No. 25-848

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

STATE OF ALABAMA,

Petitioner,

v.

MICHAEL ANTHONY POWELL,

Respondent.

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

BRIEF IN OPPOSITION

ANGELA L. SETZER
COUNSEL OF RECORD
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
Phone: (334) 269-1803
Fax: (334) 269-1806
Email: asetzer@eji.org

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Counsel for Respondent

QUESTION PRESENTED (Rephrased)

At Michael Powell's capital murder-robbery trial, the State lacked direct evidence tying Mr. Powell to the victim's death: there was no eyewitness or video recording of what occurred at the scene, (R. 1330), none of the dozens of DNA samples, fingerprints, and shoeprints collected from the scene matched Mr. Powell, none of the items of clothing from Mr. Powell's apartment had DNA evidence from the scene of the crime, and the State never recovered the murder weapon. (R. 1482, 1547, 1558-61, 2083-84, 2107, 2387.) Mr. Powell did not testify in his defense.

In rebuttal closing argument, the prosecutor argued that **"*[y]ou know there is only one person in this room who knows where the gun is. One person, he is sitting over there. That guy knows where the gun is.*"** Id. (citing R. 2393-94.) The trial court overruled defense counsel's objection and the prosecutor then repeated: **"*There is one man in this courtroom who knows where that gun is, one man and he is sitting right over there next to that jury box.*"** Id. Defense counsel renewed their objection, which was again overruled. Id.

On appeal, the Alabama Court of Criminal Appeals identified controlling Alabama precedent and "set out the evidence presented at Powell's trial and detail[ed] the closing arguments made by counsel during the guilt phase of Powell's trial" in order to "provide context to" the claim. Powell, 2024 WL 1947990 at *1; see also id. at *30 (McCool, J., dissenting) ("Although the main opinion ultimately reaches the wrong conclusion, it does set forth the context surrounding the prosecutor's statements. . . ."). Concluding that the prosecutor's comment constituted an impermissible reference to Mr. Powell's "failure to explain where the gun is," the lower court found reversible error. Powell, 2024 WL 1947990 at *9.

The rephrased questions presented are:

1. Where the Alabama Court of Criminal Appeals relied on the Alabama Constitution and longstanding Alabama case law to determine that, in the fact-specific context of the evidence and arguments presented at Mr. Powell's capital trial, the prosecutor's repeated comments over defense objections that "only one person" knows where the gun is constituted an

impermissible reference to the defendant's failure to testify requiring reversal, is certiorari review appropriate?

2. Should this Court grant certiorari in this case to reconsider Griffin v. California, 380 U.S. 609 (1965), even though the lower court's decision was wholly guided by Alabama precedent and its lone cite to Griffin was contained in a block-quote from another Alabama case?

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The Alabama Court of Criminal Appeals reversed Mr. Powell's capital murder conviction and death sentence on May 3, 2024. That decision is reported at Powell v. State, No. CR-2020-0727, 2024 WL 1947990 (Ala. Crim. App. May 3, 2024). The Alabama Supreme Court denied certiorari on September 12, 2025. Ex parte Powell, No. SC-2024-0529 (Ala. Sept. 12, 2025).

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 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.

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.

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

This is a capital case in which the death penalty has been imposed. Michael Powell was convicted of one count of capital murder-robbery, pursuant to Alabama Code Section 13A-5-40(a)(2), in connection with the death of Tracy Algar in Shelby County, Alabama on October 30, 2016. Powell, 2024 WL 1947990 at *1.

At trial, the State's case was primarily circumstantial. None of the multiple DNA swabs, fingerprints, or shoeprints recovered at the scene of the crime matched Mr. Powell (R. 1547, 1558-59); nor did the clothes recovered from Mr. Powell's apartment contain Ms. Algar's DNA (R. 1559-61). Police never found a murder weapon and were not able to perform any ballistics examination on the shell casing found at the scene. (R. 2107).

Without any eyewitnesses or forensic evidence tying Mr. Powell to the scene, the State relied primarily on "[s]urveillance video from businesses around the gas station,"[1] clothes found at Mr. Powell's apartment and a "box of Winchester .380 ammunition" found at "a home belonging to one of Powell's girlfriends," a confession letter that David Jackson – who was in the Shelby County Jail with Mr. Powell – claimed that Mr. Powell "convinced" him to write,[2] and testimony from Shelby County jailhouse snitch, Kelvin Hines, who stated that Mr. Powell "told

[1] In its opinion, the lower court found that videos from two of those locations – Faith Consignment and The View Apartments – had been improperly admitted at Mr. Powell's trial. See Powell, 2024 WL 1947990 at *21 ("Powell is correct in asserting that there was no testimony to establish that the recording device used at Faith Consignment was 'capable of recording what a witness would have seen' had the witness been present at the time"); Powell, 2024 WL 1947990 at *24 ("we agree with Powell that the State failed to satisfy the third and fourth Voudrie requirements as to the surveillance videos [Exh. 61] from the View"; "As to State's Exhibit 60, Powell argues that the circuit court improperly admitted the video under the pictorial-communication theory. We agree with Powell.").

[2] David Jackson died prior to trial. (C. 166-67). Over defense objection, the State was permitted to introduce Mr. Jackson's pretrial deposition, taken just eight days after Mr. Powell's lawyers were appointed to the case and before the State had turned over complete discovery, as substantive evidence against Mr. Powell at his capital trial. (C. 377-78.)

him details about Algar's murder."[3] Powell, 2024 WL 1947990 at *2-4. In his defense, Mr. Powell "presented testimony from Tina Brown," who testified that the "person-of-interest photos" distributed by law enforcement "looked like the man she sees walking around her neighborhood." Id. at *4.

During closing arguments, defense counsel "addressed the weaknesses in the State's evidence, and questioned the usefulness of the State's surveillance videos," highlighting the "lack of evidence linking Powell to the murders": "There is doubt all over the place, DNA, ballistics, no gun." Id. at *5 (citing R. 2386-87.) In rebuttal, the prosecutor began by arguing that "*[y]ou know there is only one person in this room who knows where the gun is. One person, he is sitting over there. That guy knows where the gun is.*" Id. (citing R. 2393-94.) Defense counsel objected and argued that this was an improper comment on silence as it was clearly directed at Mr. Powell. Id. (citing R. 2394-96.) The trial court overruled the objection and the prosecutor then repeated: "*There is one man in this courtroom who knows where that gun is, one man and he is sitting right*

[3] At trial, the prosecutor admitted that this snitch testimony and the surveillance videos were their only "direct evidence," in the case. (R. 2235.)

over there next to that jury box." Id. Defense counsel renewed their objection, which was again overruled. Id. After highlighting an alleged letter in which State witness David Jackson said he told Mr. Powell where the gun was, id., the prosecutor again argued that only "Michael Powell knows where the gun is." (R. 2406.)

On appeal from his capital conviction and death sentence, Mr. Powell raised several claims, including a challenge to the prosecutor "repeatedly and erroneously comment[ing] on [his] silence." Powell, 2024 WL 1947990, at *6. In its opinion addressing and ultimately finding reversible error on this claim, the Alabama Court of Criminal Appeals first "set out the evidence presented at Powell's trial and detail[ed] the closing arguments made by counsel during the guilt phase of Powell's trial" in order to "provide context to" the claim. Powell, 2024 WL 1947990 at *1; see also id. at *30 (McCool, J., dissenting) ("Although the main opinion ultimately reaches the wrong conclusion, it does set forth the context surrounding the prosecutor's statements. . . ."). Relying on Alabama precedent, the lower court laid out the "framework to be used to determine whether the State has impermissibly commented on a

defendant's right not to testify," noting specifically that such comments must be "viewed in the context of the evidence presented in the case and the entire . . . arguments made to the jury," id. at *7 (citation omitted), before finding that the prosecutor's twice-objected to comments were "clearly a direct comment on Powell's failure to testify at trial." Id. at *9. Addressing the State's argument on appeal that the prosecutor's comment was "not commentary on his failure to testify, but rather, was a refutation of defense counsel's argument that the State had the wrong person," the lower court noted that the prosecutor at trial had "responded differently," but under "either theory," the comment was "impermissible," as "Powell is the only person who could have testified as to the whereabouts of the gun." Id. at *9. While recognizing that in some cases, a prosecutor may be permitted to comment on "the fact that the State's evidence is uncontradicted," the court found that based on the specific facts in this case "the prosecutor crossed that line," and based on this evaluation, reversal was required. Id. The Alabama Supreme Court denied the State's petition for writ of certiorari. Ex parte Powell, No. SC-2024-0529 (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),[4] 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 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 reviewing 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

[4] 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).

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.[5]

[5] 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."); 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

Alabama's rigorous analytical framework is the reason more than 30 years passed in between the last reversal of an Alabama capital conviction 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: Michael Powell and Brandon Sykes. State v. Sykes, No. 25-847. And in each of the cases that came before, the reviewing 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

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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.").

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).[6] Mr. Powell's case is no exception.

[6] 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, 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))).

II. ALABAMA'S ANALYTICAL FRAMEWORK, AS APPLIED IN THIS CASE, IS CONSISTENT WITH UNITED STATES V. ROBINSON.

While conceding that "neither [United States v.]Robinson nor any other case since Griffin offer[s] a full 'framework for deciding if a statement is a comment on a defendant's silence' and if so, 'whether it is adverse,'" Pet. 17 (citation omitted), the State nevertheless contends that certiorari is appropriate because "[t]he rule that any 'direct comment' on silence violates Griffin is the same error this Court reversed in [United States v.]Robinson," Pet. 13. But this contension is belied by this Court's analysis in Robinson and the court's analysis below.

In Robinson, this Court affirmed the "principle that prosecutorial comment must be examined in context . . . ." 485 U.S. 25, 33 (1988). In that federal case, Mr. Robinson argued at trial that the government had unfairly denied him the "opportunity to explain his side of the story," a claim which both the prosecutor and the trial court understood to reference his ability to testify at trial. 485 U.S. at 31. Without any objection from defense counsel, the prosecutor commented that the defendant "could have taken the stand and explained it to you" followed

by a cautionary instruction from the trial court. 485 U.S. at 28-29. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that "because the prosecution's reference to respondent's failure to testify had been 'direct,' *it did not matter that it was made in response to remarks by defense counsel."* Id. at 29 (emphasis added). This Court subsequently reversed the lower court's finding that "any 'direct' reference by the prosecutor. . . violates the Fifth Amendment," 485 U.S. at 32, and reaffirmed that any comment by the prosecution on the accused's silence, "must be taken in the light of the facts of that case." 485 U.S. at 34.

Consistent with Robinson, Alabama, like many other states,[7]

[7] 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

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). This distinction serves as a tool to aid the state courts in assessing remarks in context, which is exactly the kind of analysis Robinson requires. Alabama courts unquestionably assess

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 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.").

remarks in the context of the specific facts of each case, as evidenced by their long history of affirming convictions where there has been an alleged comment on the defendant's failure to testify. Supra §I.

Ignoring virtually the entire body of Alabama caselaw on this issue, the State now asks this Court to intervene, claiming that Alabama courts have in practice "ma[d]e the direct label dispositive." Pet. 17. But this contention cannot be squared with either the long-standing Alabama precedent on which the lower court relied, or the fact-specific analysis it actually conducted in this case. Indeed, consistent with Robinson, here the lower court actually did evaluate the context in which the direct comment was made, specifically rejecting the State's argument that the prosecutor's comment was "not commentary on his failure to testify, but rather, was a refutation of defense counsel's argument that the State had the wrong person." Powell, 2024 WL 1947990 at *9 (noting that under either State's theory at trial or on appeal, comment was "impermissible," as "Powell is the only person who could have testified as to the whereabouts of the gun.").

And, unlike United States v. Hasting, on which the State relies in its

Petition and which "declined" to apply the harmless error doctrine to a prosecutorial remark, 461 U.S. 499 (1983), there is no question that Alabama courts routinely evaluate the "impact of an allegedly improper comment in the context of the entire proceeding," Thomas v. State, 824 So. 2d 1, 26 (Ala. Crim. App. 1999), rev'd on other grounds, 889 So. 2d 528 (Ala. 2004), and that here, the lower court did just that by evaluating the context of Mr. Powell's entire trial – both "the evidence presented" and "the closing arguments made by counsel during the guilt phase of Powell's trial" – in order to determine whether the jury "necessarily would have" viewed the remark as a comment on the defendant's failure to testify. Powell, 2024 WL 1947990 at *1, *7 (citations omitted).

And there are good reasons for why the prosecutor's comment in this case was so prejudicial. From an evidentiary perspective, the State's case against Mr. Powell was quite weak: the surveillance video system inside the gas station did not record videos and there were no eyewitnesses to what occurred at the scene. (R. 1330.) None of the dozens of DNA samples, fingerprints, and shoeprints collected from the scene matched Mr. Powell, none of the items of clothing from Mr. Powell's apartment had DNA

evidence from the scene of the crime, and the State never recovered the murder weapon. (R. 1482, 1547, 1558-61, 2083-84, 2107, 2387.)

Unlike other cases where Alabama courts have rejected a challenge to the prosecutor's comment, here, there were real questions about Mr. Powell's culpability that made the prosecutor's direct reference to him as the only eyewitness who could have told the jury "where the gun is" especially harmful.[8] 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

[8] Indeed, in another capital case in which the prosecutor likewise remarked to the jury: "No gun. We don't have a gun. Where is the gun? I don't know. He knows. He knows where the gun is," Mitchell v. State, 84 So. 3d 968, 979 (Ala. Crim. App. 2010), the same lower court affirmed the conviction and death sentence, finding that in the context of the case, the comments were not "improper[] comment[s] on Mitchell's failure to testify," but were rather a message that "law enforcement had not recovered the murder weapons because Mitchell disposed of them," Mitchell, 84 So. 3d at 980, where defense did not object and the jury already knew that Mr. Mitchell "knows where the gun is" because a video introduced at trial showed Mr. Mitchell firing the gun. Mitchell, 84 So. 3d at 977.

nature of the evidence of Thomas' 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.").

There is no conflict between Robinson and Alabama's analytical framework, generally or as specifically applied in this case, 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. POWELL'S 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,[9] 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

[9] Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

reconsider Griffin altogether. Pet. 30 ("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 all criminal prosecutions, the accused shall not be compelled to give evidence against himself"—and controlling Alabama Supreme Court cases which require courts to "carefully guard against a violation of a defendant's constitutional right not to testify." Powell, 2024 WL 1947990 at *7 (citing Ex parte Williams, 461 So. 2d 852, 853 (Ala. 1984) (citing Whitt v. State, 370 So. 2d 736, 739 (Ala. 1979)); see also Id. *8-9. Indeed, the court's lone citation to Griffin comes in a block-quote pulled from another Alabama case. Id. at *7 (citing Smith v. State, 387 So. 3d 150 (Ala. Crim. App. 2022)). Given the lower court's primary reliance on Alabama precedent to arrive at its holding, Mr. Powell's case is not the proper vehicle for reconsidering Griffin.[10]

[10] Even where Alabama courts have invoked Griffin in assessing whether a challenged comment violated the defendant's Fifth Amendment right not to testify, courts rarely find reversible error, and nearly always affirm the conviction. See, e.g., Ex parte Payne, 683 So. 2d 458, 465 (Ala. 1996); Ex parte Land, 678 So. 2d 224, 232 (Ala. 1996); Ex parte McWilliams, 640 So. 2d 1015, 1019 (Ala. 1993); Hammonds v. State, 777 So. 2d 750, 764 (Ala. Crim. App. 1999); 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.

CONCLUSION

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

Respectfully submitted,

/s/ Angela L. Setzer
ANGELA L. SETZER
COUNSEL OF RECORD
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
Phone: (334) 269-1803
Fax: (334) 269-1806
Email: asetzer@eji.org

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Counsel for Respondent

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).