

No. 21-125

In The Supreme Court of the United States

AUSTIN CODA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

TEAM 38

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QUESTIONS PRESENTED

I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where there is no evidence of bad faith on the part of the government?

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

STATEMENT OF THE CASE

In January 2002, Petitioner, Austin Coda (“Coda”), opened a hardware store in Plainview, East Virginia, a small, rural town right on the border between East Virginia and North Carolina. R. at 1. For many years, Coda’s entrepreneurial spirit proved successful, and his store thrived, garnering a large customer base from local residents in both East Virginia and North Carolina. *See* R. at 1. Unfortunately, beginning in 2008, like many other small business owners in Plainville and across the nation, Coda’s business declined as a result of the Great Recession. R. at 1. When a large chain store moved into the small town of Plainville in 2009, Coda’s business struggled all the more, as his previously loyal customer base was lured away by the reduced prices offered at the big box store. *See* R. at 1. Coda, however, persevered; determined to ride out the wave of the financial crisis, he cut costs where he could, including reducing the amount he spent on maintaining the hardware store. *See* R. at 1.

Unfortunately, on December 22, 2010, while Coda celebrated his birthday up north in New York with his family, Coda’s hopes of reviving his once thriving business were dashed when a shocking explosion destroyed the store into which he spent years pouring all his efforts. *See* R. at 2-3. Upon investigation by local authorities and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF), it was revealed that the devastating explosion was the result of the frigid December weather causing a leak in an old, faulty gas line. R. at 2.

Soon thereafter, Sam Johnson, a neighbor and friend of Coda, contacted the FBI. R. at 2. Johnson told the FBI that Coda was experiencing financial difficulties and that, like any responsible business owner, Coda maintained an insurance policy on his business, which included coverage for total loss. R. at 2. Johnson also suggested that Coda appeared “anxious and paranoid” the week of the accident. R. at 2. Although Coda may have appeared to be nervous for

any number of reasons and despite the ATF's investigative findings showing the cause of the explosion to be the faulty pipe, the FBI nonetheless referred the issue to the U.S. Attorney's Office. R. at 2.

In the U.S. Attorney's Office, Coda's case was marked as "low-priority" and lost in the bureaucratic milieu and high employee turnover rate. *See* R. at 2. After close to a decade of being passed from one Assistant U.S. Attorney to another, the Assistant U.S. Attorney then assigned to Coda's case realized that the statute of limitations was about to expire, and Coda was indicted under 18 U.S.C. § 844(i).¹ R. at 2. In May 2019, nearly ten years after the explosion—a hair's breadth from the lapse of the statute of limitations—Coda was indicted. R. at 2.

On August 23, 2019, Coda was arrested and taken into custody by FBI Special Agent Park. *See* R. at 7. Following Coda's arrest, Special Agent Park informed Coda of the charges pending against him, but did not read him his *Miranda* rights until after they reached the detention center to begin formal interrogations. *See* R. at 7. Immediately following his arrest, Coda, shocked by his sudden arrest nearly ten years after suffering the devastating loss of his livelihood, exercised his right to remain silent, choosing not to reveal his alibi defense to the arresting agent. *See* R. at 7. After being read his *Miranda* rights, Coda was formally interrogated by the agents. *See* R. at 7. During these interrogations, Coda did not apparently reveal any additional information—either incriminating or exculpatory—as during the subsequent trial, no such statements were used by the prosecution against him. *See* R. at 15 n.4.

At the trial, the evidence against Coda was thin. With only circumstantial evidence of Coda's guilt available to persuade the jury, the prosecution relied heavily upon Coda's post-

¹ 18 U.S.C. § 844(i) provides: Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years.

arrest but pre-*Miranda* silence, presenting it to the jury as substantive evidence of Coda's guilt during its case-in-chief and closing argument. The prosecution contended that Coda's silence was incriminating, arguing that if he had an alibi, he would have quickly disclosed it to the arresting officer on the day of his shocking arrest nearly ten years after the alleged crimes. R. at 7.

Unfortunately, due to the lengthy preindictment delay, Coda had little evidence to present to the jury to exonerate himself. Coda continued to exercise his Fifth Amendment right against self-incrimination and chose not to testify, and due to the significant and lengthy preindictment delay, corroborating evidence of his alibi and innocence were unavailable. *See* R. at 3. In the ten years that lapsed between the disastrous loss of his store and his arrest, four of the five people whom Coda celebrated his birthday with on that fateful night and could corroborate his alibi passed away—two from chronic illnesses and two very suddenly and unexpectedly. R. at 3. The remaining family member that was with Coda now suffers from dementia and is unable to testify regarding Coda's 2010 birthday visit to New York. R. at 3. Additionally, because of the prolonged delay, Coda cannot produce his Greyhound bus records as they are stored online for only three years, and Coda made his last annual trip in 2015, four years prior to his indictment. R. at 3.

Subsequently, Coda was convicted in the District Court for the District of East Virginia under 18 U.S.C. §844 for maliciously destroying property with an explosive and was sentenced to ten years in prison. R. at 11. During his trial, the district court denied Coda's motions to dismiss the indictment against him based upon prejudicial preindictment delay and to suppress evidence of his post-arrest but pre-*Miranda* silence. R. at 10.

The lower courts found that Coda suffered actual and substantial prejudice to his defense. R. at 5-6. However, the lower courts denied Coda's motion to dismiss because he did not show that the government's delay was in bad faith nor done with the purpose to gain an unfair advantage, using an outside district court decision, *United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018). R. at 6. They further supported this conclusion under the ruling of *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985). R. at 6.

In denying his motion to suppress the use of his post-arrest but pre-*Miranda* silence, the lower courts, applying the Court's precedent in the distinguishable case *Salinas v. Texas*, 570 U.S. 178 (2013) (which determined that the admission of the defendant's non-custodial, mid-interview silence did not violate the protections guaranteed by the Fifth Amendment to the Constitution), held that the admission of Coda's silence as substantive evidence of his guilt was constitutionally permissible.

On July 9, 2021, this Court granted certiorari to consider two issues. First, whether the almost ten year preindictment delay, which caused Coda actual prejudice in that he was unable to present evidence of his alibi, violates the Fifth Amendment to the United States Constitution, even though there is no evidence of bad faith on the part of the government. Second, whether the admission of Coda's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt violates the Fifth Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

Coda endured a lengthy preindictment delay that substantially and materially prejudiced his right to Due Process under the Fifth Amendment of the United States Constitution, outweighing any motivations for the delay put forth by the government. The prejudice was actual and substantial in that Coda lost the testimony of five alibi witnesses as well as exonerating material evidence. Although there was no bad faith motive on the part of the government, the government displayed a reckless disregard of Coda's circumstances, and the delay lacked any legitimate investigative purpose. Finally, although Coda's indictment took place within the applicable statute of limitations, this does not prevent this Court from ruling to dismiss because the statute in question has failed to act within its intended purpose as a procedural safeguard against prejudicing a defendant's case.

Through his refusal to speak, Coda asserted his right against self-incrimination, and the admission of his silence as substantive evidence of his guilt violates his rights under the Fifth Amendment. Additionally, even if Coda had not asserted his Fifth Amendment rights through his silence, he was in custody under the reasoning of *Miranda*. By permitting the admission of his post-arrest, pre-*Miranda* silence, the lower court's decision curtails the right against self-incrimination, defies the spirit of the seminal *Miranda* case, and provides an unjust incentive for law enforcement officers to delay formal interrogations in order to gain incriminating evidence through unsuspecting detainee's silence. Further, not only was admission of the Coda's silence constitutionally forbidden, but it was also crucial to his conviction and was not a harmless error by any standard.

ARGUMENT

The Fifth Amendment to the United States Constitution guarantees that no person “shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property without due process of the law.” U.S. Const. amend. V. Due Process protections are “so rooted in the traditions and conscience of our people as to be ranked fundamental.” *Snyder v. Com. of Mass.*, 291 U.S. 97, 105 (1964). In failing to dismiss the indictment against Coda due to the unfair and prejudicial preindictment delay and unconstitutionally admitting Coda’s post-arrest, pre-*Miranda* silence as substantive evidence of his guilt, the lower courts denied Coda the fundamental rights guaranteed to him by the Fifth Amendment. In order to preserve the sanctity of the justice system and protect the rights guaranteed by the Fifth Amendment, the Court should reverse the lower courts’ decisions due to the unfair and prejudicial preindictment delay and the substantial error in the denial of the motion to suppress Coda’s post-arrest, pre-*Miranda* silence.

I. The preindictment delay caused actual prejudice to Coda, violating his Fifth Amendment rights, even though there was no evidence of bad faith on the part of the government.

The Fifth Amendment to the United States Constitution guarantees that “no person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V. The district court opined that “there are no clear standards for a court to determine whether the government’s justification outweighs the defendant’s prejudice.” R. at 5. However, in order for a preindictment delay to violate a defendant’s due process rights under the Fifth Amendment, he must show substantial and actual prejudice and the government’s recklessness and lack of legitimate investigatory justification for the delay. *United States v. Sabath*, 990 F. Supp. 1007, 1016 (N.D. Ill., 1998).

Then, a balancing test is employed to weigh the prejudice suffered by the defendant against the government's motivations for the delay. *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

A. Coda suffered actual and substantial prejudice because of the preindictment delay greater than the government's reason for the delay.

A dismissal for preindictment delay requires the showing of actual and substantial prejudice. *Lovasco*, 431 U.S. at 789. The defendant further bears the burden of proving that he suffered this prejudice. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). The defendant must prove that the prejudice was "definite and not speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case." *Id.* In *United States v. Marion*, this Court explained that prejudice can constitute the impairment of memories, loss of evidence, loss of witnesses, or other interference with a defendant's ability to defend himself. 404 U.S. 307, 321 (1971). Additionally, witness deaths alone may meet the required showing of prejudice so long as the court is convinced that the witness would have testified, been credible, and able to withstand a cross-examination. *Sabath*, 990 F. Supp. at 1014 (citing *United States v. Doerr*, 886 F.2d 944, 964 (7th Cir. 1989)).

When a person is accused of a specific crime, he can devote himself to forming a defense, including gathering alibi witnesses and evidence. *Marion*, 404 U.S. at 331 (Douglas, J. concurring). In contrast, when there is no formal accusation, the government may proceed to build its case, possibly over the span of years, while the prospective defendant may lose any chance of defense. *Id.*

Here, Coda has suffered actual and substantial prejudice to his defense because of the government's delay. As the district court noted, "It is undisputed that Coda's inability to provide this corroborating evidence is due to the government's preindictment delay. Therefore, Coda has proven that the government's preindictment delay caused actual and substantial prejudice to his

defense.” R. at 5-6. The district court contended, however, that this does not outweigh the government’s interest.

However, at trial the balance was very much in favor of the government because Coda had little exonerating evidence to present to the jury due to the preindictment delay. Both Coda’s alibi witnesses and his material evidence were lost due to the preindictment delay. As Chief Judge Martz noted in his dissent, “[Coda] no longer has a facially air-tight alibi defense.” R. at 12. In the ten years that lapsed between the explosion and Coda’s arrest, four of the five people able to corroborate Coda’s alibi passed away, and the lone remaining individual now suffers from dementia and could not testify.

Taken together, the testimony of five witnesses would have met the threshold outlined in *Sabath* because they would have been able to corroborate one another's stories and provide moral support to help one another withstand the adversarial environment. Furthermore, because of the excessively long delay, Coda was unable to produce the Greyhound bus records of his 2010 trip as evidence at trial because the records are stored online for only three years, and Coda made his last annual trip in 2015, four years prior to his indictment.

Together, the loss of not one but five alibi witnesses and material evidence meet Coda’s burden of proving actual and substantial prejudice as outlined in *Marion*, outweighing any motivation by the government for the delay. Therefore, Coda has proven that the preindictment delay constitutes a denial of his Fifth Amendment due process rights and this Court should reverse the lower courts’ decision.

B. The lack of bad faith motivation on the part of the government does not outweigh the prejudice felt by Coda under the balancing test approach because the government’s preindictment delay was both reckless and culpable.

Once a defendant has established actual prejudice, the court must then balance this prejudice against the government’s justification for the preindictment delay. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). A preindictment delay will be permissible unless it violates “fundamental conceptions of justice.” *Moran*, 759 F.2d at 782. The inquiry thus becomes about whether the government’s action in prosecuting after substantial delay violates fundamental conceptions of justice or the community’s sense of fair play and decency. *Howell*, 904 F.2d at 895 (citing *United States v. Automated Med. Lab’ys., Inc.*, 770 F.2d 399, 404 (4th Cir. 1985)).

In *United States v. Marion*, the Court agreed that, in addition to substantial prejudice, the government’s intentional delay to gain a tactical advantage over the defendant may constitute a violation of these fundamental conceptions of justice. 404 U.S. at 324-25. Therefore, under a balancing test approach, legitimate investigative reasons can justify prejudicial delay. *Sabath*, 990 F. Supp. at 1014. In contrast, the absence of such investigative efforts provides strong circumstantial evidence of bad faith motivation on the part of the government as applied by *United States v. Lovasco. Sabath*, 990 F. Supp. at 1018. And, convenience to law enforcement officials cannot override a defendant’s constitutional right to due process. *Howell*, 904 F.2d at 893.

As noted by the district court, *Marion* does not define a level of governmental culpability needed in order to prevail. R. at 4 (citing *Marion*, 404 U.S. at 324–25). In his concurrence with the *Marion* decision, Justice Douglas noted that the outcome of a case shifts more in favor of the government the longer the government lags. *Marion*, 404 U.S. at 331 n.3 (Douglas, J., concurring) (citing *Nickens v. United States*, 323 F.2d 808, 813 (U.S. App. D.C. 1963)). Further,

Justice Brennan noted that a negligent failure by the government to ensure a speedy trial is nearly as damaging to a defendant's rights to fundamental conceptions of justice as an intentional failure or delay by the government. *Marion*, 404 U.S. at 334 (Brennan, J., concurring).

Therefore, the real question is whether the government's preindictment delay could have been reasonably avoided, rather than whether it was made in bad faith. *Id.* This Court took this into consideration and adopted a less stringent approach in *Lovasco*, writing that a showing of reckless disregard of circumstances by the prosecution can meet the test of unconstitutional preindictment delay. 431 U.S. at 795 n.17.

The Ninth Circuit took this into consideration in *Moran*, ruling that negligent governmental conduct may form a basis for unconstitutional delay as long as there is some showing of governmental culpability in the deprivation of due process. 759 F.2d at 783. The lower courts cited to the holding of the district court in *Burks*, which requires a bad faith or intentional delay in order for a preindictment delay to violate due process. R. at 6 (citing *Burks*, 316 F. Supp. 3d at 1043). The lower courts supported this finding by citing the Third Circuit's decision in *Sebetich*. R. at 6 (citing *Sebetich*, 776 F.2d at 430). However, the Seventh Circuit has acknowledged that unintentional delay can violate the Constitution. *Sabath*, 990 F. Supp. at 1016. Additionally, the Fourth and Ninth Circuits have explicitly eschewed the bad faith requirement in proving unconstitutional preindictment delay in favor of a lesser showing of government culpability where the defendant has been greatly prejudiced by the delay. *Id.* at 1017. Using *Lovasco*'s balancing test, these circuits held that governmental negligence is sufficient to establish a due process violation when the delay prejudices the defendant to the point of violating fundamental conceptions of justice. *Sabath*, 990 F. Supp. at 1017.

Here, the prejudice that Coda suffered outweighs any motive the government may present for the delay because the delay was both reckless and lacked any legitimate investigative purpose. As Chief Judge Martz noted in his dissent, “[I]t is undisputed that Coda lost his only defense due entirely to the government’s delay.” R. at 12. In the U.S. Attorney’s Office, Coda’s case was marked as “low-priority” and was put on the back burner. R. at 2. There was no effort on the part of the government to actively investigate Coda’s case. Channeling the Fourth Circuit’s decision in *Howell v. Barker*, Chief Judge Martz also noted that “it is inherently unfair for a defendant to lose his only defense merely because his case was ‘low-priority’ to governmental officials for almost a decade.” R. at 12.

Furthermore, the preindictment delay could have been reasonably avoided if the government had not had a reckless disregard for Coda’s circumstances and actively investigated, rather than focusing on internal politics and power plays. It was only when the Assistant U.S. Attorney realized that the statute of limitations was about to expire, nearly ten years after the initial incident and just barely within the statute of limitations, that Coda was indicted. Deciding to pursue an indictment against Coda when it was convenient is a violation of Coda’s due process rights. This also displays the government’s culpability in substantially prejudicing Coda’s case. The government delayed its indictment of Coda as long as possible, shifting the balance of the favor of the case as far to its side as possible. Therefore, this Court should find that the preindictment delay, causing substantial prejudice, is a violation of Coda’s right to due process even without evidence of a bad faith motive on the part of the government.

C. Although the indictment took place within the statute of limitations, this does not prevent the Court reversing the decisions of the lower courts because the statute of limitations has effectively run.

The district court noted that statutes of limitations exist as a procedural safeguard against unfair prejudicial delay. R. at 5. While this may be correct, the district court ignores the fact that statutes of limitation are designed to protect individuals from having to defend themselves against charges when the basic facts may have been obscured by the passage of time. *Marion*, 404 U.S. at 323 (citing *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)). This is echoed in Chief Judge Martz's dissent, "Surely Congress did not intend the mere imposition of a statute of limitations to conclusively establish that governmental negligence trumps constitutional protections." R. at 12-13. Further, in *Marion*, this Court found that even if a defendant is indicted within the statute of limitations, the case can still be dismissed if the preindictment delay resulted in substantial prejudice. *Marion*, 404 U.S. at 324. This is because statutes of limitation are intended to prevent prejudice in a case. *Id.* at 322.

Here, although Coda's indictment fell within the statute of limitations, the statute of limitations is not the best measure of prejudice caused by preindictment delay. This is because the facts of Coda's case have become obscured by the passage of time. Because facts, through loss of witnesses and spoliation, have been lost, actually and substantially prejudicing Coda's case, the purpose of the statute of limitations in question has become moot. Therefore, Coda still suffered severe Fifth Amendment due process rights violations that defy fundamental conceptions of justice despite the statute of limitations. Coda's situation further fits within the framework thought out in addressing the statute of limitations question in *Marion*, and as a result, this Court should find that the statute of limitations has effectively run.

II. The district court’s admission of the Coda’s post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violates the Fifth Amendment to the United States Constitution, and the unconstitutional admission was not a harmless error.

The Fifth Amendment's guaranteed protection against self-incrimination is “fundamental to our system of constitutional rule.” *Miranda v. Arizona*, 483 U.S. 436, 468 (1966). Preserving its protection is crucial in maintaining a fair judicial system, and it is essential that the privilege not be cut down or diminished. On the day Coda was arrested, he remained silent from the moment of his interaction with law enforcement officers. Through his refusal to speak, Coda asserted his Fifth Amendment rights, and the admission of his silence as substantive evidence of guilt violated his Fifth Amendment rights. Additionally, even if Coda had not asserted his Fifth Amendment rights through his silence, permitting the admission of his post-arrest, pre-*Miranda* silence infringes on the right against self-incrimination, defies the spirit of the seminal *Miranda* case, and provides an unjust incentive for law enforcement officers to delay formal interrogations for as long as possible in order to gain incriminating evidence through unsuspecting detainee’s silence. Additionally, not only was the admission of the Coda’s silence constitutionally forbidden, but it was also crucial to his conviction and was not a harmless error by any standard.

A. By refusing to speak, Coda asserted his privilege against self-incrimination, and the district court’s admission of his silence as substantive evidence of his guilt violated his Fifth Amendment Rights.

The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution. U.S. Const. amend. V. Although precedent makes clear that, outside of a limited set of circumstances that impede a person’s ability to freely assert the privilege, one must claim the right in order to gain its protection, *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984), once claimed, a person cannot be penalized for exercising his Fifth Amendment rights. *Griffin v. California*, 380 U.S. 609, 614 (1965); *Miranda* 483 U.S. at 468 n.38 (“The prosecution may not .

. . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation.”).

Permitting the prosecution to comment upon or admit evidence of a defendant’s assertion of that right is “a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.” *Griffin*, 380 U.S. at 614. *See also Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (holding that “the use for impeachment purposes of Petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause”); *United States v. Okatan*, 728 F.3d 111, 1189 (2d Cir. 2013) (holding that the admission of a police officer’s testimony regarding the defendant’s pre-arrest request for a lawyer during the prosecution’s case-in-chief violated the defendant’s Fifth Amendment rights); *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989) (holding that the trial court’s admission of the defendant’s pre-arrest statement invoking his right against self-incrimination violated his Fifth Amendment right against self-incrimination).

There is no script or prescribed policy to follow in order to claim Fifth Amendment privileges. According to the Court in the seminal *Miranda* case, “If the individual indicates in any manner, at any time prior to or during questioning, that he wished to remain silent . . . he has shown that he intends to exercise his Fifth Amendment privilege.” *Miranda*, 384 U.S. at 473-74. The Court in *Miranda* did not require that such an invocation be verbal, but rather allowed for “any manner” of indication of his wish to remain silent, *id.*, and there is “no ritualistic formula is necessary to invoke the privilege,” *Quinn v. United States*, 349 U.S. 155, 164 (1955). So long as the assertion is “unambiguous,” it is enough. *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (holding that a defendant’s statement, but not his silence, after two hours and forty-five minutes

of an interview in which he remained silent was admissible because by voluntarily speaking, he “waiv[ed]” his right to remain silent).

When, almost ten years after the crime he was alleged to have committed, Coda was arrested and taken into custody, he asserted his Fifth Amendment right against self-incrimination by remaining silent and refusing to speak. Raising the invocation of his rights as substantive evidence of his guilt penalized him for asserting his constitutional rights, making the assertion of his privilege costly and violating his Fifth Amendment rights. Surely, there is no more unambiguous method of asserting one’s right to remain silent as simply and consistently remaining silent from the moment of contact with police and throughout the trial. Unlike in *Berghuis*, wherein the court held that the defendant waived his *Miranda* rights by speaking after remaining silent for two and a half hours of an interview, Coda did not utter a single word to the arresting officer or “act[] in a manner inconsistent with [the] exercise” of his right to remain silent. *Berghuis*, 560 U.S. at 385. Thus, there was no voluntary waiver or abandonment of his right to remain silent. Instead, Coda consistently asserted his right to remain silent throughout his interactions with law enforcement, and by raising his silence as substantive evidence of his guilt, the prosecution made his assertion costly and infringed upon his Fifth Amendment rights.

Although in *Fletcher*, the Court asserted that post-arrest silence is admissible for impeachment purposes “[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings,” the Court specifically limited the use of such admissions only for impeachment purposes “when a defendant chooses to take the stand.” *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). *See also Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (“[T]he Constitution does not prohibit the use of impeachment purposes of a defendant’s silence prior to arrest . . . or after arrest if no *Miranda* warnings are given.”). Here, not only was Coda’s post-arrest, pre-

Miranda silence not used for impeachment purposes, but *Fletcher* is also distinguishable from the instant case. Coda has consistently asserted his privilege against self-incrimination from the moment of his arrest and throughout his trial, declining to testify on his own behalf, and his silence was used as substantive evidence of his guilt, rather than for the purposes of impeachment. Neither *Fletcher* nor *Brecht* permits the admission of post-arrest silence for purposes other than impeachment of the defendant upon cross-examination, *id.*, and, thus, does not apply here.

Further, while the district court, citing *Salinas v. Texas*, 570 U.S. 178 (2013), asserted that “[t]he Supreme Court has established that pre-custodial silence is admissible as substantive evidence of guilt,” R. at 8, the court both erred in its application of *Salinas* and misconstrued its holding. In *Salinas*, the Court held that the admission of the defendant’s noncustodial, mid-interview silence in response to one question sandwiched in the midst of a one-hour interview in which the Petitioner voluntarily answered all other questions asked of him did not violate the Fifth Amendment. *Salinas v. Texas*, 570 U.S. at 182. Additionally, in *Salinas*, “All agree[d] that the interview was noncustodial.” *Salinas*, 570 U.S. at 181. Here, however, Coda remained consistently silent, never waiving his Fifth Amendment rights by speaking and he was, indisputably in custody at the time of his silence. The district court erred in equivocating the admissibility of *Salinas*’s pre-custodial, mid-interview silence and Coda’s custodial, complete silence. Thus, Coda invoked his privilege against self-incrimination, and it was constitutionally impermissible for the prosecution to raise Coda’s silence as substantive evidence of his guilt.

B. Even if Coda had not asserted his Fifth Amendment rights, he was in custody under the reasoning of *Miranda*, and such an assertion was not necessary to gain the protection against self-incrimination

The “constitutional protection [against self-incrimination] must not be interpreted in a hostile or niggardly spirit.” *Ullmann v. United States*, 350 U.S. 422, 426 (1956). Although Coda’s consistent silence was an unambiguous assertion of his Fifth Amendment right to remain silent, even if Coda had not asserted his Fifth Amendment right to remain silent, he was in custody for the purposes of *Miranda*, and anything he did or did not say should be deemed inadmissible because law enforcement failed to properly advise him of his *Miranda* rights. To hold otherwise would defy the spirit of *Miranda* and provide an incentive for law enforcement officers to delay informing detainees of their *Miranda* rights and the commencement of formal interrogations so that unsuspecting defendant’s silence could be used against them as substantive evidence of guilt.

Since the Court issued its ruling in *Miranda*, it has been recognized that “[a] witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary.” *Salinas*, 570 U.S. at 184. The Court in *Miranda* based its decision on the premise that custodial interrogations contain “inherently compelling pressures” and “trickery” that can compel a defendant to unwittingly or unwillingly act against his best interests. 385 U.S. at 453, 467.

While this Court has not directly addressed a situation, such as Coda’s, wherein a person’s consistent post-arrest, pre-*Miranda* silence is used against him as substantive evidence of guilt, several circuits have, consistently holding that to do so defies the spirit of *Miranda* and violates the Constitution. For example, in *United States v. Moore*, the D.C. Circuit held that “custody and not interrogation is the triggering mechanism for the right of pretrial silence under

Miranda.” 104 F.3d 366, 385 (D.C. Cir. 1997). In *Moore*, during direct examination of one of the arresting officers and the closing argument, the prosecution raised the defendant’s post-arrest, pre-*Miranda* silence as substantive evidence of his guilt, claiming that if the defendant were innocent, he would have appeared surprised or asserted his innocence. *Id.* at 384. Similarly, in *United States v. Velarde-Gomez*, the Ninth Circuit reasoned, “[O]nce the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given.” 269 F.3d 1023, 1029 (9th Cir. 2001).

While *Miranda* spoke specifically of custodial interrogations, psychological pressures and trickery are not exclusive to custodial interrogation. Rather, such inherent pressures are also present in situations, like Coda’s, wherein a person is arrested out of the blue for supposed crimes for which they never knew they were suspected. The reasoning of *Miranda*, that the “inherently compelling pressures” of custodial interrogation require that defendants be informed of their *Miranda* rights, 385 U.S. at 467, should compel the Court to extend such requirements to cases like Coda’s, wherein he was subject to the intense psychological pressures of being shockingly arrested almost a decade after he lost his store and livelihood in a devastating explosion.

Here, the Court should adopt the lower courts’ reasoning in *Moore* and *Velarde-Gomez* and formally expand the protection against self-incrimination to include the period in which a person has been taken into custody but has not been formally interrogated. If not, it infringes on the protections provided by *Miranda* and encourages the sort of trickery by law enforcement that *Miranda* was intended to prevent. As stated by the court in *Moore*, “Any other holding would

create an incentive for arresting officers to delay interrogation in order to create an intervening ‘silence’ that could be used against the defendant.” *Moore*, 104 F.3d at 385.

C. The unconstitutional admission of Coda’s silence was crucial to his conviction and was not a harmless error.

The violation of Coda’s Fifth Amendment Right through the wrongful admission of his silence was not a harmless error by any standard of review. Constitutional errors do not necessitate “automatic reversal . . . [and] ‘there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless.’” *Brecht*, 507 U.S. at 630 (quoting *Chapman v. California*, 386 U.S. 18, 22 (1967)). When a case reaches the Court on direct review through a writ of certiorari, as here, it is subject to the standard elucidated in *Chapman. Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). According to the *Chapman* standard, “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman*, 386 U.S. at 24. In *Chapman*, the Court elaborated upon this standard, explaining that an error is not harmless if it is “a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts.” 386 U.S. at 25-26.

The Ninth Circuit has provided further guidance regarding what factors ought to be considered when determining whether the government’s comments on the defendant’s silence were harmless beyond a reasonable doubt including: “the extent of the comments made . . . , whether an inference of guilt from silence was stressed to the jury, [and] the extent of other evidence suggesting the defendant’s guilt.” *United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991). In applying the *Newman* factors to a case in which the prosecution raised the defendant’s post-arrest, pre-*Miranda* silence in both its case-in-chief and closing statements, the

Ninth Circuit held that the unconstitutional error was harmless because the silence was only mentioned twice during the trial, was not stressed, and there was other “overwhelming” evidence that the defendant was guilty. *United States v. Hernandez*, 476 F.3d 791, 797 (9th Cir. 2007).

In contrast, in applying the harmless error standard to a case in which the prosecution used the defendant’s pre-arrest invocation of his right against self-incrimination as substantive evidence of his guilt, the First Circuit held it was not a harmless error because the victim was unable to make a courtroom identification and the remainder of the evidence presented was circumstantial (including the defendant having a fresh band aid when confronted by the police, inconclusive DNA evidence, and three jail informants’ testimony that the defendant had admitted to the crime). *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989). Thus, the court was unable to determine that “the admission of the [defendant’s] statement was harmless beyond a reasonable doubt.” *Id.* Similarly, in *United States v. Okatan*, the Second Circuit held that the prosecution’s use of the defendant’s custodial silence as substantive evidence of guilt was not harmless beyond a reasonable doubt, because the remainder of the prosecution’s evidence was “purely circumstantial,” and “[t]he strength of the prosecution’s case is probably the single most critical factor in determining whether the error was harmless.” 728 F.3d 111, 120-21 (2d Cir. 2013).

However, when a case reaches the Court through collateral review, such as through a writ for habeas corpus, it is subject to the less stringent (for the government) *Kotteakos* standard. *Brecht*, 507 U.S. at 630. Under *Kotteakos*, the test is whether the error “had a substantial and injurious effect or influence in determining the jury’s verdict.” *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). When applying the *Kotteakos* standard, the Court in *Brecht* held that the error in admitting the petitioner’s post-*Miranda* silence was harmless, as the prosecution’s

impermissible references to the silence were “infrequent, comprising less than two pages of the 900–page trial transcript,” and the other evidence presented to the jury was “certainly weighty,” including ballistics evidence that directly contradicted the story the petitioner told at trial. *Brecht*, 507 U.S. at 639.

Here, the error in admitting Coda’s post-arrest, pre-*Miranda* silence as substantive evidence of his guilt is not harmless by either the *Chapman* or the *Kotteakos* standard. Unlike *Hernandez* and like *Coppola* and *Okatan*, the prosecution relied heavily upon and stressed Coda’s silence as substantive evidence of his guilt both in its case-in-chief and closing argument and the other evidence presented to the jury was circumstantial and entirely insufficient to prove his guilt beyond a reasonable doubt. The only other evidence the prosecution presented to the jury was a tip the FBI received from Coda’s neighbor, Sam Johnson, claiming that Coda’s business was in decline, that Coda had an insurance policy on the store (as any responsible business owner would), and that Coda seemed “anxious and paranoid” when they spoke the week of the explosion at his store. R. at 2. On the other hand, Coda had evidence exonerating himself, including the Federal Bureau of Alcohol, Tobacco, and Firearms investigation, which suggested that the explosion at Coda’s store was the result of the cold weather causing an old, faulty gas line to leak and destroy the decrepit building. As in *Chapman*, this is a case wherein absent the constitutionally forbidden comments from the prosecution, a reasonable jury could have brought in verdicts of not guilty.

Additionally, even though the *Chapman* standard properly applies here, the error is also not harmless under the *Kotteakos* standard as the error had a “substantial and injurious influence” on the jury’s verdict. *Kotteakos*, 328 U.S. at 776. Unlike in *Brecht*, the prosecution stressed Coda’s silence as substantive evidence of his guilt. Additionally, the other evidence against Coda

was anything but weighty and was, at best, circumstantial. In contrast to *Brecht*, the forensic evidence of the cause of the explosion supported the story Coda presented to the jury, i.e., that he had nothing to do with the explosion at the hardware store. Thus, the prosecution's unconstitutional presentation of Coda's silence as substantive evidence of guilt is not harmless by any standard.

CONCLUSION

Before the Court is the opportunity to preserve the rights guaranteed by the Due Process Clause of the Fifth Amendment and maintain the sanctity and fundamental fairness of the criminal justice system. In order to ensure the strength and sustainability of the protections guaranteed by the Fifth Amendment, the Court should find that the preindictment delay, which caused Coda actual prejudice even though there was no evidence of bad faith on the part of the government, and that the admission of Coda's post-arrest, pre-*Miranda* silence as substantive evidence of his guilt violate the guaranteed protections of the Fifth Amendment and reverse the judgement of the lower courts.

Respectfully submitted.

TEAM 38

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