No. _____

In The

SUPREME COURT OF THE UNITED STATES

GLEN S.,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
CONNECTICUT APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

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March 7, 2022

QUESTION PRESENTED FOR REVIEW

Should an affirmative duty be imposed on trial courts to canvass criminal defendants and alleged probation violators about their constitutional right to testify, when: a.) the defendant does not ask to testify, and b.) the defendant does not declare he or she is waiving his or her right to testify, and c.) neither defense counsel nor the court nor the state make any on-the-record statements reflecting that the defendant understands that he or she has the right and that the decision to testify was solely theirs to make?

LIST OF PARTIES

The caption of the case contains the redacted name of the petitioner, Glen S., and the prosecuting authority, the State of Connecticut.

LIST OF ALL PROCEEDINGS IN STATE, FEDERAL AND APPELLATE COURTS

State of Connecticut Superior Court Proceedings: *State v. Glen S.,* Docket No. UWY-CR-08 (redacted), Federal Proceedings: None. State of Connecticut Appellate Court Proceedings: *State v. Glen S.,* 207 Conn. App. 56, 261 A.3d. 805, cert denied, 332 Conn. 909, 264 A.3d 577 (2021).

There are also two state habeas corpus cases: *Glen S. v. Commissioner of Correction*, No. CV17- (redacted, pending), *Glen S. v. Commissioner of Correction*, No. CV19 - (redacted, pending).

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The Petitioner, Glen S., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court which entered in the above-entitled proceeding on (App. p. 1a) and became final on December 7, 2021 when the Connecticut Supreme Court denied certification for further appellate review. (App. p. 34a.)

OPINION BELOW

The opinion below was from the Connecticut Appellate Court. It was published and filed on August 31, 2021. The case was styled *State of Connecticut v. Glen S., No. AC 43101.* It is published as *State v. Glen S.*, 207 Conn. App. 56, 261 A.3d. 805 (2021). The entire text of this opinion is reproduced in the appendix. (App. pp. 1a.) The Connecticut Supreme Court denied certification for further appellate review on December 7, 2021, 332 Conn. 909, 264 A.3d 577 (2021).

BASIS FOR JURISDICTION

The judgment of the Connecticut Appellate Court entered on August 31, 2021. The Connecticut Supreme Court denied certification for further review on December 7, 2021. The statutory provision believed to confer jurisdiction to review judgment in this matter on a writ of certiorari is 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT RULES

United States Supreme Court, Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither

controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another Untied States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Connecticut General Statutes:

Connecticut General Statutes § 53a-32 Violation of Probation or Conditional Discharge

Connecticut General Statutes § 53a-70b Sexual Assault in Spousal or Cohabiting Relationship

Connecticut General Statutes § 53a-167a Interfering with an Officer

Connecticut General Statutes § 53a-181 Breach of Peace

Connecticut General Statutes § 54-86e Confidentiality of Identifying Information Pertaining to Victims of Certain Crimes

Published in Appendix G, pages 91a-96a.

United States Code

28 U.S.C. § 1257 State courts; certiorari;

(a) Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

STATEMENT OF THE CASE

In August, 2018, the petitioner, Glen S.,[1] was arrested for the misdemeanors of second degree breach of peace and interfering with an officer and then was arrested by warrant for violation of probation.[2] The violation of probation was prosecuted at the Waterbury Superior Court. The defendant was arraigned on August 29, 2018. At a hearing held on September 12, 2018 the defendant informed the court, I'm representing myself pro se." (9-12-18 Tr. p. 2, App. p. 76a.) Thereupon the trial court canvassed the defendant regarding some of the disadvantages of self-representation and found the defendant "capable of representing [him]self." (*Id*, p. 7, App. p. 79a.)

October 30, 2018 was the first day of the violation of probation hearing. The defendant, who had no law school training, proceeded to defend himself pro se without any standby counsel having been appointed.

The violation of probation hearing was based on the state's charging document known as the "Long Form Information." It was dated October 4, 2018 and states in pertinent part, that the defendant violated his probation by his alleged:

> 1. Failure to abide by condition that he not violate any criminal laws of the State of Connecticut.
> 2. Failure to report to probation officer as directed;
> 3. Failure to keep probation officer informed of whereabouts;
> 4. Failure to complete sex offender evaluation and treatment;
> 5. Failure to provide truthful information to . . . State Police Sex Offender Registry Unit, in violation of Section 53a-32(a) . . . of the General Statues (sic.).(p.1, App. p.78a.)

On October 30, the state's first witness was Charles Santiago. He was one of the probation officers familiar with the defendant's file. He identified the "order of probation" pertaining to the

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[1] The petitioner's last name is redacted pursuant to C.G.S. § 54-86e. App. p. 95a.
[2] C.G.S. §§'s 53a-181 and § 53a-167a are at App. P. 93a and 94a.

defendant. It was admitted as State's Exhibit Two. The witness identified the "conditions of probation" form as State's Exhibit Three. The witness testified he reviewed the conditions with the defendant and the defendant signed the form. Similar questions and answers occurred regarding State's Exhibit Four, the "sex offender conditions of probation." (10-30-18, Tr. p. 31, App. p. 79a.) The state's second and final witness was Mr. Jason Grady. He was the defendant's probation officer starting in mid-December 2017. He testified that the defendant was required to meet with him weekly. He testified that in May of 2018 he tried to contact the defendant because he "had missed appointments with me." (*Id.*, Tr. p. 45, App. p. 80a.) He testified he was "trying to get him into compliance with supervision." *Id.* He explained the steps he took.

> One of them was checking the Connecticut State Sex Offender Registry. I noticed that he had changed his place of residence with the sex offender registry to an address in Bridgeport which turned out to be the administrative office of the Greater Bridgeport Mental Health Department. And the next I heard of Mr. S. was the night of his arrest -- a new arrest. (*Id.*, p. 46, App. p. 81a.)

During the state's direct examination of this witness, the defendant tried to explain that, "it was a false arrest and . . . criminality on the police report part." (10-30-18 Tr. p. 49, App. p. 82a.) The pro se defendant then interrupted the direct examination of this witness and argued that he "didn't do anything wrong." Id. The court told the defendant that he was arguing and he was "going to have his chance . . . to argue." (*Id.*, p. 50, App. p. 80a.)

The prosecutor questioned Mr. Grady about the defendant having changed his address to an address in Bridgeport. Mr. Grady testified the address was sixteen "Center Avenue in Bridgeport." (*Id.*, p. 51, App. p. 84a.) He was asked, "[d]o you have an idea if he was actually living at that address?" *Id.* He replied: A *I do not believe he was living there.* I believe that is the administrative

offices of the Greater Bridgeport Mental Health Department." (*Id.* p. 52, App. p. 85a., emphasis added.) The pro se defendant objected and told the court, "*But I was there, inpatient.*" (*Id.*, emphasis added.)[3] When the court asked him what the objection was, the defendant replied (referring to the fact that he had been a residential "inpatient" at that address) "it's the whole truth, Your Honor." (*Id.*) The court overruled the objection, stating that the defendant was making an argument. *Id.*

The state also inquired about the defendant's condition of probation to attend sex offender treatment. Mr. Grady identified a treatment discharge letter dated February 1, 2018. (10-30-18 Tr. p. 53, App. p. 86a.) He testified the defendant was "administratively discharged because he "was unable to participate in treatment." (*Id.*) When asked why, the witness testified, "[t]hey did not believe him to be mentally stable." (*Id.*)

The pro se defendant attempted to cross-examine Mr. Grady. The defendant was able to develop that Mr. Grady told him "to get a Bridgeport address." (*Id.* p. 59, App. p. 87a.) The defendant attempted to develop that he "got illegally kicked out" of his new address and whether Mr. Grady knew about all of the problems he encountered while living in Bridgeport. The defendant became upset and had trouble asking cross-examination questions. At that point the defendant had no further questions and the state rested.

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[3] After he was appointed assigned counsel to fully represent him, counsel called no witnesses to prove the defendant was in fact living at the Greater Bridgeport Mental Health Center. Prior to the appointment of counsel, the pro se defendant had sent a handwritten list of witnesses' names to the court whom he wanted subpoenaed in his defense. One witness was an employee of the Greater Bridgeport Mental Health Center located at "1635 Central Avenue Bridgeport, CT 06604."

As the first day of the violation of probation hearing concluded, the defendant was asked if he wanted to call witnesses and he said "yes." Thereafter the defendant moved for a 60-day continuance which was granted.

On the second day of the violation of probation hearing, i.e., the date on which the defendant would be able to call witnesses in his own defense and testify, May 9, 2019, no witnesses were called by Attorney Brown. Brown had been court-appointed in the interim between the two hearing dates of October 30, 2018 and May 9, 2019. The defendant stated in his brief to the Connecticut Appellate Court:

> The court never canvassed the defendant about his constitutional right to testify. The defendant's court-appointed counsel *never informed the court that the defendant had chosen to testify or not to testify*. Court-appointed counsel never asked the court to canvass the defendant about his constitutional right to testify. *Court-appointed counsel never moved to re-open the state's case. Court-appointed counsel did not move to have the state's witnesses re-called so that court-appointed counsel could cross-examine them.* Court-appointed counsel never even stated that the defendant rested its case. Instead, court-appointed counsel moved to have a guardian ad litem appointed and to have a third 54-56d examination of his client. These motions were summarily denied. (5-9-19 Tr. pp. 2-3.)

(Def. Br. p. 20, App. p. 61a., referring to transcript at App. pp. 88a-89a, emphasis added.)

Following the arguments by the state and defense counsel, the trial court reopened the 2008 judgment of conviction for sexual assault "in spousal or cohabiting relationship," a violation of C.G.S. § 53a-70b, [4] vacated the suspended sentence time and imposed a sentence of "ten years, execution suspended after service of six years and the remaining period of probation." App. p. 32a.) The defendant timely appealed. One argument sought direct appellate review regarding ineffective assistance he received of his counsel.

> The defendant asserts that on May 9, 2019 his lawyer "entirely failed to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S.

[4] C.G.S.§ 53a-70b is published at App. p. 96a.

> 648 at 658 (1984). Defense counsel failed to have the state's witnesses re-called to testify under cross-examination. The defendant's pro se attempted cross-examination was a shambles. . . . Assuming that counsel had read the transcript of October 30, 2018 which was State's Exhibit 1, . . . , *he knew that the pro se defendant was attempting to develop that he had obtained a new residence in Bridgeport at Mr. Grady's request; that for a period of time he indeed was living at the Bridgeport Mental Health Center; that he did not willfully quit therapy and instead had been administratively discharged.* The record established that on February 13, 2019 the trial court appointed Attorney Brown as the defendant's "full-time lawyer." The court even "allow[ed]" the full-time counsel to have "any time it takes to review the transcripts and prepare your trial." The defense attorney did not need any of the defendant's mental health treatment records to prove that the defendant was living at one address he told the officer about followed by another he also told them about which was the health center.

(Def. Br. p. 26, App. p. 67a, emphasis added.) The Appellate Court declined to review this issue in accordance with the preference for ineffectiveness of counsel claims to be adjudicated via the habeas corpus process. *State v. Glen S.,* 207 Conn. App. 56, 80, n. 9, (2021). (App. p. 25a.)

The defendant also argued that despite binding state precedent to the contrary "the trial court was required to canvass the defendant about his right to testify." (Def. Br. p. 20, App. p. 61a.) In addition to appellate decisions which require such canvassing, the defendant referred to Rule 1.2 (a) of the *Model Rules of Professional Conduct*, adopted by the American Bar Association.

> "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." (Id.) Given this ethical rule of conduct, an excellent means of assuring that a defendant actually understands that his or her core constitutional right of testifying or not is not the lawyer's decision and is solely the client's decision would be to require a judicial canvass."

(Def. Br. p. 24, App. p. 65a.) The defendant also argued that "[w]hat happened here is inconsistent with United States Supreme Court precedent which rejects any presumption of waiver of "important federal rights from a silent record." *Boykin v. Alabama*, 395 U.S. 238 at 243 (1969). (Def. Br. p. 25, App. p. 65a.)

The petitioner appealed his conviction to the Connecticut Appellate Court, Connecticut's intermediate appellate court, claiming, inter alia, that he should have been judicially canvassed regarding whether he understood he had the constitutional right to testify and that the decision to testify or not testify was solely his. The Connecticut Appellate Court affirmed. 207 Conn. App. 56 (2021). The petitioner then petitioned the Connecticut Supreme Court which denied the petition for certification on December 7, 2021.[5]

REASONS FOR GRANTING THE PETITION

The writ of certiorari should be granted because this petition raises a constitutional issue of great importance. A defendant in a criminal case possesses the constitutional right to take the witness stand and testify in her or his defense. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). After the prosecution rests its case and a defendant does not declare whether she or he wishes to testify or not and defense counsel makes no representation to the court that the accused understands the decision is solely his or her decision and has counseled the client about it, a silent record should not constitute waiver of the right to testify. In *Rock*, supra, it was noted that a "defendant's right to testify is one of the rights that are essential to due process in a fair adversary proceeding." 483 U.S. 44, 51 (1981) citing U.S. Const. Amend. V, VI, XIV. A knowing and intelligent waiver should not be presumed from a silent record. One reason for granting the writ is this court's precedent which rejects any presumption of waiver of "important federal rights from a silent record." *Boykin v. Alabama*, 398 U.S. 238 at 243 (1969). To knowingly exercise the waiver of the fundamental right to testify, a canvass should be constitutionally required.

[5] 332 Conn. 900 (2021), App. p. 34a.

Review is warranted because the District of Columbia Circuit Court of Appeals, the First, Second, Fifth and the Eleventh Circuit Courts of Appeal do not hold that a silent record constitutes a waiver of the right to testify. This conflicts with several other circuit courts of appeal which hold that a silent record constitutes waiver.

A. The Long-standing Split Among the Circuits Should be Resolved.

1. Five Circuit Courts Hold That a Defendant's Silence Cannot Support an Inference of the Waiver of the Right to Testify.

In *Chang v. United States*, 250 F. 3d 79 (2d. Cir. 2001) the court explained:

> We concluded [in *United States v. Vargas*, 920 F.2d 167, 170 (2nd Cir. 1990)] that "[w]e regard as highly questionable the proposition that a defendant's failure to object at trial to counsel's refusal to allow him to take the stand constitutes a waiver of the defendant's constitutional right to testify on his own behalf." We follow *Vargas's* lead and agree with those circuits that have refused to find a waiver or forfeiture solely from a defendant's silence at trial. At trial, defendants generally must speak only through counsel, and absent something in the record suggesting a knowing waiver, silence along cannot support an inference of such a waiver. Id. at 83-84.

The First Circuit is in accord with the Second Circuit. It stated:

> "Declining to place upon the defendant the responsibility to address the court directly is consistent with the reality that routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to." *Owens v. United States,* 483 F.3d 48 at 58 (1st Cir. 2007).

The Fifth Circuit similarly holds that a defendant's silence in such situations does not constitute waiver. In *United States v. Mullins*, 315F.3d 449 at 455 (6th Cir. 2002) the court stated, "[a]t trial, defendants generally must speak only through counsel, and *absent*

something in the record suggesting a knowing waiver, silence alone cannot support an inference of such waiver." (Emphasis added.)

In the case at bar there was not anything in the record suggesting a waiver, much less a *knowing* waiver. The trial court never canvassed the defendant about his constitutional right to testify. The defendant's court appointed counsel made no statements or representations to the court that his client was waiving his right to testify. The trial court did inquire of defense counsel: "Does the defense intend to put on anything further?" Defense counsel replied in the negative and requested that a guardian ad litem be appointed. (T. Tr.5-9-2019, pp. 1-2, App. pp. 90a, 88a.) After that was denied, the trial court stated: "I'm going to proceed to the closing arguments . . . . I think you can argue – we won't have separate arguments, both with liability and both sentencing. We can do it all in one." (T.Tr. 5-9-19, p. 3, App. p 89a.) As was previously noted, at the first hearing date when the defendant was pro se, his narrative-like cross-examination of state witnesses suggested that he wanted to testify. (T. Tr. 10-30-18, pp. 49-53. App. 82a-86a.) The defendant probably had no clue that he could overrule his court-ordered attorney and testify in his own defense.

The District of Columbia Circuit Court rejected adopting a new rule "that whenever the defendant does not testify there is a per se requirement that the . . . court" canvass a defendant. *United States v. Ortiz*, 82 F.3d 1066 at 1076 (D.C. Cir.1996). But it then went on to state:

> However, we also reject the demand rule, requiring that the defendant directly express to the court during the trial the desire to testify, in recognition of the impracticality of placing a burden on

> the defendant to assert a right of which he might not be aware or to do so in contravention of the court's instructions that the defendant speak to the court through counsel . . . Notwithstanding the defendant's silence, there may be circumstances, as a number of circuits acknowledge, when the district court must conduct a colloquy with the defendant to assure that he has knowingly and intelligently waived his right to testify.

The case at bar required such a colloquy, especially given the representations his counsel made which suggested that a conflict or possible conflict existed between attorney and client.[6]

In the Eleventh Circuit, defendants who allege their counsel violated their right to testify cannot assert the constitutional violation on direct appeal. Such claims must be brought via ineffectiveness of counsel petitions. *United States v. Teague*, 953 F.2d 1525, 1534 (en banc), cert. denied, 506 U.S. 842 (1992). Criminal defendants have a "fundamental constitutional right to testify in [their] own behalf at trial. That right is personal to the defendant and cannot be waived either by the trial court or by the defense counsel." *Id.*, at 1532. (Emphasis in the original.) It was noted in *Gallego v. United States* that when defense "counsel has . . . . refused to call [the defendant] to the stand, or . . . *never informed [him]* of *his* right to testify *and that the final decision belongs to the defendant alone,* defense counsel has not acted "within the range of competence in criminal cases," and thus such a defense counsel has been ineffective. 174 F.3d 1196-97 (11th Cir. 1999) (citing *Teague, supra* at 1534 and *Strickland v. Washington*, 466 U.S. 668 at 687 (1984) (emphasis added). Such an approach is an imperfect constitutional remedy but it is far better than no remedy at all.

2. Two Circuits Hold that a Defendant's Silence When His Counsel Does Not Call Him As a Witness Constitutes a Waiver of His Right to Testify.

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[6] See Defendant's Brief, pages 29-32, App. pp. 70a - 73a.

In the Ninth Circuit a defendant's silence equals waiver. The leading case is *United States v. Edwards,* 897 F.2d 445 (9th Cir.) *cert. denied*, 498 U.S. 1000 (1990). In the Ninth Circuit, a defendant must affirmatively speak to the trial judge during the trial. Four years later, relying on *Edwards*, the Ninth Circuit held that a defendant was not denied his Sixth Amendment right to effective assistance of counsel even though his attorney waived his client's right to testify and failed to advise the client he has the right. The decision is *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1994). Regarding the defendant's argument that counsel was ineffective, it held:

> *This argument is precluded* by *United States v. Edwards*, 897 F.2d. 445 (9th Cir.), *cert. denied,* 498 U.S. 1000 (1990). In *Edwards*, the defendant wanted to testify, but the lawyer misunderstood him and did not call him as a witness. *Id.* at 446. *We held that the court has no duty to advise the defendant of his right to testify*, nor is the court required to ensure that an on-the-record waiver has occurred. *Id. When a defendant is silent in the face of his attorney's decision not to call him as a witness, he has waived his right to testify. Id.* at 447.

Nohara, at 1243-44 (emphasis added). This Ninth Circuit precedent remains undisturbed. See, e.g. *United States v. Sewell*, No. 2:05-cr-0554-TLN-EFB P *11-12 (E.D. Cal. May 5, 2015). Relying on *Edwards* and *Nohara*, it denied Sewell's claim that his counsel was ineffective in not advising him he had a constitutional right to testify. It stated that "trial courts have no duty to advise defendants of their right to testify. . ." *Id.* at 11. It also noted that "the Ninth Circuit has held that a defendant's silence in the face of his attorney's decision not to call him to [testify] constitutes an effective waiver of the right to testify on his own behalf, *even if he later claims that his attorney refused to allow him to testify and he was unaware he had a right to testify." Id.*

at 11, (emphasis added.) In these circuits, such defendants are precluded from litigating ineffectiveness of counsel claims on appeal.

The Eighth Circuit's waiver rule predates the Ninth's. It holds that a defendant "must act affirmatively" when the defendant's attorney rests their case without having the client testify in his or her defense. *United States v. Bernloehr*, 833 F.2d 749, 751-52. The *Bernloehr* court partly relied on 18 U.S.C. § 3481 and on a First Circuit decision which predated *Rock v. Arkansas, supra.* That decision was *United States v. Systems Architects, Inc.*, 757 F.2d 374 (1st Cir. 1985). Nevertheless, this rule of precluding a constitutional challenge based on defense counsel's failure to inform and advise clients of their right to testify remains unchanged in these two circuit courts.

3. Some Circuit Courts Recognize That District Court Judges Have a Duty to Verify that Defendants Have Voluntarily Waived Their Right to Testify But Only in Exceptional Circumstances.

Between the doctrinal opposites of a defendant's silent record requiring a trial judge to inquire if a defendant is waiving the right to testify and a silent record constituting waiver even when defense counsel admits failure to inform the client of this fundamental right, there exists a third approach followed by some circuits. In *United States v. Pennycooke*, 65 F.3d 9,12 (3d. Cir. 1995), it was recognized that the duty to determine whether a defendant has knowingly and voluntarily waived their right will exist "in exceptional, narrowly defined circumstances." One example of such an exceptional circumstance is when defense counsel "is frustrating [a defendant's] desire to testify." *Id.* at 13. The Sixth Circuit adopted this approach in *United States v. Webber,* 2008 F.3d 545, 552 (6th Cir. 2000). The Seventh Circuit is in accord. A trial

judge is not required "to question a defendant *sua sponte* in order to ensure that his decision not to testify was undertaken knowingly and intelligently unless there is some indication that the defendant has been prevented from exercising that right." *Pennycooke, supra*, at 25. Also see *United States v. Stark*, 507 F.3d 512 (7th Cir. 2007).

B. The Split Among the States Should be Resolved

The Connecticut Appellate Court stated in its decision in this case that the:

> Connecticut Supreme Court's decision in *State v. Paradise*, 213 Conn. 388, 404-405, 567 A.2d 1221 (1990), overruled in part on the grounds by *State v. Skakel,* 276 Conn.633, 693, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct.578, 166 L. Ed. 2d 428 (2006), is controlling with respect to whether a trial court is constitutionally required to canvass a defendant about the waiver of his or her right to testify. *Paradise* provides that federal law does not "[contain] any such procedural requirement" for a trial judge to affirmatively canvass the defendant "to ensure that his waiver of his right to testify is knowing, voluntary and intelligent . . . where the defendant has not alleged that he wanted to testify or that he did not know that he could testify."

State v. Glen S., 207 Conn. App. 56 at 79, 261 A.3d 805, 822, *cert denied* 332 Conn. 909 (2021). Connecticut thus follows the approach of most states. Most state appellate courts hold that trial courts are not required to make an on-the-record inquiry of non-testifying defendants. See *e.g. State v. Bey,* 709 N. E.2d 484, 499 (Ohio 1999), *State v. Reynolds*, 670 N.W.2d 405, 413 (Iowa 2003), and for a state appellate decision which collects this majority view, see *Johnson v. Texas*, 169 S.W.3d 223, 232 (Tex. Crim. App. 2005).

A minority of jurisdictions hold that trial courts have a duty to engage defendants in a colloquy/canvass to determine if defendants understand they have a constitutional right to testify and the decision is solely theirs and to ensure their decision is voluntarily, knowingly and

intelligently made. *State v. Weed*, 666 N.W. 2d, 485, 498-99 (Wis. 2003), *Momon v. State,* 18 S.W. 3d. 152, 162 (Tenn. 1999), *State v. Salmons*, 509 S.E. 2d 842, 862-63 (1998), *Tachibana v. State*, 900 P.2d 1293, 1301-03 (Hawaii 1995), *Lavigne v. State*, 812 P. 2d 217, 220-22 (Alaska 1991), *Sanchez v. State*, 841 P.2d 85, 89 (Wyo. 1992), *People v. Curtis*, 681 P2d. 504, 514-15 (Colo. 1984).

CONCLUSION:

Given the strained relationship between the petitioner and his court-appointed attorney on the second day of the violation of probation hearing, a problem the trial court was well aware of, it is doubtful that counsel informed him that even though he was no longer pro se, he had the right to testify and the decision was solely his. When he was pro se he tried to tell his side. The record is silent as the state, the defense attorney, the judge and the defendant said nothing. Waiver of a defendant's fundamental right to testify should not be presumed from a silent record. Some state appellate courts require that defendants be canvassed by the court. Connecticut is not such a state. Some state and federal circuit courts hold that a defendant's silence is insufficient to demonstrate a knowing, voluntary and intelligent waiver which reflects agreement with counsel's advice to not testify, assuming such advice is given. Other courts equate silence with waiver. Petitioner argues that a mandatory on-the-record colloquy regarding waiver would ensure that a defendant's right to testify is constitutionally protected.

In 2008, following the Seventh Circuit's decision in *United States v. Stark*, 507 F.3d 512 (7th Cir. 2007), a scholarly comment addressed the schism among the federal circuits.

> Federal courts have now had two decades to determine how to enforce the right announced in *Rock*, and the system they have developed fails to do so in a way that is doctrinally or practically

> justified. Years of insufficient protection of a fundamental, personal right, coupled with instances – such as *Stark* – of hindering defendants' receipt of the most effective representation, offer hard evidence of the inadequacy of the current regime. The time is ripe for serious reconsideration of proposals for on-the-record waiver of the right to testify. 121 Harv. L. Rev. 1660, 1668 (2008).

Given the conflict among the federal circuits and among the state appellate courts and given the seriousness of the issue, this petition for a writ of certiorari should be granted.

March 7, 2022

Respectfully Submitted, Petitioner Glen S.

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