No.

In the Supreme Court of the United States

CORDARYL SILVA,

Petitioner,

v.

CONNECTICUT,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

GLENN W. FALK
ROBERT BLACK
New Haven Legal Assistance Association, Inc.
426 State Street
New Haven CT 06510-2018
(203) 946-4811

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

This Court held in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that a suspect who is taken into custody has the right to remain silent, and it held in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), that the state may not use a suspect's silence after receipt of the *Miranda* warning for purposes of impeachment at trial. In light of these holdings, the question presented is:

Whether, once a suspect has been taken into custody and given the *Miranda* warning, the suspect's "selective silence"—that is, the refusal to answer some but not other questions—may be used by the State to establish the suspect's guilt at trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cordaryl Silva respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Connecticut in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Connecticut (App., *infra*, 2a-36a) is reported at 141 A.3d 916 (Conn. App. 2016). The decision of the Connecticut Supreme Court denying certification (App., *infra*, 1a) and the judgment of the Connecticut Superior Court (App., *infra*, 37a-38a) are unreported.

JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on June 14, 2016. On September 23, 2016, the Connecticut Supreme Court denied petitioner's petition for certification. On December 9, 2016, Justice Ginsburg granted an extension of time within which to file a petition for a writ of certiorari to February 17, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be compelled in any criminal case to be a witness against himself

The Due Process Clause of 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

After suspects in criminal cases are taken into custody and given the familiar warning mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), they often answer some police questions but decline to answer others—that is, in the usage of many courts, they are "selectively silent." This case presents the question whether such selective silence may be used against a criminal defendant at trial.

This Court held in *Miranda* that, under the Fifth Amendment, a suspect has the right to stand silent and that post-custodial silence may not be used against a criminal defendant to establish guilt at trial. The Court expanded on that rule in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), holding that, once a suspect has been taken into custody and assured under *Miranda* that he or she may remain silent, due process principles preclude using that silence against the suspect at trial for purposes of impeachment. But "[t]he issue of selective silence has never been directly addressed by the United States Supreme Court" (*Bartley* v. *Commonwealth*, 445 S.W.3d 1, 10 (Ky. 2014)), and in the absence of that guidance the federal courts of appeals and state courts of last resort have been deeply divided on when prosecutors may use the silence of suspects who answer some but not all police questions. The result has been an extensive and widely acknowledged conflict in the courts.

In this case, the court below (relying on settled authority of the Connecticut Supreme Court) held that the selective silence of petitioner—who, after receiving the *Miranda* warning, answered some questions but declined to answer others—could be used against him by the prosecution at his trial for murder, both to establish the state's affirmative case and

to impeach petitioner's exculpatory account. That holding was wrong: both *Miranda* and *Doyle* make clear that, once a defendant is taken into custody and given the *Miranda* warning, the suspect's silence (whether complete or selective) may not be used by the prosecution at trial. This Court should grant review, resolve the conflict on this significant and recurring question, and reverse the judgment below.

A. Factual background

As recounted by the court below, law enforcement officers arrested petitioner in connection with the murder of Javon Zimmerman and advised petitioner of his *Miranda* rights. App., *infra*, 25a. Petitioner refused to allow the interview to be recorded, but answered some of the questions posed by detective Patrick Meehan.

In particular, "Meehan told [petitioner] that he wanted to discuss the shooting of Javon Zimmerman at R.J.'s café and the defendant's possible involvement in that shooting. The defendant told Meehan that he had been at R.J.'s Café at the time of the murder, that he had an altercation with Javon Zimmerman in the parking lot, and that he ran away after the altercation." App., *infra*, at 25a. The court continued: "When Meehan asked the defendant if he had murdered Javon Zimmerman, the defendant did not reply, and just gave 'a blank stare' and shrugged. Following his refusal to answer that question, the defendant continued to answer questions about whether had had touched the car that Javon Zimmerman had been in when he arrived at R.J.'s Café, and about his history with the Zimmermans." *Id*. at 26a-27a.

At trial, the prosecution explored petitioner's refusal to answer Detective Meehan's questions both in its direct case and on cross-examination of petitioner. In a lengthy exchange with the prosecutor, Meehan recounted in detail petitioner's failure to answer the question "if he murdered Javon Zimmerman." App., *infra*, 26a n.9. In Meehan's words, petitioner "was pretty cooperate [*sic*] with us [the interrogating officers]. He just wouldn't answer any questions specifically with regard to that shooting." *Ibid*. Meehan also described petitioner's non-response to the question whether he murdered Zimmerman. According to Meehan, petitioner "doesn't reply. He doesn't—admit it or deny it. It's just a blank stare" and "[j]ust some nonconfirmatory like shrugs." *Ibid.*

During his cross-examination of petitioner, the prosecutor questioned petitioner on his silence. "When [the officer] asks you if you shot [the victim], you don't say * * * why does everybody keep pointing the finger at me? You don't say, I didn't do this. You don't say, this my life we're talking about. I got kids. I would never shoot somebody in the middle of a parking lot with witnesses around. You say none of that." App., *infra*, 27a-28a. Petitioner responded that "I say nothing" and that "I didn't answer all of [Meehan's] questions because when he asked me what happened that night I told him I don't want to even get into that." *Ibid*.

The prosecutor also probed petitioner's failure to reveal that he knew the identity of the real shooter until his testimony at trial, when he stated that he saw who had fired the shot. Trial Tr. 56-57. The prosecutor emphasized: "Detective Hunt, Detective Netto, and Detective Meehan indicate that no matter how many times they tried to talk to [petitioner]

about this * * *, [he] never once denied doing it." Trial Tr. 152. Again, before resting the state's case, the prosecutor emphasized that "during the course of [petitioner's] four hours of questioning by police, he [n]ever told them that he knew the identity of the real murderer." App., *infra*, 27a

In addition, the government raised petitioner's refusal to record the interview with Detective Meehan, as well as his decision to remain silent in response to certain questions, during closing argument: "We don't have any audio or video of that; [the defendant] wouldn't allow it." App., *infra*, 28a. The prosecutor continued:

> "But the important part about that, well, Detective Meehan stressed—you decide what is the important part. But Detective Meehan stressed, he is all over the place in the first part. The Zimmermans; the killers; they bring people up to pull the trigger. Javon you know was there, and on and on about that. Did you do it? *The shrug basically told you what I did.*"

Ibid. (emphasis added).

The jury convicted petitioner of murder. He was sentenced to fifty years' incarceration and ten years of special parole.

B. Procedural background

On appeal, petitioner maintained that the state "improperly used his post-*Miranda* silence and demeanor to imply his guilt and that this constitutional violation was harmful." App., *infra*, 28a. In particular, petitioner argued "that the state's use of his failure to answer Meehan's questions about whether he

had killed Javon Zimmerman violated the rationale of *Doyle*, which held that it is a violation of due process to use a defendant's post-*Miranda* silence to impeach him at trial." *Ibid*. Because the *Miranda* warning implies "that silence will carry no penalty," petitioner argued that his silence in response to certain questions should not have been used either as substantive evidence of guilt or for impeachment purposes. *Id.* at 30a (quoting *Doyle*, 426 U.S. at 617-18).

But the Connecticut Appellate Court upheld the conviction, rejecting petitioner's arguments under *Doyle* and *Miranda*. App., *infra*, 24a-36a.[1] Relying on settled authority of the Connecticut Supreme Court, the appellate court held that "[a] *Doyle* violation does not occur * * * where a defendant has not invoked his right to remain silent or has remained 'selectively silent.'" *Id*. at 32a (quoting *Connecticut* v. *Talton*, 497 A.2d 35, 44 (Conn. 1985)). Quoting the state supreme court's decision in *Talton*, the appellate court reasoned that, once a suspect has answered certain police questions and thus "waived his right to remain silent," "'the *Doyle* rationale is not operative [if the suspect declines to answer additional questions] because the arrestee has not remained silent.'" *Id*. at 33a (quoting 497 A.2d at 44). At that point, the court continued, the suspect "'knows that anything he says can and will be used against him and it is manifestly illogical to theorize that he might be choosing not to assert the right to remain silent as to part of his exculpatory story, while invoking that right as to other parts of that story.'" *Ibid*. (quoting 497 A.2d at 44).

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[1] The court also rejected petitioner's argument that he was denied the right to self-representation. App., *infra*, 5a-24a. That issue is not presented here.

Applying that reasoning here, the appellate court observed that "[t]he defendant remained selectively silent when asked if he had committed the crime, yet answered questions before and after about his relationship with the victim and his whereabouts on the morning of the victim's murder." App., *infra*, 35a. Because "there was no indication that the defendant was invoking his right to remain silent upon being asked that question," and he "continued to answer questions thereafter and did not stop the interview," the court held that "the state's use of the defendant's post-*Miranda* silence during direct examination, cross-examination, and its closing argument was not a violation of his fifth and fourteenth amendment privilege against self-incrimination." *Id*. at 36a.[2]

The Connecticut Supreme Court denied review. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

Petitioner was taken into custody and informed, under *Miranda*, that he had the right to remain silent. And he did remain silent, at least in part, refusing to answer pointed police questions about the crime. But the state then used that silence against petitioner at trial to establish his guilt.

Although some courts agree with the treatment accorded selective silence by the court below, in many courts, including at least four federal courts of appeals and two state courts of last resort—which

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[2] Although petitioner had not raised his selective silence claim at trial, the appellate court chose to reach and resolve the question because petitioner "alleged a constitutional violation and the record is adequate for review." App., *infra*, 29a (citing *State* v. *Golding*, 567 A.2d 823, 827-28 (1989)).

protect selective silence—petitioner's case would have come out differently. And under *Miranda* and *Doyle*, that is the correct outcome. Further review by this Court, accordingly, is warranted.

A. The courts are deeply divided on the permissible uses that may be made of custodial, post-*Miranda* warning selective silence.

There can be no denying the existence and wide scope of the conflict on the uses that prosecutors permissibly may, and may not, make of a suspect's selective silence. Both federal and state courts repeatedly have recognized that "[m]any courts * * * have differing views on whether such [selective] silence should be admissible at trial against a defendant." *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 104 (3d Cir. 2012). Of the "courts that have addressed the applicability of the *Doyle* rule in selective silence cases, * * * [s]ome courts have concluded the *Doyle* rule does not bar the prosecution's use of the defendant's silence. * * * Other courts have concluded the opposite." *People* v. *Bowman*, 136 Cal. Rptr. 3d 119, 127 (Cal. App. 2011); accord *Friend* v. *State*, 473 S.W.3d 470, 480 (Tex. App. 2015) (same); *State* v. *Galvan*, 326 P.3d 1029, 1036 (Idaho Ct. App. 2014) ("[t]here is a federal circuit split."); *People* v. *Hart*, 828 N.E.2d 260, 275 (Ill. 2005) (recognizing disagreement on effect of *Doyle*); *People* v. *McReavy*, 462 N.W.2d 1, 18 (Mich. 1990) (Levin, J., concurring in part) ("In sum, there appears to be a split of authority whether the Fifth Amendment permits the substantive use of a defendant's failure to answer particular questions during postarrest, post-*Miranda*

interrogation.").[3] Commentators agree: "The split over the selective silence doctrine grows wider." Evelyn A. French, Note, *When Silence Ought To Be Golden: Why the Supreme Court Should Uphold the Selective Silence Doctrine in the Wake of* Salinas v. Texas, 48 Ga. L. Rev 623, 627 (2014).

Even members of this Court have recognized that lower courts disagree on whether selective silence may be used against a defendant. Dissenting in *Salinas* v. *Texas*, a case about pre-*Miranda* silence, Justice Breyer—joined by Justices Ginsburg, Sotomayor, and Kagan—wrote: "the defendant's deeds (silence) and circumstances (receipt of the warnings) * * * tie together silence and constitutional right. Most lower courts have so construed the law, even where the defendant, having received *Miranda* warnings, answers some questions while remaining silent as to others." 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting). Justice Breyer then cited decisions of the First, Fourth, Seventh, Ninth, and Tenth Circuits supporting a selective silence doctrine, before adding a "but see, *e.g.*" citation to a contrary Eighth Circuit decision. *Ibid.* (citing *United States* v. *Harris*, 956 F.2d 177 (8th Cir. 1992)).[4]

In all, at least four federal courts of appeals and two state courts of last resort have held that selective silence following *Miranda* warnings may *not* be used against a defendant; at least two federal courts

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[3] See also *Kibbe* v. *DuBois*, 269 F.3d 26 (1st Cir. 2001) (finding that post-arrest, post-*Miranda* selective silence "fall[s] outside any clearly established Supreme Court precedent").

[4] As we explain below, we believe that the law in the First and Seventh Circuits actually is somewhat confused on the point, while other courts have agreed with the Eighth.

of appeals and seven state courts of last resort have held to the contrary. Intermediate state appellate courts also have weighed in on each side of the conflict. And perhaps not surprisingly, given this confusion, additional courts have been unable to articulate a consistent rule. This Court should resolve the conflict.

*1. At least four federal courts of appeals and two state courts of last resort prohibit use of post-*Miranda *warning selective silence against a defendant.*

On one side of this conflict, numerous courts have embraced the principle that use of selective silence against the accused is precluded by the Fifth Amendment or the Due Process Clause. These courts include:

The **Fourth Circuit**, in a case where the defendant declined to answer questions on a particular subject after receiving *Miranda* warnings, held that "[t]here can be little doubt that in stating that he did not desire to answer [these] questions * * * [the defendant] was relying on his understanding of the *Miranda* warning which had been read to him at the beginning of the interview." *United States* v. *Ghiz*, 491 F.2d 599, 600 (4th Cir. 1974) (Haynsworth, C.J.). Therefore, because the defendant was "invok[ing] his [F]ifth [A]mendment privilege or in any other manner indicat[ing] he [wa]s relying on his understanding of the *Miranda* warning," an FBI agent's testimony on the defendant's selective silence was inadmissible. *Ibid.*

In a case where the defendant "answered some questions but then refused" to answer others about a vehicle he was alleged to have operated illegally, the

Sixth Circuit held that "[i]t [was] a violation of [defendant's] due process rights under the Fifth Amendment when he was cross-examined about his failure to answer," pre-arrest but post-*Miranda* warning, questions about "how much and in what manner he paid for the vehicle and from whom he purchased it." *United States* v. *Williams*, 665 F.2d 107, 109 (6th Cir. 1981). This was true, according to the court, "even if the cross-examination were limited to purposes of impeachment." *Ibid.*

The **Ninth Circuit** held that "the right to silence is not an all or nothing proposition." *Hurd* v. *Terhune*, 619 F.3d 1080, 1087 (9th Cir. 2010). In this case, after the defendant gave his version of the facts, he declined to submit to a polygraph examination and to reenact the crime. *Id.* at 1083-84. The court held that the defendant had a right to "remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial," and therefore his selective refusals could not be used against him. *Id.* at 1087. In reaching this conclusion, the Ninth Circuit expressly declined to adopt the contrary understanding of *Miranda* and *Doyle* adopted by the California Court of Appeal, which the federal court labeled "incorrect." *Ibid*.

The **Tenth Circuit** held that when a defendant "answer[s] some questions and refuse[s] to answer others, this partial silence does not preclude him from arguing that a violation of *Doyle* occurred." *United States* v. *Harrold*, 796 F.2d 1275, 1279 n.3 (10th Cir. 1986), cert. denied, 479 U.S. 1037 (1987); see *id.* at 1278-80 (*Doyle* violated, but error harmless). In *United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993), that court likewise ruled that the

prosecutor's reference to the defendant's post-*Miranda* warning selective silence regarding his assertion that he had been "set up" was improper; the reference suggested "that [the defendant] was guilty because an innocent person would have presented the set-up theory to the arresting officers." 985 F.2d at 485-86. Although the defendant "did not remain totally silent, but instead made several statements to the police after he received *Miranda* warnings," "this partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*." *Id.* at 486.

The **Kentucky Supreme Court** embraced the same conclusion in the pre-arrest, post-*Miranda* warning context where the defendant "was selectively silent, having agreed to speak with [a detective] about some matters and then remaining silent when asked questions touching on her possible involvement in her husband's murder." *Bartley* v. *Commonwealth*, 445 S.W.3d 1, 10 (Ky. 2014). In a case where the defendant did not testify at trial, the court held that "the giving of *Miranda* warnings generally bars the use of any ensuing silence" by the state to establish its affirmative case; "[s]elective silence is permissible and protected." *Id.* at 9, 10-12, 17-18.

The **Kansas Supreme Court** held that a prosecutor "flirt[s] with disaster" by referring to a defendant's selective silence where "guilt depended on whether the jury believed his most sympathetic version of events," although the error was found to be harmless in *State* v. *Fisher*, 373 P.3d 781, 791 (Kan. 2016). The prosecutor cross-examined the defendant and asked why he never contacted the police to give a "more definitive statement about what happened" and "[n]ever said a word about [an exculpatory story]

until today." *Ibid.* The court reasoned that, "[i]f the prosecutor intended to impeach by pointing out inconsistencies among [the defendant's] statements, the prosecutor needed to focus on what [the defendant] *did* say during police interviews * * * instead of focusing on what [the defendant] *did not* say." *Ibid.*

In addition, the highest courts in Washington[5] and Texas[6] have denied review of similar, lower-court decisions.

Petitioner's silence would have been inadmissible had his trial taken place in these jurisdictions. These courts all have embraced the principle that selective silence may not be used against a defendant, and most have done so in factual circumstances that are materially identical to some of those in this case, involving selective refusal to answer questions (see, *e.g.*, *Hurd*, *Ghiz*, *Fisher*) or to offer details of an exculpatory story (see *e.g.*, *Canterbury*, *Fisher*).

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[5] *State* v. *Fuller*, 282 P.3d 126, 136 n.7 (Wash. Ct. App. 2012) (holding that the defendant was entitled to a new trial because the government violated his rights by attempt to infer guilt from his selective refusal to answer certain questions), review denied, 297 P.3d 68 (Wash. 2013).

[6] *Friend* v. *State*, 473 S.W.3d 470, 475-82 (Tex. App. 2015) (holding that because defendant answered multiple questions but, when asked whether he had been drinking, responded by stating that he was "[n]ot saying anything to that one," defendant invoked "his constitutional right to remain silent with respect to the topic of alcohol consumption" and his silence could not be used as evidence of guilt), review denied, (Tex. Ct. Crim. App. 2015).

2. Two federal courts of appeals and seven state courts of last resort allow the prosecution to use a defendant's selective silence at trial.

On the other side of the equation, courts like the Connecticut Supreme Court and the court below in this case have reasoned that, once a suspect has answered certain police questions, "the *Doyle* rationale is not operative [if the suspect declines to answer additional questions] because the arrestee has not remained silent." *State* v. *Talton*, 497 A.2d 35, 44 (Conn. 1985). These courts are of the view that, once the suspect waives the right to remain silent by answering a question, he or she will not be presumed to be resting on the right to remain silent when refusing to answer additional questions, unless and until the suspect expressly invokes *Miranda*. That is so, these courts conclude, because they view it as "manifestly illogical to theorize" that an arrestee could be asserting his or her right to remain silent with respect to some statements but not others. *Ibid.* In addition to the Connecticut Supreme Court, these courts include:

The **Second Circuit**. When a defendant "clearly waived his right to remain silent and there is no indication in the record that he resurrected and asserted this right" beyond non-verbal conduct, the prosecutor may comment on defendant's silence. *United States* v. *Pitre*, 960 F.2d 1112 , 1126 (2d Cir. 1992).

The **Eighth Circuit**. The court did "not believe that the admission of [a defendant's] silence in response to one question posed to him in the midst of his interrogation was a violation of the Supreme Court's holding in *Doyle*." *United States* v. *Burns*, 276 F.3d 439, 441 (8th Cir. 2002). "[W]e believe that

[the defendant's] silent response to one inquiry during the interrogation and eventual refusal to respond to further questioning were 'part of an otherwise admissible conversation' and that the admission of the conversation in its entirety did not violate his due process rights." *Id.* at 442.

The **Massachusetts Supreme Judicial Court**. "Where the record is bereft of any indication that the defendant ever [re]invoked his right to remain silent, * * * the prosecutor's comment and the testimony concerning the defendant's refusal to answer certain questions posited by the police cannot be construed as an impermissible comment on the defendant's having invoked that right." *Commonwealth* v. *Senior*, 744 N.E.2d 614, 622 (Mass. 2001) (internal quotation marks and citation omitted). "[T]here must be * * * an *expressed* unwillingness to continue * * *." *Id.* at 621 (internal quotation marks and citation omitted; emphasis added by the court).

The highest courts in **Michigan**, **Florida**, **Georgia**, **North Carolina**, **Virginia**, and the **District of Columbia** agree.

- *People* v. *McReavy*, 462 N.W.2d 1, 6, 10-11 (Mich. 1990) (no violation for prosecutor to provide "description of partial silence");
- *Valle* v. *State*, 474 So.2d 796 (Fla. 1985) (no violation for prosecutor to comment on defendant's refusal "to answer one question of many" when *Miranda* right not expressly invoked), vacated on other grounds, 476 U.S. 1102 (1986);
- *Downs* v. *Moore*, 801 So. 2d 906, 911 (Fla. 2001) (no violation where the state cross-examined defendant about defendant's failure to present his version to police);

- *Rogers* v. *State*, 721 S.E.2d 864, 872 (Ga. 2012) (evidence of "refusal to answer a particular question" admissible absent express re-invocation of *Miranda*), disapproved of on other grounds, *State* v. *Sims*, 769 S.E.2d 62 (Ga. 2015);
- *State* v. *Westbrooks*, 478 S.E.2d 483, 496-97 (N.C. 1996) (failure to provide an exculpatory story may be used against a defendant where the defendant had not remained completely silent);
- *Squire v. Commonwealth*, 283 S.E.2d 201, 204 (Va. 1981) ("[o]nce [defendant] broke his silence to answer questions under pretrial police interrogation * * *, he did not have the right thereafter to remain silent selectively and then prevent the prosecution from cross-examining him about his failure to reveal exculpatory facts");
- *Hill* v. *United States*, 404 A.2d 525, 531 (D.C. 1979) ("once an arrestee begins to explain his conduct after being informed of his right to remain silent" selective silence may be used against him), cert. denied, 444 U.S. 1085 (1980).[7]

Meanwhile, the **California** Supreme Court has declined to review decisions of the California Court of Appeal reaching the same conclusion. See *People* v. *Hurd*, 73 Cal. Rptr. 2d 203, 209 (Cal. App. 4th 1998) ("A defendant has no right to remain silent selective-

[7] The Oklahoma Court of Criminal Appeals reached a similar conclusion on similar facts. See *Rowe* v. *State*, 738 P.2d 166, 171 (Okla. Crim. App. 1987) (when defendant, "[a]fter answering several questions, * * * suddenly stopped responding" and "did not effectively reassert [his right to silence] until his silence made it apparent that he no longer wanted to cooperate," the court held that evidence of defendant's sudden stoppage alone was admissible).

ly. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights.").

3. Additional courts have been unable to state a definitive rule.

Finally, the confusion on the status of selective silence is so profound that some courts have been unable to state a coherent rule. The **Fifth Circuit**, for example, has explicitly recognized the internal inconsistency of its case law. "In determining whether there has been a *Doyle* violation, our circuit's decisions have turned on a case-by-case, fact-specific analysis, and at times, there seems to be inconsistencies in our reasoning." *United States* v. *Fambro*, 526 F.3d 836, 842 (5th Cir. 2008).

Thus, in both *United States* v. *Pennington*, 20 F.3d 593 (5th Cir. 1994), and *United States* v. *Garcia-Flores*, 246 F.3d 451 (5th Cir. 2001), the defendant was read his *Miranda* rights, made some statements, and then stopped answering questions. In *Pennington*, the Fifth Circuit panel found it permissible, during cross-examination of a law enforcement officer, for the prosecutor to state: "Mr. Pennington didn't deny knowing about it, he merely told you that, 'I have nothing to say.'" *Pennington*, 20 F.3d at 599. The court reasoned that the prosecutor was more "commenting on what Pennington said, not what he did not say." *Ibid.* But in *Garcia-Flores*, the panel found impermissible the prosecutor's emphasis in closing argument that the defendant had failed to name the person who allegedly committed the crime. *Garcia-Flores*, 246 F.3d at 457. The panel there ruled unconstitutional "the intent of the government * * *

to create an inference from Garcia-Flores' refusal to accurately describe the man," although it found the violation harmless. *Ibid.* The two decisions, the Fifth Circuit subsequently concluded, are "difficult to reconcile." *Fambro*, 526 F.3d at 845.

Although it has not yet explicitly recognized the internal tension, the **First Circuit's** holdings on selective silence are also hard to square with one another. In *United States* v. *Goldman*, 563 F.2d 501 (1st Cir. 1977), addressing the defendant's refusal to answer certain questions, the court held that "[a] defendant cannot have it both ways[:] If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can be later referred to." *Id.* at 503. In *Grieco v. Hall*, 641 F.2d 1029 (1st Cir. 1981), on the other hand, the court reasoned that it is not the case that "any time a defendant makes any post-arrest statement the door is open to full cross-examination about the defendant's failure to recount the exculpatory trial story earlier. *Miranda* protections apply equally to refusals to answer specific questions." *Id.* at 1034. Most recently, the court cited *Goldman* but not *Grieco* in holding that, "[a]s a general rule, any inculpatory or exculpatory statements made by a defendant (including silence with regard to particular questions) are admissible at trial insofar as they were the product of a knowing and voluntary waiver." *United States* v. *Andújar-Basco*, 488 F.3d 549, 555 (1st Cir. 2007). It thus is not clear whether the First Circuit endorses or refutes the right to remain selectively silent.

Similar inconsistencies are present in the **Seventh Circuit** case law. For example, in *United States* v. *Davenport*, 929 F.2d 1169 (7th Cir. 1991),

the court allowed the use of Davenport's selective silence during a non-custodial interview by Internal Revenue Service agents, in which she was informed of her right to remain silent. *Id.* at 1171. Similarly, in *United States* v. *Scott*, 47 F.3d 904 (7th Cir. 1995), the court held that Scott's selective silence, in the form of "omissions between his earlier version of the story and his trial testimony," could be used against him. *Id.* at 907. But also in *Scott*, the Seventh Circuit held that "a suspect may speak to the agents, reassert his right to remain silent or refuse to answer certain questions, and still be confident that *Doyle* will prevent the prosecution from using his silence against him." *Ibid.* (citing *Canterbury*, 985 F.2d at 486). And in *United States* v. *Jumper*, 497 F.3d 699 (7th Cir. 2007), the court applied that line of reasoning in holding that a videotape of Jumper's post-arrest, post-*Miranda* interview, in which he explicitly refused to answer certain questions but not others, could not be introduced at trial. *Id.* at 702-703.

Against this background, the need for review by this Court is manifest. It should be intolerable that the same question of constitutional law is answered differently in different jurisdictions, resulting in otherwise identical prosecutions producing different results. The scope of the confusion, meanwhile, has flummoxed the courts, leading to inconsistent outcomes within jurisdictions and creating uncertainty about the permissible conduct of criminal trials.

And the need for review is especially acute because federal and state courts in the same geographic areas have reached different results on the status of selective silence, raising the danger that these differing standards will result in state prosecutions being set aside on federal post-conviction review. In

fact, that already *has* happened in California. Thus, the California Court of Appeal held that "[a] defendant has no right to remain silent selectively." *People* v. *Hurd*, 73 Cal. Rptr. 2d 203, 209 (Cal. App. 4th 1998). But on habeas review, the Ninth Circuit held that "[t]he California Court of Appeal's *Miranda* and *Doyle* analysis is incorrect. * * * Contrary to the conclusion of the California Court of Appeal, the right to silence is not an all or nothing proposition." *Hurd* v. *Terhune*, 619 F.3d 1080, 1087 (9th Cir. 2010). This means that "[a] suspect may remain selectively silent by answering some questions and then refusing to answer others without taking the risk that his silence may be used against him at trial." *Ibid.* In turn, however, California state courts continue to follow the state Court of Appeal's ruling and have expressly rejected the Ninth Circuit's critique of that decision—which is sure to create federal-state tension and habeas challenges in the future.[8]

The same danger is evident in the Fourth Circuit, which takes a different approach to selective silence than does the Supreme Courts of Virginia and North Carolina, and could well arise in other jurisdictions where state and federal decisions are in ar-

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[8] *See, e.g.*, *People* v. *Velarde*, No. F067948, 2016 WL 859246, at *10 n.7 (Cal. Ct. App. Mar. 4, 2016), reh'g denied (Mar. 23, 2016), review denied (May 11, 2016) ("In light of this clear California authority, [*People* v. *Hurd*,] we are not persuaded otherwise by a case decided by the Ninth Circuit, *Hurd* v. *Terhune* (9th Cir. 2010) 619 F.3d 1080, on which Velarde relies, which concluded that a suspect may remain selectively silent without taking the risk that his silence may be used against him at trial."); see also *People* v. *White*, No. F070431, 2017 WL 118041, at *33 & fn.17 (Cal. Ct. App. Jan. 11, 2017) (same); *People v. Poynter*, No. A131607, 2012 WL 5866203, at *6 & fn.4 (Cal. Ct. App. Nov. 20, 2012) (same).

guable tension (such as the First Circuit and Massachusetts, the Fifth Circuit and Texas, the Sixth Circuit and Michigan, the Seventh Circuit and Indiana, and the Tenth Circuit and Oklahoma). Definitive resolution of the issue by this Court is essential.

B. Under *Miranda* and *Doyle*, selective silence may not be used against a defendant who received *Miranda* warnings.

The decision below is in conflict with more than the holdings of other lower courts; it also is inconsistent with this Court's doctrine. The principles of both *Miranda* and *Doyle* dictate that selective silence not be used against a suspect after *Miranda* warnings have been given.

1. Miranda *itself dictates protection for selective silence.*

First, the analysis used by the Court in *Miranda* itself strongly supports the view that the right to remain silent includes selective silence. As the Court there described the governing rule, a criminal suspect "must be warned prior to any questioning that he has the right to remain silent, [and] that anything he says can be used against him in a court of law." *Miranda*, 384 U.S. at 479. The Court then added: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id.* at 468 n.37.

The *Miranda* Court did not suggest that this protection applies only if the privilege is claimed expressly; to the contrary, as the four dissenting Jus-

tices emphasized in *Salinas* v. *Texas*, 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting) (quoting *Miranda*, 384 U.S. at 468 n.37), "a prosecutor may not comment on the fact that a defendant in custody, *after* receiving *Miranda* warnings, 'stood mute'—regardless of whether he 'claimed his privilege' in so many words." See *id.* at 2185, 2189. The *Salinas* plurality, although holding that the prosecution's use of *pre*-custodial silence is consistent with the Fifth Amendment, did not disagree with the dissent about the significance of silence following receipt of the *Miranda* warning.

There is, moreover, nothing in the analysis or logic of *Miranda* that makes it permissible for the state to use the suspect's silence simply because the defendant answered some questions before, or after, choosing to stand "mute." To the contrary, the Court explained that, "where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated." *Miranda*, 384 U.S. at 475-476. And the Court in this respect contrasted selective silence in the context of custodial interrogation with that before a grand jury: "Although this Court held in *Rogers* v. *United States*, 340 U.S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements." *Miran-*

da, 384 U.S. at 476 n.45. The *Miranda* Court therefore expressly had it in mind that prosecutorial comment on the suspect's silence is impermissible even when that silence follows answers to police questions.

Accordingly, the Fifth Amendment principle that underlies *Miranda* supports protection of selective silence. Whether or not the suspect has made a statement or answered certain questions, he or she is "penalize[d]" for "exercising [the] Fifth Amendment privilege" when the prosecutor uses the suspect's failure to respond to a question.

*2. Due process principles require protection for post-*Miranda *warning selective silence.*

In addition, protection for selective silence follows from the due process principles that underlie *Doyle*, where the Court held that the defendant's post-*Miranda* warning silence could not be used even for impeachment purposes (the state there did "not suggest [the defendants'] silence could be used as evidence of guilt"). 426 U.S. at 617. As the Court there explained, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Ibid.* And because the "assurance that silence will carry no penalty * * * is implicit to any person who receives the warnings," "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation he subsequently offered at trial." *Id.* at 618.

As the Court added, repeating an observation of Justice White:

> "[W]hen a person under arrest is informed that he may remain silent [and] that anything he says may be used against him * * *, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest * * *. Surely [the defendant] was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case."

Doyle, 426 U.S. at 619 (quoting *United States* v. *Hale*, 422 U.S. 171, 182-83 (1975) (White, J., concurring)). See also *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986) ("[B]reaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires."). The Court recently reaffirmed this rule in *Salinas*, declaring it "correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings." 133 S. Ct. at 2182 n.3 (plurality opinion).

In nevertheless holding that *Doyle* is inapplicable to cases involving selective silence, decisions like the one below in this case have reasoned that, "[o]nce an arrestee has waived his right to remain silent [by answering a police question], the *Doyle* rationale is not operative because the arrestee has not remained silent and an explanatory statement assuredly is no longer 'insolubly ambiguous.'" App., *infra*, 33a (quoting *Talton*, 497 A.2d at 35, 44). Therefore, these courts opine, because the suspect "'knows that any-

thing he says can and will be sued against him," it "is manifestly illogical to theorize that he might be choosing not to assert the right to remain silent as to part of his exculpatory story, while invoking that right as to other parts.'" *Ibid.* (quoting *Talton*, 497 A.2d at 35, 44).

But this reasoning itself rests on a non sequitur. We know from *Miranda* that neither complete silence nor an express invocation of the privilege is necessary to make impermissible a prosecutor's comment on the accused's silence. And that suspects know that what they *say* in response to questions may be used at trial does not mean that suspects also assume that what they *do not say* may be used. To the contrary, petitioner in this case "'was not informed that his silence, as well as his words, could be used against him at trial'" (*Doyle*, 426 U.S. at 619 (quoting *Hale*, 422 U.S. at 182-83 (White, J., concurring)); he *was* assured that he had the right to remain silent. His choice to do just that in response to certain questions renders his failure to answer *those questions* "insolubly ambiguous."

Indeed, the point comes clear from *Doyle*, which *itself* involved selective silence by the defendants. As Justice Poff of the Virginia Supreme Court noted, "Doyle had *not* remained mute." *Squire*, 283 S.E.2d at 206 (Poff, J., dissenting) (emphasis added). See also *Doyle*, 426 U.S. at 628 (Stevens, J., dissenting) ("petitioner Doyle did not even remain silent"). In fact, Doyle and his co-defendant each spoke to police officers at points either during or after their arrest. See Nos. 75-5014, *Doyle* v. *Ohio*, Joint Appendix 11-12, 25-26, 33-34. But the Court did not regard this reality as detracting either from the force of the Fifth Amendment privilege or from the due process imper-

ative that silence not be used against suspects who refuse to answer post-*Miranda* warning questions.

*3. Protection for post-*Miranda *warning selective silence would advance the sound administration of justice.*

A rule that precludes prosecutorial use of selective silence also both avoids uncertainty that otherwise would undermine application of the *Miranda* doctrine and furthers the sound administration of justice. Under the rule announced below, a suspect is deemed to waive the right to remain silent by answering any question, making the *Doyle* principle "not operative." App., *infra*, 33a. But suspects have a right under the Fifth Amendment to stop cooperating with investigators, and to stop answering questions, at any time. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 438, 429 (2000) (arrestees have a "continuous opportunity to exercise" the "right of silence" (quoting *Miranda*, 384 U.S. at 467)). Under the approach taken by courts that reject protection for selective silence (like the court below in this case), it is not entirely clear what suspects in such a situation must do to preclude their silence from being used against them. If the rule requires them to *expressly* invoke their Fifth Amendment privilege, as the court below appears to require, it becomes a trap for unwary or unknowledgeable suspects; it also would, illogically, apply different rules at the outset of an interrogation (when express invocation of the privilege is not required) and in the middle. But if that is not the rule, the determination whether silence can be used against a defendant will be uncertain and inconsistent.

At the same time, the rule adopted below creates peculiar incentives that will disadvantage both law

enforcement investigators and suspects. Investigators are under no duty to inform suspects of the expected subject-matter of their questioning. See *Colorado* v. *Spring*, 479 U.S. 564 (1987). This means that suspects can have no idea at the outset of an interview whether they will be willing to answer all of the interrogator's questions. In addition, it often will be the case—as it was in this one—that suspects are willing to answer some, but not all, police questions. Yet under the rule adopted below, a suspect who answers an initial set of questions but chooses not to answer subsequent ones runs the risk of having adverse inferences drawn from that refusal. Knowledgeable suspects (or those who have consulted counsel) therefore either will refuse to answer questions at all or, at a minimum, will bring the questioning to a complete halt when presented with a question they choose not to answer.

This sort of all-or-nothing regime has significant disadvantages. If any questioning at all takes place, a suspect will have the incentive to stop the interrogation at the first unsettling question. But it often will be to the advantage of law enforcement authorities for questioning to continue even when the suspect declines to answer some queries—which is why, as the reported cases demonstrate, law enforcement authorities almost never voluntarily bring an interview to a close at the first refusal to answer a question. Sometimes continued questioning will produce valuable information or even an inculpatory statement, as it did in *Berghuis* v.*Thompkins*, 560 U.S. 370, 375-76 (2010). A rule that gives suspects a powerful incentive to *stop* talking to investigators is, therefore, not a sensible one.

In large part for this reason, recent scholarship strongly favors the view that selective silence is protected by the Constitution and is sound public policy. See French, *supra*, 48 Ga. L. Rev at 646 (arguing that "the selective silence doctrine is necessary to protect the Fifth Amendment's full privilege against self-incrimination" and that it "best comports with Supreme Court precedent on silence and public policy concerns relating to police interrogations"); Stephen Rushin, Comment, *Rethinking* Miranda*: The Post-Arrest Right to Silence*, 99 Calif. L. Rev. 151 (2011) (proposing an analogous idea through the lens of selective invocation); see also Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 Wm. & Mary Bill Rts. J. 773 (2009) (an unambiguous statement is not necessary to assert the right to remain silent); Andrew J.M. Bentz, Note, *The Original Public Meaning of the Fifth Amendment and Pre-*Miranda *Silence*, 98 Va. L. Rev. 897 (2012) (collecting evidence that the original public meaning of the Fifth Amendment supports the right to remain silent pre- and post-*Miranda*). But see Micheal A. Brodlieb, Note, *Post-*Miranda *Selective Silence: A Constitutional Dilemma with an Evidentiary Answer*, 79 Brook. L. Rev. 1771 (2014) (discussing the public policy benefits of a regime that excludes silence from evidence, while expressing doubt regarding constitutional protection for selective silence).

C. The issue presented here is recurring and important.

Finally, the issue presented here is one of enormous practical importance to the administration of justice, affecting both the proper conduct of police in-

vestigations and the course of criminal trials. It warrants this Court's attention.

First, as a general matter, this Court's many decisions in the area demonstrate that the rules governing law enforcement interrogations, and the use that may be made of evidence produced in those interrogations, is central to the criminal investigative process. And the substantial number of reported cases addressing the issue of selective silence makes clear that this subject, in particular, is a recurring one that arises with great frequency.[9] It is essential

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[9] In addition to the decisions cited above in text, numerous district courts have addressed the issue—and, unsurprisingly, those courts in circuits that adopt divergent approaches have reached conflicting outcomes. Compare *Hogan* v. *Ercole*, 2011 WL 3882822 at *10 (E.D.N.Y. 2011) (holding that "once an arrestee waives his right to remain silent," the government may introduce evidence of selective silence); *Nowicki* v. *Cunningham*, 2011 WL 12522139 at *5 (S.D.N.Y. 2011) (finding defendant "waived and never reasserted his *Miranda* rights" when remaining selectively silent); see also *United States* v. *Corcoran*, 855 F.Supp. 1359, 1373 (E.D.N.Y. 1994) (finding that defense counsel's failure to object to the use of defendant's selective silence "did not fall below an objective standard of reasonableness") with *Ingram* v. *Varga*, 2011 WL 835788 at *20 (C.D. Cal. 2011) (treating the selective silence doctrine as clearly established law after *Hurd v. Terhune*); *United States* v. *Diermyer*, 2010 WL 4683550 (D. Alaska 2010) (finding that defendant "intended to limit the scope of the questioning" through selective silence, and thus that evidence of the defendant's refusal to answer those questions should be suppressed). See also *United States* v. *Moran*, 2004 WL 2496503 (N.D. Ill. 2004) (holding that prosecution may impeach defendant on the basis of selective silence); *United States* v. *Hampton*, 843 F.Supp.2d 571 (E.D. Pa. 2012) (finding that while selective silence might be admissible generally, the statements at issue were inadmissible under Rule 403).

that the rules governing this subject be clear, settled, and applied consistently.

Second, the prosecution's improper use of a defendant's selective silence frequently determines the outcome of the case. Courts that recognize protection for selective silence very often reject the argument that the state's use of that silence at trial was harmless. See, *e.g.*, *Hurd*, 619 F.3d at 1090-91; *Canterbury*, 985 F.2d at 486; *Ghiz*, 491 F.2d at 600; *Friend v. State*, 473 S.W.3d 470 (Tex. App. 2015); *State* v. *Fuller*, 282 P.3d 126, 138-39 (Wash. App. 2010), review denied, 297 P.3d 68 (Wash. 2013).

Indeed, a suspect's silence can be very powerful evidence that often is invoked by prosecutors; outside of the interrogation context, evidentiary rules often allow a party's silence in the face of an accusation to serve as evidence of guilt. See Fed. R. Evid. 801(d)(2)(b); Michael H. Graham, *Winning Evidence Arguments* § 801:21. As a leading evidence treatise explains: "Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion." 2 Wigmore, *Evidence* (Chadbourn rev), § 292. In such circumstances, silence may be treated as "a genuine admission in express words." *Ibid.* See *Hale*, 422 U.S. at 176 (reasoning that silence is probative when it would be "natural under the circumstances to object to the assertion in question."). It therefore is crucial that improper use of a defendant's silence be precluded.

Third, this case presents a suitable vehicle with which to resolve the question of selective silence. It involves virtually all of the permutations of silence that are reflected in the reported cases: petitioner at points during the police interview was literally silent

("the defendant did not reply"; "[h]e just wouldn't answer any questions about the crime" (App., *infra*, 25a, 26a n.9)); expressly declined to answer questions ("when he asked me what happened that night I told him I don't want to even get into that" (*id.* at 27a-28a)); and failed to offer exculpatory evidence he later submitted at trial (during "four hours of question by police, he [n]ever told them he knew the identity of the shooter" (*id.* at 27a). And it involves all of the prosecutorial uses of silence addressed by other courts: the prosecutor used petitioner's failure to speak to establish the state's affirmative case, to impeach petitioner's testimony, and to challenge petitioner's failure to tell an exculpatory story.

Moreover, petitioner's silence played a significant role at trial. On the state's affirmative case, the prosecutor engaged in a lengthy colloquy on the subject with Detective Meehan, the investigating officer. See App., *infra*, 25a-27a. The prosecutor led petitioner through a similar exchange when the latter took the stand, in terms that placed great weight on petitioner's failure to offer an exculpatory account: "When [the officer] asks you if you shot [the victim], you don't say * * * why does everybody keep pointing the finger at me? You don't say, I didn't do this * * *. You say none of that." *Id.* at 27a-28a. And petitioner's silence had a prominent place in the government's closing argument. After asking "[d]id [petitioner] do it?" the prosecutor answered his own question: "[t]he shrug basically told you what [petitioner] did." *Id.* at 28a.

Accordingly, the issue in this case is significant, frequently recurring, the source of confusion in the lower courts, likely determinative of the outcome here—and wrongly decided by the court below. In

these circumstances, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GLENN W. FALK
ROBERT BLACK
New Haven Legal Assistance Association, Inc.
426 State Street
New Haven CT 06510-2018
(203) 946-4811

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[10]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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[10] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A