No. 22-

IN THE

Supreme Court of the United States

JAMIL AL-AMIN,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After Petitioner Jamil Al-Amin filed a federal habeas action challenging his Georgia conviction, the FBI for the first time produced: (1) a BOLO ("be on the look-out") bulletin issued to "ALL LAW ENFORCEMENT AGENCIES" the day after the crimes that described the perpetrator as "5' 6"-5' 8", 150-160 LBS" (Mr. Al-Amin stands 6' 5" and weighed 187 pounds); and (2) handwritten notes of the FBI's interview with the member of the Alabama dog tracking team who found the pistol allegedly used in the crimes, which noted that the officer stated he felt the pistol "was placed." Mr. Al-Amin then filed a state successive habeas action under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Discounting that Georgia state authorities had worked closely with the FBI in the investigation and prosecution of Mr. Al-Amin's criminal case, the state habeas court held the Prosecution did not have possession of the "it was placed" note. And even though (1) the BOLO bulletin directly supported Mr. Al-Amin's mistaken identity defense and (2) the "it was placed" note corroborates the defense theory that the weapons found in Alabama had been planted, the state habeas court found both documents immaterial.

The questions presented are:

1. Did the trial court err in holding the Prosecution did not have possession of the "it was placed" note ultimately produced by the FBI?

2. Did the trial court err in holding that the BOLO bulletin and the "it was placed" note did not constitute material evidence that could have impacted the outcome of the trial?

RULE 14.1(B)(III) STATEMENT

This case challenges the same criminal conviction as imposed or otherwise addressed in the following actions:

In *State v. Al-Amin*, No. 00-SC-03563 (Ga. Super. Ct., Fulton Cty.), the jury returned a guilty verdict on March 9, 2002, and Mr. Al-Amin was sentenced to life without the possibility of parole on March 13, 2002. The state trial court denied Mr. Al-Amin's amended motion for new trial on July 2, 2003.

The Supreme Court of Georgia issued its opinion in the direct appeal affirming the verdict and sentence on May 24, 2004. *Al-Amin v. State*, No. S04A0151 (Ga.).

This Court denied Mr. Al-Amin's petition for a writ of certiorari in his direct appeal on November 15, 2004. *Al-Amin v. Georgia*, No. 04-6606, 543 U.S. 992.

In *Al-Amin v. Smith*, No. 2005-HC-66 (Ga. Super. Ct., Tattnall Cty.), the state court denied Mr. Al-Amin's first state habeas petition by Final Order entered on July 28, 2011.

The Supreme Court of Georgia denied Mr. Al-Amin's application for a certificate of probable cause to appeal the denial of his first state habeas petition on May 7, 2012. No. S12H0007 (Ga.).

Mr. Al-Amin filed his federal habeas petition in the United States District Court for the District of Colorado (where he was incarcerated at the time), but that court transferred the habeas action to the United States District

Court for the Northern District of Georgia on May 15, 2012. *Al-Amin v. Davis*, No. 1:12-cv-01197-BNB (D. Colo.).

The magistrate judge in the United States District Court for the Northern District of Georgia issued a Report and Recommendation and Final Order in Mr. Al-Amin's federal habeas action on March 24, 2016. The district court judge issued an Order overruling Mr. Al-Amin's objections to the magistrate judge's Report and Recommendation and denying his federal habeas petition on September 29, 2017. *Al-Amin v. Shartle*, No. 12-CV-1688-AT-GGB (N.D. Ga.).

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Mr. Al-Amin's federal habeas petition on July 31, 2019. *Al-Amin v. Warden*, No. 17-14865 (11th Cir.).

This Court denied Mr. Al-Amin's petition for a writ of certiorari in his federal habeas action on April 6, 2020. *Al-Amin v. Ward*, No. 19-573, 140 S. Ct. 2640.

Mr. Al-Amin filed a successive state habeas action, presenting a *Brady* claim based on information produced after the conclusion of his first state habeas action. The trial court denied that habeas petition on March 18, 2022. *Al-Amin v. Georgia*, No. HC00999 (Ga. Super. Ct., Fulton Cty.).

The Supreme Court of Georgia denied Mr. Al-Amin's application for a certificate of probable cause to appeal the denial of his successive state habeas petition on February 21, 2023. *Al-Amin v. Georgia*, No. S22H0932 (Ga. S. Ct.).

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OPINIONS BELOW

The Order of the Supreme Court of Georgia denying Mr. Al-Amin's application for a certificate of probable cause to appeal from the denial of Mr. Al-Amin's successive habeas corpus petition (App. 1a-2a) is unreported.

The "Final Order Dismissing Petition for Writ of Habeas Corpus" ("Order") of the Superior Court of Fulton County, Georgia, denying Mr. Al-Amin's successive habeas petition (App. 3a-17a), is unreported.

The opinion of the Eleventh Circuit (App. 18a-38a) affirming the denial of Mr. Al-Amin's federal habeas petition is reported at 932 F.3d 1291. The Order of the district court denying Mr. Al-Amin's federal habeas petition (App. 39a-73a) is reported at 2017 WL 6596602. The Final Report and Recommendation and Order of the magistrate judge (App. 74a-117a) is reported at 2016 WL 10718765.

The Order of the Supreme Court of Georgia denying Mr. Al-Amin's application for a certificate of probable cause to appeal the denial of his first state habeas petition (App. 118a-119a) is unreported. Neither the Eleventh Circuit nor the state successive habeas court relied upon the unreported Final Order of the state habeas trial court denying Mr. Al-Amin's first state habeas petition.

The opinion of the Georgia Supreme Court in Mr. Al-Amin's direct appeal (App. 120a-150a) is reported at 597 S.E.2d 332.

JURISDICTION

The Supreme Court of Georgia denied Mr. Al-Amin's application for a certificate of probable cause to appeal the denial of his successive state habeas petition on February 21, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Mr. Al-Amin, formerly known as H. Rap Brown, is a "former civil rights activist who served as a community leader for over two decades in Atlanta's West End neighborhood." App. 40a. He was the "fifth Chairman of the Student Nonviolent Coordinating Committee and one of a handful of civil rights leaders specifically identified in the 1967 FBI memorandum outlining the counterintelligence program known as 'COINTELPRO,'

the purpose of which was to expose, disrupt or otherwise neutralize civil rights leaders and organizations." *Id.*

1. On the night of March 16, 2000, Fulton County Deputy Sheriffs Ricky Kinchen and Aldranon English drove to the West End neighborhood of Atlanta to serve a bench warrant on Mr. Al-Amin, which had issued when he failed to appear for a traffic stop hearing. App. 47a-48a & n.3. Not finding Mr. Al-Amin, the Deputies were leaving the area when they saw a vehicle pull to the curb behind them. The Deputies turned around, pulled up to the car, and approached a man standing on the curb near the vehicle. The Deputies exited their car and Deputy English asked the man to show them his hands. The man produced an automatic rifle and began firing at the officers. *Id.* at 48a.

The Deputies "returned fire," and both Deputies "were confident that they had wounded the shooter." App. 48a, 49a. Deputy English testified he fired three rounds, "two to the chest, one to the head." *Id.* at 49a. Deputy Kinchen informed officers who arrived on the scene that "I shot him, I think I shot him." *Id.* at 50a. In addition to a "trail of blood from the scene of the crime to an empty house a few blocks away," a 911 operator received at least one call stating "a man involved in the shooting was bleeding and begging for a ride." *Id.* at 53a. The police secured a search warrant for "blood, bloody clothing, and evidence of medical intervention," but none of the blood evidence matched Mr. Al-Amin. *Id.* at 50a.

At the first state habeas hearing, Mr. Al-Amin testified he was in the West End area during the shooting but denied any involvement in it. App. 50a. He left the area

because he "thought the shooting might be a retaliatory attack directed towards him" by young men with whom he had engaged in a "heated discussion" earlier that day. *Id.* As he drove away, his back window fell out, which also caused him to believe the shooting was directed at him. *Id.* He drove to White Hall, Alabama, where he had helped develop a Muslim community. *Id.*

FBI agents (including an agent named Ron Campbell) traveled to White Hall and arrested Mr. Al-Amin a few days after the crimes. App. 51a. Despite the deputies' testimony they had shot the assailant, and despite allegations Mr. Al-Amin had fired at law enforcement officers shortly before his arrest, Mr. Al-Amin showed "no signs of having been shot, and no gun residue was found on him." *Id.* While Mr. Al-Amin was handcuffed on the ground, FBI Agent Campbell attacked Mr. Al-Amin without provocation. *Id.* (explaining Agent Campbell "spit on him, and kicked him").

After Mr. Al-Amin's arrest, local and federal officers found a pistol, an assault rifle, and ammunition in the area. App. 52a. The Prosecution presented testimony the guns had been used to shoot the Deputies. *Id.* The guns did not have any fingerprints on them, and there was "no other evidence linking him to the weapons other than the fact that they were found in his vicinity in White Hall." *Id.* at 53a. Mr. Al-Amin consistently contended the guns "were planted by [FBI Agent] Ron Campbell." *Id.*

Deputy Kinchen died from his wounds the day after the shooting. App. 49a. While under the influence of morphine, Deputy English chose Mr. Al-Amin's photo from a photo array of six pictures. *Id.* The defense raised

numerous questions regarding the reliability of Deputy English's eyewitness identification, including that a pepper spray canister on his belt had been "ruptured by a bullet, temporarily blinding him," at the beginning of the shooting. *Id.* at 48a. Deputy English, moreover, unequivocally "insisted the shooter had grey eyes." *Id.* at 49a; *see also id.* at 53a (noting Deputy English "reported and repeatedly testified that the shooter had grey eyes"); Tr. 572-73 ("My Mom always told me, *look a man in his eyes . . . I remember them grey eyes*.") (emphasis added).[1] Mr. Al-Amin has brown eyes. *Id.*

2. At Mr. Al-Amin's trial, he offered the testimony of nearly 20 witnesses, including Imhotep Shaka. App. 52a. Mr. Shaka testified he witnessed the shooting and was "absolutely positive" the shooter was not Mr. Al-Amin, because the shooter did not have Mr. Al-Amin's "distinctive" tall and thin body type. *Id.*; *see also* Tr. 3574-75. Another witness similarly testified the shooter did not match Mr. Al-Amin's physical description. App. 52a. And another witness testified that a man known as Mustafa had been at the masjid the night of the crime but had been asked to leave the final prayer because he "had a bulge in his back" that the witness believed looked like "a weapon." Tr. 3425-26, 3436-37.

Regarding the evidence found in Alabama, one of the defense theories at trial was that Agent Campbell was a "rogue" agent who had "planted" weapons to implicate Mr.

1. "Tr." refers to the transcript of Mr. Al-Amin's underlying trial, "HT" refers to the transcript of the hearing in his first habeas action, and "2HT" refers to the transcript of the hearing in his second habeas action. "Dkt." refers to the docket entry in *Al-Amin v. Ebbart*, No. 1:12-CV-1688-AT-GGB (N.D. Ga.).

Al-Amin when Campbell was separated from the search team members in the Alabama woods. Tr. 2628 (testimony that Agent Campbell "fell behind" the other agents in White Hall and could not be observed); HT 97. At trial, Agent Campbell falsely testified on direct examination that he needed assistance from other officers when he crossed the barbed wire fence where the pistol ultimately was found, only to admit on cross-examination that "I was alone when I went over the fence." *Compare* Tr. 1717-18 (direct) *with id.* at 1754 (cross).

3. On his attorneys' advice, Mr. Al-Amin did not testify at trial, even though he wanted to testify. App. 54a; *see also* HT 129-30. During closing arguments, the Prosecution "repeatedly referenced Mr. Al-Amin's decision to remain silent." App. 54a. It presented a previously-prepared "visual aid" entitled "QUESTIONS FOR THE DEFENDANT" that posed several mock cross-examination questions to Mr. Al-Amin, including:

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

Id.

The Prosecution then presented the jury "with a few questions you should have for the defendant." App. 54a. These questions tracked the visual aid verbatim and

focused the jury's attention on Mr. Al-Amin's failure to testify:

> "The first question. Who is Mustafa?"
>
> "Question two. Why would the FBI care enough to frame you?"
>
> "Third question. How did the murder weapons end up in White Hall? . . . Mr. Defendant, how did those murder weapons get there to White Hall?"
>
> "Next question. How did your Mercedes get to White Hall? . . . More important, how did your Mercedes get shot up?"

Id. at 54a-55a. As discussed below, the Georgia Supreme Court in the direct appeal and the federal habeas courts found that the Prosecution's mock cross-examination repeatedly violated Mr. Al-Amin's Fifth Amendment rights, but the courts refused to grant Mr. Al-Amin relief based on those violations.

Mr. Al-Amin was convicted on all counts. The jury nevertheless rejected the death penalty and instead sentenced him to life imprisonment without parole. App. 57a; *see also* Dkt. 150 (noting empirical evidence supporting connection between residual doubt and jurors' decision not to impose a death sentence).

4. In his direct appeal, Mr. Al-Amin primarily challenged his conviction based on the Fifth Amendment violations. The Georgia Supreme Court held that "Al-

Amin's constitutional and statutory rights were violated when the prosecutor in effect engaged in a mock cross-examination of the accused who had invoked his right to remain silent," but found the violation "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18 (1967). App. 139a-141a.

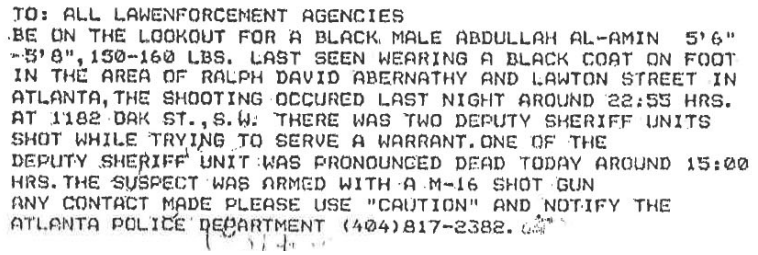
5. After the denial of a petition for certiorari in his direct appeal, Mr. Al-Amin filed his first state habeas action. In addition to challenging the mock cross-examination, Mr. Al-Amin's state habeas action included a claim his attorneys had been ineffective for failing adequately to investigate the claims made by James Santos a/k/a Otis Jackson, who repeatedly had confessed to committing the crimes. Dkt. 1-6 & 1-7. Mr. Al-Amin contended his attorneys improperly had accepted the Prosecution's representation that ankle monitoring data for Mr. Santos conclusively established he could not have committed the crimes. Mr. Al-Amin presented the unrefuted testimony of one of the founders of the ankle monitoring company, who opined the ankle monitoring data did not establish an alibi for Mr. Santos. HT 48-70.

At the first state habeas hearing, Mr. Al-Amin testified, was cross-examined, and answered questions posed directly by the state habeas judge. HT 120-51. After the state court denied his first habeas petition, Mr. Al-Amin filed an application for a certificate of probable cause to appeal, which the Georgia Supreme Court denied. App. 118a-119a.

6. Mr. Al-Amin then filed his federal habeas action, in which he was allowed to subpoena the FBI for exculpatory information showing (1) Mr. Al-Amin was not the person

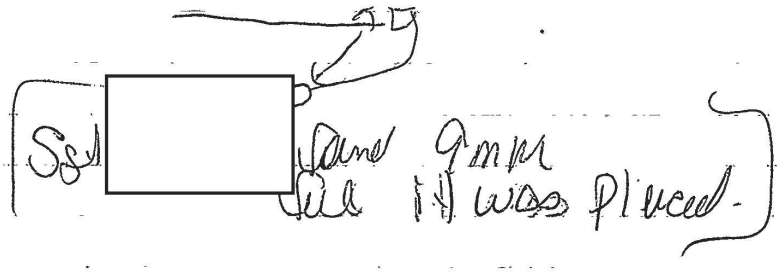
(or among the persons) who shot the Deputy Sheriffs; and (2) FBI Agent Campbell planted weapons in the vicinity of the location where Mr. Al-Amin was arrested in Alabama. *See* Dkt. 108. On September 24, 2015—after the FBI had responded to the subpoena, and two days after the close of discovery in Mr. Al-Amin's federal habeas action—the FBI mailed a CD containing 700 pages of documents in response to requests for information under FOIA made in March 2013. These 700 pages included the BOLO bulletin and the "it was placed" note giving rise to Mr. Al-Amin's current *Brady* claim. *See* 2HT 6-7 & Exs. 1-2.

The pertinent section of the BOLO bulletin is pasted below:


TO: ALL LAWENFORCEMENT AGENCIES
BE ON THE LOOKOUT FOR A BLACK MALE ABDULLAH AL-AMIN 5'6"
-5'8",150-160 LBS. LAST SEEN WEARING A BLACK COAT ON FOOT
IN THE AREA OF RALPH DAVID ABERNATHY AND LAWTON STREET IN
ATLANTA,THE SHOOTING OCCURED LAST NIGHT AROUND 22:55 HRS.
AT 1182 OAK ST.,S.W. THERE WAS TWO DEPUTY SHERIFF UNITS
SHOT WHILE TRYING TO SERVE A WARRANT.ONE OF THE
DEPUTY SHERIFF UNIT WAS PRONOUNCED DEAD TODAY AROUND 15:00
HRS.THE SUSPECT WAS ARMED WITH A M-16 SHOT GUN
ANY CONTACT MADE PLEASE USE "CAUTION" AND NOTIFY THE
ATLANTA POLICE DEPARTMENT (404)817-2382.

2 HT, Ex. 1. The BOLO bulletin first produced in September 2015 shows that, the day after the crimes, law enforcement had issued an all-points bulletin identifying the shooter as being "5' 6"-5' 8", 150-160 LBS.," whereas Mr. Al-Amin stands 6' 5" and weighed 187 pounds. Dkt. 53-2, at 2.

The "it was placed" note from the FBI notes of the interview with the Alabama officer who found the pistol allegedly used in the crimes is pasted below:



2HT, Ex. 2. The "it was placed" note first produced in September 2015 supports the defense theory presented at Mr. Al-Amin's trial that FBI Agent Campbell or another law enforcement officer had planted the weapons found shortly after Mr. Al-Amin's arrest in Alabama.

After Mr. Al-Amin asserted a *Brady* claim in his federal habeas action based on these documents, the federal court found the claim had not been exhausted and ordered him to either (a) dismiss the *Brady* claim without prejudice to re-filing a successive state habeas petition in state court or (b) file a motion to stay the federal action pending exhaustion of the *Brady* claim in state court. *See* Dkt. 134. Mr. Al-Amin withdrew his *Brady* claim from the federal habeas action, without prejudice to raising those claims in a successive state habeas petition. *See* Dkt. 135.

The magistrate judge recommended the denial of Mr. Al-Amin's remaining habeas claims. Regarding the mock cross-examination, the magistrate judge found "there is no dispute that Al-Amin's constitutional rights were violated." App. 84a. The magistrate judge recommended

a finding under 28 U.S.C. § 2254(d) that the Georgia Supreme Court unreasonably applied *Chapman* because it "summarized the facts proven at trial under the *Jackson v. Virginia*, 443 U.S. 307 (1979), 'sufficiency-of-the-evidence' standard and relied on that summary as the basis for conducting its review pursuant to *Chapman*." *Id.* at 84a-85a. But the magistrate judge recommended denying relief to Mr. Al-Amin, stating the "prosecutor's constitutional violation was addressed immediately and comprehensively, and the evidence of Al-Amin's guilt was overwhelming." *Id.* at 101a.

7. Mr. Al-Amin objected, but the district court overruled his objections and denied his habeas petition. The district court agreed with the Georgia Supreme Court and the magistrate judge that the Prosecution violated Mr. Al-Amin's Fifth Amendment rights by engaging in a mock cross-examination during closing arguments, describing the violations as "repeated, blatant, central to the prosecutor's closing argument, intentional, and . . . arguably returned to in the prosecution's rebuttal." App. 59a. And the court also agreed with the magistrate judge that the Georgia Supreme Court unreasonably applied *Chapman*, by failing to consider the "whole record" and instead viewing the evidence "in the 'light most favorable to the verdict.'" *Id.* at 45a, 46a, 59a. But the district court rejected the magistrate judge's conclusion that the trial court's instruction cured the harm from the constitutional violations, because the instruction "was not strongly worded, failed to admonish the prosecution for the blatant nature of the violation, and was undermined by the trial court's contemporaneous but confusing instruction . . . ." *Id.* at 59a-60a. The court found "it is plain that the instruction was ineffective." *Id.* at 61a.

The district court then reviewed the strength of the Prosecution's case against Mr. Al-Amin. App. 61a-68a. Describing the evidence from "the actual crime scene" as "a mixed bag" and a "mishmash of inconsistencies," the court noted the evidence favorable to Mr. Al-Amin, including eyewitness testimony that Mr. Al-Amin was not the shooter; statements by both of the Deputies they had shot their assailant (Mr. Al-Amin had not been shot); repeated testimony by the surviving Deputy that the assailant had "grey eyes" (Mr. Al-Amin has brown eyes); the circumstances in which the Deputies had identified Mr. Al-Amin; and a 911 call on the night of the crime stating a man "'involved in the shooting of the deputies' was bleeding in the West End area and begging for a ride – a fact inconsistent with the reality that Mr. Al-Amin was not shot." *Id.* at 62a. According to the district court, "[i]f this were the only evidence in the record, the Court might harbor 'grave doubt about whether the trial errors had a substantial and injurious effect . . . in determining the jury's verdict.'" *Id.*

But the district court concluded it "must deny Mr. Al-Amin relief because there is 'weighty' evidence supporting his conviction." App. 61a. The court focused on evidence found in White Hall, including Mr. Al-Amin's car and the weapons found after Mr. Al-Amin's arrest. *Id.* at 62a-63a. The court recognized Mr. Al-Amin's theory that "the car had bullet holes in it only because it was parked near the scene of the shooting – not because he was involved in the crime." *Id.* at 65a n.11. But the court found Mr. Al-Amin "simply has no reasonable explanation for how this evidence got to White Hall," discounting his theory that FBI Agent Campbell had planted the guns in Alabama as "not credible." *Id.* at 63a.

The district court also rejected Mr. Al-Amin's ineffective assistance of counsel claim regarding the failure adequately to investigate Mr. Santos (who had repeatedly confessed to committing the crimes). App. 71a-72a. But the court granted a certificate of appeal as to all claims, because "reasonable jurists could disagree" about the court's "'actual prejudice' holding" under *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). *Id.* at 73a.

8. Mr. Al-Amin's federal habeas appeal challenged the district court's actual prejudice determination under *Brecht* as well as the lower court's refusal to find the Prosecution's misconduct satisfied *Brecht*'s "unusual case" exception.

As with the district court, the court of appeals discussed the significant evidence supporting acquittal, describing Mr. Al-Amin as presenting a "substantial defense." App. 22a. The Eleventh Circuit discussed the eyewitness testimony stating that Mr. Al-Amin was not the shooter, the Deputies' testimony that they were "confident that they had shot their assailant," the "blood trail leading away from the scene" (despite Mr. Al-Amin being uninjured), and the challenges to Deputy English's identification of Mr. Al-Amin, including "that Deputy English had consistently said the shooter had grey eyes, while Al-Amin has dark brown eyes." *Id.* The court of appeals also noted Mr. Al-Amin's theory Agent Campbell had planted the guns and the lack of DNA or fingerprint evidence connecting Mr. Al-Amin to the guns. *Id.*

The Eleventh Circuit agreed with every other reviewing court that Mr. Al-Amin's Fifth Amendment rights had been violated. App. 30a. The closing argument

"highlighted the *defendant's* failure – not the defense's failure – to explain inculpatory evidence." *Id*. The court of appeals concluded this constitutional error was "substantial." *Id.* at 32a. And it agreed with the district court "that the trial court's curative instruction was largely ineffective" and "did little to cure the error." *Id.*

But the Eleventh Circuit ruled that actual prejudice under *Brecht* had not been shown. App. 33a-35a. Examining "whether the error contributed to the verdict," the court of appeals characterized Mr. Al-Amin's defense as turning on the "credibility of Deputy English's identification of Al-Amin as the assailant" and the "reliability of the physical evidence found in White Hall." *Id.* at 33a-34a. The court found it "unlikely" the jury's determination of these issues had been "substantially affected" by the Prosecution's improper mock cross-examination of Mr. Al-Amin in closing argument. *Id.* at 34a.

9. As noted above, during the pendency of Mr. Al-Amin's federal habeas action in the district court, the FBI produced the two documents giving rise to his current *Brady* claims. *See* 2HT 6-7 & Exs. 1-2. First, the FBI produced the BOLO bulletin issued to "ALL LAW ENFORCEMENT AGENCIES" on March 17, 2000 (the day after the crimes), which described the height and weight of the perpetrator as "5' 6"-5' 8", 150-160 LBS" (Mr. Al-Amin stands 6' 5" and weighs 187 pounds). *Id.* Ex. 1. Second, the FBI produced handwritten notes of an interview with Sergeant Paul Rogers, the member of the Alabama dog tracking team who found the .9 mm pistol allegedly used in the crimes, which states that Sergeant Rogers felt the pistol "was placed" in the location where he found the pistol. *Id.* Ex. 2.

Mr. Al-Amin amended his federal habeas petition to add a *Brady* claim based on these documents, but the federal habeas court ruled the *Brady* claim had not been exhausted. Mr. Al-Amin then withdrew his *Brady* claim from the federal action and filed a state successive habeas action.

On March 1, 2022, the trial court held a final hearing in the state successive habeas action. On March 18, 2022, the trial court signed and entered an Order prepared by counsel for the State denying Mr. Al-Amin's successive state habeas petition. On February 21, 2023, the Georgia Supreme Court denied Mr. Al-Amin's application for a certificate to appeal the Superior Court's decision.

REASONS FOR GRANTING THE PETITION

This Court has held that *Brady* imposes on a prosecutor "'a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Following this reasoning, numerous lower courts reviewing prosecutions that involved agents of multiple governments have utilized a "case-by-case analysis of the extent of interaction and cooperation between the two governments" to determine whether *Brady* obligations extend to exculpatory information learned by officials of the separate governmental entity assisting in the investigation and prosecution. *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (finding "extensive cooperation between the investigative agencies" required knowledge of separate government's agents to be "imputed" to prosecutor under *Brady*).

The Court should clarify that *Brady* applies where, as here, the Prosecution and FBI worked cooperatively in both the investigation and prosecution of the underlying criminal trial. The approach taken by the state courts here—to immunize the Prosecution from a failure to disclose favorable evidence held by federal agents acting in concert with state investigators—invites prosecutorial misconduct by allowing prosecutors to avoid providing exculpatory evidence to the defense simply because that evidence is in the custody of the prosecution's investigative and prosecutorial partner.

The case also presents important questions regarding *Brady*'s materiality requirement. *See Wearry v. Cain*, 577 U.S. 385, 392 (2016) (*per curiam*) (holding favorable evidence qualifies as material if there is "any reasonable likelihood" it could have "affected the judgment of the jury") (internal quotation marks omitted). The two wrongfully withheld pieces of evidence – the BOLO bulletin issued by law enforcement that provided a fundamentally different description of the perpetrator, and the handwritten note indicating that the Alabama officer who found the pistol felt "it was placed" – strongly weigh in favor of Mr. Al-Amin's defense and would have been material to the jury at the trial. At a minimum, the new evidence suffices to "'undermine confidence' in the verdict." *Id.* (quoting *Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (quoting *Kyles*, 514 U.S. at 434 (internal quotation marks omitted)).

Accordingly, Mr. Al-Amin's petition should be granted.

I. The Georgia state courts erred in holding that the State did not possess and suppress exculpatory evidence.

The Prosecution should have produced both the BOLO bulletin and the "it was placed" note to fulfill its *Brady* obligations.

At the final hearing, Mr. Al-Amin's lead trial counsel, John R. Martin, testified the State never produced the BOLO bulletin and the "it was placed note" to Mr. Al-Amin. 2HT 30, 39. The State did not present evidence contradicting Mr. Martin's testimony and has never contended these specific documents were produced to Mr. Al-Amin before or during his underlying criminal trial.

The BOLO indicates the Atlanta Police Department ("APD") issued the bulletin. The top lines of the BOLO identify "GAAPD0000" (presumably referring to APD) as the source of the bulletin; a line at the bottom of the BOLO states "AUTH:ATLANTA POLICE DEPARTMENT"; and the text of the BOLO requests any law enforcement agencies who come in contact with the suspect to "NOTIFY THE ATLANTA POLICE DEPARTMENT." 2HT, Ex. 2. While the State did not dispute that it never produced the BOLO bulletin to Mr. Al-Amin (despite the BOLO bulletin having been issued by the Atlanta Police Department), it contended, and the state successive habeas court agreed, that certain radio traffic produced during the underlying trial provided the "information contained in the BOLO." App. 9a. As addressed below, this finding overstates the significance of the handful of lines of traffic flagged by the State and understates the highly persuasive value of an all-points bulletin issued by law enforcement that day

after the crimes that described the perpetrator as having physical characteristics completely different from Mr. Al-Amin's distinctive body type. *See infra* § II.B.

With respect to the "it was placed" note, the trial court stated that it credited the testimony of Anna Green Cross, a member of the Prosecution's team, that "these handwritten notes were never provided to nor in the possession of the State of Georgia." App. 10a. Relying upon this testimony, the trial court ruled that Mr. Al-Amin "has not shown, and there is no evidence demonstrating, that the FBI agents and United States Marshals who assisted in the apprehension of Petitioner in the State of Alabama were under the direction or supervision of the Fulton District Attorney so that these notes which have been in the federal government's possession would or should be imputed to the State." *Id.*

The handwritten note was prepared as part of the FBI interview of Sergeant Paul Rogers of the Kilby Correctional Facility in Alabama. Sergeant Rogers discovered the 9 mm pistol allegedly used in the crimes shortly after Mr. Al-Amin's arrest in Alabama. Before trial, the prosecution produced to Mr. Al-Amin the FBI's 302 report of the interview with Sergeant Rogers and Mr. Al-Amin's attorneys used that document to cross-examine Sergeant Rogers about his discovery of the pistol.[2] Given that the prosecution acknowledged its *Brady* obligations

2. *See* 2HT 39-40 (testimony by John R. Martin, Mr. Al-Amin's lead trial counsel, that the FBI's 302 report was used to cross-examine Sergeant Rogers) & Ex. 3; Tr. 2215. That the notes had been used to prepare the FBI 302 report produced and relied upon during the trial underscores the close relationship of the FBI to Mr. Al-Amin's criminal trial.

encompassed the FBI's summary of its interview with Sergeant Rogers, it also should have produced the handwritten notes regarding that same interview.

Moreover, as stated by the underlying trial court, "[t]he Fulton County District Attorney, as well as a state and local task force, worked closely with the FBI in the investigation and prosecution of this case, and information was shared."[3] FBI Special Agent Campbell—part of an Atlanta-based FBI search team assigned to assist local law enforcement in searching for and arresting Mr. Al-Amin—and FBI Agent Harris testified extensively on behalf of the prosecution.[4] At least six other FBI officers also testified in support of the prosecution.[5] Given the close interaction and cooperation between state and federal authorities, the State's *Brady* obligations extended to information in the possession of the FBI to the same extent as any other member of the State's investigative or prosecutorial team. *See, e.g.*, *Strickler*, 527 U.S. at 280 (holding *Brady* imposes on prosecutor "'a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police'" (quoting *Kyles*, 514 U.S. at 437)).

Before the Georgia courts, Mr. Al-Amin emphasized Fifth and Eleventh Circuit Court of Appeals decisions holding that knowledge of information in the possession of federal agents could be imputed to the state where the

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3. Dkt. 80, at 12-13.

4. Tr. 1690-1782, 2611-62 (Agent Campbell); *id.* at 2139-99 (Agent Harris).

5. *Id.* at 2224, 2325, 2338, 2363, 2380, 2417.

evidence showed a high "level of cooperation between the state prosecutors and the F.B.I." *Hays v. Alabama*, 85 F.3d 1492, 1497 & n.2 (11th Cir. 1996) (citing *Antone*, 603 F.2d at 570); *United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992) (noting government's concession "that the report was in the possession of an FBI agent is of no consequence," given that the "'prosecution team'" includes "both investigative and prosecutorial personnel"). Numerous other federal and state courts similarly have agreed that *Brady*'s duty of disclosure extends to favorable information known to other governments that have a "close working relationship" with the prosecuting government in connection with the investigation or prosecution of the underlying criminal trial. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992); *see also, e.g.*, *Stacy v. Alaska*, 500 P.3d 1023, 1034-35, 1039 & nn.75-76 (Alaska Ct. App. 2021) (collecting authorities holding that *Brady* extends to "officers from cross-jurisdictional agencies who have a 'close working relationship' with the prosecution" and "other governmental offices and actors who are 'closely aligned with the prosecution' or acting on the government's behalf"); *United States v. Bases*, 549 F. Supp. 3d 822, 825, 828-29 (N.D. Ill. 2021) (explaining that prosecutor's "duty to review documents in the possession, custody, or control of another agency arises where the Government conducts a 'joint investigation' with another agency" and finding *Brady* applicable to information known to separate agency in light of "extensive cooperation, joint participation, and sharing of resources" between agencies) (cleaned up) (citation omitted).

The Georgia courts refused to extend the Prosecution's *Brady* obligations to the FBI because the FBI agents were not "under the direction and supervision of the Fulton

District Attorney." App. 10a (citing *Zant v. Moon*, 440 S.E.2d 657 (Ga. 1994), *Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002), and *United States v. Meros*, 866 F.2d 1304 (11th Cir. 1989)). But the cited cases still applied the case-by-case "cooperation" analysis under which "possession" for purposes of *Brady* should include materials in the FBI's possession that pertain to the FBI's investigation of Mr. Al-Amin in this case. *See Zant*, 440 S.E.2d at 664 (explaining that scope of "prosecution team" turns on "extent of interaction, cooperation, and dependence of the agents working on the case" but finding no evidence other officials "engaged in a joint investigation" or shared "resources or labor"); *Moon*, 285 F.3d at 1309-10 (agreeing *Brady* would extend to separate governments that "'pooled their investigative energies'" including forming "a joint investigative task force composed of FBI agents and state investigators") (quoting *Antone*, 603 F.2d at 570); *Meros*, 866 F.2d at 1308-09 (noting petitioner did not show extensive interaction and cooperation among different law enforcement officials in the investigation or prosecution of the underlying trial). These cases thus support, rather than undermine, applying *Brady* to the favorable information known to the FBI here.

This Court should adopt the test announced and applied in all these cases and find that the FBI was part of the Prosecution in this case. The FBI extensively interacted and cooperated with Georgia officials in both the search for and arrest of Mr. Al-Amin, as well as the investigation and prosecution of him. Following Mr. Al-Amin's arrest but before his trial, the FBI interviewed the Alabama officer who located the pistol allegedly used in the crimes and made a handwritten note that the Alabama officer felt the pistol "was placed," but then

produced a 302 report that omitted this fact without also producing the "it was placed" note. Because the FBI directly participated in the Alabama search and arrest of Mr. Al-Amin, because the FBI handled the follow-up investigation with the Alabama officer who located the pistol, and because eight different FBI agents testified in support of the Prosecution (including presenting testimony regarding the arrest of Mr. Al-Amin and the collection of evidence found in Whitehall), the trial court erred in holding *Brady* did not extend to favorable evidence in the FBI's possession.

II. Had the suppressed evidence been disclosed to the defense, a reasonable probability exists that the outcome of Mr. Al-Amin's underlying trial would have been different.

To show materiality, Mr. Al-Amin must show at least a "'reasonable likelihood'" that the BOLO bulletin and the "it was placed" note "could have 'affected the judgment of the jury.'" *Wearry*, 136 S. Ct. at 1006 (citation omitted). Mr. Al-Amin "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* (citation omitted); *Kyles*, 514 U.S. at 434 (describing materiality test as turning on whether suppressed evidence "'undermines confidence in the outcome of the trial'") (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

Courts must measure materiality "in terms of suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436-37. Here, every reviewing

court has found the prosecution violated Mr. Al-Amin's Fifth Amendment right not to testify during its closing argument, and both the federal district court and the Eleventh Circuit examined the entire trial court record in evaluating whether to grant habeas relief based on the prosecution's Fifth Amendment violations under the rigorous federal collateral relief standard of *Brecht*, 507 U.S. at 629. These acknowledged constitutional violations, as well as the federal courts' detailed review of the trial record to evaluate the strength of the evidence supporting Mr. Al-Amin's conviction, provide necessary context as to the "totality of the circumstances" of this case to evaluate *Brady* materiality.

While undertaken as part of the *Brecht* analysis of the Fifth Amendment violation, the federal habeas court's careful review of the record illustrates the materiality of the *Brady* documents at issue in this case. The BOLO bulletin would have further tilted the crime scene evidence towards Mr. Al-Amin's innocence, and the "it was placed" note would have materially supported Mr. Al-Amin's defense that the weapons had been planted in Alabama by FBI Agent Campbell.

A. The federal habeas district court conducted a full evidentiary review that illustrates *Brady* materiality here.

In Mr. Al-Amin's federal habeas case, the district court found that the Georgia Supreme Court ruled "contrary to the clearly established law found in *Chapman*" in deeming the prosecution's violation of Mr. Al-Amin's right not to testify to be harmless error. *Al-Amin v. Shartle*, No. 1:12-CV-1688, 2017 WL 6596602, at *8 (Sept. 29, 2017),

adopting 2016 WL 10718765, at *4 (explaining the Georgia Supreme Court improperly relied upon "sufficiency-of-the-evidence" standard of *Jackson*, 443 U.S. 307, rather than examining the "whole record" to evaluate harmless error under *Chapman*) (citing *Delaware v. Arsdall*, 475 U.S. 673, 681 (1986)). But the district court did not grant relief, finding Mr. Al-Amin had not shown a "substantial and injurious effect or influence" on the verdict "resulting from the State's violation of Mr. Al-Amin's Fifth and Fourteenth Amendment rights," as required under *Brecht*. *Id.*

In conducting its review of the entire trial record to conduct this analysis, the district court divided the State's evidence against Mr. Al-Amin into two categories: evidence from the scene of the shooting in Atlanta and evidence from the area where Mr. Al-Amin had been arrested in Alabama.

Regarding the Atlanta evidence, the district court concluded "the evidence at the actual crime scene might be a mixed bag," describing the "mishmash of inconsistencies from the scene of the shooting":

> Eyewitnesses testified that Mr. Al-Amin was not responsible for the shooting. (Doc. 32-3 at 88-90.) The deputies and the shooter exchanged fire at close range. Both deputies were convinced that each had shot Mr. Al-Amin, and the police obtained a warrant based on blood evidence at the scene. But that blood evidence did not match Al-Amin, and he was not wounded when he was apprehended. Deputy English swore that the shooter had grey eyes, when Mr. Al-Amin has brown eyes. And both deputies were severely wounded and under duress at the time they

> identified Mr. Al-Amin. Deputy English had been shot and pepper sprayed and was under the influence of morphine when he picked Mr. Al-Amin out of a photo array. And the shooter had fatally wounded Deputy Kinchen. In addition, a 911 operator received a call that a man "involved in the shooting of the deputies" was bleeding in the West End area and begging for a ride—a fact inconsistent with the reality that Mr. Al-Amin was not shot. (Doc. 31-8 at 48-49; Doc. 32-3 at 43.)

Id. at *10. The federal court stated: "If this were the only evidence in the record, the Court might harbor 'grave doubt about whether [the] trial error[s] of federal law had a substantial and injurious effect . . . in determining the jury's verdict.'" *Id.* (citation omitted).

The district court, however, concluded the Alabama evidence "strongly ties Mr. Al-Amin to the crime," noting that the weapons used in the shooting had been found "along the path" he traveled before his arrest. *Id.*; *see also id.* at *11.

B. The BOLO bulletin would have tilted the balance of the crime scene evidence towards Mr. Al-Amin's innocence.

The state successive habeas court determined that even though the prosecution failed to disclose the BOLO bulletin, "the information contained in the BOLO (Exhibit 1) about the height of the person to look out for on foot (5'6" to 5'8") was provided to the defense prior to trial as part of the State's discovery." App. 9a. The trial court credited the testimony of Anna Green Cross, a member of

the Prosecution team, who testified that "this information was provided to the defense via two CAD reports as well as an audio version of the radio traffic that included this dispatch." *Id.*

At the hearing, Ms. Cross testified the Prosecution produced a transcription and an audio recording of police radio traffic on the night of the shooting that included the following statements: "B/M 5'6"-5'8" BLK COAT"; "BLK COAT, 5'6"; and "PERP ON FOOT." 2HT 62-61 & Exs. A & B. These few lines of radio traffic from the night of the shooting differ materially from the BOLO bulletin, in which law enforcement identifies the *suspected shooter*—one day after the shooting—as being "5'6"-5'8", 150-160 lbs." 2HT, Ex. 1. The BOLO bulletin's description of the suspected shooter does not match Mr. Al-Amin, who stands 6' 5" and weighed 187 pounds. Dkt. 53-2, at 2. By identifying the suspected shooter as having average height and build, the BOLO materially would have impacted Mr. Al-Amin's primary defense of mistaken identity.

Moreover, the BOLO's description of the suspected shooter matches the trial testimony of Imhotep Shaka, who described the shooter as "average height, average build." Tr. 3571-73. Mr. Shaka testified he was "absolutely positive" that the shooter was not Mr. Al-Amin because "Jamil [Al-Amin] has a distinctive—Jamil is tall." *Id.* at 3574-75. Trial witness Fareed Jihad likewise testified that he saw an individual leaving the scene of the shooting who was "about 5' 8", 5' 9", somewhere in that area." *Id.* at 3522.[6]

6. Neither Mr. Shaka nor Mr. Jihad had been interviewed before the BOLO issued and thus could not have been the source of the shooter's description. According to Mr. Shaka, none of the police on the scene after the shooting asked him what he heard or saw; an

James Santos a/k/a Otis Jackson, who repeatedly confessed to committing the crimes (including confessions made before the trial began), matches the description in the BOLO. According to records of the Nevada Department of Correction, when Mr. Santos returned to their custody in July 2000 (less than four months after the March 2000 shooting), he measured 5' 8" and weighed 165 pounds. Dkt. 1-4, at 41.

The trial court ruled that Mr. Al-Amin had not demonstrated materiality of the BOLO bulletin because the record contains other information that the shooter matched the description of the individual identified in the BOLO bulletin:

- "Detective Zimrick testified about other leads police received, which included an incident at a nearby retirement home where the surveillance camera showed an individual who was between 5'5 and 5'7 trying to get in the back doors." App. 9a (citation omitted).

- Mr. Jihad "heard the shooting and said that he saw a person who was 'about 5'8, 5'9, somewhere in that area,' and 'no more than 6' feet coming up the steeet after the shootings and get in a white van."

Id. (also noting BOLO included Mr. Al-Amin's name and vehicle information, both of which were on the warrant the Deputy Sheriffs attempted to serve).

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investigator for Mr. Al-Amin only interviewed him about "a month later." Tr. 3578, 3604. Mr. Jihad testified that the police did not try to speak with him the night of the shooting, other than telling him to "get off the street." *Id.* at 3530.

The state habeas court turned the materiality analysis on its head. Having a contemporaneous police document confirming the description of the shooter provided by defense witnesses—indicating a consensus as to the description of the suspected shooter—would have materially impacted the jury's view of the Prosecution's crime scene evidence purportedly showing Mr. Al-Amin shot the Deputy Sheriffs. But unlike the testimony of Messrs. Shaka and Jihad—long-time residents of the West End neighborhood who knew Mr. Al-Amin—the BOLO had been issued by law enforcement, significantly increasing its persuasive impact on the jury. The BOLO bulletin shows that, the day after the crimes, law enforcement officials had been told to be on the lookout for someone other than Mr. Al-Amin.

The BOLO bulletin's description of an individual lacking Mr. Al-Amin's distinctive tall and slender build also would have been extremely useful in cross-examining Deputy Sheriff English, the only trial witness who identified Mr. Al-Amin as the shooter. If APD (or the FBI) had disclosed the BOLO before the trial, the prosecution would have been required to explain to the jury why it (a) initially believed the shooter to be "5' 6"-5' 8", 150-160 LBS" (consistent with Mr. Shaka's description of the shooter and Mr. Jihad's description of the man leaving the scene, as well as Mr. Santos's build) but (b) a day later, identified the sole suspect as "6' 5" TALL' 187 LBS." (*i.e.*, the height and weight of Mr. Al-Amin as stated in the underlying warrant).[7]

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7. *See Al-Amin v. State*, Civ. A. No. HC00999, Mem. in Supp. of Pet. for Writ of Habeas Corpus, Ex. 7 (Ga. Super. Ct., Fulton Cty. filed Sept. 21, 2016) (all-points bulletin issued on March 18, 2000).

This drastic change to the initial physical description of the shooter to match Mr. Al-Amin's distinctive build—adding almost a foot to his height and 30-40 pounds of weight—would have undermined the credibility of the investigation and strengthened the contention the authorities improperly ignored all other leads in electing to focus entirely on Mr. Al-Amin. *See, e.g.*, *Kyles*, 514 U.S. at 441-42 (finding *Brady* materiality established where, among other things, a contemporaneous statement by a key witness identified the assailant as having average height and built, in contrast to "6-feet tall and thin" defendant). Thus, the Georgia state courts erred in ruling the BOLO bulletin did not constitute material exculpatory information under *Brady*.

C. The "it was placed" note would have materially strengthened Mr. Al-Amin's defense relative to the Alabama evidence.

In the underlying trial, Mr. Al-Amin's defense attorneys emphasized the lack of corroborating evidence, such as fingerprints, linking Mr. Al-Amin to the guns. Tr. 1273-1274, 2844. Mr. Al-Amin's defense attorneys also argued that the weapons in Alabama had been planted. *Al-Amin*, 597 S.E.2d at 345. As described by the Eleventh Circuit, this defense theory contended "law enforcement had targeted and framed Al-Amin for the murder of Deputy Kinchen," specifically arguing "that the FBI had planted the murder weapons and other incriminating evidence at the scene at White Hall to connect Al-Amin to the murder." *Al-Amin v. Warden*, 932 F.3d at 1301. Mr. Al-Amin presented evidence that FBI Special Agent Ron Campbell "fell behind" and became separated from the rest of the members of the search team in the Alabama

woods, in locations where the weapons would later be found by other members of the search party. *See Al-Amin*, 597 S.E.2d at 345 (describing defense theory); Tr. 2628 (testimony Campbell "fell behind" other agents and could not be observed).

It is undisputed that, at the time of his arrest, FBI Agent Campbell kicked and spat upon Mr. Al-Amin.[8] It is also undisputed that, when arrested, Mr. Al-Amin did not have any guns in his possession, nor did he have wounds from having being shot by the Deputy Sheriffs.[9] In fact, the FBI had a medic on hand to document Mr. Al-Amin's anticipated injuries, only to find he had none.[10]

The opening statement by John Martin (Mr. Al-Amin's lead trial attorney) specifically discussed the unusual position of the pistol in the photograph taken by the FBI, describing it as appearing to have been "placed": "Look at the picture of it as you hear the evidence. Look at how it's wrapped up as *if it has almost been placed* there." Tr. 248 (emphasis added). Evidence the (non-FBI) Alabama officer who found the pistol likewise felt the .9 mm had been "placed" materially would have supported Mr. Al-Amin's defense theory that the guns in Alabama had been planted.

During the trial, Mr. Al-Amin's defense attorneys caught Agent Campbell lying about being alone when—

8. Tr. 1718-19; *Al-Amin*, 597 S.E.2d at 344.

9. Tr. 1900, 1927-28.

10. *Id.* at 511, 513-14, 830, 911, 1060, 1068-76, 1877, 1923, 1934-35, 2979-80.

immediately after he heard that Mr. Al-Amin had been arrested—he crossed the barbed wire fence where Sergeant Rogers later found the pistol. In direct examination, Agent Campbell testified that he needed assistance from fellow officers to cross the fence. Tr. 1717-18. But on cross examination, Agent Campbell admitted: "I was alone when I went over the fence." *Id.* at 1754. Thus, Mr. Campbell—whom Mr. Al-Amin sought to cross-examine about dropping a fingerprint-less gun next to an unarmed African American he had shot in the back of the head in 1995[11]—had the opportunity to place the pistol where Mr. Al-Amin crossed the barbed wire fence.

Shortly after Mr. Al-Amin and Agent Campbell crossed the fence, a group of officers retraced the path Mr. Al-Amin had taken before his arrest. Dkt. 117-2, at 2. This group included three FBI Agents and Alabama Sergeant Paul Rogers. *Id.* After crossing the fence, Sergeant Rogers notified the FBI Agents that he had located a .9 mm Browning pistol "in a black holster, wrapped with a black belt," with additional ammunition "located next" to the pistol. *Id.*

The FBI's September 2015 FOIA production includes handwritten notes of an interview with Sergeant Rogers dated September 6, 2000. At the bottom of the second page of the notes the following statements by Sergeant Rogers had been placed in brackets (the first word of the second line of this note may be "feel" rather than "felt"):

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11. The underlying trial court prevented Mr. Al-Amin from cross-examining FBI Agent Campbell about a 1995 incident in Philadelphia where Campbell allegedly planted a fingerprint-less gun on a Muslim man he had just shot. *See Al-Amin v. Shartle*, 2017 WL 6596602, at *12-13 (rejecting habeas claim based on trial court's limitation of Mr. Al-Amin's cross-examination of Agent Campbell).

> [Sgt. [redacted] found 9mm
> felt ***it was placed***.]

2 HT, Ex. 2. Although Sergeant Rogers testified at trial, the handwritten notes regarding the September 2000 interview had not been produced to Mr. Al-Amin, and thus the defense did not cross Sergeant Rogers about his statement the pistol had been "placed." *See* Tr. 2210-2222. This note likely would have had a substantial impact on the credibility of the defense's "planted evidence" theory—far more than an advocacy-drive description of the placement of the gun by Mr. Al-Amin's attorney—because the (non-FBI) law enforcement official who found the handgun perceived that "it was placed."

The habeas court described the phrase "it was placed" as "ambiguous," noting that "nothing on the face of the notes shows who they were written by, but only lists a date (9/6/00) and the notes are not signed nor attested to." App. 10a. But these handwritten notes directly link up to the FBI's 302 report of the interview with Sergeant Rogers produced to the defense, including that the "investigation" was conducted on September 6, 2000. *See* 2HT, Ex. 3. Had the prosecution disclosed these notes, Mr. Al-Amin's trial counsel could have cross-examined Sergeant Rogers about whether he felt the pistol had been "placed" and explored his reasons for so characterizing the placement of the gun.[12]

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12. The trial court also noted that Sergeant Rogers had been "extensively cross-examined by [Mr. Al-Amin's] defense counsel on the details" of "where he found the gun and who saw it first," quoting Sergeant Rogers's testimony that he had no "personal knowledge as to when and who placed those items there." App. 11a. But this testimony relates to the FBI's subsequent discovery of a rifle, not

By failing to disclose the "it was placed" note, the prosecution deprived Mr. Al-Amin's trial counsel of the opportunity to establish that the (non-FBI) Alabama officer who actually found the pistol believed the .9 mm had been "placed." This would have materially supported Mr. Al-Amin's defense theory that FBI Agent Campbell had planted the guns in Alabama. *See Kyles*, 514 U.S. at 447-49 (addressing *Brady* materiality of evidence indicating key witness, rather than defendant, may have planted key incriminating evidence supporting defendant's arrest).

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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the pistol found by Sergeant Rogers immediately after the arrest. Tr. 2222.

APPENDIX

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APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA, DATED FEBRUARY 21, 2023

SUPREME COURT OF GEORGIA

Case No. S22H0932

February 21, 2023

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

JAMIL ABDULLAH AL-AMIN

v.

THE STATE.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur, except LaGrua and Pinson, JJ., disqualified.

Trial Court Case No. HC00999

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Appendix A

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ , Clerk

APPENDIX B — FINAL ORDER OF THE SUPERIOR COURT OF FULTON COUNTY IN THE STATE OF GEORGIA, DATED MARCH 18, 2022

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION NO. HC00999

JAMIL ABDULLAH AL-AMIN,

Petitioner,

v.

STATE OF GEORGIA, WARDEN, USP TUCSON, ARIZONA, TIMOTHY WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents.

HABEAS CORPUS

FINAL ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This case came before the Court for a hearing on March 1, 2022, in this, Petitioner Al-Amin's second, habeas corpus case filed in the state courts, challenging the validity of his Fulton County convictions for malice murder and other felonies, arising from a jury trial in 2002 and affirmed on appeal in 2004. See *Al-Amin v. State*, 278 Ga. 74, *cert. denied*, 543 U.S. 992 (2004).

Appendix B

The parties do not dispute that Petitioner is currently incarcerated in a federal prison, pursuant to an agreement between the Georgia Department of Corrections ("DOC"") and federal authorities, for the service of his Fulton County convictions for malice murder (count 1), for which he was sentenced to life without parole; obstruction of a law enforcement officer (count 6), for which he was sentenced to five years, to run concurrently with the sentence for count 9; aggravated battery on a peace officer (count 9), for which he was sentenced to twenty years, to run consecutively to count 1; and five years each for possession of a firearm during the commission of a felony (counts 12 and 13), to run consecutively to each other and the other sentences. *See Al-Amin v. State*, 278 Ga. at 74 n.1.

PROCEDURAL HISTORY

Petitioner previously challenged the validity of these convictions in *Al-Amin v. Smith*, No. 2005-HC-66 (Tattnall Super. Ct. July 27, 2011), in which habeas corpus relief was denied. The Georgia Supreme Court denied his application for a certificate of probable cause to appeal that ruling in *Al-Amin v. Smith*, No. S12H0007 (Ga. May 7, 2012).

Petitioner then challenged the validity of these convictions in a federal habeas corpus case originally filed in the United States District Court for the District of Colorado, as he had been transferred to a federal facility, the Administrative Maximum Security Prison ("Supermax") in Florence, Colorado, to continue serving his Fulton County sentences pursuant to an agreement between DOC and federal authorities. The case was transferred to the Northern District of Georgia for

disposition and the district court ultimately denied relief in *Al-Amin v. Shartle, Warden, et al.*, No. 1:12-CV-1688-AT (N.D. Ga. Sep. 29, 2017). The Eleventh Circuit affirmed the district court's ruling in *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291 (11th Cir. 2019), *cert. denied sub nom., Al-Amin v. Ward*, ___ U.S. ___, 140 S.Ct. 2640 (2020).

While his federal habeas case was pending, Petitioner filed this, his second Petition for Writ of Habeas Corpus, challenging his convictions in this Court on September 21, 2016, and raised one ground for relief. He amended the Petition in 2020 to add a second ground. In the interim, the then-DOC Commissioner (Homer Bryson) filed a motion to intervene as a party respondent, an answer, and a motion to dismiss the petition as untimely under the four-year limitations provision of O.C.G.A. § 9-14-42(c)[1]

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1. O.C.G.A. § 9-14-42(c), enacted by Ga. L. 2004, p. 917, and effective on July 1, 2004, provides in pertinent part:

> "Any action brought pursuant to this article shall be filed within . . . four years in the case of a felony . . . from:
>
> (1) The judgment of conviction becoming final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until . . . July 1, 2008, in the case of a felony to bring an action pursuant to this Code section;
>
> (2) The date on which an impediment to filing a petition which was created by state action in

and as successive under O.C.G.A. § 9-14-51[2]. The current DOC Commissioner, Timothy Ward, filed a supplemental answer to the amended petition.

The Court conducted a hearing on March 1, 2022, where the parties presented evidence, including the records from Petitioner's prior habeas corpus case which also has the records from the criminal trial and direct appeal,[3] and argument in support of their positions.

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violation of the Constitution or laws of the United States or of this case is removed, if the petitioner was prevented from filing such state action;

(3) The date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence."

2. O.C.G.A. § 9-14-51 provides, "All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

3. Citations to the 48 volumes of transcript in Petitioner's original habeas case in Tattnall County are "HT" followed by the volume number and page number(s) in the volume; parallel cites

Appendix B

THE GROUNDS FOR RELIEF

A. Ground 1

In ground 1 of the Amended Petition, Petitioner argues that his right to due process was violated when the State allegedly did not provide "all exculpatory evidence to which he was entitled before or during trial, as required by *Brady v. Maryland*, 373 U.S. 83 (1963)," in that he was not provided two documents, which he states he obtained in September 2015 via Freedom of Information Act requests, which are: (a) a BOLO issued on March 17, 2000 which purports to describe the perpetrator as being 5'6" to 5'8" and weighing 150-160 pounds; and (b) handwritten notes purportedly from an interview with Sergeant Paul Rogers of the Kilby Dog Tracking Team, who found the gun used in the shootings in the Alabama woods where Petitioner was apprehended. (Amended Petition, p. 5, Exhibits 1, 2). Pretermitting the threshold questions of whether this ground is untimely and/or successive, as it was filed within four years of when the FOIA response was provided, the Court finds that this ground lacks merit.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

The evidence is material only if there is a

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to the trial transcript and its page number(s) are "TT" and added where applicable.

> reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 373 U.S. 667, 682 (1985) (citation omitted). *See also Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

In order to prevail on a *Brady* claim, a defendant must show: "(1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial court have been different." *Schofield v. Palmer*, 279 Ga. 848, 852, (2005). *See also Banks v. Dretke,* 540 U.S. 668, 691 (2004); *Mize v. State*, 269 Ga. 646, 648 (1998); *Burgeson v. State*, 267 Ga. 102, 104 (1996).

> *Brady* is concerned only with cases in which the government possesses information which the defendant does not. . . . *[T]here is no Brady violation if the defendant knew* or should have known *the essential facts permitting him to take advantage of the information in question*, or if the information was available to him from another source.

Cain v. State, 306 Ga. 434, 439-40 (2019) (quoting *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)) (emphasis added).

The Court finds that the information contained in the BOLO (Exhibit 1) about the height of the person to look out for on foot (5'6" to 5"8") was provided to the defense prior to trial as part of the State's discovery. On this point, the Court credits the testimony of Anna Green Cross, who was one of the prosecuting attorneys for the State in the criminal case, that this information was provided to the defense via two CAD reports as well as an audio version of the radio traffic that included this dispatch.

Furthermore, the Court finds that Petitioner has not demonstrated that this BOLO is material. Detective Zimrick testified about other leads police received, which included an incident at a nearby retirement home where the surveillance camera showed an individual who was between 5'5 and 5'7 trying to get in the back doors. (HT Vol, 37, pp. 14023-24/TT 1188-89). Petitioner presented testimony from Fareed Jihad, who heard the shooting and said that he saw a person who was "about 5'8, 5'9, somewhere in that area," and "no more than 6" feet coming up the street after the shootings and get in a white van. (HT Vol. 40, pp. 16354-60/TT pp. 3516-22). The BOLO also specifically identified Petitioner by name and stated he could possibly be "driving a dark color 1978 Mercedes Benz Ga. Tag No. 246MBG four door, tinted windows." (Exhibit 1). The latter matched the registration information for Petitioner's 1978 Mercedes Benz four door, tag number 246 MBG. (HT Vol. 39, p. 15600/TT p. 2762).

As to the handwritten notes (Exhibit 2), Petitioner argues that the notes support his trial theory that an FBI agent planted the murder weapons in Alabama. However, nothing on the face of the notes shows who they were written by, but only lists a date (9/6/00) and the notes are not signed nor attested to. The notes were provided to Petitioner per his FOIA request, which indicates they have been in the possession of the federal government. The phrase "it was placed" is ambiguous, is not referenced elsewhere in these notes, and Petitioner presented no sworn testimony from Sergeant Rogers to this Court to explain what this phrase meant. In addition, the Court credits the testimony of Ms. Cross that these handwritten notes were never provided to nor in the possession of the State of Georgia.

"*Brady* requires information to be revealed only when it is 'possessed by the prosecutor or anyone over whom the prosecutor has authority.'" *Moon*, 264 Ga. at 100 (quoting *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989)). The question of whether a person is on the prosecution team is to be determined on a case-by-case basis. *See Moon*, 264 Ga. at 100. *See also Moon v. Head*, 285 F.3d 1301, 1309-10 (11th Cir. 2002) (there is "no per se rule to determine whether information possessed by one government entity should be imputed to another"). Here, Petitioner has not shown, and there is no evidence demonstrating, that the FBI agents and United States Marshals who assisted in the apprehension of Petitioner in the State of Alabama were under the direction or supervision of the Fulton District Attorney so that these notes which have been in the federal

government's possession would or should be imputed to the State.

Moreover, Petitioner has not shown that these handwritten notes are material and exculpatory. Again, the Court finds the phrase "it was placed" to be ambiguous. Sergeant Rogers testified at trial about where he found the gun and who saw it first, and he was extensively cross-examined by Petitioner's defense counsel on the details. *See* HT Vol. 38, pp. 15037-59/TT pp. 2200-2222. That cross-examination ended as follows:

> Q. Thank you, sir. And you, as you sit there, you have no personal knowledge as to when and who placed those items there, do you?
>
> A. No, sir.

(HT p. 15059/TT p. 2222).

Based upon all of the foregoing, the Court finds that the arguments raised with respect to ground 1of the Petition are lacking in merit.

B. Ground 2

In ground 2 of the Amended Petition, Petitioner asserts that the State violated his Fifth Amendment and due process rights when the prosecuting attorney commented in closing argument on Petitioner's decisions not to testify and to remain seated when the judge and jury entered the courtroom, and that the "cumulative

prejudicial effect" of these purported errors should have been considered in determining if Petitioner received a fair trial. (Amended Petition, p. 5, Attachment 4). The Court finds the issues raised in this ground to be successive under O.C.G.A. § 9-14-51, as these claims were decided adversely to Petitioner in his prior habeas corpus case (and in his direct appeal), and there has been no intervening change in the substantive law which would restart the four-year clock or permit this Court to re-examine these issues. *See Abrams v. Laughlin*, 304 Ga. 34 (2018); *Bruce v. Smith*, 274 Ga. 432 (2001).

Specifically, in enumeration of error 14 on direct appeal, Petitioner alleged that the prosecutor's closing argument violated his due process and Fifth Amendment rights when the prosecution: (1) repeatedly referenced Petitioner's failure to testify; (2) expressed personal opinion as to the quantum and quality of evidence; (3) misstated the evidence; and (4) "urged the jury to consider [Petitioner]'s conduct during the trial," i.e., Petitioner remained seated when the judge and jury would enter and exit the courtroom, and his mistrial motion should have been granted. (HT Vol, 48, pp. 19574-85). He also urged the appellate court to consider the "cumulative effect of the errors in the closing argument." *Id.*

On appeal, the Georgia Supreme Court determined that the prosecutor did impermissibly comment on the failure of Petitioner to testify in violation of his Fifth Amendment right against self-incrimination, but that the constitutional violation was harmless beyond a reasonable doubt. *See Al-Amin*, 278 Ga. at 84. Ultimately,

the Supreme Court ruled that the other challenges to the prosecutor's argument lacked merit and that the mistrial motion was properly denied. See id. at 86. The Court also declined to consider the cumulative effect of the purported errors in closing argument as Georgia did not follow such a rule. *See id.*

Petitioner reasserted these claims in his original habeas corpus case and contended that the Georgia Supreme Court misapplied the harmless error standard. *See Al-Amin v. Smith*, Final Order at pp. 27-28. In its decision, the habeas court noted that the Georgia Supreme Court specifically addressed each issue in the direct appeal and that the issues could not be reasserted in habeas corpus. *See id.* The court also found Petitioner's claim that the Georgia Supreme Court misapplied the harmless error standard for constitutional violations "to be unpersuasive." *Id.* The Georgia Supreme Court thereafter denied Petitioner's application for a certificate of probable cause to appeal the habeas court's decision.

Petitioner now asks this Court to revisit these issues in light of the Supreme Court's holding in *State v. Lane*, 308 Ga. 10 (2020). In *Lane*, the Georgia Supreme Court adopted a cumulative error rule for analyzing claims on direct appeal "to consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel." *Id.* at 16. However, the Court finds that Petitioner's reliance on this rule of analysis does not make his petition timely under subsections (3) or (4) of O.C.G.A. § 9-14-42 (c), and that *Lane* does not articulate an intervening change in

the substantive law which would permit this Court to re-examine the claims.

O.C.G.A. § 9-14-42 (c), enacted by Ga. L. 2004, p. 917, and effective on July 1, 2004, provides in pertinent part:

Any action brought pursuant to this article shall be filed within . . . four years in the case of a felony . . . from:

> (1) The judgment of conviction becoming final by the conclusion of direct review or the expiration of the time for seeking such review; provided, however, that any person whose conviction has become final as of July 1, 2004, regardless of the date of conviction, shall have until . . . July 1, 2008, in the case of a felony to bring an action pursuant to this Code section;
>
> (2) The date on which an impediment to filing a petition which was created by state action in violation of the Constitution or laws of the United States or of this case is removed, if the petitioner was prevented from filing such state action;
>
> (3) The date on which the right asserted was initially recognized by the Supreme Court of the United States or the Supreme Court of Georgia, if that right was newly recognized by said courts and made retroactively applicable to cases on collateral review; or

> (4) The date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.

Under O.C.G.A. § 9-14-42 (c) (1), "a judgment of conviction becomes 'final' when the United States Supreme Court either affirms a conviction on the merits or denies a petition for writ of certiorari, i.e., at 'the conclusion of direct review,' or when the time for pursuing the next step in the direct appellate review process expires without that step having been taken, i.e., 'the expiration of the time for seeking such review.'" *Stubbs v. Hall*, 308 Ga. 354, 359 (2020). It is undisputed that this Petition was not filed within four years of when Petitioner's convictions became "final" in 2004, when his certiorari petition was denied.

The Court finds that *Lane* did not announce a new substantive rule of law that would apply retroactively in habeas corpus. The distinction between a procedural rule and a substantive rule is as follows:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. [Cits. omitted]. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural.

Schriro v. Summerlin, 542 U.S. 348, 353 (2004) (emphasis in original).

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The Georgia Supreme Court has treated new substantive rules of criminal law as falling under O.C.G.A. § 9-14-42 (c) (3) for purposes of restarting the four-year clock to file a timely habeas corpus petition. *See e.g. Abrams v. Laughlin*, 304 Ga. at 36 (a petitioner has four years from when a new substantive rule is announced in which to file a habeas corpus petition). The substantive rule at issue in *Abrams* was the holding in *Garza v. State*, 284 Ga. 696 (2008), in which the Georgia Supreme Court announced a new test for determining whether the asportation element of kidnapping had been proven. The Court made clear in *Abrams* that a case announcing an intervening change in the law did not constitute a "fact" to restart the four-year limitations period under subsection (4) of O.C.G.A. § 9-14-42 (c). *Abrams*, 304 Ga. at 41.

In sum, the Court finds that *Lane* created a rule of analysis on direct review for collectively assessing harm from erroneous evidentiary rulings and the "errors" of counsel whose performance was deemed deficient. It did not affect the definitions of any of the crimes of which Petitioner was convicted nor remove his conduct from the range of punishment and, as such, did not announce a new substantive rule. Furthermore, it did not alter the Fifth Amendment standard by which his claims about the prosecutor's closing argument was decided. Accordingly, the Court finds that *Lane* has no impact on the untimeliness of the second Petition.

For the same reasons, *Lane* does not constitute an intervening change in constitutional law that would permit this Court to revisit the issues decided by the Georgia

Supreme Court on direct appeal. See *Bruce v. Smith*, 274 Ga. at 436 (because the change in the law regarding a jury instruction on disproving an affirmative defense "involves an issue of state procedural law that does not rise to the level of constitutional significance, it cannot be the basis for a collateral attack").

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Habeas Corpus is hereby DISMISSED.

If Petitioner desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date this order is filed. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Fulton County within the same thirty (30) day period.

SO ORDERED, this 18th day of March, 2022.

/s/_____
Honorable Eric K. Dunaway
Judge, Fulton County Superior Court
Atlanta Judicial Circuit

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 31, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14865

D.C. Docket No. 1:12-cv-01688-AT

JAMIL ABDULLAH AL-AMIN,

Petitioner-Appellant,

versus

WARDEN, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents-Appellees.

July 31, 2019, Decided

Appeal from the United States District Court
for the Northern District of Georgia

Before WILSON, JILL PRYOR, and TALLMAN,* Circuit Judges.

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* The Honorable Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appendix C

WILSON, Circuit Judge:

Jamil Abdullah Al-Amin appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Al-Amin argues that he is entitled to habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), for the constitutional errors that occurred during his state trial. After careful review and with the benefit of oral argument, we affirm the district court's denial of habeas relief.

I. Factual and Procedural Background

One evening in March 2000, Fulton County Deputies Ricky Kinchen and Aldranon English drove to Al-Amin's home to execute a valid arrest warrant.[1] Believing that Al-Amin was not home, the Deputies began to drive away. But the Deputies quickly turned around when they spotted a black Mercedes pull in front of Al-Amin's home. A man exited the vehicle, and the Deputies approached.

The Deputies asked the man to show his hands. The man began firing an automatic rifle and pistol at the officers. The Deputies, standing only a few feet away, returned fire. During the firefight, Deputy English's pepper spray canister exploded, temporarily blinding him. Deputies Kinchen and English were both shot during the exchange, and both believed they had shot the assailant

1. The warrant was issued after Al-Amin failed to appear for a traffic stop hearing. A Georgia trial court later ruled that the underlying traffic stop was unconstitutional.

in return. As the man drove away in the black Mercedes, Deputy English radioed for help. When help arrived, Deputy Kinchen described the assailant as a 6'4" black male wearing a long coat and a hat. Both Deputies were transported to a local hospital, where Deputy Kinchen died from his injuries.

Officers who responded to the scene found a trail of blood leading from the crime scene to a vacant house and nearby woods. The investigating officers believed the blood belonged to the fleeing assailant. Neighbors also reported seeing a bleeding and injured man in the area that night.

The next day, while on morphine and other medication, Deputy English identified Al-Amin as the assailant after examining a photo lineup. Soon after, law enforcement received a tip that Al-Amin was in White Hall, Alabama. Federal and local law enforcement converged on White Hall, where, after an exchange of gunfire with a fleeing figure matching Al-Amin's description,[2] they eventually found Al-Amin unarmed and alone near a wooded area. When officers arrested Al-Amin, he was wearing a bulletproof vest and had the keys to his black Mercedes. Al-Amin's medical assessment revealed no signs that he was recently shot or wounded.

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2. Defense witnesses at trial testified that that they observed this portion of the manhunt for Al-Amin and that only law enforcement officials fired their weapons. The officers testified they exchanged gunfire with the suspect as he fled through the woods.

Appendix C

After Al-Amin was arrested, law enforcement searched the surrounding area for other evidence. The officers located a 9mm pistol and ammunition. The next day, officers recovered a bag in the woods containing, among other things, ammunition, a cell phone, registration documents for a Mercedes indicating that Al-Amin was the owner, Al-Amin's passport, and a bank statement for Al-Amin. An assault rifle was also discovered nearby. Expert testimony at trial later established that these weapons were those used to shoot Deputies Kinchen and English. Experts matched, for example, the two 9mm bullets recovered during Deputy Kinchen's autopsy to the pistol found at White Hall. Experts also matched the shell casings found at the scene of the Fulton County shooting and in the area of Al-Amin's White Hall arrest to the .223-caliber Ruger rifle recovered in the White Hall woods.

Several days after apprehending Al-Amin, law enforcement discovered his Mercedes on his friend's private property. The car was riddled with bullet holes. Investigators later matched the bullets recovered from the Mercedes to the Deputies' service weapons.

Al-Amin was charged with malice murder and various other offenses in Georgia state court. During the jury trial, the state's case against Al-Amin included, among other things, the physical evidence from White Hall and in-court testimony by Deputy English identifying Al-Amin as the assailant.

Appendix C

Invoking his Fifth Amendment right against self-incrimination, Al-Amin did not testify. Al-Amin nonetheless presented a substantial defense. Approximately twenty witnesses testified on his behalf, including a neighbor and eyewitness to the shooting who testified that he was "absolutely positive" that Al-Amin was not the shooter. The defense showed that although the Deputies were confident that they had shot their assailant and there was a blood trail leading away from the scene, Al-Amin was not injured when he was apprehended. The defense also attempted to undermine Deputy English's identification of Al-Amin as the shooter. The defense emphasized that Deputy English was on morphine when he picked Al-Amin out of a lineup, and that Deputy English had consistently said the shooter had grey eyes, while Al-Amin has dark brown eyes.

At trial, the defense argued that law enforcement—namely, FBI Agent Ron Campbell—planted the weapons found in the White Hall woods, noting that law enforcement had never connected Al-Amin's DNA or fingerprints to the weapons.[3] Five years before Al-Amin's arrest, Agent Campbell was involved in a shooting of an allegedly unarmed Muslim black man. News reports suggested that law enforcement may have planted a weapon at the scene, but Agent Campbell was later cleared of any wrongdoing in that incident. The trial court refused to let the defense cross-examine Agent Campbell about this past shooting.

3. As part of its general defense theory, the defense argued that law enforcement targeted Al-Amin given his status as a controversial civil rights activist.

Appendix C

During closing arguments, the prosecution told the jury, "I want to leave you with a few questions you should have for the defendant." The prosecution then presented a visual aid to the jury titled, "QUESTIONS FOR THE DEFENDANT." This visual aid included several written questions, including:

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

The prosecution also posed these rhetorical questions aloud to the jury:

> Why would the FBI care enough to frame you?
>
> How did the murder weapons end up in White Hall? . . . Mr. Defendant, how did those murder weapons get there to White Hall?
>
> Next question. How did your Mercedes get to White Hall? . . . Did you drive it there?

> More important, how did your Mercedes get shot up?

Defense counsel objected to both the chart and these questions and moved for a mistrial. The court denied the motion but ruled that the prosecution should not focus on Al-Amin's choice not to testify or failure to present evidence. The court offered to give a curative instruction, but the defense declined it, believing such an instruction would compound the error. The prosecution then changed its visual aid to read "QUESTIONS FOR THE DEFENSE" and continued with its closing arguments. After the prosecution again asked a question directed specifically towards Al-Amin, the defense again moved for a mistrial. This time, the defense asked for a curative instruction given the impropriety of the comments and chart. The trial court chastised defense counsel in front of the jury, characterizing the defense's objections as "what you believe is an impropriety." The trial court overruled the defense's objections, but eventually gave an instruction:

> There has been an objection to some of [the prosecution'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.

The court also emphasized to the jury that it gave the instruction "just in an abundance of caution" and reiterated that the court had overruled Al-Amin's objections to the prosecutor's closing argument. The defense renewed its mistrial motion, arguing the instruction was insufficient. The motion was denied.

After the instruction, the prosecution continued with its closing argument, and asked the last question on the chart: "Where was the defendant at 10 p.m. on March 16?" The prosecution answered its own question: "He was standing outside his black Mercedes murdering Deputy Ricky Kinchen and trying to murder Deputy Aldranon English. That's the only evidence you have heard and will

hear in this case as to where Jamil Abdullah Al-Amin was at 10 p.m. on March 16, 2000. That's it." The defense, interpreting this as another comment on Al-Amin's decision not to testify, again moved for a mistrial. The court denied the motion.[4] The jury convicted Al-Amin on all counts, and the court sentenced him to life without the possibility of parole.

On direct appeal, the Georgia Supreme Court affirmed Al-Amin's convictions. *Al-Amin v. State*, 278 Ga. 74, 597 S.E.2d 332 (2004). The court held that the trial court did not abuse its discretion in refusing to let Al-Amin cross-examine FBI Agent Campbell about prior allegations of planting a gun. *Id.* at 84. The court also held that the prosecution violated Al-Amin's Fifth Amendment right against self-incrimination during closing arguments. *Id.* at 84-86. The court found this error harmless, however, under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The Supreme Court denied certiorari. *Al-Amin v. Georgia*, 543 U.S. 992, 125 S. Ct. 509, 160 L. Ed. 2d 380 (2004).

Al-Amin then filed a state habeas petition, which was denied.[5] The Georgia Supreme Court also denied

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4. At the end of its rebuttal argument, the prosecution also told the jury: "You watched what happened in this courtroom, who wouldn't stand for you. Don't stand for him." This was a clear reference to Al-Amin's religiously based and court approved decision not to stand when the jury or judge entered the courtroom. The prosecutor's comments were patently improper.

5. In support of his state habeas petition, Al-Amin included an affidavit from a juror at his trial. The district court declined

his Application for a Certificate of Probable Cause. Al-Amin then filed the instant federal habeas petition. The district court, like the Georgia Supreme Court, held that Al-Amin's Fifth Amendment rights were violated by the prosecutor's comments at closing arguments. The district court ultimately held, however, that Al-Amin was not entitled to relief under the stringent harmless error standard under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). The district court also denied Al-Amin's Confrontation Clause claim regarding Agent Campbell. The district court granted Al-Amin a certificate of appealability on all claims.

II. Standard of Review

We review de novo the district court's denial of a 28 U.S.C. § 2254 petition. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). Because Al-Amin seeks collateral review, his appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y, Dep't of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Under AEDPA, a federal court may only grant habeas relief to a state petitioner if the state court's determination of a federal claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "was based on an unreasonable determination of the facts in light of the

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to consider this affidavit, as do we. Both federal law and Georgia law permit the introduction of jury testimony to impeach a verdict only in rare circumstances, none of which are present here. *See* O.C.G.A. § 24-6-606(b); Fed. R. Evid. 606(b)(2).

evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

When a defendant alleges a non-structural constitutional error at his trial, a state court reviewing a conviction on direct review analyzes the error under the standard established in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under the *Chapman* standard, a constitutional violation is harmless if the government can show beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24.

But on collateral review, we apply a more stringent harmless error standard. *See Brecht*, 507 U.S. at 623. Under *Brecht*, we cannot grant habeas relief unless we have "grave doubt" that the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995) (explaining the *Brecht* standard). To prevail, a petitioner must show "actual prejudice" from the constitutional error. *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1110 (11th Cir. 2012). "To show prejudice under *Brecht*, there must be more than a reasonable possibility that the error contributed to the conviction or sentence." *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012) (quotation and citation omitted).

"Harmlessness under the *Brecht* standard is a question of law that we review de novo." *Id.* at 1307. Ultimately, "for a federal court to grant habeas relief,

it must be true *both* that the state court's application of the *Chapman* harmless beyond a reasonable doubt standard was objectively unreasonable *and* that the error had a substantial and injurious effect or influence on the verdict." *Id.* at 1307-08; *see also Fry v. Pliler*, 551 U.S. 112, 119, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007).

III. Discussion

On appeal, Al-Amin argues that (1) the State violated his Fifth and Fourteenth Amendment rights when the prosecution engaged in a mock cross-examination of him after he invoked his right not to testify, and (2) the State violated his Sixth and Fourteenth Amendment rights by precluding him from cross-examining FBI Agent Campbell about alleged conduct in a past shooting. Al-Amin argues that because both errors prejudiced him, he is entitled to relief under *Brecht*.

A. *Griffin* Error Analysis

The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's choice not to testify. *See Griffin v. California*, 380 U.S. 609, 614-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *see also United States v. Knowles*, 66 F.3d 1146, 1162 (11th Cir. 1995). A comment amounts to a constitutional violation where it was "manifestly intended to be a comment on the defendant's failure to testify" or it was "of such a character that a jury would naturally and necessarily take it to be a comment on" the defendant's silence. *Isaacs v. Head*, 300 F.3d 1232, 1270 (11th Cir. 2002) (quotation omitted). The

prosecutor's "comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement." *Knowles*, 66 F.3d at 1163. It is not erroneous, for example, for a prosecutor "to comment on the failure of the *defense*, as opposed to the *defendant*, to counter or explain the evidence." *United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir. 1984) (quotation omitted).

Every court to review this case—including the Supreme Court of Georgia—concluded that the prosecutor's comments during closing argument violated Al-Amin's Fifth Amendment right not to testify. The Georgia Supreme Court found that the prosecutor's comments and use of the chart amounted to a "mock cross-examination" of a defendant who had invoked his right to remain silent. *See Al-Amin v. State*, 278 Ga. 74, 85, 597 S.E.2d 332 (2004). We agree. The prosecutor's closing argument highlighted the *defendant's* failure—not the defense's failure—to explain inculpatory evidence. The mock cross-examination was thus "of such a character that a jury would naturally and necessarily take it to be a comment on" the defendant's silence. *Isaacs*, 300 F.3d at 1270 (quotation omitted). This was constitutional error.

The primary issue, then, is not whether Al-Amin's Fifth Amendment rights were violated, but whether Al-Amin suffered actual prejudice from the error. *See Davis v. Ayala*, 135 S. Ct. 2187, 2197, 192 L. Ed. 2d 323 (2015) ("For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual

prejudice." (quotation omitted)). This requires "more than a reasonable probability that the error was harmful." *Id.* at 2198 (quotation omitted). Determining whether the error was harmful requires a close examination of the facts particular to the case. *See Mansfield*, 679 F.3d at 1313; *see also Trepal*, 684 F.3d at 1114 (explaining that, to determine "the effect on the verdict of a constitutional error, the Court must consider the error 'in relation to all else that happened' at trial" (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946))).

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. *See, e.g., Hill v. Turpin*, 135 F.3d 1411, 1416-19 (11th Cir. 1998) (holding that a *Doyle* error[6] was not harmless when the prosecutor's statements were "repeated and deliberate," the trial court's curative instruction was ineffective, there were significant weaknesses in the state's case, and the defendant's credibility was critical to his case). Other circuits have considered similar factors in the specific context of a *Griffin* error. *See Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013) (holding that a *Griffin* error was not harmless when there were repeated references to defendant's silence, the jury instructions to ignore the references were ineffective, and there was substantial evidence supporting acquittal).

6. A *Doyle* error refers to when the prosecution uses a defendant's post-*Miranda* silence to impeach a defendant's exculpatory testimony at trial. *See Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

We agree with Al-Amin, and with the district court, that the constitutional error in Al-Amin's case was substantial. The prosecutor's unconstitutional comments were not isolated—they were instead repeated and central to his closing argument.

We also agree that the trial court's curative instruction was largely ineffective. The trial court likely confused the jury by instructing that, although it was not proper for the prosecution to comment "on the failure of the Defendant to testify," it was proper for the prosecution to comment on one side's "failure to present certain evidence."[7] The court further undermined this instruction when it admonished the defense attorneys in front of the jury, emphasized that it was overruling the defense's objections to the prosecution's closing argument, and reiterated that it was giving the instruction "just in an abundance of caution." The instruction thus did little to cure the error.

To determine whether the error prejudiced Al-Amin, we must consider it in light of everything that happened at trial. *See Trepal*, 684 F.3d at 1114. The district court ultimately denied habeas relief because it found that the

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7. It is proper for a prosecutor to comment on the *defense's* failure to present evidence. *See United States v. Griggs*, 735 F.2d 1318, 1321 (11th Cir. 1984). But when we consider the trial court's instruction in light of the prosecutor's specific closing argument in Al-Amin's case, we find that the jury could have understood this instruction to mean that it could consider *Al-Amin's* failure—instead of the defense's failure—to counter or explain the evidence. At a minimum, after multiple rounds of objections and arguments, the jury was likely confused about which comments it was permitted to consider.

evidence proving Al-Amin's guilt was otherwise "weighty" or "overwhelming." We are unable to quarrel with the district court's determination. The prosecution introduced substantial physical evidence recovered from White Hall linking Al-Amin to the crime. The White Hall ballistics evidence included, for example, the same ammunition used to shoot the Deputies among Al-Amin's personal effects, the gun used to shoot the Deputies, and Al-Amin's Mercedes, found hidden in White Hall and riddled with bullets matched to the Deputies' service weapons. The prosecution also presented evidence that the Mercedes drove away immediately after the shooting and that the car's registration and keys were found on Al-Amin when he was apprehended. Finally, the prosecution presented Deputy English's eyewitness identification of Al-Amin as his shooter, which was consistent with his identification in the hours following the shooting.

But *Brecht* does not necessarily demand that we deny relief to a defendant even when there is overwhelming evidence against him, especially in the face of a substantial and uncured error. *Brecht* adopted its harmless error standard from *Kotteakos v. United States*, which explained that the harmless error analysis does not focus solely on whether there was enough evidence to convict the defendant. *See Kotteakos*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error."). We instead must consider the specific context and circumstances of the trial to determine whether the error contributed to the verdict.

Appendix C

At Al-Amin's trial, the defense's general theory of the case was that law enforcement had targeted and framed Al-Amin for the murder of Deputy Kinchen. An important component of this theory was that the FBI had planted the murder weapons and other incriminating evidence at the scene at White Hall to connect Al-Amin to the murder. The viability of this theory turned on (1) the credibility of Deputy English's identification of Al-Amin as the assailant, and (2) the reliability of the physical evidence found in White Hall. Both issues can be—and likely were—resolved by weighing the credibility of competing eyewitness accounts and expert opinions on the reliability and chain of the physical evidence. We find it unlikely that the verdict was substantially affected by the prosecutor's attempt to highlight that Al-Amin had not explained his whereabouts or activity.

Al-Amin argues this case is similar to *Hill v. Turpin*, 135 F.3d 1411 (11th Cir. 1998), in which we granted habeas relief in light of an uncured *Doyle* error. In *Hill*, the State lacked concrete eyewitness testimony or strong physical evidence connecting the defendant to a murder. The defendant, who served as the defense's primary witness, testified that he was unarmed at the time of the murder. *Id.* at 1418. Throughout the trial, the prosecution made multiple references to the defendant's post-*Miranda* silence, each time attempting to impeach his story that he was unarmed. *Id.* at 1414-15. These errors were not cured, and when we considered both the "significant weaknesses in the state's case against [the defendant]" and "the importance of [the defendant's] credibility to his defense," we found that the error likely impacted the

verdict and prejudiced the defendant. *Id.* at 1416-17. The defendant was therefore entitled to habeas relief.

Al-Amin's case is different. Given both the overwhelming evidence against Al-Amin—including physical evidence and eyewitness testimony—and the difficulty in tracing the error to the verdict in his case, we conclude that Al-Amin did not suffer actual prejudice from the error.[8] Al-Amin is thus not entitled to habeas relief.[9]

B. Confrontation Clause Analysis

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, guarantees a criminal defendant "the right . . . to be confronted with the

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8. Because Al-Amin does not satisfy the *Brecht* standard, we need not consider whether the Georgia Supreme Court unreasonably applied the *Chapman* harmless error standard in denying relief. *See Mansfield*, 679 F.3d at 1308 (explaining that we may deny relief based solely on a determination that a federal constitutional error was harmless under the *Brecht* standard).

9. *Brecht* also recognized the possibility that "in an unusual case, a deliberate and especially egregious error . . . or one that is combined with a pattern of prosecutorial misconduct" could warrant habeas relief even if the error did not substantially influence the jury's verdict. *Brecht*, 507 U.S. at 638 n.9. Al-Amin urges us to use *Brecht*'s exception for "deliberate and egregious" trial errors to grant habeas relief if we do not find that he suffered actual prejudice. While we condemn the prosecutor's behavior in the instant case, we do not believe the error rises to the level contemplated by the Supreme Court as to merit reversal under *Brecht*'s exception. We do not foreclose the possibility, however, that such a case may emerge.

witnesses against him." U.S. Const. amend. VI. A court violates the Confrontation Clause when it inappropriately restricts the scope of cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985); *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). But "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

If a defendant's Confrontation Clause rights are violated, the error should be analyzed on direct review under *Chapman*'s harmless beyond a reasonable doubt standard. *Id.* at 684. On federal collateral review, however, we review an alleged Confrontation Clause error under *Brecht*'s actual prejudice standard. *See Grossman v. McDonough*, 466 F.3d 1325, 1339 (11th Cir. 2006). Whether such an error was harmless may depend on, among other things, "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

Of course, we must first find an error before we can determine whether that error is harmless. *See Williams*

v. Singletary, 114 F.3d 177, 180 (11th Cir. 1997). Al-Amin claims the State violated his Sixth and Fourteenth Amendment rights by precluding him from cross-examining FBI Agent Ron Campbell about Campbell's previous involvement in a shooting of an allegedly unarmed Muslim man in 1995. Newspaper accounts at the time alleged that law enforcement may have planted a gun to cover up the shooting, although Agent Campbell was later cleared of any wrongdoing. The defense intended to question Agent Campbell about the incident, but the trial court did permit this line of questioning, believing it would confuse the jury. Al-Amin argues that the error prejudiced him because this line of questioning was critical to his defense theory that Agent Campbell planted the murder weapons in White Hall, Alabama.

Like the district court, we discern no Confrontation Clause error. Agent Campbell was investigated and cleared of any wrongdoing in the incident, and the newspaper accounts accusing law enforcement of wrongful conduct did not allege wrongdoing by Agent Campbell individually, but by law enforcement more generally. Al-Amin's proposed questioning about the prior shooting was thus inherently speculative and likely to lead the jury astray. Importantly, the trial court otherwise permitted cross-examination of Agent Campbell, and the prohibition on cross-examining Agent Campbell about these particular allegations did not prevent Al-Amin from making his general defense that the weapons were planted. Although "the Confrontation Clause guarantees an *opportunity* for effective cross-examination," it does not guarantee "cross-examination that is effective in whatever way, and

to whatever extent, the defense might wish." *Fensterer*, 474 U.S. at 20. Given the trial court's significant discretion to limit the scope of cross-examination where appropriate, we find no constitutional error.

IV. Conclusion

The standard for granting habeas relief under *Brecht* is extremely demanding. And it provides no disincentive for a prosecutor to disregard the boundaries of his constitutional obligation. We regret that we cannot provide Mr. Al-Amin relief in the face of the prosecutorial misconduct that occurred at his trial. A prosecutor's duty in a criminal proceeding is not to secure a conviction by any means, but to ensure that justice will prevail. *See Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). The prosecutor at Al-Amin's trial failed to live up to that duty. Al-Amin is nevertheless not entitled to habeas relief unless the error had a substantial and injurious effect on the jury's verdict. Because Al-Amin has not shown that the *Griffin* error prejudiced him, the error was not harmful under *Brecht v. Abrahamson*. Nor has Al-Amin successfully shown a Confrontation Clause error. Accordingly, we affirm the district court's denial of habeas relief.

AFFIRMED

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 29, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HABEAS CORPUS
28 U.S.C. § 2254

CIVIL ACTION NO.
1:12-CV-1688-AT-GGB

JAMIL ABDULLAH AL-AMIN,

Petitioner,

v.

JOHN "J.T." SHARTLE, WARDEN, et al.,

Respondents.

ORDER

This matter is before the Court on Petitioner Jamil Abdullah Al-Amin's ("Mr. Al-Amin") Objections to the Magistrate Judge's Report and Recommendation ("R&R") that Mr. Al-Amin's Fourth Amended Habeas Petition be denied. For the following reason, the Court **OVERRULES** Mr. Al-Amin's Objections and **DENIES** his habeas petition. The Court **GRANTS** Mr. Al-Amin a Certificate

of Appeal as to all claims discussed in this Order (and not already abandoned by him).

I. Standard of Review for a Report and Recommendation

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate Judge's Report and Recommendation for clear error if no objections are filed to the report. 28 U.S.C. § 636(b)(1). If a party files objections, however, the district court must determine de novo any part of the Magistrate Judge's disposition that is the subject of a proper objection. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b). Petitioner has objected to the entirety of the R&R. The Court therefore reviews the Petition and record on an independent de novo basis.

II. Procedural Background

Petitioner Al-Amin[1] is a former civil rights activist who served as a community leader for over two decades in Atlanta's West End neighborhood. He was the fifth Chairman of the Student Nonviolent Coordinating Committee and one of a "handful of civil rights leaders . . . specifically identified in the [1967] FBI memorandum outlining the counterintelligence program known as 'COINTELPRO,' the purpose of which was to 'expose, disrupt . . . or otherwise neutralize' civil rights leaders and organizations." (Fourth Am. Pet. at 23.)

1. Mr. Al-Amin was formerly known as H. Rap Brown.

Appendix D

On March 9, 2002 Mr. Al-Amin was convicted of malice murder and other offenses related to the March 16, 2000 shooting of Fulton County, Georgia Deputy Sheriffs Ricky Kinchen and Aldranon English. He filed a motion for a new trial, which was denied on July 2, 2003. Mr. Al-Amin then filed a notice of appeal with the Supreme Court of Georgia. In his appeal, Mr. Al-Amin argued that his constitutional rights were violated when the prosecutor engaged in a mock cross-examination of Mr. Al-Amin even though he had invoked his right to remain silent. The Supreme Court of Georgia agreed that Mr. Al-Amin's rights were violated but found that the error was harmless. *Al-Amin v. Georgia*, 597 S.E.2d 332, 346 (Ga. 2004). The court reached its decision by viewing the evidence against Mr. Al-Amin in the "light most favorable to the verdict," looking only to "determine if the evidence was sufficient for a rational trier of fact to find" Mr. Al-Amin guilty of the charged offenses. *Id.* at 339 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The United States Supreme Court declined to grant certiorari. *Al-Amin v. Georgia*, 543 U.S. 992 (2004).

Mr. Al-Amin filed his state habeas petition in 2005. The state court held an evidentiary hearing on February 27, 2007, and denied relief on July 28, 2011. The Supreme Court of Georgia denied a certificate of probable cause to appeal on May 7, 2012. (Doc. 1-11.) Mr. Al-Amin next filed his federal habeas petition in Colorado. It was transferred to this district shortly thereafter. He amended his petition several times, finally filing his Fourth Amended Petition on November 24, 2015. His Fourth Amended Petition raises four claims:

> (1) the State violated Al-Amin's Fifth and Fourteenth Amendment rights when the prosecution engaged in a mock cross-examination of him after he invoked his right not to testify;
>
> (2) the State violated Al-Amin's Sixth and Fourteenth Amendment rights by precluding him from cross-examining FBI Agent Ron Campbell about Campbell's involvement in a 1995 shooting of a black Muslim man;
>
> (3) Al-Amin was deprived of effective assistance of counsel; and
>
> (4) the State violated *Brady v. Maryland* by failing to provide exculpatory evidence.

Mr. Al-Amin voluntarily withdrew his *Brady* claim (claim four in the Petition) on December 23, 2015. (Doc. 135.) On March 24, 2016, the Magistrate Judge issued the instant R&R.

The Magistrate Judge first recommended that the Court find that Mr. Al-Amin's Fifth Amendment rights were violated when the prosecution made repeated references to Al-Amin's silence. The Magistrate Judge further recommended finding that the Supreme Court of Georgia unreasonably erred in calling this violation harmless because that court (incorrectly) looked only at the evidence most favorable to the verdict, not the whole record. (R&R at 11.) However, the Magistrate

Judge found that any error at Mr. Al-Amin's trial did not have a "substantial and injurious effect" on the jury because the remainder of the evidence against him was so overwhelming and because the trial court "immediately and comprehensively" addressed the prosecutor's unconstitutional closing remarks. (R&R at 28); *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). For these reasons, the Magistrate Judge recommended that all remaining claims in Mr. Al-Amin's Petition be denied.

Mr. Al-Amin argues that the R&R was incorrect for several primary reasons.

- First, he says that the R&R failed to give proper weight to the fact that the violations were repeated and core to the prosecution's closing argument. (Objections, Doc. 143 at 17.)

- Second, he argues that that the trial court's instructions were at best ineffectual and at worst actively harmful. (*Id.* at 15-17.)

- Third, he claims that the prosecution did not put on overwhelming evidence of guilt in light of the "significant evidence supporting acquittal." (*Id*. at 25.)

- Fourth, he contends that the two reasons offered by the Magistrate Judge to reject Al-Amin's confrontation clause claim – that FBI Agent Ron Campbell was not a key witness and that Al-Amin failed to offer

"admissible" evidence to support asking Campbell about a 1995 shooting – are irrelevant.

- Fifth, he argues that the Magistrate Judge failed to appreciate that the state habeas court made an unreasonable fact determination in rejecting Mr. Al-Amin's ineffective assistance of counsel claim.

- Sixth, he argues that the Magistrate Judge erred in rejecting his cumulative error argument.

III. Legal Standards

This case primarily requires the Court to assess if the constitutional errors in Mr. Al-Amin's trial were harmless, or instead so impacted the jury's verdict that the Court must grant habeas relief. The procedural posture of this case has a significant impact on both the evidence the Court must consider in deciding that question and on the Court's ultimate answer.

In Mr. Al-Amin's direct appeal, the Supreme Court of Georgia reviewed whether (1) the State violated Mr. Al-Amin's constitutional rights at trial and (2) if so, if those violations were "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 23-24 (1967). The Supreme Court of Georgia was required to examine "the whole record" to determine if the error was harmless. *Delaware v. Van Ardsall*, 475 U.S. 673, 681 (1986). The

Supreme Court of Georgia agreed that Mr. Al-Amin's Fifth and Fourteenth Amendment right to not testify was violated but then held such error was harmless after (incorrectly) viewing the evidence in the "light most favorable to the verdict." *Al-Amin*, 597 S.E.2d at 346. The Supreme Court of Georgia thus erred when it failed to review the whole record when judging the impact of the violations.

But this habeas case is a collateral proceeding, not a direct appeal. Therefore, the Court must impose the twin requirements of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Supreme Court's harmless error test laid out in *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) – not the harmless error test established by *Chapman*. The Court thus looks at this case through a different prism than that used by the Supreme Court of Georgia on direct appeal.

Under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

AEDPA also requires this Court to presume that a state court's factual findings are correct. 28 U.S.C. § 2254(e)(1). However, because the Supreme Court of Georgia failed to consider "the whole record" when deciding if the trial errors were harmless, the Court must now consider the whole record. *Libby v. Duval*, 19 F.3d 733, 741 (1st Cir. 1994) (noting that both *Chapman* and *Brecht* require "whole-record" review). For this reason, the Court discusses evidence in the record not outlined in the Supreme Court of Georgia's decision rejecting Mr. Al-Amin's direct appeal.

If the Court determines that the state court "unreasonably" applied *Chapman*, then it must also determine that the trial error resulted in "actual prejudice" before it can grant habeas relief under *Brecht*. 507 U.S. at 629. "Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (cleaned up). "There must be more than a 'reasonable possibility' that the error was harmful." *Id.* (quoting *Brecht*, 507 U.S. at 637).

Brecht's "actual prejudice" test is more onerous to habeas petitioners than *Chapman's* "harmless beyond a reasonable doubt" test. *Brecht* "subsumes the limitations

imposed by AEDPA," *Ayala*, 135 S. Ct. at 2199, and imposes its own requirements above and beyond AEDPA. *See id*. ("Ayala must show that he was actually prejudiced [by the error], a standard that he necessarily cannot satisfy if a fair-minded jurist" could agree that the state court's harmlessness determination was reasonable.) Thus, satisfying AEDPA is necessary but not sufficient to satisfy *Brecht's* requirements for habeas relief in a federal court's review of a state court criminal judgment. *See Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1307–08 (11th Cir. 2012) (emphasis supplied) ("The *Brecht* standard is more favorable to and less onerous on the state, and thus less favorable to the defendant, than the *Chapman* harmless beyond a reasonable doubt standard.")

Ultimately, "for a federal court to grant habeas relief, it must be true *both* that the state court's application of the *Chapman* harmless beyond a reasonable doubt standard was objectively unreasonable *and* that the error had a substantial and injurious effect or influence on the verdict." *Mansfield*, 679 F.3d at 1307–08.

With these standards in mind, the Court turns to the facts of the case.

IV. Factual Background[2]

Deputy Kinchen and Deputy English arrived in Mr. Al-Amin's West End Neighborhood at around 10:00

2. The Court draws from the Record, the Petition, the R&R, and Petitioner's Objections to the R&R in presenting this factual background.

pm to serve Mr. Al-Amin with a Cobb County bench warrant relating to a May 31, 1999 traffic stop.[3] They were uniformed and driving a marked police car. After finding that Mr. Al-Amin was not at home, the deputies began to drive away. But they stopped and turned around when they noticed a black 1979 Mercedes-Benz sedan park in front of Mr. Al-Amin's residence and witnessed an individual they believed matched Mr. Al-Amin's physical description get out. The deputies pulled up nose-to-nose with the Mercedes and then exited their vehicle. Deputy English asked the individual to show him his right hand. The man responded by frowning, saying "yeah," raising an assault rifle, and opening fire. (Doc. 29-3 at 66-70, 78.) The deputies returned fire. (Doc. 29-3 at 77-81.) Deputy English ran to an adjacent field and radioed for assistance. Deputy Kinchen remained by the patrol car.

Both deputies were shot. Deputy English was shot four times, and a pepper spray canister on his utility belt was ruptured by a bullet, temporarily blinding him. (Doc. 29-3 at 13, 81-82, 98.) Deputy Kinchen was also hit several times, and seriously wounded by a gunshot to his abdomen just under his bulletproof vest. (Doc. 31-3 at 144, 157-58.) While in the field adjacent to his parked squad car, Deputy English radioed in a report that the shooter had fled north in a black Mercedes-Benz. (Doc. 29-6 at 84.)

When responding officers arrived on the scene, Deputy Kinchen identified the shooter as a 6'4" tall black male

3. The trial court later ruled that the traffic stop leading to this warrant was unconstitutional and suppressed the resulting indictment (but not the warrant itself). (Doc. 15-6 at 45-47.)

in trench coat-like attire. (Doc. 29-6 at 7.) Both injured officers were loaded into ambulances and transported to a hospital for surgery. Deputy Kinchen died of his wounds the day after the shooting. Deputy English, hospitalized and under the influence of morphine[4] (Doc. 31-5 at 152-156), identified Mr. Al-Amin from a photo array of six pictures. Deputy English was told before picking Mr. Al-Amin out of the photo array that the suspect may or may not have been in the array. (Doc. 29-3 at 108.) But when Deputy English identified the shooter, he insisted the shooter had grey eyes. (*See* Doc. 29-4 at 121.) Mr. Al-Amin's eyes are in fact brown, but were (mistakenly) listed as grey on the Cobb County traffic warrant. Deputy English also later identified Mr. Al-Amin in the courtroom during trial. (Doc. 29-3 at 63.) Mr. Al-Amin attacked Deputy English's identifications by raising the "inherent concerns presented where officers eager to secure an identification to support an arrest warrant present a single photo line-up with only six pictures." Mr. Al-Amin also "raised numerous questions regarding the reliability of Deputy English's eyewitness identification," including the fact that he was blinded during much of the gunfight by pepper spray, inaccurately described the color of Mr. Al-Amin's eyes, and was under the influence of powerful pain medication. (Fourth Am. Pet. at 48; Doc. 31-5 at 152-156.)

Both deputies were confident that they had wounded the shooter. Deputy English testified that he fired three rounds, "[t]wo to the chest, one to the head." (Doc. 29-3

4. Deputy English was also prescribed Phenergan, but his surgeon testified that the Phenergan dosage was not high enough to have a sedative effect. (Doc. 31-5 at 156.)

at 80.) Deputy Kinchen informed officers who arrived on the scene that "I shot him, I think I shot him." (Doc. 29-6 at 77.) On this basis, the police secured a search warrant for blood, bloody clothing, and evidence of medical intervention. (*E.g.*, Doc. 30-1 at 74.) Ultimately, none of this blood evidence matched Mr. Al-Amin.

Mr. Al-Amin acknowledges that he was in the West End area during the shooting but denies any involvement in it.[5] At the state habeas hearing, he testified that he fled because he thought the shooting might be a retaliatory attack directed towards him by third parties. Earlier on the day of the shooting, Mr. Al-Amin had engaged in a heated discussion with four young men he thought were selling drugs in the neighborhood. He feared that they were the ones doing the shooting, and that it was aimed at him. (Doc. 1-3 at 141.) Mr. Al-Amin drove away from the scene in a Mercedes. (Doc. 1-3 at 125.) He acknowledged that the car may have been hit by gunfire: as he was driving away, "the back window, you know, collapsed and fell out of the car." (Doc. 1-3 at 152.)[6] He testified that this too caused him to believe the shooting "was directed at [him]." (Doc. 1-3 at 152.) After the shooting, Mr. Al-Amin drove to White Hall, Alabama, a small town where he had helped develop a Muslim community. (Doc. 1-3 at 128.)

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5. The evidence in this paragraph is drawn from the state habeas hearing.

6. (*See also id.* at 125 ("I didn't know in terms that the car had been hit until I pulled down the street and the back window fell out.").)

Appendix D

The FBI tracked Mr. Al-Amin to White Hall and began conducting surveillance in an attempt to locate him. Four days after the shooting, United States Marshals spotted Mr. Al-Amin in White Hall and reported that he fled into the woods.[7] United States Marshall Jerry Lowery testified that Mr. Al-Amin took three shots at him and other law enforcement officers just before retreating into the woods. (Doc. 30-5 at 37-39.) Mr. Al-Amin presented civilian witnesses at trial who testified that they observed this portion of the manhunt for Mr. Al-Amin and that only law enforcement officials fired their weapons. (*E.g.*, Doc. 32-1 at 93-97.)

FBI agents (including an agent named Ron Campbell) and a dog tracking team followed Mr. Al-Amin into the woods. Three hours later, Mr. Al-Amin was apprehended walking along a road near the woods, wearing torn jeans and a bulletproof vest. He was carrying the keys to the black Mercedes and driver's licenses in his name from three states. (Doc. 30-3 at 115-116; Doc. 30-7 at 65; 103; Doc. 31-2 at 22-24.) While Mr. Al-Amin was handcuffed and on the ground, Ron Campbell called Mr. Al-Amin a cop killer, spit on him, and kicked him. Mr. Al-Amin showed no signs of having been shot, and no gun residue was found on him that might indicate he had fired a weapon recently. (*See* Doc. 31-2 at 107. 139-40.)

After Mr. Al-Amin was apprehended, local and federal officers combed Mr. Al-Amin's path through the

7. There is conflicting testimony in the record about whether, in the area near the woods, Mr. Al-Amin fired at law enforcement officials, whether law enforcement officials fired at Mr. Al-Amin, or whether both sides exchanged fire.

woods. They discovered a piece of fabric from his jeans on a barbed wire fence, a 9mm handgun and ammunition, an assault rifle and ammunition, a nylon bag, documents indicating Mr. Al-Amin owned the Mercedes-Benz, Mr. Al-Amin's day planner, a bank statement, a cell phone, and a jacket with Mr. Al-Amin's passport.

The 9mm pistol and assault rifle found in the White Hall woods were the same used to shoot Deputies Kinchen and English. However, they had no fingerprints on them, and Mr. Al-Amin consistently contended that they were planted by Ron Campbell. Several days later, investigators found the license plate for the Mercedes-Benz. About a week after that they found the car itself, riddled with bullet holes fired from the deputies' service weapons. The car was in the White Hall area on property owned by a friend of Mr. Al-Amin. (Doc. 31-3 at 2.)

Mr. Al-Amin maintained his innocence throughout the investigation and trial. At trial, he offered nearly twenty (20) witnesses, including Imhotep Shaka, an individual who had known Mr. Al-Amin for several years. Shaka testified that he witnessed the West End shooting and saw the shooter, and was positive that it was not Al-Amin because the shooter did not have Mr. Al-Amin's distinctive tall and skinny frame. (Doc. 32-3 at 88-90.) Another eyewitness similarly testified that the shooter did not match Mr. Al-Amin's physical description. Mr. Al-Amin also highlighted inconsistencies in the testimony and evidence, several of which are listed on pages 22 and 23

of the R&R.[8] In particular, Mr. Al-Amin focused on these evidentiary problems:

1. The Deputies both stated that each was positive or nearly positive that they had shot their assailant, but Mr. Al-Amin did not have any gunshot wounds when he was arrested.

2. There is evidence in the record that there was a trail of blood from the scene of the crime to an empty house a few blocks away, and a 911 operator received at least one phone call stating that a man involved in the shooting was bleeding and begging for a ride. (Doc. 128 at 49-50.) But because Mr. Al-Amin was not shot, this blood trail cannot be his and it is plain he was not the wounded individual supposedly asking for a ride.

3. Deputy English reported and repeatedly testified that the shooter had grey eyes, when Mr. Al-Amin has brown eyes.

4. There is no fingerprint or gunshot residue evidence connecting Mr. Al-Amin to the firearms used in the murder,[9] and no other evidence linking him to the weapons other than the fact that they were found in his vicinity in White Hall, Alabama. Mr. Al-Amin argued that Ron Campbell planted the two guns found in the White Hall woods.

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8. The Court considered all of these inconsistencies when viewing the record as a whole.

9. The Court notes that investigators did not test Al-Amin for gunshot residue. (Doc. 31-2 at 107, 119, 139-40.)

Finally, Mr. Al-Amin offered the witnesses from White Hall who claimed that United States Marshalls or FBI agents fired at Mr. Al-Amin.

Mr. Al-Amin elected not to take the stand to testify at his trial, on his attorneys' advice. During closing arguments, the prosecution repeatedly referenced Mr. Al-Amin's decision to remain silent. The prosecutor first did so by displaying a visual aid for the jury titled, "QUESTIONS FOR THE DEFENDANT." This visual aid posed several mock cross-examination questions, including:

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

The prosecutor then stated that he wanted to leave the jury "with a few questions you should have for the defendant." He then rattled off a series of queries aimed at Mr. Al-Amin which mirrored the visual aid:

> "The First Question. Who is Mustafa?"
>
> "Question two. Why would the FBI care enough to frame you?"

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> "Third question. How did the murder weapons end up in White Hall? . . . Mr. Defendant, how did those murder weapons get there to White Hall?"
>
> "Next question. How did your Mercedes get to White Hall? . . . More important, how did your Mercedes get shot up?"

(Doc. 32-5 at 23 – 26.)

Mr. Al-Amin's attorneys objected and moved for a mistrial. The trial court denied the motion outside the presence of the jury but offered a curative instruction. The defense declined the trial court's offer, fearing it would make the matter worse.

The prosecutor re-labeled his visual aid to "Questions for the Defense." But after the jury returned, the prosecutor persisted in his unconstitutional line of questioning, and again referred to Mr. Al-Amin's failure to take the stand. He began to ask, "the question is either *your* car was there at the scene parked in front of *your* store," before the defense interjected and objected and again moved for a mistrial. The trial court refused the request a second time, this time in front of the jury. (Doc. 32-5 at 33.) In response, Mr. Al-Amin's attorneys requested a curative instruction because of the "impropriety" of the prosecution's comments and chart. The trial court corrected the defense attorneys in front of the jury, characterizing the defense's objections as "what you believe is an impropriety." (Doc. 32-5 at 34.)

The trial court then gave this instruction:

> There has been an objection to some of Mr. McBurney'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.

The defense renewed its motion for a mistrial, which the trial court again denied. *After* the instruction, the prosecution asked, "Why run if *you* didn't do it? If *you're* innocent, just turn yourself in." (Doc. 32-5 at 38.) The defense again renewed its motion for a mistrial, which was again overruled. (Doc. 32-5 at 39.)

The prosecutor also stated near the end of closing arguments: "Don't stand for him." Here, the prosecution was blatantly referencing Mr. Al-Amin's religiously-based (and court-approved) decision to not stand when the jury or judge entered the courtroom. The prosecutor made his "Don't stand for him" comment not once, but twice. (Doc. 32-6 at 13-14.) Mr. Al-Amin was convicted and then sentenced to life without parole.

V. Discussion

The Court now turns to the twin lenses of AEDPA and *Brecht*. AEDPA governs a federal court's review of a state court's determination that a constitutional error in a criminal trial was harmless. *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). Mr. Al-Amin must therefore satisfy this standard to obtain habeas relief. But as discussed above, AEDPA is "subsumed" into the requirements of *Brecht*. For this reason, the Court focuses its gaze on whether or not Al-Amin has met *Brecht's* test.

Under *Brecht*, Mr. Al-Amin must show that the underlying trial error resulted in actual prejudice. *Brecht*, 507 U.S. at 637. *Brecht's* test is satisfied only if the federal court has "grave doubt" about whether a trial error had a

"substantial and injurious effect or influence" on the jury's verdict. *Ayala*, 135 S. Ct. at 2198. In making this inquiry, the court must not focus on whether or not it believes the petitioner is guilty, but instead on whether or not the error had an impact on the minds of the jurors in the case in light of the rest of the trial. *Trepal v. Sec'y, Florida Dep't of Corr.*, 684 F.3d 1088, 1114 (11th Cir. 2012).

The *Brecht* analysis is intensely fact-specific. Courts may consider whether the references to the defendant's silence were repeated or intentional; whether the trial court promptly addressed the violation with a curative instruction; and whether the evidence was otherwise "weighty" or "overwhelming." *Hill v. Turpin*, 135 F.3d 1411, 1417 (11th Cir. 1998); *Gongora v. Thaler*, 710 F.3d 267, 278 (5th Cir. 2013) (violation not harmless when there were repeated references to defendant's silence, the jury instruction to ignore the references were half-hearted, and the evidence in case "was not overwhelming, and there was substantial evidence supporting acquittal.") At its core, the *Brecht* test is concerned with "what effect the error had . . . upon the jury's" actual decision. *Duest v. Singletary*, 997 F.2d 1336, 1338-39 (11th Cir. 1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)).

Finally, when there is "weighty" evidence in favor of guilt, *Brecht* is likely not met, even if other factors weigh in favor of habeas relief. *E.g.*, *Prevatte v. French*, 547 F.3d 1300, 1306 (11th Cir. 2008); *see also Trepal*, 684 F.3d at 1114 ("the erroneous admission of evidence is likely to be harmless under the *Brecht* standard where there is significant corroborating evidence, or where other evidence of guilt is overwhelming.")

The Court first agrees with Mr. Al-Amin and the R&R that the Supreme Court of Georgia's application of the incorrect standard of review was contrary to the clearly established law found in *Chapman*.[10] However, this finding does not end the Court's analysis of Claim 1. Under *Brecht*, Mr. Al-Amin must show "actual prejudice" and a substantial and injurious effect or influence resulting from the State's violation of Mr. Al-Amin's Fifth and Fourteenth Amendment rights.

The Court next finds that the prosecution's comments were repeated, blatant, central to the prosecutor's closing argument, intentional, and were arguably returned to in the prosecution's rebuttal. (*See* Doc. 32-6 at 13-14.) But under *Brecht*, these facts are not enough on their own. In fact, *Brecht* itself confronted that situation. There, the prosecutor made three references to the defendant's pretrial silence during closing arguments. 507 U.S. at 625 n.2. But the Supreme Court still held that this was not a "deliberate and especially egregious" trial error or a "pattern of prosecutorial misconduct" worthy of granting habeas relief in the face of weighty or overwhelming evidence of guilt. *See id.* at 638 n.9; *see also United States v. Wiley*, 29 F.3d 345, 349 (8th Cir. 1994) (three references to defendant's post-*Miranda* silence not enough to warrant habeas relief in face of overwhelming evidence).

The Court also finds that the trial court's curative instruction did not actually "cure" any harm because it was not strongly worded, failed to admonish the

10. The State did not concede this point at oral argument. (Doc. 153 at 55-56.)

prosecution for the blatant nature of the violation, and was undermined by the trial court's contemporaneous but confusing instruction that the jury was permitted to draw inferences from Mr. Al-Amin's failure to present evidence, but not his failure to testify.

Gongora v. Thaler illustrates the problems with the trial court's instructions. 710 F.3d 267, 280 (5th Cir. 2013). There, a defendant was on trial for his alleged role in a conspiracy to rob and shoot an individual. The defendant's alleged co-conspirators testified against him. However, the co-conspirators had major credibility problems, including the fact that one of them had initially identified other individuals as the shooters. *Id.* at 271. Thus, "[a] principal focus of the prosecutor's closing argument, and central to the State's case, was the credibility of co-conspirators' statements that [the defendant] was the shooter." 710 F.3d at 279.

In closing arguments, the prosecutor made at least five comments about the defendant's failure to testify. The district court characterized the remarks as "numerous and blatant." *Id.* Among the comments, the prosecutor asked, "[w]ho else would you want to hear from, though? The shooter? We're not going to talk to that person." *Id.* In doing so, the prosecutor "attempted to bolster the credibility" of the co-conspirators' statements by pointing to the fact that they had taken the stand and the defendant had not.

The trial court issued general instructions about the defendant's right to not testify at voir dire and before closing arguments. However, the prosecutor's improper

comments followed those closing arguments. Two of the prosecutor's comments were objected to. The trial court sustained those objections and told the jury to disregard the comments, but in a manner that the Fifth Circuit characterized as "perfunctory and devoid of specificity." *Id. at* 280. And the trial court did not sustain all of the defense's objections to the prosecution's remarks. The Fifth Circuit thus found that the curative instruction was, "diminished by the lack of a strong admonishment . . . the court's overruling of [defendant's] objection . . . and the mixed message resulting from allowing the jury to consider the comments in some respects." *Id.* The Fifth Circuit granted habeas relief because the remarks were blatant, the curative instructions ineffective, and because there was "substantial evidence supporting acquittal." *Id.* at 281. The instruction here was lengthier than those given in *Gongora*, but similarly ineffective. As in *Gongora*, the trial court here overruled some of the defense's objections. And like *Gongora*, some of the unconstitutional comments came after the curative instruction was given. Moreover, here the trial court undermined its instruction by characterizing the prosecution's comments as something that "[Mr. Al-Amin] believe[s] is an impropriety," and by stating to the jury in the middle of its instruction that "it is proper for one side or the other to comment on failure to present certain evidence" – likely mitigating the instruction's impact. Thus it is plain that the instruction was ineffective, as it was in *Gongora*. This too weighs in favor of relief.

The Court nonetheless must deny Mr. Al-Amin relief because there is "weighty" evidence supporting his conviction. *Brecht*, 507 U.S. at 639.

Mr. Al-Amin's best evidence is the mishmash of inconsistencies from the scene of the shooting. Eyewitnesses testified that Mr. Al-Amin was not responsible for the shooting. (Doc. 32-3 at 88-90.) The deputies and the shooter exchanged fire at close range. Both deputies were convinced that each had shot Mr. Al-Amin, and the police obtained a warrant based on blood evidence at the scene. But that blood evidence did not match Al-Amin, and he was not wounded when he was apprehended. Deputy English swore that the shooter had grey eyes, when Mr. Al-Amin has brown eyes. And both deputies were severely wounded and under duress at the time they identified Mr. Al-Amin. Deputy English had been shot and pepper sprayed and was under the influence of morphine when he picked Mr. Al-Amin out of a photo array. And the shooter had fatally wounded Deputy Kinchen. In addition, a 911 operator received a call that a man "involved in the shooting of the deputies" was bleeding in the West End area and begging for a ride – a fact inconsistent with the reality that Mr. Al-Amin was not shot. (Doc. 31-8 at 48-49; Doc. 32-3 at 43.) If this were the only evidence in the record, the Court might harbor "grave doubt about whether [the] trial error[s] of federal law had a substantial and injurious effect . . . in determining the jury's verdict." *Ayala*, 135 S. Ct. at 2198 (punctuation and citation omitted).

But the evidence from White Hall is "if not overwhelming, certainly weighty." *Brecht*, 507 U.S. at 639. Investigators found the license plate for Mr. Al-Amin's black Mercedes-Benz in a shed near where Mr. Al-Amin was first spotted in White Hall. The car itself was found

several days after Mr. Al-Amin was apprehended, mixed in with other abandoned cars on a property owned by one of Mr. Al-Amin's friends. (Doc. 31-3 at 2.) Mr. Al-Amin concedes that this car was at the crime scene, that he drove it away, and that it was hit by at least one bullet (though he disputes the surrounding circumstances of all of the above).

The car had several bullet holes containing bullets fired from the deputies' handguns. Other of Mr. Al-Amin's effects were found in the woods near White Hall near where Mr. Al-Amin was apprehended and along the path between where he was initially spotted and the place of his arrest. The murder weapons were also found along the path. Mr. Al-Amin simply has no reasonable explanation for how this evidence got to White Hall. His claim that the weapons were planted by a rogue FBI agent is not credible given the lack of supporting evidence for that assertion. To believe this argument the Court would have to assume that the FBI somehow acquired the weapons from the real perpetrator, the scene of the crime, or elsewhere, without disclosing that fact to Atlanta police, and then transported the weapons across state lines to drop them in the Alabama woods.

Mr. Al-Amin offers no real evidence to support this purported conspiracy. Mostly he claims he was prevented from doing so because he was prevented from cross-examining FBI Agent Campbell about a 1995 incident in Philadelphia where Campbell allegedly planted a fingerprint-less gun on a Muslim man whom he shot in the context of a law enforcement stop. But as discussed

below in connection with Claim 2, it was not error for the state trial court to preclude this cross examination.

Mr. Al-Amin's evidence is also not as powerful as that in other cases where courts granted habeas relief. For example, in *Gongora*, a robbery and murder case, one of the prosecution's witnesses was under the influence of heroin, pot, and alcohol at the time of the shooting *and* had participated in the robbery and feared a capital murder charge himself. 710 F.3d at 272. Another key witness had also participated in the crime but had identified two individuals *other than* the defendant as likely shooters, before changing his story. *Id.* at 271. Most importantly, "the physical evidence and the statement of the only non-biased eyewitness did not support the" idea that the defendant was the shooter. *Id.* at 283. And another individual had bragged to a non-party that he was the shooter, not the defendant. *Id.*

Jensen v. Clements also provides a contrast. 800 F.3d 892 (7th Cir. 2015). There, a husband was convicted of killing his wife. The investigation and prosecution of the crime dragged on, and the husband was not convicted until nearly nine years after his wife died. At trial, the prosecution submitted into evidence a handwritten letter from the husband's late wife that said, in a nutshell, if anything bad happened to her then it should be assumed her husband killed her. *Id.* at 895. The case "was no slam dunk" and the "evidence was all circumstantial." *Id.* at 908. There was significant evidence in favor of the theory that the wife had taken her own life. She had called her neighbor the day of her death to tell her not to

worry if she did not see her outside that day. She saw her doctor two days before her death, and he described her as "depressed and distraught." One of the prosecution's witnesses was a jailhouse informant whom the trial judge referred to as the "top liar I've ever had in court." *Id.* at 907. The informant's testimony was the only basis for later testimony from a medical professional that the victim had suffocated. A defense witness doctor testified that the wife was a "significant suicide risk." The court ultimately held that the jury "improperly heard [the wife's] voice from the grave" and so there was a serious risk of error warranting habeas relief under *Brecht*.

By contrast, here the evidence at the actual crime scene might be a mixed bag, but the White Hall evidence strongly ties Mr. Al-Amin to the crime. He was found after fleeing, and the evidence strongly suggests he possessed and dumped the murder weapons and secluded his car amongst other abandoned cars.[11] It was punctured with bullet holes containing projectiles fired by the two deputies.

Mr. Al-Amin attempts to undercut this significant evidence by introducing the testimony of a juror who avers that his verdict was influenced by Mr. Al-Amin's failure to testify. But under both federal and Georgia law applicable at the time of Mr. Al-Amin's conviction, evidence of jury testimony to impeach a verdict is not permitted. There

11. The Court recognizes, though, that Mr. Al-Amin's theory is that the car had bullet holes in it only because it was parked near the scene of the shooting – not because he was involved in the crime.

are only a few exceptions, almost all of which concern the problem of outside influences on a jury's decision-making.

For example, in *Turpin v. Todd*, relied upon by Petitioner, a bailiff remarked to the jury that a homicide defendant who received a life sentence would likely only be in prison for "about seven years." 493 S.E. 2d 900, 903-04 (Ga. 1997). The jury then sentenced the defendant to die. Importantly, this "extra-judicial evidence was offered outside the presence of Todd and his counsel," and therefore not subject to the adversarial process and not rectifiable by the trial court. *Id.* The Supreme Court of Georgia held that the habeas court should consider whether jurors could testify about the impact of the bailiff's statements because the "general rule against impeaching verdicts must succumb to the defendant's right to a fair trial." *Id.*

But this does not mean that Georgia applied this exception willy-nilly at the time. Instead, it was confined to cases like *Todd* "where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." *Gardiner v. State*, 444 S.E.2d 300, 303 (Ga. 1994).[12] And at the time, Georgia law was that, "[t]he affidavits of jurors may be taken to sustain but

12. *Ward v. Hall,* 592 F.3d 1144, 1177-78 (11th Cir. 2010) also involved a bailiff's comment to juror's about a defendant's eligibility for parole. *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995) similarly concerned extrajudicial information. There, a juror said in the jury room that he knew people who knew the defendant and that the defendant had a propensity for violence. *Id.*

not impeach their verdict." OCGA § 17-9-41.[13] Fed. R. Evid. 606 contains the same exceptions as those outlined in *Gardiner*, and is focused on the same concern: the influence of extrajudicial evidence or communications on the jury.

Recently, in *Pena-Rodriguez v. Colorado*, --- S. Ct. ---- (2017), the Supreme Court recognized an exception to this bar, and permitted a habeas court to consider juror testimony about racial bias infecting jury deliberations. But in doing so, the Supreme Court relied on the uniquely pernicious nature of racial bias. It explained that it had rejected such an exception even in cases where jury members were drinking during the trial, falling asleep, or ingesting cocaine. *Tanner*, 483 U.S. 109-11. *Pena-Rodriguez* is a narrow exception to the otherwise fairly straightforward rule that jurors may not impeach their own verdicts except in cases where they offer evidence of outside influence or information infiltrating the jury's deliberations.

Mr. Al-Amin's other cited cases also fall within the exception for extrajudicial information. In *Scott v. Calderon* the Ninth Circuit upheld a trial court's refusal to admit jury testimony to show that a juror had brought into the jury room and shared with the jury a newspaper article ridiculing diminished capacity defenses in a case involving just that defense. 39 F.3d 188 (9th Cir. 1994) (Table). This is because no juror purported to testify

13. This statute was repealed in 2012 as part of Georgia's overhaul of its evidence code, but was in effect at the time *Todd* and *Gardiner* were decided, as is reflected in both opinions.

that they were actually influenced by the article. Setting aside the fact that the trial court's refusal to consider juror testimony was affirmed, the case still dealt with extrajudicial information. In *Perez v. Marshall*, a California federal district court discussed competing juror affidavits about the jury's discussion of the defendant's refusal to testify. 946 F. Supp. 1521, 1537-38 (S.D. Cal. 1996). The court did not reach the issue of whether or not it was appropriate to consider the juror affidavits because it instead held that even if it had considered them, the jury's consideration of the defendant's failure to testify halted when the jury foremen informed them they could not do so and so the constitutional error did not actually prejudice the defendant. *Id*. The court also concluded that the jury would have convicted regardless of whether or not the defendant testified. *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) is inapposite because Mr. Al-Amin relies on that case's dissent. (Pet.'s Supp. Br., Doc. 156 at 17.)

Although Mr. Al-Amin argues that the juror's affidavit concerns "an improper external influence on the jury" in the form of "the unconstitutional mock cross-examination," (Pet.'s Supp. Br., Doc. 156 at 18 n.12) most all of the cases discussed above involve information not presented in court. In other words, they involve information or influences "external" to the trial, not improper conduct that occurred *within* the trial. Moreover, the juror's affidavit at issue does not explicitly point to the prosecutor's comments as the impetus for the jury's consideration of Mr. Al-Amin's failure to testify. For these reasons, the Court declines to consider the juror's affidavit.

Appendix D

Claim 2

Mr. Al-Amin's second claim alleges that his Sixth and Fourteenth Amendment rights were violated when he was prevented from cross-examining Robert Campbell about Campbell's 1995 shooting of an unarmed Muslim man in Philadelphia. Campbell allegedly planted a fingerprint-less gun next to the Philadelphia victim's body to cover up the shooting. Mr. Al-Amin contends that he should have been permitted to examine Campbell to establish that Campbell had acted in a "certain manner previously and, therefore, the jury [should] infer that he acted in a similar manner" here. (Fourth Am. Pet., Doc. 129 at 71.) He claims there is evidence that Campbell fell behind the dog tracking team while it was in pursuit of Al-Amin and White Hall and took the opportunity to plant some of the evidence found there just like he allegedly did in Philadelphia in 1995.

Mr. Al-Amin submitted to the state trial court (and attached to his Objections to the R&R) a handful of news articles and other documents about the shooting. (*See* Doc. 143-3.) Mr. Al-Amin contends these materials were offered to show his "good faith basis" for asking Campbell about the 1995 incident on cross examination. *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1313 (11th Cir. 2014) (*citing United States v. Beck*, 625 F.3d 410, 418 (7th Cir. 2010)). The trial court excluded this evidence on the basis that "Campbell had not been prosecuted for the alleged misconduct, and [] any probative value was far outweighed by the danger of unfair prejudice." *Al-Amin*, 597 S.E. 2d at 345-46.

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The collection of documents offered by Mr. Al-Amin does not suggest that the state court(s) erred. First, Campbell was investigated by the Philadelphia district attorney's office, the FBI, and the Department of Justice in connection with the shooting and was cleared of wrongdoing. (Doc. 143-3 at 12.) Mr. Al-Amin's documents say as much. And none of the articles convincingly tie Campbell to the alleged planting of the gun on the Philadelphia shooting victim; instead, at least some of them simply suggest the gun was "planted by law enforcement officers." (Doc. 143-3 at 30.) The Court understands that Mr. Al-Amin firmly believes that had he been permitted to cross-examine Campbell about the 1995 shooting, the resulting testimony would have been core to his theory that he was framed. But the trial court had broad discretion to limit the scope of cross-examination based on concerns regarding the significant danger of unfair prejudice given the specific circumstances before the Court, even if Al-Amin had a good faith basis for his questions. And the materials relied upon by Al-Amin were not nearly so strong as to suggest that the trial court abused its discretion in precluding questioning Campbell about the 1995 shootings.

The Court therefore cannot say it was an unreasonable application of clearly established law to bar questions about the 1995 shooting or to reject Mr. Al-Amin's confrontation clause argument. 28 U.S.C. § 2254(d). The Court therefore agrees with the Magistrate Judge that Mr. Al-Amin is not entitled to habeas relief under Claim 2, even if the Court's reasoning differs from that in the R&R. (R&R at 34.)

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Claim 3

Mr. Al-Amin also argues that his trial attorneys failed to adequately investigate the confession of Otis Jackson, an individual who recanted and then re-confessed to the crime several times. The Court also agrees with the R&R that Mr. Al-Amin's ineffective assistance of counsel claim fails. Habeas petitioners who seek to prevail on a claim for ineffective assistance of counsel must meet the standard laid out in *Strickland v. Washington*, 466 U.S. 668 (1984), which asks whether an attorney's representation amounted to incompetence under prevailing professional norms. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). A petitioner seeking to establish that a state court's application of *Strickland* was unreasonable must *also* overcome § 2254(d)'s deferential standard of review. *Id.* Thus, Mr. Al-Amin must overcome two highly deferential standards of review to prevail on his ineffective assistance of counsel claim.

Mr. Al-Amin simply cannot do so. His trial counsel reasonably decided not to pursue more information about Otis Jackson's confession or interview him personally after Jackson recanted that confession. Trial counsel was (perhaps wrongfully) under the impression that ankle monitoring data or documents showed that Jackson was not in the area of the crime on the night of the shooting, and trial counsel's investigator described Jackson as "a little kooky." (Objections at 37.) Although Mr. Al-Amin's attorneys have since developed information that might have caused an attorney to more carefully examine Mr. Jackson as a potential alternative shooter, much of

that information was not available at trial. As the R&R observes, relying on hindsight bias is what "*Strickland* and AEDPA seek to prevent." (R&R at 39 (citation omitted).)

Cumulative Error Claim

The R&R properly rejected Mr. Al-Amin's cumulative error claims for the reasons stated therein. If a cumulative error claim exists, it requires more than one error. *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 n.3 (11th Cir. 2012). Because the Court is rejecting Mr. Al-Amin's second and third claims, there are not multiple errors to accumulate. And even if the Court considered the impact of the prosecution's "Don't stand for him" comments in conjunction with Mr. Al-Amin's first claim, the Court cannot find that there was sufficient cumulative error to warrant granting the Petition based on governing legal standards. *Id.*

VI. Conclusion

For the foregoing reasons, the Court **ADOPTS IN PART** and **DECLINES TO ADOPT IN PART** the Report and Recommendation as described herein. [Doc. 136]. The Court **DENIES** Mr. Al-Amin's habeas petition. The constitutional violations at Mr. Al-Amin's trial as described in Claim One were serious and repeated. But under the onerous standards set forth by AEDPA and the Supreme Court's case law, the Court is constrained to reject his request for relief.

Under *Slack v. McDaniel*, 529 U.S. 473 (2000) the Court may issue a certificate of appeal if "reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." The Court finds that Mr. Al-Amin meets the standards set forth by *Slack* for a Certificate of Appeal and grants it as to all claims discussed in this Order (and not already abandoned by Mr. Al-Amin). It does so because (1) reasonable jurists could disagree about this Court's "actual prejudice" holding under *Brecht* and (2) Mr. Al-Amin's other claims should be considered alongside the Court's *Brecht* holding because they are intertwined with and inform it. The Court therefore **GRANTS** Mr. Al-Amin a Certificate of Appeal as described herein.

The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 29th day of September, 2017.

/s/Amy Totenberg
Amy Totenberg
United States District Judge

APPENDIX E — FINAL REPORT AND RECOMMENDATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 24, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HABEAS CORPUS
28 U.S.C. § 2254

CIVIL ACTION NO. 1: 12-CV-1688-AT-GGB

JAMIL ABDULLAH AL-AMIN, BOP ID 99974-555,

Petitioner,

v.

JOHN "J.T." SHARTLE, WARDEN, AND
HOMER BRYSON, COMMISSIONER,

Respondents.

FINAL REPORT AND RECOMMENDATION AND ORDER

This matter is before me for entry of a Final Report and Recommendation ("Final R&R") addressing (A) state inmate Jamil Al-Amin's Fourth Amended Petition for Writ of Habeas Corpus by a Person in State Custody (Doc. 129), (B) Georgia Department of Corrections ("GDOC")

Appendix E

Commissioner Homer Bryson's Fourth Supplemental Answer-Response (Doc. 130) and Brief (Doc. 131), both as corrected (Doc. 132), (C) Al-Amin's Reply in Support of Fourth Amended Petition (Doc. 133), and (D) Al-Amin's Unopposed Amendment to Withdraw and Delete *Brady* Claim (Claim IV) (Doc. 135). In addition, this matter is before me for entry of an Order addressing (E) Al-Amin's Motion to Expand the Record (Doc. 101), (F) Al-Amin's Second Motion to Expand the Record (Doc. 116), and (G) Al-Amin's Supplement to Second Motion to Expand the Record (Doc. 117).

For the reasons set forth below, I recommend that Al-Amin's Fourth Amended Petition, as further amended to delete Claim IV, be denied, and I deny each of Al-Amin's motions to expand the record.

I.

A.

As a preliminary matter, I note that although Al-Amin is a prisoner serving a state sentence, he is incarcerated in a federal prison pursuant to an agreement between the GDOC and the Federal Bureau of Prisons. As a result, Al-Amin has named as respondents in his federal habeas petitions both the Commissioner of the GDOC (currently, Homer Bryson) and the wardens of the various federal penitentiaries in which he has been incarcerated. Al-Amin has advised the Court that he was recently transferred to the Federal Correctional Institution in Tucson, Arizona, and stated that both he and Commissioner Bryson consent

to the substitution of that facility's Warden, John "J.T." Shartle, as a Respondent, in place of Warden David Ebbart. *See* (Doc. 135 at 1 n.1).

The Clerk is **DIRECTED** to update the docket to add Warden Shartle as a Respondent and to terminate Warden Ebbart as a Respondent.

B.

For reasons that are discussed later in this Final R&R, Al-Amin sharply contests the Georgia Supreme Court's summary of the facts as proven at trial and the state habeas court's summary of facts as proven in collateral proceedings. To provide context at the outset, however, it is still useful to recite the Georgia Supreme Court's summary of the procedural history of this case:

> Jamil Abdullah Al-Amin was convicted of malice murder and various other offenses stemming from the shooting of two Fulton County Deputy Sheriffs, that resulted in the death of one and injury to the other.
>
> The crimes took place on March 16, 2000. On March 28, 2000, Al-Amin was charged in a 13-count indictment with malice murder, felony murder (four counts), aggravated assault on a police officer (two counts), obstruction of a law enforcement officer (two counts), aggravated battery on a police officer, possession of a firearm by a convicted felon, and possession

> of a firearm in the commission of a felony (two counts). The state sought the death penalty. Voir dire commenced on January 22, 2002, and on March 9, 2002, Al-Amin was found guilty on all counts. At the conclusion of the sentencing phase on March 13, 2002, the jury fixed punishment at life without possibility of parole. Al-Amin was sentenced accordingly on the same day. He filed a timely motion for new trial, which was amended on December 10 and 13, 2002, and denied on July 2, 2003. A notice of appeal was filed on July 18, 2003, and the case was docketed in [the Georgia Supreme] Court on September 26, 2003. Oral argument was heard on January 27, 2004.

Al-Amin v. State, 597 S.E.2d 332, 339 & 339 n.1 (Ga. 2004) (footnote moved).

The Georgia Supreme Court denied Al-Amin's direct appeal on May 24, 2004. *Id.* Later that year, the United States Supreme Court declined to grant a writ of certiorari. *See Al-Amin v. Georgia*, 543 U.S. 992 (2004).

Beginning in 2005, Al Amin attacked his convictions and sentence in state habeas proceedings. *See* (Doc. 1-6). Al-Amin received an evidentiary hearing on February 27, 2007. *See* (Doc. 1-7). The state habeas court denied relief by Order dated July 28, 2011. *See* (Doc. 1-2). The Georgia Supreme Court denied Al-Amin's application for a certificate of probable cause to appeal on May 7, 2012. *See* (Doc. 1-11). The following day, Al-Amin filed his initial federal habeas petition in Colorado. *See* (Doc. 1).

The District of Colorado case was transferred to this Court. Al-Amin ultimately filed the Fourth Amended Petition now pending before me on November 24, 2015, *see* (Doc. 129), amending it further on December 23, 2015, to delete one of his four numbered claims, *see* (Doc. 135).

C.

Al-Amin's lawyers state that "[i]n the 1960s, Mr. Al-Amin was widely known by his name at that time, H. Rap. Brown, as a civil rights activist." (Doc. 129 at 37). Because of the nature of the crimes and the identity of the defendant, this was a high-profile case, drawing pooled press coverage from the national media. *See, e.g.*, (Doc. 15-6 at 1; Doc. 20-2 at 86).

It is also noteworthy that Al-Amin has been represented by court-appointed or *pro bona* counsel at all relevant times. Before and at trial, Al-Amin was represented by John "Jack" Martin, Bruce Harvey, Michael Warren, and Tony Axam. *See* Fourth Am. Pet. at 70. On direct appeal, Al-Amin was represented by Jack Martin, Don Samuel, and William Lea. *See id.* at 81. In state habeas proceedings, Al-Amin was initially represented by G. Terry Jackson and Linda Sheffield, *see id.* at 90, later adding A. Stephens Clay and C. Allen Garrett Jr. as counsel. *See id.* And in this federal habeas proceeding, Al-Amin continues to be represented by Messrs. Clay and Garrett, together with their partners Miles Alexander and Ronald Raider. *See id.* at cover page.

Because Al-Amin has been represented at all times by lawyers, the rule that a *pro se* litigant's filings ought to be liberally construed does not apply.

D.

Commissioner Bryson has contested neither the timeliness of Al-Amin's federal habeas petitions, nor the adequacy of the exhaustion of available state remedies with respect to Al-Amin's three remaining numbered Claims.

II

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to this case. AEDPA established new limits on the circumstances in which federal habeas relief may be granted. The relevant statutory text now provides, in part, as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

The Supreme Court has observed that:

> If this standard is difficult to meet, that is because it was meant to be. . . . Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington v. Richter, 562 U.S. 86, 102-03 (2011) (internal quotation marks and citation omitted).

AEDPA also requires that deference be shown to state court findings of fact and establishes limits on the introduction of new evidence and the scheduling of evidentiary hearings during federal habeas proceedings. The relevant statutory text now provides, in part, as follows:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable

> factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e). The proper application of the standards in § 2254(d)&(e) have been elaborated on in many decisions handed down by the Supreme Court since the enactment of AEDPA. Those decisions are discussed further below, where applicable.

III.

The three numbered Claims Al-Amin asserts are as follows:

> CLAIM I The State violated Mr. Al-Amin's Fifth and Fourteenth Amendment rights when the prosecution engaged in a mock cross-examination of Mr. Al-Amin after he had invoked his constitutional right not to testify ....
>
> CLAIM II The State court violated Mr. Al-Amin's Sixth and Fourteenth Amendment rights by precluding him from cross-examining FBI Agent Campbell regarding Campbell's 1995 shooting of Glenn Thomas in Philadelphia.
>
> CLAIM III The Defense Lawyers violated Mr. Al-Amin's Sixth and Fourteenth Amendment rights to effective assistance of counsel by failing to investigate the confession of Otis Jackson adequately.

Appendix E

Fourth Am. Pet. at iv-v.

Al-Amin had initially included a Claim IV in his Fourth Amended Petition, but he withdrew it in an Unopposed Amendment to Withdraw and Delete *Brady* Claim (Claim IV). *See* (Doc. 135).

Al-Amin also included in his Fourth Amended Petition a "catch-all" claim for relief, *see* Fourth Am. Pet. at 15, and he sought to incorporate by reference the more than thirty other issues and grounds for relief that he had previously raised in his direct appeal or in state habeas proceedings, *see id.* at 17-19 nn. 3, 5 & 6.

Each of these numbered and unnumbered Claims is discussed below.

A.

Al-Amin states his Claim I as follows: "The State violated Mr. Al-Amin's Fifth and Fourteenth Amendment rights when the prosecution engaged in a mock cross-examination of Mr. Al-Amin after he had invoked his constitutional right not to testify." Fourth Am. Pet. at 79; *id.* at iv. (same). This statement of the issue is incomplete, however, and obscures the question that must actually be answered in a federal habeas corpus proceeding.

During his trial, Al-Amin never took the stand, and he was not "examined" or "cross-examined." As he acknowledged in his brief on direct appeal in the Georgia Supreme Court, and acknowledged again in his application

for a certificate of probable cause to appeal in the state habeas proceeding, Al-Amin is actually complaining that the prosecutor improperly commented during closing argument on his election not to testify.

Indeed, the Georgia Supreme Court has already agreed with Al-Amin that the prosecutor "impermissibly commented on the failure of Al-Amin to testify, in violation of his Fifth Amendment right against self-incrimination." *Al-Amin*, 597 S.E.2d at 346. Thus, there is no dispute that Al-Amin's constitutional rights were violated. Rather, what is really at issue is the Georgia Supreme Court's further conclusion that "the error, although of constitutional magnitude, was harmless beyond a reasonable doubt." *Id.*

The Supreme Court's decision in *Chapman v. California*, 386 U.S. 18 (1967), set forth the "harmless error" standard that the Georgia Supreme Court was obliged to apply. Al-Amin is now arguing that the Georgia Supreme Court's application of the *Chapman* harmless-error standard either "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" as those standards are set forth in § 2254(d).

Al-Amin's contention that the Georgia Supreme Court should not have summarized the facts proven at trial under the *Jackson v. Virginia*, 443 U.S. 307 (1979), "sufficiency-of-the-evidence" standard and relied on that summary as

the basis for conducting its review pursuant to *Chapman* for "harmless error" is well-taken. Under *Chapman*, the reviewing court in a *direct appeal* should examine "the whole record," *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986), not just the portions of the record that support the convictions.

However, on federal habeas review this Court is required to apply a different test for "harmless error" than the one set forth in *Chapman* that the Georgia Supreme Court was required to apply. As the Supreme Court has stated:

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence .... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials ....
>
> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires the state courts to engage in on direct review ....

Appendix E

> The test [on federal habeas review] is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.

Brecht v. Abrahamson, 507 U.S. 619, 633, 636, 637 (1993) (internal quotations marks and citations omitted).

Moreover, as the Supreme Court explained very recently, obtaining federal habeas relief in the wake of AEDPA now also requires demonstrating that the state court's merits adjudication under *Chapman* is not entitled to deference under Section 2254(d). *See generally Davis v. Ayala*, 135 S. Ct. 2187 (2015). And even if deference pursuant to § 2254(d) is not warranted, the *Brecht*-standard still applies, and sets a very high bar for relief.

> We assume for the sake of argument that [the petitioner's] federal rights were violated, but that does not necessarily mean that he is entitled to federal habeas relief. . . . In the absence of the rare type of error that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness ....
>
> The test for whether a federal constitutional error was harmless depends on the procedural

> posture of the case. On direct appeal, the harmlessness standard is the one prescribed in *Chapman*: Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.
>
> In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had a substantial and injurious effect or influence in determining the jury's verdict. There must be more than a reasonable possibility that the error was harmful. The *Brecht* standard reflects the view that a State is not to be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error; the [federal habeas] court must find that the defendant was actually prejudiced by the error.

Id. at 2197-98 (internal quotations marks, brackets, and citations omitted).

A thorough review of the entire trial record reveals this: After Al-Amin failed to appear to answer criminal charges in Cobb County in January 2010, a bench warrant

was issued for his arrest. *See* (Doc. 29-3 at 18-19 & 23; Doc. 29-6 at 107); State Tr. Ex. 9. Because Al-Amin resided in Fulton County, the Fulton County Sheriffs Office was assigned to serve the warrant. *See* (Doc. 29-3 at 8).

Shortly before 10:00 pm on March 16, 2000, Fulton County Deputy Sheriffs Ricky Kinchen and Aldranon English drove slowly by Al-Amin's address at 1128 Oak Street in Atlanta. *See* (Doc. 29-3 at 20, 24 & 42-43). Because no one appeared to be there and they were concerned they would "blow the warrant," the deputies decided not to stop. *See* (Doc. 29-3 at 50). As the deputies continued up the street, Deputy Kinchen observed a black sedan pull up and park in front of 1128 Oak Street, and he brought the patrol car to a stop. *See* (Doc. 29-3 at 51). When, in the deputies' judgment, a man matching Al-Amin's general physical description in the warrant and wearing Muslim garb exited the black sedan, they turned around and drove back. *See* (Doc. 29-3 at 51-53).

The deputies identified the black sedan as a Mercedes-Benz and noted that it was parked facing the wrong-way on Oak Street in front of Al-Amin's address. *See* (Doc. 29-3 at 53-54). The deputies pulled their clearly-identified patrol car up nose-to-nose with the Mercedes-Benz and parked. *See* (Doc. 29-3 at 56).

Observing the man-whom they could now see was an older black male-still standing beside the driver's side door, both uniformed deputies exited the patrol car. *See* (Doc. 29-3 at 55-61). Deputy English, the passenger in the patrol car and the officer on the same side as the man, was

the "contact officer." *See* (Doc. 29-3 at 45 & 61). Deputy Kinchen, the driver, stood beside the patrol car, and was the "cover officer." *See* (Doc. 29-3 at 61).

When Deputy English approached the man beside the Mercedes-Benz and asked him to show his right hand, the man said "yeah," frowned, swung up an assault rifle, and started shooting. *See* (Doc. 29-3 at 66-68, 70 & 78). Both deputies drew their handguns and returned fire. *See* (Doc. 29-3 at 77, 80-81 & 117; Doc. 29-4 at 109; Doc. 29-5 at 114). Deputy English ran between the patrol car and the Mercedes-Benz into an adjacent field. *See* (Doc. 29-3 at 76 & 79). While running and while in the field, Deputy English used his radio to call for assistance. *See* (Doc. 29-3 at 77 & 84; Doc. 29-4 at 23-28); State Tr. Ex. 10. Deputy Kinchen remained in the road, beside the patrol car. *See* (Doc. 29-5 at 13, 106-08 & 112; Doc. 29-6 at 5 & 176).

Both deputies were shot. *See* (Doc. 29-5 at 82-83). Deputy English was hit four times, and he was further incapacitated when a bullet ruptured the pepper spray canister on his utility belt, temporarily blinding him. *See* (Doc. 29-3 at 13, 81-82, 98 & 118-30; Doc. 29-4 at 112-14); State Tr. Exs. 18, 19, 22-27 & 229. Deputy Kinchen was also shot multiple times, receiving a fatal wound in his abdomen, just below the bottom of his bullet-proof vest. *See* (Doc. 31-3 at 144 & 157-58); State Tr. Exs. 338, 339, 341, 343-346, 348, 349, 351-355, 357, 358, 360-62. A gunshot had also rendered Deputy Kinchen's handgun inoperable. *See* (Doc. 29-6 at 180-81; Doc. 30-1 at105-09); State Tr. Exs. 141, 143, 144 & 213. As Deputy Kinchen lay defenseless on his back in the road, the man shot him in

the groin with a 9mm handgun several more times. *See* (Doc. 29-5 at 90; Doc. 30-3 at 146; Doc. 31-3 at 144). The paramedic who found Deputy Kinchen testified that "there were literally like war wounds, like Vietnam War wounds," something outside her previous and subsequent experience, (Doc. 29-5 at 90), testimony echoed by the trauma surgeon who operated on Deputy Kinchen, *see* (Doc. 30-3 at 144-45).

Fearing that the shooter would come to find him in the field, Deputy English began pleading for his life. *See* (Doc. 29-3 at 87-88; Doc. 29-6 at 139). After hearing a door slam and an engine start, Deputy English radioed in a report that the shooter had fled north in a black Mercedes-Benz toward Ralph David Abernathy Boulevard. *See* (Doc. 29-3 at 88-89; Doc. 29-6 at 84); State Tr. Ex. 10.

As officers from multiple law enforcement agencies flooded the area, Atlanta Police Department Officer Peavy found Deputy English lying in a fetal position in the field. *See* (Doc. 29-3 at 84; Doc. 29-5 at 26-27 & 30; Doc. 29-7 at 40-42). *See also* (Doc. 29-5 at 84) (paramedic finds Deputy English in a "semi-fetal position"). Deputy English told Officer Peavy that the shooter was a tall black male, about 6'4", wearing a tan trenchcoat. *See* (Doc. 29-3 at 99); *see also* (Doc. 29-3 at 62 (Deputy English equating "trenchcoat" with Muslim attire)).

When responding officers found Deputy Kinchen lying in the road, he told one that "the subject was 6'4" in height and had on a tan or black trench-like coat." (Doc. 29-6 at 7). Moments later, Deputy Kinchen told another

that the shooter had been "a black male, with long black trenchcoat, some sort of hat on." (Doc. 29-5 at 109).

The crime scene was chaotic. *See* (Doc. 29-5 at 36, 41, & 95; Doc. 29-6 at 83). There were difficulties with inter-agency communication and on-scene coordination. *See* (Doc. 29-5 at 16 & 158; Doc. 31-7 at 155-56). Evidence was disturbed, *see, e.g.*, (Doc. 30-1 at 113), in the rush to provide medical treatment to the deputies, *see, e.g.,* (Doc. 30-4 at 29).

One law enforcement officer noted that members of the community were much less forthcoming in response to queries for information than in previous instances. *See* (Doc. 29-7 at 50). Another noted that unlike a typical homicide investigation scene, where a crowd of onlookers often gathers, in this instance there were none. *See* (Doc. 30-1 at 94). Two witnesses called by the defense acknowledged on cross-examination that they intentionally gave false answers to investigating officers. *See, e.g.*, (Doc. 32-2 at 98, 114 & 121).

The following day, Deputy Kinchen died. *See* (Doc. 29-6 at 91; Doc. 29-7 at 9-12). Deputy English, while hospitalized after surgery and receiving morphine and other medication, identified Al-Amin as the shooter in a photo line-up. *See* (Doc. 29-3 at 106-112; Doc. 30-1 at 37 & 39; Doc. 30-2 at 17-18); State Tr. Ex. 17. Deputy English also identified Al-Amin during the course of trial as the man who had shot him and Deputy Kinchen. *See* (Doc. 29-3 at 63 & 96-97).

Appendix E

After an arrest warrant for Al-Amin was issued, *see* (Doc. 30-2 at 22-23 (initial warrant for aggravated assault) & 24 (subsequent warrant for murder)), a federal unlawful flight to avoid prosecution warrant was also issued, *see* (Doc. 30-1 at 76; Doc. 30-2 at 32; Doc. 31-1 at 111; Doc. 31-2 at 3-4). The FBI tracked Al-Amin to White Hall, Alabama, a town just outside Montgomery. *See, e.g.,* (Doc. 30-5 at 17; Doc. 31-2 at 4-5).[1] Federal and local law enforcement officers then conducted intensive surveillance in White Hall to locate Al-Amin, *see, e.g.*, (Doc. 30-5 at 18-21 & 23-26; Doc. 30-6 at 116; Doc. 31-2 at 5-6), and the FBI dispatched SWAT teams from Alabama and Georgia to assist with any arrest.

Four days after Deputies Kinchen and English had been shot, United States Marshals involved in the surveillance spotted Al-Amin in White Hall, stated that he fired an assault rifle at them, and reported that he fled into nearby woods. *See* (Doc. 30-5 at 26, 29, 37-38, 146, 155-57). A local dog tracking team followed Al-Amin into the woods, supported by three FBI agents who were to provide security for the dog handlers. *See* (Doc. 30-6 at 43; Doc. 30-8 at 2-3). One of the supporting FBI agents was Ron Campbell.

About three hours later, a Deputy Sheriff posted nearby apprehended Al-Amin walking along a road near the woods, trailed by a dog from the tracking team. *See* (Doc. 30-5 at 106; Doc. 30-7 at 12-15, 34, 87 & 137). *See also*

1. As his trial lawyers acknowledged in their opening statement, White Hall is a community in which Al-Amin had close friends and contacts.

(Doc. 31-1 at 15 (explaining why the tracking dog walked beside Al-Amin after finding him). When arrested, Al-Amin was wearing tom blue jean overalls and a bulletproof vest. *See* (Doc. 30-6 at 3; Doc. 30-7 at 65, 100 & 138; Doc. 31-2 at 21); State Tr. Ex. 75. Al-Amin was also carrying a pocketknife, several sets of keys (including the key to the black Mercedes-Benz), three drivers' licenses issued in his name by different states, and slightly more than $1,000 in paper currency and change. *See, e.g.*, (Doc. 30-3 at 115-116; Doc. 30-7 at 65 & 103; Doc. 31-2 at 22-24). *See also* St. Tr. Exs. 56, 58-60, 78, 79 & 80. Upon examination by an FBI medic, Al-Amin showed no signs of having been shot in the gunfight with the deputies in Atlanta. *See* (Doc. 30-7 at 63-66 & 89).

A few minutes later, three more dogs, the pursuing dog handlers, and the accompanying FBI agents arrived at the arrest site. *See* (Doc. 30-6 at 48-49 & 141). While Al-Amin was handcuffed and facing sideways on the ground, Agent Campbell called Al-Amin a cop killer and kicked him; and, when Al-Amin responded verbally, Agent Campbell spat and Al-Amin spat back. *See* (Doc. 30-6 at 49-50 & 122; Doc. 30-7 at 16-17 & 125; Doc. 31-5 at 47). A supervisory FBI agent intervened, immediately pushing Agent Campbell away and later directing him to leave Alabama. *See* (Doc. 30-8 at 18; Doc. 31-1 at 101-102).

That night and the following day, local and federal officers re-tracing Al-Amin's path through the woods discovered, among other things, a piece of fabric tom from his blue jean overalls on a barbed wire fence, a 9mm handgun and ammunition, an assault rifle and ammunition,

shell casings, a nylon bag, paperwork listing Al-Amin as the Mercedes-Benz's owner, Al-Amin's dayplanner, a bank statement for Al-Amin with the 1128 Oak address, a shooting glove, a cellular telephone, and a field jacket with a passport in Al-Amin's name in one pocket. *See, e.g.*, (Doc. 30-3 at 115-16; Doc. 30-6 at 127 & 164-65; Doc. 30-7 at 1, 4 & 74-76; Doc. 30-8 at 24-30 & 50-60; Doc. 31-1 at 34-40, 106-08 &148-52; Doc. 31-2 at 25-53); State Tr. Exs. 77, 81, 81-A, 82-114A & 374. The assault rifle and handgun recovered in White Hall were determined to be the ones used to shoot Deputies Kinchen and English. *See* (Doc. 31-7 at 28-32 & 38-44).

Several days after that, investigators found the license plate for the black Mercedes-Benz secreted in a shed near where Al-Amin had first been spotted in White Hall. *See* (Doc. 31-2 at 149-51; Doc. 31-3 at 36); State Tr. Exs. 125 & 126. And, roughly a week after that, investigators searching by helicopter found the Mercedes-Benz itself, tagless, punctured with bullet-holes, and containing bullets fired from the deputies' handguns. *See, e.g.*, (Doc. 30-2 at 132; Doc. 31-3 at 1-8 & 35-42; Doc. 31-5 at 90-103; Doc. 31-7 at 18-28); State Tr. Exs. 131-36, 248-68 & 382-88. When found, the Mercedes-Benz was mixed in with abandoned vehicles on property owned by a friend of Al-Amin's. *See* (Doc. 30-6 at 135-36; Doc. 31-3 at 2-8, 18-19 & 36-40).

At trial, Al-Amin contended that he was the victim of mistaken identity. During the guilt/innocence phase of trial, he offered nineteen witnesses, including Imhotep Shaka, who testified that he looked out his window after

hearing gunfire on Oak Street and did not believe the shooter he saw had Al-Amin's tall, thin body-type. *See* (Doc. 32-3 at 88-90). Al-Amin further contended through an expert witness that Deputy English's photo line-up identification was unreliable because of the effects of post-surgical pain relief medication. *See* (Doc. 29-3 at 42-43; Doc. 30-1 at 58; Doc. 32-1 at 46-47, 50 & 78). And Al-Amin asserted that Deputy English's testimony that he "would never forget" the shooter's grey eyes, suggested that Al-Amin could not have been the shooter because his eyes are brown. *See* (Doc. 29-4 at 106-08 & 120-21; Doc. 29-5 at 3-4).

Al-Amin also sought to demonstrate that the investigation and investigators were inept and/or corrupt through direct and cross-examination of multiple law enforcement witnesses. In support, Al-Amin alleged that there were material inconsistencies in the evidence, including inconsistencies among the deputies' personal statements and inconsistencies between the deputies' statements and the physical evidence. *See, e.g.*, (Doc. 29-4 at 40-57 & 61-135; Doc. 29-6 at 144 (lay witness saw a Cadillac rather than a Mercedes drive away); Doc. 29-6 at 160 (lay witness testified that pistol fire preceded assault rifle fire); Doc. 31-6 at 117-19; Doc. 32-2 at 172-75 (same)).

Al-Amin also suggested that investigators had prevented him from obtaining helpful evidence, including, for example, by having the deputies' patrol car repaired, by failing to follow-up fully on leads generated before the investigation focused tightly on him, and by failing to test the guns found in White Hall for fingerprints or to

examine the clothing that he had been wearing for bullet holes or gunshot residue. *See, e.g.*, (Doc. 29-6 at 132-33; Doc. 30-2 at 116-17 & 123; Doc. 30-3 at 53, 70-71 & 122; Doc. 31-2 at 78-88; Doc. 31-3 at 127-28; Doc. 31-6 at 84-94; Doc. 32-3 at 144)

Al-Amin's attorneys alluded vaguely to other people who might have shot the deputies and implied through examination that there might have been multiple shooters and multiple getaway vehicles. *See, e.g.*, (Doc. 29-4 at 119-20; Doc. 29-6 at 144; Doc. 31-3 at 48; Doc. 32-2 at 115-16 (reference to "Mustafa" as possibly possessing a "weapon"); Doc. 32-3 at 19-22 (testimony that a club van, driven by a man under 6'0", was seen by neighbors fleeing the crime scene with its lights out) & 36-39 (same) & 129 (testimony regarding security camera footage shot at 3:00 am at a retirement home one and one-half miles away from the crime scene of an apparently injured man)); Def. Tr. Exs. 92-99, 100 (911 tape subject to limiting instruction relating to a report of a wounded man in the neighborhood), and 106-120.

Al-Amin offered witnesses from White Hall, Alabama who stated that the U.S. Marshals or FBI agents were the only ones who fired shots near the woodline. *See, e.g.*, (Doc. 32-1 at 93-96, 138-40 & 164). And Al-Amin suggested that the FBI, and particularly Agent Ron Campbell who fell behind the dog tracking team, might have planted incriminating evidence in Alabama in order to frame him for the shooting of Deputies Kinchen and English. *See, e.g.*, (Doc. 30-8 at 35-46 & 57-60; Doc. 31-1 at 163-64; Doc. 31-5 at 43-45). *See also* (Doc. 31-1 at 68-70 (eliciting

testimony that the tracking team did not see most of the items recovered later that night or the next day in the course of their pursuit); Doc. 31-5 at 64 (implying the FBI "want[ed] to maintain control" over Agent Campbell); Doc 32-5 at 105 (closing argument that the evidence was "too staged, too convenient, too perfect").[2]

Al-Amin elected not to take the stand to testify in his own defense. This reflected his four trial lawyers' advice that he ought not do so. *See, e.g.*, (Doc. 32-3 at 157); *see also* (Doc. 32-5 at 70 (closing argument)).[3]

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2. ln closing argument, Al-Amin went so far as to suggest that had the FBI captured him in Alabama rather than local law enforcement officers: "We might not have a trial today because ... a Ron Campbell with a high-powered rifle would finish him off ...." (Doc. 32-5 at 105); *see also* (*id.* at 114) ("It was shoot first, ask questions later .... If Big John hadn't been there we wouldn't be having a trial today.").

3. By avoiding testifying himself or seeking to introduce character evidence, Al-Amin was able during the guilt/innocence phase of trial to limit the stipulation with respect to his criminal history to a statement that he had been convicted of a felony, *see* (Doc. 31-7 at 140), without having to reveal that his prior criminal history included multiple felony convictions after a 1970s shootout with police in New York in which an officer was shot and disabled with an assault rifle, *see generally* (Doc. 29-6 at 25-27 & 116-120 (side-bar exchange regarding the introduction of character evidence); Doc. 33-1 at 7-44 (side-bar discussion of New York convictions during penalty phase and trial court's exclusion of any discussion of the underlying facts); Doc. 33-3 at 106-07 (argument regarding New York indictment and convictions)); St. Tr. Ex. 398.

Appendix E

As noted above, during closing argument the prosecutor violated Al-Amin's constitutional rights by commenting impermissibly on Al-Amin's decision not to testify. The prosecutor did this by posing and "answering" rhetorical "Questions for the Defendant" that he displayed with a visual aid for the jury to read. The questions were as follows:

QUESTIONS FOR THE DEFENDANT

- Who is Mustafa?

- Why would the FBI care enough to frame you?

- How did the murder weapons end up in Whitehall?

- How did your Mercedes get to Whitehall?

- How did your Mercedes get shot up?

- Why did you flee (without your family)?

- Where were you at 10PM on March 16, 2000?

(Doc. 15-7 at 62).

When Al-Amin's attorneys objected and moved for a mistrial, the trial judge directed the prosecutor to alter his line of argument so that he was not commenting on Al-Amin's failure to testify. *See* (Doc. 32-5 at 29). At Al-Amin's lawyers' suggestion that it "might be okay to say Questions for the Defense," the prosecutor re-labeled his

visual aid accordingly. *See* (Doc. 32-5 at 27 & 31). Al-Amin's lawyers expressly declined the trial judge's offer to give a curative instruction. *See* (Doc. 32-5 at 29 & 31).

The prosecutor persisted, however, and Al-Amin's lawyers renewed their motion for a mistrial. *See* (Doc. 32-5 at 33). Asked by the trial judge do "you wish the Court to do anything," Al-Amin's lawyers responded "not at this time, your Honor." (Doc. 32-5 at 33.).

When the prosecutor continued to pose his rhetorical questions, Al-Amin's lead trial attorney said: "Your Honor, changing my mind. I do believe we need an instruction. With this type of chart we believe it's improper. We would request instruction to the jury about the impropriety of it." (Doc. 32-5 at 34). The specific request was that:

> The court give an instruction to the jury that — two things. That first the Defendant has no burden to present any evidence whatsoever in any case. The burden is always on the State to prove its case. And the Defendant has no obligation to testify or explain, and no adverse — no inference should be drawn against the Defendant for his failure to testify.

(Doc. 32-5 at 34-35).

The Court then gave a curative instruction making all those points, saying, *inter alia*:

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> 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.

(Doc. 32-5 at 35-36).

Al-Amin expressed dissatisfaction with the instruction at trial, (Doc. 32-5 at 36), and he does so again in his Fourth Amended Petition, *see* (Doc. 129 at 57-64). He now also argues that he is entitled to federal habeas relief.

While of constitutional dimension, the acknowledged violation that occurred when the prosecutor impermissibly commented on Al-Amin's decision not to testify at trial is insufficient to entitle Al-Amin to have his convictions overturned. Applying the *Brecht*-standard, and considering the totality of the evidence presented at trial, including that presented by Al-Amin, I am not in "grave doubt" as to whether the prosecutor's improper comments during closing argument had a "substantial and injurious" effect on the outcome of the case. The prosecutor's constitutional violation was addressed immediately and comprehensively, and the evidence of Al-Amin's guilt was overwhelming.[4] In sum, under the *Brecht*-standard, it is clear that Al-Amin did not suffer "actual prejudice."[5]

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4. I note that after hearing evidence over the course of three weeks during the guilt/innocence phase, the jury returned its verdict the day after receiving final instructions from the trial court.

5. I am aware that Al-Amin offered in state habeas proceedings an affidavit from one juror asserting his belief that members of the jury would liked to have heard Al-Amin testify. But the state habeas court concluded that under Georgia law it had no authority to revisit the Georgia Supreme Court's decision on issues relating to closing argument because those issues had been resolved on direct appeal. Although Al-Amin's four habeas lawyers may well believe they identified a "better" argument and "better" evidence that the prosecutor's comments during closing argument were harmful under the *Chapman*-standard than Al-Amin's four trial and three appellate lawyers made and offered on his behalf at trial, in the motion for new trial, and on direct appeal, the time for making that argument and offering the affidavit were long-past by the time of the state habeas proceeding. Al-Amin's

Appendix E

Al-Amin is not entitled to federal habeas relief based on his Claim I.

B.

Al-Amin states his Claim II as follows: "The State court violated Mr. Al-Amin's Sixth and Fourteenth Amendment rights by precluding him from cross-examining FBI Agent Campbell regarding Campbell's 1995 shooting of Glenn Thomas in Philadelphia." Fourth Am. Pet. at 103; *id.* at iv (same).

Al-Amin and his lawyers contend that in 1995 Agent Campbell executed an unarmed Muslim man by shooting him in the back of the head and then planting a gun at the scene. Al-Amin's habeas lawyers now assert that Al-Amin's trial lawyers wanted to offer evidence of this "similar transaction" not "to tarnish the witness's character (*i.e.*, for pure impeachment), but to show [that] the witness acted in a certain manner previously and, therefore, the jury [could] infer that he acted in a similar manner in this case." (Doc. 129 at 71). It is Al-Amin's contention that the trial court improperly precluded him from pursuing this line of examination of Agent Campbell. *Id. See also* (Doc. 30-6 at 58-59). And it is Al-Amin's further contention that Georgia Supreme Court repeated this error when it concluded that Al-Amin's true aim was to impeach the character or veracity of Agent Campbell with evidence

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habeas lawyers offered nothing to demonstrate that the affidavit from the juror could not have been obtained and offered sooner, so that it might have been considered before the Georgia Supreme Court had had its final say on the issue.

of a specific instance of prior misconduct. *See, e.g., Al-Amin*, 597 S.E.2d at 345-46 & (Doc. 30-6 at 58-59). But even assuming for the sake of discussion that both state courts missed the thrust of Al-Amin's argument, he has not demonstrated that it resulted in an error warranting the grant of federal habeas corpus relief.

Although Al-Amin's habeas lawyers now seek, repeatedly, to characterize Agent Campbell as a "key" or "critical" or "essential" prosecution witness, see, *e.g.*, (Doc. 129 at 122-25), he was none of those things. Al-Amin's trial lawyers acknowledged as much in their closing arguments when they stated that "[t]his case is not all about Ron Campbell," (Doc. 32-5 at 103), and observed that Deputy English was the "key witness" (Doc. 32-5 at 96).

Moreover, Al-Amin's trial lawyers' assessment is borne out by the trial record. The prosecution offered 45 witnesses whose testimony spanned roughly 3000 pages at trial. Agent Campbell's direct and redirect testimony constituted about 53 pages of that total. He testified to none of the material facts summarized above, other than that he accompanied the dog tracking team that pursued Al-Amin into the woods, and that he had engaged in egregious professional misconduct at the arrest site by calling Al-Amin a cop killer, kicking him, and spitting. He also testified that he had been investigated and was subject to discipline for that misconduct.

None of this testimony was "key," "critical," or "essential" to the prosecution's case; it established no element of any of the crimes for which Al-Amin was

prosecuted. On this basis alone, the trial court's decision to preclude "cross-examination" of Agent Campbell on Al-Amin's allegation that he had shot a Muslim African-American man in Philadelphia in 1995 is readily distinguishable from *Davis v. Alaska*, 415 U.S. 308 (1974), and *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989), the decisions relied upon by Al-Amin's habeas lawyers. The first of those cases involved "a crucial witness for the prosecution" whose testimony went to the heart of the charges against the defendant. *Davis v. Alaska*, 415 U.S. at 310. The second involved a cooperating co-defendant who "was the government's primary witness" to his non-cooperating co-defendants' participation in the fraudulent scheme for which they were being prosecuted. *Cohen*, 888 F.2d at 776.

Moreover, Al-Amin's trial lawyers never offered, and his habeas lawyers have not offered, any admissible evidence that the criminal conduct they accuse FBI Agent Campbell of having committed in Philadelphia in 1995 actually occurred. Al-Amin's trial lawyers could say only "we have strong reason to believe that Mr. Campbell back in June the 1st of 1995 shot a young African-American who was also a Muslim in the head, the back of the head." (Doc. 29-2 at 25). And, Al-Amin's habeas lawyers can now point only to "multiple contemporaneous press accounts." (Doc. 121 at 166). But newspaper articles do not establish the "truth" of the statements included therein. *See, e.g., United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, (11th Cir. 2015) ("Courts may take judicial notice of documents such as the newspaper articles at issue here for the limited purpose of determining which statements

the documents contain (*but not for determining the truth of those statements*).") (emphasis added). On the other hand, there is a reported Pennsylvania decision affirming the *dismissal* of a private criminal complaint filed by a community member against Agent Campbell for the alleged shooting. *See Commonwealth v. Campbell*, 686 A.2d 1318 (Pa. Super. Ct. 1996).

Al-Amin's habeas lawyers also argue that "[t]he FBI generally and FBI Agent Campbell in particular were a critical focus of the defense team's conspiracy theory." (Doc. 129 at 124). Central to this defense theory are the propositions that the FBI somehow (A) collected the murder weapons and many of Al-Amin's belongings from the crime scene in Atlanta before any local law enforcement officers could respond to Deputy English's radio report that he and Deputy Kinchen were under fire, (B) transported it all to Alabama, and (C) then had Agent Campbell walk through the woods distributing this evidence surreptitiously for other law enforcement officers to find. Al-Amin had no evidence to offer at trial that any of this occurred, and he still has no evidence. Rather, he wanted to imply that it might have occurred, given Agent Campbell's acknowledged misconduct at the arrest site in White Hall and alleged misconduct at an arrest site in Philadelphia five years earlier.

Although "the Confrontation Clause guarantees an opportunity for effective cross-examination," it does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). There was

no effective cross-examination to be had on this issue where all Al-Amin could do was cast unsubstantiated accusations.

Thus, looking at Al-Amin's claim pursuant to the *Brecht*-standard in light of the whole record, I readily conclude that Al-Amin did not suffer "actual prejudice." *See, e.g., Grossman v. McDonough*, 466 F.3d 1325, 1339 (11th Cir. 2007) (applying the *Brecht*-standard to the harmless error analysis of an alleged Confrontation Clause violation on habeas review).[6]

Al-Amin is not entitled to federal habeas corpus relief on his Claim IL

C.

Al-Amin states his Claim III as follows: "The Defense Lawyers violated Mr. Al-Amin's Sixth and Fourteenth Amendment rights to effective assistance of counsel

6. Even under the less-onerous *Chapman*-harmless error standard that the Georgia Supreme Court would have applied had it concluded that Al-Amin's Confrontation Clause rights were violated, there is no good argument that reversible error occurred. None of the factors a reviewing court must weigh on direct review — "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the strength of the prosecution's case," *Delaware v. Van Arsdall*, 475 U.S. 673, 686-87 (1986)—weighed in Al-Amin's favor.

by failing to investigate the confession of Otis Jackson adequately." Fourth Am. Pet. at 111; *id.* at iv-v (same).

As noted above, this was a high profile case, both because of the nature of the crimes and the identity of the defendant. In the aftermath of the crime, a number of people "confessed" to having committed it, among them, Otis Jackson.

In the state habeas proceeding, Al-Amin's habeas lawyers claimed that his trial lawyers failed adequately to investigate Jackson's confession. In support, they offered testimony given by Jackson in a deposition after the Georgia Supreme Court had issued its decision on direct appeal summarizing the trial evidence, that they allege "tracks key trial evidence." (Doc. 129 at 113).

The state habeas court was required to judge Al-Amin's claim under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "The performance prong of *Strickland* requires a defendant to show 'that counsel's representation fell below an objective standard of reasonableness.'" *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (quoting *Strickland*, 466 U.S. at 688)). The prejudice prong of *Strickland* requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. And it is plain from the record that the state habeas court, in fact, applied that standard.

It is noteworthy that *Strickland* itself involved an inadequate investigation claim and said this:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. And *Strickland* emphasized that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" and that "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment." *Id.* at 690.

Furthermore, on federal habeas review:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and§ 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105 (internal quotations marks and citations omitted).

Although Al-Amin argues that§ 2254(d) should not apply in this case, I conclude that he is mistaken. The state habeas court cited *Strickland*, applied it in a manner that was not unreasonable, and summarized the evidence it found most relevant to its analysis, also in a manner that was not unreasonable.

Specifically, the state habeas court found and concluded as follows:

> Mr. Martin testified at [Al-Amin's] evidentiary hearing that [the defense lawyers] had charged their experienced investigator, Mr. Watanni Tyehimba, with locating and interviewing Mr. Jackson. [T]he defense team strategically decided not to use the information about Otis Jackson for three reasons: 1) Mr. Jackson was being monitored by an ankle bracelet at the time of the shooting and the ankle monitor documents showed Mr. Jackson was at his home and could not have been present on the night of the shooting; 2) Mr. Jackson had retracted and repeated his confession numerous times; and 3) the defense team's experienced investigator had interviewed Mr. Jackson and doubted the reliability of his testimony. Mr. Martin further stated the defense team ultimately chose not to utilize Mr. Jackson or his confession because he was afraid the tactic would "backfire" on the Petitioner and make him look "desperate." Based on the foregoing and because deciding on which defense witnesses to call is a matter of trial strategy and tactics that does not constitute ineffective assistance of counsel, the Court rejects the Petitioner['s] argument that he was denied effective assistance of counsel as to this claim.

(Doc. 1-2 at 11).

The complete failure to investigate cases that Al-Amin now cites are inapposite. Al-Amin's trial attorneys

did investigate Jackson's confession, through their experienced investigator. There was no obligation for the attorneys personally to have interviewed Jackson. It is axiomatic that "[a]n attorney can avoid activities that appear distractive from more important duties [and counsel] was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategy." *Richter*, 562 U.S. at 107 (internal quotation marks and citations omitted). A reasonable jurist could conclude that is the decision the defense team made here.

Moreover, "[a]n attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." *Id.* at 108. It is evident from Martin's testimony that is precisely what the defense team feared. It was not unreasonable for the state habeas court to conclude that Al-Amin's trial lawyers decided that further investigation would be fruitless and might well be harmful to Al-Amin.

Al-Amin's habeas lawyers now ask that this Court revisit that strategic pretrial decision and judge it against information they developed years *after* the trial was concluded. But "[r]eliance on the harsh light of hindsight to cast doubt on a trial that took place now more than 15[7] years ago is precisely what *Strickland* and AEDPA seek to prevent." *Id.* at 107. Under the doubly deferential review that the state habeas court's decision is entitled to receive,

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7. In *Richter*, the trial had occurred 15 years earlier. Here, Al-Amin's trial occurred 14 years ago.

I readily find and conclude that there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 788.

Al-Amin is not entitled to federal habeas relief on his Claim III.

I note that in connection with Claim III Al-Amin's habeas lawyers seek to add new material to the record. This new evidence includes an affidavit from Martin to supplement the testimony he gave at the state habeas hearing. Al-Amin's habeas lawyers, however, give no reason for the failure to have asked Martin during state habeas proceedings questions that would have elicited the information they now offer in the affidavit.

Not only would Al-Amin have a very tenuous argument as a general matter for adding to the record now information that was available to him *before* the state habeas evidentiary hearing, but in light of AEDPA's restrictions his "fail[ure] to develop the factual basis of a claim in State court proceedings" clearly precludes him from doing so now. 28 U.S.C. § 2254(e)(2); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

Accordingly, Al-Amin cannot expand the record in support of his Claim III.

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D.

Al-Amin has withdrawn the Claim IV that he included in his Fourth Amended Petition, *see* (Doc. 135), and it requires no substantive discussion.

To the extent that Al-Amin's is still asking to expand the record to introduce new material related to his *Brady* claim, those requests must be denied as moot.

E.

As I noted earlier, *see* p. 9 *supra*, Al-Amin also contended in passing that his Claims collectively warrant federal habeas relief, even if none of those Claims individually warrant relief. Al-Amin's entire argument on this point was that:

> Taken individually, any of the constitutional errors infecting Mr. Al-Amin's trial support[s] habeas relief. All four errors, however, relate to and support each other. Allowing the cross-examination of FBI Agent Campbell regarding the Philadelphia incident would have developed evidence answering several of the Prosecution's mock cross-examination questions (such as "Why would the FBI care enough to frame you? and "Mr. Defendant, how did those murder weapons get there to White Hall?"). Similarly, the confession of Otis Jackson and any exculpatory evidence from the FBI's investigation of Mr. Al-Amin at the

> time of the crime would answer the question of who actually shot Deputy Sheriffs Kinchen and English on March 16, 2000. Taken together, these errors compel habeas relief.
>
> Accordingly, Mr. Al-Amin respectfully requests that his petition for habeas corpus be granted.

Fourth Am. Pet. at 15-16. Al-Amin, who has four attorneys representing him in this federal habeas proceeding, cited no cases in support of this argument and developed it no further in his 150-page Fourth Amended Petition.

To his credit, Commissioner Bryson addressed this argument on the merits and at length. *See* (Doc. 131 at 48-50). Commissioner Bryson's response informed Al-Amin's habeas attorneys that they were making a "cumulative error" argument and cited relevant cases. Thus, in their Reply in Support of Fourth Amended Petition, Al-Amin's habeas lawyers developed a more complete argument on this point. *See* (Doc. 133 at 41-43).

As a threshold matter, I conclude that Al-Amin's "fail[ure] to provide any citation to authority or arguments in support" of his 'catch-all' claim in the Fourth Amended Petition waived it. It is a well-established that "[a] party abandons all issues on appeal that he or she does not 'plainly and prominently' raise in his or her initial brief." *United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003)). Similarly, a failure to provide any citation to authority or arguments in support

waives an issue. *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) ("We will not address this perfunctory and underdeveloped argument"); *see also Flanigan 's Enters. Inc. v. Fulton Cty, Ga.*, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (holding that a party waives an argument if the party "fail[s] to elaborate or provide any citation of authority in support" of the argument). Nor may "[p]arties ... raise new issues in reply briefs." *Krasnow*, 484 F. App'x at 429 (citing *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008)). The same principles apply at the district court level.

Moreover, even if I were to conclude that Al-Amin had "plainly and prominently" raised the issue of "cumulative error" and even if he had provided citations to authority, I would still conclude that federal habeas relief is not warranted on this basis. First, there is no merit to any of Al-Amin's three numbered claims individually, and in these circumstances it is unnecessary to decide whether the "cumulative error" doctrine applies. *See, e.g., Morris v. Secy, Dep't of Corr.*, 677 F.3d 1117, 1132 n.3 (11th Cir. 2012). Second, Al-Amin does not appear to have raised a "cumulative error" argument in the state courts, and he thus failed to fully-exhaust this claim. *See generally* 28 U.S.C. § 2254(b)(1).

Federal habeas relief is not warranted on this "catch-all" basis, and it provides no basis for expanding the record, either.

F.

Finally, I note that Al-Amin included in his Fourth Amended Petition a footnote declaring: "Mr. Al-Amin incorporates and does not waive any of the claims asserted in his direct appeal, his initial state habeas petition, or his amended state habeas petition." Fourth Am. Pet. at 19 n.6. This footnote purports to incorporate by reference the 16 issues that he raised on direct appeal and the 17 grounds for relief that he raised in state habeas proceedings. *See id*. at nn. 4&5. For the reasons just discussed above in the text—namely that none of these claims was "plainly and prominently" raised or supported by citations to authority in the Fourth Amended Petition—I conclude that all of these claims were waived.

IV.

For the foregoing reasons, I **RECOMMEND** that Al-Amin's Fourth Amended Petition (Doc. 129), as further amended to withdraw Claim IV (Doc. 135), be **DENIED**.

I further **RECOMMEND** that Al-Amin be **DENIED** a Certificate of Appealability because he has not demonstrated that he meets the requisite standards. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000). *See also* 28 U.S.C. § 2253(c)(2); 28 U.S.C. foll. § 2254, Rule 11(a).

And I **DENY** Al-Amin's Motion to Expand the Record (Doc. 101), Second Motion to Expand the Record (Doc. 116), and Supplement to Second Motion to Expand the Record (Doc. 117)

I **DIRECT** the Clerk to terminate the referral of this case to me.

IT IS SO RECOMMENDED, ORDERED, AND DIRECTED, this 24th day of March, 2016.

/s/_____
GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

APPENDIX F — ORDER DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE OF THE SUPREME COURT OF GEORGIA, DATED MAY 07, 2012

SUPREME COURT OF GEORGIA

Case No. S12H0007

Atlanta, May 07, 2012

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

JAMIL ABDULLAH AL-AMIN

v.

HUGH SMITH, WARDEN

From the Superior Court of Tattnall County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Hunstein, C.J., who dissents

Trial Court Case No. 2005-HC-66

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

Appendix F

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/Pamela M. Fishburne
Deputy Clerk

APPENDIX G — OPINION OF THE SUPREME COURT OF GEORGIA, DATED MAY 24, 2004

SUPREME COURT OF GEORGIA

No. S04A0151.

AL-AMIN

v.

THE STATE

May 24, 2004.

Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332 (2004):

THOMPSON, Justice.

Jamil Abdullah Al–Amin was convicted of malice murder and various other offenses stemming from the shooting of two Fulton County Deputy Sheriffs, that resulted in the death of one and injury to the other.[1] The

1. The crimes took place on March 16, 2000. On March 28, 2000, Al–Amin was charged in a 13–count indictment with malice murder, felony murder (four counts), aggravated assault on a peace officer (two counts), obstruction of a law enforcement officer (two counts), aggravated battery on a peace officer, possession of a firearm by a convicted felon, and possession of a firearm in the commission of a felony (two counts). The State sought the death penalty. Voir dire commenced on January 22, 2002, and on March 9, 2002, Al–Amin was found guilty of all counts. At the conclusion of the sentencing phase on March 13, 2002, the jury fixed punishment at life without possibility of parole. Al–Amin was sentenced accordingly on the same day. He

State sought the death penalty, but a jury returned a sentence of life without possibility of parole, and judgment was entered accordingly. Finding no reversible error, we affirm.

1. On appeal from a criminal conviction, we view the evidence in a light most favorable to the verdict, and the defendant no longer enjoys the presumption of innocence. *Short v. State,* 234 Ga.App. 633, 634(1), 507 S.E.2d 514 (1998). We do not weigh the evidence or determine witness credibility, but only determine if the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

So viewed, the evidence established that Fulton County Deputy Sheriffs Aldranon English and Ricky Kinchen went to the home of Al–Amin in the West End community of Atlanta to execute a bench warrant for his arrest issued by Cobb County Superior Court.[2] The warrant was issued when Al–Amin failed to appear at an arraignment in that court to answer charges of theft by

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filed a timely motion for new trial, which was amended on December 10 and 13, 2002, and denied on July 2, 2003. A notice of appeal was filed on July 18, 2003, and the case was docketed in this Court on September 26, 2003. Oral argument was heard on January 27, 2003.

2. Al–Amin served as an Iman (prayer leader) at a Muslim Masjid (house of worship) which was established in a small renovated house. The address on the warrant which Al–Amin listed with Cobb County authorities as his residence, is the same location as the Masjid.

receiving stolen property, impersonating an officer, and operating a motor vehicle without proof of insurance. The Fulton County deputies were in uniform with their badges displayed and they were driving a marked Fulton County Sheriff's patrol car.

Al–Amin's residence was unlit and it appeared to the deputies that he was not at home. Instead of possibly "blowing the warrant" by alerting neighbors of their attempt to find the subject, the deputies decided to leave the area.[3] They had driven a short distance when they saw a black car pull up and park near Al–Amin's residence, and they observed a man exit the vehicle. Although it was after dark, the street lights provided good illumination so that the deputies were able to discern that the individual, dressed in Muslim attire, appeared to fit the description of their subject as provided in the warrant. Deputy Kinchen made a U-turn, drove toward Al–Amin's residence, and parked the patrol car nose-to-nose with Al–Amin's vehicle, a black Mercedes–Benz. Al–Amin stood next to his vehicle and kept his gaze on the patrol car as it approached; his left hand was on his car door and he held a brown bag in his right hand. Deputy English exited from the passenger side and walked toward Al–Amin; the officer had not drawn his service revolver. Deputy Kinchen simultaneously exited the patrol car from the driver's side; he was to provide cover for his partner. Deputy English directed that Al–Amin place his right hand in view, whereupon Al–Amin

3. This was their second attempt; Deputy English along with a second deputy had been to Al–Amin's residence to execute the Cobb County warrant one week earlier. On that occasion, it also appeared that the residence was unoccupied, and the deputies left.

suddenly produced an assault rifle and began firing at the two officers. After shooting both deputies numerous times, using both the assault rifle and a pistol, Al–Amin drove away from the scene.

A neighbor who heard repeated gunfire called 911 and reported that there was an officer down in the street begging for his life. The neighbor described a dark–colored vehicle (he believed to be a Cadillac) speed away from the scene.

Deputy English radioed for help and alerted the dispatcher that the perpetrator left the scene in a black Mercedes. When police arrived at the scene, Deputy Kinchen was able to describe his assailant as an African–American male, 6′4″ in height, wearing a long trenchcoat, a "beanie" type hat, and armed with an assault rifle.

The next day Deputy English gave the investigating officers a statement describing the events, and he identified Al–Amin in a photo line-up. Later that afternoon, Deputy Kinchen died from his injuries. A Fulton County warrant was issued for the arrest of Al–Amin on charges of murder, aggravated assault, and other crimes stemming from the shooting. In addition, federal authorities, acting on information that Al–Amin had left Georgia, issued a warrant for unlawful flight to avoid prosecution (UFAP warrant).

Within a day of the shooting, federal authorities received information that Al–Amin might have fled to Whitehall, Alabama; a multi-agency surveillance team

was deployed to that area. On the fourth day after the shooting, Al–Amin was spotted on foot in Whitehall by a team of three United States Marshals who were part of the surveillance operation. When the uniformed marshals observed Al–Amin walk toward a wooded area, they exited their vehicle and identified themselves as law enforcement officers. Al–Amin immediately opened fire on them, and then retreated into the woods; the marshals were uninjured.

Al–Amin was captured about three hours later after a team of tracking dogs was brought in to assist in the search. He was wearing a bulletproof vest, and he had in his possession a wallet containing $1,000 in cash and three drivers's licenses issued in his name by three different states. In the vicinity, officers located a .9 millimeter pistol, holster, belt, a magazine of .9 millimeter ammunition, and a piece of fabric on a barbed wire fence that had been torn from the shirt Al–Amin was wearing. The next morning, officers conducted a further search of the area and located the following: several .223 caliber shell casings (both expended and live); a green canvas bag containing a cellular phone, clothing, a magazine containing .223 ammunition, and the registration documents for a Mercedes–Benz automobile showing Al–Amin as owner and reflecting his Fulton County address; a brown day planner containing a bank statement issued to Al–Amin at the same address; and a .223 caliber semi-automatic Ruger assault rifle and two magazines of .223 ammunition.

Nine days after Al–Amin's arrest, his black Mercedes automobile was recovered on private property in the

Whitehall area; the license plate was found in a nearby shed. Numerous bullet holes were visible on the car. Bullets which had been fired from the service revolvers of both Deputies Kinchen and English were removed from the wheel rim, frame, windshield, and rear seat of the vehicle.

Ballistics evidence also established that two .9 millimeter metal jacket bullets which had been removed from Deputy Kinchen's abdomen and femur had been fired from the .9 millimeter pistol recovered at the time of Al–Amin's arrest in Whitehall. It was also shown that shell casings collected from the site of the Fulton County shootings had been ejected from that weapon. Numerous .223 caliber cartridge casings collected both at the site of the Fulton County shootings and in the vicinity of Al–Amin's arrest, had been ejected from the .223 caliber Ruger rifle found along with Al–Amin's personal belongings on the morning after his arrest in Whitehall.

The evidence was sufficient for a rational trier of fact to have found Al–Amin guilty of the crimes for which he was convicted. *Jackson v. Virginia,* supra.

2. Al–Amin claims that his constitutional right to equal protection, as well as the statutory procedures for selecting grand juries, were violated because the grand jury wheel from which his grand jurors were selected was "forced balanced" by selecting people based on race, gender, and age.

Evidence presented at a pretrial hearing showed that the voter registration list for Fulton County was

the sole source for the master grand jury list from which the grand jury in this case was summoned; and because African–Americans in Fulton County do not register to vote at the same rate as Caucasians, a random selection from the voter registration list did not result in a master grand jury wheel which accurately represented the age-eligible African–American community. To remedy this disparity, and to ensure compliance with the Unified Appeal Procedure (UAP) applicable in a death penalty prosecution, jury commissioners employed the process of "forced balancing."[4] A computer was instructed to pick names of potential grand jurors from the voter registration list based on race, gender, and age in order to comply with the five percentage point requirements of UAP II(E).

The statutory procedures for creating the grand jury list are found at OCGA § 15–12–40, et seq.[5] This

4. Under UAP II(C)(6), a trial court in a death penalty case is required to compare the percentages of cognizable groups on the grand jury source list with the percentages of those groups in the population as measured by the most recent census, to certify that there is "no significant under-representation," and to correct any such under-representation. Under UAP II(E), the difference in those percentages must be less than five percentage points. See *Ramirez v. State,* 276 Ga. 158(3), 575 S.E.2d 462 (2003).

5. OCGA § 15–12–40(a) was revised effective July 1, 2000, requiring jury commissioners to make use of lists of county residents who are holders of drivers' licenses, personal identification cards issued by the Department of Public Safety, registered voters lists, and other lists deemed appropriate, in compiling revisions to the grand jury and trial jury lists. At the time of Al–Amin's

Court has consistently held that the use of forced racial balancing is not violative of a defendant's statutory rights. See *Ramirez v. State,* 276 Ga. 158(1); 575 S.E.2d 462 (2003) (Court approved a grand jury selection procedure fixing the percentage of African–American persons on the grand jury source list to the percentage of African–American persons in the county as reported in the most recent census in accordance with the requirements of the UAP); *Yates v. State,* 274 Ga. 312(5), 553 S.E.2d 563 (2001) (Court approved forced balancing to ensure that the racial balance in a grand or traverse jury pool reflects the racial balance in the county population); and *Gissendaner v. State,* 272 Ga. 704(5), 532 S.E.2d 677 (2000) (forced racial balancing is not unlawful).

Al–Amin further asserts that the process of forced balancing violates his right to equal protection. To succeed on an equal protection challenge in the context of grand jury selection, defendant must show (1) that the group is a recognizable, distinct class; (2) the degree of under-representation by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors; and (3) that the selection procedure is susceptible of abuse or is not racially neutral, thus supporting a presumption of discrimination raised by the statistics. *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Ramirez,* supra. See also *Morrow v. State,* 272 Ga. 691(1), 532 S.E.2d 78 (2000).

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indictment on March 28, 2000, jury commissioners were only to look to the voter registration list in the county in composing the grand jury list, former OCGA § 15–12–40(a).

Appendix G

In *Ramirez,* supra, we rejected defendant's equal protection claim arising from the use of the county's forced balancing system. We explained that where the source list "was constructed in accordance with the [UAP], specifically with the intent to equally represent the cognizable groups in [the county] as measured by the most comprehensive and objective source available at the time the list was constructed [the 1990 census]," id. at 161, 575 S.E.2d 462, Ramirez failed to establish the third element of a prima facie claim of an equal protection violation—that the grand jury selection process was susceptible of abuse or was not racially neutral. See also *Meders v. State,* 260 Ga. 49, 56, 389 S.E.2d 320 (1990) (Benham, J., concurring). It follows that Al–Amin's equal protection claim fails under both the federal and Georgia constitutions.

3. Al–Amin claims that his rights to equal protection and to a fair cross-section of jurors were violated because the master grand jury wheel grid had no category for potential grand jurors 65 years and over who were neither African–American nor Caucasian, but were categorized as "other" for racial purposes. Jury commissioners testified that such individuals were not included because they represented such a small fraction of the population that even the inclusion of one would amount to over-representation. To make a prima facie showing of a fair cross-section violation as well as an equal protection violation, Al–Amin was required to show, in part, that those who are both over the age of 65 and are not African–American or Caucasian were a cognizable group; and such persons were under-represented over a significant

period of time. *Ramirez,* supra at 159–161(1)(b),(c). He has established neither.

4. Al–Amin also asserts that his right to a fair cross-section of jurors was violated by the alleged systematic and substantial under-representation of the Hispanic/Latino community in the master petit jury wheel from which his petit jurors were selected.[6]

Evidence presented on this issue established that the *absolute disparity* of Hispanics/Latinos (the difference between the Hispanic/Latino percentage of the jury pool and the Hispanic/Latino percentage of the community) was 1.84 percent, well within constitutional requirements and the five percent permitted by the UAP. See *Cook v. State,* 255 Ga. 565(11), 340 S.E.2d 843 (1986); *Smith v. State,* 275 Ga. 715(1), 571 S.E.2d 740 (2002); *Morrow,* supra at 692(1) (defendant must show "wide absolute disparity" between percentage in the population and in the jury pool). Al–Amin urges that a *comparative disparity* method be applied (the absolute disparity divided by the percentage of the Hispanic/Latino community), which would show that the age eligible and citizen eligible Hispanic/Latino community was under-represented by 67 percent. However the comparative disparity method has

6. In *Congdon v. State,* 261 Ga. 398(2), 405 S.E.2d 677 (1991), this Court acknowledged that a criminal defendant has standing to raise an equal protection claim with respect to race-based exclusions of petit jurors, whether or not the defendant and the excluded juror share the same race. The same rule applies to equal protection challenges alleging systematic exclusion of grand jurors. *Campbell v. Louisiana,* 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998).

been expressly criticized, and we decline to apply it here. *Cook,* supra at 570(11). See also *United States v. Pepe,* 747 F.2d 632, 649 (11th Cir. 1984); *Godfrey v. Francis,* 613 F.Supp. 747 (N.D.Ga.1985).

The trial court found that Hispanic/Latino citizens were a cognizable group for Sixth Amendment fair cross-section analysis in Al–Amin's case, see *Smith,* supra at 716(1); *Castenada,* supra, but it concluded that the evidence presented failed to demonstrate this group was systematically excluded from the jury pool. We find no error. *Morrow,* supra at 692(1); *Smith,* supra at 716(1).

5. Al–Amin claims that the statutory exclusion of non-citizens, OCGA § 15–12–40.1, reduced the Hispanic/Latino population in Fulton County and thus violated his fair cross-section rights under the Sixth Amendment.

A potential juror must be a citizen of the United States in order to serve. OCGA § 15–12–40.1. Therefore, eligible population statistics, not gross population figures, must be considered. Al–Amin has not established error in the composition of the jury pool on this ground. See *Smith,* supra at 723(5).

6. Because the voter registration list was the sole source of names for the petit jury, Al–Amin asserts that the result was a substantial under-representation of African–American persons and a substantial over-representation of Caucasian persons, in violation of the Sixth Amendment and the UAP requirements.[7]

7. His argument is premised on evidence that an inordinate portion of African–American registered voters were inactive

As shown previously, prior to July 1, 2000, voter lists were appropriate sources for potential jurors. Former OCGA § 15–12–40(a). And the list required supplementation only if it failed to represent a fair cross-section of the community. See *Lipham v. State,* 257 Ga. 808(5), 364 S.E.2d 840 (1988). "A defendant has no right to a jury selected from a list which perfectly mirrors the percentage structure of the community. What is required is a list which represents a fair cross-section of the community and which is not the product of intentional racial or sexual discrimination." *Cook,* supra at 573, 340 S.E.2d 843. Al–Amin has not established that use of the voter registration list fails to result in a fair cross-section of the eligible members of the community.

7. We reject the claim that reversal of Al–Amin's convictions is required because jury selection officials systematically violated statutory authority for the selection of petit jurors, as well as a court-ordered plan established pursuant to that authority, which resulted in the exclusion of eligible citizens. See OCGA § 15–12–42(b)(1) (chief judge of the superior court may establish a plan for selection of jurors by mechanical and electronic means).

"Statutes regulating the selection, drawing, and summoning of jurors are intended to distribute jury duties among the citizens of the county, provide for rotation in jury service, and are merely directory. Obviously, however, a disregard of the essential and substantial provisions of

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voters, while Caucasians were over-represented on the active voter list and under-represented on the inactive list.

the statute will have the effect of vitiating the array." (Punctuation omitted.) *Meders,* supra at 53, 389 S.E.2d 320. The trial court found that the jury commissioners did not violate or disregard any essential and substantial statutory provisions. We agree that the allegations of non-compliance with the plan do not constitute substantial violations and do not require reversal. We find no abuse of the trial court's discretion. *Id.*

8. It is asserted that the trial court erred in failing to sever the two weapons possession counts (unlawful possession of a firearm by a convicted felon, and felony murder predicated on unlawful possession of a firearm by a convicted felon), or alternatively, to order a bifurcated trial of these counts, on the basis that inclusion of these counts impermissibly placed defendant's character in issue.

The trial court correctly determined that the possession charge was material in that it served as the predicate offense for felony murder. Under such circumstances, a bifurcated trial is not required. *George v. State,* 276 Ga. 564(3), 580 S.E.2d 238 (2003); *Johnson v. State,* 275 Ga. 508(2), 570 S.E.2d 292 (2002); *Jones v. State,* 265 Ga. 138(2), 454 S.E.2d 482 (1995). It follows that the trial court did not abuse its discretion in refusing to grant the requested relief.

9. The State introduced into evidence a cover letter attached to the Cobb County bench warrant which contained the following notation: "AGG ASSAUL; POSS ARMED." Al–Amin asserts the trial court erred in

denying his motion to redact the statement which falsely suggests that he had been charged with aggravated assault in Cobb County, and that the failure to redact impermissibly placed his character in evidence.

The document was introduced into evidence along with a limiting instruction informing the jury that both parties agree the reference to aggravated assault "was not accurate," and setting forth the correct Cobb County charges. As for the further notation that the suspect was possibly armed, the information is relevant to show that the accused had a motive for shooting the officers who were there to effect a lawful arrest. See generally *Groves v. State,* 175 Ga. 37(2), 164 S.E. 822 (1932). " 'Evidence which is relevant and responsive but which minimally places the character of the defendant into issue, is nevertheless admissible where the relevance of the testimony outweighs any prejudice it may cause. (Cits.)' [Cit.]" *Roebuck v. State* 277 Ga. 200, 205(5), 586 S.E.2d 651 (2003). We find no error.

10. In reliance on *Carr v. State,* 267 Ga. 701(1), 482 S.E.2d 314 (1997), overruled on other grounds in *Clark v. State,* 271 Ga. 6(5), 515 S.E.2d 155 (1999), Al–Amin asserts that the trial court erred in admitting evidence that he was tracked by dogs when he was arrested in Alabama because there was no scientific evidence shown of the reliability of the evidence.

In *Carr,* supra, we held that evidence of the use of a dog trained to alert to the presence of accelerants is not admissible in the absence of a showing that the evidence

has reached the "state of verifiable certainty" required by *Harper v. State,* 249 Ga. 519(1), 292 S.E.2d 389 (1982). The *Harper* requirement was imposed in *Carr,* supra, because the testimony concerning the dog alert was offered as substantive evidence of the presence of accelerants, and thus bore directly on the guilt of the accused on arson and murder charges. Because that type of expert testimony is not one that the average layperson could determine for himself, we held that the analysis and data gathering leading to the testimony should have been subject to the requirements of scientific verifiability required under *Harper,* supra. *Carr,* supra at 703, 482 S.E.2d 314.

Unlike *Carr,* the issue now before the Court turns on "testimony regarding use of dogs to flush defendant out of a wooded area ... [It] was not germane to the question of whether defendant committed the crimes charged ... [but] was relevant only to prove the manner in which law enforcement officers apprehended [the] suspect." *Ingram v. State,* 211 Ga.App. 821(1), 441 S.E.2d 74 (1994). Because this is evidence which is within the ken of the average layperson, it was not necessary that the *Harper* standards be met. *Carr,* supra at 703, 482 S.E.2d 314.

11. Nor did the court err in refusing to conduct a *Harper* hearing regarding the admissibility of firearms/ballistic/tool marks evidence. "Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature." *Harper,* supra at 526(1), 292 S.E.2d 389. The ballistics evidence was

introduced through the testimony of a properly qualified expert. Such ballistics evidence "is not novel, and has been widely accepted in Georgia courts." *Whatley v. State,* 270 Ga. 296, 299(6), 509 S.E.2d 45 (1998).[8] It follows that the trial court was authorized to accept the expert's testimony and that a *Harper* hearing was not required.

12. It is asserted that FBI Special Agent Campbell, who was part of the federal task force which apprehended Al–Amin, gave substantially misleading testimony at the behest of the prosecution, in violation of defendant's due process rights. The undisputed evidence showed that after

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8. Such evidence has also been widely accepted in other jurisdictions. In *United States v. Foster,* 300 FSupp2d 375, n. 1 (D.Md.2004), the court observed that [b]allistics evidence has been accepted in criminal cases for many years. The first comprehensive textbook of ballistics, Firearms Investigation, Identification and Evidence, was published by Major Julian S. Hatcher in 1935.... [N]umerous cases have confirmed the reliability of ballistics identification. See, e.g., *United States v. Santiago,* 199 FSupp2d 101, 111 (S.D.N.Y.2002) ("The Court has not found a single case in this Circuit that would suggest that the entire field of ballistics identification is unreliable.... To the extent that [the defendant] asserts that the entire field of ballistics identification is unacceptable 'pseudo-science,' the Court disagrees."); *United States v. Cooper,* 91 FSupp2d 79, 82–83 (D.D.C.2000) (implying that ballistics identification involves "well-established" scientific principles); *United States v. Davis,* 103 F.3d 660, 672 (8th Cir.1996) (upholding the use of expert testimony to link bullets recovered from a crime scene to a firearm associated with the defendant); cf. *United States v. Scheffer,* 523 U.S. 303, 313–314, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (contrasting polygraph evidence with other more accepted fields of expert testimony, including ballistics).

Al–Amin had been arrested and handcuffed, Campbell spit at him and kicked him. At trial, the prosecutor elicited testimony from Campbell on direct examination that he had been "suspended pending dismissal" for that conduct and that the FBI "intends" to fire him. Al–Amin asserts that this testimony was substantially misleading because Campbell was later to receive only a 60–day suspension for his misconduct.

"'Conviction of a crime following a trial in which perjured testimony on a material point is knowingly used by the prosecution is an infringement on the accused's Fifth and Fourteenth Amendment rights to due process of law.' [Cit.]" *Gates v. State,* 252 Ga.App. 20, 21(1), 555 S.E.2d 494 (2001). See also *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Despite Al–Amin's protestations to the contrary, we are not persuaded that the testimony in issue was material to the issues on trial. But even if it could be said that testimony that the FBI intended to fire Campbell was material, it was established at the hearing on the motion for new trial that the FBI did not make a final decision as to what penalty would be imposed until after the conclusion of trial. Consequently, Al–Amin failed to show the knowing use of perjured testimony by the prosecution. *Gates,* supra.

13. Al–Amin also contends that the State violated his rights under *Brady v. Maryland*[9] and Georgia discovery statutes by failing to produce FBI records relating to the internal investigation of Special Agent Campbell. These

9. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

documents were sought to support the defense theory that Campbell planted evidence to incriminate Al–Amin.

In response to a defense subpoena, the FBI turned over to the trial court certain documents relating to their investigation of Campbell. During trial, the court examined the documents in camera, disclosed to Al–Amin all relevant portions, and sealed what the court deemed irrelevant. The court did so under the Georgia discovery statute, and on general grounds of fairness, noting that the material would not necessarily have been subject to *Brady*. Al–Amin had the opportunity to cross-examine Campbell as well as other federal agents regarding Campbell's conduct and the subsequent investigation.

This issue was revisited during the hearing on the motion for new trial, at which time the trial court reviewed in camera and turned over to the defense all the documents produced by the FBI in response to Al–Amin's post-trial request. The court noted that these documents were entirely consistent with Campbell's trial testimony. Al–Amin conjectures that the FBI failed to produce every document in its possession pertaining to the Campbell investigation, and that somehow the State is under a duty to remedy the alleged omission. Even assuming arguendo that all relevant documents in the possession of the FBI were not produced, "a state criminal defendant, aggrieved by the response of a federal law enforcement agency made under its regulations, may assert his constitutional claim to the investigative information before the district court, which possesses authority under the [Administrative

Procedure Act][10] to compel the law enforcement agency to produce the requested information in appropriate cases." *United States v. Williams,* 170 F.3d 431, 434 (4th Cir.1999). Thus, the remedy lies in federal court.

With regard to the material produced by the FBI but which the trial court deemed irrelevant and refused to disclose to the defense, we perceive no *Brady* violation or error under Georgia law.

14. Al–Amin contends that the trial court improperly restricted cross-examination of Special Agent Campbell regarding his shooting of another suspect in an unrelated case in Philadelphia in 1995.

Specific instances of prior misconduct may not be used to impeach the character or veracity of a witness "unless the misconduct has resulted in the conviction of a crime involving moral turpitude." (Punctuation omitted.) *Allen v. State,* 275 Ga. 64, 68(3), 561 S.E.2d 397 (2002). See also OCGA § 24–9–84. In *Pruitt v. State,* 270 Ga. 745(21), 514 S.E.2d 639 (1999), under very similar circumstances, the defense sought to cross-examine the State's chief police investigator concerning his misconduct in an unrelated matter when he allowed a DUI suspect to avoid arrest and prosecution as a favor to another officer. The defense claimed that the evidence was relevant to show that the investigator may have tampered with evidence in Pruitt's murder prosecution. The trial court disallowed questioning about the prior incident. We affirmed that

10. See 5 USC §§ 701–706.

ruling, holding that "the DUI case was wholly unrelated to Pruitt's case; questioning about this incident was obviously and solely intended to diminish [the officer's] credibility as a witness. [The officer] was not convicted of any crime in the DUI incident, and impeaching a witness with specific acts of bad character is not permissible." *Id.* at 754, 514 S.E.2d 639.

In the case now before the Court, the trial court excluded evidence of the 1995 incident on the basis that Campbell had not been prosecuted for the alleged misconduct, and that any probative value was far outweighed by the danger of unfair prejudice. "While a defendant is entitled to effective cross-examination, he is not entitled to unfettered cross-examination, and the trial court has broad discretion in limiting its scope." *Allen,* supra at 68, 561 S.E.2d 397. We find no abuse of that discretion for any of the reasons advanced.

15. It is asserted that during closing argument the prosecutor impermissibly commented on the failure of Al–Amin to testify, in violation of his Fifth Amendment right against self-incrimination, and the concomitant statutory right contained in OCGA § 24–9–20(b). We agree, but we find that the error, although of a constitutional magnitude, was harmless beyond a reasonable doubt.

During closing argument, the prosecutor told the jury, "I want to leave you with a few questions you should have for the defendant." He then displayed a chart which contained a series of seven "questions for the defendant." In addressing those questions, the prosecutor argued,

inter alia, "Mr. defendant, how did those murder weapons get there to Whitehall.... How did your Mercedes get to Whitehall.... Did you drive it there?" At that point, the defense moved for a mistrial, asserting that the argument violated Al–Amin's right to remain silent under both federal and Georgia law. The trial court denied the motion and invited the defense to propose a curative instruction; it declined to do so. The prosecutor then altered the caption on the chart to state, "questions for the defense," and he continued with his closing. The defense renewed its motion for mistrial, which was again denied. The defense then requested a curative instruction from the court. In response, the court instructed the jury that closing argument is not evidence; that a criminal defendant is under no duty to present evidence and is not required to testify; that no adverse inference should be drawn if a defendant elects to remain silent; that the burden always remains on the State to prove guilt beyond a reasonable doubt; and the prosecution may not comment on the failure of the defendant to testify.[11] A renewed motion for mistrial was denied. The prosecutor continued its argument, reiterating that the defendant is not obligated to present evidence; and that burden rests at all times with the State.

As a rule of both constitutional law and Georgia statutory law, a prosecutor may not make any comment upon a criminal defendant's failure to testify at trial. *Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); OCGA § 24–9–20(b). This rule ensures

11. These instructions were repeated in the final charge to the jury.

that the State does not impose "a penalty" for or make "costly" the exercise of the constitutional right to remain silent. 380 U.S. at 614, 85 S.Ct. 1229. *Raheem v. State,* 275 Ga. 87, 92(7), 560 S.E.2d 680 (2002). Here, Al–Amin's constitutional and statutory rights were violated when the prosecutor in effect engaged in a mock cross-examination of the accused who had invoked his right to remain silent.

Improper reference to a defendant's silence, however, does not automatically require reversal. [Cits.] Assuming that a defendant has preserved the point by proper objection, the error may be harmless beyond a reasonable doubt. [Cits.] The determination of harmless error must be made on a case by case basis, taking into consideration the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of defendant's guilt.

Hill v. State, 250 Ga. 277, 283(4), 295 S.E.2d 518 (1982). See also *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Al–Amin's guilt was overwhelmingly established through the eyewitness identification by Deputies Kinchen and English, as well as by the vast amount of physical evidence tying defendant to the crimes. The jury was promptly given a lengthy instruction setting forth the correct principles of law. Compare *Salisbury v. State,* 221 Ga. 718(5), 146 S.E.2d 776 (1966) and *Spann v. State,* 126 Ga.App. 370(2), 190 S.E.2d 924 (1972) (the error was deemed harmful in the absence of any effort by the trial court to correct the injury the improper remark caused

the defendant). The strength of the evidence against Al–Amin coupled with the contemporaneous curative instruction leads this Court to conclude that the violation here was harmless beyond a reasonable doubt. *Chapman v. California,* supra; *Raheem,* supra at 92(7); *Hill,* supra at 283(4).

16. Al–Amin challenges the prosecutor's closing argument in other respects.

(a) It is asserted that the prosecutor misstated the testimony given by a State's witness. What is impermissible is "the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." (Punctuation omitted.) *Bell v. State,* 263 Ga. 776, 777, 439 S.E.2d 480 (1994). Here the prosecutor imprecisely restated the description given by Deputy Kinchen of his assailant to one of the EMTs on the scene. The EMT testified that Deputy Kinchen told him that he and his partner were in the process of serving a warrant "when the suspect opened up on us." The prosecutor misstated the EMT's testimony by recounting that Deputy Kinchen identified his assailant as "the guy on the warrant." Upon objection by the defense, the trial court instructed the jury that the attorneys in good faith are recalling the evidence, but closing arguments are not evidence and in the end the evidence is what the jury determines it to be. We find no error.

(b) Al–Amin asserts that he was entitled to a mistrial when at the conclusion of the State's closing argument, the prosecutor stated, "don't stand for him," alluding to

Al–Amin's religious beliefs which prevented him from rising when the jury entered the courtroom. The record reveals that several times during trial, the court offered to instruct the jury that as an observant Muslim, Al–Amin is prevented by his religious beliefs from standing in the courtroom. On each occasion, the defense declined. The defense ultimately accepted the court's offer to explain this conduct during the jury charge at which time the jury was instructed that the defendant is a practicing Muslim, that he has elected not to stand because of his religious beliefs, and that his conduct has the court's approval. Al–Amin was not harmed by the prosecutor's comments.

(c) Although it is asserted that the cumulative effect of the errors in closing argument deprived defendant of a fair trial, Georgia does not follow a cumulative error rule of prejudice. *Morrison v. State,* 276 Ga. 829(5), 583 S.E.2d 873 (2003).

(d) Any remaining assertions of error with respect to the State's closing argument were not preserved for review. See *Mullins v. State,* 270 Ga. 450(2), 511 S.E.2d 165 (1999).

17. During cross-examination of a State's witness, defense counsel elicited testimony that the witness had grown up in the West End community; counsel then asked the witness if he had seen how the neighborhood had changed. Anticipating that the questioning was leading to Al–Amin's role in community improvement, the State requested a bench conference and asked the trial court for a ruling as to whether such evidence would open the

"character door." The defense objected but discontinued that line of questioning. After further argument on the issue, the court ruled that testimony concerning Al Amin's positive influence in the community would constitute evidence of good character under *State v. Braddy,* 254 Ga. 366, 330 S.E.2d 338 (1985), and would permit the State to offer rebuttal evidence. On appeal, Al–Amin asserts that the court erred in its ruling, and that the error was amplified when the State introduced evidence that the reaction of the community to the crime was "unusual" in that no onlookers were present when the police arrived at the scene of the crime, thus *implying* that local witnesses feared the defendant.

"[W]here the defendant offers testimony of a witness as to his general good reputation in the community, the State may prove the defendant's general bad reputation in the community, and may additionally offer evidence that the defendant has been convicted of prior offenses under the authority of OCGA § 24–9–20(b)." *Jones v. State,* 257 Ga. 753, 758(1), 363 S.E.2d 529 (1988). "[I]t is possible for a criminal defendant to put his character in issue while cross-examining a [S]tate's witness." *Franklin v. State,* 251 Ga. 77, 81(2), 303 S.E.2d 22 (1983).

In *Braddy,* supra at 366–367, 330 S.E.2d 338, this Court addressed the question of whether evidence of a defendant's impact on the community constituted character evidence:

The character of a defendant in most criminal cases is a substantive issue. [Cit.] A party *can* establish character

by showing the community's perception of the defendant—his reputation, things the defendant has done—specific acts, and what a witness thinks personally about the defendant. The rules of evidence determine, by attempting to balance the truth seeking function with the interest of fairness, which method a party *may* use to establish character in a given situation. See 1A Wigmore, Evidence § 52, at 1148. (Tillers Revision, 1983).

Based on the foregoing, the trial court correctly determined that if the defense had pursued its questioning of the witness concerning Al–Amin's positive contributions to the West End community, the defense would have made "an election to place his good character in issue." *Jones,* supra at 758, 363 S.E.2d 529.

Evidence as to the reaction of the community merely described the crime scene and results of the investigation, both of which were relevant and admissible. See generally *Corza v. State,* 273 Ga. 164(2), 539 S.E.2d 149 (2000) (State is entitled to present evidence of the entire res gestae of a crime; this is so even if the defendant's character is incidentally placed in issue). Al–Amin has not established that the trial court abused its discretion in admitting the evidence.

18. When Al–Amin was arrested, he was approached by an FBI agent who identified himself as a medic and asked him if he was injured. Al–Amin responded that he was "out of breath." He now contends that the court erred in admitting this statement because it was given without *Miranda* warnings, and it was not revealed to the defense

prior to trial as required by the Georgia discovery statute, codified at OCGA § 17–16–4(a)(1).

The trial court determined that the question was asked for the sole purpose of assessing whether the suspect required medical aid, and was unrelated to the police investigation. The court then admitted the testimony only as it relates to a physical assessment of the suspect, and prohibited the State from drawing any inferences from it.

(a) *Miranda* warnings are required "not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis,* 446 U.S. 291, 300, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In this context, the term "interrogation" refers not just to express questioning, but also to questioning that the police should know is "reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301, 100 S.Ct. 1682; *Lucas v. State,* 273 Ga. 88(2), 538 S.E.2d 44 (2000). Unless the police know that the suspect is susceptible to questions concerning his health, or unless the suspect's health is somehow related to a crime that the police believe he committed, it is unlikely that questions concerning the suspect's physical health would elicit an incriminating response. See *United States v. Robles,* 53 M.J. 783, 790(II)(b) (2000) (holding that under the *Innis* definition of interrogation, inquiring about a suspect's health is not the functional equivalent of questioning). See also *Colon v. State,* 256 Ga.App. 505(1), 568 S.E.2d 811 (2002) (police officers have the responsibility to ask medical questions as part of routine

booking in order to fulfill the government's obligation to provide medical treatment to one in custody, and such routine booking questions are generally considered exempt from *Miranda*). Because the question posed by the medic related only to Al–Amin's physical condition and was not likely to elicit an incriminating response, *Miranda* warnings were not required. *Innis,* supra, 446 U.S. at 300, 100 S.Ct. 1682; *Colon,* supra at 505(1).

(b) Even assuming arguendo that OCGA § 17–16–4(a)(1) requires pretrial disclosure of the statement, Al–Amin has not shown that he was prejudiced by the lack of pretrial disclosure, or that the State acted in bad faith. Under the circumstances, the State was not prohibited from introducing the statement into evidence. OCGA § 17–16–6; *Simmons v. State,* 271 Ga. 563(3), 522 S.E.2d 451 (1999); *Felder v. State,* 270 Ga. 641(6), 514 S.E.2d 416 (1999).

19. Al–Amin contends that the court erred in excluding on hearsay grounds the statements of two individuals who spoke to police investigators on the night of the shootings, and who were unavailable to testify.

The first was a statement given to an investigating officer by an elderly neighbor who said she heard gunfire at about 10:00 p.m. (the time established that the deputies were shot), and that five to ten minutes later, she heard a vehicle drive away at a high rate of speed. The neighbor was not able to testify due to ill health, and the defense sought to introduce her statements through the investigating officer under the necessity exception to the hearsay rule. OCGA § 24–3–1(b).

The second was an unknown declarant who told an officer on the night of the shooting that "someone just ran through here, but don't tell anybody I told you this"; the officer did not note the name of the individual. Al–Amin argued that this statement was admissible under the necessity exception, or alternatively, as an excited utterance as part of the res gestae exception to the rule against hearsay. OCGA § 24–3–3.

Neither of the statements were admissible under the necessity exception.[12]

In order to introduce any hearsay statement under the necessity exception, (1) the declarant must be unavailable to testify; (2) there must be particularized guarantees of the statement's trustworthiness; and (3) the statement must be both relevant to a material fact and more probative regarding that fact than any other evidence concerning appellant's motive for the crimes.... Merely because [the declarant] made his statement to police within hours of the shooting and never recanted or contradicted his statement does not, standing alone, demonstrate that the statement was sufficiently trustworthy to warrant its admission under the necessity exception. Only where "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross–examination would be of marginal utility" does the hearsay rule not bar admission of a hearsay statement at trial.

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12. Because the Sixth Amendment's Confrontation Clause is not implicated where the proponent of the hearsay is the defendant, the recent decision of the United States Supreme Court in *Crawford v. Washington,* 541U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) is inapplicable here.

Appendix G

Phillips v. State, 275 Ga. 595, 597(4), 571 S.E.2d 361 (2002). The same rule applies when a defendant is the proponent of the hearsay. *Turner v. State,* 267 Ga. 149(3), 476 S.E.2d 252 (1996).

The trial court correctly determined that with respect to the statement of the neighbor, the defense failed to carry its burden of demonstrating particularized guarantees of trustworthiness. *Phillips,* supra at 597(4). In addition, the evidence would have been cumulative of the testimony given by several witnesses that gunfire was heard at 10:00 p.m., and a vehicle (dissimilar to Al–Amin's) was seen driving away from the scene several minutes later. Thus, the excluded evidence was not more probative of the fact for which it was offered than other properly admitted evidence. *Id.*

Likewise, there was absolutely no showing of reliability with respect to the statement of the anonymous declarant. Nor did the anonymous statement qualify as an excited utterance. To be admissible as an excited utterance, the proponent of the hearsay must show that the event precipitating the statement was "sufficiently startling to render inoperative the declarant's normal reflective thought processes, and the declarant's statement must have been the result of a spontaneous reaction." *Walthour v. State,* 269 Ga. 396, 397(2), 497 S.E.2d 799 (1998). See also *Lindsey v. State,* 271 Ga. 657(2), 522 S.E.2d 459 (1999). Al–Amin failed to meet this burden.

The trial court correctly determined that the hearsay statements were not admissible for the reasons advanced.

Appendix G

Judgment affirmed.

All the Justices concur.