No. 25-____

In the Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

BRANDON DEWAYNE SYKES,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Brandon Sykes was convicted of capital murder for killing Keshia Sykes, his ex-wife. Defense counsel pursued a residual-doubt strategy, arguing that the State had "no idea how anything happened" in Keshia's house the day she died. In rebuttal, the prosecutor agreed that he could not "know exactly what happened," for "only two people in the world [] know what happened in that house. One of them's dead, and the other one is sitting right there at the end of that table." "[B]ut," he added, "we can look at the facts in evidence." Sykes did not object.

In context, the remark was "perfectly proper." *United States v. Robinson*, 485 U.S. 25, 33 n.5 (1988). Numerous courts have allowed comments just like it. But the lower court ignored the context and held that *any* "direct comment" on the decision not to testify violates the right against self-incrimination under *Griffin v. California*, 380 U.S. 609 (1965). It added that any uncured *Griffin* error "must be reversed" (App.23a) despite this Court repeatedly rejecting "a *per se* rule" of "automatic reversal," *United States v. Hasting*, 461 U.S. 499, 508 (1983) (applying *Chapman v. California*, 386 U.S. 18 (1967)). The Court should summarily reverse on this question presented:

1. Whether courts must reverse for *Griffin* error without examining a prosecutor's comment in context and without finding prejudice.

Or the Court should grant the petition to decide:

2. Whether *Griffin* should be overruled.

LIST OF PROCEEDINGS

Supreme Court of Alabama, No. SC-2024-0395, *Ex parte State of Alabama*, order Sept. 12, 2025 (quashing petition for writ of certiorari), order Feb. 20, 2025 (granting petition for writ of certiorari).

Court of Criminal Appeals of Alabama, No. CR-2022-0546, *Sykes v. State*, order June 21, 2024 (denying rehearing), order May 3, 2024 (reversing and remanding for new trial).

Circuit Court of Lamar County, No. CC-2019-144, *State v. Sykes*, order Apr. 5, 2022 (sentencing).

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PETITION FOR WRIT OF CERTIORARI

I. In *Griffin v. California*, the Court announced that prosecutors violate the Self-Incrimination Clause if they "comment … on the accused's silence." 380 U.S. 609, 615 (1965). Since then, the Court has repeatedly clarified both the scope of the rule and the remedy.

First, not all comments on silence violate *Griffin*, which held that prosecutors may not use silence "as substantive evidence of guilt." *United States v. Robinson*, 485 U.S. 25, 34 (1988). Other remarks on the choice not to testify "may, in context, be perfectly proper." *Id.* at 33 n.5.

Second, not all *Griffin* errors require reversal. In *Chapman v. California*, the Court held that while some trial protections are so fundamental "that their infraction can never be treated as harmless," *Griffin* is not one of them. 386 U.S. 18, 23 (1967). The Court "rejected a *per se*" or "automatic reversal" rule and held that "a reviewing court must ask" whether the *Griffin* error prejudiced the defendant. *United States v. Hasting*, 461 U.S. 499, 508, 510 (1983).

I.A. The court below flatly defied *Robinson* when it held that the prosecutor's statement "only two people … know what happened" was "a direct comment" that necessarily violates *Griffin*. App.23a. This Court has already rejected "the view that any 'direct' reference" is improper, upholding instead the "principle that prosecutorial comment must be examined in context." *Robinson*, 485 U.S. at 31, 33. Twelve federal courts of appeals and most state courts apply a contextual standard that makes no reference to the "directness" of the challenged remark—an antiquated criterion that did not survive *Robinson*. Accordingly, numerous courts have examined comments like "only two people

know" and deemed them perfectly proper. Because the Alabama appellate courts refuse to apply *Robinson*, this Court should vacate and remand or summarily reverse on the ground that "a fair response by the prosecutor" does not violate *Griffin*. 485 U.S. at 34.

I.B. The court below also refused to apply any standard for prejudicial error. In its view, a *Griffin* violation can be harmless *only* with prompt curative instructions, App.20a—even where, as here, there was no objection by the defendant. That's wrong. A prosecutor's reference to the defendant's silence is not structural; it does not render the trial automatically unfair. Because the court below failed to review for prejudicial error, the Court should vacate and remand or summarily reverse on the ground that the alleged *Griffin* violation was not reversible in light of the overwhelming evidence that Sykes is guilty.

II. Although both errors should have been avoided, the root of the problem is *Griffin*. Ever since the Court declared that a prosecutor's mere *comment* is tantamount to *compulsion*, courts have struggled. Finding the line between proper and improper argument is impossible because *Griffin* "lacks foundation" in "text, history, or logic." *Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Thomas, J., dissenting); *see id.* at 336 (Scalia, J., dissenting); *Salinas v. Texas*, 570 U.S. 178, 192 (2013) (Thomas, J., dissenting); *Lakeside v. Oregon*, 435 U.S. 333, 344-45 & n.5 (1978) (Stevens, J., dissenting). The rule is not workable, its contours remain ill defined, and its offspring for too long have "throttle[d]" "our machinery of justice." *Brooks v. Tennessee*, 406 U.S. 605, 617 (1972) (Burger, C.J., dissenting). *Griffin v. California* should be overruled.

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

PRIOR OPINIONS AND ORDERS

The Alabama Court of Criminal Appeals decision is available at 2024 WL 1947829 and App.1a-43a. The order denying rehearing is available at App.44a. The Alabama Supreme Court's orders granting the State's petition for writ of certiorari and quashing the writ are available at App.45a-46a.

JURISDICTION

Jurisdiction arises under 28 U.S.C. §1257(a). The judgment below was entered on September 12, 2025. The State sought and received a 30-day extension to file this petition by January 12, 2025.

PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "[N]or shall any person … be compelled in any criminal case to be a witness against himself."

STATEMENT

A. Constitutional Background

In *Wilson v. United States*, the Court considered a prosecutor's statement inviting the jury to infer guilt from the defendant's failure to take the stand. 149 U.S. 60, 66-67 (1893). Applying a federal statute (since codified at 18 U.S.C. §3481), this Court reversed, reasoning that the remark "tended to [the defendant's] prejudice." *Id.* at 68. The trial court should have sustained defense counsel's objection and instructed the jury not to "attach to the failure [to testify] any

importance whatever as a presumption against the defendant." *Id.* at 67. In *Bruno v. United States*, the Court interpreted the same statute to require a jury instruction, when requested, that the defendant's failure to take the stand cannot weigh against him. 308 U.S. 287, 293-94 (1939).

In the mid-20th century, the Court effectively applied the federal statutory regime to the States. In what Justice Scalia later called "a breathtaking act of sorcery," *Griffin v. California* "simply transformed legislative policy into constitutional command," insisting that 18 U.S.C. §3481 reflected the "spirit" of the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting); *accord id.* at 343 n.* (Thomas, J., dissenting). According to the *Griffin* majority, "comment on the refusal to testify … cuts down on the [Fifth Amendment] privilege by making its assertion costly." 380 U.S. 609, 614 (1965). While Griffin's conviction had been procured with the aid of judicial *instruction* to take silence as evidence, *id.* at 613, the Court barred not only such "instructions by the court" but also "comment by the prosecution on the accused's silence," *id.* at 615.

Griffin's rule supplanted earlier state law dealing with prosecutorial comments on silence. *See, e.g.*, *Padgett v. State*, 223 So. 2d 597, 603 (Ala. Ct. App. 1969) ("*Griffin v. California*, supra, has taken over [Ala. Code §] 305, supra, and even perhaps overturned *Broadway v. State*, [60 So. 2d 701 (Ala. 1952)].").[1] "It

[1] Alabama's pre-*Griffin* regime required defendants to object at trial, *Stone v. State*, 17 So. 114, 118 (Ala. 1895), and request a jury instruction, *Arant v. State*, 167 So. 540, 543 (Ala.

is thus" based on an interwoven analysis, including the "federal constitutional aspect" of the privilege, as "spoken to by [this] Court in *Griffin v. California*" that Alabama courts will reverse based on an uncured and "direct comment on defendant's failure to testify." *Whitt v. State*, 370 So. 2d 736, 738-39 (Ala. 1979).

But not all *Griffin* violations are reversible. In *Chapman v. California*, the Court contrasted errors that "automatically call for reversal" with those that "in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." 386 U.S. 18, 22-23 (1967). Even "highly prejudicial" comments that violate *Griffin* can still be "harmless" if they "did not contribute to the verdict obtained." *Id.* at 24.

The Court reaffirmed *Chapman* in *United States v. Hasting*, rejecting the view that "*Griffin* error was *per se* error requiring automatic reversal." 461 U.S. 499, 508 (1983). Rather, *Griffin* violations must be treated like "most constitutional violations," which courts have a "duty … to ignore" if "harmless." *Id.* at 509. Even a "clear" violation does not mandate reversal if there is "overwhelming evidence of guilt" and "scanty evidence" for the defense. *Id.* at 510, 512. And, as with most trial errors, an unpreserved *Griffin* claim must satisfy the even heavier burden of plain-error review in federal and many state courts. *See United States v. Robinson*, 485 U.S. 25, 29-30 (1988).

1936). To be reversible, a comment had to be "so grossly improper and highly prejudicial as to have been ineradicable." *Id.* "[C]overt references [were] construed against the defendant … no matter what the jury might infer[.]" *Padgett*, 223 So. 2d at 602 (collecting cases "at variance with [some] interpretation[s] of *Griffin*").

B. Procedural Background

1. The State proved overwhelmingly that Sykes murdered his ex-wife.

Brandon and Keshia Sykes had two children together, Bron and Brooklyn, and Keshia had another child, Dakota, from a prior relationship. R.644, 647.[2] After their divorce, Keshia had been awarded custody, and Sykes had visitation rights, R.648, 1505-07. But in February 2015, the two were still involved in a custody dispute. R.1374-75. This dispute arose in part because Sykes would not return Bron as required, R.676, 681, and did not want Brooklyn around Keshia's new boyfriend, Drapher Bonman, who had been convicted of a sex offense involving a minor, C.823; R.873-74.

On the morning of February 19, 2015, Keshia did not respond to calls from her boyfriend or her mother, Kathleen Nalls. R.655-56, 721. After work, Nalls went to Keshia's house to check on her. R.660. Upon entering, she saw "blood throughout" the house and noted that Keshia's car, wallet, and cell phone, as well as a bedspread and several rugs, were missing. App.3a.

Nalls called the police, and Chief Davy Eaves arrived on the scene. *Id.* "In the kitchen, Chief Eaves saw bloodstains and smears throughout – on the back door, on the floor, on the counter, and on the appliances. A rag covered in blood sat on the kitchen table, and there was a mop in the corner that appeared to have bloodstains." *Id.* He noted a bloody footprint in the living room along with substantial bloodstains on the carpet such that it was "soaked completely."

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[2] "R.__" refers to the reporter's transcript of court proceedings. "C.__" refers to the clerk's compilation of case documents.

App.4a. Outside, Chief Eaves found drops of blood and a small, frozen piece of flesh lying in the grass. DNA testing matched the flesh and blood to Keshia. *Id.*

The evidence established that around 4:00 or 5:00 a.m. that day, Sykes had been on the phone with a friend, "sound[ing] erratic" and asking for Keshia's whereabouts. R.1168. From 7:00 to 8:00 a.m., he had a series of calls with Benjamin Scott, a meth addict whom Sykes had previously paid (with meth) to stalk Keshia's boyfriend. R.1057-61. That morning, Sykes had Scott drive him to the woods near Keshia's house. R.1070-72. At 8:58 a.m., Sykes called Scott to come pick him up; Scott could hear that Sykes was out of breath and that an infant was crying in the background. C.614; R.1075-76. But Scott declined to help any more, later explaining that he thought Sykes had "kidnapped his baby or something." R.1076.

Sykes's sister Lekeshia told police that Sykes had left Brooklyn with her that morning around 9:00 a.m. and instructed that "[i]f anybody asks, Keshia brought her." R.1118. Sykes also sent a text message to Lekeshia—from Keshia's phone—asking, "Can you keep Brooklyn?" *Id*. Soon after, Sykes called Lekeshia from his own phone, telling her to "play along" with the phony text message. *Id*. at 1119.

At 10:31 a.m. that same morning, Sykes called his cousin, Eric Blevins, to talk about "sinking a car." R.1159. Sykes then called another cousin, asking to leave a car at his house in Mississippi. R.1134-35. Sykes brought Keshia's car to Mississippi, where it was later found burned; he was seen with a gas can around the same time. R.942-43, 1138-46.

Police found Sykes on the night of the murder and noticed cuts on his hand and finger, as well as blood in the bed of his truck. R.853-56, 864-75. Sykes said the blood was probably from his dogs, R.875, but it was later determined to be Keshia's, R.1004-06. Two days later, Sykes warned Scott: "You don't want to get on my bad side. That's the first time I killed in a long time." R.1081. Keshia's cell phone was later recovered and traced back to Sykes's house. R.1259-61.

Sykes was arrested on April 9, 2015, and spoke with investigators on April 10 and 15. R.1436, 1449. Sykes gave them an unsubstantiated story about his involvement with a Mexican drug cartel in Tennessee, elaborating that the cartel became angry when they discovered that Keshia was a DEA informant. R.1441. He added that Keshia and her boyfriend bought drugs from the cartel using fake currency, and the cartel called Sykes to demand "their money or her." R.1442-43. Sykes tried to diminish his culpability, claiming that he "led [the cartel] down there but ... didn't do nothing to her." R.1443.

Sykes's long-time friend, Jacob Wiley, testified that Sykes admitted that he beat a woman, tied her up with blocks, and dumped her body in the Sipsey River near their old fishing spot. R.1417-18, 1426.

2. Sykes was convicted of capital murder and sentenced to death.

Sykes was charged with capital murder. C.24-25. Trial began in February 2022. R.640. The facts would not support Sykes's Mexican cartel narrative, R.1456, 1460, so his counsel tried to raise doubt about the connection between Sykes and the crime scene, pressing

the State's investigator to agree that he had "no idea of [the] manner" of the murder. R.1459.

Before closing arguments, the court instructed that the State had the burden of proof and attorney argument is not evidence. R.1574-75. Defense counsel argued that Sykes "didn't kill her," R.1605, and that "the State has no real theory," R.1598. As to the crime-scene evidence, he responded:

> And you remember if anybody sat on this stand and said, "You know, what? With that amount of blood lost, you expect somebody to be dead". This is the serious physical injury.
>
> Did you hear him? No. And you know why? Nobody knows. Nobody knows. …
>
> [W]e have no idea of a time of death. … You are going to tell me that Brandon Sykes went inside, whether Robbery, Burglary, Kidnapping, beat the hell out of her, cleaned up, did something with the body, and was at his sister's house [in an hour]? … How did that happen?

R.1600-01, 1603-04. He concluded:

> When you don't have what you need, you just try to throw in everything you can. And that's what's been done in this case.
>
> Consider the State's burden of proof. Consider the testimony you've heard. Consider the fact there's other DNA inside that house. Consider the fact it's a very compressed timeline.
>
> Consider the fact they have no idea how anything happened; but yet, they are wanting you to find him guilty.

R.1607.

In rebuttal, the prosecutor addressed each contention, including that the State had "no idea" what happened at the bloody scene of the crime:

> One thing [defense counsel] brought up is what happened in the house. The State doesn't know it. The State doesn't know. I'll concede some of that. We don't know exactly what happened in the house.
>
> There's only two people in the world that know what happened in that house. One of them's dead, and the other one is sitting right there at the end of that table. (Indicating.) Those are the only two people that know what happened in that house, but we can look at the facts in evidence.
>
> We can look at the facts in evidence, and we can derive an answer to what happened there. Let's do that.

R.1619. Among other facts in evidence, the prosecutor pointed to Sykes's admission to Wiley and the crime-scene evidence, including the volume of blood, which proved not only that Keshia suffered grievous injury then and there, but also that the fight was so "violent," "visceral," and "ang[ry]" as to be "personal." R.1620.

The trial court again instructed the jury that the State had the burden of proof, the defendant is presumed innocent, attorney argument is not evidence, and the decision not to testify could not be considered. R.1654, 1657-58. The jury convicted Sykes on all counts and unanimously recommended a death sentence, which the trial court imposed. C.242-44, 257.

3. The court of appeals reversed based on the allegedly "direct comment" on Sykes's decision not to testify.

In a divided decision with no majority opinion, the Court of Criminal Appeals reversed. Relying on prior cases applying *Griffin* and its progeny, the plurality described the prosecutor's "only two people" remark as a "direct comment" on the decision not to testify. App.23a. The State had argued that "in context," however, the "remark was merely a response to the argument of defense counsel during his closing argument" that the State had no idea what happened in Keshia's home. *Id.* Addressing the State's primary argument, the plurality simply restated the remark, complained that it "called the jury's attention to the fact that [Sykes] … did not testify," and concluded that it "was a direct comment on [the] decision not to testify." *Id.*

The State had also argued that because Sykes did not object at trial, his *Griffin* claim should be reviewed for plain error. With no analysis of the plain-error standard or even harmless error under *Chapman*, the court held that because the trial judge failed to cure (*sua sponte*) the prosecutor's "direct comment," "the conviction must be reversed." *Id.*

Presiding Judge Windom dissented, arguing that the plurality "focuse[d] too much on the remark itself and ignored the context in which [it] was made." App.37a. She noted that "a primary theory of Sykes's guilt-phase defense was that law enforcement did not know what had happened to Keshia Sykes and, in fact, could not even be certain that she was dead." *Id.* Viewing the closing arguments holistically, the dissenter noting that after the remark, "the prosecutor then

addressed the evidence that supported the State's theory." App.40a. Because the remark was *not* "a direct comment," Judge Windom would have held that it was not "plain error [to] fail[] to sua sponte provide a curative instruction." App.41a-42a.

REASONS TO GRANT THE WRIT

I. The Decision Below Defies This Court's Clear Precedents And Conflicts With Numerous Decisions Of Other State And Federal Courts.

Following *Griffin*, Alabama courts developed a rule distinguishing "direct" from "indirect" remarks on the defendant's decision not to testify. *See, e.g.*, *Whitt v. State*, 370 So. 2d 736, 739 (Ala. 1979); *Beecher v. State*, 320 So. 2d 727, 733 (1975). Under this interpretation, any "direct comment" by the prosecutor violates the right against compelled self-incrimination. And if the comment does not prompt an immediate curative jury instruction, it "mandates the reversal of the defendant's conviction." App.16a.

Purporting to be "[c]onsistent with th[e] reasoning" of "federal courts," *id.* (citing *Griffin* and Eleventh Circuit caselaw), the Alabama courts have misconstrued the Fifth Amendment. Applying its "direct comment" framework from the 1970s and declaring *any* uncured "direct comment" to be reversible, the court below committed two unmistakable errors. First, as nearly every jurisdiction has recognized, this Court has rejected a rule that "directness" can be dispositive regardless of the context in which the prosecutorial comment occurs. Second, as the Court has repeatedly explained in the very context of *Griffin*, an improper prosecutorial comment does not warrant automatic

reversal; instead, courts *must* apply *at least* harmless-error review, giving the State the opportunity to prove the verdict would have been obtained anyway. (Indeed, courts may apply an even higher standard, such as plain-error review, for unpreserved errors). Because the decision below neither evaluated the unobjected-to remark in context nor assessed whether it was prejudicial, the Court should summarily reverse or at least vacate and remand for proceedings consistent with *United States v. Robinson*, *Chapman v. California*, and *United States v. Hasting*.

A. The rule that any "direct comment" on silence violates *Griffin* is the same error this Court reversed in *Robinson*.

1. Nearly forty years ago, the Court explained that *Griffin* stands for the narrow rule "that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt." *United States v. Robinson*, 485 U.S. 25, 34 (1988). The Court firmly rebuked the notion "that because the prosecution's reference to respondent's failure to testify had been 'direct,' it did not matter that it was made in response to remarks by defense counsel." *Id.* at 29. Rather, the Court explained that to identify *Griffin* error, the challenged "prosecutorial comment must be examined in context." *Id.* at 33. The Court adopted this contextual approach for three reasons.

First, "the view that any 'direct' reference … violates the Fifth Amendment" would require a very "broad reading" of *Griffin* and "expand" it. *Id.* at 31, 34. In *Griffin*, the Court reminded, the prosecution had repeatedly and "*baldly* stated to the jury that the defendant *must* have known what the disputed facts

were, but that he had *refused* to take the stand to deny or explain them." *Id.* at 31 (emphases added). There is a "considerable difference" between those "sorts of comments" and ones that fairly respond to defense counsel's argument. *Id.* at 32.

Second, the Court explained that a rule prohibiting any "direct comment" "would be quite inconsistent with the Fifth Amendment, which protects against compulsory self-incrimination." *Id.* at 31-32. At its core, *Griffin* bars the prosecution from offering "silence as substantive evidence of guilt" "on his own initiative," "ask[ing] the jury to draw an adverse inference." *Id.* at 32. Anything more would transform the Amendment's "protective shield … into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.* (quoting *United States v. Hasting*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring)). And treating the privilege as a sword fits poorly in our adversarial system, which requires that "both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *Id.* at 33; *cf. Doyle v. Ohio*, 426 U.S. 610, 628 (1976) (Stevens, J., dissenting) (describing *Griffin* as the rule that silence cannot be used in the "case in chief").

Third, the Court noted that considering the context of a prosecutorial remark would bring *Griffin* in line with other caselaw on prosecutorial argument. Under the familiar *Donnelly* test, a remark must "so infect[] the trial with unfairness" to rise to the level of a constitutional violation. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Courts do "not lightly infer … the most damaging meaning" from an ambiguous

remark, nor assume that a jury would. *Id.* at 647. "Isolated" comments are unlikely to "have a significant impact on the jury's deliberations," *id.* at 646, and "must be judged in the context in which they are made," *Boyde v. California*, 494 U.S. 370, 385 (1990); *accord Darden v. Wainwright*, 477 U.S. 168, 179 (1986) ("It is helpful … to place these remarks in context."); *United States v. Young*, 470 U.S. 1, 16 (1985) ("[A]ppellate courts [are] to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure."). Thus, emphasizing in *Robinson* that the challenged remark was "made in response," 485 U.S at 29, the Court adhered to prior precedent that a prosecutor's comments "must be evaluated in light of the defense argument that preceded it," *Darden*, 477 U.S. at 179.

2. The requirement to examine prosecutorial comments in context involves more than reviewing the trial transcript for forbidden words or mechanically labeling comments as "direct" or "indirect." *See, e.g.*, *Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006) ("Historically, courts drew distinctions between 'direct' comments … usually held to be improper and prejudicial, and 'indirect' comments, which were usually found not to warrant reversal. … Now, however, a less formalistic rule governs[.]" (citation modified) (quoting *Moore v. State*, 669 N.E.2d 733, 737 (Ind. 1996))); *United States v. Wing*, 104 F.3d 986, 990 (7th Cir. 1997) (describing "debate over … directness" as "unproductive" and not "the central issue").

The central issue is not "the language used" by the prosecutor but whether that language asked the jury to *infer guilt* from the choice not to testify. *See*

Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955) (citing *Morrison v. United States*, 6 F.2d 809 (8th Cir. 1925)). Twelve federal courts of appeals apply a test derived from *Knowles*, which focuses on the *intent* of the prosecutor or the *effect* on the jury, not a list of words that constitute "direct" comment.[3] Most state courts take the same functional approach.[4] So

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[3] *E.g.*, *United States v. Sepulveda*, 15 F.3d 1161, 1187 (1st Cir. 1993); *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994); *United States v. Brennan*, 326 F.3d 176, 187 (3d Cir. 2003); *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973); *Samuels v. United States*, 398 F.2d 964, 968 (5th Cir. 1968); *Bowling v. Parker*, 344 F.3d 487, 514 (6th Cir. 2003); *United States v. Tanner*, 628 F.3d 890, 899 (7th Cir. 2010); *United States v. Gardner*, 396 F.3d 987, 989 (8th Cir. 2005); *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006); *United States v. Hooks*, 780 F.2d 1526, 1533 (10th Cir. 1986); *United States v. Thompson*, 422 F.3d 1285, 1299 (11th Cir. 2005); *United States v. Williams*, 521 F.2d 950, 953 (D.C. Cir. 1975).

[4] *E.g., Seigle v. State*, No. A-13725, 2025 WL 326144, at *5 (Alaska Jan. 29, 2025); *State v. Cook*, 821 P.2d 731, 742 (Ariz. 1991); *State v. Outlaw*, 324 A.3d 107, 131 (Conn. 2024); *Shelton v. State*, 744 A.2d 465, 502 (Del. 2000); *Pyne v. State*, 906 S.E.2d 755, 764 (Ga. 2024); *State v. Tsujimura*, 400 P.3d 500, 515 (Haw. 2017); *State v. Bishop*, 387 N.W.2d 554, 562 (Iowa 1986); *State v. Ninci*, 936 P.2d 1364 (Kan. 1997); *Ragland*, 191 S.W.3d at 589; *State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005); *Evans v. State*, 226 So. 3d 1, 32 (Miss. 2017); *State v. Gonyea*, 730 P.2d 424, 427 (Mont. 1987); *Flowers v. State*, 456 P.3d 1037, 1051 (Nev. 2020); *State v. Kenison*, No. 2017-0073, 2018 WL 4940744, at *4-5 (N.H. Sept. 17, 2018); *State v. DeGraff*, 131 P.3d 61, 65-66 (N.M. 2006); *State v. Hanson*, 987 N.W.2d 655, 657 (N.D. 2023); *State v. Gapen*, 819 N.E.2d 1047, 1067 (Ohio 2004); *State v. Marizan*, 185 A.3d 510, 517 (R.I. 2018); *State v. Ball*, 675 N.W.2d 192, 200 (S.D. 2004); *State v. Jackson*, 444 S.W.3d 554, 588 (Tenn. 2014); *Sandoval v. State*, 665 S.W.3d 496, 550 (Tex. Crim. App. 2022); *State v. Hales*, 652 P.2d 1290, 1291 (Utah

even a "direct" comment may be unobjectionable—for example, if it is "a fair response to a claim made by defendant or his counsel." *Robinson*, 485 U.S. at 32; *see, e.g.*, *People v. Fields*, 538 N.W.2d 356, 365 (Mich. 1995) (permitting "fair response" because "contextual analysis is the proper approach" under *Robinson*). Similarly, a prosecutor may "legitimate[ly] comment" "on the weaknesses in the defense case." *Robinson*, 485 U.S. at 32; *see, e.g.*, *Wright v. State*, 958 So. 2d 158, 164, 166 (Miss. 2007) (applying *Robinson* to permit comment "based on the status of the record at the time the comments were made in closing").

To be sure, neither *Robinson* nor any other case since *Griffin* offered a full "framework for deciding if a statement is a comment on a defendant's silence" and, if so, "whether [it] is adverse." *Hoyle*, 987 N.W.2d at 739; *see also Freeman v. Lane*, 962 F.2d 1252, 1260 (7th Cir. 1992) (observing lack of "direct … guidance"). As a result, lower courts have generally struggled to develop uniform rules. *See infra* §II; *see, e.g.*, *United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir. 1984) ("[T]he line of demarcation between permissible and constitutionally unacceptable commentary is quite difficult to draw."). But at least one thing is crystal clear: whether a prosecutor's remark is "perfectly proper," on the one hand, or compelled self-incrimination in violation of *Griffin*, on the other, always depends on context. *Robinson*, 485 U.S. at 33 n.5. Courts nationwide have internalized that lesson.

1982); *State v. Hamlin*, 499 A.2d 45, 50 (Vt. 1985); *Powell v. Commonwealth*, 552 S.E.2d 344, 360 (Va. 2001); *State v. Barry*, 352 P.3d 161, 167 (Wash. 2015); *State v. Mills*, 566 S.E.2d 891, 901 (W.Va. 2002); *State v. Hoyle*, 987 N.W.2d 732, 741 (Wis. 2023).

3. But not in Alabama. While Alabama courts often recite a more contextual standard, in practice they make the "direct" label dispositive. Relying on *Griffin* and *Donnelly*, the state high court declared in 1975 that "[w]here there has been direct comment on defendant's failure to testify" without a prompt curative instruction, "the conviction must be reversed." *Beecher v. State*, 320 So.2d 727, 733 (Ala. 1975); *see Meade v. State*, 381 So. 2d 656, 657 (Ala. Crim. App. 1980); *Whitt v. State*, 370 So. 2d 736, 738 (Ala. 1979) ("Direct comment on the defendant's failure to testify … [is] error [under] *Beecher*[.]").

Decades later, even with the benefit of *Robinson*, Alabama courts reverse after finding a "direct" and uncured comment on silence—"no[] matter" what, *contra Robinson*, 485 U.S. 29. *See, e.g.*, *Witherspoon v. State*, 596 So. 2d 617, 619 (Ala. Crim. App. 1991) (despite citing *Robinson*); *Ex parte Wilson*, 571 So. 2d 1251, 1265 (Ala. 1990) (same). Contemporaneously with this petition, the State is seeking certiorari in *Powell v. State*, a case in which the lower court said its "first" order of business was to categorize "the comment in question []as either a direct comment or an indirect comment." No. CR-20-0727, 2024 WL 1947990, at *7 (Ala. Crim. App. May 3, 2024). These decisions are not compatible with *Robinson*.

Nor was the decision below, which was premised entirely on the "directness" of the challenged remark, not the context in which it occurred. Addressing in a few sentences the State's defense of the comment as a fair "response to the argument of defense counsel," App.23a, the court of appeals simply repeated what the prosecutor said, called it "direct," and reversed, *id.*

The State's plea that the court consider context was deemed "unavailing." *Id.* This unsupported conclusion conflicts with *Robinson*, which "rejected the argument that 'any direct reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*.'" *Thompson*, 422 F.3d at 1298 (quoting *Robinson*, 485 U.S. at 31).

The Court should summarily reverse. *Robinson* makes clear that the prosecutor's statement did not violate *Griffin*. When the parties gave their closing arguments, the jury had already heard decisive evidence of Sykes's guilt. *Supra* Statement §B.1. Defense counsel was left to argue residual doubt and suggest that his client had been treated unfairly. *E.g.*, R.1597. Much like the defense in *Robinson*, trial counsel here argued that Sykes "tried to tell them that day what happened," R.1605, that he "didn't kill her," R.1605, and that the State "ha[d] no idea how anything happened" in Keshia's home, R.1607. In rebuttal, the prosecutor opened by signaling that he would be addressing "some things [defense counsel] said." R.1612. The prosecutor then responded to a number of items raised by defense counsel, including the claim that the State had no idea what happened in Keshia's home. R.1612-24. To that point, the prosecutor responded:

> There's only two people in the world that know what happened in that house. One of them's dead, and the other one is sitting right there at the end of that table. (Indicating.) Those are the only two people that know what happened in that house, but we can look at the facts in evidence.

> We can look at the facts in evidence, and we can derive an answer to what happened there. Let's do that.

R.1619. As promised, the prosecutor then walked through the testimony, Sykes's cellphone data, and physical evidence from the crime scene, which suggested the murder was "personal." R.1620-30.

In context, then, the prosecutor simply answered the question raised by defense counsel. The defense had suggested that reasonable doubt existed because there had been no showing of what *exactly* happened to Keshia or how she died. To rebut the misimpression that the State was required to prove *exactly* what happened, the prosecutor accurately stated that only two witnesses knew; neither testifying, the jury had to rely on the evidence tending to show that Sykes brutally killed Keshia in her home. *Cf. Lockett v. Ohio*, 438 U.S. 586, 595 (1978) (noting prosecutor's comments "added nothing to the impression that had already been created"); *Robinson*, 485 U.S. at 33 (same); *United States v. Ivory*, 532 F.3d 1095, 1101 (10th Cir. 2008) (citing context and "unfair[ness]" in forbidding "the prosecutor to explain why the government produced no witness" on a particular issue); *State v. Reineke*, 337 P.3d 941, 947 (Or. 2014) (observing right "to rebut any misimpressions created by the defendant"). Put differently, "the prosecutor was not suggesting that if [Sykes] were innocent, he would have testified to [what exactly happened in Keshia's house]. That would be absurd." *State v. La Madrid*, 943 P.2d 110, 115 (N.M. Ct. App. 1997). The remark added nothing because the jury was well aware of the State's position

that Sykes killed Keshia, so, in the State's view, he must have known exactly what happened.

Courts using a contextual standard have allowed almost identical comments. Most often, "only two people know" is considered fair rebuttal,[5] but it can also be upheld as a "summary of the evidence."[6] It can be "isolated and indirect,"[7] or "not so egregious" as to be unlawful.[8] Court after court has had no trouble sustaining a conviction despite what Alabama's magic-words test deems a "direct comment" that "must be reversed." App.23a. Neither should this Court. Where federal law calls for a "fact-dependent and context-sensitive approach," lower courts are not free to adopt a rule that "prevents that sort of attention to context." *Cf. Barnes v. Felix*, 605 U.S. 73, 81-82 (2025).

At a minimum, the Court should vacate and remand for the Alabama courts to apply *Robinson* in the first instance.

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[5] *See, e.g.*, *State v. Ciccone*, 297 P.3d 1147, 1159 (Idaho Ct. App. 2012); *Kenison*, No. 2017-0073, 2018 WL 4940744, at *4; *State v. Wheeler*, 828 N.W.2d 592, 2013 WL 513929, at *4 (Wis. 2013); *Carmack v. State*, No. 12-01-379-CR, 2004 WL 100388, at *3-4 (Tex. Ct. App. 2004); *Vargas v. Tate*, No. 05-01-340-CR, 2002 WL 56293, at *2 (Tex. Ct. App. Jan. 16, 2002); *State v. Haase*, 702 A.2d 1187, 1194 (Conn. 1997); *cf. Dessaure v. State*, 891 So. 2d 455, 466 (Fla. 2004).

[6] *See, e.g.*, *Wellons v. State*, 463 S.E.2d 868, 879 (Ga. 1995); *Neal v. State*, 402 S.E.2d 114, 115 (Ga. Ct. App. 1991); *cf. State v. Harris*, 729 S.E.2d 99, 102 (N.C. Ct. App. 2012).

[7] *Goldsbury v. State*, 342 P.3d 834, 835 839 (Alaska 2015).

[8] *State v. Cochran*, No. 03-CA-01, 2003 WL 22966844, at *3 (Ohio Ct. App. Dec. 17, 2003).

B. The rule that any "direct comment" on silence requires automatic reversal squarely conflicts with *Chapman* and *Hasting*.

1. Wholly apart from its reliance on the "direct" label identifying *Griffin* error, the court below defied clear precedent when it held that any uncured "direct comment" on the choice not to testify *mandates* reversal. The court could not have been clearer that "because the circuit court failed to take prompt curative action, *this Court must reverse* Sykes's convictions and sentence of death." App.23a (emphasis added); *see also* App.16a ("direct comment … mandates reversal" if uncured); App.23a ("In a case where there has been a direct reference to a defendant's failure to testify and the trial court has not … cure[d] that comment, the conviction must be reversed."). The court did not apply the plain-error standard, as the State had urged in its brief, nor did it substantively address the State's lengthy argument on application for rehearing that *at best* for Sykes, the harmless-error standard of *Chapman* should apply. App.68a-71a.

Under *Chapman v. California*, most trial errors, including *Griffin* errors specifically, do not justify automatic reversal. 386 U.S. 18, 21 (1967). "Just because a constitutional error took place at trial does not necessarily mean a new one must be held." *Pitts v. Mississippi*, No. 24-1159 (U.S. Nov. 24, 2025) (slip op., at 5); *accord, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

Soon after *Griffin* was decided, the Court began applying *Chapman*'s standard to *Griffin* claims. *See, e.g.*, *Anderson v. Nelson*, 390 U.S. 523, 525 (1968). In

United States v. Hasting, the Court reiterated that it had "affirmatively rejected a *per se* rule" of reversal. 461 U.S. 499, 508 (1983). Asked "whether … a reviewing court may ignore the harmless error analysis of *Chapman*," the Court deemed "automatic reversal[]" to be a "retreat" from judicial "responsibilities." *Id.* Rather, the Court held that in every case in which the defendant alleges constitutional error that is not structural—*i.e.*, does not implicate the fundamental fairness of the trial—a reviewing court must *at least* ascertain if the State's evidence was such that "the error complained of did not contribute to the verdict" "beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. And here, because Sykes did not object at trial, his claim should have been subject to plain-error review, *see* App.12a-13a (acknowledging standard), which is even further from a rule of "*per se*" reversal, *United States v. Young*, 470 U.S. 1, 16 n.14 (1985).[9] *Griffin* errors are not exceptional; had the *Robinson* Court identified a violation, it would have asked "whether the violation constituted plain error." 485 U.S. at 29-30. Were it "[o]therwise, defense counsel could obtain a reversal … simply by failing to object and by design depriving the trial court of the opportunity to prevent or correct the error." *People v. Herrett*, 561 N.E.2d 1, 10 (Ill. 1990).

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[9] Under this demanding standard, a defendant must show "(1) 'error,' (2) that is 'plain,' … (3) that 'affect[s] substantial rights,'" and "(4) [that] the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v. United States*, 520 U.S. 461, 467 (1997); *accord, e.g.*, *Thomas v. State*, 824 So. 2d 1, 12-13 (Ala. Crim. App. 1999) (noting that "the Alabama Supreme Court has adopted the federal courts' interpretation of the 'plain-error' standard").

Alabama courts are not alone in failing to apply a prejudicial-error standard to *Griffin* clams. For at least some violations, several courts have effectively elevated *Griffin* to the status of structural error.[10] But by and large, most courts faithfully apply *Chapman* and *Hasting*,[11] which leave no room for a special set of *Griffin* violations that merit automatic reversal. Courts must consider "what effect [the error] had upon the guilty verdict in the case at hand." *Sullivan*, 508 U.S. at 279; *Young*, 470 U.S. at 16 n.14. By labeling "direct" comments *per se* prejudicial, Alabama courts do not address "*this* trial" in particular. *Sullivan*, 508 U.S. at 279. They have elevated *Griffin* errors to "structural defects" akin to "total deprivation" of a constitutional right. *Id.* at 279, 281.

2. The Court should summarily reverse because *Griffin* errors do not void a conviction automatically. As it did in *Hasting*, the Court should apply the proper standard and conclude that the alleged *Griffin* error made no difference to the verdict. The Court has at its disposal the lower court's extensive recitation of the

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[10] *See, e.g.*, *State v. Tarbox*, 158 A.3d 957, 962 (Me. 2017) (holding that a preserved challenge to an "unambiguous[]" comment on silence is "prejudicial as a matter of law"); *Patterson v. State*, 565 P.3d 692, 700 (Wyo. 2025) ("Prejudice is not relevant to the question of whether there has been an improper comment on the right to silence which is prejudicial per se.").

[11] *See State v. Ramos*, 330 P.3d 987, 993 (Ariz. Ct. App. 2014) ("Subsequent development of the law … persuades us that a prosecutor's comment on a defendant's failure to testify does not necessarily require reversal of the defendant's conviction."); *People v. Miller*, 113 P.3d 743, 748 (Colo. 2005) (overruling cases holding that constitutional error must be harmless beyond a reasonable doubt even where no objection raised as "inconsistent with the current direction from the [U.S.] Supreme Court").

evidence—overwhelming proof that Sykes murdered his ex-wife. The evidence includes (1) the bloody scene at Keshia's house, including a trail of blood leading outside and Keshia's blood in Sykes's truck, R.853-56, 864-75; (2) cuts on Sykes's hands the night of the murder, R.853-56; (3) Keshia's burned-out car, found near where Sykes had visited his cousin and after Sykes was seen with a gas can, R.942, 1138-46; (4) Sykes's "erratic" conversations the day of the murder, calling a friend to locate Keshia, R.1165-68; calling his cousin about sinking a car, R.1159-60; and calling his sister to help concoct an alibi, R.1119; (5) Sykes's warning to Benjamin Scott not "to get on [his] bad side" as "[t]hat's the first time I killed in a long time," R.1081; (6) Sykes's admission to Jacob Wiley that he killed a woman and dumped her body, R.1417-18; (7) Sykes's lie that Keshia had been threatened by a Memphis-based Mexican drug cartel, R.1441-43; and (8) Sykes's phone data confirming his movements and conversations, C.614-17. "In the face of this overwhelming evidence of guilt," Sykes had "scanty evidence." 461 U.S. at 510, 512. The single alleged *Griffin* remark must be ignored and Sykes's conviction, affirmed.

At a minimum, the Court should vacate and remand for the Alabama courts to apply the proper standard of review. Just this Term, when the Court identified a violation of the Confrontation Clause, it remanded to give the State the opportunity to argue harmless error. *Pitts*, No. 24-1159 (slip op., at 5). Here, the State *did* argue that the case does not warrant a new trial either under the plain-error standard or harmless-error review, App.68a-71a.

II. The Court Should Overrule *Griffin*.

A. The Court's decision in *Griffin v. California* was "gravely mistaken" and "unmoored" from the start. *Cf. Ramos v. Louisiana*, 590 U.S. 83, 106 (2020). As four Justices recognized a quarter century ago, *Griffin* "did not even pretend to be rooted in a historical understanding of the Fifth Amendment." *Mitchell v. United States*, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting). After all, the Self-Incrimination Clause protects only against being "compelled" to testify. *See Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) ("By definition, 'a necessary element of compulsory self-incrimination is some kind of compulsion.'"). But a mere reference to the defendant's silence "does not 'compel.'" *Mitchell*, 526 U.S. at 331 (Scalia, J., dissenting); *accord Griffin*, 380 U.S. at 621 (Stewart, J., dissenting) ("[C]omment by counsel and the court does not compel testimony[.]").

Nor does a prosecutorial comment "truly 'penalize' a defendant" in any way bearing "constitutional significance." *Mitchell*, 526 U.S. at 342 (Thomas, J., dissenting); *see also Carter v. Kentucky*, 450 U.S. 288, 306 (1981) (Powell, J., concurring). Until the innovations of the 1960s, the Fifth Amendment was "never … thought to forbid all pressure," *Miranda v. Arizona*, 384 U.S. 436, 512 (1966) (Harlan, J., dissenting), which is to some degree inevitable, *Raffel v. United States*, 271 U.S. 494, 499 (1926) ("We need not close our eyes to the fact that every person accused of crime is under some pressure to testify[.]"); *Brooks v. Tennessee*, 406 U.S. 605, 614 (1972) (Burger, C.J., dissenting) (noting "the compulsion faced by every defendant who chooses not to take the stand"); *cf. Hasting*, 461

U.S. at 515 (Stevens, J., concurring in judgment) ("[The] election not to testify is almost certain to prejudice the defense[.]" (citation modified)).

Rather, the common-law principle animating the privilege was much more specific: It was "thought to ban only testimony forced by compulsory oath or physical torture." *Mitchell*, 526 U.S. at 333 (Scalia, J., dissenting). "Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsense inference as equivalent pressure." *Id.* at 335; *cf., e.g.*, *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) ("what the Constitution abhors[] [is] *compelled* confession"); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (citing purpose of Fifth Amendment to prohibit testimony compelled by "inhumane treatment and abuses"). Thus, because the "sole concern of the Fifth Amendment" is "coercion," *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), and there is no coercion in a mere reference to the defendant's silence, "*Griffin* is impossible to square with the text of the Fifth Amendment," *Salinas v. Texas*, 570 U.S. 178, 192 (2013) (Thomas, J., concurring in judgment).

"*Griffin*'s [historical] pedigree is equally dubious." *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting). At common law, a defendant could not testify but was still "expected to speak rather extensively" at trial. *Id.* If "he did not," the jury would "draw[] an adverse inference" and "very likely … convict[]," which "strongly suggests that *Griffin* is out of sync with the historical understanding of the Fifth Amendment." *Id.* at 332-33. "No one" in the founding era "seemed to think this

system inconsistent" with the right against compulsory self-incrimination. *Id.* at 334; *accord* J. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1052-55, 1065-66, 1075-76 (1994); *id.* at 1083-85 & n.160 (concluding that the privilege has "changed character profoundly" from the "original" to the "modern" and "controversial" rule of *Griffin*); *cf. Portuondo v. Agard*, 529 U.S. 61, 65-67 (2000); *contra Griffin*, 380 U.S. at 614 (incorrectly asserting that any comment on silence "is a remnant of the 'inquisitorial system of criminal justice'").

B. *Griffin* contains no workable standard, which immediately led to sharp divisions in its application. *See, e.g.*, *Padgett v. State*, 223 So. 2d 597, 602 (Ala. Ct. App. 1969) (citing split among courts in Alabama, Connecticut, Kentucky, and New Jersey over whether prosecutor can remark on "uncontradicted" evidence when only the defendant could contradict it). Sixty years later, the line between permissible argument and constitutional violation is not much clearer. This "Court has not established a framework for deciding if a statement is a comment on a defendant's silence and whether such comment is adverse." *State v. Hoyle*, 987 N.W.2d 732, 739 (Wisc. 2023). As a result, guilty defendants continue to receive new trials—undeserved windfalls—simply due to the vagueness of *Griffin*'s command.

Chief among the obstacles to uniform enforcement has been the quest to categorize comments on silence as "direct" or "indirect," "advertent" or "inadvertent," "emphasized" or "casual," "clear" or "ambiguous," and the like. *State v. DiGuilio*, 491 So. 2d 1129, 1136 (Fla.

1986). It is doubtful that any "bright line *can* be drawn" on such grounds. *Id.* (emphasis added). Thus, it was a welcome development when this Court in *Robinson* rejected the view that "any 'direct' reference" to silence violates *Griffin*. 485 U.S. at 31.

But the absence of a bright-line rule cuts in two directions. While some "direct" comments are constitutionally permissible, some merely "indirect" comments are deemed forbidden. Inevitably, courts grasp for new rules and new doctrines to identify violations. *See, e.g.*, *Robertson v. State*, 596 A.2d 1345, 1357 (Del. 1991) (asking whether indirect comment had "substantial" or "attenuated" impact on fairness); *State v. Libby*, 410 A.2d 562, 563 (Me. 1980) (violation if indirect comment lacked "equivocation or ambiguity" in urging jury to accept undenied evidence); *Evans v. State*, 226 So. 3d 1, 32 (Miss. 2017) (violation by "innuendo and insinuation"); *Mata v. State*, 489 P.3d 919 (table), 2021 WL 2910972, at *2 (Nev. July 9, 2021) (harmless violation if "mere passing reference"); *United States v. Murra*, 879 F.3d 669, 683 (5th Cir. 2018) (contrasting the "egregious" from the "benign"); *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013) (contrasting "episodic violations" from "repeated and direct" ones).

Robinson merely moved the bump in the rug, and *Griffin*'s ineradicable line-drawing problem remains. Consequently, some state courts err on the side of extreme caution—asking if the prosecutor said something even "subject to interpretation" as a comment on silence. *Moore v State*, 669 N.E.2d 733, 738 (Ind. 1996); *see also Simpson v. State*, 112 A.3d 941, 949 (Md. 2015); *Ragland v. Commonwealth*, 191 S.W.3d

569, 589 (Ky. 2006); *State v. Ellsworth*, 855 A.2d 474, 477 (N.H. 2004); *DiGuilio*, 491 So. 2d at 1135.[12] Thus, remarks neither intended to comment on silence nor expressly doing so—such as simply noting that some piece of the State's evidence went unrebutted—can lead to reversal in many courts. *See, e.g.*, *State v. Scutchings*, 759 N.W.2d 729 (N.D. 2009); *State v. McMurry*, 143 P.3d 400 (Idaho 2006). *Griffin* doctrine is still so ambiguous after sixty years that state courts force retrial out of an abundance of caution; the rule is not workable.

C. Beyond the problems interpreting and applying *Griffin* itself, the decision has caused mischief in other areas of criminal procedure. By deeming prosecutorial remarks unconstitutional because of the "cost[]" or "penalty" they add to the choice to remain silent, 380 U.S. at 614, some courts—including this one—took any conceivable cost to violate the Fifth Amendment. For example, Tennessee's statute "requiring the defendant to testify first," a rule well rooted in history and "tradition[]," had to give way. *Brooks*, 406 U.S. at 607; *see id.* at 617 (Burger, C.J., dissenting) (lamenting "the faltering condition of our machinery of justice"); *id.* at 618-20 (Rehnquist, J., dissenting) (criticizing the majority for "stand[ing] [tradition] on its head"). Not only did the Court give defendants the right to testify after hearing every other witness; for decades thereafter, lower courts prohibited

[12] *But see, e.g.*, *Sandoval v. State*, 665 S.W.3d 496, 550 (Tex. Crim. App. 2022) (no violation from a comment "reasonably construed as merely an implied or indirect allusion"); *United States v. Wells*, 623 F.3d 332, 338-39 (6th Cir. 2010) (no violation if there are plausible alternative interpretations).

prosecutors from merely remarking on this tremendous advantage. *See Agard*, 529 U.S. at 67 (collecting cases and observing that *Griffin* had "sparked" this novel theory). Again, the Court had to intervene and reject an "exten[sion of] *Griffin*" (*id.* at 65) that had already done serious damage for years. *Accord Robinson*, 485 U.S. at 34 ("declin[ing] to expand *Griffin*" and observing that the Fifth Amendment must tolerate "some 'cost'" to remaining silent).

For another example, *Griffin* was the backbone of footnote 37 in *Miranda v. Arizona*, which declared that a prosecutor may not "use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation" during a custodial interview. 384 U.S. at 468 n.37. The Court then expanded the rule to bar the prosecution's use of post-arrest silence for impeachment purposes too. *See Doyle v. Ohio*, 426 U.S. 610, 616-19 (1976); *id.* at 628 (Stevens, J., dissenting). And then it took until 2013 to stop lower courts from barring the use of *pre-arrest* silence, an expansion of *Griffin* that at least ten jurisdictions had endorsed. Pet. for Writ of Cert. at 8-10, *Salinas v. Texas*, No. 12-246 (Aug. 24, 2012). These and other problems will proliferate as long as *Griffin*'s vague and ahistoric reasoning remains on the books.

* * *

Overruling *Griffin* is the solution. In *Mitchell*, the United States did not ask for *Griffin* to be overruled, yet four Justices agreed that it was wrongly decided "[a]s an original matter." 526 U.S. at 331 (Scalia, J., dissenting). The best the majority could muster in *Griffin*'s defense was its "utility" as an "instrument for teaching that the question in a criminal case … is

whether the Government has carried its burden." *Id.* at 330. The *Salinas* dissenters likewise reasoned from the spirit of the Fifth Amendment, asserting that the accused would face a "predicament" without *Griffin*. 570 U.S. at 195 (Breyer, J., dissenting). Yet for nearly two centuries, the "predicament" occasioned by a stray remark on silence, even by an overt invitation to infer *guilt* from silence, had no constitutional import. Accordingly, no Member of the Court has seriously defended *Griffin* as consistent with original meaning, and even fifty years ago, "the roster of scholars and judges with reservations about expanding the Fifth Amendment privilege read[] like an honor roll of the legal profession," *Lakeside*, 435 U.S. at 345 n.5 (Stevens, J., dissenting); *see generally* Off. Leg. Pol'y, U.S. Dep't of Just., *Report to the Attorney General on Adverse Inferences from Silence*, 22 U. Mich. J.L. Reform 1005 (1989). Since then, the doctrine has evolved erratically, and it is unlikely there will ever be a uniform "framework" for violations, *Hoyle*, 987 N.W.2d at 739. If the Court does not summarily reverse, *supra* §I, it should abandon *Griffin*'s misadventure and restore the original meaning of the right against "compelled" self-incrimination.

CONCLUSION

The Court should grant the petition and reverse.

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