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 Connecticut

REPLY BRIEF FOR PETITIONER

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The State's opposition brief reveals significant areas of common ground between the parties. Connecticut concedes that "there is 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." Opp. 17. The State also evidently recognizes that the rule governing selective silence in Connecticut, and applied below in this case, conflicts with the approach taken by numerous federal courts of appeals and state courts of last resort. See Pet. 10-13. And Connecticut does not deny that the proper treatment of selective silence presents a recurring issue of great importance that should be resolved by this Court. See Pet. 28-32.

In nevertheless opposing review, the State's sole contention is that "this case presents an unsuitable vehicle for considering the [selective silence] issue" because (1) the record does not "fairly and cleanly" present the issue and (2) any error was harmless. Opp. 17. These boilerplate contentions, however, are baseless.

A. The Selective-Silence Issue In This case Is Clearly And Unambiguously Presented By The Record.

In raising doubt about the state of the record, Connecticut does not deny that the selective silence issue was fully argued to the court below by both parties, was thoroughly considered by that court, and was the subject of that court's detailed holding. But the State maintains that, because the selective silence issue was not raised at trial, the record on the

issue was not "fully and precisely developed" and therefore is not "fairly and cleanly present[ed]." Opp. 17-18. For several reasons, this makeweight argument is insubstantial.

First, the record here is complete and clear; there is no doubt or dispute about what petitioner said, and did not say, during police questioning. Petitioner's refusal to answer particular questions, and his literal silence in response to those questions, was described in detail at trial by both the investigating officer and by petitioner, and was recounted at length by the court below as the basis for its decision. See Pet. App. 25a-28a & n.9. Neither party's account of what petitioner said and did was challenged by the other party.

Thus, according to the State's own account, when asked about the shooting: "[P]etitioner '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*.'" Opp. 9 (quoting Tr. 4/3/14, at 135) (ellipses and italics added by the State). When petitioner was told that he had been identified as the shooter, "there was '[n]o verbal response[,]' no confirmation that the petitioner had done it, and '[n]o denial.'" *Ibid*. (quoting Tr. 4/3/14, at 136). And as "[t]he discussion continued," petitioner "'just wouldn't answer any questions specifically with regard to that shooting.'" *Id*. at 9-10 (quoting Tr. 4/3/14, at 136). It is difficult to imagine how this account of petitioner's silence could have been more "fully and precisely developed."

Second, the court below regarded the record as fully developed—which is why that court had no difficulty resolving the selective-silence issue. In doing so, the appellate court invoked the Connecticut Supreme Court's doctrine in *State* v. *Golding*, 567 A.2d

823 (Conn. 1989), which allows for resolution of an issue that was not pressed at trial *only* when (among other things) "'the record is adequate to review the alleged claim of error.'" Pet. App. 29a (quoting *Golding*, 567 A.2d at 827). Under this doctrine, there can be no doubt that the record below on selective silence is complete and unambiguous. When the record is defective, *Golding* instructs the appellate court *not* to resolve the constitutional claim: "the defendant bears the responsibility of providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." *Golding*, 567 A.2d at 827. But the court below raised *no* concern about the completeness of the record.[1]

Indeed, it is especially revealing, when viewed against this background, that the State raised no question below about the adequacy of the record.

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[1] Connecticut suggests that its Supreme Court's *Golding* rule is peculiar and "unique" (Opp. 18), but there is nothing extraordinary about appellate courts addressing issues that were not pressed at trial when the record is adequate to decide the question and there is a good reason to do so. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. * * * Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, * * * or where 'injustice might otherwise result.'" *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). See, *e.g.*, *Freeman* v. *Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013).

Under the *Golding* doctrine, if the record had been "insufficient, unclear or ambiguous," the State would have advanced that deficiency as a reason for the appellate court to have declined to address the selective-silence argument at all. But the State did no such thing, embracing the adequacy of the record before both the appellate court, where Connecticut argued the merits of the selective-silence issue at length (see No. A.C. 38313 (Conn. App.), *Connecticut* v. *Silva*, State Br., at 20-32), and before the Connecticut Supreme Court, where the State opposed review on the ground that the appellate court's selective-silence ruling was correct. See No. A.C. 38313, Docket # AAN-CR12-0146509-T (Conn. Sup. Ct.), *Connecticut* v. *Silva*, State Opp. 3. The State offers no explanation for its sudden and belated discovery before *this* Court that the record is (in some unspecified way) not "fully and precisely developed."

***Third*,** Connecticut is unable to describe what more could have been done to "fairly and cleanly present [the] issue of 'selective silence.'" Opp. 18. To begin with, as the State recognizes, "[a]t the time of the petitioner's trial, and presently, binding Connecticut Supreme Court precedent clearly and unequivocally held that, once an arrestee has received the *Miranda* warnings and waived the right to remain silent, the *Doyle* rationale is not operative, and subsequent 'selective silence' is not constitutionally protected." Opp. 18. That being so, there would have been no point to petitioner raising a selective-silence argument before the trial court, which would have been bound to reject such a contention out of hand.

And in any event, there is no way in which the record on selective silence *could* have been improved. As we have explained, the record already shows ex-

actly what petitioner said and failed to say during questioning, and the ways in which his silence was used against him at trial. The State's only concrete suggestion regarding additional record-perfecting steps that the parties could have taken is that the trial court might have made "credibility determinations and factual findings." Opp. 19. But that is not so. There is no issue of credibility here, and no dispute about what any of the actors said. The only question is the *constitutional* one whether the State was permitted to make use of petitioner's silence.

Fourth, taking a somewhat different tack, the State also suggests that Detective "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." Opp. 19. Connecticut declares that this sort of shrug presents "[f]actual nuances" and that "[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." Opp. 19-20.

For present purposes, however, this observation is entirely beside the point. Whatever the legal significance of a shrug, the State's own account confirms that the *record* is *un*ambiguous—"Meehan's testimony plainly established" what happened. There was no question what petitioner's "shrugs" meant: the State's evidence explained that they were "'nonconfirmatory * * * shrugs,'" in which petitioner "'doesn't admit [the crime] or deny it.'" Pet. App. 25a-26a n.9; see also *id.* at 28a (petitioner's testimony

that "'I say nothing'"; "'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'").[2] Of course, Connecticut now makes the *legal* contention that this sort of nonconfirmatory gesture "does not amount to protected silence because such a response does not operate to unambiguously or unequivocally invoke the right to remain silent"; we argue, in contrast, that, precisely *because* post-*Miranda* warning silence "is insolubly ambiguous," 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." *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976). This Court should decide which of those views is correct.

Finally, far from presenting an inadequate record, this case offers an especially suitable vehicle with which to resolve the selective-silence question. As we showed in the petition (at 30-31), the case cleanly presents virtually all of the ways in which silence comes into play during a police investigation, as well as all of the uses to which silence may be put during a trial.

Thus, petitioner cooperated with investigators, both before and after the questions he declined to

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[2] There was no doubt in the court below that the shrugs, and petitioner's entire course of conduct, amounted to a failure to answer Detective Meehan's questions. See Pet. App. 28a (court characterizing shrug as "defendant's refusal to answer Meehan's question"); *ibid.* (describing "the state's use of [petitioner's] failure to answer Meehan's questions"); *id.* at 35a (referring to "the state's use of the defendant's failure to answer questions"); *ibid.* ("The defendant remained selectively silent when asked if he had committed the crime[.]").

answer. See Pet. App. 25a-27a & n.9. He was literally silent in response to those questions. See *id*. at 25a n.9 ("'He doesn't reply. He doesn't—he doesn't admit it or deny it. It's just a blank stare[.]'"). He refused to answer questions. See *id*. at 26a n.9 ("'He just wouldn't answer any questions specifically with regard to that shooting.'"); *id*. at 28a ("'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.'"). And at trial, the prosecutor elicited extensive testimony from the State's witness about petitioner's refusal to answer questions concerning the crime (see *id*. at 25a-26a & n.9); cross-examined petitioner at length about his failure to offer an exculpatory story prior to trial (*id*. at 27a-28a); dwelled at closing argument on petitioner's failure to answer the investigating officer's questions (*id*. at 28a); and returned on rebuttal to petitioner's failure to offer an exculpatory account. See Opp. 14.

Accordingly, the issue here appears plainly in the record, which shows that petitioner exercised "selective silence" in just the meaning of that term as it is used by courts on both sides of the conflict. The question that divides the courts is cleanly presented here.

B. The State's Claim Of Harmless Error Should Be Decided On Remand, After This Court's Resolution Of the Selective-Silence Issue.

The state's other "vehicle" argument—that any erroneous use of petitioner's silence was harmless beyond a reasonable doubt—also lacks substance.

To begin with, the question of harmlessness, which the court below declined to resolve (see Pet. App. 29a), is properly considered on remand *after*

this Court resolves the legal significance of selective silence (if, of course, petitioner prevails on the merits of that question). We have shown that petitioner's silence—both his refusal to answer questions and his failure to offer an exculpatory account—was a central element of the trial, explored on direct examination, on cross-examination, in the government's closing argument, and on its rebuttal. In these circumstances, it would be appropriate for this Court to determine whether these repeated uses of petitioner's silence were improper and, if they were, to leave the determination of a remedy for the court below. That is the Court's usual approach to issues left open by lower courts when the question presented warrants review. Cf., *e.g.*, *Fitzgerald* v. *Barnstable School Comm.*, 555 U.S. 246, 260 (2009).

In addition, and in any event, the error below most certainly was *not* harmless.[3] This point is evi-

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[3] It is evident that the court below did *not* regard use of petitioner's selective silence to be harmless. Under the Connecticut *Golding* doctrine, absence of harmlessness is one of the elements that must be established to obtain relief, along with adequacy of the record, the constitutional magnitude of the error, and that the constitutional violation deprived the defendant of a fair trial. *Golding*, 567 A.2d at 827. The defendant's claim will fail "[i]n the absence of any one of these conditions," and "[t]he appellate tribunal is free * * * to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." *Ibid.* The Connecticut Supreme Court has emphasized that "[i]n many cases of an alleged constitutional violation * * * the state is able to demonstrate the harmlessness of such alleged violation beyond a reasonable doubt." *Id.* at 828. "Under such circumstances," the court has instructed, "it would be a waste of judicial resources, and a pedantic exercise, to delve deeply into the constitutional merits of a claim that can appropriately be resolved in accordance with the relevant harmless error analysis." *Ibid.* Here, that the ap-

dent from the State's own presentation: two of the three types of evidence upon which Connecticut relies in arguing harmlessness—evidence that petitioner "shrugged" in response to Detective Meehan's questions and that he failed to offer an exculpatory story (Opp. 22, 23-24)—*themselves* involve petitioner's silence. The State's inability to get away from petitioner's silence is unsurprising, given the central role that silence played at trial, but it renders Connecticut's harmlessness argument against review tautological: the State's error in relying on petitioner's silence to convict him surely cannot be rendered harmless by pointing to proof of guilt supplied by petitioner's silence. And the simple fact, as we showed in the petition, is that silence may be very powerful evidence, leading courts routinely to hold that a State's wrongful reliance on selective silence is *not* harmless. See Pet. 30 (citing cases). Connecticut makes no response.

Finally, the remaining evidence cited by the State hardly establishes harmlessness beyond a reasonable doubt. Connecticut points to two witnesses who identified petitioner as the shooter (Opp. 22), but as the State acknowledges (Opp. 4), one of those witnesses (Tyquan Bailey) recanted that story on the stand (see Tr. 4/1/14, at 202-204). The other (Quandre Howell) did not identify petitioner until three weeks after the shooting, when that witness was himself arrested for multiple narcotics offenses. *Id*. at 149. And both of these witnesses were informed that petitioner was a confidential police in-

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pellate court chose to "delve deeply into the constitutional merits" of the selective-silence claim, rather than resolve the case on harmless error grounds, strongly suggests that the court was unpersuaded by the State's harmless error argument.

formant in cases where they had just been arrested, giving them an obvious motive to testify against him. Tr. 4/3/14, at 167. Connecticut also asserts that petitioner confessed the crime to two fellow inmates while he was awaiting trial (Opp. 10), but both of those witnesses were themselves facing serious felony charges and conceded that they incriminated petitioner in hopes of getting the charges reduced. Tr. 4/2/14, at 28-29, 61-62, 63. Whether or not this evidence is probative at all, it is not so definitive as to establish guilt beyond a reasonable doubt—which, presumably, is why the State repeatedly returned at trial to petitioner's selective silence.

* * * *

We showed in the petition that the courts are deeply divided on the important question presented here: "some * * * circuits have held that *Miranda* and *Doyle* protect a defendant's partial or selective silence from being used against him at trial," while "[o]ther circuit courts * * * have held that a defendant has no constitutional right to prevent his selective silence from being used against him at trial." *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 104 (3d Cir. 2012). The state courts of last resort are similarly divided. See Pet. 10-21. The court below in this case, a participant in that conflict, resolved the case by expressly denying constitutional protection to what it recognized as petitioner's selective silence. This Court should grant review to resolve the conflict and bring clarity to an important point of constitutional principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[1] 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.