

No. 25-847

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

STATE OF ALABAMA,

Petitioner,

v.

BRANDON DEWAYNE SYKES,

Respondent.

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

BRIEF IN OPPOSITION

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February 17, 2026

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CAPITAL CASE

QUESTION PRESENTED (Rephrased)

At Brandon Sykes' 2022 capital murder trial, the prosecution's case was entirely circumstantial. There was no direct evidence that Mr. Sykes was responsible for his ex-wife's death. At the outset of trial, the prosecution expressly acknowledged the weaknesses in the evidence against Mr. Sykes. First, "[w]e've never recovered the body in this case . . . So yes, this is a case that . . . the State has never recovered the body of the victim." (R. 629.) "Second," the prosecutor told the jury, "no DNA from the Defendant at the scene. That's also true. The DNA in this case, the DNA shows you who the victim is. And there's also a problem. There's a problem with the DNA in this case . . . And we do not have DNA, and we do not have fingerprints that put the Defendant at the scene." (R. 629–30.)

In closing arguments, the prosecutor **pointed at Mr. Sykes**, who had not testified, and identified him to the jury as the only person who could have provided missing evidence of his guilt: **"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 trial court took no curative action.

Relying on Alabama law, the Alabama Court of Criminal Appeals “review[ed] the entire record” to assess the context of the prosecutor’s comment and gesture toward Mr. Sykes; determined that “the remark was a direct comment on Sykes’s decision not to testify”; and then considered not just the prejudicial impact of the comment, but whether it met the heightened prejudice standard required by Alabama’s plain error rule, before finding reversible error. Sykes v. State, No. CR-2022-0546, 2024 WL 1947829, at *5, 9 (Ala. Crim. App. May 3, 2024).

The rephrased questions presented are:

1. Where the lower court relied on the Alabama Constitution and longstanding Alabama case law to determine that, in the context of the evidence and arguments presented at Mr. Sykes’ capital trial, the prosecutor’s comment constituted an impermissible reference to the defendant’s failure to testify, and that it not only was prejudicial but “adversely affected the substantial right of the appellant,” is certiorari review

appropriate?

2. Should this Court grant certiorari in this case to determine whether Griffin v. California, 380 U.S. 609 (1965), should be reconsidered even though the lower court's determination was wholly guided by Alabama case law and its only cite to Griffin was contained in a block-quote from another Alabama case?

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OPINIONS BELOW

The Alabama Court of Criminal Appeals reversed Mr. Sykes' capital murder conviction on May 3, 2024. That decision is reported at Sykes v. State, No. CR-2022-0546, 2024 WL 1947829 (Ala. Crim. App. May 3, 2024). On September 12, 2025, the Alabama Supreme Court quashed certiorari. Ex parte Sykes, No. SC-2024-0395 (Ala. Sept. 12, 2025).

STATEMENT OF JURISDICTION

The State of Alabama filed a petition for writ of certiorari with this Court on January 12, 2026. This Court has jurisdiction to consider the State's petition pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

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

Article I, § 6 of the Alabama Constitution provides:

That in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.

STATEMENT OF THE CASE

At trial, the prosecution's theory was that Mr. Sykes broke into his ex-wife Keshia Sykes' house, trapped her, and killed her inside the home before dumping her body in an unknown location, stealing her car and her phone in the process. (R. 627.) The prosecution presented no direct evidence that tied Mr. Sykes to the scene of the alleged murder, or proved that he was responsible for Keshia's death. Beyond some DNA found on a mop handle that matched one in three Black males and one in four white males, there was no other DNA evidence to indicate the presence of another person in Keshia's home, let alone Mr. Sykes. (R. 1039.) The defense argued that the prosecution had not met its burden of proof. (R. 638, 1607.)

In his final appeal to the jury, the prosecutor acknowledged, "[t]he State doesn't know [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." (R. 1619.) In an effort to shift the blame for missing evidence of guilt, the prosecutor gestured towards Mr. Sykes and identified him as the only person who could have filled the gaps in the prosecution's theory against him, declaring: **"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 jury returned a guilty verdict for three counts of capital murder in the course of burglary, kidnapping, and robbery. (C. 242–44.) The next day, following the penalty phase, the jury returned a 12-0 death verdict. (C. 257.)

Mr. Sykes appealed his conviction and death sentence to the Alabama Court of Criminal Appeals. The lower court examined the entire trial record and considered the evidence the prosecution presented to establish that Keshia Sykes had been killed inside her home, and that Mr. Sykes had a motive and plan to kill her. Sykes v. State, No. CR-2022-0546, 2024 WL 1947829, at *1–5 (Ala. Crim. App. May 3, 2024). Conducting plain error review of the comment, the lower court reversed Mr. Sykes'

conviction and ordered a new trial, finding that constitutional error occurred because in the context of the entire record, the prosecutor's uncured comment led the jury to infer that Mr. Sykes' failure to take the stand should be used against him. Id. at *9 ("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.'" (emphasis in original)). After initially granting the State's petition for discretionary review, the Alabama Supreme Court quashed the writ. Ex parte Sykes, No. SC-2024-0395 (Ala. Sept. 12, 2025).

REASONS FOR DENYING THE WRIT

I. CONSISTENT WITH LONGSTANDING ALABAMA PRECEDENT, THE LOWER COURT EVALUATED THE CONTEXT AND HARM OF THE PROSECUTOR'S COMMENT.

Even before Griffin v. California, 380 U.S. 609 (1965), Alabama courts made clear that a defendant's right to silence cannot be commented upon by a prosecutor. See, e.g., Street v. State, 96 So. 2d 686, 687 (Ala. 1957) ("It is difficult to see how the solicitor's remarks could reasonably be interpreted other than as referring to the failure of defendant himself to take the stand and deny the confession . . . It seems

to us that this interpretation of the remarks is one naturally flowing from them under the circumstances.”); Arant v. State, 167 So. 540, 543 (Ala. 1936) (prosecutor’s comment is “invasive of defendant’s statutory right of immunity from comment for failure to testify” if “remark was so grossly improper and highly prejudicial as to have been ineradicable.”).

As the Alabama Supreme Court recognized, “this right finds its roots in [Article I, §] 6 of the Alabama Constitution,” Whitt v. State, 370 So. 2d 736, 738 (Ala. 1979),¹ and forms the basis of Section 12-21-220 of the Alabama Code, which provides:

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.

Ala. Code § 12-21-220.

In enforcing this right, Alabama courts have consistently conducted a contextual analysis to determine whether a challenged remark was actually a comment on the defendant’s right not to testify, or, as in many

¹ In Whitt, the Court separately recognized “the federal constitutional aspect of this right,” established in Griffin v. California, 380 U.S. 609 (1965). 370 So. 2d 736, 738 (Ala. 1979).

cases, a reply-in-kind or proper rebuttal. See, e.g., Ex parte Brooks, 695 So. 2d 184 (Ala. 1997) (“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.”). To ascertain whether a comment was improper, the court analyzes how directly the comment implicates the defendant in failing to provide missing evidence, whether there was a curative instruction, and whether any error was harmless. See, e.g., Whitt, 370 So. 2d at 739 (“We will consider the circumstances of each case on its own, considering the type of remark, whether reply in kind or not, whether promptly objected to, and the appropriateness of the trial judge’s instructions.”). Time and again, Alabama courts have affirmed convictions, determining that a prosecutor’s comment was not a reference to the defendant’s silence, proper in the context of the trial, or harmless because it did not contribute to the guilty verdict.²

² See, e.g., Ex parte Davis, 718 So. 2d 1166, 1174 (Ala. 1998) (affirmed where prosecutor argued, “Who was going to dispute that?”); Ex parte Clark, 728 So. 2d 1126, 1131 (Ala. 1998) (affirmed where prosecutor argued, “He didn’t tell the entire truth in his statement. There was no testimony, it was a statement we offered.”); Ex parte Brooks, 695 So. 2d 184, 189–90 (Ala. 1997) (affirmed where prosecutor argued, “[H]ave you

heard one word in this courtroom . . . that causes you to believe there's a reasonable hypothesis of innocence . . . ?"); Ex parte Payne, 683 So. 2d 458, 466 (Ala. 1996) (affirmed where prosecutor argued defendant "was available in court to testify."); Ex parte Land, 678 So. 2d 224, 233 (Ala. 1996) (affirmed where prosecutor argued defendant should "tell us the truth, tell us the truth."); Ex parte McWilliams, 640 So. 2d 1015, 1021 (Ala. 1993) (affirmed where prosecutor argued, "There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it."); Ex parte Musgrove, 638 So. 2d 1360, 1370 (Ala. 1993) (affirmed where prosecutor argued, "What did you hear from the Defendant?"); Ex parte Dobard, 435 So. 2d 1351, 1359–60 (Ala. 1983) (affirmed where prosecutor argued, "There is no evidence before you that could give you any reason why you could think that Jeanette Kennedy shot Officer Sudduth as opposed to Mr. Dobard. The evidence is very clear. As far as I can see, it is undisputed . . ."); Arant v. State, 167 So. 540, 543 (Ala. 1936) (affirmed where prosecutor argued, "nobody knows how they were shot but him, and whether he will ever state it or not, I don't know."); Woodward v. State, 123 So. 3d 989, 1028 (Ala. Crim. App. 2011) (affirmed where prosecutor argued, "We spent a lot of time talking about what connects the defendant to the crime. What evidence, before you, from witnesses, exhibits, common sense, disconnect the defendant from the crime? What?"); Mitchell v. State, 84 So. 3d 968, 980 (Ala. Crim. App. 2010) (affirmed where prosecutor argued, "No gun. We don't have a gun. Where is the gun? I don't know. He knows. He knows were [sic] the gun is."); Phillips v. State, 65 So. 3d 971, 1034 (Ala. Crim. App. 2010) (affirmed where prosecutor argued, "He told us the truth, very detailed statement, but he left out details and he left out certain things."); Killingsworth v. State, 82 So. 3d 716, 756 (Ala. Crim. App. 2009) (affirmed where prosecutor argued, "What did they do during that time? We don't know what they said because we haven't heard."), rev'd on other grounds, 82 So. 3d 761 (Ala. 2010); Belisle v. State, 11 So. 3d 256, 305 (Ala. Crim. App. 2007) (affirmed where prosecutor argued, "Mr. Belisle never admitted to you that he did anything or he never said that he did anything. Not at first. Bur [sic] later, he did. And told me he was

involved.”); Barber v. State, 952 So. 2d 393, 440 (Ala. Crim. App. 2005) (affirmed where prosecutor argued, “And it’s the last piece of evidence, I assume they would not[] want to talk about much, which is that confession. All they have to say was he’s intoxicated.”); Blackmon v. State, 7 So. 3d 397, 428 (Ala. Crim. App. 2005) (affirmed where prosecutor argued, “You never heard anything else about anybody else being in there.”); Lee v. State, 898 So. 2d 790, 823 (Ala. Crim. App. 2001) (affirmed where prosecutor argued, “I can’t get inside that kind of mind.”); Ray v. State, 809 So. 2d 875, 883 (Ala. Crim. App. 2001) (affirmed where prosecutor argued, “I’d like to think based on what I know in this case and what you have heard . . . and seeing both of these men . . . on the stand and knowing how brassy this man . . . right over here is.”); Baker v. State, 906 So. 2d 210, 273 (Ala. Crim. App. 2001) (affirmed where prosecutor argued, “Did you hear, in any manner or fashion, in any way, defense offered you any testimony about that?”), rev’d on other grounds, 906 So. 2d 277 (Ala. 2004); Broadnax v. State, 825 So. 2d 134, 189 (Ala. Crim. App. 2000) (affirmed where prosecutor argued, “There was no testimony of him saying, ‘I tried to call my brother.’”); Taylor v. State, 808 So. 2d 1148, 1187 (Ala. Crim. App. 2000) (affirmed where prosecutor argued, “The only way that we have any proof at all of money . . .”); Smith v. State, 797 So. 2d 503, 541 (Ala. Crim. App. 2000) (affirmed where prosecutor argued, “We’re not ever going to know what happened.”); Hammonds v. State, 777 So. 2d 750, 765 (Ala. Crim. App. 1999) (affirmed where prosecutor said, “Let [defendant] testify.”); Griffin v. State, 790 So. 2d 267, 285 (Ala. Crim. App. 1999) (affirmed where prosecutor argued, “And the real issue in this case, as I see the evidence presented, is he’s trying to say through his attorneys and through his witnesses that it was somebody else that did this murder, but it wasn’t him.”), rev’d on other grounds, 790 So. 2d 351 (Ala. 2000); Thomas v. State, 824 So. 2d 1, 26, 31 (Ala. Crim. App. 1999) (affirmed where prosecutor argued, “Now, [the victim] is obviously not alive to tell us what this Defendant did,” “[W]e will never know what goes on in the mind of someone like Billy Thomas,” and “[U]nderstand the Defendant doesn’t have to testify.”), rev’d on other grounds, 889 So. 2d 528 (Ala. 2004); McWhorter v. State, 781 So. 2d 257, 319 (Ala. Crim. App. 1999) (affirmed where prosecutor twice referred to

defendant's statements as "testimony"); Baxter v. State, 723 So. 2d 810, 818 (Ala. Crim. App. 1998) (affirmed where prosecutor accidentally argued he expected "Mr. Baxter" to testify); Burgess v. State, 723 So. 2d 742, 753 (Ala. Crim. App. 1997) (affirmed where prosecutor argued, "He didn't say that, but you can see, you can see what he [was] doing."); Roberts v. State, 735 So. 2d 1244, 1254 (Ala. Crim. App. 1997) (affirmed where prosecutor argued, "Now, I'm sure y'all are all asking yourself as I'm asking [myself]: 'Why did he do it?' I can't – we can't lift off the top of David Roberts's head . . . and pull out of his mind why he did what he did."); Ivery v. State, 686 So. 2d 495, 517 (Ala. Crim. App. 1996) (affirmed where prosecutor argued, "Because no one, not even a psychologist or a psychiatrist, can look into the mind of another human being."); Ponder v. State, 688 So. 2d 280, 287 (Ala. Crim. App. 1996) (affirmed where prosecutor argued, "[T]he only one that has testified as to the elements of their defense, as a practical matter, is Stevie, the only testimony that has come to you from the stand."); Bush v. State, 695 So. 2d 70, 134 (Ala. Crim. App. 1995) (affirmed where prosecutor argued, "This man told you in his own voice on that tape, and the State's evidence is uncontradicted."); Long v. State, 668 So. 2d 56, 64 (Ala. Crim. App. 1995) (affirmed where prosecutor argued, "I've brought you every piece of evidence that I could bring you as to what happened."); Slaton v. State, 680 So. 2d 879, 890 (Ala. Crim. App. 1995) (affirmed where prosecutor argued, "But what evidence is out there . . . that Nathan Slaton had one of those explosions?"); Cartwright v. State, 645 So. 2d 326, 328 (Ala. Crim. App. 1994) (affirmed where prosecutor argued, "And if he had panic attacks then he still has panics, but he has set through almost three days of a murder trial showing no evidence of physical stress."); Jackson v. State, 629 So. 2d 748, 754 (Ala. Crim. App. 1993) (affirmed where prosecutor argued, "Now, if he had wanted to testify, that would be fine, but he did not."); Money v. State, 612 So. 2d 1270, 1272 (Ala. Crim. App. 1992) (affirmed where record did not include alleged improper comment, and "the record does not provide the context in which the comment was made and therefore does not provide this court with the means to ascertain whether the comment was improper."); Williams v. State, 601 So. 2d 1062, 1074–75 (Ala. Crim. App. 1991) (affirmed where prosecutor argued, "You notice he didn't comment on this part at all.");

Alabama’s rigorous analytical framework is the reason more than 30 years passed in between the last reversal of an Alabama capital conviction

Owen v. State, 586 So. 2d 958, 960 (Ala. Crim. App. 1990) (affirmed where prosecutor argued, only “God and Donald Owen know” what went through defendant’s mind on night of murder), rev’d on other grounds, 586 So. 2d 963 (Ala. 1991); Kimble v. State, 545 So. 2d 228, 230 (Ala. Crim. App. 1989) (affirmed where prosecutor argued, “[T]here are 3 people that knew what occurred out there, one being Mr. Woodall, Number Two, Dennis, Number Three is the defendant, Mr. Kimble.”); Bates v. State, 549 So. 2d 601, 610 (Ala. Crim. App. 1989) (affirmed where prosecutor argued, “[H]as there been any evidence from the defense that this defendant didn’t do it?” and “But who is the only person in the courtroom . . . that had a motive to shoot Roger Cramer? The only person that had a motive is George Bates.”); Brinks v. State, 500 So. 2d 1311, 1315 (Ala. Crim. App. 1986) (affirmed where prosecutor argued, “William Brinks who wants to tell you that he wasn’t there . . .”); Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981) (affirmed where prosecutor argued, “[T]his defendant . . . sits, quietly, calmly, never says . . . nothing . . . And what is that supposed to show . . . that she can’t talk . . . that she is not normal, but during the break, she gets up and goes over here with her friends and her family and talks to them.”); Grady v. State, 391 So. 2d 1095, 1102 (Ala. Crim. App. 1980) (affirmed where prosecutor argued, “There are only two people that know and one of them is dead.”); Collins v. State, 385 So. 2d 993, 1002 (Ala. Crim. App. 1979) (affirmed where prosecutor argued, “Mr. Floyd Collins, the Defendant, has not explained his possession of these goods to which he is talking about.”), rev’d on other grounds, 385 So. 2d 1005 (Ala. 1980); Smith v. State, 342 So. 2d 466, 468 (Ala. Crim. App. 1977) (affirmed where prosecutor argued that State’s evidence went uncontradicted); Adair v. State, 288 So. 2d 187, 190 (Ala. Crim. App. 1973) (affirmed where prosecutor argued, “The defendant could have taken the stand and told you he didn’t seal [sic] this tractor.”); Williams v. State, 190 So. 2d 556, 559 (Ala. App. 1966) (affirmed where prosecutor argued, “No testimony was presented from the witness stand to contradict any testimony of the State.”).

due to a prosecutor’s improper comment on silence and the lower court’s May 2024 reversals in the two cases now before this Court: Brandon Sykes and Michael Powell. State v. Powell, No. 25-848. And in the cases that came before, the court evaluated the context and prejudicial impact of the comment before ordering a new trial. See Ex parte Wilson, 571 So. 2d 1251, 1264–65 (Ala. 1990) (“Our examination of the record indicates that the comment was not made in the context of a discussion of the taped statement . . . Given the context of the rebuttal, it is difficult to imagine a more specific comment on Wilson’s failure to testify”); Powell v. State, 631 So. 2d 289, 291 (Ala. Crim. App. 1993) (“In this case, the prosecutor’s comment adversely affected the appellant’s substantial right not to be compelled to give evidence against himself.”); Windsor v. State, 593 So. 2d 87, 92 (Ala. Crim. App. 1991) (court considered prosecutor’s “gesture towards the defendant” and “evidence presented” before finding reversible error).³ Mr. Sykes’ case is no exception.

³ In the rare instance where Alabama courts have reversed in a non-capital case, they have likewise evaluated the context and prejudicial impact of the prosecutor’s comment, based on an examination of the available record. Ex parte Brooks, 562 So. 2d 604, 607 (Ala. 1990) (“The cumulative effect of the prosecutor’s questions, coupled with his improper closing argument, was so prejudicial that a new trial is required,

Ignoring virtually the entire body of Alabama case law on the issue, the State now asks this Court to intervene, claiming that Alabama has adopted—and applied in Mr. Sykes’ case—a “magic words test” that mandates “automatic reversal” if a remark is labeled a “direct comment.” Pet. 21–22. But this contention cannot be squared with either the long-standing Alabama precedent on which the lower court relied, or the plain error analysis it actually conducted in this case. Unlike in United States v. Hasting, on which the State relies in its petition, where the Court of Appeals “declined” to apply the harmless error doctrine to a

particularly in light of the prosecutor’s continued questions to Brooks even after objections to these questions were sustained by the trial judge.”); Whitt v. State, 370 So. 2d 736, 738 (Ala. 1979) (“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.”); Ex parte Yarber, 375 So. 2d 1231, 1234 (Ala. 1979) (“Under the facts of this case reversal is required.”); Beecher v. State, 320 So. 2d 727, 735 (Ala. 1975) (“Under the specific facts of this case, we have no doubt that . . . reversal is required.”); Warren v. State, 288 So. 2d 826, 828 (Ala. 1973) (prosecutorial comments must be “interpreted in the light of the circumstances of what has transpired in the case, the nature of the evidence against the defendant, the burden of proof fixed by law, and any other circumstances which may have occurred during the trial” (quoting Broadway v. State, 60 So. 2d 701, 703 (Ala. 1952))); Rigsby v. State, 136 So. 3d 1097, 1101 (Ala. Crim. App. 2013) (“[T]his Court cannot say that the State’s improper comment was harmless beyond a reasonable doubt.” (citing Chapman v. California, 386 U.S. 18, 24 (1967))).

prosecutorial remark, here the lower court expressly applied Alabama's plain error standard of review, which imposes an even higher threshold for reversal than the harmless error standard, because defense counsel did not object to the prosecutor's comment at trial. 461 U.S. 499 (1983); see Ala. R. App. P. 45A. As the lower court explained in its opinion:

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. 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. 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. 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. Plain 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. Thus, under 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. The 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.

Sykes v. State, No. CR-2022-0546, 2024 WL 1947829, at *5 (Ala. Crim. App. May 3, 2024) 5 (quoting DeBlase v. State, 294 So. 3d 154, 182–83

(Ala. Crim. App. 2018) (citation modified)). Pursuant to this demanding standard of review, the Alabama Court of Criminal Appeals “review[ed] the entire record,” to determine if the prosecutor’s comment here was so “egregious” that failure to reverse would result in a “miscarriage of justice.” Sykes, 2024 WL 1947829, at *5. Following this review, the lower court rejected the State’s “assert[ion] that, when viewed in context, the challenged remark was merely a response to the argument of defense counsel,” and concluded that the prosecutor’s remark, along with his gesture towards Mr. Sykes, “constituted plain error.” Id. at *9, 10. Even Presiding Judge Windom, the sole dissenter, agreed with the majority that a review of the arguments in the case provided no support for the State’s “reply-in-kind” argument: “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.” Id. at 13, *n.5.

There are good reasons for why the prosecutor's comment in this case was so prejudicial. Contrary to the State’s assertion that there was “overwhelming proof that Sykes murdered his ex-wife,” Pet. 25, the record

revealed significant gaps in the prosecution's theory of guilt despite the circumstantial evidence presented. There was no eyewitness, DNA, fingerprint, or blood type evidence connecting Mr. Sykes to the home where the alleged crime took place (R. 629–30); Mr. Sykes was “extremely cooperative” with law enforcement on the day of Keshia Sykes’ disappearance (R. 855); law enforcement observed no injuries on Mr. Sykes that were consistent with a fatal attack (R. 881); police found “not a drop” of blood on his clothes or shoes (Id.); when Lt. Thompson performed a visual inspection of the interior of Mr. Sykes’ truck on February 19, 2015, the day Keshia went missing, he found “nothing” (R. 861); after Mr. Sykes was arrested, his truck underwent more thorough testing and investigators concluded there was “nothing of evidentiary value” inside (R. 1549); there was no physical evidence that connected Mr. Sykes to Keshia’s burned vehicle found in Lowndes County, Mississippi (R. 1536); law enforcement could not corroborate the testimony of the prosecution’s star witness Jacob Wiley, a jailhouse informant who testified that Mr. Sykes made an incriminating statement to him about where he put Keshia’s body (R. 1417–20).

Unlike other comment on silence cases where Alabama courts affirmed the appellant's conviction, there were real questions about Mr. Sykes' culpability that made the prosecutor's direct reference to him as the only eyewitness who could have provided missing evidence of guilt especially harmful. Cf. Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997) (“[T]he overwhelming evidence of guilt rendered that error harmless beyond a reasonable doubt.”); Ex parte Land, 678 So. 2d 244, 246 (Ala. 1996) (“Moreover, we find that the record contains overwhelming evidence indicating Land's guilt.”); Thomas v. State, 824 So. 2d 1, 31–32 (Ala. Crim. App. 1999) (“We are particularly persuaded by . . . the overwhelming nature of the evidence of Thomas's guilt.”), rev'd on other grounds, 889 So. 2d 528 (Ala. 2004); Baxter v. State, 723 So. 2d 810, 818 (Ala. Crim. App. 1998) (“Moreover, there was overwhelming evidence of the appellant's guilt.”); Adair v. State, 288 So. 2d 187, 190 (Ala. Crim. App. 1973) (“[T]he evidence of guilt is here very strong, and there is none tending toward acquittal.”). The State's argument that Alabama courts adopted a rule of “per se reversal” in Mr. Sykes' case is without merit.

II. ROBINSON SUPPORTS ALABAMA'S ANALYTICAL FRAMEWORK FOR EVALUATING CHALLENGED COMMENTS.

United States v. Robinson affirmed that “prosecutorial comment must be examined in context.” 485 U.S. 25, 33 (1988). Consistent with Robinson, Alabama, as it did in this case, and like many other states,⁴

⁴ E.g., Goldsbury v. State, 342 P.3d 834, 838 (Alaska 2015) (“We conclude that the State satisfied its burden to prove the constitutional error harmless . . . given the brief, isolated, and indirect nature of the comment . . . , and the instructions to the jury immediately before and after that comment.”); State v. A.M., 152 A.3d 49, 58 (Conn. 2016) (“Because the defendant here has established that the prosecutor violated his fifth amendment rights by directly referencing his failure to testify, we next must determine whether the state has proven beyond a reasonable doubt that the violation was harmless.”); People v. Brady, 236 P.3d 312, 329 (Cal. 2010) (“The prosecutor’s comments, rather than being a direct (or even indirect) reference to defendant’s silence, constituted reasonable comment on defendant’s failure to introduce material evidence or logical witnesses.”); Marston v. State, 136 So. 3d 563, 570 (Fla. 2014) (“The prosecutor directly commented on Marston’s silence and hammered the point home.” (citation modified)); Moore v. State, 669 N.E.2d 733, 740 (Ind. 1996) (“Remarks directly referring to a defendant’s silence are also more prejudicial than indirect references.”); Ellzey v. State, 412 So. 3d 358, 380 (Miss. 2024) (“[P]rosecutors are prohibited from making direct comments on the defendant’s failure to testify; they are also precluded from referring to the defendant’s failure to testify by innuendo and insinuation But in this case, the prosecutor was not commenting on [defendant’s] constitutionally protected decision not to testify.” (citation modified)); State v. Rice, 573 S.W.3d 53, 75 (Mo. 2019) (“A comment on a defendant’s decision not to testify can be either direct or indirect.”); Flowers v. State, 456 P.3d 1037, 1051 (Nev. 2020) (“The prosecutor’s comments . . . only indirectly insinuated that [defendant] had ‘something

distinguishes between direct comments, which directly implicate the defendant in failing to provide missing evidence, and indirect comments, where it is less clear to whom the prosecutor was referring, in order to evaluate the harm of a contested remark in the context of the trial. Ex parte Brooks, 695 So. 2d 184, 188–89 (Ala. 1997); Ex parte Wilson, 571 So. 2d 1251, 1261 (Ala. 1990). As even the State agrees, beyond emphasizing the importance of contextual analysis, “neither Robinson nor any case since Griffin offered a framework for deciding if the statement is a comment on a defendant’s silence, and if so, whether it is adverse.” Pet. 17 (citation omitted). This distinction between direct and indirect references is a tool to aid the state courts in assessing remarks in context, which is exactly what Robinson requires. Alabama courts unquestionably

to hide.”); State v. Sena, 470 P.3d 227, 235 (N.M. 2020) (“Prosecutor comments on a defendant’s right not to testify may be direct or indirect.”); State v. Randle, 916 N.W.2d 461, 467 (S.D. 2018) (“This Court has specified that a prosecutor is forbidden from making direct comments on the defendant’s failure to take the stand or indirect allusions designed to accomplish that end and which in fact could accomplish it.” (citation modified)); State v. Atherton, 144 A.3d 311, 322 (Vt. 2016) (“Nothing in the prosecutor’s comment here contains any direct or indirect comment on defendant’s silence”); Ridinger v. State, 478 P.3d 1160, 1169 (Wyo. 2021) (“Viewing it in context, the prosecutor’s comment . . . did not constitute a direct or indirect comment on [defendant’s] failure to testify.”).

evaluate remarks in the context of the specific facts of each case, as evinced by their long history of affirming convictions where there has been an alleged comment on the defendant’s failure to testify. Supra §I. There is no conflict between Robinson and Alabama’s analytical framework, and thus no basis for certiorari review in this case. See Sup. Ct. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

III. MR. SYKES’ CASE IS NOT AN APPROPRIATE VEHICLE FOR RECONSIDERING GRIFFIN V. CALIFORNIA.

Without much in the way of a “compelling reason[]” for this Court to intervene,⁵ given the lower court’s adherence to Robinson’s primary “principle”—that a “prosecutorial comment must be examined in context,” the State alternatively asks this Court to grant certiorari in order to reconsider Griffin altogether. Pet. 25 (“Overruling Griffin is the solution.”). But, as previously explained, the lower court’s judgment in this case was rooted in the Alabama Constitution—which commands that “[i]n

⁵ Sup. Ct. R. 10 (“A petition for a writ of certiorari will be granted only for compelling reasons.”).

all criminal prosecutions, the accused shall not be compelled to give evidence against himself”—and two “controll[ing]” Alabama Supreme Court cases: Whitt v. State and Ex parte Wilson. Id. at *6–7. Indeed, the court’s lone citation to Griffin comes in a block-quote pulled from another Alabama case. Id. at *6 (citing Ex parte Brooks, 695 So. 2d 184, 188–89 (Ala. 1997)). Given the Alabama Court of Criminal Appeals’ primary reliance on Alabama statute and precedent to arrive at its holding, Mr. Sykes’ case is not the proper vehicle for assessing whether Griffin should be reconsidered.⁶

⁶ Even where Alabama courts have invoked Griffin in assessing whether a challenged comment violated the defendant’s Fifth Amendment right to not testify, courts rarely find reversible error, and nearly always affirm the conviction. See, e.g., Ex parte Payne, 683 So. 2d 458, 466 (Ala. 1996); Ex parte Land, 678 So. 2d 224, 232 (Ala. 1996); Ex parte McWilliams, 640 So. 2d 1015, 1019 (Ala. 1993); Bush v. State, 695 So. 2d 70, 132 (Ala. Crim. App. 1995); Cartwright v. State, 645 So. 2d 326, 328 (Ala. Crim. App. 1994); Jackson v. State, 629 So. 2d 748, 752 (Ala. Crim. App. 1993); Williams v. State, 601 So. 2d 1062, 1074 (Ala. Crim. App. 1991); Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981); Grady v. State, 391 So. 2d 1095, 1100 (Ala. Crim. App. 1980); Adair v. State, 288 So. 2d 187, 189 (Ala. Crim. App. 1973); Williams v. State, 190 So. 2d 556, 559 (Ala. App. 1966).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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February 17, 2026

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