

CAUSE NO. 21-125

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IN THE  
SUPREME COURT  
OF THE UNITED STATES

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AUSTIN CODA,  
Petitioner,

—v.—

UNITED STATES OF AMERICA,  
Respondent.

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

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BRIEF FOR PETITIONER

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ORAL ARGUMENT REQUESTED

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## **QUESTION PRESENTED**

- I. Whether the Government's needless nine-year pre-indictment delay warrants dismissal under the Fifth Amendment's Due Process clause when the delay robbed a small business owner of his right to fair trial after losing five key alibi witnesses while the Government carelessly procrastinated indictment.
  
- II. Whether the Government violates the Fifth Amendment right against self-incrimination by using a small business owner's refusal to make statements after arrest as substantive evidence of guilt just because the silence occurred before the Government's Miranda warning.

## STATEMENT OF THE CASE

### **I. Statement of the Facts**

Mr. Coda, a hardworking business owner living in the small rural town of Plainview, East Virginia, fought to keep his hardware store afloat during the Great Recession. R. at 1. On December 22, 2010, a catastrophic explosion set his store ablaze, destroying everything he had worked so hard to build. R. at 2. The Government investigators concluded that an old, leaky gas line had caused disaster. Id. Nine years after Mr. Austin Coda tragically lost his business, the Government pours salt into the wound by indicting him on baseless charges. R. at 3.

Like everyone else in America, Mr. Coda struggled financially during the late 2000's. R. at 1. Like every responsible business owner, Mr. Coda maintained an insurance policy on his hardware store. R. at 2. Like anyone would be in his position, Mr. Coda was anxious about the future. Id. Yet after learning of these reasonable measures, the Government toyed with the idea of foul play. Id. Of course, the Government considered its investigation of Mr. Coda a "low priority," and for nearly a decade, the case did not progress. Id. However, just days before the statute of limitations had run, with no new evidence, the Government indicted Mr. Coda under 18 U.S.C. § 844(i) in a desperate attempt to pin the blame on someone at the last minute. R. at 2- 3.

Unsurprisingly, the needless and unreasonably long delay hampered Mr. Coda's ability to defend himself against the Government's Hail Mary attempt to score a conviction. R. at 3. As the family man that he is, Mr. Coda was spending his birthday and holiday season with close relatives in New York the day he lost his business. Id. Four of the five family members he visited that Christmas that could testify to his whereabouts have since passed away. Id. Two were lost in battles with chronic disease. Id. Two more died in a horrific car crash. Id. The only surviving

family member Mr. Coda could rely on sadly suffers from dementia. R. at 3. Furthermore, in the decade the Government procrastinated, Mr. Coda also lost the Greyhound bus records that would corroborate his alibi. Id.

Trying to excuse its lack of diligence, the Government first pointed to Mr. Coda's entirely unrelated State court proceedings. R. at 2. The Government argued that these proceedings, which have long since ended, would have created travel inconveniences. Id. Additionally, the Government argues political pressure to focus on more important cases gave reason to completely Coda's "low priority" case. Id. Finally, the Government tries to claim that office turnover prevented it from investigating Mr. Coda for roughly a decade. Id.

Showing up on his doorstep nine years later, the Government arrested Mr. Coda on April 23, 2019. R. at 7. Throughout the arrest, Mr. Coda remained silent, as is his constitutional right. Id. It was not until he reached a detention center for interrogation that the Government finally read Mr. Coda his Miranda rights. Id. Absurdly, the Government claims that a reasonable person would not remain silent after arrest. R. at 8. Despite the explosion occurring nearly a decade earlier, the Government claims that Mr. Coda should have immediately recalled and asserted his alibi defense. Id. Now, the Government wishes to use Mr. Coda's post-arrest silence as substantive evidence of guilt simply because the silence occurred before receiving a Miranda warning. R. at 7.

## **II. Procedural History**

Mr. Coda has moved to dismiss his indictment under 18 U.S.C. § 844(i) on the grounds that the Government's unwarranted pre-indictment delay violated his Fifth Amendment right to Due Process. R. at 1. The District Court of East Virginia held that Mr. Coda suffered actual and substantial prejudice to his defense. R. at 7. Mr. Coda argued for the application of a balancing

test, weighing the actual harm and length of the pre-indictment delay against the Government's justifications for the delay. R. at 4. Instead, the District Court required a near impossible showing that the Government tactically and intentionally delayed Mr. Coda's indictment in "bad faith." Id.

Mr. Coda also moved to suppress the Government's attempt to use his silence as substantive evidence of guilt. R. at 7. Mr. Coda asserted the use of this evidence would violate the Fifth Amendment. R. at 7-8. But the District Court of East Virginia declined to suppress the use of Mr. Coda's silence as substantive evidence. R. at 7. The court was persuaded that "common sense" suggested Mr. Coda remained silent after his arrest because he did not in fact have an alibi. R. at 9. Requiring Mr. Coda to assert his right to remain silent verbally, the District Court held that using Mr. Coda's silence as substantive evidence of guilt did not violate the right against self-incrimination. R. at 10.

Mr. Coda appealed, and amidst the dissent of its Chief Justice on both issues, the Thirteenth Circuit Court of Appeals affirmed the District Court's holding. R. at 16.



## **SUMMARY OF THE ARGUMENT**

The Government's needless and unreasonable pre-indictment delay deprived Mr. Coda of his Fifth Amendment right to Due Process. The Government concedes that its delay caused Mr. Coda to suffer actual prejudice. Nevertheless, the District and Circuit Courts applied the wrong test when analyzing Mr. Coda's deprivation of Due Process by requiring him to prove the Government acted in bad faith. When assessing Due Process, this Court considers three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of procedure erroneously depriving these interests; and (3) the fiscal, administrative, or practical burdens corrected procedures would place on the Government. The balancing test satisfies these factors, whereas the bad faith requirement applied by the lower courts does not. The statute of limitations failed to protect Mr. Coda's interest in receiving a fair trial because it did nothing to protect against actual and substantive prejudice. The bad faith requirement failed to prevent the risk of error because it creates an impossible standard that negates the purpose of having a test whatsoever. And perhaps most notably, the balancing test sufficiently protects the Government's interests because it creates no practical burdens. Therefore, the Fifth Amendment's guarantee of Due Process requires this Court to discontinue the bad faith requirement, apply the balancing test, and find the Government's pre-indictment delay deprived Mr. Coda of his right to a fair trial.

Additionally, the Government's use of silence as substantive evidence of guilt flies in the face of the Fifth Amendment right against self-incrimination. The Government claims that Mr. Coda never asserted his right to remain silent between the time he was arrested and the time he received a Miranda warning. However, Mr. Coda properly asserted his right simply by exercising it. Mr. Coda's right against self-incrimination began the very second the Government placed him

under arrest, and he never once took any actions that could lead anyone to believe he waived his right. Moreover, even if this Court does not find that Mr. Coda properly asserted his right to remain silent, the Government still cannot use Mr. Coda's silence as substantive evidence of guilt. Rather, the Government could only use silence for the limited purpose of impeachment. Even still, it could only do so if Mr. Coda's silence provided a substantial amount of probative value. Thus, the admission of Mr. Coda's post-arrest, pre-Miranda silence as substantive evidence of guilt violated his Fifth Amendment right against self-incrimination.

## ARGUMENT

### **I. This Court Should Adopt a Balancing Test—Weighing the Pre-indictment Delay’s Harm and Length Against the Government’s Justifications—to Determine When Pre-indictment Delay Violates Due Process.**

The Fifth Amendment Due Process Clause shields Mr. Coda from the Government’s illegitimate, prejudicial pre-indictment delay. Due Process protects all American Citizens from unjust deprivations of liberty.<sup>1</sup> U.S. CONST. amend. V. Due Process even protects these citizens before formal indictment. United States v. Marion, 404 U.S. 307, 324 (1971). Because this Court has never found that pre-indictment delay caused actual prejudice, this Court has never had the opportunity to determine when Due Process demands the dismissal of an indictment. United States v. Lovasco, 431 U.S. 783, 797 (1977) (deciding not to establish a definitive test because pre-indictment delay did not cause actual prejudice).

But now the Government’s illegitimate nine-year pre-indictment delay actually prejudiced Mr. Coda and oppressively stripped him of his right to fair trial. R. at 5, 16. Mr. Coda’s circumstances present this Court with the unique window to resolve the ambiguity surrounding Due Process and pre-indictment delay. The attack on Mr. Coda’s constitutional rights compels this Court to adopt the following three-part balancing test: (1) the defendant proves actual prejudice; (2) the pre-indictment delay’s length of time and harm caused outweighs the prosecution’s reasons for delay; (3) the Government was culpable in delaying the indictment. Howell v. Baker, 904 F.2d 889, 895 (4th Cir. 1990) (applying the balancing test when determining whether to dismiss charges for pre-indictment delay); accord United States v. Doerr, 886 F.2d 944, 964 (7th Cir. 1989); United States v. Mays, 549 F.2d 670, 677 (9th Cir. 1977); United States v. Barket, 530 F.2d 189, 195 (8th Cir. 1975). This Court should formally

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<sup>1</sup> “No person shall . . . be deprived of life, liberty, or property without due process of the law. . .” U.S. CONST. amend. V.

adopt the balancing test for three reasons: the statute of limitations does not sufficiently protect Mr. Coda's right to Due Process; a bad faith test insurmountably burdens Mr. Coda while giving the Government free rein to prejudice his defense without consequence; and the balancing test protects Mr. Coda's interests from the Government's erroneous procedure without burdening the Government.

**A. The Statute of Limitations Does Not Protect Mr. Coda's Right to Due Process.**

The statute of limitations failed to protect Mr. Coda's interest in receiving a fair trial because it only set a maximum limitation and fails to account for otherwise prejudicial pre-indictment delay. The statute of limitations can only protect Mr. Coda against speculative prejudice or incidental prejudice—not actual prejudice. Marion, 404 U.S. at 324 (holding statute of limitations protected due process rights when lost witness testimony *might have* exonerated defendant because witnesses could only testify to small circumstantial details); United States v. Anagnostou, 974 F.2d 939, 943 (7th Cir. 1992) (finding defendant's prejudice speculative when defendant claimed his now deceased friend would have confessed to the crime). Due Process, however, safeguards individuals' rights when substantial delays violate justice, fair play, and decency. Lovasco, 431 U.S. at 789-93 (finding Due Process helps protect against oppressive delay when delay causes substantial and actual prejudice). Thus, the statute of limitations alone is insufficient, and Due Process must apply when pre-indictment delay results in the loss of witnesses who would have provided dispositive testimony in the accused's defense. Howell, 904 F.2d at 895 (reasoning a mother's relation to the accused assured she would have provided dispositive testimony); accord Doerr, 886 F.2d at 964.

Here, the statute of limitations did not adequately protect Mr. Coda's constitutional rights. Mr. Coda lost all five of his witnesses to either death or disease because of the

Government's pre-indictment delay. The Government concedes its pre-indictment delay substantively prejudiced Mr. Coda despite being within statute of limitations. As Marion shows, when the defendant's supplementary witness's memories faded over time, losing witness testimony does not always dispositively prove prejudice. Yet Mr. Coda's loss suffices in proving prejudice contrasting Marion, Mr. Coda's witnesses' memories did not simply fade. Four of his five witnesses died within the nine-year delay, while the fifth family member cannot credibly testify because of his dementia.

Unlike when the defendant merely lost witnesses who could only testify to small circumstantial details in Marion, Mr. Coda lost witnesses who were the crux of his defense. Just as in Howell, the delay cost Mr. Coda his alibi witnesses. For that reason, the statute of limitations failed in protecting Mr. Coda's fundamental right to present essential witness testimony.

Further, the Government's pre-indictment delay caused actual—not speculative—prejudice. Contrasting the defendant in Anagnostou—who conveniently claimed his recently deceased friend would have confessed to the crime—Mr. Coda lost the testimony of five family members who assuredly would have helped prove his innocence. Much like Barker, where the accused lost the testimony of his mother, Mr. Coda's close family relationship between him and his lost witnesses guaranteed they would provide dispositive testimony.

Mr. Coda's witnesses were certain to corroborate Mr. Coda's assertions. Differing from Anagnostou, when the defendant claimed the lost witness would have taken the blame, Mr. Coda's lost witness only needed to testify to Mr. Coda's whereabouts during the alleged offense. Comparatively, it is much more likely that Mr. Coda's family members would have testified that he visited them during his birthday than the defendant's friend testifying to being the actual

culprit, thereby jeopardizing the friend's own liberty. Consequently, Mr. Coda's prejudice was actual—not speculative. Because the statute of limitations failed to prevent the Government's pre-indictment delay from extinguishing Mr. Coda's fundamental right to a fair trial, Due Process must safeguard him instead.

**B. The Bad Faith Test Insurmountably Burdens Mr. Coda, Permits Oppressive Government Behavior, and Essentially Nullifies Due Process.**

The bad faith requirement applied by the lower courts failed to prevent the risk of erroneously depriving Mr. Coda Due Process because it is an impossible standard to prove. Proving bad faith is such a strenuous burden that the 11th Circuit once remarked it has never once dismissed a case for pre-indictment delay under the bad faith test. United States v. Foxman, 87 F.3d 1220, 1225 n.4 (11th Cir. 2011).<sup>2</sup> Because it is impossible to prove, this Court has repeatedly refused to adopt a bright-line bad faith rule when faced with the proposition. See Lovasco, 431 U.S. at 796; see also Marion, 404 U.S. at 324.

Bad faith is so arduous to prove because individuals have no possible way of obtaining evidence necessary to meet their burden. Mays, 549 F.2d at 676 (rejecting the bad faith requirement because the Government can always withhold evidence by claiming privilege). Thus, the toothless bad faith test grants the Government free rein to egregiously prejudice American Citizen. Howell, 904 F.2d at 895 (holding pre-indictment delay warranted dismissal even though an accused driver did not prove bad faith because Government delay was fundamentally unjust and unfair). To prevent rampant Government foul play, Circuit Courts have begun asking the Government to provide rationale for its harm, after the accused proves the heavy burden of actual prejudice. United States v. Sowa, 34 F.3d 447, 451 (7<sup>th</sup> Cir. 1994)

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<sup>2</sup> “[S]o far as we can tell, we have never concluded that such a dismissal was appropriate.” Foxman, 87 F.3d at 1225 n.4.

(asserting the Government should at least justify its delay because accused has no way of knowing why Government delayed).

Here, the Government provided Mr. Coda with no avenue to prove it intentionally or knowingly delayed his indictment to gain a tactical advantage. As in Mays, where the Government claimed privilege to withhold evidence of bad faith, the Government altogether failed to provide Mr. Coda with any evidence of its intent. The first time the Government even offered a reason for delay was when arguing to uphold Mr. Coda's conviction in their brief to the District Court of East Virginia.

Moreover, Mr. Coda had no way of preemptively preventing the Government from prejudicing his case. In Sowa, the accused would have had to disclose his defense so that the Government would know its delay was harmful. Here too, Mr. Coda would have had to provide critical information about the strengths and weaknesses of his case for the Government to specifically know its delay would harm Mr. Coda's defense. This requirement is fundamentally unfair to the accused. American citizens should not be unjustly forced to disclose any information to the Government before indictment. This information strengthens the Government's case against the accused, thereby forcing individuals to help prosecute themselves. Even if he wanted to inform the Government about how delay would harm his defense, the Government never gave him the chance. Mr. Coda had no idea he was under investigation until the Government indicted him. Thus, this Court should uniformly reject the bad faith test because the impossible standard fails to prevent the risk of the erroneous deprivation of Mr. Coda's Due Process rights.

### **C. The Balancing Test Sufficiently Preserves Government Interests.**

The balancing test creates no practical burdens for the Government because it allows the Government to maintain prosecutorial discretion. The balancing test grants wide latitude to delay indictment for legitimate investigative purposes. Lovasco, 431 U.S. at 793 (permitting delay so long as the Government can at least tie the reasons for its delay back to an investigation in some way). The balancing test expands to grant the Government even more discretion when handling a complex case. United States v. Moran, 759 F.2d 777, 783 (9th Cir. 1985) (finding Government justified in delaying a complex case involving multiple individuals because complex cases require more caution). The balancing test also allows administrative freedom by permitting the Government to delay indictments while the accused stands before court proceedings in other jurisdictions. Sowa, 34 F.3d at 451 (holding Government had valid reason to delay indictment until state proceedings against the accused). That said, the Government is only justified in delaying until the conclusion of the accused's other court proceedings. Id.

That said, the Government cannot illegitimately delay indictment and deprive individuals of their fundamental liberties under this balancing test. Barket, 530 F.2d at 196 (dismissing charges when Government's disorganization delayed indictment because Government's sloppy communication—while not intentional—still robbed banker of his fundamental right to fair trial). Likewise, heavy workload and office turnover is not a compelling reason for pre-indictment delays. Anagnostou, 974 F.2d at 943 (finding pre-indictment delay unreasonable when Government attributed its delay to high workload causing the case to shift from one attorney to the next). Further, delaying indictment until the “eve” of the statute of limitations simply because the Government prioritized other cases does not justify depriving citizens of a fair trial. United States v. Sabath, 990 F. Supp. 1007, 1016 (N.D. Ill. 1998) (holding Government's pre-indictment



delay unjustified when it prioritized other “more winnable” cases, reasoning Government should have dropped charges if it were so concerned with “winnability”).

The Government could have delayed indictment for investigative reasons. While this case was not as complex as Moran, the Government could have reasoned they needed nine years to build a case against Mr. Coda. But the Government cannot even claim delaying for investigative reasons because the investigation ceased in 2010, more than nine-years before indictment.

Ultimately, the Government’s reasons for delay are insufficient. The Government only ever justified the initial delay when they waited for the conclusion of state proceedings. Unlike in Sowa—where the Government indicted the defendant as soon as his other proceedings concluded—here the Government continued to delay after Mr. Coda’s state proceedings concluded. It has not provided and cannot provide any justification for the next nine years. Just like in Sabath—where the Government delayed indicting a low priority case right up until the statute of limitations—the Government now blames its procrastination on Mr. Coda’s case being “low priority.” Similar to Barket, the Government was so irresponsibly disorganized that it only indicted Mr. Coda once it realized the statute of limitations had nearly expired.

## **II. The Government’s Use of Mr. Coda’s Post-Arrest Silence as Substantive Evidence of Guilt Violates the Fifth Amendment.**

The Fifth Amendment of the United States Constitution guarantees all citizens of the United States the privilege against being “compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. In the landmark case Miranda v. Arizona, this Court gave the right against self-incrimination broad protection. Miranda v. Arizona, 384 U.S. 436, 468 (1966). The Court held every arrest must be accompanied by a recitation of certain constitutional rights,

now known as the “Miranda rights.”<sup>3</sup> This Court recognized that a forceful Government agent could easily convince the average citizen that remaining silent is a sign of guilt. Id. The Court further reasoned that reading a citizen their Miranda rights serves to implicitly assure every American “that silence will carry no penalty.” Doyle v. Ohio, 426 U.S. 610, 617 (1976) (reasoning the accused will believe silence carries no penalty after being assured he has the right to remain silent). This Court found it necessary to provide base-level knowledge of Constitutional rights to helpless police targets.<sup>4</sup>

After Miranda, this Court continues to affirm that the Government may not use a citizen’s *post*-Miranda warning silence as substantive evidence of guilt. Doyle, 426 U.S. at 617-19. However, evidence of a citizen’s *pre*-Miranda silence is admissible as substantive evidence in the most limited of circumstances. See Salinas v. Texas, 570 U.S. 178, 186 (2013) (pre-Miranda silence found to be admissible in the uncommon situation where suspect was not yet placed into police custody and also initiated talks with police voluntarily). Salinas established a rare situation where silence may be used as substantive evidence before the Government ever places an individual into custody. Doyle, however, expressly found that silence cannot ever be used as substantive evidence after the recitation of Miranda rights.

The critical question is whether an individual who has not been Mirandized after an arrest should have his constitutional right against self-incrimination stripped away. The issue falls into an extremely narrow gap between Salinas and Doyle. This Court should explicitly establish the protection of Mr. Coda’s Fifth Amendment right for two reasons: (1) his arrest triggered the right

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<sup>3</sup> When a person is read a Miranda warning, also known as being “Mirandized,” they are told: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. See Berghuis v. Thompkins, 560 U.S. 370, 374-75 (2010).

<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 468 (1966) (“for those unaware of the privilege, the warning is needed simply to make them aware of it.”)

to remain silent, which he never waived; and (2) regardless, the Government can only use silence to impeach his testimony, not as substantive evidence of guilt.

**A. Mr. Coda’s Right to Remain Silent Triggered When the Government Placed Him Under Arrest, and He Never Waived That Right.**

The right to remain silent is an integral part of an American’s constitutional guarantee against self-incrimination.<sup>5</sup> The reading of Miranda rights are not a prerequisite to the ability to exercise them; the purpose of the Miranda Court was to “assure that those rights were properly safeguarded.” United States v. Moore, 104 F.3d 377, 386 (D.C. Cir. 1997). With this in mind, the Government may not use an individual’s silence as substantive evidence once the right to remain silent has been triggered. After a triggering event, these rights must be given the broad protection the Supreme Court sought. Id. at 467-68. The only way Miranda protections cease is if an individual actively waives the right to remain silent. Berghuis v. Thompkins, 560 U.S. 370, 388-89 (2010). The issue, then, is twofold: (1) what triggers an individual’s right to remain silent; and (2) how can that right be waived. This Court should find that police custody triggered Mr. Coda’s right to remain silent, and he never waived this constitutional guarantee.

**1. Mr. Coda’s Privilege Against Self-Incrimination was Triggered by Police Custody, and He Properly Asserted His Right by Remaining Silent.**

The Government does not have to inform someone of a constitutional right before they are entitled to its protection. The recitation of the Miranda rights are only intended to inform the uninformed. Miranda never meant for the recitation of rights to act as the singular triggering mechanism for the right against self-incrimination. Moore, 104 F.3d at 386 (declaring no case holds that a defendant’s silence can be used against him as long as Miranda rights have not been read). For the right against self-incrimination to have any meaning, then surely it must stand on

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<sup>5</sup> Miranda, 384 U.S. at 467 (asserting that the Fifth Amendment “serves to protect persons in all settings.”)

its own legs before Miranda rights have been read. Moore, 104 F.3d at 386 (reasoning that a citizen’s protection against self-incrimination does not only attach after “officers recite a litany of his rights”).

The right to remain silent can trigger prior to a Miranda warning by an affirmative declaration. Salinas, 570 U.S. at 188 (reasoning that an individual can verbally assert his Fifth Amendment right if he wishes to rely on it pre-Miranda). Alternatively, the right to remain silent automatically triggers once a citizen is placed into “custodial interrogation.” Id. (finding one does not need verbally assert the Fifth to exercise it because custodial interrogation exposes the accused to Government coercion). However, “interrogation per se” does not need to begin for the right to remain silent to automatically trigger; mere police custody is satisfactory. Moore, 104 F.3d at 377 (reasoning that no case suggests a defendant’s right to remain silent attaches “upon the commencement of questioning as opposed to custody”); United States v. Hernandez, 476 F.3d 791, 796 (9th Cir. 2007) (finding that a suspect’s Miranda rights triggered when he was placed into custody). Furthermore, not even formal police custody is necessary to trigger these protections, a reasonable belief is satisfactory. Id. (finding a suspect’s Miranda rights had triggered when he was surrounded by six officers because he was *essentially* in custody).

Once someone is placed into custody, there is no specific language requirement to invoke the Fifth. Quinn v. United States, 349 U.S. 155, 164 (1955) (asserting that there is “no ritualistic formula” needed to invoke one’s Fifth Amendment privilege). Officers need only be given reasonable notice that the individual is exercising his right to remain silent. United States v. Okatan, 728 F.3d 111, 119 (2d Cir. 2013) (finding officer put on reasonable notice where an individual asked for a lawyer); Coppola v. Powell, 828 F.2d 1562, 1565 (1st Cir. 1989) (finding officer put on reasonable notice where an individual declared he “knew his rights”). Therefore,

after the Government places someone into custody, he can assert his Fifth Amendment right by just remaining silent. Berghuis, 560 U.S. at 386 (finding the defendant could have simply said nothing in response to an officer's questions to assert his right).

The Government's arrest triggered Mr. Coda's right to remain silent. Mr. Coda was placed under arrest and taken to a detention center for interrogation; only then was he finally read his Miranda rights. Mr. Coda chose to exercise his right to remain silent at the time of arrest. In Hernandez, the suspect was taken aside and surrounded by six officers. The man was not read his Miranda rights but stopped talking as soon as the cops surrounded him. The court in Hernandez found that the individual's silence could not be admitted as substantive evidence because the suspect was *effectively* in police custody. Mr. Coda, who was *formally* in police custody, faced the same immense pressure of the officers' presence when he asserted his right to remain silent. Therefore, Mr. Coda's right to remain silent triggered as soon as the officer arrested him.

Further, Mr. Coda properly exercised his constitutional right by remaining silent during his arrest. He never had a duty to affirmatively declare that he was asserting his right. The court in Coppola analyzed whether a citizen who declared that he "wouldn't confess" to an officer and that he "knew his Constitutional rights" properly invoked the privilege against self-incrimination. The court found that this was a proper assertion of the privilege because the citizen's conduct reasonably put the officer on notice that the defendant intended to assert his Fifth Amendment right. Mr. Coda's assertion of his right to remain silent is even clearer than the defendant in Coppola. Mr. Coda properly exercised his right because *remaining silent* reasonably put the officer on notice that he intended to assert his Fifth Amendment right. The words used to invoke the right to remain silent do not matter. The silence itself is enough.

## **2. Mr. Coda Never Waived His Right to Remain Silent.**

After the right to remain silent attaches, the protections offered can only be removed via waiver. Waiver has two prongs: (1) the waiver must be voluntary, and not the product of coercion or intimidation, and (2) the waiver must be made with understanding of its effect and understanding of the right given up. Berghuis, 560 U.S. at 382-83. A waiver can be explicit, where a person acknowledges he is freely waiving his right to remain silent, or implicit, by a person's conduct. Id. Any uncoerced statement made after Miranda rights have been read to a suspect is sufficient to show an implied waiver of the right to remain silent. Id. (finding the citizen waived his right to remain silent where he was read his Miranda rights, and then during the subsequent interrogation eventually answered an incriminating question). This Court has also found an implicit waiver of the privilege against self-incrimination where a citizen voluntarily begins talking to an officer. See e.g. Salinas, 570 U.S. at 185-86 (finding the accused's silence was admissible where he voluntarily answered several police questions, but remained silent when asked a potentially incriminating question); see also Moore, 104 F.3d at 385 (finding a citizen who volunteers an unsolicited admission may be held to have waived his privilege, but a defendant who remains silent will be treated as having asserted it).

Mr. Coda never explicitly or implicitly waived his right to remain silent. Upon his arrest, the Government informed Mr. Coda of the charges against him. Only after hauling Mr. Coda to a detention center and preparing an interrogation, did the Government finally read Mr. Coda his Miranda rights. At no point did Mr. Coda answer any questions or communicate with the Government whatsoever. Contrastingly, in Salinas the suspect implicitly waived his right to remain silent by voluntarily speaking with an officer. The suspect did not attempt to exercise his right to remain silent until the Government asked a potentially incriminating question. However, by this time the suspect had already waived his right. After the right to remain silent is waived, a

citizen may only reinstate the right by expressly declaring it. Mr. Coda, on the other hand, never once answered any of the Government's questions. Therefore, Mr. Coda never waived his Constitutional right to remain silent.

**B. This Court Should Hold that the Government can only use a Defendant's Pre-Miranda, Post-Arrest Silence for the Limited Purpose of Impeachment.**

Under no circumstances can the Government use post-Miranda silence, not even for impeachment. Doyle, 426 U.S. at 619. Anything presented after the reading of Miranda "cross[es] the *Doyle* line," and is unconstitutional. Brecht v. Abrahamson, 507 U.S. 619, 629 (1993) (finding only pre-Miranda silence admissible for impeachment). Furthermore, this Court has already limited the Government's harmful use of pre-Miranda, post-arrest silence to impeach. Fletcher v. Weir, 455 U.S. 603, 605-06 (1982) (allowing the Government to use the defendant's pre-Miranda silence *to impeach* his testimony when the defendant claimed self-defense for the first time on the stand at trial but remained silent at the time of his arrest). Thus, the Government may only use a defendant's post-arrest, pre-*Miranda* silence for impeachment but never as substantive evidence of guilt. Hernandez, 476 F.3d at 796.<sup>6</sup>

The Government vastly overreaches constitutional boundaries by seeking to use Mr. Coda's pre-Miranda silence as substantive evidence of guilt. Mr. Coda simply chose not to assert his decade old alibi defense at the very moment he was placed in custody. The only permissible use of such silence is for impeachment. When a man in Fletcher stabbed another man in a parking lot, he chose not to claim self-defense at the time of his arrest but attempted to do so at trial. The Government did not even attempt to use his silence as substantive evidence of guilt as

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<sup>6</sup> The Government cannot even impeach with silence unless it is proven to have probative value. Jenkins v. Anderson, 447 U.S. 231, 239 (1980) (asserting prior silence to be used for impeachment where silence "is not probative of a defendant's credibility and where prejudice to the defendant might result").

it knew doing so exceeded constitutional limitations. In much the same way, the Government now cannot use Mr. Coda's silence as substantive evidence because it occurred post-arrest.

The Government cannot use silence as part of its case in chief, even if Miranda warnings have not been read to the defendant. In Hernandez, the court explicitly declared that the Government can only use a defendant's silence to impeach once a defendant has been placed into custody, even if he has not been read his Miranda rights. As applied to the present case, this Court should explicitly rule that the Government can only use Mr. Coda's silence after his arrest to impeach his alibi. Under no circumstance may the Government go so far as to suggest that such silence is indicative of guilt.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court reverse and remand this case to the Eastern District of Virginia so the District Court may apply the proposed balancing test and grant Mr. Coda's motion to exclude his post-arrest, pre-Miranda silence.

Respectfully submitted this 13th day of September 2021.

*/s/ Team 29*

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