No. 19-573

IN THE

Supreme Court of the United States

JAMIL ABDULLAH AL-AMIN,

Petitioner,

v.

WARDEN, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY FOR PETITIONER

In *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993), this Court noted that a "deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding" to warrant habeas relief, even where a "substantial and injurious" effect on the verdict had not been shown. Respondent's argument this exception has not been satisfied downplays the egregiousness of the violations and cites authorities that illustrate the lower courts' errors. If *Brecht*'s exception has any meaning, it should apply here.

Respondent's contention the violations were not prejudicial mischaracterizes key evidence and confirms the exceptional circumstances of Mr. Al-Amin's case. No other case has excused intentional, extensive, visually-aided comments on the decision not to testify where the trial court gave an "ineffective" instruction and the defendant offered a "substantial defense."

Accordingly, the Court should grant certiorari.

I. Respondent mischaracterizes key evidence and downplays the Prosecution's improper closing argument comments.

Respondent's second Question Presented describes the guns as having been found "in his possession." Opp., at i. But a few pages later, Respondent admits officers found the guns when they "searched the wooded area" after his arrest. *Id.* at 3-4. As the court of appeals noted, the guns had been found when officers "searched the surrounding

area" following the arrest, not in Mr. Al-Amin's possession. App. 4a; *see also* App. 36a (guns found "[i]n the vicinity"), App. 107a. This critical difference relates to the defense theory the guns had been planted and to one of the mock cross-examination questions.

Respondent seeks to diminish the extensive evidence the assailant had been shot (Mr. Al-Amin had not been shot), stating "testing of debris from the scene and surrounding area did not reveal human blood." Opp., at 3. The defense challenged the Prosecution's blood testing evidence, showing that only one of the bloody leaf samples had been tested in May 2000 (two months after the crimes) and that the remaining decomposing leaf samples had not been tested until July 2001. R. 30-2, at 1296, R. 31-3, at 71-72, 89, 103. And while the first leaf tested contained DNA, the testing official dismissed it as non-human, despite a "faint bar" indicating to the contrary. R. 31-3, at 100; *see also id.* at 100-01 (admitting "something has appeared there").

Respondent claims it "presented unrebutted evidence that Al-Amin . . . owned the murder weapons." Opp., at 22. The Prosecution presented no such evidence. Rather, as the district court explained, there is "no other evidence linking him to the weapons other than the fact that they were found in his vicinity in White Hall, Alabama." App. 36a; *see also id.* 5a. The lack of any evidence connecting Mr. Al-Amin to the guns constituted critical support for his defense FBI Agent Ron Campbell had "planted the weapons." *Id.* 5a.

Respondent also downplays the egregiousness of the Prosecution's improper comments. Regarding the

pre-planned and visually-aided attacks on Mr. Al-Amin's decision not to testify, Respondent acknowledges the Prosecution engaged in the mock cross-examination in its initial closing and rebuttal. Opp., at 5-8. But Respondent characterizes the violations as having a "limited scope" and being a "fraction" of the argument. Opp., at 11, 21-22. These comments constituted the heart of the initial closing, running from "[m]idway" through the argument to the end. *Id.* at 5. They continued after the first motion for mistrial and admonition from the trial court. And they were returned to in rebuttal, along with other improper comments.

Respondent also brushes off the "Don't stand for him" comments, stating no court had found them a "basis to overturn his conviction." Opp., at 8 n.3. Both lower courts found these comments to be a "clear reference to Al-Amin's religiously based and court approved decision not to stand when the judge or jury entered the courtroom." App. 9a n.4; *see also* App. 40a. Under *Brecht*'s exception, egregious trial errors – such as the mock cross-examination – "combined with a pattern of prosecutorial misconduct" – such as the "Don't stand for him" comments – warrant the grant of habeas relief. 507 U.S. at 638 n.9.[1]

1. The Georgia Supreme Court found the "Don't stand for him" error to be "harmless" and refused to consider the "cumulative effect of the errors in closing argument," because "Georgia does not follow a cumulative error rule of prejudice." App. 126a. On February 10, 2020, the Georgia Supreme Court overruled this portion of its decision in Mr. Al-Amin's appeal and adopted a cumulative prejudice rule. *State v. Lane*, No. S19A1424, 2020 WL 609615 (Ga. Feb. 10, 2020).

II. Respondent's authorities confirm the Prosecution's violations here present the unusual case warranting relief under *Brecht*'s exception.

Respondent argues the Court need not address *Brecht*'s unusual case exception in the absence of a circuit split as to its proper application. Opp., at 12-15. Respondent's cited authorities, however, illustrate that Mr. Al-Amin's case constitutes precisely the type of exceptional case *Brecht* anticipated.

Both *Brecht* and *Greer v. Miller*, 483 U.S. 756, 769 (1987) (Stevens, J., concurring in judgment), involved *Doyle* violations (improper comments on a defendant's pre-trial silence) where the defendant had testified at trial. In *Greer*, the trial court sustained an objection to a single unanswered question implicating pretrial silence and instructed the jury to "disregard any questions to which an objection was sustained." 483 U.S. at 764. In *Brecht*, the "infrequent" references to the defendant's post-*Miranda* silence constituted less than two pages of the transcript; were "cumulative" of "extensive and permissible references to petitioner's pre-*Miranda* silence"; and arose in a case where the defendant did not deny shooting the victim, only his intent (despite evidence showing motive). 507 U.S. at 639.

In contrast, the (pre-*Brecht*) decision of *Anderson v. Nelson*, 390 U.S. 523, 523-24 (1968) – the Court's only habeas case addressing the harmlessness of comments on a defendant's decision not to testify at trial – found the error harmful under *Chapman v. California*, 386 U.S. 18 (1967), "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could

have submitted acquittal." The Court's *Chapman* decision likewise found, on direct review, that a "machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against defendant of a coerced confession." 386 U.S. at 25.

The "unusual case" exception of *Brecht* easily accommodates the harmful error findings of *Anderson* and *Chapman*. Unlike the minor *Doyle* violations in *Brecht* and *Greer*, both *Anderson* and *Chapman* involve systematic, uncured Fifth Amendment violations similar to those here. And as with *Anderson* and *Chapman*, Mr. Al-Amin presented a "substantial defense." App. 5a; *see Chapman*, 386 U.S. at 25 (finding error harmful despite "reasonably strong 'circumstantial web of evidence'").

None of Respondents' cited authorities found deliberate comments on a defendant's decision not to testify at trial fell outside of *Brecht*'s "unusual case" exception. Most did not involve allegedly improper comments on a defendant's silence (either before or during trial) at all.[2] Others found

2. *See, e.g.*, *Underwood v. Royal*, 894 F.3d 1154, 1178 (10th Cir. 2018) (improper admission of victim's parents' sentence recommendations); *Duckett v. Mullin*, 306 F.3d 982, 989-95 (10th Cir. 2003) (improper comments in closing arguments not involving the defendant's silence); *Cupid v. Whitley*, 28 F.3d 532, 538 (5th Cir. 1994) (wrongful admission of hearsay evidence); *Hardnett v. Marshall*, 25 F.3d 875, 880 (9th Cir. 1994) (confrontation clause violation); *see also United States v. Bowen*, 799 F.3d 336, 349-55 (5th Cir. 2013) (prosecution's posting of anonymous online comments during trial); *United States v. Harbin*, 250 F.3d 532, 537, 545 (7th Cir. 2001) (prosecution used "saved" preemptory strike mid-trial).

no Fifth Amendment violation[3] or that the state courts had not engaged in a clearly erroneous application of established federal law[4] (in contrast to the district court's determination the state court had misapplied *Chapman*, *see* App. 42a). And one involved *Doyle* violations where the objections to the improper questions "were immediately raised and sustained," while the two "ambiguous references" to pretrial silence during closing arguments did not "infect the very integrity" of the conviction.[5]

While inapposite, some of the decisions' articulations of the *Brecht* exception confirm its applicability here. The *Duckett* court recognized prosecutorial misconduct could so infect the trial "as to make the proceeding fundamentally unfair and thus immune from harmless-error review." 306 F.3d at 995. The *Hardnett* court framed the question as whether "the combination of misconduct and error infected the process and destroyed its fairness." 25 F.3d at 880. Here, the Prosecution's improper comments permeated its closing arguments, with the mock cross-examination constituting the centerpiece of the initial argument and the "Don't stand for him" violations coming at the

3. *Torres v. Mullin*, 317 F.3d 1145, 1159 (10th Cir. 2003) (finding no Fifth Amendment violation from comment on lack of remorse evidence).

4. *Burgess v. Dretke*, 350 F.3d 461, 471 (5th Cir. 2003) (finding reliance on *Brecht* "misplaced" where no error shown under 28 U.S.C. § 2254(d)(1), and finding arguable error regarding one set of pretrial statements harmless).

5. *Hassine v. Zimmerman*, 160 F.3d 941, 961 (3d Cir. 1998); *see also id.* at 961-62 (Nygaard, J., concurring) (agreeing defendant had not shown conduct "infect[ing]" trial's integrity or a "pattern" of misconduct, but describing behavior as coming "very close" to prejudice and "event closer" to *Brecht* unusual case exception).

very close of the rebuttal. This cumulative combination of misconduct and the "ineffective" instruction – after Mr. Al-Amin had refused to testify in reliance on the Prosecution not engaging in a Fifth Amendment violation – infected the entire trial proceeding and rendered it fundamentally unfair.

III. Respondent's own prejudice authorities confirm that, as with *Gongora v. Thaler*, 710 F.3d 267 (5th Cir. 2013), the Prosecution's egregious and uncured misconduct in closing arguments had a substantial and injurious effect on the jury's verdict.

According to Respondent, the courts of appeals consistently have applied *Brecht*'s prejudice rule to "cases involving comment on a defendant's silence." Opp., at 19. A review of the cited authorities, however, confirms that in the only case involving systematic improper commentary on a defendant's silence at trial, an ineffective jury instruction, and evidence supporting acquittal, the Fifth Circuit found prejudice under *Brecht*. *See Gongora v. Thaler*, 710 F.3d 267, 278-79 (5th Cir. 2013). None of the other cases involves the circumstances presented here.

In some of Respondent's cases, the courts did not find a Fifth Amendment violation,[6] or found an arguable

6. *Edwards v. Roper*, 688 F.3d 449, 461 (8th Cir. 2012) (finding no Fifth Amendment violation based on lack of remorse comment during penalty phase where defendant had testified during guilt phase, and finding harmless error as to failure to give penalty-phase adverse inference instruction because jury would not have expected defendant to testify again); *Matthews v. Workman*, 577 F.3d 1175, 1188 (10th Cir. 2009) (finding no Fifth Amendment violation where prosecutor commented on failure to present evidence rather than failure to testify).

minor violation easily offset by overwhelming evidence.[7] One unusual case involved reference to defendant's silence by defense counsel as well as the prosecutor, where the Fifth Amendment objection had been defaulted and the defendant could not show ineffective assistance of counsel.[8]

Two cases cited by Respondent found a Fifth Amendment violation harmless under *Brecht*. In a habeas case, the First Circuit found a "slip of the tongue" Fifth Amendment violation during closing argument harmless, where the trial court provided a proper instruction and the evidence of guilt included two eyewitnesses who saw the shooting.[9] In a direct appeal, the D.C. Circuit found one improper closing argument comment, but ruled the error harmless because the jury did not convict the defendant on the count to which the comment related.[10]

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7. *Cook v. Schriro*, 538 F.3d 1000, 1021 (9th Cir. 2008) (questioning whether comment regarding eyewitness's testimony violated Fifth Amendment rights, but finding any assumed error would be harmless given overwhelming evidence, including testimony as to confession); *Cotten v. Cockrell*, 343 F.3d 746, 752 (5th Cir. 2003) (assuming comment was directed to failure to testify rather than failure to present evidence and finding "isolated comment in a sea of evidence" harmless given extensive eyewitness evidence, including testimony as to confession); *see also United States v. Harris*, 271 F.3d 690, 700-04 (7th Cir. 2001) (in direct appeal where defendant failed to object, finding error harmless where court provided curative jury instruction and overwhelming evidence included eyewitness testimony and corroborating tape-recorded conversation of defendant).

8. *Hall v. Vasbinder*, 563 F.3d 222, 236-39 (6th Cir. 2009).

9. *Gomez v. Brady*, 564 F.3d 532, 537-39 (1st Cir. 2009).

10. *U.S. v. Ortiz*, 82 F.3d 1066, 1073-74 (D.C. Cir. 1996).

In contrast to these cases, the decision in *Gongora* – as with this Court's decisions finding harmfulness in *Chapman* and *Anderson* – found prejudice under *Brecht* from extensive improper comments that stressed an inference of guilt from silence, an ineffective jury instruction, and the existence of "substantial evidence supporting acquittal." 710 F.3d at 278-83. Although Respondent acknowledges both this case and *Gongora* involve "repeated" improper comments and an ineffective jury instruction, it claims *Gongora* involved weaker guilt evidence and tighter relevance of the comments to the prosecution's case. Opp., at 20.

In *Gongora*, two eyewitnesses identified the defendant as the shooter, but the defense gave the jury "reason to question" their testimony. 710 F.3d at 281. Here, the only testifying eyewitness who identified Mr. Al-Amin (Deputy English), "insisted the shooter had grey eyes." App. 32a; *see also id.* at 36a; R29-5 at 3 ("My Mom always told me, *look a man in his eyes . . . I remember them grey eyes*.") (emphasis added). Mr. Al-Amin has brown eyes. And both Deputy English and Deputy Kinchen (who died from his wounds) stated they were "confident that they had shot their assailant," consistent with the "blood trail leading away from the scene" (Mr. Al-Amin had not been shot). App. 5a.

Also in *Gongora*, an "independent eyewitness" provided testimony defendant had not shot the victim. 710 F.3d at 281. Here, eyewitness Imhotep Shaka testified he was "absolutely positive" the shooter was not Mr. Al-Amin, because the shooter did not have Mr. Al-Amin's "distinctive" tall and skinny frame. App. 35a; *see also* R32-3 at 89-90. Another witness similarly testified the shooter

did not match Mr. Al-Amin's build. *Id.* Mr. Al-Amin presented other evidence supporting acquittal, including (a) testimony about a man known as Mustafa being asked to leave the masjid the night of the crime because of a "bulge in his back" that looked like "a weapon" (R32-2 at 116-17, 126-27); (b) the absence of any DNA, fingerprint, or other physical or documentary evidence connecting Al-Amin to the guns found in White Hall (App. 5a); and (c) the absence of any motive evidence (*see* R32-5 at 83).

As in *Gongora*, the Prosecution's mock cross-examination undermined Mr. Al-Amin's acquittal evidence, by "aggressively prompt[ing] the jury to infer guilt based on [the defendant's] failure to testify." 710 F.3d at 278-80. The fact the Prosecution chose to engage in a deliberate and visually-aided egregious *Griffin* violations – violations that continued after the trial court's instruction to stop – and then closed its rebuttal argument with a further improper comment on Mr. Al-Amin's religiously based decision to remain seated reveals its concern with the possibility the jury would acquit Mr. Al-Amin if it did not violate his rights. *See Gongora v. Thaler*, 726 F.3d 701, 702 (5th Cir. 2013) (Higginbotham, J.) (denying rehearing en banc) (noting that in a "difficult case" prosecutor may use improper "comments on silence" to "close[] the evidentiary gap").

Respondent tries to characterize the subjects of the mock cross-examination as "tangential" to the Prosecution's case, characterized as resting on eyewitness testimony and the Alabama evidence. Opp., at 22-23. But as shown above, Mr. Al-Amin had developed substantial acquittal evidence he was not the shooter, only to have the Prosecution deliberately invite the jury to infer his

guilt from his failure to testify. And the second and third questions in the Prosecution's chart – "Why would the FBI care enough to frame you?" and "How did the murder weapons end up in White Hall?" – both directly relate to the Alabama evidence and seek to undermine the defense theory the guns had been planted, based on an adverse inference from Mr. Al-Amin's failure to testify.

Finally, Respondent argues Mr. Al-Amin had "an immediate chance to address the error: during the defense's closing argument." Opp., at 22. But the argument of counsel cannot "un-ring the bell" of harm attendant to extended *Griffin* violations occurring after the defendant already has exercised his Fifth Amendment right not to testify, in reliance on the prosecution complying with its constitutional and prosecutorial obligations. *Cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (explaining prosecutor's obligation "to refrain from improper methods calculated to produce a wrongful conviction"). And the Prosecution returned to its Fifth Amendment violations in rebuttal, compounding the error with still further improper comments designed to inflame the jury regarding Mr. Al-Amin's Muslim faith just six months after September 11, 2001.

In these circumstances, the failure of any of the reviewing courts to deter future prosecutors from engaging in the most egregious and deliberate misconduct, thereby denying defendants their basic constitutional rights, threatens to undermine the right to a fair trial that forms the bedrock of our judicial system. *Cf.* App. 21a (describing "regret that we cannot provide Mr. Al-Amin relief in the face of the prosecutorial misconduct that occurred at trial").

CONCLUSION

The Court should grant certiorari.

Respectfully submitted

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