

No. 21-125

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IN THE

Supreme Court of the United States

OCTOBER TERM 2021

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AUSTIN CODA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent,*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT

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**BRIEF FOR PETITIONER**

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COUNSEL FOR PETITIONER

TEAM 10

DATED SEPTEMBER 13, 2021

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## QUESTIONS PRESENTED

- 1) The Fifth Amendment guarantees that no person may be deprived of life, liberty, or property without due process of law. Coda was indicted barely within the applicable statute of limitations, while his corroborating witnesses and bus records became unavailable. Because Coda lost his ability to corroborate his alibi and the government lacked a strong reason for its delay, the district court erred in denying Coda's Motion to Dismiss the indictment for preindictment delay.
- 2) The Fifth Amendment guarantees no person must be a witness against himself. Coda remained silent while the government arrested him, took him into custody, and read him his *Miranda* rights prior to interrogation. Because Coda remained silent before officials questioned him, the district court erred in holding that his Fifth Amendment rights were not violated, as admission of his silence constituted self-incrimination, penalizing Coda.

## STATEMENT OF THE CASE

“[H]e would be unable to produce critical testimony to corroborate his defense.” R. at 3. That is how Austin Coda (Coda) informed the district court he would be affected by the government’s delay in prosecuting his case. *Id.* At an evidentiary hearing, Coda testified that every year he would take a Greyhound bus to visit his family in New York to celebrate his birthday. *Id.* Unfortunately, on his birthday on December 22, 2010, Coda’s hardware store exploded, remaining completely unsalvageable. R. at 2.

Coda intended to raise an alibi defense, at trial, but he could not produce the bus records or the critical testimony of his five witnesses to corroborate his defense. R. at 3. Due to the government’s delay, all the records corroborating Austin Coda’s alibi on that date were unobtainable, which included four corroborating witnesses that died and one that contracted dementia, as well as Greyhound bus records that were no longer accessible because they were only stored for three years. *Id.*

Prior to the accident, Coda’s business was not generating much revenue and he did not have money to properly upkeep the store. R. at 1. Federal Bureau of Alcohol, Tobacco, and Firearms agents and local fire investigators found evidence to suggest that a leaky old gas line caused the explosion. R. at 2. Nevertheless, Sam Johnson (Johnson), a friend of Coda’s, told the Federal Bureau of Investigation (FBI) the state of Coda’s declining finances and that Coda had insured his hardware store in case of loss. R. at 2. Johnson also told the FBI that Coda seemed “very anxious and paranoid” during the week of the accident. *Id.* The FBI relayed this information to the U.S. Attorney’s Office (Office), as the FBI believed Coda might be at fault, but the Office labelled Coda’s case a “low-priority.” *Id.*

At first, the Office did not prioritize Coda's case because Coda was being prosecuted for other state charges and the Office did not want the mere inconvenience of transporting him around for the proceedings. *Id.* After Coda's state offense concluded, the Office prioritized drug offenses, causing a lot of turnover that resulted in Coda's case being shuffled around the Office to different Assistant U.S. Attorneys. *Id.* Meanwhile, Coda's case remained a "low-priority" and the Office made no progress on it. *Id.*

Finally, after an Assistant U.S. Attorney realized Coda's ten-year statute of limitations was about to be complete, an FBI agent arrested Coda in April 2019. R. at 2–7. After being arrested, the arresting agent notified Coda of the charges against him. R. at 7. In response, Coda stayed silent. *Id.* After the agent took Coda to the detention center and prior to interrogation, the FBI read him his *Miranda* rights. *Id.*

The government indicted Coda in May 2019, mere months before the statute of limitations would run. R. at 3. Coda was indicted under 18 U.S.C. § 844(i), which disallows using an explosive to maliciously "destroy property that affects interstate commerce." R. at 3. Coda moved to dismiss the indictment, on the grounds that the preindictment delay that he faced violated his Fifth Amendment right to due process. *Id.* He further argued that the court should employ a balancing test and "carefully consider each situation on a case-by-case basis." R. at 4. After an evidentiary hearing on September 15, 2019, the district court denied Coda's Motion to Dismiss the indictment for preindictment delay because it determined that Coda "must show (1) actual prejudice and (2) bad faith to bring a successful Due Process challenge to preindictment delay" and that the balancing test is not appropriate. R. at 1–5. In the end, the district court held that Coda proved that he faced "actual and substantial prejudice to his defense" because of the government's

preindictment delay. R. at 6. But the district court determined that Coda failed to prove prosecutorial bad faith and therefore, the district court denied Coda's motion to dismiss. *Id.*

Next, Coda filed a Motion to Suppress his post-arrest but pre-*Miranda* silence, because admission of his silence would violate the Fifth Amendment. R. at 7. The district court found that the facts were not in dispute, and it held that the evidence was admissible as substantive evidence of guilt. R. at 7–8. The district court reasoned that Coda's post-arrest, pre-*Miranda* silence was admissible because it coincided with his arrest and at any point Coda could have asserted his silence. R. 8–10. Further, the district court found that the jury needed to hear the arresting agent's common-sense observation of Coda's silence to best determine guilt beyond a reasonable doubt. R. 9–10. Yet, Coda maintained that the right to remain silent should not begin at interrogation because then arresting officers could delay questioning to create incriminating silence, in violation of the Fifth Amendment. *Id.* Nevertheless, the district court denied Coda's Motion to Suppress his post-arrest but pre-*Miranda* silence. R. at 10.

Coda was convicted under 18 U.S.C. § 844(i) and received a ten-year sentence in prison. R. at 11. Coda appealed the denial of his Motion to Dismiss and his Motion to Suppress, as well as his conviction. *Id.* The United States Court of Appeals for the Thirteenth Circuit affirmed the district court's ruling in full. R. at 12. Coda's Petition for Writ of Certiorari was granted by this Court. R. at 16.

### **SUMMARY OF THE ARGUMENT**

The Fifth Amendment ensures that no person will be deprived of life, liberty, or property, without due process of law. When the government delays prosecuting an accused, the reviewing court must use its judgment to determine the reasons for the government's delay in prosecution and the prejudice to the accused, to ensure that the accused received a fair trial. Some federal courts



of appeals hold that a court should employ a balancing test which involves the accused proving actual prejudice, after which the court weighs that prejudice against the government's delay. Other federal courts of appeals hold that the accused must prove actual prejudice and prosecutorial bad faith. For example, although one court held the balancing test would involve weighing the incomparable, another court deemed a 27-month delay in prosecution for mere convenience when balanced against the prejudice to the accused, a violation of the accused's Fifth Amendment right to due process, as the government's delay resulted in the accused losing his alibi witness.

Next, the Fifth Amendment guarantees that no person will be forced to be a witness against himself. Upon arrest and before interrogation, an officer must warn the accused that he has a right to remain silent by reading him *Miranda* rights. Although pre-arrest silence is admissible as substantive evidence of guilt, post-*Miranda* silence is only admissible as impeachment evidence. Further, various federal courts of appeals have held that an accused's post-arrest, pre-*Miranda* silence is also not admissible as substantive evidence of guilt. For instance, one court held that an accused's post-arrest, pre-*Miranda* silence was not admissible because there are many reasons why an accused could be silent, like being too shocked to speak, and therefore, the accused should not be penalized for that silence. While some federal courts of appeals have held that an accused must affirmatively assert silence, other federal courts of appeals have held that simply remaining silent is an affirmative assertion. Next, while some federal courts of appeals have held that an accused's right to exclude silence as substantive evidence of guilt begins after a *Miranda* warning, other federal courts of appeals have held that an accused's silence after arrest cannot be used as substantive evidence of guilt.

The district court erred in denying Coda's Motion to Dismiss the indictment for preindictment delay, as it employed the wrong legal standard. If the court had employed the

balancing test, then the prejudice that Coda faced would far surpass the “low-priority” reason the government gave for its delay, in violation of the Fifth Amendment. If a 27-month delay for mere prosecutorial convenience was deemed a violation of the Fifth Amendment so too should Coda’s almost ten-year delay, as Coda also lost his corroborating evidence. In addition, under the balancing test this Court would not be comparing the incomparable but rather it would be giving proper weight to the prejudice Coda faced. Next, requiring prosecutorial bad faith places an unfair burden on Coda, as no matter how extreme the prejudice was to Coda, if he fails to prove prosecutorial bad faith then he has no claim to a Fifth Amendment violation. Requiring Coda to prove prosecutorial bad faith, when he has very little access to the Office’s decision-making process is an extreme burden, leaving Coda without a fair and just trial. Thus, this Court should employ the balancing test to ensure Coda’s Fifth Amendment rights are preserved.

The district court erred in denying Coda’s Motion to Suppress his post-arrest, pre-*Miranda* silence because admission of Coda’s silence as substantive evidence of guilt violates his right against self-incrimination under the Fifth Amendment. Coda could have stood silent because he was in shock or because he knew about his right to remain silent from his state charges. Although Coda failed to verbally assert his right to remain silent, his silence alone should suffice, as he was merely in custody and not being formally questioned. If this Court holds otherwise, this Court would be forcing an accused to speak upon arrest and run the risk of saying something incriminating, when mere silence should suffice. Next, Coda’s right to remain silent should attach at custody to prevent officers from manufacturing incriminating silence by merely allowing time to pass before reading an accused his rights. If not, Coda faces a Catch 22. If this Court deems his silence admissible then the government can use it as substantive evidence of guilt even though he did not know he was incriminating himself. If Coda had spoken and denied the allegation against

him, the government could impeach him at trial with other evidence. Either way, Coda's Fifth Amendment rights are violated because he was forced to incriminate himself. Thus, this Court should hold that Coda's silence upon arrest is not admissible as substantive evidence of his guilt, to preserve his Fifth Amendment rights.

### ARGUMENT

A district court's denial of a motion to dismiss for preindictment delay in violation of an accused's right to due process under the Fifth Amendment is reviewed de novo. *United States v. Lively*, 852 F.3d 549, 565–66 (6th Cir. 2017). Any factual findings the district court relied on to deny the motion to dismiss are reviewed for clear error. *Id.* at 566. Further, a district court's denial of a motion to suppress a "custodial statement" on Fifth Amendment grounds is reviewed de novo. *United States v. Lucas*, 963 F.2d 243, 245 (9th Cir. 1992). Finally, any factual findings the district court relied on to reject the motion to suppress are also reviewed for clear error. *United States v. Sheikh*, 357 F.3d 756, 762 (8th Cir. 2004).

The district court incorrectly denied Coda's motion to dismiss the indictment because the preindictment delay violated his Fifth Amendment right to due process, as the delay caused actual prejudice, resulting in an unfair trial. First, "[no] person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. To ensure that an accused receives a fair trial, a court must employ "delicate judgment based on the circumstances of each case." *United States v. Marion*, 404 U.S. 307, 325 (1971). In a due process inquiry, those circumstances have been interpreted to include "the reasons for the delay as well as the prejudice to the accused." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). This Court has differentiated the reasons for delay as "investigative delay" and "delay undertaken by the Government solely 'to gain tactical advantage.'" *Id.* at 795 (citing *Marion*, 404 U.S. at 324). If the investigative delay is merely

undertaken by a prosecutor to gather evidence to “promptly . . . establish guilt beyond a reasonable doubt,” then that is not a violation of the Due Process Clause, as long as the accused is only “somewhat prejudiced by the lapse of time.” *Lovasco*, 431 U.S. at 795–96. The Court of Appeals for the Fourth Circuit and the Court of Appeals for the Ninth Circuit have interpreted the wording of *United States v. Lovasco* and *United States v. Marion*, to require a balancing test where the accused must prove actual prejudice, after which the court weighs that prejudice against the prosecution’s reasons for delay, while the other federal courts of appeals have held that the accused must prove actual prejudice and then prove prosecutorial bad faith. *See Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996).

Next, the district court incorrectly denied Coda’s motion to suppress his post-arrest but pre-*Miranda* silence, because in admitting his silence the court violated the prohibition against self-incrimination under the Fifth Amendment. First, the Fifth Amendment guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Salinas v. Texas*, 570 U.S. 178, 181 (2013). After a suspect has been arrested, but before “custodial interrogation,” the suspect “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). When a suspect remains silent after this *Miranda* warning, that silence is not admissible as substantive evidence of guilt, *Doyle v. Ohio*, 426 U.S. 610, 616–20 (1976), while pre-arrest silence is admissible for that purpose. *Salinas*, 570 U.S. at 186–91. Lastly, various federal courts of appeals have held that a suspect’s post-arrest, pre-*Miranda* silence is not admissible as substantive evidence of the suspect’s guilt. *United States v. Hernandez*, 948 F.2d 316, 322–24 (7th Cir. 1991); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997); *United States v. Bushyhead*, 270 F.3d 905, 912 (9th Cir. 2001).

**I. THE DISTRICT COURT ERRED IN DENYING CODA’S MOTION TO DISMISS THE INDICTMENT FOR PREINDICTMENT DELAY BECAUSE IT EMPLOYED THE WRONG LEGAL STANDARD IN VIOLATION OF CODA’S FIFTH AMENDMENT RIGHTS.**

Preindictment delay that causes actual prejudice, despite a lack of prosecutorial bad faith, is still a violation of Coda’s Fifth Amendment rights to due process, because under the balancing test the prejudice to Coda far outweighs the “low-priority” reason for the prosecution’s delay. First, in accordance with *Marion* and *Lovasco*, the beginning step of the balancing test requires the accused to prove that the prosecutor’s delay caused him actual and non-speculative prejudice, such as being prejudiced by losing witnesses. *See United States v. Barken*, 412 F.3d 1131, 1135 (9th Cir. 2005). Next, once the accused meets the burden of proving actual prejudice, the court weighs the delay against the prosecutor’s reasons for it, and the accused must demonstrate that the delay offends fundamental concepts of justice to prevail in claiming a violation of his Fifth Amendment rights. *Id. But see United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (holding that an accused must prove actual prejudice and prosecutorial bad faith to successfully argue a violation of due process).

**A. This Court should employ the balancing test, and not require prosecutorial bad faith, because that is most fair and just to Coda.**

Under *Lovasco* and *Marion*, whether preindictment delay causes a violation of an accused’s Fifth Amendment right to due process, is determined on a case-by-case basis according to the circumstances of each case and prosecutorial bad faith is not required. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). For instance, in *Howell v. Barker*, the Court of Appeals for the Fourth Circuit held that the balancing test is the proper test to determine whether a preindictment delay violates the Fifth Amendment; and, the accused was entitled to a fair retrial under that balancing test. *See id.* There, the prosecution delayed 27-months in serving the accused with an arrest

warrant. *Id.* at 891. The accused claimed this was a violation of due process, as he was unable to locate an alibi witness due to the delay. *Id.* The court reasoned that, because the prosecution admitted that the preindictment delay was merely for convenience, and not for preindictment investigation, the prejudice to the accused was not fair and just. *Id.* at 895. *See also United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (holding that the balancing test is the correct standard to determine whether a preindictment delay is a violation of an accused’s due process rights). However, in *United States v. Crouch*, the Court of Appeals for the Fifth Circuit held that the balancing test was not the correct standard because neither *Marion* nor *Lovasco* mentioned weighing or balancing, and even if a balancing test was used it would involve weighing the incomparable. *Crouch*, 84 F.3d at 1510–14.

Here, this Court should employ the balancing test to ensure that Coda’s Fifth Amendment due process rights are not violated. For, the district court violated Coda’s Fifth Amendment rights to due process, when it failed to employ the balancing test, as the prejudice to Coda far outweighed the government’s “low priority” reason for the delay. Due to this delay, Coda received an unfair trial, as his corroborating witnesses and his Greyhound bus records were no longer available. If the mere 27-month delay in *Howell* when weighed against the governmental reasons for that delay was found to be an unfair violation of the accused’s Fifth Amendment rights, then the almost ten-year delay that Coda faced should be deemed an unfair violation of his Fifth Amendment rights. For, Coda, like the accused in *Howell*, lost access to his corroborating witnesses and bus records due to the lengthy delay. Further, like the accused in *Howell*, the government here claimed the delay was only for convenience, as Coda was also facing state charges, the government was focusing on other prosecutions, and high turnover caused Coda’s case to get passed from one Assistant U.S. Attorney to another. Although the statute of limitations for prosecuting Coda had

not yet run, the government was not stalling for preindictment investigation, but rather for convenience, as Coda's case was merely "low-priority." Therefore, it is fundamentally unjust that Coda lost all opportunity for an alibi while his case was merely not worthy of a U.S. Attorney's attention until the statute of limitations was about to expire, as he completely lost his opportunity to prove his alibi.

Next, although the government will argue that *Marion* and *Lovasco* do not set forth a bright line balancing test, the language used by this Court in *Marion* gives the effect that a court must look at all the circumstances to ensure an accused receives a fair trial. This reasonably includes weighing the prejudice to the accused against the reasons for the governmental delay. However, in *Lovasco*, this Court seems to enumerate that investigative delay is fine but delay "to gain a tactical advantage" is not. Yet, this language does not aid an accused like Coda, who faced neither, therefore the balancing test is the proper test for this Court to employ. The balancing test is correct because it will allow for an accused's prejudice to properly be weighed against the government's reasons for the delay. And in a situation like Coda's, it will allow for the fair administration of justice, not a mere comparison of the incomparable like in *Crouch*, as the loss of Coda's only corroborating witnesses and the bus records will receive the proper hefty weight they deserve, compared to the mere convenience the delay provided the government. Therefore, this Court should find that the district court erred in holding that evidence of bad faith is required, as the correct and more just test is the balancing test.

**B. This Court should not require prosecutorial bad faith, because that places an unfair burden on Coda to prove that the government intentionally delayed.**

Requiring prosecutorial bad faith "violate[s] fundamental conceptions of justice." *Howell*, 904 F.2d at 895. For instance, in *Howell v. Barker*, the Court of Appeals for the Fourth Circuit held that an accused did not have to prove prosecutorial bad faith. *Id.* The court reasoned that

requiring bad faith would be unfair and unjust because “no matter how egregious the prejudice” nor however long the delay, if an accused failed to prove prosecutorial bad faith, his Fifth Amendment due process rights would not have been violated. *Id.* In addition, the court reasoned that if the prosecutorial bad faith were required, notions of fair play and fundamental justice would be violated, as proving prosecutorial bad faith would require the accused to attempt a very difficult feat. *Id.* However, in *Crouch*, the Court of Appeals for the Fifth Circuit found that prosecutorial bad faith is required. *Crouch*, 84 F.3d at 1514. There, the court reasoned that requiring prosecutorial bad faith rather than the balancing test would ensure the judiciary does not violate separation of powers. *Id.* at 1513. For, the court determined a decision to label a case as low-priority belongs to the Executive and Legislative Branches, as officials in those branches decide the allotment of manpower and level of priority afforded to each case, not the judiciary. *Id.*

Here, the bad faith requirement places an unfair burden on Coda because he is not able to prove prosecutorial bad faith, and absent that bad faith, he has no defensive recourse for the egregious prejudice he faced. First, like the accused in *Howell*, Coda should not have to prove prosecutorial bad faith because the prejudice to Coda was appalling, as he lost all access to proving his alibi, innately causing an unfair trial. Further, the government has already stated that they delayed for mere convenience, as they labelled his case “low priority;” therefore, bad faith seemed to be lacking. If this Court finds that prosecutorial bad faith is required, that puts Coda in an impossible position, as he has very little access to the U.S. Attorney’s decision-making process and the government can merely advance another reason for their delay, while Coda is left without a fair and just trial. Surely, the Legislature did not intend for the ten-year statute of limitations to cause such an extreme harm to Coda. Next, however, the government may argue that requiring the balancing test over prosecutorial bad faith implicates the separation of powers doctrine. Yet, unlike



the court in *Crouch* held, if a court employs the balancing test, it would not be making decisions for other branches, like what priority status each case should receive, but rather it would be weighing the decision the branch of government already made against the prejudice to the accused. The separation of powers and the accused's rights would be preserved. Therefore, this Court should employ the balancing test, in lieu of requiring prosecutorial bad faith, to ensure that Coda's Fifth Amendment rights to due process have not been violated.

**II. THE DISTRICT COURT ERRED IN DENYING CODA'S MOTION TO SUPPRESS HIS POST-ARREST BUT PRE-MIRANDA SILENCE BECAUSE ADMISSION OF HIS SILENCE IS SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT.**

The district court incorrectly denied Coda's Motion to Suppress, because admission of his post-arrest, pre-*Miranda* and pre-interrogation silence is self-incrimination, in violation of his Fifth Amendment rights, as remaining silent should not be a penalty that can later be used as substantive evidence of guilt. First, implied in the right to remain silent is an "assurance that silence will carry no penalty." *Doyle*, 426 U.S. at 618. At trial, "[t]he prosecution may not . . . use . . . the fact that [an accused] stood mute . . . in the face of accusation" during a custodial interrogation as substantive evidence of guilt. *Miranda*, 384 U.S. at 468. Further, an accused's silence, at the time of his arrest and post-*Miranda*, is only admissible as impeachment evidence not as substantial evidence of guilt. *Doyle*, 426 U.S. at 619. If an accused chooses not to take the stand to testify, the Fifth Amendment forbids that the accused's silence—not testifying—be used as substantive "evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965). If an accused chooses to take the stand, his post-arrest, pre-*Miranda* silence is admissible only upon cross-examination. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Yet, there is no case that stands for the proposition that an accused's silence can be used against him—without agreeing to take the stand—until he has received *Miranda* warnings. *See Moore*, 104 F.3d at 386.

**A. Coda’s post-arrest, pre-*Miranda* silence should be deemed inadmissible, as Coda should not be penalized for merely remaining silent.**

An accused’s post-arrest, pre-*Miranda* silence should not be deemed admissible because it would act “as an impermissible penalty on the exercise of the [accused’s] right to remain silent.” *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978). For instance, in *United States v. Hernandez*, the Court of Appeals for the Seventh Circuit held that an accused’s silence was inadmissible because admission of that silence violated the Fifth Amendment right against self-incrimination. *United States v. Hernandez*, 948 F.2d 316, 322-23 (7th Cir. 1991). There, an accused exited his car and remained silent, while moments later the arresting officer read the accused his *Miranda* rights. *Id.* at 322. The court reasoned there are many reasons why an accused may remain silent post-arrest and pre-*Miranda*, like being too shocked to speak, which should not penalize the accused for his silence. *See id.* at 325. Further, in *United States v. Moore*, the Court of Appeals for the District of Columbia Circuit held that an accused who “stands silent must be treated as having asserted it.” *Moore*, 104 F.3d at 385 (D.C. Cir. 1997). There, the prosecutor was allowed to comment on the accused’s post-arrest, pre-*Miranda* silence during the trial, even though the accused never took the stand. *Id.* at 384. The court reasoned that the prosecutor’s comment was a violation of the Fifth Amendment because under *Doyle*, pre-*Miranda* silence is only admissible for impeaching an accused’s testimony at trial. *See id.* at 385. Further, the court found that allowing prosecutorial comment could cause the accused to feel the need to take the stand in defense, burdening his Fifth Amendment right to remain silent at trial. *Id.* at 385. *But see Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (emphasis added) (finding an accused must assert the right to remain silent while *testifying at trial* otherwise the prosecutor can continue any questioning); *Berghuis v. Thompkins*, 560 U.S. 370, 380–82 (2010) (emphasis added) (holding an accused must

unambiguously assert the right to remain silent while being *interrogated post-Miranda* otherwise law enforcement can continue questioning the accused).

Here, admission of Coda's post-arrest, pre-*Miranda* silence as substantial evidence of guilt violated his Fifth Amendment rights because it impermissibly penalized Coda by allowing self-incrimination. First, like the accused in *Hernandez*, Coda may have had a good reason for remaining silent, like being in shock. Or he could have remained silent because he knew about *Miranda* rights, from his state charges, and did not want to risk incriminating himself by speaking. Thus, this Court should hold, like the court in *Moore*, that Coda asserted his right to silence by remaining silent. Like the accused in *Moore*, Coda did not take the stand in his defense; therefore, under *Doyle*, his silence is not admissible as impeachment evidence. Additionally, if Coda's silence is treated as substantial evidence of guilt, his Fifth Amendment right to remain silent at trial could have been implicated, as he may have been more likely to take the stand in his defense.

Next, although the government may argue that Coda's silence is admissible because he failed to affirmatively assert it, unlike in *Minnesota v. Murphy* and *Berghuis v. Thompkins*, Coda's silence was post-arrest and pre-*Miranda*, not while testifying at trial or being interrogated post-*Miranda*. Further, even though it would have been easy for Coda to affirmatively assert his right to remain silent, his silence alone should suffice, as he was merely in custody and not being formally questioned. Although an officer's common-sense observation about an accused's silence may be valuable, if an accused remains silent upon arrest, he or she should be deemed to have asserted that silence. If this Court holds otherwise, this Court would be forcing an accused to verbally speak up upon arrest and run the risk of saying something incriminating. Coda's simple silence, considering his likely knowledge from his prior arrest, should be deemed inadmissible, as

holding otherwise causes a violation to Coda's Fifth Amendment right to remain silent for mere silence.

**B. Coda's silence should be deemed inadmissible, as custody is the better trigger for an accused's Fifth Amendment privilege against self-incrimination.**

Custody rather than interrogation is the proper trigger for an accused's right to remain silent. *Moore*, 104 F.3d at 385. For instance, in *Moore*, the Court of Appeals for the District of Columbia Circuit held that the right to remain silent attaches not at the start of questioning, but rather upon custody. *Id.* There, an accused remained silent post-arrest, pre-*Miranda*, and pre-interrogation, while the prosecutor used the accused's silence at trial as substantive evidence of guilt. *Id.* The court reasoned that the prosecutor's use of the accused's silence violated the accused's Fifth Amendment rights because under *Miranda*, it is the accused's statements not his silence that can be used against him, otherwise arresting officers could stall interrogation to manufacture incriminating silence that can later be used as substantive evidence of guilt. *Id.* at 385–87. Next, in *United States v. Velarde-Gomez*, the Court of Appeals for the Ninth Circuit held that an accused's Fifth Amendment rights were violated when evidence of the accused's post-arrest, pre-*Miranda* silence was introduced at trial. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001). There, an agent testified that the accused failed to respond to post-arrest, pre-*Miranda* questions about the drugs that customs officials found in the accused's car. *Id.* at 1026–30. The court reasoned that an accused had a right to remain silent upon arrest, regardless of *Miranda* warnings, because those warnings were “a prophylactic means of safeguarding Fifth Amendment rights” but were not the beginning of those rights. *Id.* at 1029 (citing *Doyle*, 426 U.S. at 617). Further, the court determined that the accused, had the right to remain silent because otherwise the accused faced a “Catch 22: if he remained silent, the government could use” the accused's silence as substantive evidence of guilt, while if he denied that the drugs existed, the

government could impeach him at trial with physical evidence to discredit him. *Velarde-Gomez*, 269 F.3d at 1032. *But see United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (finding the government could introduce evidence of an accused’s post-arrest, pre-*Miranda* silence because the accused had not been given a *Miranda* warning); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that an accused’s post-arrest, pre-*Miranda* silence was admissible merely if the accused had not received a *Miranda* warning).

Here, Coda remained silent after being placed in custody; therefore, this Court should hold that Coda’s post-arrest, pre-*Miranda* silence is inadmissible as substantial evidence of guilt, in preservation of his Fifth Amendment rights. First, like the accused in *Moore*, Coda’s Fifth Amendment rights were violated, because it was his pre-*Miranda* silence—not a statement—that was used against him in the district court. Further, this Court should find that Coda’s right to remain silent attaches at custody to prevent an officer from manufacturing incriminating silence by stalling and reading an accused his rights after much time has passed. Additionally, like the accused in *United States v. Velarde-Gomez*, Coda faces a Catch 22. If this Court deems his silence admissible, then the government can use it as substantive evidence of his guilt. Alternatively, if Coda had spoken and denied the allegation against him, then the government could impeach him at trial with other evidence and discredit him. Either solution results in Coda’s Fifth Amendment rights being violated, as he would have no recourse but to incriminate himself. Although the government may argue that Coda’s silence is admissible because the arresting officer had yet to read Coda his *Miranda* rights, contrary to the holdings in *United States v. Rivera* and *United States v. Love*, this Court should hold that the right to remain silent begins upon custody. For, an “interrogation trigger” to the Fifth Amendment would give officials an incentive to prolong reading an accused his rights in the hopes that he incriminates himself. Custody is the proper

measure for the start of an accused's right to remain silent to avoid the Catch 22 of an accused incriminating himself. Therefore, this Court should hold that Coda's post-arrest, pre-*Miranda* silence is inadmissible as substantial evidence of guilt because at custody, the proper trigger for an accused's right to remain silent, Coda asserted his silence by remaining silent.

### CONCLUSION

The United States District Court for the District of East Virginia's denial of Coda's Motion to Dismiss the indictment for preindictment delay and denial Coda's Motion to Suppress his post-arrest but pre-*Miranda* silence should be reversed.

Respectfully submitted,

/s/ Team 10  
Counsel for Petitioner

**CERTIFICATE OF SERVICE**

We certify that a copy of Petitioner’s brief was served upon Respondent, the United States of America, through its counsel of record by certified U.S. mail return receipt requested, on this the 13th day of September 2021.

/s/ Team 10  
Counsel for Petitioner