

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**

Team 40  
Counsel for Petitioner

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## QUESTION PRESENTED

- I. Whether reckless and negligent prosecutorial motives require the dismissal of delayed indictments where the degree of prejudice to the defendant is severe.
- II. Whether using a defendant's post-arrest, pre-*Miranda* silence as evidence of substantive guilt at trial violates the Fifth Amendment right against self-incrimination.

## STATEMENT OF THE CASE

December 22, 2010, was Austin Coda's birthday. R. at 3. It was also the day an explosion burned down his hardware store in Plainview, East Virginia. R. at 2. Initial investigations by both local and federal authorities suggested the fire was caused by a gas leak from a faulty line. *Id.* Like many businesses in Plainview, Coda's once-prosperous business had fallen on hard times and the building was in a state of disrepair. *Id.* Coda claims that, as was his annual custom, he was in New York that day, celebrating with five family members. R. at 3. Nearly ten years on, four of those family members are now dead; the other has dementia. *Id.*

In spring 2019, prosecutors, realizing the relevant statute of limitations was about to run, alleged that Coda destroyed his own store for insurance money and indicted him under 18 U.S.C. § 844(i). *Id.* Nearly ten years earlier, shortly after the fire itself, the FBI had passed on a tip from a neighbor to the local U.S. Attorney's Office suggesting that Coda had a motive to burn down his business. R. at 2. For nearly ten years, the U.S. Attorney's Office found one reason after another not to act. *Id.* As an initial matter, they marked Coda's case as "low priority." *Id.* Prosecutors then decided to await the resolution of state charges to avoid inconvenience in transporting Coda back and forth. *Id.* Next, the U.S. Attorney's Office claims that "political pressure" "caused" them to prioritize drug cases to the exclusion of the Coda matter. *Id.* They further blame political pressure for high turnover in the office and the subsequent passing around of Coda's case among various Assistant U.S. Attorneys. *Id.* The government does not say when of if this political pressure ceased or, if it continued, how it nonetheless finally found time to bring Coda's case in April-May 2019. *Id.*

In April 2019, Coda was arrested by FBI Special Agent Park. R. at 7. Immediately after completing the arrest, Park took the time to inform Coda of the charges against him but delayed reading him his *Miranda* rights. *Id.* Coda remained silent and said nothing at all to Park for the duration of the drive to the detention center where he was to be interrogated. *Id.* Only then did the FBI read Coda his *Miranda* rights. *Id.*

In order to secure Coda's conviction, the government used Coda's silence during the drive to the detention center as substantive evidence of his guilt, arguing that any reasonable person would have immediately spoken up about their alibi from nine years previous. *Id.* The government's case relied heavily on this evidence, as their other evidence was circumstantial and insufficient to prove guilt beyond a reasonable doubt. R. at 15. The silence evidence was sufficiently prejudicial to the outcome of the case that the government did not even attempt to allege, in the subsequent appeal, that the admission of Coda's silence was harmless. *Id.*

Coda moved for dismissal of the charges against him, arguing that the government's preindictment delay caused him substantial prejudice and therefore violated his Due Process rights. R. at 1. Despite concluding that the government's delay caused Coda "actual and substantial prejudice," the district court denied his motion and the 13th Circuit Court of Appeals affirmed, adopting the lower court's analysis in full. R. at 6, 12. The district court adopted the stricter of the two tests stemming from the Supreme Court's decisions in *Marion* and *Lovasco*, requiring Coda to prove both actual prejudice and bad faith motive on the government's part. R. at 4. Because Coda could not show that the government *intentionally* delayed bringing to gain advantage over him, his motion failed despite the prejudice he suffered. R. at 5-6. Coda argued that the court should adopt the balancing test endorsed by some circuit courts on the basis that the Supreme Court "never intended to permit gross governmental negligence." R. at 4-5.



Coda also moved to suppress evidence of his post-arrest silence on the basis that post-arrest but pre-*Miranda* silence is inadmissible as substantive evidence of guilt, and the admission of this evidence violated his Fifth Amendment protections. R. at 8. The district court rejected this argument, and instead determined that *Salinas* is controlling. *Id.* The court acknowledged that *Salinas* only dealt with pre-custodial silence, but agreed with the government's argument that *Salinas* should nonetheless control when the post-arrest silence coincides with the defendant's arrest. *Id.* The district court further noted that if Coda intended to protect his pre-*Miranda* silence, he needed to unambiguously assert that right, which he delayed doing in this case. R. at 9. The 13th Circuit Court affirmed, adopting this holding in full. R. at 12.

## SUMMARY OF THE ARGUMENT

- I. The government's substantial delay in bringing charges against Coda violated his Due Process rights under the Fifth Amendment.
  - a. This Court should adopt the Fourth, Seventh, and Ninth Circuit's balancing test, which requires courts to weigh prejudice to the defendant against the government's motives, because it better serves the purposes of the Fifth Amendment.
  - b. The government's nearly ten-year delay—a period which saw the death or incapacitation of five witnesses and the expiration of key evidence—caused substantial prejudice to Coda.
  - c. The government acted recklessly by consistently de-prioritizing Coda's case and passing it around the office, only to bring charges just before the statute of limitations expired.
- II. The 13th Circuit Court erred in permitting the use of post-arrest but pre-Miranda silence as substantive evidence of Coda's guilt.
  - a. This Court should adopt the position of the First, Second, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits that post-arrest, pre-Miranda silence is inadmissible as substantive evidence of guilt.
  - b. This Court should also clarify that individuals have the right to remain silent immediately upon being placed in custody and need not verbally invoke that right in order to prevent the government from using their pre-Miranda silence as evidence of guilt.

- c. Even if this Court declines to clarify and fully adopt this standard for Miranda analysis, Coda's post-arrest but pre-Miranda silence should still be disallowed as substantive evidence of guilt. However, even if the Court uses this standard, the prosecution's usage of Coda's silence arguably renders the reading of his charges as a functional interrogation.

## ARGUMENT

I. The government’s substantial delay in bringing charges against Coda violated his Due Process rights under the Fifth Amendment.

a. This Court should adopt the balancing test for weighing preindictment delay

This Court should adopt the Fourth, Seventh, and Ninth Circuit’s balancing test—which weighs prejudice to defendants against the government’s explanation for delay—because it better serves the purposes of the Fifth Amendment. The balancing test requires, as a threshold question, that defendants prove that they were substantially prejudiced by the government’s delay; if they were, the court then balances the prejudice to the defendant against prosecutors’ proffered non-investigative reasons for delay (whether negligent, reckless, or intentional). *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994). Other Circuit courts mandate a restrictive intent-only, two-prong test, which puts the burden on defendants to prove both substantial prejudice and that the government either intended to cause that prejudice by its delay or acted with some “other impermissible, bad faith purpose.” *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996).

One of the most important rights of procedural due process is the right of criminal defendants to present evidence in their favor. Judge Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1281-2. The harm of preindictment delay is that it deprives defendants of that opportunity. Because this harm will occur regardless of the motive behind prosecutorial delay, defendants should not have to prove that “delay was ... intentional.” *Crouch* at 1514. Instead, courts should balance prejudice to a defendant against the government’s proffered explanation for the delay. Purely investigative delay does not weigh against the government in

this analysis, because conducting a thorough investigation prior to indictment is required by another constitutional right (protection against double jeopardy). See *United States v. Lovasco*, 431 U.S. 783, 795 (1977). Practically all non-investigative motives for delay, however, are considered in the analysis. In this way, courts safeguard the right to a fair trial while making concessions to the practicalities and resource constraints of prosecutors in a fact-specific inquiry—a small delay due to overwork or lost documents might not be dismissed even if a defendant suffered some prejudice, but egregious prejudice would be redressed even if prosecutors’ motives were not willful.

The balancing test is a logical fulfillment of the Supreme Court’s rulings in *Marion* and *Lovasco*, as informed by forty years of experience. In *Lovasco*, the Court explicitly noted that “intentional delay to gain tactical advantage over the accused” was merely *one* kind of unacceptable government motivation. *Id.* at 796-797. Between the poles of “intentional delay to gain tactical advantage” and pure investigative delay lie many kinds of reckless and negligent motivations. See *United States v. Sabath*, 990 F. Supp. 1007, 1014 (N.D. Ill. 1998). In adjudicating future cases, the Court charged lower courts with applying “the settled principles of due process ... to the particular circumstances of each case.” *Lovasco* at 797. Refusing this complicated task, the majority of circuit courts instead adopted a bright-line test: intentional delay was transformed from the most egregious of improper government motives to the *only* improper motive, and defendants were stuck with the burden of proof. Michael J. Cleary, *Comment: Pre-Indictment Delay: Establishing a Fairer Approach Based on United States v. Marion and United States v. Lovasco*, 78 Temp. L. Rev. 1049, 1060, 1071; *Crouch* at 1514. This test creates “an impossible threshold” to clear, as subsequent cases have revealed: by 1998,

nearly twenty years after *Lovasco*, no Federal circuit court had ever held for a defendant in a preindictment delay case. *Sabath* at 1018.

The strongest argument in favor of caution when applying the Fifth Amendment to preindictment delay is that it protects citizens against overly precipitous prosecutions. As the Supreme Court explained, criminal accusations can “interfere with the defendant's liberty, ... disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.” *United States v. Marion*, 404 U.S. 307, 320. It is in the public interest, then, to avoid a rule which might encourage prosecutors to bring cases before they are confident that they can prove guilt beyond a reasonable doubt. See *Lovasco* at 791. This important policy interest, however, is served just as well by the balancing test as by the intent-only test. This is because the balancing test does not punish prosecutors for delays intended to prove guilt beyond a reasonable doubt—investigative delays, in other words. The balancing test merely takes into account forms of delay, short of intentionally prejudicing a defendant, that serve no investigative purpose.

Supporters of the intent-only test also point to separation of powers concerns. See *Crouch* at 1513. In a bank fraud case where understaffing caused the government to delay prosecution by several years, the Fifth Circuit Court of Appeals reasoned that, for the court to find that the defendant's right had been violated by negligence would be to make a policy determination “essentially committed to the legislative and executive branches.” *Id.* (“Finding [the government's efforts] ‘insufficient’ is in substance determining that greater manpower *should* generally have been allocated to investigation and prosecution in that jurisdiction, and that a higher priority *should* have been assigned to this particular investigation.”) The Fifth Circuit's argument, however, is inconsistent with the Court's approach to other criminal rights—notably

the Speedy Trial clause of the Sixth Amendment, where length of delay is balanced against the government's reasons for it. *Cleary* at 1075; *Barker*, 407 U.S. 514, 522-30. Further, this reasoning gives legislatures a perverse incentive to try and skirt the requirements of criminal procedure. Under the Fifth Circuit's logic, underfunding prosecutors' offices can paradoxically make convictions *easier* to obtain. Overworked prosecutors will inevitably take longer to bring indictments and will thereby weaken more defendants' cases than fully staffed offices would on average—but courts will wholly set aside that prejudice merely because it was caused unintentionally. Overall, separation of powers argument marks a misguided attempt to turn a rights issue into a policy issue.

In first adopting the intent-only test, Circuit Courts often argued that they were upholding the wording of *Lovasco* by leaving “a limited role” to the Fifth Amendment in protecting against prosecutorial delay relative to statutes of limitations. See *Crouch* at 1510. But practice has revealed that, under the intent-only test, the Fifth Amendment plays, not a limited role, but *no* role. The time has come for a more capacious test: one that can comprehend all forms of prosecutorial misconduct and one that is actually possible for defendants to pass.

b. The government's nearly ten-year delay caused Coda substantial prejudice

The government's nearly ten-year delay—a period that saw the death or incapacitation of five witnesses and the expiration of key evidence—caused substantial prejudice to Coda. Under either the balancing or two-prong test, defendants must show that prosecutorial delay caused “actual prejudice: the proof must be definite and not speculative.” *United States v. Moran*, 759

F.2d 777, 782 (9th Cir. 1985). “[W]itness deaths alone may meet the required showing of prejudice.” *Sabath* at 1014.

In order for a witness’ death or unavailability to qualify as prejudicial, the defendant must show that “he was meaningfully impaired in his ability to defend against the . . . charges to such an extent that the disposition of the criminal proceeding was likely affected . . . [he must] identify the witness he would have called; demonstrate, with specificity, the expected content of that witness’ testimony; establish to the court’s satisfaction that he has made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources.” *Jones v. Angelone*, 94 F.3d 900, 908 (4th Cir. 1996).

Defendants who fail to demonstrate prejudice generally fail on the specificity and location prongs of the *Jones* test. In one case, after the police purchased drugs from a man in Baltimore, they returned to the house where the sale took place and arrested everyone inside. *United States v. Harris*, 551 Fed. Appx. 699, 701. One of the arrestees claimed he was not at the house when the sale took place but that he had lost contact with the woman who could testify to his alibi as a result of the government’s preindictment delay. *Id.* at 703-4. However, the man could not explain how he lost contact or link that loss to the government’s delay. *Id.* at 704. This man claimed another lost witness (this one deceased), but could not specify the content of the expected testimony. *Id.* By contrast, in *Sabath*, a small business owner in an arson-for-insurance money case successfully asserted that the death of two witnesses prejudiced his defense: the first, his father, would have testified to his alibi at the time of the fire; the second, a store employee, would have testified to motive (the business was performing well at the time of the fire). *Sabath*, 990 F. Supp. at 1010-11. The court noted that the father’s testimony could have been outcome-



determinative despite his ingrained bias toward his son: “many family relatives testify effectively, believably and sincerely on behalf of close family members.” *Id.* at 1010.

The facts of the present case closely resemble those of *Sabath*. Unlike in *Harris*, where the nature of a deceased witness’ testimony was vague and not clearly exculpatory, Coda’s witnesses would have testified to a specific alibi defense: was he or was he not in New York for his birthday on the night of the fire. Unlike *Harris*, Coda has kept track of all the witnesses: four are dead and one has developed dementia. As all five attendees are accounted for—and his Greyhound bus ticket is more than three years old and thus beyond retrieval in their online system—Coda has no alternative way to establish his alibi. Each of Coda’s witnesses, just like the father in *Sabath*, was a family member, but, like the judge held in *Sabath*, that fact would not necessarily have diminished the efficacy of their testimony.

Coda has named and located each of his lost witnesses; laid out the exculpatory nature of their testimony with specificity; and shown that he cannot obtain similar information from any other source. He has thus demonstrated actual and substantial prejudice resulting from the government’s preindictment delay.

c. The government acted recklessly by consistently de-prioritizing Coda’s case

The government acted recklessly by consistently de-prioritizing Coda’s case and passing it around the office, only to bring charges just before the statute of limitations expired. Under the balancing test, any *non-investigative* delay creates an inference of bad faith. *Sabath*, 990 F. Supp. at 1018 (“*Lavasco*, at the very least, must be read to allow defendants to prove bad faith circumstantially, by the absence of a legitimate investigatory reason”). This inference is

especially strong where the nature of the case or of the evidence is such that delay carries a “substantial risk” of prejudice to the defendant of which prosecutors should have been aware. *Id.* at 1019. All non-investigative reasons for delay are then weighed against the degree of prejudice to the defendant. *Sowa* at 451.

Only non-investigative reasons for delay suggest bad faith. *Sabath* at 1018. In *Marshall*, the State reopened a 20-year cold murder case after new forensic analysis surfaced and a key alibi witness admitted lying to investigators. *Marshall v. McEwen*, 2013 U.S. Dist. LEXIS 172925 (C.D. Cal. 2013). Although the 20-year delay impacted the defendant’s ability to mount his defense, because the delay arose out of legitimate investigative reasons, any prejudice the defendant suffered did not implicate Fifth Amendment rights. *Id.* at 80. By contrast, prosecutors in *Sabath* attempted to offer investigatory reasons for a five-year delay in seeking an indictment in an arson-for-profit case, but the court found them spurious. *Sabath* at 1015 (“No new witnesses or documentary evidence were uncovered or even sought during this time”). Notably, the court refused to consider a backlog at the U.S. Attorney’s office a valid investigatory reason. *Id.* Further bolstering the court’s finding of bad faith was the nature of evidence in arson-for-profit cases:

The government was also well aware that circumstantial arson cases are not easier to defend as they get older. The government’s case relies mainly on financial motive evidence—evidence that never fades and remains documented in financial and insurance records. In contrast, Defendant’s ability to mount a defense suffers from the fatal combination of diminished memories, flawed government reports, lost evidence and unavailable witnesses.

*Id.* at 1019.

An important exception to the non-investigative category is when prosecutors await the resolution of state charges—even for an unrelated crime—before bringing federal charges; this kind of delay is legitimate even if it serves no investigative purpose. *Sowa* at 451.

The government's delay in this case was entirely non-investigative. The FBI took a statement from their key witness (Coda's neighbor) and completed their investigation "shortly after" the fire took place. R. at 1. Prosecutors then sat on the FBI's file for nearly ten years. Unlike in *Marshall*, where the government's belated decision to bring the case was motivated by a change in the evidence, here the indictment was motivated by the imminent expiration of the statute of limitations. One indication of governmental recklessness was the decision to mark the case "low-priority." The facts here—a small-business owner accused of burning down his own business for insurance profit—are nearly identical to those in *Sabath*, so the same reasoning about prosecutors' probable knowledge applies: i.e., the government ought to have known that, while the evidence for *its own* case was relatively static and in-hand, *Coda's* case was extremely vulnerable to "diminished memories, ... lost evidence, and unavailable witnesses." While the government initially delayed bringing charges for a legitimate reason—waiting for unrelated state charges to resolve—its subsequent delays, and failure to upgrade the case's priority, were unjustifiable. With every year that passed, the risk of substantial prejudice to Coda increased. As in *Sabath*, prosecutors here claim overwork, as well as political pressure to pursue other types of cases. But these reasons are non-investigative and, consequently, non-exculpatory. They merely factor into the balancing test and are weighed against the degree of prejudice to Coda.

Coda suffered severe prejudice as a direct result of the government's delay. Five witnesses became unavailable and record of his Greyhound bus ticket purchase was lost, amounting to the total obliteration of his alibi defense. The circumstantial nature of an alibi defense to arson indicates the government's conscious disregard for the possibility that delay might prejudice Coda. Even if this court finds that the government's behavior was entirely due to backlogs and political pressure (i.e., was merely negligent), Coda's prejudice was severe enough

that his Fifth Amendment rights were still violated, as the possibility of a fair trial was not merely diminished but destroyed.

II. Admission of petitioner's post-arrest but pre-Miranda silence as substantive evidence of guilt violated his Fifth Amendment right against self-incrimination

The Fifth Amendment of the United States Constitution expressly prohibits the government from compelling an individual in a criminal case “to be a witness against himself.” U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court established certain prophylactic rules to appropriately safeguard this Fifth Amendment right against self-incrimination. Prior to any questioning, an individual in state custody “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.” *Id.* at 444. The court puts forward several reasons why the police should read this statement of rights: to “overcome[] the inherent pressures of the interrogation atmosphere,” “to make [the arrestee] aware not only of the privilege, but also of the consequences of forgoing it,” and to ensure that any waiver of these rights is made “knowingly and intelligently.” *Id.* at 468, 469, 479. Notably, nowhere in this opinion is any indication that the purpose of reading the *Miranda* rights is to formally grant these rights to a defendant; if the purpose is to make an individual aware of a right, then that right existed prior to the warning that enlightened them. In dicta, the court gives two possible means by which the *Miranda* right to silence might be used, both of which cannot be used at trial by the prosecution: “The prosecution may not, therefore, use at trial the fact that he stood mute *or* claimed his privilege in the face of accusation.” *Id.* at 468 n. 37 (emphasis added).

Subsequent court cases have expounded upon these safeguard protections from the Fifth Amendment. In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Supreme Court held that the implication of the Miranda warnings is that “silence will carry no penalty” and as such, “it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.”<sup>1</sup> In this way, *Doyle* clarified the dicta in *Miranda* (which might have only encompassed the affirmative use of evidence in the prosecutor’s case in chief), establishing the inadmissibility of silence as either in chief or impeachable evidence in a trial.

More recent Supreme Court cases have exposed divisions in the judiciary’s application of *Doyle* and *Miranda*. In *Berghuis v. Thompkins*, 560 U.S. 370, 374 (2010), after being arrested and given his *Miranda* rights, defendant Thompkins was interrogated for almost three hours. During this time, Thompkins was mostly silent, but gave “a few limited verbal responses.” *Id.* at 375. He neither asked for a lawyer nor specifically invoked his right to silence, and eventually he verbally admitted to praying for forgiveness for his suspected crime. *Id.* at 376. The Supreme Court rejected his later attempt to have this evidence excluded, finding that he had not invoked his Fifth Amendment rights but had instead waived them. *Id.* at 388, 389. The Court held that mere silence after being given *Miranda* rights was insufficient to invoke those rights, and that Thompkins needed to say “that he wanted to remain silent or that he did not want to talk with the police.” *Id.* at 382. The Court goes on to state that “[h]ad he made either of these simple, unambiguous statements, he would have invoked his ‘right to cut off questioning.’” *Id.* citing

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<sup>1</sup> Regarding this specific case, the Thirteenth Circuit Court was thus incorrect to fully adopt the East Virginia District Court opinion regarding this case; *Doyle* holds post-*Miranda* silence inadmissible as even impeachment evidence, contrary to what the district court held. Similarly, the district court’s summation of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) is also incorrect – the case also holds post-*Miranda* silence inadmissible as impeachment evidence.

*Mosley*, supra, at 103, 96 S. Ct. 321 (quoting *Miranda*, supra, at 474) (emphasis added). The Court also held that by choosing to end his silence and effectively confess to the crime, Thompkins effectively waived his right to remain silent. *Berghuis*, 560 U.S. at 386.

The implications of *Berghuis* are a matter of dispute. The case was referenced extensively in *Salinas v. Texas*, 570 U.S. 178 (2013), in both the plurality opinion and the dissent. The plurality opinion argued that where an individual is voluntarily interacting with police, pre-arrest and pre-*Miranda*, they have no *Miranda* protections of excluding silence evidence, absent an express invocation of their right to silence. *Id.* at 188, 189. However, in doing so, the Court relies heavily on *Berghuis* and states that, “regardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.” *Id.* at 188.

The plurality opinion in *Salinas* thus seeks to expand *Berghuis*’s arguments far beyond their original limitations; in *Berghuis* the question was never whether the defendant’s interview *silence* was admissible, but rather their *confession*. In *Berghuis*, the Court notes that invoking the right to remain silent would only have had a result of cutting off interrogation; at no point is it implied that the interview silence needed protection through invocation, as it was already protected. The right to continued silence was also implicit in the *Berghuis* Court’s statement that “If Thompkins wanted to remain silent, *he could have said nothing in response* to Helgert’s questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation.” *Berghuis*, 560 U.S. at 386 (emphasis added).

As could be expected, the fractured and non-definitive nature of the *Salinas* decision has done nothing to rectify the circuit split on the admissibility of silence evidence.

- a. To rectify the discrepancy in judicial practice, this Court should adopt the rule of the First, Second, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, that post-arrest, pre-*Miranda* silence is inadmissible as substantive evidence of guilt.

In *United States v. Wilchcombe*, 838 F.3d 1179, 1190 (11th Cir. 2016) (citations omitted), the Eleventh Circuit Court of Appeals notes that while the Fourth, Eighth, and Eleventh Circuits only prohibit the use of post-*Miranda* silence as substantive evidence of guilt, the Ninth, Tenth, and D.C. Circuits prohibit the use of post-arrest, pre-*Miranda* silence and the First, Second, Sixth, and Seventh Circuits go even farther, prohibiting even the use of pre-arrest silence as substantive evidence of guilt.<sup>2</sup> This slight majority of Circuits is as close to a consensus as the federal courts have come with *Miranda* rights, and holds as inadmissible at least the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. *Coppola v. Powell*, 878 F.2d 1562 (1st Cir. 1989); *United States v. Okatan*, 728 F.3d 111 (2nd Cir. 2013); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000); *Seymour v. Walker*, 224 F.3d 542 (6th Cir. 2000); *Ouska v. Cahill-Masching*, 246 F.3d 1036 (7th Cir. 2001); *United States v. Muhammad*, 502 F.3d 646, 657-658 (7th Cir. 2007); *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000); *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991); *United States v. Moore*, 104 F.3d 377 (D.C. 1997). Given the “spectacularly chaotic farrago of opinions” surrounding *Miranda* rights that is now “of such complexity that only one practicing attorney in a thousand can accurately summarize them off the top of her head,” the Supreme Court should affirm this intersection of court

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<sup>2</sup> Closer examination of the cases provided in *Wilchcombe* actually shows that the 10<sup>th</sup> Circuit should fall within the first group. *Wilchcombe* cites *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), which actually deals with a pre-arrest silence being inadmissible as substantive evidence of guilt.

opinion. CONTRIBUTION: MIRANDA'S FOURFOLD FAILURE, 97 B.U.L. Rev. 849, 869 (quoting James Duane).

Unlike in the pre-arrest cases above, post-arrest cases within this body of the Circuit Courts have not detailed any instances where invocation of rights was necessary to secure *Miranda* protections. In *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), Timothy Whitehead was arrested after he was found to be smuggling marijuana in his car into the United States from Mexico. After his arrest, Whitehead remained silent while a U.S. Customs Service Inspector continued to search the vehicle and his person. *Id.* at 637. During the subsequent trial, the government used testimony about Whitehead's silence during its case-in-chief and then brought up his silence again during closing arguments. *Id.* at 638. The Ninth Circuit held that this was impermissible and to allow such "would 'act[] as an impermissible penalty on the exercise of the . . . right to remain silent.'" *Id.*, citing *Douglas v. Cupp*, 578 F.2d 266, 267 (9th Cir. 1978). The Ninth Circuit expounded further on this principle in *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001), where they explained that the recitation of *Miranda* rights to a defendant "[is] not the genesis of those rights" but that they stem from the Fifth Amendment: "Therefore, once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning."

In response to this idea, the government is likely to argue that the justifications underlying exclusion of post-*Miranda* silence do not exist for pre-*Miranda* silence. In *United States v. Frazier*, 408 F.3d 1102, 1110 (8th Cir. 2005), the Eighth Circuit ruled that post-*Miranda* silence may not be used against a defendant based on the following justifications: "1) such silence may be nothing more than an arrestee's exercise of her constitutional rights; and 2)



because the *Miranda* warnings carry an ‘implicit assurance’ that an arrestee's silence will not be used against her, using her silence would unfairly penalize her for relying on these assurances.”

This argument is convincingly answered in *United States v. Nunez-Rios*, 622 F.2d 1093 (2nd Cir. 1980), where prosecutors sought to use a woman’s failure to react as evidence of her guilt when—after she was arrested—drugs were found in her purse. The court ruled that the prosecution’s use of her silent reaction was improper (though the error was harmless because other evidence sufficiently established her guilt). *Id.* at 1101. In its discussion of the admissibility of pre-*Miranda* silence evidence, the court pointed out that the right to remain silent is derived from constitutional guarantees rather than the *Miranda* warnings, and thus exist before the rights are read to her. *Id.* at 1100.<sup>3</sup> The court then quotes the New York Court of Appeals in *People v. Conyers*, 400 N.E.2d 342, 346 (1980):

The implied promise made to a suspect where he is given *Miranda* warnings merely repeats and reiterates the promise already made by both (New York and Federal) Constitutions. Although it is necessary to repeat that promise in order to ensure that the suspect fully understands his constitutional rights, the failure of the police to do so does not serve to prevent a suspect from relying upon that promise.

*Nunez-Rios*, 622 F.2d at 1100.

By this reasoning, *Miranda* rights exist independently of when a government actor vocalizes them. *Doyle* correctly states that it would be unjust to punish someone for relying on a verbal or written assurance of *Miranda* rights. However, *Doyle* only seems to apply to the implied promise of government agents and police when they specifically read someone their *Miranda* rights, rather than acknowledging that the Supreme Court is the one that has expressly made the assurance of those rights. If *Doyle* were given this logical extension, then defendants

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<sup>3</sup> While this reasoning might also apply to pre-arrest silence, the court takes care to note that Fifth Amendment protections “assume greatest importance following arrest, when the arrestee is confronted with a direct accusation of criminal conduct.” *Id.* at 1100.

such as Coda would be protected where they relied on the Supreme Court’s promise of a right to remain silent. Furthermore, extending *Doyle* to all post-arrest situations would “encourage law enforcement officials to give Miranda warnings promptly,” rather than “delay Miranda warnings in order to observe defendant’s conduct,” which was precisely what happened in *Nunez-Rios*. *Id.* at 1101.

In Coda’s case, the Thirteenth Circuit and East Virginia District Courts erred in holding that a three-justice plurality opinion about pre-arrest cases should control, rather than the holding used by the majority of Circuits that post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt. Coda’s facts are quite similar to the events of *Whitehead* and *Nunez-Rios*. In all three instances, government actors arrested the defendants and then waited to inform them of their *Miranda* rights. *R.* at 7. In all three instances, defendants remained silent in response to officers’ actions. *Id.* In all three instances, defendants used no invocation to signify their intention to remain silent. There is some minor difference in how the government is using the reaction of silence—for Coda, the government is arguing that any reasonable person with an alibi would have asserted that alibi—but in all three instances, prosecution attempted to use a non-response to a non-question as evidence of guilt. *Id.*

Under the rule of the First, Second, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, the silence evidence in Coda’s case would be inadmissible as substantive evidence of guilt. Unlike in *Nunez-Rios*, the prosecution’s use of silence was not harmless error. The appellate record and Chief Judge Martz indicate that Coda’s silence was sufficiently vital to the case that the government did not even attempt to allege harmless error. *R.* at 15. This Court should reverse the lower court’s admission of Coda’s silence as evidence and dismiss the charges against him.

- b. In the alternative, the Court should find that the prosecution's use of Coda's silence renders the reading of charges and the subsequent silence as the functional equivalent of an interrogation.

If the Court declines to adopt the Circuit majority rule above, then Coda's silence should still be considered inadmissible on the grounds that it came as the result of a functional interrogation. In *R.I. v. Innis*, 446 U.S. 291, 300, 301 (1980), the Supreme Court ruled that “*Miranda* safeguards come into play” with “either express questioning or its functional equivalent.” Words or actions by the police “that the police should know are reasonably likely to elicit an incriminating response” are the functional equivalent of an interrogation. The Court further defines “incriminating response” as “*any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial.*” *Id.* at 301, n. 5 (emphasis added).

In the case at hand, the bare facts show that this standard is met. FBI Special Agent Park arrested Coda, then immediately informed him of the charges against him. R. at 7. His response was silence, which the prosecution now seeks to introduce at trial. *Id.* If the government is able to use post-arrest, pre-*Miranda* silence as substantive evidence of guilt, Coda's situation is exactly the sort of self-incriminating situation *Miranda* sought to avoid; an individual is trapped in custody and their only options are to incriminate themselves through silence or confession.

- c. If this Court rejects the preceding arguments and allows Coda's conviction to stand on *Salinas*' plurality holding that one must invoke *Miranda* rights, it will have carried out a gross miscarriage of justice.

Given the lack of clarity in current case law, placing a duty of invocation on defendants when the specific wording of the right is a “right to remain silent” is absurd. This Court should clarify or retract the reasoning in *Salinas*, where “the plurality adopts a set of cases readily distinguishable from both the facts and issues before it in order to manufacture a Fifth Amendment framework that precludes application of the privilege to any defendant who has not immediately and expressly invoked the privilege except in narrow, enumerated circumstances.” Anna Strandberg, Article, Asking for It: Silence and Invoking the Fifth Amendment Privilege Against Self-Incrimination After *Salinas v. Texas*, 8 Charleston L. Rev. 591, 623 (2014).

To require express invocation of a right that the Supreme Court in *Miranda* mandated arrestees be informed of is baffling; if the purpose behind reading *Miranda* rights is, in fact, “to make him aware . . . of the privilege,” then how can an expectation be placed on individuals to be aware of their rights before being so informed? *Miranda*, 384 U.S. at 469. To allow silence—the right which government actors must tell individuals they have—to be used as evidence of guilt would in effect penalize individual for reliance on the very rights that this court has tried to inform people that they have.

Furthermore, an expectation of legal competence in the reasonable arrestee beyond simple knowledge of the right to remain silent is laughable, given the differing levels of interpretation about *Miranda* rights within the legal field itself. One case from the Second Circuit even calls into question whether an individual *can* anticipatorily invoke *Miranda* rights outside of a custodial interrogation. *United States v. Medunjanin*, 752 F.3d 576, 587 (2d Cir. 2014) (citations omitted).

Whether a suspect’s silence can be used now depends on whether he was or was not in custody when he declined to speak, whether he had or had not received the

Miranda warnings, whether he did or did not invoke the privilege against self-incrimination, and whether the government seeks to use his silence to establish his guilt, impeach his testimony, determine his sentence, or impose prison discipline. Displaying the interaction of these variables would require a chart with many boxes, a significant number of which would remain blank.

CONTRIBUTION: MIRANDA'S FOURFOLD FAILURE, 97 B.U.L. Rev. 849, 869.

Requiring an invocation of rights makes sense where some action is expected in response by the government; the government need not assign a lawyer without request and need not end interrogation without request. But passive rights rarely require express invocation before they are used. Churchgoers need not pause before entering a church building to invoke their religious freedoms. Journalists need not preface articles with a statement of their press freedoms. The Supreme Court's *Miranda* wording is not simply a "right to silence" but a "right to *remain* silent." *Miranda*, 384 U.S. 468 (emphasis added). Nowhere is there an implication that the right to *remain* silent requires one to cease *remaining* silent and vocally request the right.

Furthermore, by choosing to allow an ambiguous silence to be substantive evidence of guilt rather than a presumptive exercise of a well-known right, then the court is abandoning a fundamental precept of the criminal justice system: the presumption of innocence. By permitting silence in this case to be used as substantive evidence of guilt, the court would be choosing to assume guilt as an explanation over knowledge of rights as an explanation.

On that subject, the conviction outcome of this case shows the potential level to which this prosecutorial evidentiary power might prejudice a case. The case otherwise had insufficient evidence to convict beyond a reasonable doubt. R. at 15. Any number of other explanations might have been at play, rendering Coda silent upon his arrest. Perhaps he was shocked or scared, or had confusion or uncertainty about what actually happened nine years in the past and so had a desire not to misspeak. Perhaps he had an awareness of his own lack of knowledge of how the system works and desired to wait to rely on a lawyer. Any of these might have been the

case herein, and yet the prosecution was able to use this silence to secure a conviction that they otherwise would not have. This indicates a dangerous level of prosecutorial evidentiary power, and both the Second Circuit and the DC Circuit have raised the concern of giving problematic incentives to police. *Nunez-Rios*, 622 F.2d at 1101; *Moore*, 104 F.3d at 385.

### CONCLUSION

The prosecution of the case against Austin Coda was marked by violations of procedural justice. First, prosecutors decimated Coda's alibi defense with an unjustified, non-investigative delay. Second, the government used Coda's post-arrest, pre-*Miranda* silence as evidence of his substantive guilt in a mockery of this Court's rulings that safeguard the right against self-incrimination. For these reasons, this Court should REVERSE the judgment of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

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Team 40

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