APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

Rel: May 3, 2024

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 2023-2024

CR-2022-0546

BRANDON DEWAYNE SYKES

v.

STATE OF ALABAMA.

Appeal from Lamar Circuit Court
(CC-19-144)

PER CURIAM.

Brandon Dewayne Sykes appeals his capital-murder convictions and his sentence of death. Sykes was convicted of murder made capital for intentionally killing Keshia Nicole Sykes during a first-degree burglary, *see* §13A-5-40(a)(4), Ala. Code 1975, for intentionally killing Keshia Nicole Sykes during the commission of a first-degree kidnapping, *see* § 13A-5-40(a)(1), Ala. Code 1975, and for intent-

ionally killing Keshia Nicole Sykes during the commission of a first-degree robbery, *see* § 13A-5-40(a)(2), Ala. Code 1975. The jury unanimously sentenced Sykes to death.

Facts

Sykes and Keshia were married from May 2012 to May 2014, and they had two children together during the marriage, a son named Bron and a daughter named Brooklyn. The divorce had been contentious, with Keshia being awarded custody of their children amidst allegations that she had been abused by Sykes. Sykes was unhappy with the court's custody determination, and he was particularly incensed by Keshia's living with and becoming engaged to Drapher Bonman, who at the time had a pending charge for a sex offense against a minor. Sykes had already refused to return Bron to Keshia following a visitation period, and he sought to obtain custody of Brooklyn, as well. On February 8, 2015, Sykes attempted to report to Lt. Steve Thompson of the Vernon Police Department that Keshia had imperiled their daughter's safety by living with Bonman. Lt. Thompson encouraged Sykes to take the information to the attorney handling his domestic case. Sykes agreed but stated to Lt. Thompson, "'If the court won't help get my kids back, then I'll do whatever I have to do to get them back.'" (R. 896.)

On February 18, 2015, Keshia moved out of Bonman's house and into a house next door to her parents. That night, though, Bonman spent the night with Keshia in her new home. Around 7:20 a.m. the following morning, Keshia's mother, Kathleen Nalls, called Keshia on her way to work. Keshia told her mother that she and Brooklyn were watching television at home. Nalls testified that when she arrived

at work, she noticed Sykes sitting in his truck in a parking lot across the street. Nalls went inside and peered through a window. She saw Sykes leave the parking lot in his truck.

Nalls attempted to contact Keshia later that morning but was unsuccessful, and Nalls learned that Keshia had failed to pick up Nalls's sister as scheduled. Nalls telephoned a nephew who lived with her and asked him to look for Keshia's vehicle, a silver Honda owned by Bonman that Keshia was using at the time. Her nephew told Nalls that the vehicle was not at Keshia's house.

After work Nalls went to Keshia's house. Upon entering, Nalls saw that there was blood throughout the residence, that a bedroom window had been shattered, and that several of Keshia's possessions, such as her vehicle, wallet, and cell phone, were missing. Nalls also noticed that a bedspread and several rugs had been removed from the house. Neither Keshia nor Brooklyn were at the home.

Chief Davy Eaves of the Vernon Police Department responded to the emergency call about the state of Keshia's house. 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. The mop was still damp, according to Chief Eaves. Chief Eaves stated that he accidentally bumped a chair in the kitchen while taking pictures of the scene; when the chair moved, one of the feet left a streak of blood on the floor from blood that had pooled underneath it. Chief Eaves testified that it "looked like something had happened that somebody had tried to clean it up." (R.

743.) Chief Eaves noted a bloody footprint in the living room along with substantial bloodstains on the carpet in the house. Chief Eaves stated that blood had "soaked completely through the carpet padding and had pooled on the cement floor." (R. 757.) Outside the house, Chief Eaves photographed drops of blood in the yard and recovered a small, frozen piece of flesh lying in the grass. Subsequent genetic testing revealed that the piece of flesh and much of the blood found inside of and outside the house were from Keshia. Also, a mixture of genetic profiles was found on the handle of the bloodstained mop, and Sykes could not be excluded as a potential contributor to the minor component of this sample.

Brooklyn was located at the home of Sykes's sister, Lekeshia Sykes. Lekeshia told investigators that Sykes had dropped off his son at her house around 6:15 a.m. that day and that Keshia had sent her a text message around 11:15 a.m. asking her if she could babysit Brooklyn. Lekeshia told investigators that Keshia had arrived with Brooklyn about 15 minutes after she sent the text message.

Bonman arrived at Keshia's house while officers were assessing the scene. According to Bonman, he had left Keshia's house around 5:00 a.m. on February 19 and that, although he had attempted to call her during the day, he had not spoken to her since he left the house.

Sykes agreed to be interviewed at the Vernon Police Department on the night of Keshia's disappearance. Sykes told officers that he had not been in contact with Keshia during the previous week. Sykes stated that he had dropped off his son Bron with his sister Lekeshia around 6:30 a.m. and then went to work at Wheeler Automotive body shop, where he

remained until 3:00 p.m. After work, he drove to Lekeshia's house and stayed until 5:00 p.m. with Bron and Brooklyn. While Sykes was giving his statement, Lt. Thompson conducted a consensual search of Sykes's truck. Lt. Thompson scraped and collected what appeared to be two droplets of dried blood in the back of Sykes's truck. Subsequent genetic testing established that the blood was Keshia's.

On February 23, Inv. Keith Cox with the Pickens County District Attorney's Office was notified by law enforcement in Mississippi that Keshia's vehicle may have been located. Inv. Cox went to an address in Lowndes County, Mississippi; two mobile homes, which appeared to be vacant, sat on the property. Keshia's burned-out vehicle was found behind the mobile home on the right. Inv. Cox found a flashlight about 10 yards from the vehicle and three red gas cans – one in front of the mobile home to the right and two more inside the mobile home to the left.

Officers collected several cell phones from Sykes. The data extracted from the cell phones, and the people to whom that data led, challenged Sykes's assertion to investigators that he had been at Wheeler Automotive all day on February 19. For instance, Sykes spoke on the phone several times with Benjamin Scott, an acquaintance of Sykes, between 6:59 a.m. and 9:38 a.m. on February 19. Scott testified that he often performed odd jobs for Sykes in exchange for drugs. On February 19, Sykes asked Scott to photograph Bonman's house and to then come to Wheeler Automotive. Scott arrived at the body shop and Sykes asked for a ride. Sykes directed Scott on a circuitous route around town before directing him to drive by the house of Keshia's

parents.[1] Scott was instructed to stop his vehicle approximately 100 yards beyond the house. Sykes told Scott he would call him, and he then got out of the vehicle, running to a wooded area next to Keshia's house.

Scott drove to his girlfriend's house and waited. At some point, Scott answered a telephone call from a number he did not recognize. It was Sykes; Scott testified that Sykes sounded as though he were out of breath and that he could hear a child crying in the background. Sykes told Scott to meet him at Lekeshia's house; Scott drove to the house but did not stop. Scott explained: "I [didn't] stop because I thought he's done kidnapped his baby or something. And I didn't want to get in the middle of [that]." (R. 1076-77.) Scott next heard from Sykes later that evening. Scott went by Sykes's house and picked up methamphetamine as payment for his assistance that day. Scott called him two days later to ask for methamphetamine with a promise to pay Sykes later. Sykes agreed, warning him, "'You don't want to get on my bad side. That's the first time I killed in a long time.'" (R. 1081.)

Sykes's telephone records indicated he called his cousin Eric Blevins at 10:31 a.m. on February 19. Sykes asked Blevins if he knew of a good body of water in which to sink a vehicle. Sykes explained that he wanted to dispose of a vehicle for insurance purposes. Blevins testified that he told Sykes that he did not know where to sink a car.

Luther Hackman, Sykes's cousin who lived in Columbus, Mississippi, received a call from Sykes at

---

[1] Scott was not aware that Keshia had moved into the house next door.

10:56 a.m. on February 19. Sykes told him he "just needed to park a car." (R. 1134.) Sykes described the vehicle as a "silver or gold Honda" that belonged to "his wife's boyfriend." (R. 1135-36.) Sykes arrived around noon and parked the Honda in Hackman's backyard, which was surrounded by a high fence. Hackman then drove Sykes back to Wheeler Automotive.

Hackman saw Sykes the following day when Sykes returned to retrieve the Honda. Sykes told Hackman that "he wasn't going to let them raise his kids 'cause whoever the guy was, he was a child molester and [Keshia] was beating on his kids and . . . wasn't letting him see . . . the kids." (R. 1140-41.) As Sykes walked to the Honda, Hackman noticed that Sykes was carrying a lighter and a small gas can. Sykes asked Hackman to follow him in his own vehicle and to pick him up after he abandoned the Honda; Hackman agreed. Sykes left Hackman's property and drove for a few minutes before turning down a gravel road. Hackman drove beyond the gravel road for a few miles and then turned around. As he came back, Sykes was walking down the road. Sykes got in Hackman's vehicle, and Hackman drove Sykes back to Vernon. Geolocation tracking of Sykes's cell phone supported Hackman's testimony regarding Sykes's trips to Columbus.

On March 29, 2015, Lekeshia sought out Lt. Thompson to amend her prior statement that Keshia had brought Brooklyn to her house on February 19:

> "What actually happened that day was that at around 9:00 a.m., [Sykes] showed up with no prior notice with Brooklyn and gave me Brooklyn and told me, 'If anybody asks, Keshia brought her.' . . . At 11:15, I received

> a text message that asked, 'Can you keep Brooklyn?' I didn't recognize the number at first, and sent back a text asking, 'Who is this?', but then I remembered it was Keshia Sykes's old number . . . . Right after I sent the text, [Sykes] called me from his 2300 phone number and said, 'Just play along.' . . . I then sent a textback to Keshia's phone that said, 'Yes, I'll keep her,' and a text came back, 'I'll bring her in a minute.' I don't know if [Sykes] was sending the text from Keshia's phone or if Keshia was with [Sykes] and using the phone herself at this time. . . . [A]round 5:00 p.m., [Sykes] told me to send Keshia a text and ask about bringing Brooklyn back to her."

(R. 1119.) Keshia told Lt. Thompson that she realized lying in her previous statement was "a very serious matter" but that she had been afraid of the reaction from her family had she been truthful.

Investigators were able to tie Sykes to Keshia's missing cell phone. A month or so after Keshia's disappearance, Nalls noticed activity on her cellular billing statement from Keshia's cell phone. Nalls reported the activity, and this led investigators to Christy Sanderson, who relinquished the cell phone to investigators and stated that she had bought the cell phone from Lois Gibson. Gibson testified that she had acquired the cell phone on March 8 when she visited Sykes's house with a mutual friend. Gibson saw several cell phones in the living room of Sykes's house, and, as she was leaving, she stole one – a white, LG brand cell phone. Gibson then sold the cell phone to Sanderson. Gibson later received a telephone call from an unknown number; a female on the

line told Gibson that she was "'the sister of the guy whose house you stole the phone from. It's my phone, and I want it back.'" (R. 1269.) Gibson also received text messages demanding that the cell phone be returned; these text messages were sent from a cell phone law enforcement eventually collected from Sykes. At trial, Gibson identified Keshia's cell phone as the cell phone that she had stolen from Sykes.

Sykes was arrested on April 9, 2015. The next day, Sykes gave a statement to Agent Andy Jones with the Alabama Bureau of Investigation. Sykes told Agent Jones that investigators had a misapprehension about Keshia's disappearance. Sykes explained that at the time of his divorce from Keshia, he "was running money and drugs for the cartel out of Memphis and sometimes he would loan the car to them, sometimes he would drive it himself." (R. 1441.) Sykes stated Keshia was embittered about not being awarded Sykes's vehicle in the divorce proceedings. On one occasion when Keshia was aware of cartel members using Sykes's vehicle, Keshia spitefully contacted the Memphis office of the Drug Enforcement Administration and provided federal agents with the location of Sykes's vehicle. Sykes told Agent Jones that Keshia's tip led to the arrest of 3 cartel members and the seizure of 40 pounds of marijuana, 2 bricks of cocaine, $280,000, and his vehicle.[2]

According to Sykes, he and Keshia soon afterwards resumed their relationship. The rekindled romance ended in January 2015, though, and Keshia began living with Bonman. Agent Jones continued:

---

[2] The Drug Enforcement Administration had no record of this alleged arrest and seizure.

> "[Sykes] said that Keshia had an addiction to [methamphetamine]; and before she left Sykes, she found a flip phone that he had that he used strictly for making deals with the cartel in Memphis.
>
> "He said he had it hid inside a stuffed animal in the kids' room and Keshia had found it and took it with her when she moved in with Bonman[. Keshia] used this flip phone to set up a purchase of [methamphetamine] with the cartel in Jasper and Bonman provided her with some currency and some – counterfeit currency to make the purchase.
>
> "And [Sykes] said that Keshia and Bonman put the actual real currency on top and the fake currency on the bottom, made the purchase of the drugs and by the time the cartel found out that it was fake currency, that she'd already left with the drugs.
>
> "So [Sykes] said he got a call from a cartel member telling [Sykes] he owed [the cartel member] $20,000."

(R. 1442-43.) Sykes denied any responsibility for Keshia's actions, and, according to Sykes, the cartel "wanted their money or her." (R. 1443.) Sykes offered them Keshia. Sykes admitted to Agent Jones, "'I led them down [to Keshia's house] but I didn't do nothing to her." (R. 1443.) Sykes stated that the cartel's plan was to "kidnap her, take her to Memphis and use her in some kind of sex ring." Sykes told Agent Jones that he gave cartel members the location of the abandoned mobile homes in Mississippi as a place where Keshia's vehicle could be burned; Sykes could not

explain why geolocation tracking of his cell phone placed him in the vicinity of the burned vehicle.

Sykes initially denied to Agent Jones being taken anywhere by Scott on the day Keshia disappeared but amended his statement once he was presented with his cell-phone records. Sykes stated that Scott did pick him up at work and drop him off near Keshia's house, but that instead of going to her house, he ran to a nearby church to rendezvous with cartel members. At that meeting, Sykes told them Keshia was at her house along with her daughter; Sykes instructed them to bring his daughter Brooklyn to him at his house.

Agent Jones confronted Sykes with the presence of blood in his truck. Sykes speculated that the cartel had placed the blood in his truck to incriminate him. Sykes also told Agent Jones that he had heard there was a lot of blood inside Keshia's house. Sykes stated that "he would not doubt that she actually cut herself to make it look like she'd got hurt and that he wouldn't be surprised if she resurfaced in Vernon after she sobered up." (R. 1449.)

Agent Jones spoke to Sykes five days later, on April 15, at Sykes's request. Sykes told Agent Jones that if the district attorney was "willing to offer him a deal, that he would be willing to cooperate and give Keshia's family some closure." (R. 1452.) Sykes added that if no offer were made, the district attorney would "just have to do it the hard way." (R. 1452.)

Jacob Wiley was incarcerated with Sykes at the Pickens County Jail in May 2017. Wiley had known Sykes for approximately 12 years by that point, having first met him at a hunting and fishing club. Wiley testified that the two spoke every day while

they were in jail and that the conversations eventually turned toward the reasons for their incarcerations. Sykes told Wiley that he was in jail on a capital-murder charge. Sykes did not expressly identify his victim but did describe the actions that gave his rise to his charge. Sykes explained to Wiley that he had "beat her up and threw her in his truck" and that "he took her and dumped her" "where we used to go fishing." (R. 1418.) Wiley testified that the two used to fish the Sipsey River. Sykes told Wiley that he had dumped the body "down past the boat launch" and that he had tied the body with ratchet straps and weighted it down with cinder blocks. Despite search efforts in the area described by Wiley, Keshia's body was not recovered.

Standard of Review

Rule 45A, Ala. R. App. P., as amended effective January 12, 2023, provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals may, but shall not be obligated to, notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

This Court will continue to review the entire record for plain error in all cases in which the death penalty has been imposed, although our analysis on issues reviewed for plain error may not be as extensive as has been this Court's practice historically. *Iervolino v.*

State, [Ms. CR-21-0283, Aug. 18, 2023] ___ So. 3d ___, ___ (Ala. Crim. App. 2023).

> "'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal.' *Hall v. State,* 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Plain error is 'error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' *Ex parte Trawick,* 698 So. 2d 162, 167 (Ala. 1997), modified on other grounds, *Ex parte Wood,* 715 So. 2d 819 (Ala. 1998). 'To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.' *Hyde v. State,* 778 So. 2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So. 2d 237 (Ala. 2000). 'The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant.' *Ex parte Trawick,* 698 So. 2d at 167. '[P]lain error must be obvious on the face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error.' *Ex parte Walker,* 972 So. 2d 737, 753 (Ala. 2007). Thus, '[u]nder the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the

> outcome of the trial.' *Wilson v. State,* 142 So. 3d 732, 751 (Ala. Crim. App. 2010). '[T]he plain error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."' *United States v. Young,* 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Frady,* 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982))."

DeBlase v. State, 294 So. 3d 154, 182-83 (Ala. Crim. App. 2018).

Analysis

I.

During rebuttal closing arguments, the prosecutor stated the following: "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 over there at the end of that table. (Indicating)." (R. 1619.) Sykes asserts that the argument was a direct comment on his decision not to testify. Sykes did not object to the comment; he argues, though, that the circuit court's failure to take prompt curative action constituted plain error. This Court agrees.

In all criminal prosecutions, the accused shall not be compelled to give evidence against himself. Alabama Constitution, Art. I, § 6. The right against self-incrimination is likewise enshrined in the Alabama Code:

> "On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not

> otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment."

§ 12-21-220, Ala. Code 1975. "'[O]nce a defendant chooses not to testify at his trial the exercise of that choice is not subject to comment by the prosecution.'" *Ex parte Davis,* 718 So. 2d 1166, 1173 (Ala. 1998) (quoting *Wherry v. State,* 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981)).

> "Comments by a prosecutor on a defendant's failure to testify are highly prejudicial and harmful, and courts must carefully guard against a violation of a defendant's constitutional right not to testify. *Whitt [v. State,* 370 So. 2d 736, 739 (Ala. 1979)]; *Ex parte Williams,* 461 So. 2d 852, 853 (Ala. 1984); *see Ex parte Purser,* 607 So. 2d 301 (Ala. 1992). This Court has held that comments by a prosecutor that a jury may possibly take as a reference to the defendant's failure to testify violate Art. I, § 6, of the Alabama Constitution of 1901. *Ex parte Land,* 678 So. 2d 224 (Ala.), cert. denied, 519 U.S. 933, 117 S. Ct. 308, 136 L. Ed. 2d 224 (1996); *Ex parte McWilliams,* 640 So. 2d 1015 (Ala. 1993); *Ex parte Wilson,* [571 So. 2d 1251, 1261 (Ala. 1990)]; *Ex parte Tucker,* 454 So. 2d 552 (Ala. 1984); *Beecher v. State,* 294 Ala. 674, 320 So. 2d 727 (1975). Additionally, the Fifth and Fourteenth

Amendments of the United States Constitution may be violated if the prosecutor comments upon the accused's silence. *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *Ex parte Land,* supra; *Ex parte Wilson,* supra. Under federal law, a comment is improper if it was ' " 'manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify'" *United States v. Herring,* 955 F.2d 703, 709 (11th Cir.), cert. denied, 506 U.S. 927, 113 S. Ct. 353, 121 L. Ed. 2d 267 (1992) (citations omitted); *Marsden v. Moore,* 847 F.2d 1536, 1547 (11th Cir.), cert. denied, 488 U.S. 983, 109 S. Ct. 534, 102 L. Ed. 2d 566 (1988); *United States v. Betancourt,* 734 F.2d 750, 758 (11th Cir.), cert. denied, 469 U.S. 1021, 105 S. Ct. 440, 83 L. Ed. 2d 365 (1984). The federal courts characterize comments as either direct or indirect, and, in either case, hold that an improper comment may not always mandate reversal.

"Consistent with this reasoning, Alabama law distinguishes direct comments from indirect comments and establishes that a direct comment on the defendant's failure to testify mandates the reversal of the defendant's conviction, if the trial court failed to promptly cure that comment. *Whitt v. State,* supra; *Ex parte Yarber,* [375 So. 2d 1231, 1233 (Ala. 1979)]; *Ex parte Williams,* supra; *Ex parte Wilson,* supra. On the other hand, 'covert,' or indirect, comments are construed against the defendant, based upon the literal con-

> struction of Ala. Code 1975, § 12-21-220, which created the 'virtual identification doctrine.' *Ex parte Yarber,* 375 So. 2d at 1234. Thus, in a case in which there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute reversible error, there must have been a virtual identification of the defendant as the person who did not become a witness. *Ex parte Yarber,* 375 So. 2d at 1234; *Ex parte Williams,* supra; *Ex parte Wilson,* supra; *Ex parte Purser,* supra."

Ex parte Brooks, 695 So. 2d 184, 188-89 (Ala. 1997) (footnote omitted).

Our decision here is controlled by the opinions of the Alabama Supreme Court in *Whitt v. State,* 370 So. 2d 736 (Ala. 1979), and *Ex parte Wilson,* 571 So. 2d 1251 (Ala. 1990). In *Whitt,* the defendant had been indicted for first-degree murder arising out of a fatality in an automobile collision. The defendant was ultimately convicted of second-degree murder and was sentenced to 25 years in prison. This Court affirmed the defendant's conviction and sentence. The Alabama Supreme Court granted the defendant's petition for a writ of certiorari to consider whether the prosecutor had made an impermissible comment on the defendant's failure to testify.

The defendant in Whitt neither testified nor called any witnesses on his behalf. During closing arguments, the prosecutor remarked: "The only person alive today that knows what happened out there that night is sitting right there." Defense counsel objected to the comment and moved for a mistrial on the ground that the prosecutor had commented on the defendant's failure to testify.

The trial court denied the defendant's motion and instructed the jury: "I am going to instruct the jury though to disregard the last remark in regard to that. The statement made by the District Attorney in his argument is only his inferences from the evidence, but I want you to disregard the last remark, just what he said." *Whitt,* 370 So. 2d at 737.

This Court held that the remark "was 'argument in kind' to rebut remarks by petitioner's counsel, that it was only an 'indirect' reference to petitioner's failure to testify, and, finally, that any possible reference to petitioner was 'eradicated' by the court's instructions." *Whitt,* 370 So. 2d at 738. The Supreme Court rejected each holding.

> "We must disagree and hold that the remark was *not* an 'argument in kind,' was *not* an 'indirect' reference to the petitioner's failure to testify, and was *not* 'eradicated' by the court's instructions.
>
> "The comment 'The only person alive today that knows what happened out there that night is sitting right there' is almost identical to the comment "'No one took the stand to deny it"' held to be a *direct* comment on the defendant's failure to testify and held to be *reversible* error in *Beecher [v. State],* 294 Ala. 674, 320 So. 2d 727 (1975) (per Justice Embry). The comment is very close to the comment made in *Warren v. State,* 292 Ala. 71, 288 So. 2d 826 (1973). There, this Court held (per Justice McCall) that the argument "'The only one that said he didn't sell it (marijuana) was the little brother' was also a *direct* comment on the failure of the defendant to testify and constituted

reversible error. It is thus that we must conclude, based on the holding and rationale of those two cases, that the comment by the district attorney in this case was a *direct* comment on the failure of the defendant to testify and constituted *error* to reverse.

"We cannot agree with the Court of Criminal Appeals that this comment was 'argument in kind' to rebut remarks made by petitioner's counsel. It seems self-evident that it cannot be 'argument in kind' when we do not have the defense counsel's argument to which this comment is said to reply. The record does not contain the closing arguments in this case.

". . . .

"This brings us to a consideration of the last ground given by the Court of Criminal Appeals for finding that the second comment did not constitute reversible error, namely, whether the trial court's instructions to the jury cured such impermissible comment.

"We cannot agree that the trial court's instructions in this case were sufficient to cure the harmful effect of the district attorney's comment. The court stated:

> "'I am going to instruct the jury though to disregard the last remark in regard to that. The statement made by the District Attorney in his argument is only his inferences from the evidence, but I want you to disregard the last remark, just what he said. I will deny your motion.'

> "In seeking to instruct the jury to disregard the remark, we think that the trial court's instructions fell short of what is required to effectively erase the *highly* prejudicial and *harmful* nature of such a comment.
>
> ". . . .
>
> "We suggest that, at a minimum, the trial judge must sustain the objection, and should then promptly and vigorously give appropriate instructions to the jury. Such instructions should include that such remarks are improper and to disregard them; that statements of counsel are not evidence; that under the law the defendant has the privilege to testify in his own behalf or not; that he cannot be compelled to testify against himself; and, that no presumption of guilt or inference of any kind should be drawn from his failure to testify. With appropriate instructions, we hold that the error of the prosecutor's remarks will be sufficiently vitiated so that such error is harmless beyond a reasonable doubt. *U. S. v. Brown,* 546 F.2d 166 (5th Cir. 1977); *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Beecher v. State,* supra."

370 So. 2d at 738 (emphasis in original.)

The Alabama Supreme Court was confronted with a similar remark by the prosecutor in *Ex parte Wilson,* supra. In *Wilson,* the defendant had been convicted of three counts of capital murder and sentenced to death. Following this Court's affirmance of the defendant's convictions and sentence, the

Alabama Supreme Court granted the defendant's petition for a writ of certiorari to consider, among other things, the propriety of the following argument made during the State's rebuttal in closing arguments: "'I can't tell you what that woman went through during that night, because there is only one eyewitness, and he ain't going to tell you. I wish I could tell you all of that. I can give you this evidence that these officers have worked meticulously to gather up . . . .'" *Wilson,* 571 So. 2d at 1259. The defendant moved for a mistrial, asserting that the argument was "'the equivalent of saying that this defendant has not testified.'" *Id.* The State countered that the remark was a reasonable inference from the evidence, specifically, a taped confession given by the defendant. The trial court denied the defendant's motion for mistrial, and the prosecutor resumed his rebuttal: "When I say that, I mean this defendant didn't tell you on that tape recording that he gave Alvin Kidd as to what she went through . . . ." *Id.* The trial court gave a lengthy instruction after closing arguments had concluded regarding a defendant's right not to testify.

The State argued before the Alabama Supreme Court that the prosecutor's "comment was not on the defendant's failure to testify, . . . that his explanatory sentence 'made it clear to the jury that he was referring to the defendant's sketchy incriminating statements, which had been admitted into evidence,'" and that the jury would not have reasonably understood the remark to be a comment on the defendant's failure to testify. *Wilson,* 571 So. 2d at 1260. The Court was unpersuaded. Relying heavily on *Whitt,* the Alabama Supreme Court held the remark combined with the trial court's failure to promptly cure the remark to be reversible error:

> "The statements in this case do not fall within the bounds set forth in *Ex parte Dobard,* [435 So. 2d 1351 (Ala. 1983)], or *Beecher [v. State,* 294 Ala. 674, 320 So. 2d 727 (1975)].[3] The district attorney clearly did not comment generally on the State's evidence standing uncontradicted. His statement falls well outside the permitted range available to a district attorney in closing and is far more prejudicial than those statements deemed to be indirect comments in *Ex parte Williams,* [461 So. 2d 852 (Ala. 1984)]. *See also Stain v. State,* 494 So. 2d 816 (Ala. Crim. App. 1986) (court unable to distinguish comment from that in *Williams)* . . . .
>
> ". . . .
>
> "We find here that the comment made by the district attorney was a direct comment on the defendant's failure to testify and violated the defendant's rights as found under the United States Constitution, the Constitution of Alabama of 1901, and Ala. Code (1975), § 12-21-220. We cannot agree that the comment made by the district attorney could have been understood by the jury only as a reference to the defendant's 'sketchy incriminating statement.'"

Wilson, 571 So. 2d at 1263-65.

---

[3] In those cases, the Alabama Supreme Court held that, "[w]here the State's evidence does stand uncontradicted, the prosecutor does have the right to point this out to the jury." *Beecher,* 294 Ala. at 682, 320 So. 2d at 734.

The remark in the instant case – "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 over there at the end of that table. (Indicating)." – closely parallels the remarks in *Whitt* and *Wilson*. The State asserts that, when viewed in context, the challenged remark was merely a response to the argument of defense counsel during his closing argument that there were gaps in the State's evidence. This Court finds the State's purported justification unavailing. Here, the prosecutor asserted to the jury that there were only two people who knew what had happened to Keshia – Keshia, who was dead and unable to testify, and Sykes. The prosecutor's remark "called the jury's attention to the fact that [Sykes], the only eyewitness who *could* have taken the stand, did not testify." *Powell v. State,* 631 So. 2d 289, 291-92 (Ala. Crim. App. 1993) (emphasis in original).

In light of the holdings of the Alabama Supreme Court in *Whitt* and *Wilson,* this Court holds that the remark was a direct comment on Sykes's decision not to testify. Further, because the circuit court failed to take prompt curative action, this Court must reverse Sykes's convictions and sentence of death. *See Ex parte Wilson,* 571 So. 2d at 1261 ("In a case where there has been a direct reference to a defendant's failure to testify and the trial court has not acted promptly to cure that comment, the conviction must be reversed.").

II.

Although this Court is reversing Sykes's convictions and sentence of death based on the prosecutor's direct comment on Sykes's decision not to testify in conjunction with the circuit court's failure to take

prompt curative action, this Court must address an issue that may arise in a possible retrial – the appropriate capital-sentencing scheme to be applied should Sykes again be convicted of capital murder.

Act No. 2017-131, Ala. Acts 2017, amended §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, to, among other things, remove the circuit court's authority to override a jury's sentencing verdict, thereby making the jury the final sentencing authority in capital cases. Section 13A-5-47.1, Ala. Code 1975, states that this new capital-sentencing scheme "shall apply to any defendant who is charged with capital murder after April 11, 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017."

On April 9, 2015, Sykes was arrested on suspicion of kidnapping Keshia. That charge was elevated in May 2015 when Sykes was indicted in case no. CC-15-208 on two counts of murder made capital for intentionally killing Keshia Nicole Sykes during the commission of a first-degree burglary and for intentionally killing Keshia Nicole Sykes during the commission of a first-degree kidnapping. However, in April 2019, Sykes was reindicted in case no. CC-19-144 on three counts of murder made capital for intentionally killing Keshia Nicole Sykes during the commission of a first-degree burglary, for intentionally killing Keshia Nicole Sykes during the commission of a first-degree kidnapping, and for intentionally killing Keshia Nicole Sykes during the commission of a first-degree robbery. It was on this indictment that Sykes was tried and convicted of three counts of capital murder.

On February 22, 2021, Sykes moved the circuit court to declare that, given the date of his reindictment, the new capital-sentencing scheme should apply to him. (C. 67-68.) At a pretrial hearing, the State agreed with Sykes's motion. The circuit court granted Sykes's motion on March 5, 2021. (C. 69.)

The new capital sentencing scheme is triggered by the date on which a defendant is charged with capital murder. Sykes was first charged with capital murder in the death of Keshia in May 2015, well before the effective date of the new capital-sentencing scheme – April 11, 2017. *See* Rule 1.4(b), Ala. R. Crim. P. ("'Charge' means a complaint, indictment, or information."). Therefore, the prior capital-sentencing scheme is applicable to Sykes, should he again be convicted of capital murder.

Conclusion

The prosecutor made a direct comment during guilt-phase closing arguments on Sykes's decision not to testify and the circuit court failed to take prompt curative action to correct the error. This constituted plain error. Therefore, this Court must reverse Sykes's convictions and sentence of death and remand the case for a new trial.

REVERSED AND REMANDED.

Kellum and Cole, JJ., concur. Minor, J., concurs in the result, with opinion. Windom, P.J., dissents, with opinion. McCool, J., recuses himself.

MINOR, Judge, concurring in the result.

I concur in the result. I write separately to explain why I think that the capital-sentencing scheme enacted by Act No. 2017-131, Ala. Acts 2017, may not apply to Brandon Dewayne Sykes's charges.

As the main opinion explains, law enforcement arrested Sykes in April 2015 on suspicion of kidnapping Keshia Nicole Sykes. According to a motion Sykes filed and the State's appellate brief, the grand jury indicted Sykes in May 2015 in case no. CC-15-208 for two counts of murder made capital for intentionally killing Keshia during the commission of a first-degree burglary and a first-degree kidnapping.[4] (C. 67; State's brief, p. 1.) In April 2019, the grand jury indicted Sykes in case no. CC-19-144 on three counts of capital murder: intentionally killing Keshia during the commission of a first-degree burglary, intentionally killing Keshia during the commission of a first-degree kidnapping, and intentionally killing Keshia during the commission of a first-degree robbery. (C. 24-26.)

The main opinion also explains:

> "Act No. 2017-131, Ala. Acts 2017, amended §§ 13A-5-45, 13A-5-46, and 13A-5-47, Ala. Code 1975, to, among other things, remove the circuit court's authority to override a jury's sentencing verdict, thereby making the jury the final sentencing authority in capital cases. Section 13A-5-47.1, Ala. Code 1975, states that this new capital-sentencing scheme 'shall apply to any defendant who is charged with capital murder after April 11,

[4] The record does not include the 2015 indictment.

> 2017, and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017.'"

___ So. 3d at ___.

In her dissenting opinion, Presiding Judge Windom describes the 2019 indictment as nullifying the original 2015 indictment, citing *Hulsey v. State,* 196 So. 3d 342, 353 (Ala. Crim. App. 2015), and *Ex parte Russell,* 643 So. 2d 963, 965 (Ala. 1994).

In *Hulsey,* the grand jury returned four indictments against Hulsey. He was tried and convicted on the fourth indictment, which charged him with reckless endangerment and first-degree unlawful manufacturing of a controlled substance. Hulsey was not charged with first-degree unlawful manufacturing of a controlled substance until the fourth indictment, which was returned beyond the statute of limitations. On appeal, this Court held that "[b]ecause the previous indictments did not charge first-degree unlawful manufacture of a controlled substance, none of them tolled the statute of limitations as to that offense." 196 So. 3d at 352-53.

The State argued, in the alternative, that Hulsey should be convicted of the lesser-included offense of second-degree unlawful manufacture of a controlled substance. This Court noted that the second indictment, which was returned within the statute of limitations, charged Hulsey with that offense and thus tolled the statute of limitations. But because the third indictment was defective in charging Hulsey with that offense, the third indictment did not toll the statute of limitations. Thus, this Court held that Hulsey could not be guilty of second-degree unlawful

manufacture of a controlled substance. 196 So. 3d at 355-56.

Russell involved a different but also complicated procedure:

> "On October 3, 1991, an automobile driven by Willie Samuel Russell, Jr., collided in Tuscaloosa, Alabama, with an automobile owned and operated by the City of Tuscaloosa Police Department. Russell was promptly arrested, and prosecutions were initiated pursuant to (1) a Uniform Traffic Ticket and Complaint ('UTTC') charging him with the misdemeanor offense of driving while under the influence of alcohol ('DUI); (2) a UTTC charging him with the misdemeanor offense of driving a vehicle while his driver's license was revoked ('DRL'); and (3) a complaint signed by Officer S.L. Stimpson charging him with the felony offense of leaving the scene of an accident involving personal injury, as prohibited by Ala. Code 1975, §§ 32-10-1(a) and -6.
>
> "On November 18, 1991, a Tuscaloosa County grand jury considered and rejected the felony count, indicting Russell, instead, on the charge of 'attempt[ing] to fail to . . . stop at the scene of the . . . accident'—a misdemeanor offense as defined by § 13A-4-2(d)(4). In February 1992, Russell was convicted on the charges of DUI and DRL. He appealed those convictions to the Tuscaloosa County Circuit Court.
>
> "By October 23, 1992, Russell had been tried in the Tuscaloosa County District

Court and there acquitted of the misdemeanor offense charged in the indictment. On that date, he moved the circuit court to dismiss the cases involving the DUI and DRL charges, contending that the court lacked subject-matter jurisdiction of the appeals in those cases. The circuit court agreed with Russell, and, on March 9, 1993, dismissed those cases.

"The City of Tuscaloosa ('the City') petitioned the Court of Criminal Appeals for a writ of mandamus directing the circuit court judge to vacate his judgment of dismissal and reinstate the cases. The Court of Criminal Appeals, with an opinion, granted the City's petition. *Ex parte City of Tuscaloosa,* 636 So. 2d 692 (Ala. Crim. App. 1993).

"In seeking from this Court a writ of mandamus directing the Court of Criminal Appeals to rescind its writ of mandamus, Russell contends that the circuit court's action was mandated by Ala. Code 1975, § 12-11-30(2), which, he insists, vested in the circuit court exclusive original jurisdiction of the DUI and DRL cases. Although the parties invite us to discuss a number of interesting questions tangentially related to this case, we confine our attention to the issue that, in our view, resolves this dispute, namely, the effect of the grand jury's indictment on the offense charged in Officer Stimpson's complaint, within the context of § 12-11-30(2).

"Section 12-11-30(2) provides in pertinent part: 'The circuit court shall have exclusive original jurisdiction of all felony prosecutions and of misdemeanor or ordinance violations which are lesser included offenses within a felony *charge* or which arise from the same incident as a *felony charge* . . . .' (Emphasis added.) See also Ala. R. Crim. P. 2.2(a). Russell contends that the charge made in Officer Stimpson's complaint, and on which the arrest warrant was based, constituted a 'felony charge' within the meaning of this section. He insists that the DUI and DRL charges '[arose] from the same incident as [the] felony charge' and, consequently, that the circuit court, rather than the municipal court, had exclusive original jurisdiction of the DUI and DRL charges. He then reasons that because the circuit court had exclusive original jurisdiction, that court did not acquire jurisdiction on appeal after the cases had been, erroneously he contends, prosecuted in the municipal court.

"Russell's reasoning is based on the proposition that the complaint charging the commission of a felony offense irrevocably invoked the exclusive original jurisdiction of the circuit court. In effect, he insists that the grand jury's action, which reduced the felony charged in the complaint to a misdemeanor, was inconsequential. For the following reasons, we disagree with this proposition.

"A complaint instituting a criminal prosecution and authorizing an arrest is 'superseded' by the subsequent return of an

indictment addressed to the same set of operative facts. See Ala. R. Crim. P. 7.6(a). In such cases, a party is 'tried on the charge in the *indictment* and not on the warrant of arrest or its supporting affidavit.' *Henry v. State,* 57 Ala. App. 383, 388, 328 So. 2d 634, 638 (Ala. Crim. App. 1976) (emphasis added). Cf. *Wilson v. State,* 99 Ala. 194, 195, 13 So. 427, 427 (1893) (an indictment returned in proper form cures defects in an antecedent charging instrument); *Toney v. State,* 15 Ala. App. 14, 16, 72 So. 508, 509 (1916) (same); cf. also *Hansen v. State,* 598 So. 2d 1, 2 n.1 (Ala. Crim. App. 1991) (an indictment supersedes antecedent indictments); *Broadnax v. State,* 54 Ala. App. 546, 549, 310 So. 2d 265, 268 (Ala. Crim. App. 1975).

"Under these rules, the complaint, the original instrument charging the felony of leaving the scene of an accident, was *superseded* by the subsequent indictment containing the misdemeanor charge of *attempting* to leave the scene of an accident. In other words, the original charging instrument was *nullified* by the indictment, which was returned on November 18, 1991. When Russell was tried in the municipal court in February 1992 for DUI and DRL, no felony charge was pending; therefore, the exclusivity provision in § 12-11-30(2) was not triggered. The circuit court clearly possessed jurisdiction over those two cases when Russell appealed for a trial *de novo,* and it erred in dismissing them."

643 So. 2d at 964-65.

I am not persuaded that *Hulsey* or *Russell* are controlling. First, there is no issue about the statute of limitations. Second, there is no issue about which court had jurisdiction over the capital-murder charges. Finally, there is no question that Sykes was charged with capital murder when he was arrested and indicted in 2015, and it appears that the 2015 indictment included two of the three capital murder charges included in the 2019 indictment.

Act No. 2017-131, Ala. Acts 2017, applies to all defendants charged after April 11, 2017. It does not expressly state that it applies to defendants charged before April 11, 2017, but not convicted and sentenced to death until after that date. This Court, however, has affirmed the convictions and death sentences of defendants charged before April 11, 2017, but convicted and sentenced after that date. *See, e.g., Dearman v. State,* [Ms. CR-18-0060, Aug. 5, 2022] ___ So. 3d ___ (Ala. Crim. 2022); *Young v. State,* 375 So. 3d 813 (Ala. Crim. App. 2021), *cert. denied* (No. 1210291, Oct. 21, 2022); and *Belcher v. State,* 341 So. 3d 237 (Ala. Crim. App. 2020), *cert. denied* (No. 1200374, May 21, 2021). Those decisions, as well as the plain language of Act No. 2017-131, Ala. Acts 2017, support the idea that Sykes is not subject to the new sentencing scheme under that act. Based on the materials before this Court, however, I believe it is premature to decide this question.

WINDOM, Presiding Judge, dissenting.

The main opinion reverses Brandon Dewayne Sykes's capital-murder convictions and his sentence of death because, it holds, the prosecutor made a direct comment on Sykes's decision not to testify and the circuit court failed to take prompt curative action. Because I do not believe the prosecutor made a direct comment on Sykes's decision not to testify, I respectfully dissent.

During rebuttal closing arguments, the prosecutor stated: "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 over there at the end of that table. (Indicating)." (R. 1619.) The main opinion, relying on the opinions of the Alabama Supreme Court in *Whitt v. State,* 370 So. 2d 736 (Ala. 1979) and *Ex parte Wilson,* 571 So. 2d 1251 (Ala. 1990), holds that the foregoing was a direct comment on Sykes's decision not to testify.

The remark by the prosecutor was admittedly similar to the remarks made by the prosecutors in *Whitt* and *Wilson,* as well as a remark made by the prosecutor in *Powell v. State,* 631 So. 2d 289 (Ala. Crim. App. 1993), which is also cited by the main opinion. In all three cases, as in this case, the prosecutor referenced the defendant's being the only remaining eyewitness to the crime. Even so, I do not believe a reversal of Sykes's convictions and sentence is warranted under the circumstances here.

What distinguishes the remark at issue from the remarks made in *Whitt, Wilson,* and *Powell* is the context in which it was made. The State has assumed this position in its brief on appeal, asserting that, when viewed in context, the argument of the State in

rebuttal was merely a reply in kind to the argument of defense counsel during his closing argument that there were gaps in the State's evidence. Indeed, "[a] challenged comment of a prosecutor made during closing arguments must be viewed in the context of the evidence presented in the case and the entire closing arguments made to the jury – both defense counsel's and the prosecutor's." *Ex parte Brooks,* 695 So. 2d 184, 189 (Ala. 1997).[5]

I believe *Ex parte Musgrove,* 638 So. 2d 1360 (Ala. 1993), and *Ex parte Brooks,* 695 So. 2d 184 (Ala. 1997), are instructive. In *Musgrove,* the Alabama Supreme Court examined the following rhetorical questions posed to the jury by the prosecutor during rebuttal closing arguments: "What did you hear from the defense?" and "What did you hear from the Defendant?" The appellants objected, asserting that the questions were comments on their right not to testify. The appellants' objections to the questions

---

[5] The State relies in its brief on the reply-in-kind doctrine. Sykes counters that the reply-in-kind doctrine is inapplicable here because he made no illegal argument. On this point, I agree with Sykes. "The reply-in-kind doctrine is designed to restore an equal playing field in the courtroom *when one party violates the rules.*" *Allstate Ins. Co. v. Ogletree,* 331 So. 3d 1150, 1156 (Ala. 2021) (emphasis added); *see Minor v. State,* 914 So. 2d 372, 430 (Ala. Crim. App. 2004) ("It is a misapplication of this rule, however, to uphold an illegal argument under the guise of 'reply in kind,' where the initial argument, to which the purported reply is addressed, is itself a legally permissible comment to the jury."). Because Sykes's arguments in closing about the gaps in the State's evidence were entirely appropriate, the State cannot now avail itself of the reply-in-kind doctrine to excuse its remark on rebuttal.

Nonetheless, the fact that the State's remark was made in response to arguments raised by Sykes is relevant because it provides context for the challenged remark.

were overruled, and the circuit court gave no curative instruction to the jury. Still, the Alabama Supreme Court found no error that warranted reversal. After reviewing the entirety of the closing arguments from both parties, specifically noting that defense counsel had "made repeated attacks upon the prosecution's presentation of its case and the prosecution's motivation for obtaining a conviction," *Musgrove,* 638 So. 2d at 1368, the Alabama Supreme Court endorsed this Court's holding with respect to the prosecutor's question, "What did you hear from the Defendant?":

> "'[This comment,] when viewed in the context of the entire argument, did not refer to the appellants' failure to testify, but was rather *the prosecutor's opening into a summary of the case presented by the defense.* The comment was clearly not a direct reference to the appellants' failure to testify because it was not '"manifestly intended to be, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify."' [Citations omitted.] Nor was this comment an indirect reference to the appellants' failure to testify and there was no "close identification" of the appellants as the exact people who did not become witnesses. [Citation omitted.] *This statement by the prosecutor was merely a general opening statement to a recapitulation of the defense's case.'*

"*Musgrove and Rogers v. State,* 638 So. 2d 1347, 1359 (Ala. Crim. App. 1992).

"We agree."

Ex parte Musgrove, 638 So. 2d at 1369 (emphasis added in *Ex parte Musgrove).*

Similarly, in *Ex parte Brooks,* supra, the Alabama Supreme Court considered the following argument, which was allowed by the trial court over defense counsel's objection:

> "'In that connection I ask [defense counsel], the last thing I said before I sat down was to get up here and tell these people what's the reasonable hypothesis that's consistent with his innocence? That says anything other than he intentionally killed her while he raped and robbed her in her apartment. Have you heard it yet? Of course not.
>
> ". . . .
>
> "Well, have you heard one word in this courtroom since Tuesday morning, one word in this courtroom since Tuesday morning, that causes you to believe there's a reasonable hypothesis of innocence, that is anything except compelling of his guilt from this evidence proposed to you by [defense counsel] in argument or otherwise?"

Ex parte Brooks, 695 So. 2d at 187. Again, the Alabama Supreme Court reviewed the entirety of the parties' closing arguments and recognized that defense counsel had

> "argued that the State's evidence, because of its circumstantial nature, was insufficient to prove beyond a reasonable doubt that the defendant had committed the crimes. Def-

> ense counsel insisted that the evidence created a reasonable hypothesis of the defendant's innocence because there were unidentified fingerprints, unidentified pubic hair, and unidentified semen at the crime scene, which, defense counsel contended, suggested that another person had committed the crimes."

Id. at 189. The Alabama Supreme Court held that "in the context of the evidence and the closing arguments of both the defense and the State, the statements at issue were not a reference to the defendant's failure to testify, but rather were a reply to the insufficiency argument made by defense counsel that the evidence suggested a reasonable hypothesis of the defendant's innocence and that the State had failed to eliminate that hypothesis." *Id.*

I believe the main opinion focuses too much on the remark itself and ignored the context in which that remark was made. After all, in isolation, it would be difficult to craft an argument that more directly comments on a defendant's decision not to testify than the remark in *Ex parte Musgrove* – "What did you hear from the Defendant?" But, as in *Ex parte Musgrove* and *Ex parte Brooks,* this Court should not view the remark in isolation but rather should look to the evidence offered at trial and the entirety of the closing arguments to gather the context in which the allegedly improper remark was made.

In this case, 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. Defense counsel harped on this theory during his closing arguments:

"I asked [Agent] Andy Jones [of the Alabama Bureau of Investigation] right here, 'Is Keshia Sykes dead?' He says, 'I can't say for a fact.'

"Do you know why there's a charge for Kidnapping, one for Robbery and one for Burglary? Because the State has no real theory of what this case is about. They figure, 'If we just throw enough stuff up against the wall, something will stick.'

"So is it Burglary? Did he come through the window in the back? . . .

". . . .

"So what's the method of death? What did he do with the body? When did he move the body? . . .

". . . .

". . . 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.

". . . .

"And that's what this is about. Someone who is missing. Someone who told Clara Hollis, 'You think I'll get my' – 'my disability money? Because if not, I'm leaving in February anyway.'

"What was the impetus for her to leave? Think about the testimony of all of the

things. Think about the Burglary, the Robbery, the Kidnapping.

"You know, they are just saying it had to be one of those. It had to be one of those. Is there any evidence of that?

". . . .

"So we have no idea of a time of death. We think it's sometime allegedly between 8:00 and 8:58. Old Highway 18 right in Vernon just right off the road.

"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 by 9:00 o'clock?

". . . .

". . . Consider the fact they have no idea how anything happened; but yet, they are wanting you to find him guilty.

"Consider the facts just like Andy Jones said, 'I can't say for a fact she's dead,' and find him not guilty.

"Thank you."

(R. 1598-1607.) The prosecutor responded to defense counsel's argument in his rebuttal:

"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."

(R. 1619) (emphasis added.) The prosecutor then addressed the evidence that supported the State's theory of a brutal murder of Keshia. Viewed in context, I do not believe the prosecutor's challenged remark, which is emphasized above, was "'manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Ex parte Brooks,* 695 So. 2d at 188 (quoting *United States v. Herring,* 955 F.2d 703, 709 (11th Cir. 1992)).

In *Whitt,* the Alabama Supreme Court was precluded from considering the context of the challenged remark because the record did not contain the closing arguments. *Whitt,* 370 So. 2d at 738. In *Wilson,* the prosecutor referenced the defendant's being the only eyewitness and added that "'he ain't going to tell you'" what happened. *Ex parte Wilson,* 571 So. 2d at 1260. In *Powell,* the prosecutor specifically drew the jury's attention to the fact that the deceased victim could not "come in and testify," which left the defendant as the only eyewitness who could have taken the stand. *Powell,* 631 So. 2d at 290. In contrast, in this case the prosecutor's argument followed a lengthy challenge to the evidence, or purported lack thereof, made by defense counsel, and the prosecutor even prefaced the challenged argument with a reference to the specific argument of defense counsel that he intended to address.

Additionally, I believe this Court must be mindful that the jury was specifically instructed by the circuit court that the burden of proof rested upon the State and that Sykes was not required to prove his innocence. (R. 1654.) The circuit court also gave the following instruction:

> "The Court charges the jury that the fact that that the Defendant did not testify in this case cannot be considered in determining the Defendant's guilt or innocence.
>
> "No inference or conclusion should be drawn by the jury from the fact that the Defendant was not sworn and put on the witness stand as a witness in his own behalf, nor should this fact have any weight with the jury in reaching a verdict."

(R. 1657.)

In sum, I believe that the jurors would have perceived the remark not as a comment on Sykes's decision not to testify but rather for what it was – a rebuttal to defense counsel's closing argument. *See Thomas v. State,* 824 So. 2d 1, 26 (Ala. Crim. App. 1999), overruled on other grounds, *Ex parte Carter,* 889 So. 2d 528, 533 (Ala. 2004) ("We reiterate that we look at the impact of an allegedly improper comment in the context of the entire proceeding, and that we do not view the comment in the abstract." (citing *McWhorter v. State,* 781 So. 2d 257 (Ala. Crim. App. 1999))). It would seem, given the lack of an objection or a curative instruction, that defense counsel for Sykes and the circuit court perceived the remark in the same way.

I do not believe the challenged remark constituted a direct comment on Sykes's decision not to testify;

consequently, I do not believe the circuit court committed plain error in failing to sua sponte provide a curative instruction. Therefore, I respectfully dissent from that portion of the main opinion.

I also disagree with the discussion in the main opinion about the appropriate capital-sentencing scheme to be applied should Sykes again be convicted of capital murder.

Act No. 2017-131, Ala. Acts 2017, created a new capital-sentencing scheme that placed the final sentencing authority in capital cases with the jury. I believe that by the express wording of the applicability statute – § 13A-5-47.1, Ala. Code 1975 – the new capital-sentencing scheme applies to Sykes's charges for capital murder.

Section 13A-5-47.1 contains two provisions – one that establishes to whom the new capital-sentencing scheme applies and one that establishes to whom the new capital-sentencing scheme does not. First, § 13A-5-47.1 states that the new capital-sentencing scheme "shall apply to any defendant who is charged with capital murder after April 11, 2017." As the main opinion points out, Sykes was first indicted in May 2015 in case no. CC-15-208 on two counts of murder made capital for intentionally killing Keshia Nicole Sykes during the commission of a first-degree burglary and for intentionally killing Keshia Nicole Sykes during the commission of a first-degree kidnapping. However, he was not tried on this indictment. In April 2019, Sykes was reindicted in CC-case no. 19-144 on three counts of murder made capital for intentionally killing Keshia Nicole Sykes during the commission of a first-degree burglary, for intentionally killing Keshia Nicole Sykes during the commission of a first-degree kidnapping, and for

intentionally killing Keshia Nicole Sykes during the commission of a first-degree robbery. It was on this indictment that Sykes was tried and convicted. It seems indisputable that Sykes was, in fact, "charged with capital murder after April 11, 2017." § 13A-5-47.1.[6] Looking to the date on which Sykes was *first* charged with capital murder appears to read into the statute a qualifier that does not exist.

Next, § 13A-5-47.1 states that the new capital-sentencing scheme "shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to April 11, 2017." Sykes was sentenced to death on April 5, 2022; thus, this provision of § 13A-5-47.1 clearly does not exclude Sykes from being sentenced under the new capital-sentencing scheme.

In light of the procedural history of Sykes's case, I believe the circuit court properly determined that the new capital-sentencing scheme was applicable to Sykes's charges for capital murder. Therefore, I respectfully dissent from that portion of the main opinion as well.

---

[6] This Court has recognized that "an original charging instrument is nullified by a subsequent indictment" and that "a subsequent indictment that changes an offense of a previous indictment is not an amendment to the previous indictment; it is a new indictment that supersedes, nullifies, and replaces the previous indictment." *Hulsey v. State,* 196 So. 3d 342, 353 (Ala. Crim. App. 2015); *Ex parte Russell,* 643 So. 2d 963, 965 (Ala. 1994).

APPENDIX B

ALABAMA COURT OF CRIMINAL APPEALS

June 21, 2024

CR-2022-0546

BRANDON DEWAYNE SYKES

v.

STATE OF ALABAMA

(Appeal from Lamar Circuit Court: CC-19-144).

NOTICE

You are hereby notified that on June 21, 2024, the following action was taken in the above-referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D. Scott Mitchell, Clerk
D. Scott Mitchell, Clerk

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

September 12, 2025

SC-2024-0395

Ex parte State of Alabama PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Brandon Dewayne Syke v. State of Alabama) (Lamar Circuit Court: CC-19-144; Criminal Appeals CR-2022-0546).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 12, 2025:

Writ Quashed. No Opinion. PER CURIAM. -- Stewart, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, and Cook, JJ., concur. Lewis, J., dissents. McCool, J., recuses himself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

/s/ Megan B. Rhodebeck
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

February 20, 2025

SC-2024-0395

Ex parte State of Alabama PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Brandon Dewayne Sykes v. State of Alabama) (Lamar Circuit Court: CC-19-144; Criminal Appeals: CR-2022-0546).

ORDER

The "State of Alabama's Petition for Writ of Certiorari" filed by on July 12, 2024, directed to the Court of Criminal Appeals, having been submitted to this Court,

IT IS ORDERED that the Petition is GRANTED. Ala. R. App. P. 39(f).

IT IS FURTHER ORDERED as follows:

1. that Petitioner may file a brief in accordance with Rule 39(g)(1);

2. that Respondent may then file a response brief in accordance with Rule 39(g)(2);

3. that, should either Petitioner or Respondent choose not to file a brief, such party shall instead timely file a waiver of the right to file such brief in accordance with Rule 39(g)(1)–(2);

4. that Petitioner may then file a reply brief in accordance with Rule 39(g)(3); and

5. that requests for oral argument, if any, shall be made in accordance with Rule 39(h).

PER CURIAM. Stewart, C.J., and Shaw, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Wise and Cook, JJ., dissent. McCool, J., recuses himself.

Witness my hand and seal this 20th day of February, 2025.

/s/ Megan B. Rhodebeck
Clerk of Court,
Supreme Court of Alabama

FILED
February 20, 2025

Clerk of Court
Supreme Court of Alabama

APPENDIX E

IN THE ALABAMA COURT OF
CRIMINAL APPEALS

No. CR-22-0546

STATE OF ALABAMA,

v.

BRANDON DEWAYNE SYKES,

On Appeal from the Circuit Court of Lamar County
No. CC-19-144

STATE'S APPLICATION AND BRIEF FOR REHEARING

Steve Marshall
Attorney General

John C. Hensley
Assistant Attorney General
Counsel of Record*

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Tel: (334) 242-7300
Fax: (334) 353-3637
E-mail: john.hensley@alabamaag.gov

May 17, 2024

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Other Sources

APPLICATION FOR REHEARING

The State of Alabama respectfully moves this Court for a rehearing under Rule 40 of the Alabama Rules of Appellate Procedure. The State requests that this Court's opinion entered on May 3, 2024, be withdrawn.[1] The Court should affirm Brandon Sykes's conviction and sentence of death.

Specifically, the State believes that this Court overlooked or misapprehended the following points of law and fact:

1. The State respectfully asserts that this Court misapprehended the applicable standard of review concerning prosecutorial comments on a defendant's right not to testify, including the determination of whether a comment is a "direct" or "indirect" comment.[2] The Court also erred in its determination that the trial court failed "to take prompt curative action."[3]
2. This Court misapprehended that the harmless error rule applies to comments on a defendant's right not to testify.

STATEMENT OF THE CASE AND FACTS

Brandon Sykes was convicted of capital murder and sentenced to death in February 2022. Sykes appealed, and he filed his brief on March 23, 2023. On May 3, 2024, this Court reversed and remanded Sykes's conviction and death sentence, finding that the prosecutor made "a direct comment on Sykes's

---

[1] *State v. Sykes,* No. CR-22-0546, 2024 WL 1947829 (Ala. Crim. App. May 3, 2024).

[2] *Id.* at *9.

[3] *Id.*

decision not to testify."[4] Presiding Judge Windom wrote a dissenting opinion.[5] Judge McCool recused. The State adopts Judge Windom's statement of facts along with the main opinion's statement of facts. The State now seeks rehearing and requests that the Court withdraw its opinion and affirm Sykes's capital-murder conviction and death sentence.

STATEMENT OF THE ISSUES

1. Did this Court misapply Alabama caselaw in regards to, not only whether the prosecutor's statement during closing argument was "a direct comment on Sykes's decision not to testify,"[6] but whether the trial court erred in failing "to take prompt curative action?"[7]

2. Did this Court disregard the case law as it pertains to the harmless error rule?

ARGUMENT[8]

I. This Court erred when it misapplied Alabama caselaw in regard to the prosecutor's statement during closing argument.

This Court erred by finding that the prosecutor made a direct comment on Sykes's decision not to testify in violation of Alabama law.[9] Because Sykes

---

[4] *Id.* at *9.

[5] *Id.* at *13-*17.

[6] *Id.* at *9.

[7] *Id.*

[8] Citations to the record are as follows:

R. Reporter's transcript from trial

C. Clerk's record on appeal

[9] *See Sykes,* No. CR-22-0546, 2024 WL 1947829 at *5-9.

did not object to the prosecutor's statement, the standard of review for these issues is plain error.[10] This Court has explained that

> The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. *Hall v. State,* 820 So. 2d 113, 121 (Ala. Crim. App. 1999), aff'd, 820 So. 2d 152 (Ala. 2001). Plain error is "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." *Ex parte Trawick,* 698 So. 2d 162, 167 (Ala. 1997), modified on other grounds, *Ex parte Wood,* 715 So. 2d 819 (Ala. 1998). To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations. *Hyde v. State,* 778 So. 2d 199, 209 (Ala. Crim. App. 1998), aff'd, 778 So. 2d 237 (Ala. 2000). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. *Ex parte Trawick,* 698 So. 2d at 167. [P]lain error must be obvious on the

[10] *See Ala. R. App. P. 45A* ("In all cases in which the death penalty has been imposed, the Court of Criminal Appeals may, but shall not be obligated to, notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant.").

> face of the record. A silent record, that is a record that on its face contains no evidence to support the alleged error, does not establish an obvious error. *Ex parte Walker,* 972 So. 2d 737, 753 (Ala. 2007). Thus, "[u]nder the plain-error standard, the appellant must establish that an obvious, indisputable error occurred, and he must establish that the error adversely affected the outcome of the trial." *Wilson v. State,* 142 So. 3d 732, 751 (Ala. Crim. App. 2010). [T]he plain error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Young,* 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Frady,* 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)).[11]

Furthermore, "[w]hile th[e] failure to object does not preclude review in a capital case, it does weigh

---

[11] *Henderson v. State,* No. CR-21-0044, 2024 WL 1946585, at *4 (Ala. Crim. App. May 3, 2024); *See United States v. Daniels,* 91 F.4th 1083, 1095 (11th Cir. 2024) ("Plain error review is different from harmless error review in several respects. [Citation omitted]. First, 'relief under plain error review is discretionary, meaning that, even if a defendant establishes prejudice, her convictions might still be affirmed.' [Citation omitted]. Second, 'unlike harmless error—where the government carries the burdern—the onus of establishing prejudice under plain error rests with the defendant.' [Citation omitted]. Third, '[t]he measure of prejudice under plain error review—the third prong of the plain error test—requires that an error have affected substantial rights, which almost always requires that the error must have affected the outcome of the [trial].").

against any claims of prejudice. [Citation omitted]. This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful."[12]

In past cases, this Court has addressed prosecutors' comments about the evidence by stating

> Questions about the propriety of counsel's statements in closing argument are matters for the broad discretion of the trial court. *See, e.g., Gobble v. State,* 104 So. 3d 920, 947 (Ala. Crim. App. 2010) (quoting *Acklin v. State,* 790 So. 2d 975, 1002 (Ala. Crim. App. 2000)). A prosecutor may argue every legitimate inference from the evidence 'and may examine, collate, shift and treat the evidence in his own way.' *Taylor v. State,* 666 So. 2d 36, 64 (Ala. Crim. App. 1994). A prosecutor's arguments are to be examined in the context of the evidence as a whole. The standard of review is not whether the defendant was prejudiced by a comment, but whether the comment 'so infected the trial with unfairness as to make the resulting conviction

[12] *Smith v. State,* 2022 WL 4007496, at *18 (Ala. Crim. App. September 2, 2022) (In *Smith,* the prosecutor discussed the defendant's "testimony" and suggested that the defendant would "testify" in the prosecutor's opening statement. The defendant did not testify. This Court, examining the statements in context of the entire trial, found that the prosecutor's statements about the defendant testifying were not a direct or indirect comment on the defendant's failure to testify and that "the State committed no error, plain or otherwise.").

> a denial of due process.' *Darden v. Wainwright,* 477 U.S. 168, 169, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).[13]

Because the trial court is in the best position to "determine when discussion by counsel is legitimate and when it degenerates into abuse," [14] "[w]ide discretion is allowed the trial court in regulating the arguments of counsel." [15] Lastly, Alabama courts apply harmless-error analysis to claims regarding improper comments on a defendant's failure to take the stand.[16]

First, the Court misapprehended that an actual "direct" comment is one that *directly* refers to the defendant's failure to take the stand. [17] A direct

---

[13] *Woodward v. State,* 123 So. 3d 989, 1028 (Ala. Crim. App. 2011).

[14] *Hannah v. State,* 518 So. 2d 182, 185 (Ala. Crim. App. 1987) (quoting *Saffold v. State,* 485 So. 2d 806, 808 (Ala. Crim. App. 1986)).

[15] *Ex parte Loggins,* 771 So. 2d 1093, 1101 Ala. 2000) (quoting *Lloyd v. State,* 629 So. 2d 662, 663–64 (Ala. Crim. App. 1993)).

[16] *See Gavin v. State,* 891 So. 2d 907, 983 (Ala. Crim. App. 2003); *Ex parte Brooks,* 695 So. 2d 184, 190 (Ala. 1997)).

[17] The Court's analysis improperly relies on the direct/indirect distinction to reach the wrong conclusion. In effect, the Court has replaced a highly context-focused standard of review with a magic-words test. To the extent the direct/indirect test is controlling, the State reserves the right to challenge it before the Alabama Supreme Court. Additionally, the State preserves the argument that—whether arising under the federal or Alabama Constitutions—the extent of a criminal defendant's right to be free from comment on his failure to testify goes far beyond the original meaning of the relevant constitutional provisions. *See, e.g., Mitchell v. United States,* 526 U.S. 314, 331–41 (1999) (Scalia, J., dissenting) ("[I]t is implausible that the Americans of 1791, who were subject to adverse inferences for failing to give

comment on a defendant's failure to testify includes comments such as "The defendant did not take the stand and deny the accusation against him,"[18] or "The defendant can testify and he knows if he chooses to do so,"[19] or "Now, if he had wanted to testify, that would be fine, but he did not."[20]

Indirect comments include: "'The *defendant* did not deny,' 'Why didn't *he* tell about it,' 'Whether *he* will ever state it or not, I don't know,' '*He* did not deny he was at the still,' 'You have not heard the testimony of the *defendant* yet,' '*He* hasn't explained it,' 'There is not one iota of testimony that *he* has denied this testimony,' 'If I had been *him* I would have * * * said, 'I quit right now,' '*He* don't say he didn't do it,'

---

unsworn testimony, would have viewed an adverse inference for failing to give sworn testimony as a violation of the Fifth Amendment").

Even if the Court's characterization of the comment in *Ex parte Wilson* as a "direct" comment were controlling, a distinction must be made between the comment in that case and the comment in this case. In *Ex parte Wilson,* 571 So. 2d at 1259, the Court found that the prosecutor's comment, "I can't tell you what that women went through during that night, because there is only one eyewitness, and he ain't going to tell you," was improper, in part, because, contrary to the State's argument that the comment constituted a reasonable inference from the evidence, "the comment was not made in the context of a discussion of the [defendant's] taped statement." *Id.* at 1264. A prosecutor's statement that the defendant will not tell the jury something is obviously different than a statement that the defendant has knowledge of something.

[18] *Warren v. State,* 288 So. 2d 826, 828 (Ala. 1973).

[19] *J.E. v. State,* 997 So. 2d 335, 338 (Ala. Crim. App. 2007).

[20] *Jackson v. State,* 629 So. 2d 748, 753 (Ala. Crim. App. 1993).

'Sitting here holding his mouth,' and 'We asked him in court and *he* hasn't explained it.'"[21]

In this case, the prosecutor's comment did not directly refer to Sykes's failure to take the stand, so the conclusion that error arose from that comment rests upon a faulty premise. In reviewing these statements by prosecutors, this Court has explained that it will determine whether the statement was "(1) manifestly intended to be a comment on [the defendant's] failure to testify or (2) that it was of such character that the jury would have naturally and necessarily taken it to be a comment on [the defendant's] failure to testify."[22] Sykes "bears the burden of establishing the existence of one of the two criteria."[23] Absent a showing of either of those two criteria, "the State committed no error, plain or otherwise."[24]

The State's argument "must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury."[25] Furthermore, the prosecutor's "comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement."[26]

---

[21] *Thompson v. State,* 132 So. 2d 386, 389 (Ala. Ct. App. 1961).

[22] *Smith,* 2022 WL 4007496 at *19.

[23] *Id.* (quoting *United States v. Muscatell,* 42 F.3d 627, 632 (11th Cir. 1995)).

[24] *Id.* at *22.

[25] *Minor v. State,* 914 So. 2d 372, 418 (Ala. Crim. App. 2004)(quoting *Roberts v. State,* 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997)).

[26] *Id.*

As Presiding Judge Windom pointed out in her dissent, *Ex parte Musgrove* is illuminating for the present case.[27]

> In *Musgrove,* the Alabama Supreme Court examined the following rhetorical questions posed to the jury by the prosecutor during rebuttal closing arguments: "What did you hear from the defense?" and "What did you hear from the Defendant?" The appellants objected, asserting that the questions were comments on their right not to testify. The appellants' objections to the questions were overruled, and the circuit court gave no curative instruction to the jury. Still, the Alabama Supreme Court found no error that warranted reversal. After reviewing the entirety of the closing arguments from both parties, specifically noting that the defense counsel had "made repeated attacks upon the prosecution's presentation of its case and the prosecution's motivation for obtaining a conviction," *Musgrove,* 638 So. 2d at 1368, the Alabama Supreme Court endorsed this Court's holding to the prosecutor's question, "What did you hear from the Defendant?":
>
> "[This comment,] when viewed in the context of the entire argument, did not refer to the appellants' failure to testify, but was rather *the prosecutor's opening into a summary of the case presented by the defense.* The comment was clearly not a direct reference to the appellants' failure to testify because it

[27] *See Sykes,* 2024 WL 1947829 at *14 (citing *Ex parte Musgrove,* 638 So. 2d 1360 (Ala. 1993)).

> was not "'manifestly intended to be, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify.'" [Citations omitted.] Nor was this comment an indirect reference to the appellants' failure to testify and there was no "close identification" of the appellants as the exact people who did not become witnesses. [Citation omitted.] *This statement by the prosecutor was merely a general opening statement to a recapitulation of the defense's case.'*
>
> "*Musgrove and Rogers v. State,* 638 So. 2d 1347, 1359 (Ala. Crim. App. 1992).
>
> "We agree."[28]

Additionally, in *Ex Parte Brooks,* the Supreme Court of Alabama held that the State did not violate the defendant's Fifth Amendment right to not testify after the prosecutor's closing argument statements asking the jury if they had heard a "reasonable hypothesis that's consistent with [the defendant's] innocence":[29]

> [I]n the context of the evidence and the closing arguments of both the defense and the State, the statements at issue were not a reference to the defendant's failure to testify, but rather were a reply to the insufficiency argument made by defense counsel that the evidence suggested a reasonable hypothesis

---

[28] *Id.*

[29] *Ex parte Brooks,* 695 So. 2d 184, 187 (Ala. Crim. App. 1997).

> of the defendant's innocence and that the State had failed to eliminate that hypothesis. Accordingly, we find no reversible error."[30]

During the State's closing argument, in rebuttal to Sykes's closing argument, the prosecutor stated that, "[t]here's only two people in the world that know what happened in that house. One of them is dead, and the other one is sitting right over there at the end of the table. (Indicating)."[31] Sykes did not object or ask for a curative instruction, so the trial court did not give one. However, the trial court did instruct the jury that the State was required to prove Sykes's guilt beyond a reasonable doubt.[32] The trial court instructed the jury that Sykes was presumed innocent and was "not required to prove his innocence."[33] Additionally, the jury was instructed that

> The Court charges the jury that the fact that the Defendant did not testify in this case cannot be considered in determining the Defendant's guilt or innocence.
>
> No inference or conclusion should be drawn by the jury form the fact that the Defendant was not sworn and put on the the witness stand as a witness in his own behalf, nor should this fact have any weight with the jury in reaching its verdict.[34]

---

[30] *Id.* at 189-90.

[31] R. 1619.

[32] R. 1654.

[33] *Id*.

[34] R. 1657.

This Court, relying on *Whitt v. State*[35] and *Ex parte Wilson,*[36] decided that the prosecutor's statement was a direct comment on Sykes's decision not to testify. This Court based its decision on the premise that the prosecutor's statement in the present case was similar to the statements made by the prosecutors in the *Whitt* and *Wilson* cases, which conflicts with the highly context-focused standard of review in this area.[37] The Court also erred in its determination that the comment at issue was a forbidden "direct" comment.

Instead of examining the circumstances of *other* cases to determine whether the comment in this case was a direct or indirect comment, the Court should have assessed the context of this case. In the present case, unlike *Whitt,*[38] there is a complete record, which includes the evidence admitted at trial along with transcripts of the direct and cross examinations and the closing arguments. There is ample evidence for this Court to have viewed the prosecutor's statement in context, not only of the closing arguments, but of the trial as a whole. Yet this Court reviewed the

---

[35] *Whitt v. State,* 370 So. 2d 736 (Ala. 1979).

[36] *Ex parte Wilson,* 571 So. 2d 1251 (Ala. 1990).

[37] *Sykes,* No. CR-22-0546, 2024 WL 1947829 at *9 ("The remark in the instant case ... closely parallels the remarks in *Whitt* and *Wilson.").*

[38] *Whitt* is not controlling. In *Whitt,* the State argued that the prosecutor's comment, "The only person alive today that knows what happened out there that night is sitting right there," was "argument in kind" in response to the defendant's closing argument. *Whitt,* 370 So. 2d at 738. The Alabama Supreme Court, only having the prosecutor's comment as part of the record and not the defendant's closing argument, could not give context to the prosecutor's statement, so the Court reversed. *Id.*

statement in a vacuum and failed to examine the prosecutor's statement in the context of the trial and closing arguments. Furthermore, as will be explained below, this Court failed to even mention the context of the prosecutor's statement in its opinion.

This Court went through an extensive examination of the overwhelming evidence presented in this case in its statement of facts.[39] This includes: the significant amount of the Keshia's blood left at Keshia's house;[40] the testimony of Ben Scott that he dropped Sykes off near Keshia's house shortly before she disappeared and when Scott spoke to Sykes on the phone later that morning he heard the sound of a child crying;[41] that Sykes dropped Keshia's daughter, Brooklyn, off at his sister's house and convinced her to lie for him;[42] that Sykes took Keshia's car to Mississippi and burned it;[43] that Keshia's blood was found in the bed of Sykes's pick-up truck;[44] that Sykes had Keshia's missing cell phone;[45] that Sykes confessed to Jacob Wiley that he "beat [Keshia] up and threw her in his truck" and that "he took her and dumped her. . .where [they] used to go fishing."[46] While justifying reversing the jury's verdict, this Court completely ignored the facts that it should have examined.

---

[39] *Sykes,* 2024 WL 1947829 at *1-*5.

[40] *Id.* at *1.

[41] *Id.* at *2.

[42] *Id.* at *3.

[43] *Id.*

[44] *Id.* at *2.

[45] *Id.* at *3.

[46] *Id.* at *5.

When reviewing a potentially improper statement made by the prosecutor, the State's argument "must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury."[47] Furthermore, the prosecutor's "comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement."[48] There is not one mention of the context of the prosecutor's statement in this Court's decision.

The Court's opinion in the present case failed to examine the prosecutor's statement in the context of the trial and the closing arguments. Indeed, the Court's opinion does not consider the statements of defense counsel at all. But during the trial, defense counsel suggested multiple times that law enforcement had no idea what happened inside the house of the victim—Keshia Sykes—the day Sykes murdered her. They argued that the State failed to meet its burden of proof because Keshia's body was never found. The defense questioned law enforcement about what happened inside Keshia's house: "But no idea of manner it happened or, in fact, you don't know that she's dead, do you?"[49] Additionally, during guilt-phase closing arguments, counsel stated:

- "Do you know why there's a charge for Kidnapping, one for Robbery and one for Burglary?

---

[47] *Minor v. State,* 914 So. 2d 372, 418 (Ala. Crim. App. 2004)(quoting *Roberts v. State,* 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997)).

[48] *Id.*

[49] R. 1459.

Because the State has no real theory of what this case is about."[50]

- "So what's the method of death? What did he do with the body? When did he move the body?"[51]
- "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."[52]
- "What was the impetus for her to leave? Think about the testimony of all the things. Think about the Burglary, the Robbery, the Kidnapping. You know, they are just saying it had to be one of those. It had to be one of those. Is there any evidence of that?"[53]
- "So we have no idea of a time of death. We think it's sometime allegedly between 8:00 and 8:58. Old Highway 18 right in Vernon just right off the road. 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 by 9:00 o'clock?"[54]
- "Are you so set in your mind based on the limited evidence the State has given you right this moment that you can say beyond a

---

[50] R. 1598.

[51] R. 1599.

[52] R. 1600-01.

[53] R. 1602.

[54] R. 1603-04.

reasonable doubt she's dead? No. Their own investigator can't say it. He can't say it. So without that, all the charges fail."[55]

- "Consider the fact they have no idea how anything happened; but yet, they are wanting you to find him guilty. Consider the facts that just like Andy Jones said: 'I can't say for a fact she's dead', and find him not guilty."[56]

The State responded in its final closing argument:

> 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 is 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."[57]

When viewing the prosecutor's statement in the context of the trial and the closing arguments, the prosecutor's statement was "not a reference to the defendant's failure to testify",[58] whether directly or indirectly. The prosecutor never mentioned anything about Sykes's decision not to testify. The prosecutor was merely replying "to the insufficiency argument made by defense counsel that the evidence suggested

---

[55] R. 1606.

[56] R. 1607.

[57] R. 1619.

[58] *Ex parte Brooks,* 695 So. 2d at 189.

a reasonable hypothesis of the defendant's innocence and that the State had failed to eliminate that hypothesis."[59] No reasonable observer would conclude otherwise.

Further confirming this conclusion, Sykes (represented by counsel) did not object to the statement at trial. Nor did the judge *sua sponte* intervene. Alabama courts have "'concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful.'"[60] Otherwise, the end result is what we have here: Sykes arguing that the comment obviously and substantially influenced the jury's verdict even though it was not perceived by any lawyer participating in the trial. That's implausible.

Moreover, this Court erred by finding that the trial court failed "to take prompt curative action?" [61] Because Sykes did not object, and the statement was not improper to begin with, there was no need for the trial court "to take prompt curative action."[62] Even if the statement was improper, it did not rise to the level of plain error; and even if Sykes had preserved this issue, it would have been harmless error. This Court failed to apply the case law to the present case and must reverse its decision.

---

[59] *Id.* at 190.

[60] *Ex parte McWilliams,* 640 So. 2d 1015, 1019 (Ala. 1993) (quoting *Johnson v. Wainwright,* 778 F.2d 623, 629 n. 6 (11th Cir. 1985)).

[61] *Sykes,* 2024 WL 1947829 at *9.

[62] *Id.*

II. This Court Erred When it Disregarded the Caselaw as it Pertains to the Harmless Error Rule.

This Court erred when it ignored Alabama case law involving the application of the harmless error rule to comments on the defendant's failure to testify.[63] In *Gavin v. State,* this Court explained how the harmless error rule applies to comments on the defendant's failure to testify:

> Moreover, even if the statement might have been construed as an improper comment on the appellant's failure to testify, any error would have been harmless in this case.
>
> The United States Supreme Court has . . . held . . . "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California,* 386 U.S. 18, 22 [Citation omitted] (1967). *Chapman* involved comments on the failure of the defendants to testify at trial. . . .
>
> In *United States v. Hasting,* 461 U.S. 499 [Citation omitted] (1983), the Court cited "the interest in the prompt administration of justice and the interests of the victims" in reversing the judgment of a lower federal

[63] *See Ex parte Brooks,* 695 So. 2d 184 (Ala. 1997); *Simmons v. State,* 797 So. 2d 1134 (Ala. Crim. App. 1999); *Hammonds v. State,* 777 So. 2d 750 (Ala. Crim. App. 1999); *Baxter v. State,* 723 So. 2d 810 (Ala. Crim. App. 1998); *Long v. State,* 668 So. 2d 56 (Ala. Crim. App. 1995).

appellate court for not applying the harmless error doctrine to a prosecutor's comment on a defendant's failure to proffer evidence to rebut testimony presented by the prosecution, when the defendant had elected not to testify. [Citation omitted]. In so holding, the Court observed that "[s]ince *Chapman,* the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations," (citations omitted), and stated that the proper question for a reviewing court to ask is: "[A]bsent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" [Citation omitted].

Our harmless error rule provides in pertinent part:

No judgment may be reversed or set aside . . . on the ground of misdirection of the jury unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it would appear that the error complained of has probably injuriously affected substantial rights of the parties." *Chapman,* 386 U.S. at 23 [Citations omitted].[64]

---

[64] *Gavin v. State,* 891 So. 2d 907, 984 (Ala. Crim. App. 2003) (citing *Chapman v. California,* 386 U.S. 18 (1967), *United States v. Hasting,* 461 U.S. 499 (1983)).

In the present case, as argued above, the prosecutor's comment was a response to the defense attorney's closing argument and not a comment, direct or indirect, on Sykes's failure to testify. However, even if the prosecutor's comment violated Sykes's constitutional rights, it was harmless beyond a reasonable doubt considering the overwhelming evidence of Sykes's guilt.

This Court went through an extensive examination of the overwhelming evidence presented in this case in its statement of facts.[65] This includes: the significant amount of the Keshia's blood left at Keshia's house;[66] the testimony of Ben Scott that he dropped Sykes off near Keshia's house shortly before she disappeared and when Scott spoke to Sykes on the phone later that morning he heard the sound of a child crying;[67] that Sykes dropped Keshia's daughter, Brooklyn, off at his sister's house and convinced her to lie for him;[68] that Sykes took Keshia's car to Mississippi and burned it;[69] that Keshia's blood was found in the bed of Sykes's pick-up truck;[70] that Sykes had Keshia's missing cell phone;[71] that Sykes confessed to Jacob Wiley that he "beat [Keshia] up and threw her in his truck" and that "he took her and dumped her. . .where [they] used to go fishing."[72] Not only did the jury obviously find Sykes guilty by a

---

[65] *Sykes,* 2024 WL 1947829 at *1-*5.

[66] *Id.* at *1.

[67] *Id.* at *2.

[68] *Id.* at *3.

[69] *Id.*

[70] *Id.* at *2.

[71] *Id.* at *3.

[72] *Id.* at *5.

unanimous vote, but they were also unanimous that Sykes's crimes warranted the death penalty.[73]

As the Supreme Court of the United States has instructed, "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."[74] This Court failed to even address the harmless error doctrine and therefore its decision must be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the State's application for rehearing, withdraw its opinion, and affirm Sykes's conviction and sentence.

Respectfully submitted,

Steve Marshall
Attorney General

s/ John C. Hensley
John C. Hensley
Assistant Attorney General
Counsel of Record

---

[73] R. 1734.

[74] *Gavin, 891 So. 2d* at 984 (citing *Hasting,* 461 U.S. at 510-11).

CERTIFICATE OF COMPLIANCE

I certify that this brief in support of application for rehearing complies with the word limitation set forth in Ala. R. App. P. 40(g) & (f). According to the word-count function of Microsoft Word, this brief contains 5,133 words from the beginning of the brief through the conclusion. I further certify that this brief complies with the font requirements of Ala. R. App. P. 32(a)(7). This brief was prepared in the Century Schoolbook font in 14-point type. *See* Ala. R. App. P. 32(d).

/s/ John C. Hensley
John C. Hensley
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on May 17, 2024, I electronically filed a copy of the foregoing brief with the clerk of the court. I also served a copy upon counsel for the appellant via the United States mail, first class postage prepaid and addressed as follows:

Angela Setzer
asetzer@eji.org

Sofia Veronica McDonald
smcdonald@eji.org

s/ John C. Hensley
John C. Hensley
Assistant Attorney General
Counsel of Record

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-1209 Fax: (334) 242-7300
E-mail: John.Hensley@alabamaag.gov