No. 21-125

In The

Supreme Court of the United States

AUSTIN CODA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether a preindictment delay that resulted in actual prejudice to the defendant, and which was caused by government inefficiency, violates the Due Process Clause of the Fifth Amendment?

2. Whether the prosecution's use of defendant's unwarned, custodial silence as substantive evidence of guilt offends defendant's privilege against self-incrimination and is thus a violation of his Fifth Amendment rights?

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STATEMENT OF THE CASE

A. The Destruction of the Plainview Hardware Store

Plainview East Virginia is a small, rural town bordering North Carolina. R. at 1. Mr. Austin Coda owned and operated a hardware store there from January 2002 until December 2010, when it was destroyed in an explosion. R. at 2. Mr. Coda was visiting with family in New York in celebration of his birthday on the night of the explosion, having traveled by Greyhound bus to be there. R. at 3. The initial investigation into the destruction of the store pointed toward a faulty gas line. R. at 2. After receiving a tip incongruent with this result, however, the government moved to interview the tipster, Sam Johnson, who informed them that Mr. Coda had an insurance policy on the store, and further described the financial difficulties the store and its owner were facing before the conflagration. R. at 2.

In the years between Mr. Coda's shop being destroyed and his indictment for the crime, Mr. Coda has suffered the loss of four close family members. Two to disease and two as a result of car accidents. R. at 3. A fifth family member has been diagnosed with dementia. All five were key witnesses for Mr. Coda's defense, as they would have been able to confirm he was present in New York on the night of the incident. *Id*. Mr. Coda also intended to retrieve records of his trip by bus from East Virginia to New York. The Greyhound bus station retains records for no more than 3 years, and as Mr. Coda has not made the trip to New York since 2015, he lacked any avenue to prove his alibi at trial. R. at 3.

B. Delayed Indictment and Arrest

Despite the FBI having received Mr. Johnson's tip "shortly after" the initial investigation was closed, the US Attorney's office declined to file an indictment in 2010. R. at 2. The office cited several reasons for delay, including the low-priority status of Mr. Coda's case, political

pressure to focus on drug trafficking and related offenses, high turnover in the offices as a result of this political pressure and hesitancy to cooperate with state level authorities on custodial arrangements for Mr. Coda while he faced unrelated charges in East Virginia. *Id*. The Assistant U.S. Attorney appointed to the case in April 2019 realized the statute of limitations was soon to run out and rushed to arrest and indict Mr. Coda. R. at 2-3. The government makes no claims to have pursued investigation in the case beyond the time spent in the initial December 2010 investigation, and the brief follow up dedicated to investigating Mr. Johnson's tip shortly after this initial investigation.

On April 23, 2019, Special Agent Park with the FBI placed Mr. Coda under arrest, reading the charges that were recently filed against him. R. at 7. Though the FBI had the opportunity to mirandize Mr. Coda at this juncture they did not, Mr. Coda was instead transported to a detention facility without incident, or speech from himself. *Id*. Upon arriving at the detention facility, Mr. Coda was read his *Miranda* rights. R. at 7.

SUMMARY OF THE ARGUMENT

I.

The Due Process Clause of the Fifth Amendment protects citizens from prosecutorial abuse. Significant preindictment delay which causes the loss of valuable witnesses and digital evidence undoubtedly qualifies as abuse. Mr. Coda was actually prejudiced by the government's blunders in this case due to the loss of alibi evidence. This Court has never required that the government's errors be the result of intentional conduct. Instead, it has repeatedly been emphasized that due process analysis lends itself more readily to "case-by-case" analyses and consideration of the particular circumstances of the case. Such analysis reveals the government's violation of the fundamental principles underlying our justice system, even assuming, arguendo, that they are the result of "mere" negligence.

Government prosecutors are granted great deference in deciding when to file charges and how to develop cases, the discretion afforded to them is not unlimited. Our justice system would cease to function if prosecutors were permitted to receive criminal referrals from law enforcement and then loaf about for, potentially, years while vital evidence beneficial to the defense went stale or disappeared altogether. The statute of limitations is no defense to such behavior, and this Court has never held that the Due Process Clause's protections are contained within these legislatively imposed limitations. Government inability to provide any valid reason for delay should satisfy the inference that there was no such reason and allow for the rebuttable presumption of bad faith. Furthermore, forcing defendants to supply proof of government malfeasance in order to vindicate their due process rights wrongly places the burden on the party least able to carry it.

II.

The Fifth Amendment further protects those accused of crimes from being forced to bear witness against themselves. This right is a pillar of the judicial and legal system and ensures defendants the right to remain silent in the face of criminal accusations. The protections afforded from these rights have been enshrined in the 1966 decision Miranda v. Arizona, where this court decidedly held that those who are brought under custodial interrogation are required to be read their constitutional rights and afforded an opportunity to invoke or waive such privileges.

The arresting officers that brought Mr. Coda into police custody decided to withhold this information from him and instead sought to frame his post-arrest period of silence as evidence of Mr. Coda's guilt. In doing so, the prosecution has offended Mr. Coda's rights to be informed of his constitutional privileges as he was subject to interrogation. It has punished Mr. Coda for failing to respond to information that was purposefully withheld from him.

Ultimately, the constitutional jurisprudence surrounding Miranda and the decades of litigation that followed has proven little in the way of protecting the criminally accused. This court's narrowing of those rights, coupled with the effects of growing police forces, mass incarceration, and the criminalization of the communities most affected, has resulted in Miranda failing to protect those that need it the most. By changing course and limiting the rights of police officers to circumvent Miranda and prosecutors to use defendants' statements against them, the Court can begin to turn the tide on the harm that has followed more than five decades of Miranda litigation. Allowing prosecutors to use defendants' silence as evidence of guilt offends the fundamental notions built into one's right to remain silent and petitioner urges the Court to reverse the lower court's decision.

ARGUMENT

I. The Due Process Clause of the Fifth Amendment protects defendants from unnecessary preindictment delay when the defendant is actually prejudiced, and the government provides no justifiable reason for the delay.

The Fifth Amendment provides that "No person shall be held to answer for [an] infamous crime . . . nor be deprived of life, liberty, or property, without due process of law."[1] Enshrined within these protections is the right to defend oneself after being accused of a crime without having to bear the additional burden borne from government delay in bringing the case. This Court first analyzed this issue in 1971, where it found that "[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468 (1971). This is consistent with the Court's historical due process analyses, disfavoring hard and fast rules or "black-letter" tests. The general rule remains that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Since *Marion*, the Court has not been presented with a preindictment delay case so clearly deserving of dismissal in favor of a defendant.

Here, a productive member of society—a former business owner in fact—was ensnared in nearly ten years of delayed indictment, based off of an equally ancient tip, and now looks down the pipe of another decade wasted in prison. For an act which evidence could have conclusively proven he did not commit but for the prosecution's egregious, years long delay in filing charges. In such a case, where the defendant was actively prejudiced by the delay in

[1] U.S. Const. amend. V.

bringing the case, and the government fails to provide any justifiable reason to have ignored its duty to diligently pursue a prosecution, the indictment and all charges should be dismissed.

A. The Balance of the *Lovasco* Factors Is in Mr. Coda's Favor

This Court in 1977 did specifically address due process in relation to preindictment delay and found that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). Given the courts rulings in *Marion* and *Lovasco* a due process violation can be proved by showing both that (1) the defendant suffered actual prejudice as a result of a preindictment delay and (2) the government's delay was not justified under the circumstances of the case in question.

1. *Mr. Coda Was Actually Prejudiced at Trial by the Government's Preindictment Delay*

Lovasco held that actual prejudice is a necessary condition to proving a due process violation in cases of preindictment delay. *United States v. Lovasco*, 431 U.S. 783. As the district court correctly noted, Mr. Coda experienced actual, substantial prejudice in preparation of his defense. R. at 6. If the government had moved to indict Mr. Coda in the years between 2010 and 2015, then he would have been able to call upon all five of his witnesses to testify as to his location during the commission of the crime. This would have provided an air-tight alibi, and likely resulted in the government deferring to its original assessment of the explosion as an accident. Instead, the government's delay resulted in Mr. Coda losing four of five witnesses to deaths, and with his final witness battling dementia. R. at 3. If the government had filed its indictment in 2018, then Mr. Coda could have at least provided evidence that he went on his annual birthday trip in 2015 by recovering the Greyhound bus passenger records that are kept for

up to 3 years after the trip. R. at 3. This would have been sufficient corroboration for a jury to determine he was not lying about these trips and acquit him. The Thirteenth Circuit's adjudication that Mr. Coda was actually prejudiced by the government's delay should thus remain undisturbed.

2. The Government Does Not Have a Justifiable Reason for Its Preindictment Delay

Our system of governance affords prosecutors great latitude in determining how to bring a criminal case, but they are expected to use it wisely.[2] This rationale undergirds the *Lovasco* decision, which emphasized that the investigative delay is "fundamentally unlike delay undertaken by the government solely to gain tactical advantage over the accused." *United States v. Lovasco*, 431 U.S. at 795. The record reflects that the government diligently pursued its investigation from late 2010 and likely into 2011, having first made the determination that the explosion was an accident, then following up on the tip from Mr. Johnson which turned their attention to Mr. Coda. R. at 2. This initial period of investigation is consistent with diligent prosecutorial activity consistent with due process protections. But the deference given to prosecutors is not unlimited, it's clear the government could have brought an indictment in 2015, before the first two witnesses favorable to Mr. Coda passed. The government provides a spattering of excuses for why they so delayed the indictment, but none pass muster.

First, the government points to the low priority attached to the case at its inception. While, in some circuits, this excuse in tandem with other considerations has earned the government mercy, no court has held that prioritizing a heavy caseload in itself is justification for preindictment delays. "[P]rosecutors should be aware that the burdens of their office,

[2] Bruce A. Green, *The Difficulty and Necessity of Public Inquiry*, 123 Penn St. L. Rev. 589, 618 (2019).

including heavy caseloads, do not grant them carte blanche to delay bringing an indictment." *United States v. Baxt*, 74 F. Supp. 2d 425, 432 (D.N.J. 1999). And indeed, the record fails to reflect that there was a substantially heavy caseload. Rather, the government merely points out that Mr. Coda's case was "low priority." R. at 2.

The next explanation the government provides is the need to await the conclusion of state charges. Here, the government likely intends to rely on the so-called "'dual prosecution policy," also known as the "Petite policy".[3] In simple terms, the policy states that federal prosecutions should not be brought if they are "based on substantially the same act(s) or transactions involved in a prior state or federal proceeding." *Id*. (emphasis added). Adherence to this policy has reliably shielded the government in the past. See *United States v. Marler*, 756 F.2d 206 (1st Cir. 1985). But it's inapplicable here, because Mr. Coda was facing *unrelated* state charges when the government declined prosecution of him. Furthermore, the government continued to delay even *after* the conclusion of Mr. Coda's state charges.

Finally, the government returns to a claim of misprioritization, though this time suggesting political pressure was the catalyst, causing an increase in the turnover rate of the office. R. at 2. When actual prejudice results from the government's personnel follies, however, the balance weighs against affording prosecutor's leniency. In *U.S v. Sample* for instance, a defendant was accused of running a fraudulent discount buyer's club and defrauding hundreds of farmers to the tune of hundreds of thousands of dollars. *U.S. v. Sample*, 565 F.Supp. 1166 (1983). Despite the grave nature of the allegations and the readily available evidence, the US Attorney's office in the district shuffled the case across staff members for two years without returning an indictment. *Id* at 1184. The court held that this was a violation of due process. It

[3] United States Department of Justice, United States Attorneys' Manual § 9, c. 2 (Accessed: Sep 4, 2021)

isn't difficult to imagine reaching the same conclusion for Mr. Coda's case, where actual, substantial prejudice is present, and a delay that is possibly four times the length of the delay found in *Sample* also occurs. Because none of the government's scattered reasons provide adequate justification for delaying the indictment, the Court should find the government has violated the due process clause in this case.

B. The Balancing Test Most Accurately Reflects Current Due Process Jurisprudence

While the Thirteenth circuit correctly analyzed Mr. Coda's claim of prejudice, it misinterpreted this Court in analyzing the second factor of the *Lovasco* test. "[The] due process inquiry must consider the *reasons for the delay* as well as the prejudice to the accused," with the only explicitly permissible reasons for delay involving continued government investigation. *United States v. Lovasco*, 431 U.S. at 790 (emphasis added). The Thirteenth Circuit ignores this language and finds for the government because of the supposed difficulty in applying a balancing test. Justice Maddrey insists it is impossible to equate these factors stating that "[t]here are no clear standards for a court to determine whether the government's justification outweighs the defendant's prejudice." R. at 5. This belies the fact that numerous courts have come to precisely the opposite conclusion. The Fourth Circuit, for example, has effectively balanced the actual prejudice to the defendant against reasons for delay and found for the defendant in cases where the government violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." See *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990). Indeed, such considerations have been enshrined in due process analysis in other contexts See *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (finding that forcing the suspect to have his stomach pumped to recover illegal drugs violated 14th Amendment Due Process Clause); See also: McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) as amended (June 10, 1993)

(finding that evidence admitted to improperly reflect on defendant's character violated fundamental conceptions of justice and community sense of fair play); *Lisenba v. People of State of California*, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941) (analyzing alleged police coercion of defendant to determine if treatment violated "fundamental fairness essential to the very concept of justice" protected by Fifth Amendment due process).

The Thirteenth Circuit relies on *United States v. Crouch* to buttress its view, but that case was substantially different from Mr. Coda's case. In *Crouch*, the chairman of a bank was accused of fraudulently obtaining loans to enrich himself at the expense of the bank and its shareholders but was only officially indicted eight years after the case was opened. *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996). While the court did reject the balancing test for the Circuit, its denial of the due process claim was based on a failing of the first prong of the *Lovasco* standard—the defendant had failed to prove that he had suffered actual prejudice. Crouch suggested several witnesses who were deceased or would likely lack memories of certain events, but he was unable to substantiate much of this speculative testimony and more importantly, the preindictment issue was raised *before* trial, making any actual prejudice at trial wholly speculative. *Id* at 1523. In the instant case, Mr. Coda was actually made to stand trial after an even longer delay of 9 years. His defense failed solely due to the government's nearly decade long delay reducing his alibi witnesses to a single relative with dementia and voiding his opportunity to recover digital proof of his alibi.

A test requiring bad faith is the actual outlier in due process analysis. Common sense dictates why: if, theoretically, the government's excuse for delaying an indictment was that they had been using their investigative file as a paper weight, there would be no doubt that no additional consideration was given to the case. Yet by the logic of the Thirteenth Circuit, that

circumstance would be equally permissible as in our case, where the government finds justification in political pressure and office turnover. R. at 2. Both circumstances would be sanctioned alongside a hypothetical scenario wherein the government failed to deliver an indictment due to widespread sickness of staff. Or flooding of the offices resulting in damaged evidence. Given the wide range of reasons for delay not borne of malice or bad faith, it makes more sense to consider these various reasons and properly distinguish the good from the bad rather than provide them all blanket viability. This is precisely why the Court in *Lovasco* made the reasons for the delay determinative, rather than simply ask to consider *if there was a bad faith* reason for the delay. However, even where courts choose to apply a bad faith requirement to the test, this case presents a circumstance that would potentially satisfy even this standard.

1. *The Government's Actions Reflect a Reckless Disregard for the Circumstances and Imply Bad Faith*

Courts that follow the two-prong test requiring "bad faith" rarely countenance the precise outer edges of the inquiry. The general explanation is that bad faith may be proved if the delay was "intentional" and resulted in the government gaining some "tactical advantage over the defendant." *United States v. Marion*, 404 U.S. 307 at 324. Ironically, the *Crouch* court's issues with balancing the prejudice to defendant against the needs for delay are just as, if not more pronounced in evaluating the "tactical" nature of delays. After all, the universally valid investigative delay meets the technical definition endorsed by the court in *Marion*. Investigation is undertaken *intentionally*, and the hope is clearly to find more or better evidence with which to gain a *tactical advantage* in further proceedings. The permittance of investigative delay is reasonable, of course, but it underlines the inherent difficulty of enforcing even a bad faith standard built upon assessments of the prosecution's intentions. The government itself has

conceded that intentional conduct may not be required: "[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." *United States v. Lovasco*, 431 U.S. 783, 795 n.17.

The government describes its key witness against Mr. Coda as a "close friend," the kind of individual that would certainly be aware of Mr. Coda's annual birthday trip, circumstances which even a haphazardly conducted interview would no doubt uncover. R. at 2. The government should have known of the potential alibi that could be yielded by either discussing the trip with Mr. Coda's relatives or checking Greyhound bus records from the very inception of the case against him. Instead, it dilly-dallied for eight years while this crucial evidence was lost to time. An argument that these circumstances were not "known" to the government can no doubt be advanced, but even that claim faces hurdles under the jurisprudence.

This is why some courts shift the burden to the government, and find that, if no valid reason for a delay is supplied, bad faith may be implied. "In the lack of any reason advanced by the government for the delay, we may infer that there was an intent by the government to secure a tactical advantage over the defendant." *United States v. Harmon*, 379 F. Supp. 1349, 1351 (D.N.J. 1974). The defendant in Harmon was indicted for illegally facilitating the sale of firearms just before the lapse of the six-year statute of limitations, and only after two witnesses crucial to his defense had died. The government provided no explanation for the delay. As the court states: "In view of the extreme difficulty of the defendant in proving by competent evidence an intent by the government to secure tactical advantage by the delay, we can only adopt the adverse inference from its conduct, particularly in view of its failure to come forward

with any reason to explain the delay." *Id* at 1352. This course of action is logical given the constraints to defendants in accessing evidence in the government's hands, much less in the minds of government prosecutors. There are no statements in the record reflecting valid reasons for delay, and plenty of indication that the government's failures were self-inflicted, even if "merely" recklessly or negligently so. Thus, even assuming, *arguendo*, that the government's reasons for delay were not outweighed by the substantial prejudice against Mr. Coda's defense, they still reflect negligent or even reckless conduct warranting a dismissal of the indictment all the same.

C. Due Process Protections Are Not Limited to Circumstances of Government Malfeasance

The Due Process Clause does not operate with the intention of punishing the government for misdeeds, but to protect citizens from abrogation of their Constitutional rights. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963). This fundamental principle is why requirements of bad faith do not agree with *Lovasco*, *Marion* or due process jurisprudence generally.

1. Indictments Delivered Within the Statute of Limitations May Still Violate Due Process

The district court looked to the statute of limitations as a safeguard against due process violations. If Mr. Coda was indicted within the statute of limitations provided by 18 U.S.C. § 3295., the argument goes, then there can clearly be no issue with regards to the delay. However, this Court has held that "the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment." *United States v. Marion*, 404 U.S. 307 at

324. This is consistent with the rationale for formulating statutes of limitations in the first place: "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114–15, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156 (1970). That was precisely the circumstance in Mr. Coda's case, as he could call upon no reliable witnesses after the delay.

A related rationale for Statute of Limitations' is the desire to ensure prosecutions are performed in a timely manner. The district court of East Virginia correctly points out that the defense *or* the government could lose crucial evidence. R. at 5. But this point, rather than illuminating the benefits of a limited due process inquiry, supports more expansive protections. The government is, after all, the one bringing the case. Prosecutors have the requisite expertise and incentive to determine if the evidence they gather will hold up in the long term. "The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." *United States v. Lovasco*, 431 U.S. at 794. No citizen can properly be expected to anticipate every potential criminal case the government could bring and take proactive steps to preserve evidence, and they certainly don't have tools as effective as the government's for this purpose. While the government complied with the text of the statute of limitations, by bringing a case with only six months left before the statute would run and having no justifiable reasons for the delay, the government's actions offend the spirit of the law.

2. Requiring Defendant Prove the Government Acted in Bad Faith Contradicts Precedent and the Purpose of the Due Process Clause

The Court in *Lovasco* held that they "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *United States v. Lovasco*, 431 U.S. at 796. A sober reading of that case, combined with the context of decades of Due Process analysis elucidates the need for a balance test rather than a "black-letter test" requiring malintent on the part of the government. A due process violation in any context robs a citizen of their Constitutionally protected right to have the law applied consistently and fairly to them. The government's culpability in the violation of this right has bearing only insofar as intentional misconduct makes it certain to be a violation. This is the most natural construction of the language in *Marion* and *Lovasco*. Indeed, reading otherwise would suggest that even in cases where the actual, substantial, and wholly preventable prejudice is proved, there is no remedy unless the government acted maliciously. This all but negates the need to prove actual prejudice at all, making the government's motives the most important factor in the analysis. An analysis the purpose of which is deducing whether the defendant has suffered an irreconcilable violation of due process.

Unintentional government conduct not protected by the exceptions of prior adjudication, such as a result of investigative delays or due to the defendant's own actions, should be afforded no haven. At best they are the result of negligent conduct by the government. The Ninth Circuit has held outright that "although weighted less heavily than deliberate delays, negligent conduct can also be considered [in determining whether delay violated due process], since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." *United States v. Mays*, 549 F.2d 670 (1977). Much of the deference, respect and confidence we have in prosecutors comes from the understanding that they will endeavor to carry out their tasks with utmost care and diligence. Prosecutors must pay an actual price for failure to adhere to these

standards, at least when the result is substantial prejudice to a defendant. Otherwise, the standards themselves will become meaningless, and laziness, disorganization, and office politics will be the true dictates of justice. To subordinate due process to such concerns is wholly inconsistent with the goal of our Constitutional order.

II. Mr. Coda's *Miranda* rights were violated as a result of his custodial interrogation and his failure to unequivocally invoke his right to remain silent must not be held against him.

A. Mr. Coda Was Interrogated by Arresting Officers.

The Fifth Amendment states in part that none "shall be compelled in any criminal case to be a witness against himself."[4] This fundamental right is protected by affording one the right to remain silent, either in response to custodial interrogation or by providing that they are not forced to take the stand at trial. Where defendants choose to abstain from testifying, commenting on such "silence" by the prosecution at trial penalizes defendants for exercising their constitutional rights and is therefore prohibited. *Griffin v. California*, 380 U.S. 609 (1965). Commenting on "the fact that he stood mute or claimed his privilege in the face of accusation" is hence similarly prohibited at trial. *Miranda v. Arizona*, 384 U.S. 436 (1966).

In order to ensure that a suspects right to remain silent is properly availed when under custodial interrogation, the legal system requires that suspects are explicitly informed of these rights, either orally or written, and provided with an opportunity to invoke the privileges or to waive these rights. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966). The two most fundamental preconditions for this right to attach in police encounters are that the suspect be held

[4] U.S. Const. amend. V.

in custody and under interrogation. *Id.* Both parties here agree that Mr. Coda was in custody at the time of his alleged silence. R. at 7.

It is evident that the arresting officer's conduct in stating the charges against Mr. Coda should be considered interrogation. In fact, the prosecution is making this very argument itself. This court in *Rhode Island v. Innis* held that interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The focus is on the perceptions of the suspect, rather than the police intent. *Id.*

Statements that have been considered interrogation frequently don't include express questioning. *Edwards v. Arizona*, 451 U.S. 477, 487 (1981) (being confronted with incriminating evidence); *Brewer v. Williams*, 430 U.S. 387, 393 (1977) (being subjected to a "Christian burial speech," referring to an officer's emotional plea to suspect that suspect assist law enforcement in locating the body of alleged victim); *United States v. Henry*, 447 U.S. 264 (1980) (conversations between suspect and paid informant within a jail constituted statements that were deliberately elicited); *United States v. Jackson*, 544 F.3d 351, 357 (1st Cir. 2008) (statements made not in response to particular questions); *United States v. Familetti*, 878 F.3d 53, 59 (2d Cir. 2017) (responses to officers informing suspect of their search for child pornography and their implication that suspect was involved).

In the present case, the prosecution asserts that any reasonable person with an alibi defense would respond to charges being read to them. R. at 7. This amounts to an argument that the police made statements that they should know are "reasonably likely to elicit an incriminating response," *Innis*, 446 U.S. at 301, and specifically from the perspective of the

suspect. R. at 7. In making this argument, the prosecution is accurately portraying how the arresting officers made statements designed to elicit Mr. Coda's response—the precise criteria needed to rise to the level of an interrogation or its functional equivalent. *Innis*, 446 U.S. at 301.

Additionally, listing the allegations against a suspect need not be considered "normally attendant to arrest and custody." *Id.* This court has stated that informing someone of the reason for their arrest is not constitutionally required. *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). *Kladis v. Brezek*, 823 F.2d 1014, 1018 (7th Cir. 1987) (explaining that neither the Sixth nor Fourth Amendment provides a suspect the right to be informed of the reason for their arrest). The prosecution offers no evidence that reading an arrestee the charges against them is in fact "normal" police procedure. To the contrary, conventional police wisdom proffers numerous reasons why arresting officers frequently decline to share this information at the time of arrest.

It is well-known policing wisdom that suspects under arrest need not be told their charges or even read their *Miranda* rights if the police do not intend to use the suspect's statements against them. This is because *Miranda* did not prohibit coercive or deceptive questioning by police, merely that any resulting responses from suspects are not admissible against them at trial. Frequently, police departments decline to inform suspects of why they are under arrest for a litany of reasons. Police departments often use arrests to question suspects not about the suspect's crimes themselves but in order to gain general knowledge of crime in the area or about other members of the community.[5] One may be stopped merely for police to check if there are outstanding warrants against them or for a myriad of pretextual reasons based on and not limited to one's race, one's neighborhood, one's clothing, and one's behavior. *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). Often police make "suspicionless stops" and look

[5] Rachel A. Harmon, *Why Arrest*, 115 MICH. L. REV. 307, 357 (2016).

for justification later. *Id.* All of these scenarios have been approved of by this court in the course of its overwhelmingly pro-law enforcement jurisprudence.

Many of these situations often mean that police do not inform suspects of the reasons for their arrest, as they are ever so often for purposes of gathering unrelated information or arresting them on unrelated offenses. While empirical data is limited on precisely how frequently this occurs, the reason for that may be understandably due to the fact that in the United States more than twelve million people are arrested annually.[6] Without evidence to support that reading someone's charges are part of the normal arrest procedures, this court should not treat them as "normal and attendant to arrest and custody." *Innis*, 446 U.S. at 301.

By stating the charges alleged against Mr. Coda, the arresting officer created precisely what amounts to the functional equivalent of an interrogation: words or actions that the police should know are reasonably likely to elicit an incriminating response. They were not normally attendant to arrest and custody. They rise to the level of police actions that are considered the functional equivalent of interrogation and this triggered the requirement that Mr. Coda be read his *Miranda* warnings, less his subsequent responses be excluded from evidence against him. As the arresting officers deliberately declined to inform him of his rights, the use of his response to this unwarned custodial interrogation by the prosecution reflects a violation of Mr. Coda's right to remain silent and an explicit violation of his constitutional protections as provided by *Miranda*. This court should reject the lower court's determination and find that Mr. Coda was under custodial interrogation when read his charges by arresting officers.

B. Mr. Coda Should Not Be Punished for Failure to Invoke a Privilege For Which He Was Not Dutifully Informed

[6] *Id.* at 310.

When federal agents arrested Mr. Coda, their decision to initially withhold his *Miranda* rights from him denied Mr. Coda the opportunity to invoke his right to silence; as a result, the use of this post-arrest silence as substantive evidence of guilt violates his privilege against self-incrimination.

Miranda's landmark decision spawned prolific litigation in the criminal legal system. But at least as much remain clear: it would contravene a defendant's Fifth Amendment right against self-incrimination to punish them for failing to properly invoke a privilege that they have not been informed of. Chief Justice Warren wrote in *Miranda* that the threshold requirement for making an intelligent decision regarding one's right to remain silent is a proper warning in "clear and unequivocal terms." *Miranda*, 384 U.S. at 467–68. This warning is hence an "absolute prerequisite" in overcoming the inherently compelling pressures that comprise custodial interrogations. *Id.* The right to remain silent, among the other protections provided for by the Fifth Amendment, attaches once a suspect has been placed under formal arrest or has had their freedom of movement restricted to the degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

In order to make the case that Mr. Coda's unwarned silence should be admissible evidence, the prosecution relies on the principle stated in *Berghuis v. Thompkins* in which this court stated in effect that a suspect merely remaining silent did not adequately invoke their right to silence. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the suspect, Van Chester Thompkins, was taken into police custody and read his *Miranda* rights before being questioned for around three hours. During such questioning, Thompkins remained silent for approximately two hours and forty-five minutes, before responding to a police officer's questions near the end of the interview. *Id.* at 375–76. The Court held that Thompkins' silence for the two plus hours was

insufficient to invoke his right to remain silent; instead, Thompkins needed to have unequivocally stated out loud his intended desire to remain silent or abstain from speaking with the police entirely. *Id.* at 381–82, 386.

In the present case, federal authorities placed Mr. Coda under arrest and failed to administer *Miranda* warnings to him for minutes, if not hours, spanning at least three different settings, between the location of the arrest, the vehicle he was transported in, and the detention center where he was interrogated. R. at 7. Only once these authorities determined that they were fully ready to interrogate him did they decide to read Mr. Coda his *Miranda* warnings. *Id.*

While *Miranda* warnings are not required to be read at the outset of an arrest, the critical difference between *Berghuis* and the instant case is that Thompkins had been adequately informed of his right to remain silent prior to making the statements in question. *Berghuis*, 560 U.S. at 380. In the present case, Mr. Coda was not informed of this right to remain silent before his alleged "failure" to sufficiently invoke it. R. at 7. For the prosecution to hold Mr. Coda responsible for failing to act in accordance with a constitutional protection and a procedural rule that he was not informed of flies in the face of logic or reason. Allowing a period of Mr. Coda's unwarned silence to be evidence of guilt would create the dangerous incentive for police to continue withholding *Miranda* warnings in hopes of manufacturing admissible evidence.

This court has stated that suspects are not presumed knowledgeable of their *Miranda* rights before being told them explicitly. *Miranda*, 384 U.S. at 467–68. Because of this failure to adequately inform Mr. Coda, the prosecution should not be afforded the ability to assert that Mr. Coda failed to sufficiently invoke his right to remain silent when he declined to respond to officers' interrogatory statements. Doing so would amount to punishing Mr. Coda for failing to

properly invoke a privilege that he was purposefully not informed of. Petitioner urges the court reject this reasoning.

C. *Salinas* Plurality Should Not Control as the Distinctions Between the Two Cases Present Discrepancies That Cannot Be Remedied; *Doyle* Presents An Analogous Legal and Factual Scenario and Should Control

The prosecution's argument relies heavily on *Salinas v. Texas*, and the differences between that case and Mr. Coda's present stark differences that demonstrate why the same concerns are not present in *Salinas* that are at issue in regard to Mr. Coda's post-arrest silence. Instead, *Doyle v. Ohio*, 426 U.S. 610 (1993), presents a legal and factual scenario that can be closely analogized and should serve as the Court's basis for rejecting the prosecution's attempt at using Mr. Coda's silence.

1. Salinas is a three-justice plurality without a common rationale.

This Court held in *Marks v. United States* that when "no single rationale explaining the result" of a fragmented opinion is shared by at least five justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Most courts agree that, absent a common rationale shared between the justices, courts are bound only by the results and not the reasoning. *United States v. Davis*, 825 F.3d 1014, 1022 (9th Cir. 2016). This leaves the *Salinas* plurality on extremely narrow grounds, as Justice Alito's opinion shared common rationale with only two others, and Justice's Thomas' concurrence being founded on entirely different rationale. *Salinas*, 570 U.S. at 192 (finding that prosecution's use of defendant's silence would not have offended the Fifth Amendment because it did not compel him to give self-incriminating testimony).

With this being the make-up of the decision (a three-justice majority and a two-justice concurrence), only the case's narrow result should have any binding effect on the lower courts and any precedential effect on the present court: that a defendant's pre-custody, pre-*Miranda* statements may be used by the prosecution. *Salinas*, 570 U.S. This explicitly excludes the case at hand, which concerns Coda's post-custody silence. R. at 7. Because of this, none of the *Salinas* reasoning binds the court in precedential value, nor should be relied upon for persuasive authority due to the factual differences between the two.

2. Salinas v. Texas' Factual Scenario Differs in Material Respects from Mr. Coda.

The circumstances between the two cases are starkly different, and the following factual elements of the cases demonstrate why *Salinas* should not be treated as controlling.

a) Arrest

Genovevo Salinas was questioned by police officers after voluntarily going to the police station, only a few hours after the crime in question had occurred. *Salinas*, 570 U.S. at 182. He was not under arrest at the time of his silence and was only arrested after the conversation due to unrelated outstanding traffic warrants. *Id.* In contrast to this, Mr. Coda was arrested almost a decade *after* his alleged crime, where the prosecution *then* attempts to use his decades-later, momentary silence to imply an admission of guilt. R. at 7.

The circumstances surrounding these two periods of silence could not be more different: one suspect was discussing an alleged crime in the immediate hours following, one suspect was silent in the face of an arrest more than a decade later. Mr. Coda's "incriminating" silence could be explained by an infinite number of reasons for his arrest after the prosecution's years-long delay in trying his case, and it offends reason and logic to conflate the circumstances of these two arrests.

b) Custody

In Mr. Salinas' case, all parties had agreed that Mr. Salinas was not in custody at the time of the alleged silence. *Salinas*, 570 U.S. at 182. Contrasted from this, Mr. Coda was brought into custody directly before the alleged silence had occurred. R. at 7. The importance of this distinction cannot be understated, and this is because police custody creates an inherently coercive environment for suspects. *Miranda*, 384 U.S. at 458. In *Miranda*, the court took great effort to state the importance of employing safeguards against the "compulsion inherent in custodial surroundings." *Id.* This compulsion is typically described as the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984).

In Mr. Coda's case, his compulsion to remain silent should be treated the same as if he had felt compelled to speak. In either scenario, his custodial arrest served as an inherently coercive environment, one that was designed to compel the Mr. Coda to respond according to the pressures of such custody. Where Mr. Salinas was in a setting decidedly absent those features of coercion and compulsion, Mr. Coda was not. The prosecution's analogy treating Mr. Coda the same as Mr. Salinas find no grounds here.

c) Interrogation

The defense remains committed to the assertion that Mr. Coda responded to a custodial interrogation. But whether or not the court agrees with this, the factual differences between Genovevo Salinas' and Austin Coda's silence are starkly highlighted by the questioning that was presented to them. Mr. Salinas' silence occurred after nearly an hour of direct, back-and-forth, questioning and answering between Mr. Salinas and police officers at the station. *Salinas*, 570 U.S. at 182. There, the prosecution pointed to Mr. Salinas' silence, *in direct contrast to* his hour

of responses, as evidence of his guilt. *Id.* The argument went that, because Mr. Salinas answered so many questions prior, his sudden silence evidenced his guilt. *Id.*

Mr. Coda's alleged silence occurred after only one, deliberate statement stated by the arresting officers—there was no ongoing dialogue. R. at 7. Here, there is no discussion that the prosecution can point to in contrasting his silence to establish his evidence of guilt. There was no continued interaction between police and the accused, such that his silence could logically represent anything other than silence in the face of a custodial arrest. This silence offers no factual analogy to the circumstances in *Salinas*.

3. Doyle v. Ohio Presents An Analogous Factual Scenario to Mr. Coda and Should Control.

If the Court seeks an analogous case, it shall find one in *Doyle v. Texas*. While the lower courts did not agree that *Doyle* should control, the defense urges this court to see otherwise. This is because *Doyle* presents both a legal and factual analogy to the present case.

In *Doyle v. Ohio*, the petitioner, Jefferson Doyle, was apprehended after what he came to believe had been a set-up, alleging that a government informant attempted to frame Mr. Doyle for selling drugs when in reality he was attempting to purchase them. *Doyle v. Ohio*, 426 U.S. 610, 612–13 (1976). Upon being arrested, Mr. Doyle did not share this understanding of the events with the officers on the scene. *Id.* at 615. The prosecution attempted to highlight Mr. Doyle's failure to share his defense at the time, claiming that his "post-arrest silence" should undermine his credibility because Mr. Doyle chose to tell this story at a later time. *Id.* at 615–616. The Court rejected this line of reasoning, instead holding that the use of Mr. Doyle's silence as admissible evidence was a violation of due process. *Id.* at 619.

In coming to this conclusion, the Court emphasized a crucial point: "post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested…it

would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 617–618. "[S]ilence at the time of arrest may be inherently ambiguous even apart from the effect of Miranda warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an exculpatory explanation." *Id.*

Just as in *Doyle v. Ohio*, Mr. Coda's post-arrest silence could be attributed to a number of explanations as to why he chose not to exclaim his alibi to arresting officers, including but not limited to confusion over an arrest related to decade-old charges, well-founded fear stemming from being in police custody, or attempts to remember details of the offenses listed or how he might sufficiently prove his alibi. Any differences between *Doyle* and Mr. Coda merely swing further in favor of excluding his silence from evidence. Mr. Doyle was arrested soon after the alleged crime had taken place, meaning Mr. Coda has even an even greater number of reasons why he might have chosen or felt compelled to remain silent. *Id*. at 612. R. at 7. Mr. Doyle had been read his *Miranda* rights, meaning that the use of Mr. Coda's unwarned and hence uninformed, post-arrest silence would even further offend due process and fundamental fairness. *Doyle*, 426 U.S. at 612. Both Mr. Doyle and Mr. Coda would have been unfairly prejudiced by the use of their silence as evidence and this Court should prohibit the prosecution's use of it against Mr. Coda as it did in *Doyle*.

D. <u>This Court must turn the tide on *Miranda* jurisprudence in order to protect the fundamental Constitutional Rights of the Accused</u>

Finally, the petitioner urges the Court to examine from arm's length the destructive and detrimental effects that have spawned from over fifty years of litigating *Miranda* and its progenies. In doing so, the Court is presented with an opportunity to retreat from the knotted web of confusing, intricate, legalese that challenges the wits of even the nation's foremost jurists.

While there is little in the criminal legal system that is agreed upon wholeheartedly, one belief widely accepted is the notion that *Miranda* has failed to adequately protect the accused from coercive police questioning. Marking fifty years since *Miranda's* opinion, prominent constitutional law professor and author Erwin Chemerinsky wrote in 2016 how countless scholars and decades of legal research have concluded that *Miranda* warnings have produced little to no effect in curtailing the ability of police to gain confessions or prosecutors to secure convictions.[7] Chemerinsky offered a number of reasons for this failure, including the Court's mistaken belief that a simple recitation of one's rights would be fully understood by those receiving them, manipulative policing tactics meant to strategically circumvent the *Miranda* warnings, and a decades long assault chipping away at *Miranda's* protections by the Court.[8]

Today, the Court's silence, invocation, and waiver jurisprudence is among the most ambiguous and unclear in the whole of Constitutional law. Resulting from decisions like *Berghuis* and *Salinas*, features such as the contradictory nature of requiring someone to speak in order to maintain their right to remain silent contravenes logic and offends reason. Must a suspect "use the exact words 'Fifth Amendment?' How can an individual who is not a lawyer know that these particular words are legally magic?" *Salinas v. Texas*, 570 U.S. 178, 202–03 (2013) (Breyer, J., dissenting). The risk in allowing statements like Mr. Coda's to be used against defendants at trial is that the legal system unfairly burdens those who seek to assert their basic rights as they are unaware of such "linguistic details" as the Court requires. *Id.* at 203.

The legacy of *Miranda* and its subsequent dismantling have tangible impact on communities most affected by over-policing. In 2017, the Department of Justice's Bureau of

[7] Erwin Chemerinsky, *Why Have Miranda Rights Failed*, DEMOCRACY JOURNAL (June 27, 2016) https://democracyjournal.org/arguments/why-have-miranda-rights-failed/
[8] *Id.*

Statistics reported that justice system expenditures by federal, state, and local governments were the highest they had been in 21 years.[9] This has resulted in police arresting millions of people annually; interactions that are often frightening, humiliating, emotionally and financially taxing, and at times brutally violent or even fatal.[10] Empirical evidence from institutions such as the Innocence Project has found that false confessions, frequently as a result of coercive police questioning, have contributed to wrongful convictions in over a quarter of the DNA exonerations that have been documented since the use of DNA evidence began, with no concrete way to measure the definitive number of false confessions that may have occurred over time throughout our legal system.[11] Limited empirical evidence has shown that their prevalence in wrongful convictions is only growing.[12]

The ability of suspects in police custody to invoke their right to remain silent, to cut off questioning by police, to have a lawyer present during questioning, are all fundamental rights guaranteed by the Constitution. These rights have become intertwined into a legal system that has worked to elevate the abilities of the police to surveille, detain, arrest, and interrogate ordinary people. What was once imagined as a concrete way to protect the rights of the accused, the *Miranda* warnings and their complex invocation and waiver requirements have become a comprehensive way to ensnare the accused into "bearing witness" against themselves, in Mr. Coda's case, without even acting at all.

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[9] This amounted to approximately $149,000,000,000 spent on police protections, $66,000,000,000 in legal and judicial functions, and $89,000,000,000 on corrections, for a total of more than $305,000,000,000 from October 1, 2016 to September 30, 2017. EMILY D. BUEHLER, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 1 (2021) https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf.

[10] *See* Note 2, Harmon, at 313–315.

[11] Research Resources, Innocence Project https://innocenceproject.org/research-resources/ (last accessed September 10, 2021).

[12] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 906–907 (2004).

We must start the inflection point somewhere, as a call to say: the rights of accused peoples in the country are being infringed upon by an oppressive state police and prosecutorial criminal legal system. One that tilts the scales of power and resources against the country's most vulnerable: those that have been party to or victims of crimes, often involving police violence, substance abuse, trauma, and poverty. Communities that have been systematically under resourced and over-policed. That have been demonized and degraded by decades of state-designed broken windows policing, the failed war on drugs, the proliferation of the warrior cop, and the dehumanization system that has become known as mass incarceration.[13]

Placing these accused folks into the context of a volatile police surveillance state, one can begin to see how the complexities of these laws have been perfectly executed to ensure that those accused of crimes remain silenced, incarcerated, punished, and abused, by the very laws and rulings that are supposed to protect them. To begin to undo this harm we must start somewhere and protecting the rights of the accused in their ability to not bear witness against themselves will have impact beyond the constraints of handcuffs and trial court walls. Respectfully, we ask that the court begin to undo this harm here by reversing the lower courts' decisions in finding that the prosecution has infringed upon Mr. Coda's Fifth Amendment rights in attempting to use his Constitutionally protected silence as substantive evidence of guilt.

[13] Greg St. Martin, *Researchers find little evidence for 'broken windows theory,' say neighborhood disorder doesn't cause crime*, https://phys.org/news/2019-05-evidence-broken-windows-theory-neighborhood.html (last accessed September 9, 2021); Nathan Lee, *America has spent over a trillion dollars fighting the war on drugs. 50 years later, drug use in the U.S. is climbing again*, CNBC https://www.cnbc.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html (last accessed, September 10, 2021); RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES, PublicAffairs (2013); Wendy Sawyer & Peter Wagner, *Mass Incarceration: the Whole Pie 2020*, PRISON POLICY INITIATIVE https://www.prisonpolicy.org/reports/pie2020.html (last accessed September 10, 2021).

CONCLUSION AND PRAYER

For the forgoing reasons, Petitioner respectfully request this Court reverse the District Court on both issues.

Respectfully submitted this 13th day of September 2021.

/s/ Counselors for Petitioner