

No. 25-847

---

---

**In the Supreme Court of the United States**

---

STATE OF ALABAMA,

*Petitioner,*

v.

BRANDON DEWAYNE SYKES,

*Respondent.*

---

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

---

**REPLY BRIEF**

---

Steve Marshall

*Alabama Attorney General*

A. Barrett Bowdre

*Solicitor General*

*Counsel of Record*

Robert M. Overing

*Principal Deputy Solicitor General*

Brenton M. Smith

*Deputy Attorney General*

Cameron G. Ball

*Assistant Attorney General*

STATE OF ALABAMA

OFFICE OF THE ATTORNEY GENERAL

501 Washington Ave.

Montgomery, AL 36130

(334) 242-7300

MARCH 4, 2026

Barrett.Bowdre@AlabamaAG.gov

*Counsel for State of Alabama*

---

---

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
REPLY BRIEF.....	1
I. Consistent With Longstanding Alabama Precedent, The Lower Court Misapplied Established <i>Federal</i> Law.....	2
II. Sykes No Longer Disputes What Tests Apply, Only Whether The Decision Below Applied Them. ....	4
A. The error inquiry below did not consider the challenged comment in context. ....	6
B. The decision below applied an automatic reversal rule instead of conducting a prejudice inquiry. ....	9
III. Sykes Does Not Defend <i>Griffin</i> .....	11
CONCLUSION .....	12

## TABLE OF AUTHORITIES

### Cases

<i>California v. Prysock</i> , 453 U.S. 355 (1981).....	8
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	2, 9
<i>Ex parte Brooks</i> , 695 So. 2d 184 (Ala. 1997) .....	3, 8
<i>Ex parte Wilson</i> , 571 So. 2d 1251 (Ala. 1990) .....	3
<i>Florida v. Powell</i> , 559 U.S. 50 (2010).....	2, 3
<i>Griffin v. California</i> , 380 U.S. 609 (1965).....	1, 2, 3, 5, 6, 9, 11, 12
<i>O'Connor v. Ohio</i> , 385 U.S. 92 (1966).....	2
<i>Padgett v. State</i> , 223 So. 2d 597 (Ala. Ct. App. 1969).....	1, 2, 12
<i>Pennsylvania v. Labron</i> , 518 U.S. 938 (1996).....	2
<i>Pitts v. Mississippi</i> , 146 S. Ct. 413 (2025).....	11
<i>Three Aff. Tribes of Ft. Berthold Rsrv. v. Wold Eng'g, P.C.</i> , 467 U.S. 138 (1984).....	3
<i>United States v. Hasting</i> , 461 U.S. 499 (1983).....	9

*United States v. Robinson*,  
485 U.S. 25 (1988).....4, 6, 9

*Whitt v. State*,  
370 So. 2d 736 (Ala. 1979) .....2, 3

## REPLY BRIEF

Respondent Brandon Sykes no longer disputes the legal standards that apply—only whether this is the case in which to apply them. Helpfully, he now agrees that courts considering prosecutorial comments alleged to infringe a defendant’s right against self-incrimination must analyze them in context first for error (i.e., whether a violation occurred) and then for prejudice (i.e., whether the error requires reversal). Br.12, 17-18; *accord* Pet.12-25. And Sykes neither defends the untethered reasoning of *Griffin v. California*, 380 U.S. 609 (1965), nor denies it lacks any workable standard, Br.19-20. *Accord* Pet.26-32.

All he disputes is whether the decision below presents these issues. But the opinion speaks for itself: “[T]his 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.” App.23a. This rigid categorize-and-reverse framework cannot be squared with this Court’s clear precedent. And though Sykes downplays the problem as one of Alabama law, the Alabama courts have long acknowledged that *Griffin* has “taken over” whatever independent Alabama-law bases once existed. *Padgett v. State*, 223 So. 2d 597, 603 (Ala. Ct. App. 1969). Today, this right exists in Alabama courts as one conjoined body of federal and state law.

This Court’s intervention is necessary to cure the persistent misapplication of federal law by the Alabama courts. The State of Alabama thus respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

**I. Consistent With Longstanding Alabama Precedent, The Lower Court Misapplied Established *Federal* Law.**

Sykes suggests throughout his brief that the decision below rests on independent Alabama-law grounds impeding this Court’s review. *See, e.g.*, Br.ii. But for nearly half a century, Alabama courts have recognized that the federal and state aspects of this right are—at the very least—intertwined. *See Padgett*, 223 So. 2d at 603 (“*Griffin v. California*, supra, has taken over” Alabama law. (citing *Chapman v. California*, 386 U.S. 18 (1967), and *O’Connor v. Ohio*, 385 U.S. 92 (1966))). Alabama courts apply an interwoven analysis that does not differentiate between the “federal constitutional aspect” and state-law aspect of the right. *See Whitt v. State*, 370 So. 2d 736, 738-39 (Ala. 1979); Pet.4-5. Indeed, both the decision below and Sykes’s own briefing treated the right as a single, unified doctrine. *See* App.15a-17a; Sykes ACCA Br.14-20 (Ala. Crim. App., No. CR-22-0546, Mar. 24, 2023). Where one aspect begins and the other one ends, no one can say.

Sykes thus cannot overcome—and so ignores—this Court’s presumption that decisions involving such interwoven issues rely on the state court’s “belie[f] that federal law required” the outcome. *Florida v. Powell*, 559 U.S. 50, 56-57 (2010). That the state court “discuss[es] several of [the state’s] own decisions” makes no difference, particularly where “some of those cases relied on an analysis of [this Court’s] cases on the” issue. *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996). This presumption can be overcome only by a “clear[] and express[]” statement that the state court’s

decision is “alternatively based on bona fide separate, adequate, and independent grounds.” *Florida*, 559 U.S. at 57. Absent such, this Court should correct federal-law errors, vacate, and remand so the state court “may reconsider the state-law question free of misapprehensions about the scope of federal law.” *Three Aff. Tribes of Ft. Berthold Rsrv. v. Wold Eng’g, P.C.*, 467 U.S. 138, 152 (1984). This approach prevents lingering federal errors embedded in state jurisprudence from evading this Court’s review.

Here, federal law has long subsumed any independent state-law right. Although state law may provide greater protections separate from federal law, the Alabama courts have not taken that approach here. The decision below confirms as much. Purporting to be “[c]onsistent with [the federal courts’] 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.” App.16a (quoting *Ex parte Brooks*, 695 So. 2d 184, 188-89 (Ala. 1997)). The lower court further concluded that the outcome was “controlled” by *Whitt* and *Ex parte Wilson*, App.17a, which each invoked *Griffin* to conduct interwoven analyses, see 370 So. 2d at 738-39; 571 So. 2d 1251, 1261 (Ala. 1990).

Far from professing that an independent state-law ground controlled, the decision below instead (mis)incorporates federal law—directly and indirectly—into its holding. This doctrinal cross-contamination presents no obstacle to this Court’s review. The petition thus asks the Court to reverse the Alabama courts’

persistent misapplication of well-established *federal*—not state—law.

## **II. Sykes No Longer Disputes What Tests Apply, Only Whether The Decision Below Applied Them.**

Sykes now agrees with the State on the two key legal principles at issue. First, that this Court’s precedent requires prosecutorial comments to be assessed *in context* to determine whether they improperly refer to the defendant’s silence—not merely by labeling the comment “direct” or comparing it to those previously found erroneous. *See* Br.17-18 (quoting *United States v. Robinson*, 485 U.S. 25, 33 (1988)). And second, that courts must assess erroneous comments for prejudicial impact rather than automatically reversing. *See* Br.11-12.

Unfortunately, the court below did not apply these principles. Although Sykes denies it, the decision speaks for itself: “[T]his 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.” App.23a. That holding should come as no surprise to Sykes because he argued for exactly that: “Because [the comment] constitutes a direct comment on Mr. Sykes’s decision not to testify at trial, reversal is now required.” Sykes ACCA Br.16.

Sykes’s about-face highlights the lower court’s departure from this Court’s clear precedent. And while deeply flawed on its own terms, the decision below is no outlier. A long line of Alabama decisions have perpetuated these mistakes on and off for decades. That

may have been understandable in the immediate wake of *Griffin* (particularly given that decision's unstable basis and murky contours, *see* Pet.26-32, *infra* §III), but—as explained below—this Court has since dammed several of its most problematic offshoots. And while some Alabama cases (including the decision below) may acknowledge at least part of the correct inquiry, others do not even make it that far. In either event, they fail to apply this Court's precedent.

Sykes ignores clear quotations—including from the decision below—that demonstrate application of the wrong rule. Instead, his tedious string citations showcase Alabama decisions that may have reached the right *result*, without wading beyond shallow parentheticals to examine their reasoning. *See infra* p. 8-9. Regardless, those decisions cannot cure the obvious errors in the decision below. This Court's intervention is needed to cut through these entrenched inconsistencies with its precedent.

Sykes's brief also compounds these mistakes by conflating the separate inquiries for error and prejudice. But whether a comment “was not a reference to the defendant's silence” or otherwise “proper in the context of the trial” (i.e., not erroneous) requires distinct analysis from whether the comment “did not contribute to the guilty verdict” (i.e., not prejudicial). *Contra* Br.6. To reverse, a court must first decide that a prosecutor's comment in context is error and then separately decide that the prejudice from that error requires reversal by applying harmless- or plain-error review. *See Robinson*, 485 U.S. at 29-30. The decision below failed to undertake either inquiry.

**A. The error inquiry below did not consider the challenged comment in context.**

Sykes offers only a cursory defense as to how the decision below handled context in its error inquiry. Although he discusses general Alabama precedent on error, his defense of the decision below focuses on prejudice—i.e., whether the comment rose to the level of *plain* error. Br.12-16. Read generously, his position seems to be that the decision below labeled the remark a direct comment only *after* reviewing its context and that direct comments remain “impermissible” even *after Robinson*. See Br.ii, 17-19.

1. But this Court in *Robinson* rejected the notion that direct comments are erroneous per se. There, the Court put to rest the principle that “any ‘direct’ reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed by *Griffin*.” 485 U.S. at 31-32. Instead, “a reference”—direct or otherwise—“to the defendant’s failure to take the witness stand may, in context, be perfectly proper.” *Id.* at 33 n.5. What matters are not rigid labels, but whether context shows that the prosecutor invoked the defendant’s silence as “substantive evidence of guilt.” *Id.* at 34.

*Robinson* cannot be squared with continued reliance on a direct-or-indirect labeling system. Sykes argues (Br.18) that “the distinction between direct and indirect references is a tool to aid the state courts in assessing remarks in context” but does not explain how the distinction works—perhaps because, as explained in the petition, a context-based test for error is irreconcilable with rote categorization of comments as direct or indirect, Pet.15-21.

The continued use of these labels reflects no more than stubborn vestiges of pre-*Robinson* jurisprudence. Because context now governs the error analysis, labeling a comment as direct no longer carries any legal significance—certainly not that a comment is “impermissible.” By placing weight on this obsolete label, the decision below defies *Robinson*.

2. The decision below also did not analyze the context of the challenged remark. To the contrary, it rejected as “unavailing” even the idea that it should. App.23a. Far more probative, in its view, was that the comment “closely parallel[ed] the remarks in *Whitt* and *Wilson*.” App.23a. But magic words have no place in the controlling context-based test.

Perhaps most damning, the decision below does not even cite—let alone consider—the remarks of defense counsel to which the comment responded. App.23a. Those quotations instead appear only in the dissent, which conducted a contextual analysis and concluded that “the main opinion focuses too much on the remark itself and ignored the context in which that remark was made.” App.37a.<sup>1</sup> The court below was thus aware that those comments were relevant to the context-based analysis urged by both the State and the dissent. Its failure to cite or discuss them *at all* shows that the court did not think the context mattered.

---

<sup>1</sup> Sykes argues that the dissent rejected the State’s context-based arguments because it found the “reply-in-kind” doctrine inapplicable, Br.14, ignoring that separate legal doctrine’s narrower focus and the dissent’s broader contextual analysis, *see* App.33a-40a.

The court instead offered only a single, superficial thread of reasoning: these words look like those words. App.23a. By the court's logic, all that mattered was that the prosecutor uttered some forbidden incantation. No thought was given to context; no consideration to the fact that the court was examining the words removed from the heat of debate before a jury. To the court, none of that context matters if the prosecutor spoke some set of talismanic sounds. *Cf. California v. Prysock*, 453 U.S. 355, 360 (1981) (clarifying *Miranda* warnings are judged by substance, not "talismanic incantation[s]"). That method might be sufficient for card games or ancient curses, but this Court requires more.

Unable to defend the approach below, Sykes instead focuses on Alabama precedent more generally. Relying on cherry-picked authority, he asserts that "Alabama courts have consistently conducted a contextual analysis" in evaluating a prosecutorial comment. Br.5-6 (citing *Ex parte Brooks*, 695 So. 2d 184 (Ala. 1997)). But while some Alabama cases recite a contextual test, most treat the "direct" label as dispositive of both the error and prejudice inquiries. *See* Pet.18-19 (collecting cases). And, indeed, Sykes argued as much below. *See* Sykes ACCA Reply Br.5 (Ala. Crim. App., No. CR-22-0546, Aug. 3, 2023) ("As detailed in Mr. Sykes's opening brief, this comment was a direct comment on Mr. Sykes's decision not to testify at trial, requiring reversal under well-established precedent from the United States Supreme Court and Alabama courts."). Because these statements cannot be reconciled with this Court's precedent, the Court should grant certiorari or, at

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

**B. The decision below applied an automatic reversal rule instead of conducting a prejudice inquiry.**

Separate from its mechanical test for *Griffin* error, the decision below also defied this Court's precedent by holding that any uncured "direct comment" mandates reversal. Sykes does not defend this automatic-reversal rule; he instead denies the decision below applied it. Br.12. But, again, the decision speaks for itself: "[B]ecause the circuit court failed to take prompt curative action, this Court *must reverse* Sykes's convictions and sentence of death." App.23a (emphasis added); *see also* App.16a ("[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."); App.23a ("In a case where there has been a direct reference to a defendant's failure to testify and the trial court has not acted promptly to cure that comment, the conviction must be reversed.>").

This automatic reversal rule repeats mistakes this Court corrected decades ago. In *United States v. Hastings*, the Court reiterated that it had "affirmatively rejected a *per se* rule" of reversal for *Griffin* violations. 461 U.S. 499, 508 (1983). Rather, for all such non-structural errors the reviewing court must consider the error's contributions to the verdict under the appropriate prejudice inquiry. *See Chapman*, 386 U.S. 18 at 24 (harmless-error review); *Robinson*, 485 U.S. at 29-30 (plain-error review).

To be sure, the decision below *recited* the correct prejudice standard, App.12a-14a—but that does not excuse its refusal to apply it. Because Sykes did not object to the comment at trial, even he now acknowledges that he should have faced the daunting test of plain-error review. Br.13. The decision below parroted that test in boilerplate fashion in its standard of review, including the requirement that the defendant “must establish that the error adversely affected the outcome of the trial.” App.12a-14a. But far from “expressly appl[ying]” this standard, *contra* Br.13, its schizophrenic analysis then ignores it.

The court below apparently concluded that because all direct comments require reversal, then all such comments are *per se* plain error. *See* App.25a (“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.”). That conclusion repeats the errors corrected in *Hasting* and *Chapman*.

Last, Sykes overstates the prejudicial impact of the comment (which the court below did not address in any event). For starters, his selective use of qualifiers (*see* Br.15) to avoid discussing probative evidence does not lessen that evidence’s weight. Nor does ignoring such evidence outright. Sykes omits that his ex-wife Keisha’s blood was found in his truck. App.5a. He omits that his own family and friends testified against him—dropping him off just past the house just before the murder, seeing him with his daughter (who was with Keisha) just after, receiving messages from Keisha’s phone and asked to “play along,” seeing him with

her car later that day, and taking him to the scene where that car was burned in Mississippi. App.5a-8a. He omits the cellphone data corroborating that testimony (and undermining his story). App.5a-7a, 11a. And he omits his own incriminating statements, including first that the cartel did it and later that he could provide “closure” in exchange for a good plea deal. App.9a-11a.

The record leaves no “real questions” about Sykes’s guilt. *Contra* Br.16. And the only miscarriage of justice here would be forcing Keshia’s family through a burdensome, traumatic retrial. The decision below will also invite similar sandbagging by future defendants—wasting judicial resources and delaying justice for victims.

The clear defiance by the decision below paired with these weighty consequences warrant this Court’s intervention. The Court should grant certiorari or, at minimum, vacate and remand for the Alabama courts to apply the proper standard of review. *Cf. Pitts v. Mississippi*, 146 S. Ct. 413, 417 (2025) (remanding to give the State opportunity to argue harmless-error despite identifying constitutional violation).

### **III. Sykes Does Not Defend *Griffin*.**

Sykes offers no response to the petition’s explanation that *Griffin* should be overruled because it lacks legal support, a historical basis, or a workable standard. *Compare* Br.19-20, *with* Pet.26-32. He instead repeats the vehicle arguments rebutted above. *See supra* §I. But while he attempts to downplay the lower court’s reliance on *Griffin*—noting it appeared in a block quote—he cannot deny that *Griffin* contributed to the decision (both directly and as the root of the

present Alabama doctrine itself). Br.20. And his resort to the lower court’s “primary reliance on Alabama statute and precedent,” Br.20, is immaterial when *Griffin* “has taken over” that statute and precedent, *Padgett*, 223 So. 2d at 603. This case thus presents an ideal vehicle to correct *Griffin*’s mistakes.

And *Griffin* is indeed rife with mistakes. Its discovery of an expansive right to be free from prosecutorial comment finds no support in the Constitution’s text or its history. Pet.26-28. Given *Griffin*’s unmoored reasoning, it should come as no surprise that the jurisprudence coasting in its wake—including the decision below—has likewise drifted astray. Pet.28-32. Sykes does not even try to rebut these points. Br.19-20. Rather, he *agrees* that no “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.” Br.18 (quoting Pet.17).

This Court should now correct course. After sixty years, no workable framework for *Griffin* has emerged and that appears unlikely to change. If the Court does not summarily reverse or grant the first question, it should grant the petition and overrule *Griffin*.

## CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted,

Steve Marshall  
*Attorney General*

A. Barrett Bowdre  
*Solicitor General*  
*Counsel of Record*

Robert M. Overing  
*Principal Deputy Solicitor General*

Brenton M. Smith  
*Deputy Attorney General*

Cameron G. Ball  
*Assistant Attorney General*

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL  
501 Washington Avenue  
P.O. Box 300152  
Montgomery, AL 36130-0152  
(334) 242-7300  
Barrett.Bowdre@AlabamaAG.gov  
*Counsel for State of Alabama*

MARCH 4, 2026