No. 16-1012

In The
Supreme Court of the United States

CORDARYL SILVA,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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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 [S]tate may not use a suspect's silence after receipt of the *Miranda* warnings 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 [sic], 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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The decision of the Connecticut Appellate Court is reported at *State v. Silva*, 166 Conn. App. 255, 141 A.3d 916, cert. denied, 323 Conn. 913, 149 A.3d 495 (2016). It is set forth in the petitioner's appendix (PA) at 2a-36a.

JURISDICTION

The Connecticut Appellate Court entered its judgment on June 14, 2016. The petitioner filed his writ of certiorari on February 17, 2017. This response was requested on March 3, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. The Criminal Trial

On May 12, 2012, the petitioner, Cordaryl Silva, shot and killed the victim, Javon Zimmerman. The victim was a principal in a criminal drug enterprise known as the "Zimmerman Crew" (the crew) that had once counted the petitioner's half-brother, Steven Cook, among its members. Transcript ("T.") 4/2/14 at 72-73. Cook was in prison as a result of his participation in the 2009 shooting of a rival drug dealer. Id. By 2012, the petitioner had become irate and disillusioned with the crew because it had failed to stand by the imprisoned Cook and place money in his

prison commissary account. Id. at 74. Posts on the petitioner's Facebook page publicly announced these bad feelings. Id. at 78-106. Several months before the homicide, the petitioner and the victim had a physical altercation during which the victim bit the petitioner's abdomen. Id. at 106-07, 117-18.

In the early morning hours of May 12, 2012, the petitioner entered R.J.'s Cafe in Derby, Connecticut, where he joined Monea Howard. T.4/1/14 at 58. Howard was a close friend of the victim, knew other members of the crew, including the victim's brother, Keyshon Zimmerman, and was aware of the ongoing dispute between the crew and the petitioner. Id. at 59-60, 75, 80. The petitioner complained to Howard that Cook had "rolled" for the crew which had "basically left him for dead[,]" and that one of the Zimmerman brothers "is going to get it." Id. at 68. Howard testified that, while she and the petitioner were conversing, her cousin, Tyquan Bailey, walked into the cafe, looked at the petitioner, and gave what to Howard appeared to be "a signal basically saying . . . he's outside; one of them is outside." Id. at 63, 84. Bailey went directly into the bathroom, and the petitioner immediately went outside. Id. at 68. A little more than a minute later, Howard heard gunshots. Id. at 68. When Howard exited the cafe, she saw Bailey getting into a car in which Quandre Howell was a passenger. Id. at 69. Howard saw the victim on the ground. Id. Howard later received a Facebook message attributed to the petitioner that said "[h]is freedom [was] in [Howard's] hands." Id. at 75.

Quandre Howell testified that he was with Bailey and the victim on the night of the homicide. T.4/1/14 at 129. Bailey was driving the victim's car and, at about 1:30 a.m., he parked it near the front of R.J.'s Cafe. Id. at 131-33. Bailey and the victim exited the car and entered the cafe. Id. at 134. Howell saw the petitioner, with whom he was well acquainted, emerge on a patio and look out. Id. at 135. The petitioner then exited the cafe and walked past the car. Id. When Bailey and the victim returned to the car, Howell suggested that they leave because he feared that the petitioner, who had previously "messed up" the crew's vehicles, would do so again. Id. at 139. Howell testified that the petitioner then appeared in front of the car holding a gun. Id. When the victim exited the car, the petitioner pointed the gun at him and said, "[f]uck you, Javon[,]" after which Howell heard two shots. Id. at 139-40.

Jeffrey Johnson, the doorman and bouncer at R.J.'s Cafe that night, testified that he had known both the petitioner and the victim since they were infants. Id. at 164-65. Johnson saw the petitioner near the front door when the victim's car drove up and stopped. Id. at 173-74. Johnson recognized Bailey, who exited the car and entered the cafe. Id. Shortly thereafter, Johnson saw the petitioner holding and shooting what appeared to be a 9mm handgun. Id. at 175. Cars blocked Johnson's view of what the petitioner was shooting at, but Johnson quickly discovered that the victim had been shot and was lying on the ground. Id. at 177-78.

When the police interviewed Tyquan Bailey, he demanded consideration in his own criminal cases in exchange for his cooperation. T.4/3/14 at 157. Bailey eventually provided the police with a signed statement in which he said that he would testify and "point out [the petitioner] . . . in court[,]" but only to prevent the petitioner from "getting away with it." Id. Bailey warned the police, however, that if he did not receive the desired consideration, and was called to testify at the trial, he would "go straight up retard." Id. When Bailey testified at the trial, he acknowledged that he saw the petitioner at the cafe that night, but he denied witnessing the shooting and knowledge of the shooter's identity. Id. at 202-08. Bailey further acknowledged providing the police with the aforementioned statement, but claimed that it amounted to telling the police what they wished to hear. Id. at 205.

Derby police officer John Dorosh heard "two distinct gunshots" coming from the area of the cafe and responded immediately. T.4/1/14 at 96. A black male, later identified as the petitioner, ran past Dorosh's approaching patrol car, "clutching his waistband as he was running." Id. at 97, 101. The petitioner ignored Dorosh's command to stop and, although Dorosh kept him in sight for a while, the petitioner eluded Dorsosh and other officers. Id. at 101. Later that morning, as Dorosh walked through the detective bureau at the end of his shift, he saw a photo line-up on a desk; it included a photograph of the petitioner, which Dorosh immediately recognized as the young man he had pursued earlier. Id. at 117-19.

The petitioner's immediate flight from the cafe was captured by private, building-mounted, surveillance cameras. T.4/2/14 at 143-73. Still photographs developed therefrom clearly depicted the petitioner as the fleeing man. Id. at 162-65; T.4/3/14 at 35. At one location on Elizabeth Street, the footage showed the petitioner ducking down to hide from roving police officers. T.4/2/14 at 169-73; T.4/3/14 at 149. At that location, the police recovered a cellular telephone that belonged to the mother of the petitioner's child and contained "selfies" of the petitioner. T.4/3/14 at 5-12, 148-49.

Both prior to and after his arrest, the petitioner voluntarily spoke to several sets of police officers about the homicide on four different occasions, for more than three hours. The interviews are summarized below.

1. The Netto interview

At about 4:30 p.m. on May 12, the day of the homicide, the petitioner agreed to speak with Detective Sergeant John Netto of the Derby Police Department, who was joined by a detective employed by the Connecticut State Police, at the Ansonia Police Department (the "Netto Interview").[1] T.4/2/14 at 121, 124-27. The petitioner was not under arrest or restrained. Id.; T.4/3/14 at 53. An audiovisual recording

[1] The petitioner insisted that the interview occur at the Ansonia Police Department. T.4/2/14 at 121. At the time of the homicide, the petitioner was working with that department as an informant. Id. at 121; T.4/3/14 at 71-72.

of the interview, and Netto's testimony regarding the interview, was admitted without any objection. T.4/2/14 at 129; exhibit 42. The petitioner was advised of, and waived, his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). He spoke freely and extensively with the officers for approximately ninety minutes about his presence and actions at the cafe on the night of the homicide, and his contentious relationship with, and disdain for, the crew and for the victim. T.4/2/14 at 106-37. Several times during the interview, the petitioner denied personal responsibility for shooting the victim. Exhibit 42. Netto repeatedly informed the petitioner that witnesses had formally identified him as the person who shot the victim, implored the petitioner to speak up in his own defense, and urged him to provide any information regarding the shooting that might aid the petitioner's cause and further the investigation. Id. at 142; exhibit 42. The petitioner remained cooperative and consistently responsive, but he did not provide any specific information regarding the shooting itself or the shooter. Id.

2. The first conversation with Hunt and Macero

At approximately 8:00 p.m. on May 12, the petitioner spoke about the homicide for more than one-half hour with Ansonia police detectives Kristen Hunt and Matt Macero, who had been enlisted to drive him home from the police station. T.4/3/14 at 76-78. The petitioner had been working with these officers as a confidential informant for the past several months,

including in connection with an ongoing investigation into the activities of the crew. Id. at 71-72. The conversation was audiotaped and a copy thereof, as well as Hunt's testimony regarding the discussion, was admitted in evidence without objection. Id. at 76-78; exhibit 43. The petitioner was not under arrest and *Miranda* warnings were not readministered. Hunt did most of the talking and told the petitioner, in essence, that he was being accused of murder and now was the time to defend himself. Exhibit 43. She implored him to be forthcoming, either with the investigating officers or with her and Macero, and provide any information that might aid his cause. Again, the petitioner was cooperative and consistently responsive, but he did not provide any specific information regarding the shooting itself or the shooter. T.4/3/14 at 79-82; exhibit 43. The petitioner expressed his desire to use the upcoming weekend to speak with his family, and told the officers that he would speak with them again on Monday. T.4/3/14 at 82. When Hunt warned the petitioner to be alert for retaliation, he quipped that, by Monday, he would "probably be sitting in jail." Id.

3. The second conversation with Hunt and Macero

True to his word, on Monday, May 15, the petitioner "reached out" to Hunt and Macero to meet a second time. T.4/3/14 at 77, 82-83, 122. At about 11:15 a.m., the three of them conversed for close to forty minutes inside a police car parked near the petitioner's father's residence. Id. at 78, 122; exhibit 44. The

conversation was audiotaped and a copy thereof, and Hunt's testimony regarding the discussion, was admitted in evidence without objection. Id. The petitioner was not under arrest and *Miranda* warnings were not readministered. The petitioner again spoke freely about his presence at the cafe on the night of the homicide and his contentious relationship with, and disdain for, the crew and for the victim. Exhibit 44. Hunt again implored the petitioner to speak up in his own defense and be forthcoming with either the investigating officers or with her and Macero, and provide any information that might aid his cause. Again, although he was cooperative and consistently responsive, he did not provide any specific information regarding the shooting itself or the shooter. T.4/3/14 at 106-09; exhibit 44. The petitioner even told Hunt that he knew exactly what had happened regarding the shooting and spoke of his desire to personally write a statement describing the incident, which he believed would lead to his arrest. Id. at 109. He asked Hunt if she believed he might receive a twenty-five, fifteen, or ten year sentence should he be arrested and convicted, and he told her that he could take serving a fifteen year sentence. Id. at 110; exhibit 44.

4. The Meehan interview

Two days later, on May 17, 2012, Detective Patrick Meehan of the Connecticut State Police and a fellow trooper interviewed the petitioner at the state police barracks in Bethany, Connecticut, following the petitioner's arrest for violating his probation (the

"Meehan interview"). T.4/3/14 at 128-29. The petitioner was advised of, and again waived, his *Miranda* rights. Id. at 129. The petitioner agreed to be interviewed, but he asked that the interview not be recorded. Id. at 130. Meehan testified as follows. At first, the petitioner "didn't want to talk about the actual incident" at the cafe and instead launched into a discussion of his "beef" with the Zimmermans and his prior altercations with the victim. Id. at 130-32. When the discussion turned to the homicide, the petitioner admitted that he was at the cafe at that time. Id. at 132. He said that he and the victim "had this confrontation" outside of the victim's car, after which the petitioner ran away from the cafe. Id. at 133-34. The prosecutor asked Meehan if the petitioner had ever described the shooting itself and Meehan testified:

> He never does. He gets right up to the point and then says right after—and ***he just gives some gestures, shoulder-shrugging gestures*** after it—after the confrontation, [and said] I just ran out of there. . . .

(Emphasis added.) Id. at 134. Meehan testified that when he asked the petitioner if he murdered the victim, the petitioner "doesn't reply. He doesn't admit it or deny it. It's just a blank stare and . . . *[j]ust some non-confirmatory like shrugs*." (Emphasis added.) Id. at 135. When Meehan informed the petitioner that eyewitnesses had identified him as the person who shot the victim, there was "[n]o verbal response[,]" no confirmation that the petitioner had done it, and "[n]o denial." Id. at 136. The discussion continued regarding

the victim's car, and the petitioner remained "pretty cooperat[ive]" and willing to talk further with Meehan; "[h]e just wouldn't answer any questions specifically with regard to that shooting." Id. The petitioner spoke of getting his affairs in order, and he told Meehan that "maybe I'll talk to you guys again." Id. at 136.

During the time that he was incarcerated prior to trial, the petitioner confessed to fellow inmate Carl Hatton that he had killed a person at R.J.'s Cafe. T.4/2/14 at 19. The petitioner boasted to Hatton that he "was going to get away with it" because a witness described him as wearing a white T-shirt when he had actually been wearing a black T-shirt.[2] Id. The petitioner also told Hatton of a person known as "Beans" giving the police "a statement on [him]."[3] Id. at 20. Independent evidence established that Hatton and the petitioner had been transported to the Derby courthouse together on June 19, 2012. Id. at 42-46. In December 2013, the petitioner told fellow inmate Demetrius Thomas that he had shot a person and that "some guy with a 'J' " name, who was "[l]ike maybe a bouncer or something[,]" may have seen him do it. Id. at 53-54.

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[2] Jeffrey Johnson had, in fact, told the police that he believed the petitioner was wearing a white T-shirt when he saw him that night at the cafe. T.4/1/14 at 188.

[3] Quandre Howell's nickname is "Beans" and he, in fact, identified the petitioner as the person who shot the victim. T.4/1/14 at 141.

At his trial,

> [t]he [petitioner] testified on his own behalf. He told the jury about the ongoing feud he had with Javon Zimmerman, but explained that he had been trying to get out of the drug "game." The [petitioner] described the events on the morning of Javon Zimmerman's murder as follows. The [petitioner] admitted that he was at R.J.'s Cafe on the evening of May 11, 2012, and into the morning hours of May 12. The [petitioner] was watching from inside the entryway of the bar as Javon Zimmerman's car pulled into the parking lot, and he saw Tyquan Bailey get out of the car. The [petitioner] walked outside and spoke briefly with Bailey, and they were then joined by the [petitioner]'s friend. As they were talking, Javon Zimmerman jumped out of the vehicle and started yelling at Bailey for speaking to the [petitioner] and his friend. The [petitioner] then heard gunshots, saw a flash, and took off running. Although the [petitioner] denied being the shooter, he declined to name the person who had fired the gun, simply stating that it was his "boy."
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> During cross-examination, the prosecutor pressed the [petitioner] about his refusal to provide the name of the person he allegedly saw shoot Javon Zimmerman.[4] In particular,

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[4] "Q. Mr. Silva, this morning was the first time that you indicated that someone else, who you know, shot Javon Zimmerman, yes?

"A. Yes.

> the prosecutor asked the [petitioner] if, during the course of his four hours of questioning by police, he ever told them that he knew the identity of the real murderer. The prosecutor said, "When he asks you if you shot him, you don't say—" and the [petitioner] interrupts to say, "Nothing." The prosecutor continued, "why does everybody keep pointing the finger at me? You don't say, I didn't do this. You don't say, this [is] 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." The [petitioner] agreed, stating, "I say nothing," explaining, "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."
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> During its closing argument, the state mentioned the [petitioner]'s refusal to answer Meehan's question about whether he had killed Javon Zimmerman: "Interview with Detective Meehan. We don't have any audio or video of that; [the petitioner] wouldn't allow it. 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

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"Q. Yes. And you've never mentioned that to any police officer until today, correct?

"A. Yes.

"Q. And you never mentioned it on any videotape or any taped conversation we have for you, yes.

"A. Yes."

T.4/4/14 at 151.

> part. The Zimmermans; the killers; they bring people up to pull the trigger. [The victim] you know was there, and on and on about that. Did you do it? The shrug basically told you what [the petitioner] did."

State v. Silva, 141 A.3d 932-33 (PA at 27a-28a).

Defense counsel's closing argument focused on attempting to call into question the credibility of Howard, Howell, Johnson, Bailey, Hatton and Thomas. T.4/8/14 at 23-38. Counsel conceded that "there was a motive here; absolutely. No one is disputing that[,]" but argued that the petitioner was not the only person who possessed a motive to harm a member of the crew. Id. at 38. Counsel praised the petitioner for "talking to the police voluntarily on numerous occasions immediately following the shooting" and he concluded his remarks by stressing that the petitioner

> never admit[ted] to being the shooter; that's clear. He told Detective Meehan . . . on May 17th, 2012, [that] he bolted when the shooting started and he ran all over the neighborhood. What is he running from? The fact that someone's got a gun; the fact that the Zimmerman gang is involved. And Lord knows if any fire is returned, certainly he would be a prime target given his relationship with the Zimmerman's [sic].

Id. at 38-39. Counsel did not mention the petitioner's testimonial account of a third party shooter or assert a third party culpability defense.

In his rebuttal remarks to the jury, the prosecutor, *inter alia*, replayed a portion of exhibit 44 and argued to the jury that the petitioner "doesn't tell Detective Hunt on May 15th that his boy did it." Id. at 54.

B. The Proceedings In The Connecticut Appellate Court

In his appeal to the Connecticut Appellate Court (Appellate Court), the petitioner "allege[d] that the state's use of his failure to answer Meehan's questions about whether he killed Javon Zimmerman violated the rationale of [*Doyle v. Ohio*, 426 U.S. 610 (1976)]."[5]

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[5] In *Doyle v. Ohio*, 426 U.S., at 619, . . . [this Court] held that

> "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." This rule "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Wainwright v. Greenfield*, 474 U.S. 284, 291 . . . (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565 . . . (1983)). The "implicit assurance" upon which [this Court has] relied in [its] *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, *Jenkins v. Anderson*, 447 U.S. 231, 239, (1980), or after arrest if no *Miranda* warnings are given, *Fletcher v. Weir*, 455 U.S. 603, 606-607 . . . (1982) (per curiam). Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. See 447 U.S., at 239. . . .

Brecht v. Abrahamson, 507 U.S. 619, 628 (1993).

State v. Silva, 141 A.3d 933 (PA at 28a); see also Petitioner's Brief to the Appellate Court at 13. The state claimed in response that: (1) *Doyle* was not violated because the petitioner never invoked his right to silence, but, rather, waived his right to remain silent and then was selectively silent; and (2) any error was harmless beyond a reasonable doubt. *State v. Silva*, 141 A.3d at 933 (PA at 28a); State's Brief to the Appellate Court at 26, 30.

Although the petitioner failed to preserve any aspect of his claim on appeal by objecting at trial to the state's use of the "selective silence" he allegedly exhibited during the Meehan interview, the Appellate Court nevertheless reviewed it pursuant to *State v. Golding*, 213 Conn. 233, 567 A.2d 823 (1989), which established a rule of reviewability for unpreserved constitutional claims.

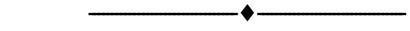
> Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.)

State v. Silva, 141 A.3d at 933 (PA at 29a), quoting *State v. Golding*, 567 A.2d at 827-28. The Appellate Court concluded that the petitioner "cannot prevail on his claim, however, because the third *Golding* condition is not met: The [petitioner] did not invoke his right to remain silent, and thus the state's use of his post-*Miranda* silence did not constitute a constitutional violation." Id. The Appellate Court concluded that the state's use of the evidence that the petitioner failed to answer Meehan's question asking whether he killed the victim was

> not a *Doyle* violation. The [petitioner] 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. Thus, the [petitioner] . . . did not refuse to answer any questions about the crime, and in fact, was quite forthcoming about details relating to his relationship with the victim and his presence at the scene of the murder. [Citation omitted.] This forthrightness, moreover, came after Meehan had told the [petitioner] that the purpose of the interview was to discuss Javon Zimmerman's murder. The only detail that the [petitioner] refused to discuss was the identity of the shooter.

State v. Silva, 141 A.3d at 937-38 (PA at 35a-36a). The Appellate Court, therefore, had no reason to reach and

rule upon the state's alternative argument that any error was harmless beyond a reasonable doubt.



REASONS FOR DENYING THE PETITION

This Court should deny the petitioner's petition for a writ of certiorari. Although there is a disagreement in the federal courts of appeals, and in the high courts of several states, regarding the government's use of evidence that a suspect was "selectively silent" after he was arrested, and received and waived his *Miranda* rights, this case presents an unsuitable vehicle for considering the issue because: (1) the petitioner's *Doyle* claim was not raised in the trial court and the record, therefore, was never fully and precisely developed with foreknowledge of such a claim and it thus fails to fairly and cleanly present an issue of "selective silence"; and (2) answering the question will have no practical significance in this case, and effectively be advisory in nature, because any constitutional error that may have occurred was harmless beyond a reasonable doubt.

A. The *Doyle* Claim Was Not Raised At Trial And The Record Fails To Fairly and Cleanly Present An Issue Of "Selective Silence"

The petition for certiorari should be denied because the petitioner's *Doyle* claim was not raised in the trial court and the record, therefore, was never fully and precisely developed with knowledge of such a

claim and it thus fails to fairly and cleanly present an issue of "selective silence." The petitioner, as demonstrated, did not move to suppress, or object to, the state's admission and use of any of the evidence of his discussions with the police. At the time of the petitioner's trial, and presently, binding Connecticut Supreme Court precedent clearly and unequivocally held that, once the arrestee has received the *Miranda* warnings and waived his right to remain silent, the *Doyle* rationale is not operative, and subsequent "selective silence" is not constitutionally protected. *State v. Talton*, 197 Conn. 280, 497 A.2d 35, 42-45 (1985); see *State v. Silva*, 141 A.3d at 935-36 (PA at 32a-33a). In light of this precedent, and because the petitioner never raised either a state constitutional claim or a federal constitutional claim seeking to alter Connecticut's *Doyle* jurisprudence in the trial court, neither party had the incentive to precisely develop and tease out the complex factual circumstances of the petitioner's various and extensive discussions with the police from a "selective silence" perspective.

As further demonstrated, the petitioner's unpreserved claim was reviewed by the Appellate Court, not on the basis of a fairly, fully and precisely developed record of "selective silence" but, rather, in accordance with Connecticut's rather unique *Golding* doctrine, which required only a record that was "adequate" for review. A record, such as the instant one, which was "adequate" for review under Connecticut's *Golding* doctrine, is an inadequate substitute for a record that is developed in the trial court based on

knowledge of the existence of a legal dispute that may be raised on appeal. See *Puckett v. United States*, 556 U.S. 129, 134 (2009) (district court ordinarily in best position to determine relevant facts and contemporaneous objection rule prevents sandbagging); see also *Roberts v. United States*, 445 U.S. 552, 559 (1980) ("The district court had no opportunity to consider the theories that petitioner now advances, for each was raised for the first time in the petitioner's appellate brief."). Here, the state had no incentive or reason to precisely develop the record relating to "selective silence" during the Meehan interview, and a trial court had no opportunity to make credibility determinations and factual findings with respect thereto.[6]

Even as presented without any objection by the petitioner, Meehan's testimony plainly established that, on at least two occasions during the interview, the petitioner was not "silent" when he was asked about the shooting, and whether he killed the victim, but, rather responded with conduct that amounted to gesturing with a shrug of his shoulders. Factual nuances such as this are vitally important for purposes of a "selective silence" claim because the constitution as embodied in the *Miranda* warnings only protects a defendant's right to remain silent. *Anderson v. Charles*,

[6] Further complicating matters, the Meehan interview, unlike the Netto interview and the petitioner's discussions with Hunt and Macero was, at the petitioner's own request, not mechanically or electronically recorded. Therefore, evidence of that interview could only have been presented via in-court testimony.

447 U.S. 404, 408 (1980) (per curiam). A nonverbal response, such as the gesturing described by Meehan, does not amount to protected silence because such a response does not operate to unambiguously or unequivocally invoke the right to remain silent. *Berghius v. Thompkins*, 560 U.S. 370, 381-82 (2010). Rather than grant certiorari to resolve the conflict presented in the petition, this Court should await a case which presents a record relating to "selective silence" that was fairly, fully and precisely developed by the parties and a trial court with knowledge that a legal dispute existed regarding such silence.[7]

B. Any Error That May Have Occurred Was Harmless Beyond A Reasonable Doubt

The petition for a writ of certiorari should be denied for the additional reason that the alleged "selective silence" error, if it occurred, was harmless beyond a reasonable doubt and, therefore, contrary to

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[7] The respondent has been unable to find a case in which this Court granted a petition for a writ of certiorari to review a state court decision involving a claim of error that was not raised in the trial court. In *Smith v. Texas*, 550 U.S. 297, 302 (2007), a capital case, the Texas court applied a heightened standard of review based on its determination that the claim of error raised by the petitioner in his habeas action was not preserved properly at the underlying criminal trial. In *Smith*, however, a majority of this Court determined that the Texas court had improperly interpreted federal law and that, therefore, the petitioner's claim had in fact been preserved. Id. at 313-16. Unlike *Smith*, the instant case is not a capital case and it is undisputed that the petitioner's claim to the Appellate Court is completely unpreserved.

the petitioner's assertion, the resolution of the question presented is not "likely [to be] determinative of the outcome here[.]" Petition at 31. This Court's action on the question, therefore, will lack any practical significance in this case and effectively be advisory in nature.

A *Doyle* error "fits squarely into the category of constitutional violations which [this Court] ha[s] characterized as 'trial error.'" (Internal quotation marks.) *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993), quoting *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991). "Trial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" Id. at 629, quoting *Fulminante*, *supra* at 307-308. In *Chapman v. California*, 386 U.S. 18, 24 (1967), this Court held that the standard for determining whether a conviction must be set aside because of federal constitutional error is whether the error "was harmless beyond a reasonable doubt." In making this determination, the Government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

Even if the state improperly used evidence of protected "selective silence" that occurred during the Meehan interview, the error was harmless beyond a reasonable doubt. First, such evidence was effectively cumulative of other evidence that was properly before

the jury: (1) the evidence of the Netto interview, and the petitioner's two discussions with Hunt and Macero, which evidence was admitted without objection and not challenged on appeal; and (2) the evidence that the petitioner either shrugged, otherwise gestured, or verbally responded in some fashion to Meehan's questions asking about the shooting and/or whether the petitioner killed the victim, which evidence did not contain any protected "silence." See *Brecht v. Abrahamson*, 507 U.S. at 638-39 (*Doyle* error harmless, *inter alia*, because challenged evidence cumulative of other evidence); See also *Wainwright v. Greenfield*, 474 U.S. 284, 301 (1986) (*Rehnquist, J.*, concurring) (*Doyle* error likely harmless where based on other evidence that "was there for the jury to consider on its own regardless of whether the prosecutor ever mentioned it").

Second, the state's evidence of guilt was substantial and weighty. See *Brecht v. Abrahamson*, 509 U.S. at 638-39 (state's evidence of guilt was, "if not overwhelming, certainly weighty" and contradicted defendant's claim of accidental shooting). Two eyewitnesses, separately, independently, and without any evidence of collusion or police malfeasance, identified the petitioner as the person who shot the victim. Both witnesses were well acquainted with the petitioner and not strangers. The petitioner admitted that he was present at the cafe at the time of the homicide and that he had a "confrontation" with the victim moments before the homicide. The petitioner admittedly ran from the cafe immediately following

the shooting and dodged the responding police officers, and his flight was memorialized on camera footage. One of the officers saw the fleeing petitioner "clutching his waistband as he was running." The petitioner admittedly possessed, and repeatedly acknowledged, a strong motive to harm members of the crew, especially the victim, with whom he had at least one recent physical altercation. Moments before the shooting, while sitting inside the cafe, the petitioner told Howard that one of the Zimmerman brothers was "going to get it." Moments later, Bailey entered the cafe and signaled the petitioner. After the homicide, Howard received an electronic message attributed to the petitioner saying that she held his freedom in her hands. Two other witnesses testified that the petitioner confessed the killing to them, and each witness offered a detail that only a person with firsthand knowledge of the incident likely would have known.

Third, and finally, the petitioner never mentioned his testimonial account of a third party shooter during any of his extensive discussions with Netto, and Hunt and Macero, despite the fact that he was fully conversant and not selectively silent with these officers, and despite the fact that the officers repeatedly told the petitioner that he had been identified as the shooter, and implored him to defend himself by providing any information that might aid his cause. In his discussions with Hunt and Macero, moreover, the petitioner frequently insinuated that he, in fact, had shot the victim. The petitioner's testimonial account of a third party shooter theory

lacked independent evidentiary support and was not even relied upon by his counsel during closing argument. Even if this Court were to conclude that the state improperly presented and used evidence of the defendant's "selective silence" during the Meehan interview, the error was harmless beyond a reasonable doubt and the resolution of the question presented will, therefore, have no effect on the outcome of the judgment of conviction, no practical significance in this case, and be effectively advisory in nature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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