No. 19-573

In The Supreme Court of the United States

JAMIL ABDULLAH AL-AMIN,

Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor's closing-argument comments in violation of petitioner's right not to testify make this an "unusual case" that warrants habeas relief without the showing of actual prejudice required by *Brecht v. Abrahamson*, *see* 507 U.S. 619, 638 n.9 (1993).

2. Whether the court of appeals correctly concluded that the prosecutor's comments did not cause actual prejudice under *Brecht*'s well-established standard, where the prosecution had introduced "overwhelming evidence" against the petitioner (an eyewitness identified him and officers found the murder weapons and the keys and registration to the getaway car in his possession).

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The opinion of the court of appeals affirming the denial of federal habeas relief (Pet. App. 1a–21a) is reported at 932 F.3d 1291 (11th Cir. 2019). The district court's order denying federal habeas relief (Pet. App. 22a–56a) is unpublished but is reported at 2017 WL 6596602 (N.D. Ga. September 29, 2017). The magistrate judge's report and recommendation (Pet. App. 57a–100a) is also unpublished but is reported at 2016 WL 10718765 (N.D. Ga. March 24, 2016).

The Georgia Supreme Court's order denying a certificate of probable cause to appeal the denial of state habeas relief (Pet. App. 101a–02a) and the superior court's order denying state habeas relief (R. 1-2) are both unpublished.

The opinion of this Court denying Al-Amin's petition for certiorari to the Georgia Supreme Court on direct appeal is reported at 543 U.S. 992 (2004). The Georgia Supreme Court's opinion on direct appeal (Pet. App. 103a–33a) is reported at 597 S.E.2d 332 (Ga. 2004).

JURISDICTION

The decision below was entered on July 31, 2019. The petition for certiorari was filed on October 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states that "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution states that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

1. Late in the evening on March 16, 2000, Fulton County Deputy Sheriffs Ricky Kinchen and Aldranon English drove to the home of Jamil Abdullah Al-Amin (formerly H. Rap Brown) in the West End Neighborhood of Atlanta to execute a valid arrest warrant. Pet. App. 2a, 23a n.1, 31a.[1] Al-Amin did not seem to be home, so the deputies began to drive away. *Id.* at 2a. But they turned around when they saw a black 1979 Mercedes Benz pull up to Al-Amin's home. *Id.* A man matching Al-Amin's description got out of the car, and the deputies approached. *Id.*

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[1] A Cobb County court had issued the arrest warrant after Al-Amin failed to appear for a hearing related to a traffic stop. 2a & n.1. A Georgia trial court later suppressed the indictment for the traffic violation on constitutional grounds, but not the arrest warrant. *Id.*

The deputies asked the man to show his hands. *Id.* He instead opened fire with an automatic rifle and pistol. *Id.* During the firefight, both deputies were shot several times, and a bullet hit English's pepper spray canister, temporarily blinding him. *Id.* The shooter drove away in the Mercedes and English radioed for help. *Id.* at 2a–3a. When help came, Kinchin described the shooter as a 6'4" black male with a long coat and hat. *Id.* at 3a. Both deputies were then taken to a local hospital, where Kinchin died of his injuries. *Id.*

The deputies believed they had wounded the shooter, and neighbors reported seeing a bleeding man in the area that evening. *Id.* at 2a–3a. But testing of debris from the scene and surrounding area did not reveal human blood. R. 30-2 at 1299.

The next day, while in the hospital on medications, including morphine, English identified Al-Amin from an array of six photos. Pet. App. 3a, 32a.

Four days after the shooting, the FBI tracked Al-Amin to White Hall, Alabama. *Id.* at 34a; R. 1-3 at 128. While searching for him, officers spotted a figure retreating into the woods (there was conflicting testimony about whether gunfire was exchanged). Pet. App. 3a n.1, 34a. Eventually, officers found Al-Amin. *Id.* at 3a. He was unarmed, but he was wearing a bullet-proof vest and had the keys to his black Mercedes. *Id.* Al-Amin was uninjured and had no gunshot residue on him. *Id.* at 3a, 34a.

After arresting Al-Amin, officers searched the wooded area where they had captured him. *Id.* at 4a.

They recovered an assault rifle, a pistol, ammunition, registration documents for Al-Amin's Mercedes, Al-Amin's passport, and a bank statement for Al-Amin. *Id.* Ballistics analysis confirmed that the rifle and pistol were the ones used to shoot the deputies. *Id.* at 4a. Law enforcement did not find fingerprints or DNA on the weapons. *Id.* at 5a.

Several days later, officers found Al-Amin's Mercedes on a friend's property. *Id.* at 4a. The car was riddled with bullet holes, and ballistics analysis proved that the bullets were fired from the deputies' service weapons. *Id.*

2. Al-Amin was charged with malice murder and various other crimes. *Id.* Because the State sought the death penalty, the proceeding was bifurcated. At the guilt-innocence stage, the State introduced substantial evidence but focused on two things. First, at White Hall, law enforcement found the murder weapons (commingled with Al-Amin's personal effects) and confirmed that his car was the getaway vehicle. Second, Deputy English identified Al-Amin as the shooter right after the shooting and at trial.

Al-Amin decided against testifying. Instead, the defense emphasized that Al-Amin had not been injured despite the officer's belief that they had wounded the shooter, called an eyewitness who testified that Al-Amin was not the shooter, and tried to impeach English's identification because he had been exposed to

pepper spray, was on morphine, and insisted that the shooter had grey eyes.[2] *Id.* at 5a.

As to the evidence discovered in White Hall, the defense argued that it was planted by FBI Agent Ron Campbell. *Id.* The defense seem to have derived that theory from Campbell's involvement, five years earlier, in the shooting of an allegedly unarmed, black, Muslim man. *Id.* News reports of that shooting suggested that a gun may have been planted at the scene, but Campbell was cleared of any wrongdoing. *Id.* Given the speculative connection to Al-Amin's case, the trial court forbade cross-examination of Campbell about the past incident. *Id.*

3. Midway through his closing argument, the prosecutor told the jury: "I want to leave you with a few questions you should have for the defendant." *Id.* at 6a; R. 32-5 at 3696. Those questions were listed on a visual aid titled "Questions for the Defendant." Pet. App. 6a. They were:

- Who is Mustafa?
- Why would the FBI care enough to frame you?
- How did the murder weapons end up in White Hall?
- How did your Mercedes get to White Hall?
- How did your Mercedes get shot up?

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[2] Al-Amin's eyes are brown, but the arrest warrant described them as grey. During his initial identification, English described the shooter as having grey eyes. *Id.* at 32a.

- Why did you flee (without your family)?
- Where were you at 10PM on March 16, 2000?

Id.

The prosecutor then posed similar questions to the jury: "Why would the FBI care enough to frame you?" R. 32-5 at 3697. "Mr. Defendant, how did those murder weapons get there to White Hall?" *Id.* at 3699. "How did your Mercedes get to White Hall? . . . Did you drive it there? . . . More important, how did your Mercedes get shot up?" *Id.*

Defense counsel objected, arguing that the prosecutor had implied to the jury that Al-Amin had a responsibility to testify or to answer these specific questions. *Id.* at 3700. The trial court agreed that the line of argument was improper but noted that the prosecution may "comment on the failure to present certain evidence." *Id.* at 3702. Defense counsel declined a curative instruction, the prosecution retitled the visual aid "Questions for the Defense," and closing arguments resumed. *Id.* at 3702–04.

The prosecutor then argued that "the question is either your car was there at the scene. . . ." *Id.* at 3706. Defense counsel again objected. When the prosecutor began to ask "[w]hy did the defendant . . . ," defense counsel decided a curative instruction was necessary. *Id.* at 3707.

The trial court instructed the jury:

> There has been an objection to some of [the State's] closing which the court has overruled. However, in order to clarify, I'm going to make very clear what I believe is appropriate.
>
> This is closing argument. Closing argument is not evidence. Attorneys may draw inferences and urge you to draw inferences from the evidence. It is proper for the attorneys to argue a failure to present certain evidence. However, you must keep in mind that a defendant in a criminal case is under no duty to present any evidence to prove innocence and is not required to take the stand and testify in the case.
>
> If a defendant elects not to testify, no inference hurtful, harmful or adverse to him shall be drawn by you, and no such fact shall be held against him.
>
> However, it is proper for one side or the other to comment on failure to present certain evidence, but not to comment on the failure of the defendant to testify.
>
> And I'm clarifying this, that, as you know, the burden of proof always remains on the State to prove the guilt of a defendant as to any charge beyond a reasonable doubt.

Id. at 3708–09.

The prosecutor then asked slightly different questions: "Why run if you didn't do it?" *Id.* at 3711. "Where was the defendant at 10:00 p.m. on March 16, 2000?"

Id. Defense counsel also objected to these questions. *Id.* at 3711–12.

After defense counsel's closing argument, the prosecutor began his rebuttal by arguing that "one thing that I didn't hear at all was an answer to any one of these questions that I posed to you before I sat down." *Id.* at 3793. He continued: "Didn't hear anything about why the FBI would care enough to frame you." *Id.* at 3794. But for the rest of the rebuttal, the prosecutor did not refer to Al-Amin's decision not to testify.[3]

4. The jury convicted Al-Amin on all counts. Pet. App. 9a. At the penalty stage, the jury did not recommend the death penalty. As a result, Al-Amin was sentenced to life without parole. *Id.*

5. On direct appeal, Al-Amin raised nineteen challenges to his conviction, but the Georgia Supreme Court upheld it. The court found that the prosecutor's closing argument violated Al-Amin's Fifth Amendment right against self-incrimination. *Id.* at 122a. But the court explained that the error "was harmless beyond a reasonable doubt," pointing to the "strength of the evidence against Al-Amin coupled with the

[3] Al-Amin also objects to the end of the prosecutor's closing argument, when he said, "[d]on't stand for [Al-Amin]." R. 32-6 at 3829. In context, the statement may have been a reference to Al-Amin's religious convictions, which prevented him from standing when the jury or judge entered the courtroom. None of the courts to review Al-Amin's habeas petition found that the statement was a basis to overturn the conviction, and Al-Amin does not argue otherwise here.

contemporaneous curative instruction." *Id.* at 122a–25a. This Court denied certiorari. 543 U.S. 992 (2004).

6. The Tattnall County Superior Court denied Al-Amin's state habeas petition, as relevant here, because the Georgia Supreme Court rejected Al-Amin's argument on direct appeal. R. 1-2 at 27. The Georgia Supreme Court denied a certificate of probable cause to appeal. R. 1-11.

7. Al-Amin then filed a federal habeas petition. The petition was referred to a magistrate judge, who recommended the petition be denied. Pet. App. 89a ("The prosecutor's constitutional violation was addressed immediately and comprehensively, and the evidence of Al-Amin's guilt was overwhelming."). The district court agreed and denied the petition. *Id.* at 55a–56a. Al-Amin had "no reasonable explanation for how [the murder weapons and getaway vehicle] got to White Hall," and so the evidence of guilt was "weighty." *Id.* at 45a–46a.

The court of appeals affirmed. *Id.* at 21a. Like all other reviewing courts, the court of appeals determined that the prosecutor's "mock cross-examination" during closing violated Al-Amin's Fifth Amendment rights. *Id.* at 13a. But despite the trial court's curative instruction being "largely ineffective," the "primary issue" was "whether Al-Amin suffered actual prejudice." *Id*.

The court of appeals reasoned that the case turned on the credibility of the eyewitness identifications of Al-Amin at the scene of the shooting and the reliability

of the physical evidence from White Hall. *Id.* at 17a. Because the "physical evidence and eyewitness testimony" was "overwhelming[ly] . . . against Al-Amin," the prosecutor's improper comments during closing did not prejudice Al-Amin. *Id.* at 18a. The court also found that the prosecutor's comments did not address the pivotal questions in the case (whether English's identification was credible and whether the physical evidence was authentic). *Id.* at 17a. For that reason, the constitutional violation was not traceable to the verdict. *Id.* at 18a. In a footnote, the court of appeals rejected Al-Amin's argument that the constitutional violation was so "deliberate and egregious" as to justify relief absent actual prejudice. *Id.* at 18a n.9.

REASONS FOR DENYING THE PETITION

Under *Brecht v. Abrahamson*, federal habeas relief may be granted based on a trial error only if the error caused actual prejudice: that is, if the error "had a substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637–38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In a footnote, *Brecht* left open "the possibility that in an unusual case, a deliberate and especially egregious" trial error "or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Id.* at 638 n.9.

Al-Amin asks this Court to review the court of appeals' analysis of both *Brecht*'s actual prejudice standard and the "unusual case" exception, in reverse order. Neither of these requests for error correction warrants review.

First, the court of appeals' analysis of *Brecht*'s "unusual case" exception does not warrant review. The courts of appeals uniformly hold that the exception only applies when the constitutional error renders a normal harmless-error analysis impossible. In any event, the issue arises so infrequently that any guidance by this Court would be gratuitous. Al-Amin thus seeks only factbound error correction, but the court of appeals properly rejected application of the exception because this case presents a classic example of an error for which normal harmless-error review is possible.

Second, the court of appeals' actual-prejudice analysis does not warrant review either. The courts of appeals do not need guidance about how to apply the actual-prejudice analysis, which federal courts have been conducting for decades. And—given the compelling evidence of Al-Amin's guilt and the limited scope of the violation—the court of appeals properly found that the Fifth Amendment violation was harmless under *Brecht*'s standard.

I. The court of appeals' factbound application of *Brecht*'s "unusual case" exception does not warrant review.

The court of appeals denied habeas relief on Al-Amin's Fifth Amendment claim based almost entirely on its conclusion that Al-Amin failed to show that the prosecutor's improper comments caused him actual prejudice under *Brecht*'s standard. *See* Pet. App. 12a–18a. But Al-Amin begins his petition instead with the court of appeals' brief footnote, *id.* at 18a n.9, rejecting his argument that *Brecht*'s "unusual case" exception relieves him of the burden of showing actual prejudice. So respondents will start there too: That footnote does not warrant certiorari review. The courts of appeals do not need guidance on the "unusual case" exception because they are not divided on how to apply it and, in keeping with its name, they rarely address or apply it. Further, the court of appeals correctly declined to grant habeas relief under the exception.

A. The courts of appeals do not need guidance on how to apply *Brecht*'s "unusual case" exception.

The petition does not allege any conflict among the circuits about how to apply *Brecht*'s "unusual case" exception, and for good reason: the question arises infrequently, and when it does, circuit courts know what to do with it.

The "unusual case" exception is not a frequent focus of federal habeas litigation. Petitioners raise the

exception rarely (only when they can find a basis for arguing theirs is an "unusual case"). And when they do, courts of appeals almost always hold that the petition does not qualify. *See United States v. Bowen*, 799 F.3d 336, 352 (5th Cir. 2015) ("Most decisions considering the possibility of *Brecht* footnote nine 'hybrid' error have declined to grant relief to defendants, because most of the complaints have involved pure trial error."); *see also*, *e.g.*, *Underwood v. Royal*, 894 F.3d 1154, 1178 (10th Cir. 2018); *Burgess v. Dretke*, 350 F.3d 461, 471 (5th Cir. 2003); *Torres v. Mullin*, 317 F.3d 1145, 1159 (10th Cir. 2003); *Duckett v. Mullin*, 306 F.3d 982, 995 (10th Cir. 2002); *Hassine v. Zimmerman*, 160 F.3d 941, 961 (3d Cir. 1998); *Cupit v. Whitley*, 28 F.3d 532, 538 (5th Cir. 1994); *Hardnett v. Marshall*, 25 F.3d 875, 880 (9th Cir. 1994).

Al-Amin fails to cite a single case in which a court granted habeas relief under the "unusual case" exception.[4] Respondents have found only two. *See Bowen*, 799 F.3d at 353, 355 (holding that anonymous online

[4] In fact, except for *Brecht, Greer*, and *Chapman*, all the cases Al-Amin cites in support of his "unusual case" argument center on whether a constitutional violation occurred at all, not whether the violation was harmless. *See Darden v. Wainwright*, 477 U.S. 168, 182–83 (1986) (finding that controversial comments by the prosecutor did not render the trial fundamentally unfair); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974) (holding that prosecutorial remarks were not "so fundamentally unfair as to deny [the petitioner] due process"); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (vacating conviction because the prosecutor knowingly used false evidence); *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing a prosecutor's obligation to ensure "that justice shall be done").

comments by high-ranking federal prosecutors through the pendency of the entire prosecution, combined with the federal government's delay and obstruction in investigating the comments, "thwarted" the court's ability "to evaluate the effect of the anonymous comments" and rendered harmless error review impossible); *United States v. Harbin*, 250 F.3d 532, 537, 545 (7th Cir. 2001) (holding that the "unusual case" exception applied when the court allowed the prosecutor to "use a peremptory challenge 'saved' from the jury selection phase to eliminate a juror on the sixth day of an eight-day trial" because it "defie[d] harmless error analysis").

In this relatively small subset of cases, the courts of appeals are neither divided nor confused about how to apply the exception. The cases reflect a common understanding of the decades-old exception: it applies only if the error at issue, although of the trial type, is so pervasive and egregious that it defies harmless-error analysis. *See*, *e.g.*, *United States v. Margarita Garcia*, 906 F.3d 1255, 1286 (11th Cir. 2018) (Wilson, J., concurring) (characterizing the "unusual case" exception as being triggered only when "the harmful effects of [the trial error] cannot be evaluated from the record"), *cert. denied sub nom. Garcia v. United States*, 139 S. Ct. 2027 (2019); *Bowen*, 799 F.3d at 353 (explaining that the violation "prevented the district court from evaluating the fairness of defendants' trial and thrust the prosecution into the rare territory of *Brecht* hybrid error"); *Duckett*, 306 F.3d at 995 (finding that the exception did not apply because the trial error did

not "so infect[ ] the trial as to make the proceeding fundamentally unfair and thus immune from harmless-error review"); *Harbin*, 250 F.3d at 545 (applying the "unusual case" exception because the trial error was "precisely the type of error that 'defies harmless error analysis' "); *Hassine*, 160 F.3d at 961 (rejecting application of the "unusual case" exception because the trial error's "impact on the entire case was not so profound as to infect the very integrity of [the] conviction"); *Hardnett*, 25 F.3d at 880 (framing the question whether this is " 'the unusual case' where the combination of misconduct and error infected the entire proceeding and destroyed its fairness?").

In short, the question presented asks this Court to review the court of appeals' application of a legal rule that is rarely at issue and well understood. That is not the kind of question that warrants this Court's review.

B. The court of appeals' conclusion that *Brecht*'s "unusual case" exception does not apply here is correct.

Constitutional errors are divided into two classes. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). "Trial errors" occur "during the presentation of the case to the jury" and "may therefore be quantitatively assessed in the context of other evidence presented . . . to determine whether its admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991). "Structural errors" are "defects in the constitution of the trial mechanism," which necessarily "defy

analysis by 'harmless-error' standards" because they infect the "entire conduct of the trial from beginning to end." *Id.* at 309; *see also Gonzalez-Lopez*, 548 U.S. at 149 (listing the denial of counsel and the denial of self-representation as examples of structural errors).

Brecht's actual-prejudice standard applies to trial errors, and Fifth Amendment violations like those here are classic examples of trial error. The Court made this clear in *Brecht* itself, where it applied harmless-error analysis to a constitutional violation based on the prosecution's questions about the defendant's pretrial silence during cross-examination and closing argument. *See Brecht*, 507 U.S. at 625; *see also Chapman v. California*, 386 U.S. 18, 19 (1967) (holding that harmless-error analysis applied when the prosecutor filled "his argument to the jury from beginning to end with numerous references to [the defendants'] silence and inferences of their guilt resulting therefrom").

Nor does the Fifth Amendment violation here trigger *Brecht*'s "unusual case" exception. As the courts of appeals uniformly hold, the exception is only available where the trial error precludes the normal prejudice analysis, and not where the petitioner simply cannot show prejudice. *See Greer v. Miller*, 483 U.S. 756, 768–69 (1987) (Stevens, J., concurring) (describing what would become the "unusual case" exception as a kind of hybrid between structural and trial errors); *see also Brecht*, 507 U.S. at 638 n.9 (citing Justice Stevens' concurrence in *Greer*). And this Court has consistently rejected the argument that the kind of trial error here—a prosecutor's comment on the defendant's silence—is

such an "unusual case." *Brecht*, *Greer*, and *Chapman* all involved such comments, but the Court applied harmless-error review in each case. *See Brecht*, 507 U.S. at 638 n.9 ("We, of course, are not presented with [an "unusual case"] here."); *Greer*, 483 U.S. at 766; *id.* at 769 (Stevens, J., concurring) ("I agree with the Court's judgment," meaning this is not an "extraordinary case"); *Chapman*, 386 U.S. at 19.

This legal backdrop puts the court of appeals' determination that the exception does not apply here on sound footing, and nothing about the facts of this particular case make it materially different. Improper comments during closing argument, even if they fill the entire argument, do not prevent harmless-error review. *See Chapman*, 386 U.S. at 19 (conducting harmless error review even when the prosecutor "fill[ed] his argument to the jury from beginning to end with numerous references to [the defendants'] silence and inferences of their guilt resulting there from").The prosecutor's comments here occurred during less than a third of the prosecutor's closing argument, making the harmless-error analysis even easier to conduct than it was in *Chapman*.[5] And, compared to *Brecht*, the comments came at the end of an even longer, more comprehensive trial (the transcript for the guilt-innocence stage exceeds 4,000 pages). *See* 507 U.S. at 626 (noting,

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[5] The prosecutor's closing argument spans about sixty pages of the trial transcript. *See* R. 32-5 at 3679–99, 3705–12, 3793–815; R.32-6 at 3816–29. The prosecutor made comments related to Al-Amin's decision not to testify on only fourteen of those pages. *See* R.32-5 at 3696–99, 3705–12, 3793–94.

as part of the harmless-error analysis, that the improper comments comprised "less than two pages of a 900 page transcript") (citation omitted). Given this Court's precedents applying harmless-error review rather than the "unusual case" exception to similar kinds of trial errors, the court of appeals correctly concluded that the exception likewise does not apply here.

That Al-Amin's request for factbound error correction also fails on its merits provides another reason not to review this question.

II. The court of appeals' application of *Brecht*'s "actual prejudice" standard does not warrant review.

Al-Amin also asks this Court to review the court of appeals' application of *Brecht*'s actual prejudice standard. That question does not warrant review: it is a request for factbound error correction (*Brecht*'s standard is long-settled and the courts of appeals are not divided on how to apply it), and the court of appeals correctly concluded that Al-Amin did not suffer actual prejudice.

A. The courts of appeals are not divided on how to apply the actual prejudice standard.

Brecht's actual-prejudice standard is well-established—it is borrowed from a 1946 case, *see* 507 U.S. at 637–38 (quoting *Kotteakos*, 328 U.S. 750) —and the courts of appeals know how to apply it.

Most relevant here, the courts of appeals have articulated and applied the *Brecht* standard consistently in cases involving comment on a defendant's silence. *See*, *e.g.*, *Edwards v. Roper*, 688 F.3d 449, 461 (8th Cir. 2012); *Gomes v. Brady*, 564 F.3d 532, 537–38 (1st Cir. 2009); *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009); *Matthews v. Workman*, 577 F.3d 1175, 1186 (10th Cir. 2009); *Cook v. Schriro*, 538 F.3d 1000, 1019 (9th Cir. 2008); *Cotton v. Cockrell*, 343 F.3d 746, 752 (5th Cir. 2003); *United States v. Harris*, 271 F.3d 690, 702 (7th Cir. 2001); *United States v. Ortiz*, 82 F.3d 1066, 1074 (D.C. Cir. 1996).

Al-Amin does not dispute that the courts of appeals agree on how to apply *Brecht* to these kinds of violations. In fact, he cites only one court of appeals case, *Gongora v. Thaler*, 710 F.3d 267 (5th Cir. 2013). Both here and in *Gongora*, the court of appeals quoted *Brecht* and considered the same factors in determining whether actual prejudice occurred. *Compare Al-Amin*, 932 F.3d at 1298, 1300 ("To determine whether a trial error was harmless, we typically consider the magnitude of the error, the effect of any curative instruction, and whether the prosecution otherwise presented overwhelming evidence of guilt to the jury." (citation omitted)) *with Gongora*, 710 F.3d at 278 (considering whether the comments were "extensive," whether the prosecutor stressed the defendant's silence as a basis for guilt, whether there was a curative instruction, and whether there was "evidence that could have supported acquittal." (citations omitted)).

The courts thus conducted the same analysis, but they reached different conclusions about the effect of the error. Both courts held that the repeated comments were improper and that the instruction did not cure the prejudice. But, in *Gongora*, the prosecution's case turned on the "credibility of co-conspirators' statements," and the prosecutor "attempted to bolster the credibility of those statements by repeatedly stressing" that the co-conspirators testified and Gongora did not. 710 F.3d at 279. In this case, by contrast, the court of appeals reasoned that "the prosecutor's attempt to highlight that Al-Amin did not explain[] his whereabouts or activity" was incidental to the prosecution's case, which focused on the credibility of English's identification and the physical evidence from White Hall. 932 F.3d at 1301. Thus, the *Gongora* court reached a different conclusion about actual prejudice because the evidence of guilt was weak and the Fifth Amendment violation was central to the prosecutor's case; the court of appeals here found that the evidence of guilt was "overwhelming" and that the constitutional violation was not relevant to the key issues.

There is thus no legal conflict for this Court to resolve. This question presented reduces to a plea for factbound error correction, which does not warrant this Court's review.

B. The court of appeals correctly applied *Brecht*'s actual prejudice standard.

Under *Brecht*, a trial error is harmless unless it "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. A conviction must stand unless the federal court harbors "grave doubt" about the prejudicial effect of the error—*i.e.*, that "the matter is so evenly balanced that [the court is] in virtual equipoise as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). In *Brecht*, the Court held that prosecutor's improper comments were harmless because they were "infrequent" and because the evidence of guilt was "certainly weighty." 507 U.S. at 639.

The court of appeals correctly held that the error here did not warrant relief for three reasons.

First, the evidence of Al-Amin's guilt was "overwhelming." *Id*. at 18a. Al-Amin focuses on the contradictory testimony from witnesses to the shooting about the physical attributes of the shooter and whether the deputies injured him*, id*. at 30–31, but the physical evidence recovered in White Hall formed the crux of the State's case. When officers arrested Al-Amin, they recovered the weapons used to shoot the deputies, along with Al-Amin's personal effects. Agents also found Al-Amin's black Mercedes, which was riddled with bullets from the deputies' guns.

Second, the Fifth Amendment violation was limited in scope and partially remedied. The prosecutor's comments comprised a fraction of the prosecutor's closing argument and an even smaller fragment of the

total trial. The jury received a curative instruction at the defense's request.[6] And, contrary to Al-Amin's contention, the defense had an immediate chance to address the error: during the defense's closing argument. *Contra* Pet. 31 (arguing that the error was particularly prejudicial because, when the comments occur in closing argument, "the defendant has no ability to offset these adverse inferences"). In context, the prosecutor's comments were infrequent, not pervasive, and partially remedied.

Third, the prosecutor's rhetorical questions were tangential to the State's case-in-chief. The prosecution presented unrebutted evidence that Al-Amin was at the scene and owned the murder weapons. Pet. App. 16a. The evidence from White Hall directly corroborated the deputies' identifications of Al-Amin. The defense's theory—that the FBI somehow found the murder weapons and planted them to frame Al-Amin—turned on the credibility of English's identification and the reliability and chain of custody for the physical evidence found in White Hall. *Id.* at 17a. The prosecutor's questions highlighting Al-Amin's failure

[6] Courts have disagreed about the effectiveness of this curative instruction. The Georgia Supreme Court and federal magistrate judge both found the instruction curative. *See* 278 Ga. at 86 ("The jury was promptly given a lengthy instruction setting forth the correct principles of law."); 2016 WL 10718765 at 11 ("The prosecutor's constitutional violation was addressed immediately and comprehensively."). The federal district court criticized the instruction as "not strongly worded" and "confusing," 2017 WL 6596602, and the court of appeals found it "largely ineffective." 932 F.3d at 1300. But even if the instruction were ineffective in curing the prejudice, it still correctly stated the law and notified the jury that the prosecutor had erred.

to explain his whereabouts or activities thus did not bear significantly on the central dispute at trial. *Id.* at 17a–18a.

In light of the compelling evidence of guilt and the limited scope and relevance of the trial error, the court of appeals correctly determined that Al-Amin failed to show actual prejudice.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted,

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