

**IN THE
SUPREME COURT
OF THE UNITED STATES**

No. 21-125

October Term 2021

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Brief for Petitioner

Oral Argument Requested

Team 24

Counsel for Petitioner

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QUESTIONS PRESENTED

- I. Whether, under the Fifth Amendment of the United States Constitution, the Respondent's preindictment delay violated Coda's right to a fair trial since it caused Coda actual and substantial prejudice, even if no bad faith is shown.

- II. Whether, under the Fifth Amendment of the United States Constitution, the Respondent can use Coda's post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt.

STATEMENT OF THE CASE

Austin Coda (“Coda”) owned a hardware store in Plainview, East Virginia. R. at 1. Plainview is a small town on the border between East Virginia and North Carolina. Id. Coda’s store conducts significant business with residents of both states. Id. Coda opened his store in 2002, and experienced many years of profitability; however, by 2010, Coda’s store barely generated enough revenue to stay open, which affected Coda’s ability to properly maintain the building. Id. On December 22, 2010, an explosion destroyed Coda’s entire store. R. at 2. Meanwhile, local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms opened an investigation into the cause of the explosion. Id. Initially, the evidence suggested that cold weather caused an old, faulty gas line to leak and destroy the run-down building. Id.

Shortly thereafter, the Federal Bureau of Investigation (“FBI”) received a tip from a man that claimed to have information regarding the destruction of Coda’s business. Id. The man claimed to be one of Coda’s friends and informed the FBI that Coda’s business and personal finances were in decline. Id. The man also knew that Coda maintained an insurance policy, which covered Coda’s store in case of total loss. Id. Moreover, the man claimed to have spoken with Coda the week of the accident and recalled Coda being “very anxious and paranoid.” Id. Subsequently, the FBI believed that Coda might be responsible for the explosion and informed the United States Attorney’s Office. Id.

For several reasons, the United States Attorney’s Office marked Coda’s case as “low-priority.” R. at 2. Thus, Coda’s case did not progress until the last possible second, right before the expiration of Coda’s statute of limitations. Id. The Respondent indicted Coda under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects

interstate commerce. *Id.* Almost ten years after the explosion of Coda's store, the Respondent finally alleged that Coda destroyed his store to claim insurance proceeds. *Id.* Subsequently, the FBI Special Agent Park arrested Coda, brought him into custody, and informed Coda of the charges against him. R. at 7. During this time, Coda remained silent. *Id.* Next, the agent read Coda his *Miranda* rights and began to interrogate him. *Id.*

Coda moved to dismiss the indictment, arguing that the preindictment delay violated the Fifth Amendment Due Process Clause. R. at 3. At the evidentiary hearing, Coda testified that he intended to raise an alibi defense at trial, claiming that he was in New York the night the explosion occurred. *Id.* Furthermore, Coda testified that December 22, 2010, the night of the explosion, was his birthday. *Id.* Next, Coda claimed that every year until 2015, he took a Greyhound bus to visit his family in New York on his birthday. *Id.*

However, Coda informed the court that because of the Respondent's large delay in prosecuting his case, Coda would be unable to produce essential testimony to corroborate his defense. *Id.* Within the elongated time between the explosion and Coda's trial, four out of the five family members Coda visited in 2010 died. *Id.* Meanwhile, a doctor diagnosed the last living family member he visited in 2010 with dementia. *Id.* As a result, the fifth family member cannot remember whether Coda visited the family in New York on the day of the explosion. *Id.* Finally, Coda cannot produce his Greyhound bus records because they are only stored online for three years, and Coda's last trip took place in 2015. *Id.* The United States District Court for the District Court of East Virginia ruled that the Respondent did not act in bad faith in delaying Coda's trial, and therefore denied Coda's Motion to Dismiss. R. at 6.

Next, Coda moved to suppress his post-arrest, pre-*Miranda* silence—which the Respondent was planning to use against Coda at trial. R. at 7. Coda argued that admission of this

evidence would violate the Fifth Amendment. *Id.* Nonetheless, the court adopted the Respondent's view and denied Coda's Motion to Suppress. *R.* at 10. Soon thereafter, the trial court convicted Coda under 18 U.S.C. § 844(i) and sentenced him to ten years in prison. *R.* at 11. Afterwards, Coda appealed the denial of both motions, seeking to have his conviction overturned and charges dismissed. *Id.* However, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's analysis. *R.* at 12. Coda now appeals to this Court, maintaining his previous positions. *R.* at 16.

SUMMARY OF THE ARGUMENT

This Court should overturn the Thirteenth Circuit's decision and overturn Coda's conviction for the following two reasons: (1) the District Court improperly denied Coda's Motion to Dismiss the indictment for preindictment delay and (2) the District Court improperly denied Coda's Motion to Suppress his post-arrest but pre-*Miranda* silence.

The Fifth Amendment protects a defendant's right to due process and a fair trial. The importance of the Fifth Amendment in the context of preindictment delays has been highlighted by this Court. Traditionally due process claims have been subject to a balancing test. Courts have weighed an individual's private interest against the State's interest. In the present case, the Thirteenth Circuit improperly applied a two-prong test that required a showing of actual and substantial prejudice as well as a bad faith showing. Rather, the proper inquiry is whether—when balancing the actual and substantial prejudice against the State's reasons for the delay—the government violated notions of fair play and decency.

In the instant case, the two different tests render drastically different results. Although Coda has clearly shown actual and substantial prejudice, no government bad faith is shown. Under the two-prong test Coda's due process claim is clearly invalid; however, under a balancing test, further inquiry is required. The Respondent clearly engaged in a reckless disregard of Coda's case by choosing to wait over nine years to bring an indictment against him, which in turn caused key evidence to be lost. Consequently, the Respondent has substantially prejudiced Coda's ability to mount a defense because of its administrative decisions. This Court never intended for the Respondent to circumvent the Due Process Clause of the Fifth Amendment by engaging in reckless behavior that causes evidence to be lost.

The Fifth Amendment protects a defendant's right to refrain from being a witness against themselves. Allowing the Respondent to use Coda's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt severely weakens the Fifth Amendment. Coda's right to remain silent is not a variable right that comes and goes; rather, it is a constitutional right that always exists. Furthermore, an individual's right to remain silent is independent of whether the police officer gave the individual their *Miranda* warnings. The Fifth Amendment lacks effect if defendants are forced to choose between making incriminating statements and being penalized for remaining silent.

Coda, in remaining silent, clearly invoked his Fifth Amendment privileges. The Respondent improperly commented on Coda's silence and used it as substantive evidence of Coda's guilt in its case-in-chief. Although the Respondent is free to use Coda's post-arrest, pre-*Miranda* silence for impeachment, it may not use it in its case-in-chief. Coda's silence could reasonably be interpreted in several other ways outside of an indication of guilt. This Court should apply the Fifth Amendment in the same way that most circuit courts do. Even more so, public policy supports such a finding because police officers are given extra incentives to delay interrogations to circumvent the Fifth Amendment.

Therefore, we respectfully urge this Court to find that the Respondent violated Coda's due process right to a fair trial and Coda's right against self-incrimination.

ARGUMENT

I. RECKLESS PREINDICTMENT DELAY THAT CAUSES THE DEFENDANT ACTUAL AND SUBSTANTIAL PREJUDICE VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fifth Amendment states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” U.S. CONST. amend. V. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results. *Snyder v. Com. of Mass.*, 291 U.S. 97, 116 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness is essential to the very concept of justice. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). To declare a denial of it, a court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. *Id.*

A. This Court has traditionally viewed Due Process claims under a balancing test.

This Court first created a balancing test in the context of a due process claim challenging the adequacy of administrative procedures used to terminate Social Security disability benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, this Court stated the nature and weight of the private interest affected by the official action challenged; the risk of an erroneous deprivation of such interest as a consequence of the summary procedures used; and the governmental function involved and state interests served by such procedures, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. *Id.* at 336. The balancing test created in *Mathews* has been applied in many different contexts involving due process. *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (applying the *Mathews* test

in termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (applying the *Mathew*'s test in the context of forcibly admitting a patient into a mental hospital); *Parham v. J. R.*, 442 U.S. 584, 585 (1979) (finding that *Mathews* sets a general approach for testing challenged state procedures under a due process claim); *but see Dusenbery v. United States*, 534 U.S. 161, 168 (2002) (reasoning that although *Mathews* has been used to evaluate due process claims in various contexts it has never been announced as an all-embracing test for deciding due process claims); *Medina v. California*, 505 U.S. 437, 442 (1992) (stating that *Mathews* has only been applied in criminal law cases on two occasions).

Although the instant case is in the context of a criminal trial, the prosecutorial discretion used to bring indictments resembles the administrative procedures used to terminate disability benefits in *Mathews*. Furthermore, the Respondent's decision to mark Coda's case as "low-priority" and toss around his case from one Assistant U.S. Attorney to another is an administrative decision. R. at 2. Even more so, the Respondent's decision to prioritize drug trafficking and refusing to increase the priority of Coda's case are administrative in nature. *Id.*

Given how due process claims have been tested in the past using a balancing test, especially when administrative decisions affect private rights, this Court should apply a balancing test in the current case.

B. The Fourth, Seventh, Eighth, and Ninth circuits have adopted the appropriate balancing test regarding preindictment delay.

The circuit split regarding the appropriate test to apply in preindictment delay cases arises out of different understandings of this Court's opinion in *Lovasco* and *Marion*. *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971); *Danielle M. Rang, The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials*, 66 S.D.L. Rev. 143 (2021) (illustrating the split among the circuits and states regarding the

appropriate test to apply in preindictment delays cases). In *Lovasco*, this Court held that prosecuting a defendant following investigative delay does not deprive the defendant of due process, even if his defense might have been somewhat prejudiced by a lapse of time. *Lovasco*, 431 U.S. at 783. The defendant in *Lovasco* lost two material witnesses due to preindictment delay. *Id.* at 785. Both witnesses died about a year after the alleged crimes occurred. *Id.* It was unclear how the witnesses would aid the defendant's case. *Id.* at 786. The government stated that there was a legitimate interest in delaying the indictment and keeping the case open. *Id.* at 787. This Court, analyzing *Marion*, reasoned that actual prejudice makes a due process claim concrete and ripe but does not make the claim automatically valid. *Id.* at 789. This Court furthered that proof of prejudice is a necessary, but not sufficient, element of a due process claim, and the inquiry must consider the reasons for the delays as well as the prejudice. *Id.* at 790. Additionally, this Court highlighted the importance of due process in protecting defendants from preindictment delays. *Id.* at 789.

Furthermore, this Court noted that no interest is served by compelling prosecution as soon as legally entitled to do so and there was a substantive difference between investigative delay and delay undertaken to gain a tactical advantage. *Id.* at 792, 795. When comparing the investigative delay and a delay undertaken to gain a tactical advantage this Court stated: “[r]ather than deviating from elementary standards of ‘fair play and decency,’ a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt.” *Id.* In *Lovasco*, by the government's own admission “[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution,

suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense,” *Lovasco*, 431 U.S. at 795 n.17.

The Fourth, Seventh, Eighth and Ninth circuits in interpreting *Lovasco* have chosen to apply a balancing test which balances the prejudice suffered with the government’s reason for its delay. *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) (finding that once the defendant has proven actual and substantial prejudice the government must come forward and provide reasons for its delay; the reason is then balanced against the prejudice to determine whether the defendant has been denied due process); *Jones v. Angelone*, 94 F.3d 900, 910 (4th Cir. 1996) (balancing the actual and substantial prejudice against the state’s reasons for the delay and deciding whether that delay violated fundamental conceptions of justice or the community’s sense of fair play and decency); *United States v. McDougal*, 133 F.3d 1110, 1113 (8th Cir. 1998) (requiring a defendant to first show the delay actually and substantially prejudiced the defense, after which the court balances the reasons for the delay against the prejudice); *United States v. Sherlock*, 962 F.2d 1349,1353–54 (9th Cir. 1989) (applying a two-prong test where defendants must first prove they suffered actual, non-speculative prejudice from the delay; next, they must show that delay when balanced against the prosecution’s reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions).

Particularly, the court in *Sabath* held that forcing a defendant to stand trial after the government delayed an indictment in a recklessly prejudicial fashion with no investigative purpose violates due process. *United States v. Sabath*, 990 F. Supp. 1007, 1020 (N.D. Ill. 1998). The case in *Sabath* involved arson and mail fraud. *Id.* at 1010. The court noted that loss of evidence was of particular importance in a close circumstantial arson case. *Id.* Three important witnesses died during the government’s delay. *Id.* The court in *Sabath* furthered reasoned that a

combination of a loss of evidence, impaired memories, flawed government reports, and deceased key witnesses have created a concrete and substantial prejudice. *Id.* at 1014. In addition, the government in *Sabath* stated that investigation of the case was completed years before the indictment was brought and that the Assistant United States Attorney had other prosecutorial priorities. *Id.* at 1016. The court saw these reasons for delay as reckless given the conscious disregard of a substantial risk of prejudice. *Id.* at 1018–19.

The balancing test applied by these courts fits squarely with how due process claims have been viewed in the past. *Snyder*, 291 U.S. 97 (finding that fairness is a relative, not an absolute, concept; it is fairness with reference to particular conditions or particular results). This Court, in *Lovasco*, defines the two ends of the spectrum for government delay: (1) investigative delay which is unlikely to violate due process and (2) bad faith delay which is likely to violate due process with a showing of prejudice. *Lovasco*, 431 U.S. 783 (1977). Although this Court referred to bad faith delay as deviating from elementary standards of fair play and decency, it did not establish it as the only delay that would be problematic.

The Thirteenth Circuit, in part relying on the language of *Marion* and *Lovasco* and in part relying on policy considerations, adopted a “two-prong” test which requires (1) actual prejudice and (2) bad faith. The Thirteenth Circuit makes two policy arguments: (1) Congress is the appropriate body to set boundaries on permissible prosecutorial delays through statute of limitations and (2) the law lacks a standard for judges to consistently apply. We respectfully disagree with the Thirteenth Circuit’s analysis. This Court has recognized that a statute of limitations does not fully define a defendant’s preindictment rights. *Lovasco*, 431 U.S. at 783 (noting that due process plays at least a limited role in protecting against oppressive delay). So,

while Congress maintains the discretion to set a statute of limitations, this Court maintains the discretion to determine whether preindictment delays violate fundamental values of fairness.

The balancing test applied by the Fourth, Seventh, Eighth and Ninth is sufficiently clear to prevent excessive subjectivity. Actual and substantial prejudice serves as a sufficient threshold to protect against subjectivity. The court in *Sabath* noted that defendants can rarely meet the threshold of proving actual and substantial prejudice. *Sabath*, 990 F. Supp. at 1013 (ruling that this was the first time a defendant was able to show actual and substantial prejudice). While balancing the government's reasons with the prejudice suffered allows individual judges to weigh the subjectivity differently, this is no different than any other balancing test this Court has applied. Furthermore, the two-prong test is not free of subjectivity given that different judges may apply the bad faith requirement differently. The balancing test is also more consistent with this Court's opinion in *Lovasco*. This Court stated, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. This language is indicative of a balancing test. Additionally, this Court should broaden the analysis to "reasons for delay" by limiting the inquiry to determining whether the government's reasons were in bad faith or intentional. Bad faith is merely an example of a reason that would violate "fair play and decency."

Thus, the proper inquiry in today's case when balancing the actual and substantial prejudice against the state's reasons for the delay, as applied by multiple circuits, is whether the government violated notions of fair play. This balancing accommodates this Court's opinion in *Lovasco* and allows courts to view due process claims on a case-by-case basis, without excessive subjectivity.

C. Under a balancing test, the actual prejudice suffered by Coda outweighs the government's reason for the preindictment delay.

The Record is clear that the Respondent's preindictment delay caused Coda to suffer actual and substantial prejudice. R. at 6. Like in *Sabath*, the instant case involves a close circumstantial arson case where key witnesses for the defendant's case have died. R. at 3; *cf. Sabath*, 990 F. Supp. at 1010 (highlighting that the case involved a close circumstantial arson). Coda's main defense is that he was in New York the night of the explosion. R. at 3. The family members who would collaborate this alibi are either dead or unavailable because of the government's preindictment delay. *Id.* Contrasting with *Lovasco*, Coda's witness died at least five years after the incident took place, indicating that had the Respondent taken the proper steps, Coda's witness would have been able to testify. R. at 3; *cf. Lovasco*, 431 U.S. at 785 (highlighting that the witnesses died around one year after the alleged crimes). Moreover, Greyhound deleted its bus records, which were highly favorable to the defendant, by 2018. R. at 3. It is undisputed that the Respondent's preindictment delay caused actual and substantial prejudice to Coda's defense. R. at 6.

The Respondent's reason for the delay is not investigative, but rather administrative. R. at 2. Specifically, the Respondent did not bring an indictment because it was still investigating, but rather because it marked Coda's case as "low priority." *Id.* Furthermore, the Respondent passed Coda's case from one Assistant U.S. Attorney to another because of political pressures. *Id.* In 2019, when the statute of limitations was about to run, the Assistant U.S. Attorney decided to arrest and indict Coda. *Id.* The Record does not indicate that the Respondent attempted to gather any evidence because of this delay. *Id.*

Unlike in *Lovasco*, the Respondent does not reference any investigative reason for its delay. R. at 3; *cf. Lovasco*, 431 U.S. at 787 (holding that the government had a good faith

investigative reason for delaying the case). Accordingly, this Court need not overstep its bounds in defining when a prosecutorial delay ought to be concluded, but rather, this Court simply needs to weigh the Respondent's stated reasons against Coda's prejudice. The Respondent's reason for delay resembles the one given in *Sabath*. *Cf. Sabath*, 990 F. Supp. at 1016 (emphasizing that the government delayed the defendant's case to focus on other priorities). Similar to *Sabath*, the prosecutor concluded the investigation long before the indictment was brought. R. at 2–3; *cf. Sabath*, 990 F. Supp. at 1011 (highlighting that the government finished its investigation well before the indictment). Like in *Sabath*, the Respondent's based its prosecutorial delay on "other prosecutorial priorities." R. at 2; *cf. Sabath*, 990 F. Supp. at 1016 (showing that the government delayed the case to prioritize other things). The Respondent chose these "priorities" with a disregard of a substantial risk of prejudice long after the investigation had been concluded. This delay is clearly reckless, and the Respondent caused it while disregarding the prejudice that Coda would suffer as a result.

Thus, while the Respondent has an interest in making administrative decisions regarding which cases to prioritize, that interest cannot be upheld when recklessly used to cause actual and substantial prejudice.

II. THIS COURT SHOULD EXPAND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO INCLUDE THE PROTECTION OF POST-ARREST, PRE-MIRANDA SILENCE.

The Fifth Amendment protects one's right to refrain from being a witness against oneself. U.S. CONST. amend. V. Courts have held that post-custodial silence is inadmissible as substantive evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 616–20 (1976). However, the issue regarding the government using post-arrest, pre-*Miranda* silence as substantive evidence of guilt is one of first impression for this Court. Granting the government authority to use post-arrest,

pre-*Miranda* silence as substantive evidence of guilt weakens the main reason why the Framers initially established the Fifth Amendment. Furthermore, there is already an increasing trend of circuit courts throughout the United States who agree that post-arrest, pre-*Miranda* silence is protected by the Fifth Amendment. Thus, this Court should expand the Fifth Amendment to include the protection of post-arrest, pre-*Miranda* silence and hold that the Respondent violated Coda's Fifth Amendment right to remain silent.

A. Allowing the Respondent to use post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt severely weakens the Fifth Amendment.

Giving the Respondent the power to use post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt cripples part of the protection established by the Fifth Amendment. The "right to remain silent exists independently of the fact of arrest." *United States v. Okatan*, 728 F.3d 111, 118 (2d Cir. 2013). Furthermore, the Fifth Amendment "permits a person to refuse to answer questions, in formal or informal proceedings, where the answers might be used to incriminate him in future criminal proceedings." *Id.* at 116 (quoting, *United States v. Ramos*, 685 F.3d 120, 126 (2d Cir. 2012)). For the Fifth Amendment to be given full effect, courts cannot force individuals to choose between potentially making incriminating statements and being penalized for refusing to make them. *Id.*

Miranda, nor any other case, implies that a defendant's protected right to remain silent attaches only upon the start of questioning as opposed to custody. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). A defendant who remains silent is distinct from a defendant who admits to unsolicited information. *Id.* A court must treat a defendant who remains silent as having asserted his or her Fifth Amendment rights. *Id.* Additionally, prosecutorial comment on this assertion unduly burdens the defendant's Fifth Amendment privilege. *Id.*

In *Moore*, the police arrested the appellant for possession of cocaine found in the appellant's car. *Id.* at 380. During the trial, the prosecutor asked the arresting officer if the appellant said anything when the officer found the cocaine. *Id.* at 384. When the officer replied in the negative, the prosecutor used this fact in the closing argument to infer the appellant's guilt. *Id.* However, the defense counsel only objected in the closing and not when the prosecutor initially asked his question to the officer. *Id.* Consequently, even though the judge agreed with the defense counsel, the court ruled that since there was no objection to the initial question, the question regarding the appellant's post-arrest silence was harmless. *Id.* at 390. The court reasoned that since the defense counsel did not object to the prosecutor's initial question about the appellant's silence, the jury was already aware of the silence by the commencement of closing remarks. *Id.*

In the instant case, this Court should rule that the Respondent improperly used Coda's post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt. Adopting *Okatan*, Coda had the right to remain silent at all points during his interaction with the FBI. R. at 7; *cf. Okatan*, 728 F.3d at 118 (holding that the right to remain silent exists independently from whether the police had arrested the defendant). Although Coda did not verbally invoke his Fifth Amendment rights, his refusal to speak to the FBI informally invoked this right. R. at 7. According to *Okatan*, for this Court to hold that Coda either must make incriminating statements against himself or be penalized would substantially weaken the impact of the Fifth Amendment. *Cf. Okatan*, 728 F.3d at 116 (stating that the courts could not give the Fifth Amendment full effect if the defendant's options were either to incriminate himself or be penalized).

Next, adopting *Moore*, Coda, having remained silent, is unlike a defendant that provides unsolicited information. R. at 7; *cf. Moore*, 104 F.3d at 385 (providing a distinction between silent defendants and defendants who give unnecessary statements). Based on *Moore*, since Coda

remained silent, the courts must treat Coda as having invoked his Fifth Amendment privileges. R. at 7; *cf. Moore*, 104 F.3d at 385 (asserting that a court must hold a silent defendant as having invoked his or her right to remain silent). Furthermore, like the prosecutor in *Moore*, the Respondent commented on Coda's silence, which thereby established an undue burden on Coda's Fifth Amendment rights. *Cf. Moore*, 104 F.3d at 385 (maintaining that prosecutorial comment on an assertion regarding one's Fifth Amendment rights unduly burdens the right). In fact, the Respondent went even further than the prosecutor in *Moore*. *Cf. Moore*, 104 F.3d at 384 (highlighting how the prosecutor asked one question during its case-in-chief about the appellant's silence). Here, the Respondent uses Coda's post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt in its case-in-chief. R. at 12. Thus, by allowing the Respondent to use Coda's post-arrest, pre-*Miranda* silence as substantive evidence of Coda's guilt, the lower courts severely weakened Coda's Fifth Amendment rights.

B. Once the Fifth Amendment is expanded to protect post-arrest, pre-*Miranda* silence, the Respondent's violation of Coda's Fifth Amendment right to refrain from self-incrimination becomes evident.

Although the government may use a defendant's post-arrest, pre-*Miranda* silence for impeachment, the government may not use it in its case-in-chief. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1030 (9th Cir. 2001). Furthermore, even though *Miranda* warnings are necessary to reduce the risk of self-incrimination, they are not the genesis of one's Fifth Amendment rights. *Id.* at 1029. Specifically, the right to remain silent originates from the Constitution. *Id.* Therefore, an individual has a right to remain silent, regardless of whether the police gave the individual his or her *Miranda* rights. *Id.*

The court must give liberal construction to a person's attempt to invoke privilege against self-incrimination. *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989). The Fifth

Amendment forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. *Id.* In *Coppola*, police questioned the petitioner about a rape that recently occurred. *Id.* at 1563. In response to the questioning, the petitioner stated, “[a]nd if you think I’m going to confess to you, you’re crazy.” *Id.* The state court allowed this statement to be included at trial, and subsequently, the court found the petitioner guilty of the rape. *Id.*

However, the First Circuit Court of Appeals reversed, holding that the inclusion at trial of the petitioner's statement to police violated the petitioner's Fifth Amendment rights. *Id.* at 1568. The court reasoned that the inclusion of the statement could not be categorized as harmless beyond a reasonable doubt. *Id.* at 1571. Specifically, the court's review of the record, leaving aside the inadmissible statement, does not make it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty. *Id.* The court also deliberated that although the petitioner was likely guilty, the prosecutor did not present an overwhelming evidence of guilt. *Id.* Likewise, the statement may have been the clincher in the jury rendering the petitioner guilty. *Id.*

In the instant case, the Respondent violated Coda's Fifth Amendment rights by including his post-arrest, pre-*Miranda* silence in its case-in-chief. Adopting *Velarde-Gomez*, Coda's Fifth Amendment right to remain silent applied before the FBI agent read Coda his *Miranda* rights. R. at 7; *cf. Velarde-Gomez*, 269 F.3d at 1029 (holding that *Miranda* rights do not establish one's Fifth Amendment rights). Since, according to *Velarde-Gomez*, the Constitution gives Coda the right to remain silent, there is no time at which he does not possess this right. *Cf. Velarde-Gomez*, 269 F.3d at 1029 (highlighting that the Constitution establishes the right to remain silent). Other constitutional rights, such as one's right to due process or equal protection, do not

come and go at certain times; thus, there is no support for one's right to refrain from self-incrimination to be variable.

Next, adopting *Coppola*, the lower courts refused to give a liberal construction when determining whether Coda invoked his Fifth Amendment right. R. at 9; *cf. Coppola*, 878 F.2d at 1568 (holding that courts must be flexible in determining whether a defendant invoked Fifth Amendment privileges). Additionally, the lower courts erred in inferring that Coda's silence may be a valid inference of guilt, as this contrasts with the holding in *Coppola*. R. at 9; *cf. Coppola*, 878 F.2d 1562, 1568 (holding that the Fifth Amendment forbids the court from suggesting that silence is potentially evidence of guilt). Furthermore, the fact pattern in *Coppola*, raises an even larger inference of guilt than the fact pattern in the current case; whereas the petitioner in *Coppola* chose to make a statement to police, Coda chose to remain silent. R. at 7; *cf. Coppola*, 878 F.2d 1562, 1568 (highlighting the petitioner's response to a question asked by the police officer).

Moreover, Coda's silence could reasonably be interpreted in several other ways. For instance, many people are shocked and are at a loss for words when the police initially arrest them. In addition, Coda may have been confused why the FBI agent was arresting him, as the crime the agent was arresting Coda for occurred almost ten years earlier. R. at 3. When taking in all the possible scenarios, and based on the holding in *Coppola*, the lower courts were wrong to infer that Coda's silence indicated that he was guilty. R. at 9; *cf. Coppola*, 878 F.2d at 1571 (reasoning that the prosecutor did not present an overwhelming evidence of guilt).

Most circuit courts have grown an emerging awareness on the issue of the government exploiting post-arrest, pre-*Miranda* silence, and has subsequently expanded Fifth Amendment protections to include post-arrest, pre-*Miranda* silence. Benjamin W. Perry, *Fifth Amendment-*

How the Antiterrorism and Effective Death Penalty Act Affects the Use of Pre-Miranda Silence As Substantive Evidence of Guilt-Hall v. Bell, No. 10-Cv-10438, 2012 WL 3156527 (E.D. Mich. Aug. 3, 2012), 36 Am. J. Trial Advoc. 411, 416 (2012). Furthermore, public policy reasons support the expansion of the Fifth Amendment. Based on the current structure, and the Respondent's reasoning, police are incentivized to delay interrogation in hopes of avoiding the protection of the Fifth Amendment.

Therefore, this Court should continue with this trend and expand the Fifth Amendment in the same exact way as the other circuit courts. Thus, since the government violates the new expansion of the Fifth Amendment, this Court should reverse the trial court's conviction of Coda, and hold that his post-arrest, pre-*Miranda* silence is inadmissible.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's conviction of
Coda.

Respectfully Submitted,

s/ Team 24

Petitioner's Counsel