25-5953 ORIGINAL

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

CHRISTOPHER HENDERSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Christopher Henderson, and his co-defendant, Rhonda Carlson, were both charged with capital murder in this case, but only Mr. Henderson was sentenced to death. Ms. Carlson agreed to testify for the State in exchange for a sentence of life without parole. Yet, other than Ms. Carlson's self-serving testimony, there was no evidence that showed Mr. Henderson was more culpable or more deserving of death. In order to persuade jurors that Mr. Henderson should be sentenced to death, even though Ms. Carlson was not, the prosecution relied on the fact that Mr. Henderson had invoked his right to remain silent, while Ms. Carlson had accepted responsibility. Under these circumstances, and where the prosecution was unable to secure a unanimous death verdict, the question presented is:

> In the sentencing phase of a capital trial, where the defendant exercises his right to remain silent and to plead not guilty, does the Fifth Amendment prohibit the prosecution and the sentencing court from drawing adverse inferences about a defendant's lack of remorse or acceptance of responsibility from his silence?

RELATED PROCEEDINGS

State v. Henderson, Madison County Circuit Court, No. 2017-3064. Judgment entered on July 1, 2021. Sentencing order entered on October 14, 2021.

Henderson v. State, Alabama Court of Criminal Appeals, CR-21-0044. Conviction and sentence affirmed on May 3, 2024. Application for rehearing overruled on August 23, 2024.

Ex parte Henderson, Alabama Supreme Court, No. SC-2024-0555. Petition for writ of certiorari denied on June 20, 2025.

Henderson v. State, Madison County Circuit Court, No. 2017-3064.60. Petition for post-conviction relief currently pending, filed April 4, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Christopher Henderson respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Henderson's convictions and death sentence, *Henderson v. State*, CR-21-0044, 2024 WL 1946585 (Ala. Crim. App. May 3, 2024), is attached as Appendix A. The opinion of the Alabama Court of Criminal Appeals denying rehearing is unreported and attached as Appendix B. The order of the Alabama Supreme Court denying Mr. Henderson's petition for a writ of certiorari, *Ex parte Henderson*, No. SC-2024-0555 (Ala. June 20, 2025), is unreported and attached as Appendix C.

STATEMENT OF JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Henderson's convictions and death sentence on May 3, 2024. *Henderson v. State*, CR-21-0044, 2024 WL 1946585 (Ala. Crim. App. May 3, 2024). The Court of Criminal Appeals overruled his application for rehearing on August 23, 2024. *Henderson v. State*, CR-17-1014, 2022 WL 4007496 (Ala. Crim. App. May 3, 2024). On June 20, 2025, the Alabama Supreme Court denied Mr. Henderson's petition for a writ of

certiorari, Order, *Ex parte Henderson*, No. SC-2024-0555 (Ala. June 20, 2025). This Court granted Mr. Henderson's application to extend the time to file a petition for writ of certiorari on September 12, 2025, extending the time to file to October 20, 2025. *Henderson v. Alabama,* No. 25A290 (Sep. 12, 2025). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Petitioner Christopher Henderson and his co-defendant Rhonda Carlson were married for six years, from 2008 to 2014. (C. 1051.) In 2014, the marriage ended because Mr. Henderson began having an affair with Kristen Chambers. (C. 1051.) Shortly thereafter, Mr. Henderson married Ms. Chambers. (R.

1499–1500.) They moved to Michigan, and Ms. Chambers became pregnant with Mr. Henderson's child. (R. 1500, 1503.) Ms. Chambers also had an eight-year-old son from a prior marriage, Clayton Chambers, who lived with them during this time. (R. 1501, 1503–04.) Ms. Chambers was scheduled to be induced to give birth on August 28, 2015. (R. 1503.)

In May 2015, Mr. Henderson, Ms. Chambers, and Clayton all returned to the Huntsville area together and moved in with Ms. Chambers's family at 215 St. Clair Lane in Madison County, Alabama. (R. 1504.) Also living in the home were Ms. Chambers's parents, Joe and Carol Jean Smallwood, her sister and her husband, Kelly and Gannon Sokolowksi, and their one-year-old son Eli. (R. 1499–1500.)

In mid to late June, Mr. Henderson and Ms. Chambers separated, and he moved out of the house. (R. 1505.) Mr. Henderson contacted Ms. Carlson about using her storage unit, and this ultimately led to them getting back together. (R. 1761.) Mr. Henderson and Ms. Chambers began the process of getting a divorce. (R. 1762.)

As she would later testify at Mr. Henderson's trial, Ms. Carlson continued to harbor tremendous animosity towards Ms. Chambers. Ms. Carlson blamed her for the break up of her marriage to Mr. Henderson (R. 1823, 1826), and resented that Ms. Chambers was pregnant with Mr. Henderson's child and that Ms.

Chambers was accusing her in the divorce proceedings of being abusive. (R. 1824.)

It was undisputed that, on the afternoon of August 4, 2015, Ms. Carlson went to the Smallwood's home while Ms. Chambers was out picking up Clayton from school. (SX. 3 at clips 5, 8; R. 1775.) When Ms. Chambers and Clayton arrived home, Ms. Chambers was on the phone with her sister, who heard Ms. Chambers say, "it's her" and start screaming. (SX. 1 at 12:40.)

Shortly thereafter, law enforcement responded to the home and found it engulfed in flames. (R. 1484–88, 1522; SX. 1.) After the fire was extinguished, the bodies of Carol Jean Smallwood, Kristen Chambers, Clayton Chambers, Eli Sokolowski, and the unborn child were recovered from the remains of the home. (R. 1689–1693.) Ms. Smallwood and Ms. Chambers had been both shot and stabbed. (R. 1628–47.) Clayton and Eli had also been stabbed. (R. 1648–61.) The unborn child had been removed from the womb, and also had sharp-force injuries, which may have occurred at the same time as Ms. Chambers's wounds. (R. 1664–68.) None of the victims, with the exception of Eli, had carboxyhemoglobin in their bloodstreams, indicating that they were not breathing when the fire started. (R. 1635, 1646, 1654, 1662, 1668.)

The Smallwood family assisted law enforcement in accessing video clips from a camera system that they had self-installed a few days before. (R. 1565.)

These clips showed Rhonda Carlson entering the home around 3 p.m. through a door next to the garage, exiting again a minute later, and then driving away. (SX. 3, at clip 5.) Another clip from the front door area also showed Ms. Carlson driving away, and then Kristen Chambers pulling into the driveway shortly thereafter. (*Id.* at clip 6.) The next clip from the garage area shows Ms. Chambers pull up, Clayton run into the house, and then Ms. Chambers enter the house. (*Id.* at clip 7.) Around 3:21 p.m., another clip from the garage area shows Ms. Carlson approach the house with a gas can in hand, she is unable to open the door, and then walks back toward the front of the house. (*Id.* at clip 8.) The next clip from the front door shows Ms. Carlson come around and enter the house, then a couple minutes later shows the back of a white male with no shoes on running out followed by Ms. Carlson. (*Id.* at clip 9.) The clip cuts off as she is exiting the house. (*Id.*)

That evening, Rhonda Carlson and Christopher Henderson were arrested together at his grandmother's home. (R. 1786.) After learning he was under arrest, Mr. Henderson declined to speak to investigators without a lawyer. (R. 185–86). Ms. Carlson, on the other hand, agreed to speak to law enforcement and gave several inconsistent accounts. (C. 932–75, 1049–82.) Ultimately, she asserted at trial that Mr. Henderson had acted alone in killing the victims, that she was not present in the house at the time, and that all she did was to bring

him a gas can. (R. 1775–81.)

At trial, the State's key witness was Rhonda Carlson, who testified in exchange for the State's plea agreement not to seek the death penalty against her. (R. 1758.) Mr. Henderson's defense theory was that Ms. Carlson was lying, and that in fact, Ms. Carlson, and not Mr. Henderson, had committed the murders. (R. 1970–75.)

Ms. Carlson acknowledged during her testimony that "the truth does not come easy for [her]," that she had "lied and lied and lied all about [her] involvement in this thing" in her initial statements to police, that she was having visual and auditory hallucinations during this time and that she was later diagnosed as psychotic. (R. 1815, 1850–51; DX. 3, at 451.)

Ms. Carlson also admitted that she had a strong motive to commit this crime. (R. 1826.) She acknowledged she was angry with Ms. Chambers for the break up of her marriage to Mr. Henderson. (R. 1823, 1826.) She told police that she participated in burning down the house because, "I was kicked out of my home because of her. He moved her in with him. I've been homeless the past year. So my thought was . . . she took my home. Let's see how she feels being homeless." (C. 997.)

Ms. Carlson also testified at trial that she "wanted [Ms. Chambers] childless." (R. 1826.) While Mr. Henderson wanted the baby and wanted to raise

it with her, Ms. Carlson stated she did not want to be a mother again. (C. 1085, 1091, 1097, 1106.) Ms. Carlson further agreed that she "wanted revenge" against Ms. Chambers and "had every motive in the world" to kill her, "cut [her unborn child] out of her," and "to kill her unborn child." (R. 1826–27.)

Ms. Carlson's testimony was also inconsistent about why she and Mr. Henderson went to the house on the day of the fire. While she claimed that, at various points, Mr. Henderson had come up with plans to kill either Ms. Chambers's father, the entire family, or just Ms. Chambers and her mother (R. 1766–72), she also testified that there was no point at which Mr. Henderson had said that they would carry out such plans that day (R. 1773), and that they had gone to the home to obtain documents and money belonging to Mr. Henderson that he had left at the house when he previously lived there with Ms. Chambers (R. 1777).

Ms. Carlson testified that when they arrived at the house, she first checked the door by the garage to see if it was unlocked, which it was, and then Mr. Henderson entered the house through the door. (R. 1776.) However, none of this was shown on the camera system. (SX. 3.) Ms. Carlson said that she then left but quickly realized Mr. Henderson had forgotten his phone, so she went back, entered the garage, and gave it to him. (R. 1776–77.) She testified that Mr. Henderson called or texted her to let her know that Ms. Chambers was home,

and then called or texted her to tell her to bring the gas can. (R. 1778.) Text messages from a phone that the State asserted belonged to Mr. Henderson were admitted at trial but showed no text to Ms. Carlson during this time period, and the State did not present any call records, despite having access to all data from the phone. (C. 804; R. 1726.)

Ms. Carlson testified that when she returned she went to the garage door but could not open it, so she entered the house through the front door. (R. 1778–79.) She said Mr. Henderson took the gas can from her, spread gas around the house, and lit the fire. (R. 1779–80.) Although she initially insisted to police that she left the house first (C. 968–69), at trial, she changed her testimony to match the video clips, which showed a white male leaving the house before she did. (SX. 3, at clip 9.) She testified that the man seen briefly in the clip was Mr. Henderson. (R. 1789.)

In addition to Ms. Carlson's testimony, the State presented the video clips from the self-installed camera system at the house, which were admitted despite the fact that the clips contained unexplained gaps that might have been due to a "glitch in it or something." (SX. 3; R. 244.)

The prosecution also presented selected data extracted from a cell phone recovered from Mr. Henderson's grandmother's home (R. 1727), which showed searches for information related to breaking into a home, quiet ammunition,

stun guns, opening an airway with a straw, and the website for Riverton Elementary, where Clayton Chambers attended school. (C. 832–39.) Additionally, the prosecution presented still photos from Walmart surveillance cameras showing Ms. Carlson and Mr. Henderson in the early morning hours on the day of the fire both wearing dark clothing (C. 916); Ms. Carlson's booking photo in which she is wearing dark clothing (C. 924); and testimony that Mr. Henderson was wearing a light-colored shirt at the time of his arrest (R. 1871).

After deliberating for the better part of a day, the jury came back with a number of questions, including the definition of complicity, whether the requirement for "intent to kill that victim or another person" means "as a consequence of killing that other person," and what would happen if they were unable to reach a verdict. (R. 2066–76; C. 653–62.) After receiving additional instructions from the judge, the jury deliberated for another full day before reaching a verdict convicting Mr. Henderson of capital murder on all counts. (R. 2076–88; C. 148–162.)

At the penalty phase, the prosecution presented victim impact testimony from Kelly Sokolowski, the mother of Eli. (R. 2116–20.) Mr. Henderson declined to testify. The defense presented testimony from a mitigation specialist regarding Mr. Henderson's work ethic, consistent employment primarily in building maintenance, and lack of criminal history. (R. 2141–59.) The

prosecution cross examined the mitigation specialist regarding mental health history but did not ask questions about Mr. Henderson's remorse. (R. 2156–59.) Mr. Henderson's mother, two sisters, and daughter testified to the ways in which he had been a positive and supportive person in their lives and the life of his autistic son. (R. 2121–40; *see also* R. 2148–53.) The defense also presented evidence regarding the greater costs of the death penalty and the difference in prison conditions for someone sentenced to death versus life without parole. (R. 2160–67.)

In closing, despite never asking any defense witness about remorse, the prosecution argued that the defense had presented no evidence of Mr. Henderson's remorse: "[N]ever once, until I just mentioned it, has the word 'remorse' come out." (R. 2193.) The defense argued in their closing that Ms. Carlson was just as culpable as Mr. Henderson and had not received the death penalty. (R. 2203–04.) In rebuttal, the State argued that Mr. Henderson deserved the death penalty and Ms. Carlson did not because "[s]he owned what she did. Accountability. She didn't deny it." (R. 2207.) In contrast, the State argued again that Mr. Henderson had not shown remorse: "[N]ot one mention of remorse, not one mention of 'I'm sorry.' It's been six years. Nothing. Nothing. . . . No remorse whatsoever. Yet they ask for mercy." (R. 2208.)

The jury returned verdicts finding that the offense was especially heinous,

atrocious, and cruel, but was unable to reach a unanimous sentencing verdict, voting 11-1 to recommend the death penalty. (C. 163–92.) After denying the defense's motion to prohibit the death penalty in the absence of a unanimous jury verdict (C. 223–26, 230), the trial court sentenced Mr. Henderson to death. (C. 252–80.)

II. PROCEEDINGS BELOW

On July 27, 2017, Mr. Henderson was indicted for nineteen counts of capital murder: five during the course of a burglary, five during the course of an arson, five involving two or more persons, three involving children under 14, and one in violation of a protective order. (C. 25–33.) Four of the counts involving two or more persons were dismissed before trial. (R. 407–08, 474–85.)

On July 1, 2021, after nearly two days of deliberations, the jury found Mr. Henderson guilty of the remaining 15 counts of capital murder. (C. 148–62; R. 2081–88.)

On July 6, 2021, the jury returned a non-unanimous verdict, 11 to 1, sentencing Mr. Henderson to death. (C. 163–92; R. 2232–42.)

On October 14, 2021, the trial court sentenced Mr. Henderson to death. (R. 2261; C. 252–80.)

On appeal, Mr. Henderson argued that the prosecution improperly commented on Mr. Henderson's invocation of his right to remain silent to argue

that he lacked remorse or acceptance of responsibility in violation of his rights against self-incrimination, due process, a fair trial, and a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See Griffin v. California*, 380 U.S. 609 (1965); *Estelle v. Smith*, 451 U.S. 454 (1981); *Mitchell v. United States*, 526 U.S. 314 (1999). The Alabama Court of Criminal Appeals simply cited to precedent and held that "remorse is . . . a proper subject of closing arguments" and that "we do not believe the jury would have naturally and necessarily taken [the prosecutor's argument] to be a comment on Henderson's decision not to testify." *Henderson v. State*, CR-21-0044, 2024 WL 1946585, at *36 (Ala. Crim. App. May 3, 2024).

The Alabama Supreme Court denied Mr. Henderson's petition for a writ of certiorari. *Ex parte Henderson*, No. SC-2024-0555 (Ala. June 20, 2025). This petition follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT FEDERAL QUESTION THAT HAS GENERATED A JURISDICTIONAL SPLIT REGARDING WHETHER ADVERSE INFERENCES MAY BE DRAWN AT SENTENCING FROM A DEFENDANT'S EXERCISE OF THEIR RIGHT TO REMAIN SILENT.

In this capital case, to bolster its case that Mr. Henderson deserved the death penalty even though his co-defendant received life without parole, the State improperly argued that because Mr. Henderson exercised his right to

remain silent, while his co-defendant did not, this was evidence of his lack of remorse or accountability. (R. 2193, 2207–08).

The lower court's opinion condoning these comments perpetuates a jurisdictional split, as recognized by this Court over 10 years ago in *White v. Wooddall*, 572 U.S. 415 (2014), about the role that adverse inferences from a defendant's silence may play in capital sentencing proceedings. This Court should grant certiorari to hold that it is impermissible to draw adverse inferences regarding a defendant's lack of remorse or accountability from his silence in sentencing the defendant to death. *See* Sup. Ct. R. 10(b), (c).

A. Mr. Henderson's Fifth Amendment Rights Were Violated When the Prosecutor Relied on Mr. Henderson's Decision to Invoke his Right to Remain Silent to Argue He Lacked Remorse or Acceptance of Responsibility and Therefore Deserved Death.

This Court has long recognized that the Fifth Amendment "forbids [] comment . . . on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court held that the right to remain silent under the Fifth Amendment — which is "as broad as the mischief against which it seeks to guard" — applies equally in the guilt and sentencing phases of a capital murder trial. *Id.* at 462–63, 467–68 ("We can discern no basis to distinguish between" the two). In *Mitchell v. United States*, 526 U.S. 314 (1999), this Court "decline[d] to adopt an exception" to *Griffin*'s "normal rule in

a criminal case [] that no negative inference from the defendant's failure to testify is permitted" and reaffirmed *Estelle*'s holding that "[t]he concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 327–29 (emphasis added).

In this case, the prosecutor specifically brought out Mr. Henderson's silence at the guilt-innocence phase. During the testimony of Investigator Eugene Nash, the prosecutor asked "Did [Mr. Henderson] elect to speak to you at that time?" in reference to Mr. Henderson invoking his *Miranda* rights during his interrogation. (R. 1868.)

Then at the penalty phase, the prosecution relied on Mr. Henderson's silence to police and at trial to convince the judge and jury that Mr. Henderson deserved the death penalty even though Ms. Carlson received life without parole. The State argued that Mr. Henderson exercised his right to remain silent, and Ms. Carlson did not, and this was evidence of a lack of remorse and accountability that warranted the death penalty. (R. 2193, 2206–08.)

Specifically, in closing argument in the sentencing phase, the prosecutor highlighted that Mr. Henderson's mitigation specialist "never mentioned remorse. In any of those conversations, in any of her research about him, never once, until I just mentioned it, has the word 'remorse' come out." (R. 2193.)

Then, in rebuttal closing in response to defense's argument that Ms.

Carlson did not receive death so Mr. Henderson should not either, the prosecutor distinguished Mr. Henderson from Ms. Carlson, who did not exercise her right to remain silent: "You know what? She owned what she did. Accountability. She didn't deny it. 'This is what I did.'" The prosecution argued that because Mr. Henderson declined to speak, he was deserving of the death penalty, while Ms. Carlson was not. (R. 2207.)

Further, in its sentencing order, the trial court relied on its assertion that "Henderson has shown little, if any, remorse for the killings" to impose the death penalty. (C. 273).

In this case, the only evidence of Mr. Henderson's lack of remorse was his silence to police and at trial. Put differently, there was no affirmative evidence presented that Mr. Henderson lacked remorse. The State did not ask any of Mr. Henderson's mitigation witnesses about Mr. Henderson's remorse and he did not testify at either the guilt or penalty phase. *See State v. Ellis*, 339 A. 3d 794, 803 (Me. 2025) (holding "any consideration of a defendant's failure to take responsibility as an aggravating factor must be based on affirmative evidence in the record to support that finding, ordinarily because the defendant testified at the trial or allocuted at the sentencing hearing"). Indeed, the only way Mr. Henderson could have rebutted the State's argument that he lacked remorse would have been to take the stand and testify. *See Lesko v. Lehman*, 925 F.2d

1527, 1544–45 (3rd Cir. 1991) ("A defendant would be placed in an intolerable dilemma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty.") (internal citation omitted).

Using Mr. Henderson's silence as evidence of his lack of remorse and placing the burden on Mr. Henderson to testify to prove his remorsefulness is precisely the type of penalty and compulsion that the Fifth Amendment prohibits. *Griffin*, 380 U.S. at 613–14 (holding comments on silence are "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly"); *Estelle*, 451 U.S. at 467–68 ("[T]he privilege is fulfilled only when a criminal defendant is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."). Thus, the prosecutor's comments violated Mr. Henderson's Fifth Amendment right to remain silent.

B. Jurisdictions Remain Split About What Inferences May Be Drawn from a Defendant's Silence at Sentencing.

Fifteen years after *Mitchell* barred holding a defendant's silence against them in determining the facts of the offense at sentencing, in *White v. Wooddall*, 572 U.S. 415 (2014), this Court noted that "we framed our holding [in *Mitchell*]

narrowly, in terms of implying that it was limited to inferences pertaining to the facts of the crime." *Id.* at 421. The *White* Court found that "*Mitchell* included an express reservation . . . : Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility . . . is a separate question. It is not before us, and we express no view on it." *White*, 572 U.S. at 421–22; *Mitchell*, 526 U.S. at 330.

Justice Scalia, writing for the *White* Court in 2014, determined that lower courts have taken "diverging approaches to the question" that *Mitchell* left "unresolved" regarding adverse inferences that may be drawn from a defendant's silence that do not pertain to "factual determinations respecting the circumstances and details of the crime." 572 U.S. at 421–22 n.3 (citing authority exhibiting "fairminded disagreement" among lower courts on issue of remorse and of other inferences that may be drawn from defendant's silence). *Compare United States v. Caro*, 597 F.3d 608, 629–630 (4th Cir. 2010) ("*Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the non-statutory aggravating factor of lack of remorse" but finding error harmless); *with Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008) (holding "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse. The latter is properly considered at sentencing . . ."); *see also Lesko v. Lehman*, 925 F.2d

1527, 1544–45 (3rd Cir. 1991) (holding "we conclude that the prosecutor's criticism of [defendant]'s failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination, in violation of the rule in *Griffin v. California*"); *State v. Shreves*, 60 P. 3d 991, 996 (Mont. 2002) (holding "a sentencing court may not draw a negative inference of lack of remorse from the defendant's silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted — i.e. that he is actually innocent."); *State v. McClure*, 537 S.E. 2d 273, 275–76 (S.C. 2000) (holding "emphasiz[ing] the fact that appellant had not shown remorse and had not testified" was reversible error in capital case); *State v. Call*, 508 S.E. 2d 496, 523 (N.C. 1998) (testimony "that defendant had neither confessed nor shown remorse for the crimes he was accused of committing . . . was improperly allowed" in capital sentencing proceeding).

In the decade since this Court's decision in *White*, lower courts have continued to disagree on *Mitchell*'s unresolved question of what adverse inferences may be drawn from a defendant's silence at sentencing. *See United States v. Whitson,* 77 F.4th 452, 456–57 (6th Cir. 2023) (holding "while courts may consider the presence or absence of remorse at sentencing, they may not cloak an impermissible sentencing factor . . . in a permissible one or punish [defendants] for exercising [their] Fifth Amendment right[s] against

self-incrimination" and finding district court "fell on the wrong side of that line") (internal citations and brackets omitted); *State v. Ellis*, 339 A.3d 794, 803 (Me. 2025) ("A defendant's sentence may not be increased, however, because he chose to forgo expressing remorse or taking responsibility at trial or sentencing."); *Jones v. State*, 539 S.E. 2d 154, 162 (Ga. 2000) (Fletcher, J., dissenting with two other Justices) ("Here, there is no specific evidence of lack of remorse. We have never held that the defendant's failure to apologize and confess is lawful evidence of a lack of remorse or that such failure permits the state to argue that a lack of remorse supports the imposition of the death penalty.").

Courts have called the question of what adverse inferences may be drawn from a defendant's silence at sentencing a "difficult one." *United States v. Sepulveda*, 64 F.4th 700 (5th Cir. 2023) (calling "whether a district court may draw an adverse inference about remorse from a defendant's silence" a "difficult question"); *United States v. Johnston*, 789 F.3d 934, 943 (9th Cir. 2015) (stating "the question of how the Fifth Amendment privilege interacts with the legitimate sentencing consideration of lack of remorse is a difficult one").

Indeed, as the Sixth Circuit and Seventh Circuits have recognized: "There is a fine line between consideration of a defendant's acceptance of responsibility . . . and penalizing a defendant for maintaining their right to avoid self-incrimination." *Whitson*, 77 F. 4th at 457; *Burr*, 546 F. 3d at 832 ("The line

between the legitimate and the illegitimate, however, is a fine one. As we have recognized, 'sometimes it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence.'") (internal citations omitted). Thus, lower courts would benefit from additional guidance on this common question. *Randolph v. State*, 353 S.W.3d 887, 891–92 (Tex. Crim. App. 2011) ("Prosecutors often argue at the punishment phase of trial that a defendant is not deserving on leniency . . . because he has not taken responsibility for his actions, shown remorse, or both.").

In this case, the prosecutor plainly encouraged the trial court and the jury to hold Mr. Henderson's invocation of his right to remain silent against him as evidence of a lack of remorse or acceptance of responsibility during the sentencing phase of his capital murder trial, even drawing a comparison between Mr. Henderson and his co-defendant, who did not exercise her Fifth Amendment rights. This Court should grant certiorari to resolve a jurisdictional split after *Mitchell v. United States*, 526 U.S. 314 (1999), about whether adverse inferences from a defendant's silence are permitted in a capital sentencing proceeding. *See* Sup. Ct. R. 10(b), (c); *White v. Wooddall*, 572 U.S. 415 (2014).

CONCLUSION

For the foregoing reasons, Petitioner Christopher Henderson prays that

this Court grant a writ of certiorari in this case.

Respectfully Submitted,

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