

No. 21-125

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*In the Supreme Court of the United State*

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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 PETITIONER**  
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September 13, 2021

Team 36  
*Counsel for the Petitioner*  
Austin Coda

## QUESTIONS PRESENTED

- I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where 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* and pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?

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## **BASIS FOR JURISDICTION**

Judgement by the Thirteenth Circuit was entered on August 28, 2020. R. at 11. The petition for certiorari was granted on July 9, 2021. *Id.* at 16. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the judgment rendered by the United States Court of Appeals for the Thirteenth Circuit.

## **CONSTITUTIONAL PROVISIONS**

The Fifth Amendment to the U.S. Constitution provides that, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . 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.” U.S. Const. amend. V.

## **STATEMENT OF THE CASE**

### **I. Background**

In January 2002, Petitioner Austin Coda (Mr. Coda) opened a hardware store in Plainview, East Virginia near the border of North Carolina. R. at 1. A large customer base yielded substantial profits for many years; however, Mr. Coda’s business fell victim to economic hardship due to recession and competing businesses in the area. *Id.* As a result, the hardware store barely generated revenue and it became increasingly difficult for Mr. Coda to maintain the building. *Id.*

On the night of December 22, 2010, an explosion occurred at Mr. Coda’s hardware store resulting in its destruction. R. at 2. Following this unexpected event, an investigation was conducted by the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) along with local fire investigators, which presented evidence that an, “Old, faulty gas line.” combined with the cold weather caused a gas leak resulting in the explosion. *Id.* According to Mr. Coda, every December he travels to New York via Greyhound bus to visit family and celebrate his birthday; a tradition he

has maintained until 2015. R. at 3. On December 22, 2010, the night Mr. Coda lost his business, was also his birthday. *Id.*

Additionally, the Federal Bureau of Investigation (FBI) was contacted by Mr. Coda's neighbor, Sam Johnson (Mr. Johnson), shortly after the incident. *Id.* Mr. Johnson claimed to have additional information relating to the event including the existence of an insurance policy on the hardware store in case of a total loss, the decline of profits due to recent economic hardships, and Mr. Coda's "anxious and paranoid" demeanor the week of the accident. R. at 2. The information led the FBI to consider Mr. Coda's involvement in the explosion to which the United States Attorney's Office (Government) was also informed of the circumstances. *Id.*

The Government considered Mr. Coda's case a "low-priority." and designated it as such. *Id.* Because Mr. Coda was being prosecuted by the state for charges unrelated to this case, the Government decided transporting Mr. Coda to multiple locations for court appearances would be too inconvenient; therefore, the Government delayed the progression of Mr. Coda's case until his state proceedings concluded. *Id.* However, once Mr. Coda's state proceedings finished, the Government continued delaying Mr. Coda's case due to "political pressure" to make prosecuting drug trafficking offenses a priority, which, subsequently caused high turnover among government attorneys. *Id.* The priority level of Mr. Coda's case was never increased, and the Government contends these circumstances caused the failure of his case to progress. *Id.*

## **II. Mr. Coda's Arrest, Indictment, And Evidentiary Hearing**

Nearly a decade after the destruction of Mr. Coda's hardware store, the Assistant U.S. Attorney who was assigned to Mr. Coda's case suddenly realized the ten-year statute of limitations under 18 U.S.C. § 3295 only had eight months remaining and was about to run. *Id.* at 2. On April 23, 2019, in order to stay within the statute of limitations, FBI Special Agent Park (Agent Park)

arrested Mr. Coda and informed him of the charges brought against him. *Id.* at 3, 7. Upon his arrest, Agent Park did not explain to Mr. Coda his right to silence or his right to an attorney under *Miranda*. *Id.* at 7. Incidentally, instead of providing a spontaneous statement to Agent Park – that he was in New York at the time of the explosion – Mr. Coda chose to remain silent at the time of the arrest. *Id.* at 7. Neither Mr. Coda or Agent Park spoke between the time of arrest and the time of arrival to the detention center where Mr. Coda was subsequently provided his *Miranda* rights before questioning. *Id.*

The following month in May 2019, the Government indicted Mr. Coda for “maliciously using an explosive to destroy property that affects interstate commerce” alleging that Mr. Coda was responsible for the destruction of his hardware store so he could acquire the insurance proceeds. 18 U.S.C. § 844(i); R. at 3. On September 15, 2019, an evidentiary hearing was held where Mr. Coda expressed his intent to use his alibi, that he was out of state the night of the explosion, as a defense for the alleged charges. R. at 1, 3. Unfortunately, due to the Government’s nearly ten-year delay in prosecuting the case, four out of the five family members Mr. Coda visited had passed away, the fifth family member was diagnosed with dementia (Call Kenyon – So what), and the Greyhound bus company only maintains bus records for three years. *Id.* at 3. Thus, it was impossible for Mr. Coda to present evidence to which could have corroborated his alibi. *Id.*

### **III. The Fifth Amendment Claim**

On September 30, 2019, prior to trial, Mr. Coda moved to dismiss the indictment under the assertion the government’s preindictment delay violated his right to Due Process under the Fifth Amendment. R. at 1, 4. Further, on December 19, 2019, Mr. Coda filed a motion to suppress the use of his post-arrest, pre-*Miranda* silence as substantive evidence of guilt arguing it was violative of the Fifth Amendment right against self-incrimination. *Id.* at 7, 8. The District Court of East



Virginia denied both motions and Mr. Coda was subsequently convicted and sentenced to a ten-year prison sentence. *Id.* at 1, 10, 11.

On August 28, 2020, eight months after an adverse ruling, Mr. Coda appealed the District Court's denial of both motions to the Thirteenth Circuit and sought to have the conviction overturned and charges dismissed. *Id.* at 11. The Thirteenth Circuit affirmed. *Id.* at 12.

### **SUMMARY OF THE ARGUMENT**

The very essence of the United States Constitution is to ensure the People are free from outrageous government conduct. The Fifth Amendment, a core pillar that such freedom stands on, enumerates the right to Due Process and the privilege to not be held witness against oneself. Here, the Government's outrageous conduct violated Mr. Coda's Fifth Amendment constitutional right which resulted in extreme prejudice to his defense.

The Government's inaction caused an unusual, and quite unnecessary, near decade-long delay in Mr. Coda's indictment. Additionally, in the last hours of a hurried investigation the Government chose to present Mr. Coda's post-arrest, but pre-*Miranda* silence as substantive evidence of guilt at trial; and in doing so, Mr. Coda was deprived of his Fifth Amendment right to Due Process and robbed of his privilege against self-incrimination.

In reliance on this Court's reasoning regarding pre-indictment delays, a two-prong test to determine whether a Motion to Dismiss due to pre-indictment delay is justified was established. First, a defendant must prove pre-indictment delays caused by the Government, were both actual and effectual so as to severely impede and disallow the defendant's right to a fair trial. Second, a defendant must show the Government acted with bad faith intent to gain an unfair tactical advantage over the defense, a nearly impossible task. Nevertheless, the Supreme Court and lower

courts have cautioned against seeing this test as a bright-line rule and have instead endorsed the belief to approach each case independently.

It has been stipulated that the pre-indictment delay by the Government resulted in a gross, actual prejudice that was the sole cause of Mr. Coda's loss of exculpatory evidence essential to his defense of the alleged charges. Although malicious intent to cause the delay is insurmountable for the defense to show, the Government's willful disregard to allow Mr. Coda's case to progress caused the delay to be more than mere inconvenience or simply negligence. Thus, whether through malintent or willful disregard, the result remains the same, the Government's delay caused substantial prejudice to Mr. Coda's right to a fair trial and gave the Government a tactical advantage over Mr. Coda's defense.

Further, the use of Mr. Coda's post-arrest, but pre-*Miranda* silence as substantive evidence of guilt violates his Fifth Amendment right against self-incrimination for two main reasons. First, a person's Fifth Amendment privilege against self-incrimination should apply at the time of arrest. Second, requiring an express invocation of that privilege during the time between an arrest and the receipt of the *Miranda* Warning, unduly burdens the accused by forcing a choice between speech and silence – both of which can be used as guilt during criminal proceedings.

It is evident Mr. Coda's rights to a fair trial have been violated by the Government's bad faith neglect resulting in his pretrial delay, and the use of his post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Here, Mr. Coda suffered actual prejudice as a result of the Government's willful disregard of his case. Next, when the Thirteenth Circuit simply accepted the lower court's analysis on the issue of using Mr. Coda's silence as evidence of guilt, it failed to accurately distinguish when a person's Fifth Amendment right privilege should attach; and, it

incorrectly adopted the paradoxical application of the express invocation requirement pertaining to Mr. Coda's post-arrest silence.

To provide for the adherence to the Fifth Amendment and the community's sense of fairness in our legal system, Mr. Coda asks this Court to find the Government's actions unconstitutional under the Fifth Amendment and reverse the Thirteenth Circuit's ruling.

## **ARGUMENT**

### **I. The Government's Willful Inaction Violated Mr. Coda's Fifth Amendment Right To Due Process By Causing An Unnecessary, Decade-long Delay In His Indictment Resulting In Substantial Prejudice And A Tactical Advantage Over His Defense.**

This Court has held, a violation of the Due Process Clause under the Fifth Amendment would require dismissal of the indictment if it were shown at trial that, "The pre-indictment delay in [the] case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307 (1971). This ruling created a two-prong test that has been utilized by this Court and lower courts to determine if dismissal for pre-indictment delay was a proper remedy. Additionally, this Court has also conceded that the two-prong test was never to be a black-letter rule. Once, actual prejudice is established, every situation and the determining factors have to be properly and fairly appreciated on a case-by-case basis to determine whether the Government intentionally gained a tactical advantage. *Howell v. Barker*, 904 F.2d 889, 895 (4<sup>th</sup> Cir. 1990). Further, where the defendant has established actual prejudice due to a government-caused pre-indictment delay, "There must be some culpability on the government's part either in the form of intentional misconduct or negligence." *United States v. Mays*, 549 F.2d 670, 678 (1977).

Therefore, the case at bar, must be approached by the individuality of Mr. Coda's circumstances and the inaction of the Government must be considered to afford Mr. Coda the right to a fair trial as guaranteed by the Fifth Amendment.

**A. The Thirteenth Circuit Has Acknowledged The Government's Pre-Indictment Delay Caused Substantial Prejudice To Mr. Coda's Defense.**

In this case, the Thirteenth Circuit acknowledged the Government's delay caused actual and substantial prejudice to Mr. Coda's case. R. at 6. The family members who were witnesses in support of his alibi could have confirmed Mr. Coda's presence in New York. However, all are tragically either deceased or mentally incapable of recalling such facts. R. at 3. Moreover, the Greyhound bus fare records to which Mr. Coda could have provided clear and undeniable proof of his travels, have been deleted due to online records were only saved for three years by the bus company. *Id.* Thus, but-for the Government's decade-long delay in bringing this case to indictment, Mr. Coda's life-changing exculpatory evidence would not have been permanently lost. Because the Thirteenth Circuit has acknowledged Mr. Coda has suffered actual and extreme prejudice due to circumstances out of his control, that were incurred precisely because of the Government's unnecessary delay, actual prejudice under *Marion*, is satisfied.

Additionally, in *Marion*, the Supreme Court stated, "it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971). Mr. Coda's event and the actual prejudice that followed were within the statute of limitations. As stated above, the statute of limitations is not the fully define

Mr. Coda's rights. Due to the unusual and unnecessary delay by the Government, coupled with the actual prejudice experienced by this delay, all within the statute of limitations, Mr. Coda's right to a fair trial has been grossly violated.

**B. The Government's Willful Disregard Of Mr. Coda's Case Caused Substantial Delay In Indictment And Gave The Government A Tactical Advantage Over The Defense.**

It has been established that a defendant must take the heavy, and nearly impossible burden, of showing the Government acted with bad faith intent to gain an unfair tactical advantage over the defense. The Court held in *United States v. Marion*, that the accommodation in the, "Sound administration of justice to the rights of the defendant to a fair trial, will necessarily involve a delicate judgment based on the circumstances of each case." *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). In this case, the Thirteenth Circuit failed to consider the individuality of Mr. Coda's case and the inaction of the Government which caused the delay. Because the Government willfully disregarded Mr. Coda's case and halted its progression, the preindictment delay gave the Government a tactical advantage over Mr. Coda.

The Third Circuit in *United States v. Sebetich* denied a motion to dismiss due to a five-year pre-indictment delay for lack of exculpatory evidence a deceased witness would have provided had the witnesses been alive during the proceeding. *United States v. Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985). Unlike in *Sebetich*, Mr. Coda was able to give exact and detailed accounts of what the decedent and mentally incapable witnesses would have testified, and the exculpatory evidence in the records from the Greyhound bus company would have exonerated Mr. Coda, had the Government not delayed the indictment. R. at 3. Had the Government not delayed Mr. Coda's indictment for nearly ten years, Mr. Coda would have been able to produce five witnesses and bus records as exculpatory evidence.

The Thirteenth Circuit was arguably adhering to the Third Circuit's ruling in *Sebetich* to deny Mr. Coda's motion to dismiss. *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985). However, in doing so the Thirteenth Circuit erred by not acknowledging the *Sebetich* indictment was only 5 years after the event; and, though the defendant also lost witnesses due to death, each case must be approached independently based on the circumstances of each case. It is important to note that Mr. Coda's case was nearly ten years aged before the indictment, unlike the defendant in *Sebetich* whose delay was only five years and five months before the statute of limitations expired. *Id.*

In *United States v. Marion*, the Court stated,

It is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

*United States v. Marion*, 404 U.S. 307, 324 (1971).

Mr. Coda's event and the actual prejudice that followed were within the statute of limitations. As stated above, the statute of limitations is not the fully define Mr. Coda's rights. Due to the unusual and unnecessary delay by the Government, coupled with the actual prejudice experienced by this delay, all within the statute of limitations, Mr. Coda's right to a fair trial has been grossly violated.

In *United States v. Lovasco*, the government's hope that other parties of the crime would later be discovered was not adequate reason or justification for a 17-month delay. *United States v. Lovasco*, 431 U.S. 783, 790 (1971). The Court held, "We are to determine only whether the action complained of here, compelling respondent to stand trial after the Government delayed indictment...further violates those fundamental conceptions of justice which lie at the base of our

civil and political institutions’...and which define the community’s sense of fair play and decency.” *Lovasco*, at 783, 790. (internal citations omitted). Although the defendant in *Lovasco* was alleging the government should have indicted once enough probable cause had been established, the Court’s reasoning that the accused be treated fairly and decently to uphold the community’s faith in our fundamental conceptions of justice nonetheless applies here.

This case is a test to see if Mr. Coda receives a fair trial or if politics rule the day. For Mr. Coda to be a recipient of these fundamental conceptions of justice, his case must be viewed from a proposition of what would constitute fairness and decency for someone forced into his situation, not one of inconvenience. Unlike *Lovasco*, where the Court understood the implications and importance of a continual investigation, the Government here was not investigating Mr. Coda. Nothing is stated in the record that the Government required more than nine years to complete its investigation. Instead, the Government contends that political pressure was the cause of such a substantial delay. R. at 2.

Compare *United States v. Baltimore* in the Sixth Circuit where the defendant moved to dismiss charges after a delay exceeded five years before an indictment. *United States v. Baltimore*, 482 F. App’x 982 (6th Cir. 2012). The Sixth Circuit concluded the delay was caused by the continued investigation of the defendant by the Drug Enforcement Agency (DEA). *Id.* at 982. It is obvious where high priority crimes that involve the coordination of multiple agencies could result in a delay due to investigation. That is not the case here.

In this case, the ATF and local fire investigators found evidence suggesting the explosion was caused by the combination of cold December weather and an old leaky gas line. R. at 2. Unlike the government in *United States v. Baltimore*, there is no record showing an attempt to coordinate with ATF, local authorities, or other agencies to reopen the investigation into the cause of the

explosion. Instead, the record shows that the transportation of Mr. Coda between state and federal trials would be inconvenient. *Id.*

In *United States v. Ross* and *United States v. Rogers*, the Sixth Circuit again considered whether the government's preindictment delay violated the fundamental conceptions of justice. *United States v. Ross*, 703 F.3d 856, 877 (6th Cir. 2012); *United States v. Rogers*, 118 F.3d 466, 476 (6th Cir. 1997). The court concluded that the need for preparation due to the "voluminous discovery", and when an investigation is so complex there becomes a need for "a thorough and fair investigation" pre-indictment delay was appropriate. *Ross*, at 856, 877; *Rogers*, at 466, 476. Comparatively, the Government here provided no such justification.

Instead of conducting a thorough and fair investigation like the government in *Ross* and *Rogers*, here the Government willfully kept Mr. Coda's file marked as "low-priority" and simply "passed Mr. Coda's file from one Assistant U.S. Attorney to another." R. at 2. Thus, the deliberate and willful disregard of Mr. Coda's case caused substantial delay in his indictment which resulted in the complete loss of his defense and a tactical advantage for the Government.

**C. Because The Government's Willful Disregard Was The Cause of Delay The Burden Of Proof Should Shift.**

Though it may be impossible to show governmental malintent, here, the end result for such a long delay due to the Government's inaction was nonetheless bad faith in gross negligence. The burden of proof must, therefore, shift to the Government to explain their inaction.

When the government offered no evidence for an investigative delay lasting over four years, the Ninth Circuit in *United States v. Mays* took the position that, "Although weighted less heavily than deliberate delays, negligent conduct can also be considered, since the ultimate responsibility for such circumstances must rest with the government rather than the defendant . . . . Where the defendant has established actual prejudice due to an unusually lengthy government-caused pre-



indictment delay, it then becomes incumbent upon the government to provide the court with its reason for the delay.” *United States v. Mays*, 549 F.2d 670, 678 (1977). Because the *Marion* Court made clear the two-prong test was not a bright-line rule, when the Government has complete control of the decision to proceed with an indictment but instead delays the proceedings for a substantially unreasonable amount of time, it becomes the Government’s burden to provide reason for such delay. *Id.* at 676.

The Ninth Circuit in *Mays* has logically shown that a negligent delay coupled with actual prejudice is enough to fulfill the bad faith requirement for the second prong of the test under *Marion*. In Mr. Coda’s case, the Government delayed the indictment due to political pressure, inconvenience, and prioritization. On one hand, Mr. Coda’s case may have been marked “low priority” by the Government’s based on the information presented by the FBI; but, on the other hand this case would have been Mr. Coda’s highest priority above all else in his life. At that time, the Government then turned their attention to prioritizing drug-trafficking offenses for political reasons, further delaying Mr. Coda’s case. As the clock ticked, time was against Mr. Coda and the unusual and unnecessary Government delay eroded Mr. Coda’s defense. None of the reasons provided by the Government could be considered worthy of such a delay to when the loss of Mr. Coda’s defense is against a prosecutorial Goliath.

Though the intention of the Government may not have been in malicious bad faith, it was nonetheless bad faith within negligence. Whether malicious or negligent, the end result for such a long delay is the same for Mr. Coda. Mr. Coda has raised reasonable objections for the burden placed upon him to show the Government’s willful disregard of his case equates to bad faith. Unless the accused has access to the inner workings of the Government, or if the Government is acting in bad faith against the accused, it is reasonable to believe it would continue in bad faith

and falsify the reason for the delay to further penalize the defense. Further, regardless if the intention of the delay is in bad faith or due to negligence on the part of the Government, the end result is the same for the accused. Thus, the negligent acts by the Government against Mr. Coda must be answered in the form of culpability on the part of the Government and resulting in Mr. Coda's case dismissed.

## **II. The Fifth Amendment Right Against Self-Incrimination Prohibits the Use Of Mr. Coda's Post-Arrest, Pre-Miranda Silence As Substantive Evidence of Guilt.**

It is unconstitutional to compel Mr. Coda to provide a defense upon his arrest. Thus, his choice to remain silent was an assertion of his Fifth Amendment privilege. The Self-incrimination Clause of the Fifth Amendment stipulates that when held to answer for a crime, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Plainly, if government action compels speech, then a person has the enumerated privilege to remain quiet if what they say could be used against them as evidence of guilt. To permit prosecutorial comment on silence as evidence of guilt puts the accused on a proverbial tightrope. If they fall left, their speech can be used as an inference of guilt, and if they fall right, their silence can be used as an inference of guilt. The only remedy to this issue is the constitutional safety-net of the Fifth Amendment.

The Court applied this reasoning in cases such as *Griffin v. California* and *Miranda v. Arizona* which paved a legal path to ensure silence, both inside and outside the courtroom, remained protected. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966); *Griffin v. California*, 380 U.S. at 609, 85 S. Ct. 1229, (1965). The Court unequivocally asserted the Fifth Amendment privilege is not restricted to the courtroom, but "serves to protect persons in all settings in which their freedom is curtailed in any significant way from being compelled to

incriminate themselves.” *Miranda*, at 436, 467. Thus, the Court should acknowledge that when a person is accused of a crime and their freedom is curtailed by arrest, they become protected by the Fifth Amendment from being compelled to speak and risk incriminating themselves.

Additionally, the Government incorrectly applied the express invocation requirement set forth in *Salinas v. Texas*, “[A] witness who desires the protection of the [Fifth Amendment] privilege . . . must claim it at the time he relies on it.” *Salinas v. Texas*, 570 U.S. 178, 133 S. Ct. 2174, 186 L.Ed.2d 181 (2013). But the decision in *Salinas* was based on the need to put the Government “on notice when a witness intends to rely on the [Fifth Amendment] privilege” so as to provide a reason during police questioning “for [witnesses] refusing to answer.” *Id.* at 183, 184. Because the Government incorrectly extended the application of this rule to post-arrest, but pre-*Miranda* custody where police questioning was absent, Mr. Coda was not required to expressly invoke his Fifth Amendment privilege. Thus, because the Government’s application in this case is flawed, *Salinas* should not control.

**A. Mr. Coda, Who Was Accused Of A Crime And Arrested, Should Be Protected Under The Fifth Amendment From Being Compelled To Speak.**

When held to answer for a crime, “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The accusatory nature of a criminal arrest undoubtedly compels the accused to assert a defense or alibi to the officer; thus, if a suspect instead chooses to remain silent in the face of that accusation, then their silence should be protected by the Fifth Amendment.

This Court has consistently provided direction for the application of the Fifth Amendment right against self-incrimination. In *Griffin v. California*, the defendant (Griffin) was confronted and accused of murder by the prosecution at trial; but, Griffin chose to remain silent and not testify in his own defense. *Griffin v. California*, 380 U.S. at 609, 85 S. Ct. 1229, (1965). In its closing

argument, the prosecution took advantage of Griffin's refusal to testify and used his silence as substantive evidence of guilt for the jury to consider. The Court recognized that regardless of innocence or guilt, once a defendant takes the witness stand they may experience "excessive timidity [and] nervousness when facing others and attempting to explain . . . offenses charged against [them]." *Griffin*, 380 U.S. at 613. If the prosecution were permitted to comment on Griffin's silence, then the pressures from such government action would have *compelled* him to take the stand and risk becoming a witness against himself; thus, when a defendant chooses to remain silent, "In its direct application . . . [the Fifth Amendment] forbids . . . comment by the prosecution on the accused's silence." *Id.* at 609, 615.

The similarities between *Griffin* and the circumstances of Mr. Coda's arrest best illustrate why the Fifth Amendment privilege should attach upon the arrest of a person accused of committing a crime. Like Griffin who faced accusations by the government, Agent Park confronted Mr. Coda at his residence, accused him of the alleged crime, and arrested him. It is unquestionable that being placed under arrest and seized from one's home would invoke a significant amount of stress, nervousness, and timidity. But mirroring *Griffin*, in the midst of such government-induced pressure from being accused, Mr. Coda *chose to remain silent* despite having an alibi. Thus, the Government's comment on Mr. Coda's refusal to provide an alibi defense in the face of such confrontation is "a remnant of the inquisitorial system of criminal justice which the Fifth Amendment outlaws." *Id.* at 614 (internal quotations omitted).

### **1. Mr. Coda's Fifth Amendment Privilege Started At The Time Of His Arrest**

*Griffin* is perhaps the most direct link between the text of the Self-Incrimination Clause: "No person . . . shall be compelled in any criminal case to be a witness against himself." and its application. U.S. Const. amend. V. But the Court in *Miranda v. Arizona* acknowledged the

language and applied the same privilege to protect the accused in settings outside the courtroom. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966). Consistent with its reasoning in *Griffin*, the *Miranda* Court believed the privilege also existed during police interrogation, which subjects those accused of crimes “to pressures which . . . compel [the accused] to speak where he would not otherwise do so freely.” *Miranda v. Arizona*, 384 U.S. at 467. The Court summarized that when a person is taken into custody by authorities, or otherwise significantly deprived of their freedom, once they become subjected to police questioning the Fifth Amendment privilege against self-incrimination is jeopardized. The Court notably held, “The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.” *Id.* at 468, 479.

The Government’s contention here is that Mr. Coda was never interrogated by Agent Park, and his silence was only in response to her statements of the charges against him; thus, Mr. Coda was not entitled to protection under the Fifth Amendment. R. at 8. It could be argued that *Miranda* stands as an interrogation case. To be sure, the Government is correct in that Mr. Coda was not interrogated by Agent Park. But *Miranda* is not simply an interrogation case, it is one against *government compulsion*. Here, government compulsion is prevalent.

The Government’s strict reliance on the assumption that interrogation is the only setting that breeds compulsion to speak causes its argument to collapse. For example, when the Fifth Amendment, *Griffin*, and *Miranda* are compared in a mechanical fashion, incongruities become apparent and the principal purpose of the amendment – to protect those answering for a crime – is lost. It is unrealistic to think the Framers of the Constitution, or the Court, would have intended such a result; therefore, it is evident from *Miranda* that the Fifth Amendment was not written, or interpreted, with watch-like precision and should therefore be applied where there is *any*

government compulsion to incriminate oneself. Because the *Miranda* Court extended the privilege to police interrogation, there is no reason to deny the privilege at the point of arrest.

While the lower courts seem to be split on this question, the better reasoned courts, such as the D.C. Circuit in *U.S. v. Moore*, agree with a custody-based trigger for the Fifth Amendment. *U.S. v. Moore*, 322 U.S.App.D.C. 104 F.3d 377, 384, 341 (1997). In *Moore*, a police officer who testified as a witness told the court that the defendant, instead of protesting in innocence, did not say anything when contraband was found under the hood of his car. *Id.* at 341. Subsequently, the prosecutor in closing argument rhetorically asked the jury, if Moore really did not know the contraband was under the hood why did he not simply tell the police that? *Id.* The D.C. Circuit rightly synthesized *Griffin* and *Miranda*; thus, when a person is under arrest, or otherwise not free to leave, the use of their silence as evidence of guilt is inconsistent and violative of the Constitution.

Here, as in *Moore*, the Government proposes that a reasonable person with an alibi defense would inform agents of the alibi upon his arrest. R. at 9. This proposal does not bolster the Government's argument, it undermines it. It stands to reason the Government is essentially saying that a reasonable person is *compelled to speak* in the face of an arrest and make a declaration of defense by way of an alibi. Like *Moore*, Mr. Coda remained silent instead of offering his alibi to Agent Park.

The Ninth Circuit followed the same logical path in *United States v. Whitehead* and *United States v. Velarde-Gomez*. *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001). The defendant in *Whitehead* was placed in custody, was not provided with *Miranda* Warnings, and was subsequently searched by

police. At trial, the prosecutor asked the jury what a person in Whitehead's position would have asked under the circumstances,

What do you do at that point? What do I do? What would anyone of us do? What is going on here? What the heck is going on? Why am I being treated like this? Why am I being arrested? But you don't say that, if you know; and the defendant didn't say a word because he knew.

*United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000).

Similar to the facts above, the defendant in *Velarde-Gomez* sought to protect his right to post-arrest, pre-*Miranda* silence after a witness testified the defendant did not respond once contraband was located in his vehicle, and did not deny having knowledge the contraband was there at the time of arrest. *Velarde-Gomez*, 269 F.3d at 1023, 1032. The Ninth Circuit recognized the comments by the prosecution, that the defendant did not react but instead remained silent in the face of confrontation, was unconstitutional. It logically reasoned that under such circumstances, the right to remain silent is derived "from the Constitution and not from the *Miranda* warnings themselves, regardless of whether the warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *Id.* at 1029.

In contrast, the Thirteenth Circuit thrusts Mr. Coda into a catch-22. Consider the Thirteenth Circuit's logic, Mr. Coda only had two options upon his arrest: (1) Make a voluntary statement, unprotected by *Miranda*, and provide an alibi to Agent Park; or, (2) remain silent. According to the Thirteenth Circuit, both options can be used as substantive evidence of guilt. The Government in this case, is making the same unconstitutional argument given by the prosecution in *Whitehead* and *Velarde-Gomez*, that "reasonable" defendants should be compelled to give an alibi or ask the arresting agent questions; otherwise, they are guilty. R. at 7. Because this type of compelled speech following an arrest is the exact reason police are required to give the *Miranda* Warnings, it is

evident that “custody and *not interrogation* is the triggering mechanism for the right of pre-trial silence.” *U.S. v. Moore*, 322 U.S.App.D.C. 104 F.3d 377, 384, 341 (1997). (emphasis added).

Therefore, the same logic must be applied to Mr. Coda, who was accused of a crime and whose freedom curtailed by arrest, because it is at that point a person undoubtedly needs the protection of the Fifth Amendment protection from government compulsion to incriminate themselves.

**B. Mr. Coda Was Not Required To Expressly Invoke The Fifth Amendment Because He Was Not Being Questioned By Police.**

By affirming the Thirteenth Circuit’s ruling which extended the express invocation requirement to post-arrest but pre-*Miranda* custody, even when police questioning is absent, this Court will establish precedent that will trap every future lower court that hears the issue on the paradoxical Penrose Staircase.

The context for the express invocation requirement stems from *Berghuis v. Thompkins* where after nearly three hours of police questioning, the suspect broke his silence and waived his rights under *Miranda*. *Berghuis v. Thompkins*, 560 U.S. 370, 376, 130 S. Ct. 2250, 2257, 176 L. Ed. 2d 1098 (2010). On one hand, the defendant argued by refusing to speak, an implied invocation should have been sufficient to end the interrogation. On the other hand, however, consistent with its doctrine in connection with the assertions for the right to counsel, the Court stated that a suspect must unambiguously assert the right to silence. *Id.* 560 U.S. at at 382. This requirement the provided an objective rule and guided to police on how to make, “difficult decisions about an accused unclear intent.” in the face of ambiguity. *Id.*

The defendant in *Salinas v. Texas*, voluntarily went to the police station, and voluntarily answered police questions regarding a murder. *Salinas v. Texas*, 570 U.S. 178, 133 S. Ct. 2174, 186 L.Ed.2d 181 (2013). However, when asked specifically about his ties to the murder weapon, the defendant fell silent. The Court, relying on *Berghuis*, held, “A witness who desires the



protection of the [Fifth Amendment] privilege . . . must claim it at the time he relies on it.” *Salinas v. Texas*, 570 U.S. at 178, 133.

Although the Court remains undoubtedly consistent, the Government in this case attempts to justify the express invocation requirement by blurring the line between: (1) Pre-arrest silence, absent *Miranda* Warnings and while being questioned, like in *Salinas* – the use of which is admissible as guilt – and; (2) Post-arrest silence, absent *Miranda* Warnings and without being questioned which is at issue here. By magnifying the true purpose of an express invocation, the blurred line becomes crystal clear.

The rationale in *Berghuis* and *Salinas* stemmed from the need to put the Government “on notice when a witness intends to rely on the [Fifth Amendment] privilege” so as to provide a reason for not speaking. *Berghuis v. Thompkins*, 560 U.S. 370, 376, 130 S. Ct. 2250, 2257, 176 L. Ed. 2d 1098 (2010); *Salinas v. Texas*, 570 U.S. 178, 133 S. Ct. 2174, 186 L.Ed.2d 181 (2013). The Court in *Salinas* reasoned, “A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.” *Salinas*, 570 U.S. at 183, 184. Thus, the express invocation requirement should only apply when a person is *being interviewed or interrogated by police*, whether in custody or not, an express invocation is required to unambiguously tell them to cease questioning because the Fifth Amendment has been invoked.

Courts have discussed at length the infinite possibilities surrounding a person’s silence and the need for unambiguous clarification during questioning to preserve the rights of police and the accused alike. But that is not at issue here. Unlike defendants in *Salinas* and *Berghuis*, Mr. Coda was not being questioned. In all actuality, aside from receiving notice of the charges against him, Mr. Coda was not spoken to whatsoever between his arrest and receipt of the *Miranda* Warnings. R. at 7. This asks two problematic questions: First, what purpose does an express invocation of

silence serve when the officer, to whom it gives notice, is neither conducting a pre-custodial interview (*Salinas*), nor post-*Miranda* interrogation (*Berghuis*) that require such notice to cease, and second, must it be required then, even in the absence of questioning, that in order to protect one's silence a person must (ironically) speak to expressly invoke their right not to speak?

Returning to *U.S. v. Moore*, the defendant who instead of protesting his innocence did not say anything when contraband was found under the hood of his car, was not given the *Miranda* Warning, and was not being interrogated per se. *U.S. v. Moore*, 322 U.S.App.D.C. 104 F.3d 377, 384, 341 (1997). With knowledge of the intent behind the requirement of *Berghuis* and *Salinas*, the D.C. Circuit was able to see the past the same blurred line the Government uses in this case. On one hand, when a person chooses to make a spontaneous statement to the police prior to questioning, that person may be held to have waived the privilege against self-incrimination. On the other hand, "a person who stands silent must be treated as having asserted [the privilege]." *Id.* at 377, 385. Therefore, until the *Miranda* Warnings are received, the burden should not be on the accused to affirmatively claim their right to silence, in order to keep that silence from harming them at trial.

In this case, there was no logical opportunity for Mr. Coda, at the time of his arrest and before he received the *Miranda* Warnings, to provide an express invocation of his Fifth Amendment privilege. Unlike the defendants in *Salinas* and *Berghuis*, if Agent Park was not interrogating or asking Mr. Coda questions, then she was not required to be put on notice to cease questioning. It is entirely unreasonable to require Mr. Coda, who is both under arrest and without the protection of *Miranda*, to make spontaneous invocation of his Fifth Amendment privilege when both his statements *and* his silence could be used later to show guilt. Thus, because Mr. Coda stood silent he must be treated as if he had asserted the privilege.

In summary, because Mr. Coda's rights to a fair trial have been violated by the Government's willful disregard resulting in his pre-indictment delay, and the use of his post-arrest, pre-*Miranda* silence as substantive evidence of guilt, Mr. Coda suffered actual prejudice because of the Government's willful disregard of his case. Additionally, when the Thirteenth Circuit simply accepted the lower court's analysis on the issue of using Mr. Coda's silence as evidence of guilt, it failed to accurately distinguish when a person's Fifth Amendment right should attach, and, it incorrectly adopted the application of the express invocation requirement pertaining to Mr. Coda's post-arrest silence.

### **CONCLUSION**

This Court should reverse the Thirteenth Circuit's judgement.

Date: September, 13, 2021

Respectfully submitted,

/s Team 36

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