth Circuit had no plausible basis on which to deny Brown a certificate of appealability.

The only reasonable interpretation of the prosecutor's remarks is the most obvious one: she used Brown's silence at the penalty phase against him. She did that in one of two ways. Either, as the State argued, and the Fifth Court found, she used his silence to create an inference of remorselessness, which places this case squarely within the "fairminded disagreement" that Justice Scalia described in *White v. Woodall* 572 U.S. at 422 n.3 (2014); or, as Brown argued to the Fifth Circuit, she simply invoked Brown's silence to create an inference of culpability—a violation prohibited since *Estelle v. Smith* established that the privilege against self-incrimination applies with as much force in a capital penalty phase as it does during guilt-innocence.[1] *See Estelle v. Smith*, 451 U.S. 454, 462-63 (1981).

Either way, this case must go back to the Fifth Circuit. Contrary to the State's numerous misdirections on what Brown is allowed to challenge here, the Fifth Circuit set the terms for Brown's petition when it accepted the State's and district court's theory that "the prosecutor may have been referencing Brown's apparent lack of remorse for murdering his ex-wife as demonstrated by the … trial evidence[.]" Pet. App. 13a. That interpretation is implausible because the prosecutor never mentioned that evidence or used the word "remorse" in her closing argument.

[1] The issue of whether the prosecutor violated *Estelle* is a question "'fairly included' within the question presented" and thus appropriate for this Court's review. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006) (citation omitted).

Nonetheless, the prosecutor's repeated descriptions of what Brown had not said or done at the penalty phase were references to his "apparent lack of remorse," *id.*, then there is "fairminded disagreement" about whether she violated Fifth Amendment. *White*, above. That fairminded disagreement not only embodies a debatable question among jurists of reason, it means "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockerell*, 537 U.S. 322, 327 (2003).

A. Brown did not "re-frame" the Fifth Amendment question to include remorse—the State and the Fifth Circuit did.

The brief in opposition argues from a premise that the State must know is false. Specifically, the State introduces its primary argument with the mischaracterization that "Brown now reframes his issue to the Court … in an attempt to establish a circuit split[.]" BIO at 1. The State commits to this mischaracterization when it argues that "[a]ccording 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." *Id.* at 19. But the record of argument on this claim shows that this supposed inference of remorselessness in the prosecutor's closing comments has never been an interpretation "according to Brown"; rather, it has always been the State's interpretation, which the Fifth Circuit adopted as its basis to deny a COA. Indeed, the Fifth Circuit made its preference for the State's interpretation plain, stating that "Brown's apparent lack of remorse" was the "[m]ost persuasive" explanation for the prosecutor's remarks. Pet. App. 13a.

The State mischaracterizes Brown's argument in another way when it says that "[u]nder 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." BIO 18 (citing Pet. Cert. 10). A cursory glance at Brown's petition shows that is not his view. Instead, the petition says that 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." Pet. Cert. 10 (emphasis added). The State's incorrect argument highlights the underlying flaw in its position—it conflates asking for mercy with remorse. As Brown put it to the Fifth Circuit, the State "blurs an important distinction. A comment about perceived lack of remorse is not the same as an argument that focuses on specific testimony the defendant did not give after exercising his right not to testify." Reply in Further Support of COA 29. More succinctly, "[w]hile the Supreme Court has not decided whether silence bears on remorse, showing remorse and begging for mercy are two different things. The district court [and the Fifth Circuit] erred in analyzing them as though they are not." Motion for COA 51 (citing *White v. Woodall*, 572 U.S. at 422 n.3 (2014)).

Brown lost that argument, with the appellate court adopting the State's view that it was just as plausible, if not more, that the prosecutor was not commenting on Brown's silence but "referencing [his] apparent lack of remorse[.]" Pet. App. 13a. But now, having won below, the State faults Brown for challenging the Fifth Circuit's decision on its own terms, asserting that Brown cannot pursue the argument that the

Fifth Amendment prohibits using a defendant's silence to create an inference of remorselessness.

Putting aside whether the State should be judicially estopped from reversing its position, it is apparent why the State would resort to this tactic: having persuaded the Fifth Circuit that "the prosecutor may have been referencing Brown's apparent lack of remorse," the State has cornered itself into one side of the circuit split that this Court clearly marked out in *White v. Woodall*, 572 U.S. 415, 422 n.3 (2014).[2]

To escape the implications of this split, the State tries to re-cast Brown's petition from a straightforward challenge to the Fifth Circuit's reasoning—reasoning that the State presented "persuasively" to the Fifth Circuit—into an impermissible new argument formulated solely to "establish a circuit split." BIO 1. Here again, the State misdirects the Court, this time from its own precedent. That precedent makes it clear that when this Court reviews an appellate court's denial of a COA, the Court focuses less on what the parties argued below and more—much more—on the appellate court reached its decision. *See, e.g., Buck v. Davis*, 580 U.S. 100, 115-16 (2017) (reversing the denial of a COA because "[t]he balance of the Fifth Circuit's opinion reflects the [wrong] approach"); *Tharpe v. Sellers*, 583 U.S. 33, 34 (2018) (reversing the denial of a COA based on "[t]he Eleventh Circuit's decision, as we read it"). It is therefore entirely proper for Brown to frame his petition in the terms on which the Fifth Circuit found "reasonable jurists could not conclude that the prosecutor's manifest intent was

[2] *See* Petition 11, 13-14 (stating that "[i]n *White v. Woodall*, the Court stated that [it had] left unresolved the question 'whether silence bears upon the determination of a lack of remorse' for purposes of sentencing") (citation modified).

to focus on Brown's decision not to testify during the sentencing phase of the trial." Pet. App. 13a.

B. The Fifth Circuit reached an implausible conclusion on whether a debatable question exists.

The State's argument should not, therefore, steer this Court away from examining the implausibility of the Fifth Circuit's denial of a COA on this claim. That implausibility lies in the Fifth Circuit's interpretation that the prosecutor could not have been commenting on Brown's silence when she asked the jury, after a short diatribe on repentance and mercy, "Have you seen [repentance] from this Defendant? Absolutely not." Pet. 5. Rather than accept the plain meaning and clear context of those remarks, the Fifth Circuit relied on the State's and district court's decontextualized interpretation. The result is a decision at odds with the first controlling standard the appellate court applied—i.e., whether there exists an "equally plausible explanation for the remark" that does not violate the Fifth Amendment. Pet. App. 12a-13a (citing *United States v. Davis*, 609 F.3d 663, 685 (5th Cir. 2010)).

The Fifth Circuit credited as "equally, if not more, plausible" the State's and district court's explanation that the prosecutor "may have been referencing Brown's apparent lack of remorse … as demonstrated by" some of the trial evidence. *Id.* at 12a-13a. The Fifth Circuit added that the prosecutor "may also have been referencing the testimony of mitigation witnesses[.]" *Id.* at 13a. The transcript does not come close to supporting either of those readings.

Instead, the transcript shows exactly what the prosecutor was responding to: the defense attorney's last penalty-phase argument, in which she asked the jury, "on

Micah's behalf, [to] render the deeds of mercy." ROA. 8721. The prosecutor then took the floor and immediately, without any reference to any evidence or other argument, picked up on the question of mercy. Her first words directed the jury to what they had not heard from the defendant:

> 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. … Who do we give life without parole to in a capital murder case? A defendant who throws himself at the mercy of the jury.

Id. at 8721-22. At that point, defense counsel objected, arguing "that is not the standard and she is misstating the law. *Id.* at 8722.

The prosecutor's response to defense counsel's objection and the colloquy that followed eliminate all doubt that she was focusing her rebuttal on Brown's failure to testify at sentencing and not, as the State and the Fifth Circuit would have it, on evidence of remorselessness or mitigation witnesses:

> MS. AIKEN [the prosecutor]: Your Honor [defense counsel] argued who should or should not get it[.] I think I should be able to argue against it.[3]
>
> THE COURT: Overruled.
>
> MS. AIKEN: 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] In this context, "it" can only mean mercy or a sentence of life without parole.

> MS. FERGUSON: Objection, Your Honor, that is not the standard. The standard is the two special issues. That is how you decide.
>
> THE COURT: Ladies and gentlemen of the jury, you are the ones that decide the issues. And again, whatever the attorneys say is not evidence. It's argument.
>
> MS. AIKEN: May I continue, Your Honor?
>
> THE COURT: You may.
>
> MS. AIKEN: So it's my fault, only me. Blame me. Punish me for what I did. No one else, just me.

ROA.8722-23. The transcript shows the prosecutor repeatedly returning to the same fact: Brown did not ask the jury for their mercy or forgiveness himself. This is not the transcript of a prosecutor referencing or reminding the jury about evidence that Brown lacked remorse. In fact, the prosecutor who castigated Brown at the beginning and the end[4] of the State's rebuttal never referenced any of that evidence at all. She never even used the word "remorse."[5] *See* ROA.8721-35. She was always—always—talking about Brown's silence at the penalty phase.[6]

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[4] *See* ROA.8735 ("[Y]ou don't give mercy to someone who hasn't asked for it.")

[5] Another prosecutor made the State's initial closing argument at the penalty phase. He used the word "remorse" once, in the context of Texas' "future dangerousness" aggravator. ROA.8688.

[6] To be clear, Brown's position is not that the prosecutor could not argue that the defendant had shown no remorse or that the mitigation evidence did not warrant a life sentence. Rather, the Fifth Amendment prohibited the prosecutor from using Brown's silence to argue those points. She could point to evidence, but she could not point to Brown's exercise of his right not to testify.

1. This Court's constructions of "plausibility" impeach the Fifth Circuit's decision.

As shown above, the Fifth Circuit's explanation that it was "equal[ly], if not more, plausible" that the prosecutor was talking about lack of remorse or mitigation witnesses was, in the face of the trial transcript, manifestly implausible. Pet. App. 13a. To see why, it is helpful to look at this Court's constructions of "plausibility" in another, well known context.

Since 2009, federal courts have routinely discussed civil pleading standards by citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), in which the Court contrasted the "plausible" against the "merely possible." This formulation often appears alongside the standard articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), that to survive a motion to dismiss, factual statements must rise "above the speculative level." *See, e.g.*, *Benfield v. Magee*, 945 F.3d 333, 336-37 (5th Cir. 2019) (citing *Iqbal* and *Twombly*). Put another way, the proponent of factual inferences must "nudg[e] their claims across the line from conceivable to plausible[.]" *Twombly*, 550 U.S. at 570.

The Fifth Circuit's alternative explanations for the prosecutor's remarks fail under these formulations of "plausibility." In fact, the Fifth Circuit's failure to articulate any plausible reasoning for denying Brown's COA plays something of a double role in this case. First, it is key to understanding the substantive violation of Brown's Fifth Amendment right: the only plausible explanation for the prosecutor's remarks is that she repeatedly used Brown's silence against him. Second, at a more general level, an appellate court that denies a COA based on a theory that does not transcend

"the speculative level," *Twombly*, such as the theory under review here, "reflects the [wrong] approach." *Buck*, 580 U.S. at 115-16. Either way, this case has to go back to the Fifth Circuit.

C. The prosecutor told everyone that she "naturally and necessarily" was talking about Brown's silence.

In discussing the second part of the disjunctive test that the Fifth Circuit applied—i.e., whether the jury would have "naturally and necessarily" construed the prosecutor's remark as a comment on Brown's silence—the State submits helpful precedent. *See* BIO 21-22 n.9. This includes the Second Circuit's instruction that "[t]he test governing whether a prosecutor's statements [violated] the Fifth Amendment *looks at the statements in context*[.]" *Id.* (quoting *United States v. Rosario*, 652 F.App'x 38, 40 (2d Cir. 2016). The context of these remarks proves the jury could have construed a damning inference from Brown's silence as the only natural and necessary meaning of the prosecutor's remarks.

As shown above, the prosecutor explained what her argument was about when she responded to defense counsel's objection that she was "misstating the law." *See* page 6, above (quoting ROA.8722). Up to that point, the prosecutor had derided Brown for failing to beg for mercy, lamented that the victim had been deprived her "chance to repent and ask for God's forgiveness," and informed the jury that "we give life without parole to … [a] defendant who throws himself at the mercy of the jury." ROA.8721-22. The prosecutor rebutted the objection by saying, "Your Honor [defense counsel] argued who should or should not get it[.] I think I should be able to argue

against it." *Id.* at 8722-23. As noted above, this "it" can refer only to life without parole or the jury's mercy—both of which are, in a capital penalty hearing, the same thing.

This context shows that the State has no basis for contending that the "natural and necessary" meaning of the prosecutor's remarks "were clearly a response to the … contention that Brown showed remorse." BIO 32. To the contrary, the prosecutor said she was arguing "against" something defense counsel had said about "who should or should not get it." Brown's remorse does not fit the prosecutor's construction: remorse is not something lawyers (or anyone else) debate regarding "who should or should not get it." Furthermore, the only defense argument about Brown's remorse occurred several minutes (that is, about fifteen transcript pages) before the prosecutor initiated her rebuttal with her jeremiad against the defendant and his silence. *See* ROA.8708.

In deciding the "natural and necessary" prong of this claim, the Fifth Circuit incorporated the same implausible alternatives discussed in Section I.B above—that the prosecutor was referring to unmentioned evidence of remorse or the testimony of mitigation witnesses. *See* Pet. App. 13a-14a. Along with being implausible, the Fifth Circuit's interpretation is contextually untenable. The relevant context plus the prosecutor's own statement of what she was arguing against clarifies that the jury naturally and necessarily heard her fault Brown for not begging for their mercy. Here again, the State's and the Fifth Circuit's interpretations fall short.

II. No court has ruled that Brown's Fifth Amendment claim is defaulted.

It is true that Brown's claim is unexhausted; it is also true that neither the district court nor the Fifth Circuit decided whether the claim is procedurally defaulted. There is, therefore, no ruling on procedural default, nor any arguments for cause-and-prejudice exceptions to default,[7] for this Court to address.

The Court should adhere to its general rule that "[w]e ordinarily do not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (citation modified). This Court has reversed a federal habeas court's ruling that a claim is defaulted and remanded the case for initial consideration on the merits. *See Lee v. Kemna*, 534 U.S. 362, 387-388 (2002). The Court should do the same here so that the lower courts can give initial consideration to the State's argument that this claim is procedurally defaulted.

III. The district court's ruling on Brown's request for a *Rhines* stay is neither here nor there.

Remand is especially warranted because the court of appeals did not fully address Brown's argument for excusing any default—the denial of his motion for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005). Most of the BIO's discussion of *Rhines* concerns the district court's denial of Brown's request to stay his case so he could exhaust his Fifth Amendment claim. BIO 34-36. The district court's analysis of Brown's *Rhines* motion is inapposite because, as the State acknowledges, the court

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[7] Contrary to the State's suggestion in its brief in opposition, Brown did not bear the burden pre-emptively rebutting any potential default argument in his petition. Procedural default is an affirmative defense, *Gray v. Netherland*, 518 U.S. 152, 165 (1996), so the burden of initiating the argument rests on the State.

whose decision this Court must review—the Fifth Circuit—did not consider the second and third prongs of the *Rhines* standard. *Id.* at 34. The best the State can say, then, is that the Fifth Circuit "would likely conclude the same" as the district court did. *Id.* at 36. But the speculative nature of that opposition supports Brown's argument that the *Rhines* question is unresolved and needs further development in the Fifth Circuit.

As explained in Brown's petition the argument challenging the Fifth Circuit's denial of a COA impeaches its holding that Brown's Fifth Amendment claim lacked merit and did not meet the first prong of the *Rhines* test. Pet. 19-20; Pet. App. 14a. The same goes for Brown's argument in reply to the BIO. In vacating the Fifth Circuit's ruling and remanding this case, this Court should instruct the Fifth Circuit to fully assess the second and third elements of Brown's request for a stay under *Rhines*.

CONCLUSION

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

DATED: July 10, 2025

Respectfully submitted,

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