

No. 21-125  
In The  
**Supreme Court of the United States**  
October Term, 2021

Austin Coda, Petitioner  
v.  
United States of America, Respondent.

*On Writ of Certiorari to the  
United States Court of Appeals for the Thirteenth Circuit*

**Brief for Respondent**

**Team 23  
Counsel for Respondent**

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED.....	v
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	5
I. THE INDICTMENT OF MR. CODA WITHIN THE PRESCRIBED STATUTE OF LIMITATIONS DID NOT VIOLATE HIS FIFTH AMENDMENT RIGHTS.....	5
A. <u>Despite arguable prejudice to the defendant, the government’s actions did not violate his Due Process rights because there was no evidence of bad faith.....</u>	5
1. <u>Under the Supreme Court’s two-element test for the acceptability of a pre-indictment delay, Mr. Coda’s indictment was constitutional.....</u>	5
2. <u>This court should decline to adopt the minority circuit courts’ balancing test.....</u>	8
II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT MR. CODA’S POST-ARREST BUT PRE-MIRANDA SILENCE IS ADMISSIBLE AS SUBSTANTIVE EVIDENCE OF MR. CODA’S GUILT.....	10
A. <u>In submitting Mr. Coda’s silence as substantive evidence of guilt, FBI agents did not violate any Fifth Amendment protections.....</u>	11
1. <u>Mr. Coda’s post-arrest but pre-Miranda silence falls in the window of admissibility.....</u>	11
2. <u>Because Mr. Coda did not unambiguously invoke his right against self-incrimination, there was no Fifth Amendment violation.....</u>	12
B. <u>Because the arresting agents followed the appropriate procedure in giving the <i>Miranda</i> warnings, it was reasonable for the agents to conclude Mr. Coda’s silence indicated his guilt.....</u>	14
CONCLUSION.....	16

## TABLE OF AUTHORITIES

### Cases: Supreme Court of the United States

<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976) .....	11
<i>Fletcher v. Weir</i> , 455 U.S. 603 (1982) .....	15
<i>Minnesota v. Murphy</i> , 465 U.S. 420 (1984) .....	13
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) .....	10,12
<i>Salinas v. Texas</i> , 570 U.S. 178 (2013) .....	passim
<i>United States v. Gouveia</i> , 467 U.S. 180 (1984) .....	7,8
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977) .....	passim
<i>United States v. Marion</i> , 404 U.S. 307 (1971) .....	5,8

### Cases: Circuit Courts of Appeal

<i>Howell v. Barker</i> , 904 F.2d 889 (4th Cir. 1990) .....	8
<i>United States v. Automated Medical</i> , 770 F.2d 399 (4th Cir. 1985) .....	8
<i>United States v. Crouch</i> , 84 F.3d 1497 (5th Cir. 1996) .....	9
<i>United States v. Love</i> , 767 F.2d 1052 (4th Cir. 1985) .....	11, 15
<i>United States v. Sebetich</i> , 776 F.2d 412 (3d Cir. 1985) .....	7

### Constitutional Amendments

U.S. Const. amend V .....	passim
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### Statutes

18 U.S.C. § 844(i) provides, in relevant part:

“Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years.”

18 U.S.C § 3295 provides, in relevant part:

“No person shall be prosecuted, tried, or punished for any non-capital offense under section 81 or subsection (f), (h), or (i) of section 844 unless the indictment is found or the information is instituted not later than 10 years after the date on which the offense was committed.”

## QUESTIONS PRESENTED

I. Does indictment of an accused violate the 5th Amendment when it is within the statute of limitations and there is no evidence of bad faith on the part of the government?

II. Does admission of an accused's post-arrest but pre-*Miranda* silence violate the Fifth Amendment when utilized as substantive evidence of guilt?

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## STATEMENT OF THE CASE

Petitioner Austin Coda owned and operated a hardware store that was successful until the 2008 recession. R. at 1. By 2010, after a large chain hardware store opened nearby, Mr. Coda's business no longer generated a profit. R. at 1. At the end of that year, an explosion destroyed the hardware store, allowing Mr. Code to collect an insurance policy covering the value of the hardware store in the case of a total loss. R. at 2. Local investigators initially attributed the explosion to cold weather causing old gas lines to leak. R. at 2. Shortly after the explosion, the Federal Bureau of Investigation (FBI) received a tip indicating the blaze was intentionally set by Mr. Coda. R. at 2. The informant, a close friend of Mr. Coda, reported the declining finances of the hardware store and indicated that Mr. Coda acted "anxious and paranoid" in the week leading up to the explosion. R. at 2. The informant also alerted authorities of the value of the insurance payout with the destruction of the business. R. at 2.

However, due to competing public policy concerns, the FBI marked Mr. Coda's case as "low priority" and the case was passed to several Assistant U.S. Attorneys until April of 2019. R. at 2. Upon realizing that the statute of limitations was about to run, authorities immediately apprehended Mr. Coda and brought him into custody. R. at 2. Authorities charged Mr. Coda under 18 U.S.C. § 844(i) with maliciously using an explosive to destroy property that affects interstate commerce. R. at 3. This arrest took place within the statute of limitations provided by 18 U.S.C. § 3295. R. at 3. It was not until an evidentiary hearing, more than five months after the arrest, did Mr. Coda proffer an alibi for the night of the explosion. R. at 3. Mr. Coda alleged that on the evening of the explosion he boarded a Greyhound bus to New York to visit family. R. at 3. Mr. Coda stated that in the years between the incident and his arrest, all but one family member present

during the 2010 visit died. R. at 3. Furthermore, Mr. Coda contended that the bus tickets were available only online and deleted from storage after three years. R. at 3.

Immediately following his arrest, FBI Special Agent Park informed Mr. Coda of the charges against him. R. at 7. Rather than informing the agent of his alibi, Mr. Coda elected to remain silent. R. at 7. Once transported to the detention center for interrogation, the agents read Mr. Coda his *Miranda* rights. R. at 7. The government intended to introduce this pre-*Miranda* silence as substantive evidence of guilt. R. at 7.

The United States District Court for the District of East Virginia denied both of Mr. Coda's pretrial motions to the court. R. at 11. Mr. Coda filed a Motion to Dismiss the indictment for preindictment delay and a Motion to Suppress his post-arrest but pre-*Miranda* silence. R. at 11. The District Court denied both motions. R. at 1, 7. On appeal the United States Court of Appeals for the Thirteenth Circuit affirmed denials from the District Court, holding no Due Process Clause or of Fifth Amendment protections were violated by the Respondent. R. at 12.

#### SUMMARY OF ARGUMENT

This Court should affirm the Thirteenth Circuit Court and District of East Virginia Court's rulings on the matters of both pre-indictment delay and use of Mr. Coda's pre-*Miranda* silence as substantive evidence of his guilt because neither constitutes a violation of Mr. Coda's Fifth Amendment rights. The Fifth Amendment protects the rights of the accused against deprivation of life and liberty without Due Process of the law, including against indictment on overripe charges and against self-incrimination. These essential rights were not dispensed in Mr. Coda's case, and his conviction should stand.

Although Mr. Coda suffered some detriment to his defense as a natural result of the passage of time between the crime and his indictment, such evidence of prejudice is a necessary but insufficient element to making a claim of violation of the Due Process clause. This Court requires defendants to supplement evidence of prejudice with evidence that pre-indictment delay occurred as the result of intentional and malicious prosecutorial tactics. Mr. Coda has failed to do so, and the government has offered several explanations for its inability to prosecute his case immediately. Confusion regarding a pending State action, turnover in the State Attorney's office, and political pressure each played a role in the petitioner's case not receiving immediate attention, however, the government was able to bring his indictment and convince a jury of his guilt within the statutory period.

A small minority of circuit courts have interpreted this Court's decisions to prescribe a balancing test of sorts. This Court should decline to adopt this test as requested by petitioner, as it is nonsensical and contrary to Congressional intent. The Fourth Circuit has used this makeshift balancing act to overturn convictions made after arguably negligent delays. However this is done against Congress' discretion in creating the applicable statute of limitations and the Supreme Court's role in interpreting laws and protecting constitutional rights. Judges who apply this "balance" test apply their judgement in lieu of that of Congress and the U.S. Attorney's Office.

Use of Mr. Coda's post-arrest, pre-Miranda silence as evidence of guilt was similarly within constitutional bounds. According to this Court's precedent, pre-custodial silence is unequivocally admissible when defendants make no effort to affirmatively invoke their right against self-incrimination. Additionally, law enforcement is not required to read a suspect the *Miranda* warnings until the commencement of a formal investigation.



Until the *Miranda* warnings are read, a suspect's silence is not protected under the Fifth Amendment without an affirmative invocation of that right. This Court consistently requires that those who wish to invoke the protections of the Fifth Amendment must claim those privileges. Mere silence alone does not amount to an invocation. Officers are permitted to draw reasonable inferences based on a suspect's silence before reading the *Miranda* warnings. In the absence of an affirmative invocation of the privilege against self-incrimination, officer testimony regarding such reasonable inferences should be presented to a jury. Here, the arresting officers followed proper procedure and read Mr. Coda his *Miranda* rights before a formal interrogation. Because the arresting agents followed the proper procedure, Mr. Coda's silence at arrest should be admitted as substantive evidence of his guilt. This evidence is dispositive of proving Mr. Coda's guilt, but it is a jury's responsibility to receive the relevant facts of the case and draw conclusions. In this case, a jury is entitled to know of Mr. Coda's silence and make a determination as to what a reasonable person would have done upon arrest.

The prosecution and arresting officers acted in good faith and with proper procedure. Because Mr. Coda's Fifth Amendment rights remained intact throughout his indictment and arrest, the Respondent respectfully requests this Court to affirm the ruling of the lower courts and uphold his conviction.

## ARGUMENT

### I. THE INDICTMENT OF MR. CODA WITHIN THE PRESCRIBED STATUTE OF LIMITATIONS DID NOT VIOLATE HIS FIFTH AMENDMENT RIGHTS.

The Fifth Amendment to the United States Constitution provides protections for citizens of the United States accused of crimes, including a guarantee that they shall not be deprived of their rights without due process of law. U.S. Const. amend. V. Mr. Coda contends that his Fifth Amendment Due Process guarantee was violated by the prosecution's failure to indict him in what he considers a timely manner. That the government brought its case against Mr. Coda within the ten-year period allotted by Congress for prosecution of non-capital arson lends to a presumption that it was timely enough to avoid the extreme sanction of pretrial dismissal, as statutes of limitations are the first line of defense against indictment on overly stale criminal charges. *United States v. Marion*, 404 U.S. 307, 322 (1971). However, the Supreme Court has held that Due Process violations may occur even when indictments are brought within statutorily defined periods.

The analysis prescribed by this Court involves determining the cause of the delay and the resulting harm to the defendant. The Supreme Court has found that dismissal under the Fifth Amendment is warranted when the delay (1) was an intentional device to gain tactical advantage over the accused *and* (2) caused substantial prejudice to appellees' rights to a fair trial. *United States v. Marion*, 404 U.S. 307 (1971), *United States v. Lovasco*, 431 U.S. 783 (1977).

A. Despite arguable prejudice to the defendant, the government's actions did not violate his Due Process rights because there was no evidence of bad faith.

1. Under the Supreme Court's two-element test for the acceptability of a pre-indictment delay, Mr. Coda's indictment was constitutional.

The Supreme Court in *Marion* found appellee defendant was not precluded from receiving a fair trial after a years-long investigative delay prior to indictment. *Marion*, 404 U.S. 307 (1971). Because there was “no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them,” the Court allowed the indictment to stand. The Court acknowledged that the applicable statute of limitations allowed a “real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost,” but reasoned that this alone was not enough to dismiss *Id.*

Six years later, in *Lovasco*, the Supreme Court revisited the topic of delay within criminal statutory periods. *Lovasco*, 431 U.S. 783 (1977). Doubling down on its reasoning in *Marion*, the Court held that even a defendant whose defense was tainted because of passage of time has not been deprived of due process in the absence of prosecutorial bad faith. *Id.* The defendants in *Lovasco* contended that the prosecution’s delay harmed their defense, as during the period between the crime and indictment, two potential witnesses passed away. *Lovasco*, 431 U.S. 783, 787 (1977). Even with the loss of these witnesses’ testimony, the Court held that the prosecution’s nonaction did not violate “those fundamental conceptions of justice...” which lay at the heart of the Fifth Amendment protections because the delay was not manufactured in order to gain a “tactical advantage.” *Id.* at 791.

In *Gouveia*, the Supreme Court once again issued an opinion on this topic, and once again espoused its faith in statutes of limitations as effective guards against “stale claims.” *United States v. Gouveia*, 467 U.S. 180, 192 (1984). The *Gouveia* opinion held decisively that dismissal is warranted when “the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him *and* that it caused him actual prejudice in presenting his defense.” *Id.*

The Third Circuit Court heard a case with similar facts to our own. In *United States v. Sebetich*, due to confusion regarding whether the state or federal government would handle the prosecution of the codefendants, the case “fell between the chairs,” and a post-investigation, pre-indictment delay commenced. *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985). The delay continued until mere days before the statute of limitations expired, and each defendant claimed to have lost key witnesses over the near five-year delay, either due to death or loss of memory. *Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985). The Third Circuit held that a mere contention that memories may have failed over the years would not be enough to trigger the extreme sanction of dismissal of the indictments under the Due Process Clause. *Sebetich*, 776 F.2d 412, 430. The defendants were required to make a showing “that the government’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” *Id.*, *Gouveia*, 467 U.S. 180 (1984), *Lovasco*, 431 U.S. 789-90, *Marion*, 404 U.S. 324 (1971).

Here, as in *Sebetich*, petitioner offered absolutely no evidence to prove intent on the part of the government to delay Mr. Coda’s indictment. The prosecution, for one reason or another, lacked the resources to immediately indict Mr. Coda, and Mr. Coda’s “alibi” disintegrated in various stages over the years since the crime. Petitioner has failed to proffer an iota of evidence of bad-faith motives for the government’s deferral of indictment. The Government, in turn, has offered several reasons for the delay. Limited budgets, immense political pressure, and high office turnover create an inhospitable environment for efficiency. In the face of immense pressure and unrealistic expectations, the collective actions of the U.S. Attorney’s Office were imperfect. However, once the Petitioner’s case came to the attention of a prudent Assistant U.S. Attorney, the government acted swiftly to apprehend and indict the suspect within the statutorily

defined period. This case is an example of bureaucratic inefficiency, not of prosecutorial malignity. Such negligence is not enough to make a successful claim for violation of Mr. Coda's Due Process.

2. This court should decline to adopt the minority circuit courts' balancing test.

The lower courts have used the *Marion*, *Lovasco*, and *Gouveia* decisions to guide their analysis of these indictment-delay issues. Of the circuit courts which have presided over delayed indictment cases, all of them, save the Fourth and the Ninth circuits read these decisions are requiring an analysis of the actual prejudice to the defendant as well as improper purpose behind the delay, with each element necessary to declare unconstitutionality.

The dissident circuit courts utilize a difficult-to-administer "balancing test," considering the reasons for the delay against the real prejudice to the defendant. The Fourth Circuit Court found that the Supreme Court's requirement of proof of bad faith to supplant "fundamental concepts of injustice." *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *United States v. Automated Medical*, 770 F.2d 399 (4th Cir. 1985). The *Howell* court balanced the prejudice the defendant faced against the government's justifications for the indictment delay to find that prosecutorial "negligence" was enough for the defendant to succeed in his claim. *Howell*, 904 F.2d 889, 895.

While this balancing test, at first blush, may seem suitable for investigating possible due process infringement, it is not only improper, but impractical. Borrowing language from the 5th Circuit, this test requires courts to "compare the incomparable." *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996). This allows courts to determine what amount of delay is acceptable using their own judgement in place of a clear-cut standard. This apples-to-oranges determination

is not for the judiciary and implicates an issue of separation of powers. *See Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996). Congress has been tasked with, and has in fact, determined the acceptable time period for prosecutors to wait before accusing a citizen of malicious non-capital arson is effectively “stale.” That period is ten years unless there exists evidence of bad faith.

In prescribing its test, this Court has conceded that some prejudice may befall defendants when prosecutors do not immediately bring charges. Mr. Coda contends that his defense was irreparably harmed by the passage of time, as his relatives who allegedly would have been capable of confirming his alibi, were no longer able to speak on his behalf either due to death or illness. However, loss of evidence such as this is an expected risk that Congress surely considered when drafting the statute of limitations. Alleged hard evidence in the form of Mr. Coda’s Greyhound Bus records were purportedly destroyed a mere three years after the day of the crime, seven years prior to the expiration of the statute of limitations. Had the government brought this case even six years before the statute expired, Mr. Coda still would have been arguably prejudiced in creating his defense. The prosecution and defendants alike stand to lose, with the passage of time, access to vital witnesses, records, and other essential pieces to building their cases. Congress has weighed these risks and decided that the acceptable period during which the government may wait to bring a charge is ten years. It is not for this Court, in the absence of bad faith, to second-guess these considerations.

In the present case, because of the extended period between the incident and his indictment Mr. Coda was unable to offer evidence supporting his alibi on the night of the crime, which points to an obvious prejudice to his defense. However, the analysis is two-pronged, and Mr. Coda has failed to offer any proof rebutting the prosecution’s non-bad-faith reasons for delaying indictment. This Court should affirm the Thirteenth Circuit Court’s decision to refuse to

dismiss Mr. Coda's case, as the extreme sanction of dismissal is reserved for those instances where the prosecution acts in bad faith.

## II. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT MR. CODA'S POST-ARREST BUT PRE-MIRANDA SILENCE IS ADMISSIBLE AS SUBSTANTIVE EVIDENCE OF MR. CODA'S GUILT.

The Fifth Amendment of the United States Constitution promises that no person in a criminal case shall be compelled to testify against himself. U.S. Const. amend. V. Here, the arresting FBI agents did not compel Mr. Coda to testify against himself. This Court established in *Miranda* that express warnings to a person in custody are required by law enforcement to overcome the inherently compulsory nature of the interrogation room. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). The *Miranda* warnings inform suspects in custody of the protections available to them during an interrogation, including the right to remain silent in the face of police questioning. *Id.* at 468. Once the *Miranda* warnings are read to the suspect, law enforcement may not infer silence throughout an interrogation as substantive evidence of guilt. *Id.* at 479. Additionally, a suspect must unambiguously invoke the privilege against self-incrimination. *Salinas v. Texas*, 570 U.S. 178, 190 (2013). However, law enforcement officers are permitted to draw reasonable inferences regarding a suspect's silence before *Miranda* warning are given and are permitted to testify as to such inferences. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

In the instant case, Agent Park arrested Mr. Coda, transported him to a detention center, then read the *Miranda* rights before commencing an interrogation. Furthermore, Mr. Coda made no effort to affirmatively invoke the Fifth Amendment protections offered to him. Because Mr. Coda remained silent upon arrest, but before receiving the *Miranda* warnings, such silence is admissible as substantive evidence as to Mr. Coda's guilt.

In accordance with this Court's prior decisions, the Respondent urges the Court to find Mr. Coda's silence upon arrest as admissible evidence of his substantive guilt. In the instant case, no constitutional violations occurred during Mr. Coda's arrest and as such his silence should remain admissible evidence.

A. In submitting Mr. Coda's silence as substantive evidence of guilt, FBI agents did not violate any Fifth Amendment protections.

1. Mr. Coda's post-arrest but pre-Miranda silence falls in the window of admissibility.

Mr. Coda's silence after his arrest but before receiving the *Miranda* rights is admissible as substantive evidence of his guilt. This Court has repeatedly affirmed that pre-custodial silence is admissible as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. 178, 186–91 (2013). However, when a suspect is silent after receiving *Miranda* warnings, that silence is deemed inadmissible as substantive evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 616–620 (1976). In *Salinas*, the defendant began answering police questions freely until officers asked a potentially incriminating question. 570 U.S. 178, 186. Once the defendant refused to answer, law enforcement placed the defendant under arrest and read the *Miranda* warnings. *Id.* This Court affirmed the testimony of the arresting officer was permitted in trial as evidence of guilt because the silence at issue occurred before the *Miranda* warnings were required. *Id.* at 182.

*Miranda* warnings are not required to be given at the time of the arrest, only before officers commence an interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). *Miranda* warnings act to ensure the suspect is aware of the option to speak or to remain silent during an interrogation by law enforcement. *Id.* at 469. While the Fifth Amendment provides protections against self-incrimination, the Constitution does not offer an unqualified right to remain silent. *Salinas*, 570 U.S. 178, 189.



In the instant case, Agent Park arrested Mr. Coda, informed him of the charges, and transported him to the detention center for interrogation. R. at 7. Once Agent Park and Mr. Coda arrived at the detention center, officers read Mr. Coda the *Miranda* rights to begin the interrogation. R. at 7. However, the silence at issue in the case is Mr. Coda's lack of response to the charges against him at the time of his arrest. Because this silence took place before the interrogation, the *Miranda* warnings were not yet required. Though Mr. Coda was in FBI custody once placed under arrest, this Court is primarily concerned with *Miranda* warnings combating the compulsory atmosphere of an interrogation. Because Mr. Coda was not yet at the detention center for interrogation, the FBI agents did not err in waiting to read the *Miranda* warnings after Mr. Coda's arrest.

2. Because Mr. Coda did not unambiguously invoke his right against self-incrimination, there was no Fifth Amendment violation.

If Mr. Coda wished for his post-arrest but pre-*Miranda* silence to be protected under the Fifth Amendment, he was free to invoke those protections but chose not to. Suspects must unambiguously and affirmatively assert the Fifth Amendment protections to protect their silence in response to police questioning. *Salinas*, 570 U.S. 178, 179. Typically, merely remaining silent to police questioning does not invoke this right before *Miranda* warnings are required to be read. *Id.* at 181. This Court consistently requires defendants to affirmatively assert the Fifth Amendment privileges against self-incrimination. *Id.* at 179.

This Court reaffirmed the requirement that a suspect affirmatively invoke the protections offered by the Fifth Amendment in *Minnesota v. Murphy*, holding the defendant's failure to invoke his privileges was fatal to his Fifth Amendment violation claim. 465 U.S. 420, 425 (1984). Should a defendant elect to make disclosures (or remain silent) in the face of government

inquiries, instead of asserting the privilege against self-incrimination, then the government cannot be said to have compelled the defendant to testify against him or herself. *Id.* at 427. This invocation requirement is imperative in ensuring the governmental interest in obtaining testimony is not overburdened. *Salinas*, 570 U.S. 178, 186.

There are few exceptions to the requirement that a suspect must invoke their privilege against self-incrimination. Specifically, in circumstances of government coercion, a suspect is not required to unambiguously invoke the privilege as the failure to do so is considered involuntary. *Id.* at 184. Furthermore, this Court recognizes no such instance where “merely remaining silent” rather than providing an incriminating answer as an exception to the invocation requirement. *Id.* at 186. This Court narrows the primary consideration to if, under the circumstances of the case, the suspect felt he had no ability to invoke the Fifth Amendment protections. *Id.*

Mr. Coda’s failure to invoke his privilege against self-incrimination allows his silence to be admissible as substantive evidence of his guilt. Having established the *Miranda* warnings were not required at the time of Mr. Coda’s arrest, if Mr. Coda wished for his pre-interrogation silence to be protected, he was at liberty to invoke his Fifth Amendment privileges. At any point after the arrest, Mr. Coda was able to express to FBI agents an invocation of the self-incrimination protections offered by the Fifth Amendment. Mr. Coda, by merely remaining silent in transit to the detention center, failed to invoke his privilege affirmatively and unambiguously.

In the instant case, the exceptions to the invocation requirement do not apply. Mr. Coda offered no evidence of coercion or intimidation by FBI agents. The record indicated that after the arrest, Agent Park simply transported Mr. Coda to the detention center for subsequent

interrogation. At no point after the arrest or in transit to the detention center did Mr. Coda indicate coercive pressure preventing him from invoking the privilege from self-incrimination.

Even though officers complied with the proper procedure in providing the *Miranda* warnings, Mr. Coda argues the “interrogation trigger” will incentivize officers delaying interrogation. However, this fear is easily dispensed with as suspects are always able to invoke the Fifth Amendment protections against self-incrimination before *Miranda* warnings are required. Furthermore, the record indicated that Mr. Coda is familiar with the judicial process, as he was prosecuted for different state charges before this case. With this background, it is likely Mr. Coda was already familiar with the protections offered by the *Miranda* warnings and was aware of the invocation requirement.

The arresting FBI agents followed the appropriate procedure in reading Mr. Coda the *Miranda* warnings after his arrest and before an official interrogation. Because law enforcement met these requirements, Mr. Coda’s post-arrest but pre-*Miranda* silence is admissible substantive evidence of guilt.

B. Because the arresting agents followed the appropriate procedure in giving the *Miranda* warnings, it was reasonable for the agents to conclude Mr. Coda’s silence indicated his guilt.

Since Mr. Coda failed to unambiguously assert his Fifth Amendment right against self-incrimination, the arresting FBI agents used his silence to make a reasonable inference of guilt. A suspect’s silence during the period immediately after arrest but before receiving *Miranda* warnings is permissible evidence. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). The justice system is invested in ensuring that a jury receives a complete description of the circumstances of the case, including law enforcement’s perceptions of the events. The admission of post-arrest but pre-*Miranda* silence into evidence, while not necessarily determinative to the

outcome of a case, allows a jury to determine the extent this silence may impact the circumstances of the case. *Fletcher v. Weir*, 455 U.S 603, 607 (1982). In the absence of *Miranda*'s affirmative assurances against self-incrimination, there is no constitutional violation in admitting a suspect's silence as substantive evidence of guilt. *Id.*

In the instant case, Mr. Coda's silence occurred after his arrest and while in transit to the detention center for interrogation. R. at 7. Mr. Coda's silence was only in response to the charges against him and outside of a formal interrogation. Because there was no constitutional violation, FBI agents may draw reasonable inferences as to why Mr. Coda elected to remain silent. Based on the circumstances of the case, the arresting agents made a common-sense inference that a reasonable person would have proffered an alibi at arrest. However, it was not until an evidentiary hearing that Mr. Coda raised an alibi regarding the charges against him. R. at 1. It is imperative that the post-arrest silence into evidence and allow a jury to make the final determination of reasonableness regarding Mr. Coda's actions.

Because no constitutional violations occurred during Mr. Coda's arrest, his post-arrest but pre-*Miranda* is admissible as substantive evidence of his guilt. The final determination of what Mr. Coda's silence means and what a reasonable person would have done during the arrest should be left to a jury.

CONCLUSION

For the above reasons, consistent with the rights guaranteed within the United States Constitution and the precedent set by this Court, we respectfully request that this Court affirm the decisions below.

CERTIFICATE OF SERVICE

I certify that a true copy of this brief was furnished to counsel for Petitioner by hand delivery this 13th day of September 2021.

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Counsel for Respondent