
No. 21-125

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

COUNSEL FOR PETITIONER
TEAM 7

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QUESTIONS PRESENTED

- I. Whether a nine-year indictment delay that prevents the defendant from bringing evidence to corroborate his defense violates the Fifth Amendment right to due process.
- II. Whether admission of the accused's silence following his arrest but before *Miranda* warnings and interrogation violates the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner Austin Coda owned a hardware store on the border between East Virginia and North Carolina. R. at 2. Coda served residents from both states for almost a decade, from when his store opened in January 2002 until December 22, 2010, when an explosion rocked the store. R. at 2-3. Firefighters were unable to prevent the resulting fire from destroying his entire store. R. at 3. An investigation was conducted following the explosion, and local investigators and the Federal Bureau of Alcohol, Tobacco, and Firearms determined that cold weather had caused a leak in an “old, faulty gas line.” *Id.*

Later, the Federal Bureau of Investigation (“FBI”) heard that Coda’s finances were in decline, that he was anxious the week of the explosion, and that he had recently purchased an insurance policy covering his hardware store. *Id.* The FBI informed the U.S. Attorney’s Office, which marked Coda’s case as “low-priority” and declined to pursue it for almost a decade, until the statute of limitations was about to expire. *Id.*

On April 23, 2019, FBI Special Agent Park (Park) arrested Coda and brought him into custody. R. at 7. Immediately following the arrest, Park informed Coda about the charges against him. *Id.* During his arrest, Coda did not speak to the arresting officers, remaining silent. *Id.* The FBI then brought Coda to the detention center where they read Coda his *Miranda* rights in preparation for interrogation. *Id.*

In May 2019 the government indicted Coda for violation of 18 U.S.C. § 844(i) for destroying property affecting interstate commerce, alleging he burned down his store for the insurance money. R. at 4. Coda testified that he was in New York the night his store burned down, a trip he took each year until 2015 to celebrate his birthday with family. *Id.* Because of the government's delay in bringing an indictment, Coda can no longer produce the testimony and evidence he would otherwise have used to corroborate his alibi. *Id.* Four of the five family members he visited in New York have since died, and the fifth suffers from dementia and is unable to testify. *Id.* The bus records from his yearly trips to New York are also no longer available, because Greyhound only keeps them for three years. *Id.*

Because the government's pre-indictment delay of almost a decade has prejudiced Coda's ability to assert his defense, Coda has moved to dismiss the charges, arguing that such delay violates the Fifth Amendment Due Process Clause. *Id.* Further, the government argues that Coda's silence prior to hearing his *Miranda* rights should be available as substantive evidence of Coda's guilt. R. at 7. According to the government, a reasonable person would have immediately presented his alibi or defense upon arrest. *Id.* In response, Coda filed a motion to suppress the evidence of his pre-*Miranda* silence, because admission of his silence would constitute a violation of his Fifth Amendment right against self-incrimination. R. at 7-8.

Ultimately, the District Court denied both Coda's motion to dismiss and his motion to suppress. The judge ruled that the pre-indictment delay did not violate the Due Process Clause of the Fifth Amendment, R. at 6, and that Coda's post-arrest but pre-*Miranda* silence was admissible as substantive evidence of Coda's guilt, R. at 10. Coda appealed both dismissals, and the Court of Appeals for the Thirteenth Circuit affirmed. R. at 12. Coda now appeals the Court of Appeals' decision. R. at 16.

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of the Thirteenth Circuit and dismiss the charges against Petitioner, Coda, because the pre-indictment delay in this case has so prejudiced Coda's ability to mount a defense that his right to due process has been violated. The government's preindictment delay caused actual and substantial prejudice to Coda and this substantial prejudice is not justified when balanced against the government's reasons for the delay. This delay thereby violated Coda's Fifth Amendment right to due process. The pursuit of justice is best achieved by a balancing test that weighs the prejudice to Coda's defense against the reasons put forth for the delay in indictment. The Fourth, Seventh, and Ninth Circuits utilize such a test.

The near-decade delay in indicting Coda resulted in the loss of key witnesses and evidence that would have exonerated Coda, and whose testimony cannot be obtained or replaced from other sources. As the District Court found, Coda has clearly suffered severe prejudice.

The reason Coda suffered such prejudice was not investigative delay. His indictment was not postponed while the government engaged in good-faith diligence to ensure they had a solid foundation for a case before charging Coda. Rather, other political considerations were prioritized over his case, which was passed from one Assistant United States Attorney to the next. Finally, when the statute of limitations was about to run, Coda was indicted on the same information the government had been privy to eight years earlier. Coda should not be the one to pay the price for the prosecution's negligent treatment of his case. The clear prejudice found by the District Court outweighs the insufficient rationale behind the delay.

In addition, this Court should reverse the decision of the Thirteenth Circuit and hold that admission of post-arrest but pre-*Miranda* and pre-interrogation silence violates the Fifth Amendment of the U.S. Constitution. Admission of Coda's post-arrest but pre-*Miranda* and pre-

interrogation silence violated his Fifth Amendment right against self-incrimination. His custodial silence should be protected under the same justifications as post-*Miranda* silence, and admission of such silence weakens the core protections of the Fifth Amendment and renders the right to remain silent practically meaningless. Coda's silence occurred in custody when his right against self-incrimination was in jeopardy. This Court's precedent supports the claim that this right, here exemplified in the right to remain silent, extends beyond custodial interrogation. And silence after arrest but before *Miranda* warnings and interrogation is far too ambiguous to be admissible as substantive evidence of guilt. A supposed "guilty" silence could just as easily be a legitimate exercise of the right against self-incrimination, and so custodial silence should be protected prior to the provision of *Miranda* warnings.

Finally, admission of post-arrest but pre-*Miranda* silence weakens the protections of the Fifth Amendment. Rather than having a clear right to remain silent, there is now an unclear obligation to speak and present an alibi following arrest or at trial in order to prevent the use of or negate the effects of admissible silence. Admission of such silence also provides adverse incentives to police officers, who might now delay interrogation in order to strengthen the prosecution's case against the accused.

Therefore, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals.

ARGUMENT

I. THE NINE-YEAR PRE-INDICTMENT DELAY VIOLATES CODA'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

The government, by waiting nearly a decade to bring an indictment against Coda, prevented him from presenting evidence that would have established a defense. When balanced against the lack of justification for the government delay, this substantial prejudice to Coda is a violation of his Fifth Amendment right to due process.

“[T]he 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, 324 (1971). The Fifth Amendment ensures defendants will not be “deprived of life, liberty, or property, without due process of law” When unjustified preindictment delay unduly prejudices the defendant’s ability to present a defense, it offends “fundamental conceptions of justice.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To 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.

Marion, 404 U.S. at 324-25.

The federal circuit courts are split on whether the defendant must show, in addition to actual prejudice, an intentional attempt by the government to delay indictment in order to gain an advantage at trial, or whether the prejudice to the defendant, and the length and rationale of the delay, should be balanced against each other. *Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996).

Contrary to what some of the circuits have adopted, and to what the district court has required in this case, the Supreme Court has held only “that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been

somewhat prejudiced by the lapse of time.” *Lovasco*, 431 U.S. at 796. Bad faith on behalf of the government in delay is a sufficient, but not a necessary component of a due process violation. *See United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985). “[T]he Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” *United States v. Gouveia*, 467 U.S. 180, 192 (1984).

While a delay in indictment alone does not establish prejudice, Coda has shown clear prejudice inflicted by the government’s delay: he has lost witnesses and evidence that would have otherwise corroborated his alibi. R. at 3; *see Jones*, 94 F.3d at 907.

Coda does not allege that the government intentionally delayed an indictment to gain an advantage, but the delay was also not the result of waiting for an investigation to come to fruition. R. at 3. The severe prejudice Coda has suffered clearly outweighs the political reasons behind the delayed indictment. *See United States v. Alderman*, 423 F. Supp. 847, 857 (D. Md. 1976). Indeed, “[i]f the reason for such delay is the scarcity of prosecutors and the abundance of culpable public officials, the answer is found not in shortchanging the due process rights of individuals but rather in adequately funding and staffing prosecutorial offices.” *Id.*

A. The most appropriate approach to deciding whether a due process violation exists is balancing prejudice to the defendant against the reasons behind the pre-indictment delay.

As the Supreme Court laid out in *Marion*, the pursuit of justice in each case can be best pursued by judging each case on its particular circumstances. 404 U.S. at 324-25. This approach is best developed in the Fourth, Seventh, and Ninth Circuits, which have adopted a balancing test approach to the question of preindictment delay. *See Jones*, 94 F.3d at 904; *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994); *Moran*, 759 F.2d at 781.

Contrary to what some of the circuits have adopted, and to what the district court has required in this case, the Supreme Court has held only “that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.” *Lovasco*, 431 U.S. at 796. Bad faith on behalf of the government in delay is a sufficient, but not a necessary component of a due process violation. *See Moran*, 759 F.2d at 781. “[T]he Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” *United States v. Gouveia*, 467 U.S. 180, 192 (1984).

The holding in *Lovasco* does not require bad faith on the part of the government, or a delay in prosecution “solely ‘to gain tactical advantage over the accused.’” 431 U.S. at 795 (quoting *Marion*, 404 U.S., at 324). Instead, *Lovasco* holds “that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.” *Id.* at 796.

In *Lovasco*, the reason behind the delay was because investigation was ongoing. *Id.* The government was attempting to learn whether there had been other participants in the criminal conduct before bringing charges. *Id.* The Court refused to consider such delay a violation of due process, finding that such an order “would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.” *Id.* at 791 (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). The Court was concerned that requiring immediate prosecution would expose suspects to “early and possibly unwarranted prosecutions” and may hinder investigations “by causing potentially fruitful sources of information to evaporate before they are fully exploited.” *Id.* at 792-93.

The concerns expressed by this Court in *Lovasco* are not present in this case. *See* 431 U.S. at 791-93. This Court holding that a nine-year baseless delay in indictment violates due process will not cause prosecutors to rush to court before establishing a solid case. *See id.* If anything, a ruling that the present conduct violated the Constitution encourages more prudent prosecution. *See id.* The conduct here frustrates both goals the Supreme Court espoused in *Lovasco*. *See id.* The concern that a speedy indictment in 2011 would have exposed Coda to an “unwarranted prosecution,” does not hold up, because no new information came to light before the government proceeded with the current prosecution. *See id.* at 793. At the same time, the lack of investigation and indictment over the course of the decade “prevent[ed] society from bringing lawbreakers to justice.” *See id.*

The District Court, and the Thirteenth Circuit in affirming the District Court, misinterpreted *United States v. Lovasco* to create a requirement of bad faith behind the delay in prosecution. Instead, the reasons behind the delay in prosecution should be balanced against the prejudice to Coda’s defense.

B. Coda suffered actual and substantial prejudice due to the government’s delay.

The government’s delay in bringing an indictment against Coda caused actual prejudice. Coda has identified specific witnesses, what they would have testified to if the government had indicted him in a timely manner, and how their absence prevents Coda from mounting his defense.

It is not enough that a government merely lengthily delayed an indictment. *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996). On this the circuit courts are in agreement. *Id.* “The law is clear that a mere showing of delay in indictment and arrest is not sufficient to show a [due process] violation, that prejudice will not be presumed from mere delay, and that a defendant must bear the burden of proving prejudice by a pre-indictment delay.” *Id.* (quoting *United States v. Baker*, 424 F.2d 968, 970 (4th Cir. 1970)). In addition, “the proof must be definite and not

speculative, and the defendant must demonstrate how the loss of a witness and/or evidence is prejudicial to his case.” *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985).

In *United States v. Bartlett*, the Eighth Circuit held that the defendant, accused of rape, had not been substantially prejudiced by the unavailability of three witnesses caused by preindictment delay. 794 F.2d 1285, 1293 (8th Cir. 1986). The defendant identified the first police officer on the scene, the defendant’s roommate, and another man who had been accused of rape by the same victim as possible witnesses, all of whom were now dead. *Id.* at 1290. The court saw no reason, and the defendant failed to allege, why the testimony of the police officer would differ from another witness who arrived on the scene first and remained present, and why the testimony of the roommate as to a former relationship between the defendant and the victim would differ from the testimony of the victim or the defendant themselves. *Id.* at 1291. The court further found that any evidence offered by the third missing witness as to the victim’s credibility would be of “limited probative value when considered against the evidence in the record.” *Id.* at 1292-93.

In *Jones v. Angelone*, the Fourth Circuit held the defendant, accused of shooting his mother and half-brother, failed to show sufficient proof of prejudice due to preindictment delay. 94 F.3d at 909. Jones claimed that due to delay, he was unable to call witnesses that would have testified that over the time period of the shooting, which occurred in Virginia, he lived at a hotel in New York. *Id.* at 908. Jones did not allege that any of these witnesses, employees at the hotel where he had lived, could have provided him with an alibi for the specific day in question. *Id.* Instead, the court said a defendant must “identify the witness he would have called; demonstrate, with specificity, the expected content of that witness’ testimony; establish to the court’s satisfaction that he has made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources.” *Id.*

United States v. Sabath is remarkably similar to the instant case: the defendant was charged with arson following his business burning down. 990 F. Supp. 1007, 1008 (N.D. Ill. 1998). The court ruled the defendant's right to due process had been violated due to a delay between the completion of the investigation in 1992, and the indictment brought in 1997. *Id.* at 1016, 1019. During that delay, multiple witnesses died, memory faded, and evidence was lost. *Id.* at 1014. Despite basing the ruling on this combination of factors, the court allowed that "witness deaths alone may meet the required showing of prejudice" where the court is convinced they would have proved a credible witness. *Id.* Specifically, the defendant, his father, and another employee were present at the scene of the fire. *Id.* at 1009. The father had since died, and the employee had moved to the Netherlands and his memory had suffered. *Id.* Another employee that would have testified to the success of the business had also since died. *Id.* at 1011.

In *United States v. Alderman*, the court found the defendant's right to due process violated by a delay before indicting him on numerous charges related to a fee-splitting scheme he engaged in while he was Baltimore County Solicitor. 423 F. Supp. at 848. The court found the indictment had been delayed by at least two years causing the defendant to lose the testimony (through loss of memory) of three members of the Baltimore County Council, without which he would be the sole advocate of his defense. *Id.* at 857-58. The court held that Alderman was not required to prove what the witnesses would have remembered two years earlier, stating: "Marion cannot be read as requiring a defendant to prove the unknown." *Id.* at 858.

In the instant case, Coda did exactly what the Fourth Circuit asked of those claiming a due process violation in *Jones*. See 914 F.3d at 908. He identifies five specific family members he visited in New York over the time period his store burned down. R. at 3. He asserts that the witnesses would have testified he was in New York visiting them on the day he is alleged to have

been in East Virginia, burning down his store. *Id.* He cannot further attempt to obtain their testimony: over the near decade between the alleged crime and the indictment four of the five witnesses have died, and the fifth cannot testify to the holiday in question due to the onset of dementia. *Id.* Finally, Coda cannot obtain the information the witnesses would have provided – his presence in New York – from another source – the Greyhound bus records – because the government’s delay has also caused that evidence to be lost. *Id.*

There is nothing in the record to indicate that the testimony now lacking can be provided from another source, as was the case in *Bartlett*. *See* 794 F.2d at 1291. Nor is there evidence in the record contradicting the proposed testimony of Coda’s witnesses and placing him in East Virginia. R. at 3. *Cf. Bartlett*, 794 F.2d at 1293. If he had been able to present the evidence that has been lost by delay, there is no reason to think it would not have been exculpatory. *See Jones*, 94 F.3d at 908 (stating that the defendant must show his ability to mount a defense was affected to such an extent that the outcome of the trial was likely affected).

Instead, the prejudice to Coda is similar if not greater than that found in *Sabath* and *Alderman*. *See Sabath*, 990 F. Supp. at 1014; *Alderman*, 423 F. Supp. at 857-58. Like *Sabath*, the witnesses to Coda’s presence and conduct during the fire have died or become otherwise unavailable. R. at 3. That court found that the death of witnesses alone could be sufficient prejudice. *Sabath*, 990 F. Supp. at 1014. Coda has also suffered the loss of corroborating evidence. R. at 3. In *Alderman*, the court did not even require a showing that, absent the delay, the witnesses would have retained their memory of the relevant information. 423 F. Supp. at 858. Here, had the government moved forward with the case within even four years of the fire, Coda would still have had witnesses and evidence to put forth, and those witnesses would have exculpated him. R. at 3.

Coda has been substantially prejudiced by the government's delay in this case and ultimately denied due process. He has identified specific witnesses that would have provided a clear alibi and defense to the alleged criminal activity, but cannot testify and whose testimony cannot be replicated due to the government's delay.

C. The severe prejudice caused by the delay outweighs the reasons behind the delay in prosecution.

Coda was severely prejudiced by the government's inaction in this case. That prejudice outweighs the government interests behind the delay: mere convenience and political considerations.

“[O]nce the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process.” *Sowa*, 34 F.3d at 451.

In *Jones*, the Fourth Circuit held that the defendant failed the second prong of the balancing test as well as the first, because the state's reasons for the delay hardly “violate[d] fundamental conceptions of justice or the community's sense of fair play and decency.” 94 F.3d at 910 (quoting *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1996)). In *Jones*, rather than intentionally or negligently delaying the indictment, Virginia was frustrated in its attempts to extradite Jones from New York by New York and by Jones himself. *Id.* at 902-03. Virginia attempted to extradite Jones immediately following his criminal conduct in 1975, 1982, and 1985 before finally succeeding in 1986. *Id.* In the following months, he was shortly indicted. *Id.*

In *Sabath*, the arson case involving the defendant's business, the court found the prejudice suffered by the defendant outweighed the reasons asserted by the government for the delay, and accordingly dismissed the charges. 990 F. Supp. at 1019. The business burned down on August 1,

1991, and the government completed its investigation by June 1992, but the defendant was not indicted until 1997. *Id.* at 1009, 1016. During the intervening five years “[n]o new witnesses or documentary evidence were uncovered or even sought” *Id.* at 1016. The Assistant United States Attorney claimed that he was busy with other prosecutorial duties at the time. *Id.*

In *United States v. Gross*, the court dismissed an indictment for bank fraud and false statements following a six-year delay between the start of the investigation and the indictment. 165 F. Supp. 2d 372, 374, 384-85 (E.D.N.Y. 2001). While the government argued that this period was caused by investigative delay, the case was only active for 94 days over the six-year period. *Id.* at 384. During this time, four different Assistant United States Attorneys were assigned to the case. *Id.* The court noted that at the close of the investigation the charges were the same claims that had been dismissed several years earlier in a civil suit. *Id.* at 385. Despite the open investigation, the court found no “legitimate investigatory reason” for the delay. *Id.*

In this case, the government’s prosecution of Coda was not delayed by investigative delay. R. at 2. Neither Coda himself nor another state actor prevented the prosecution from moving forward. *See Jones*, 94 F.3d at 902-03. The FBI received its tip on Coda’s alleged culpability “shortly after” the December 2010 fire, and then informed the U.S. Attorney’s Office. R. at 2. There, the office marked Coda’s case “low-priority” and passed it from one attorney to the next, during which the case “never progressed.” *Id.* There is no indication that the government learned anything by April 2019, when they arrested Coda, that they did not know in December 2010. *Id.*

There is furthermore no indication that they delayed in 2010 in an attempt to gather more information. *Id.* In fact, the government states clearly that they had other reasons: the inconvenience of transporting Coda, political pressure to prosecute other offenses, and a high rate of turnover within the office. *Id.* These are a far cry from the acceptable prosecutorial decisions

given in *Lovasco*. See *id.*; *Lovasco*, 431 U.S. at 796. There, the government explicitly stated their investigation continued during the delay, and that they attempted to identify other culpable participants. *Lovasco*, 431 U.S. at 796.

The reasons for the delay in Coda’s case are almost identical to those found insufficient in *Sabath* and *Gross*. See R. at 3; *Sabath*, 990 F. Supp. at 1016; *Gross*, 165 F. Supp. 2d at 384-85. In Coda’s case, there is no indication new information was found or sought during the period of delay, just like in *Sabath*. R. at 3; 990 F. Supp. at 1016. There is not even any description of activity that remotely approaches the 94 days of activity the court in *Gross* found was still not enough activity to justify delay. R. at 3; 165 F. Supp. 2d at 384. The turnover between multiple Assistant United States Attorneys is yet another similarity. See R. at 3; *Gross*, 165 F. Supp. 2d at 384. Just like in *Gross*, *Sabath*, and *Alderman*, the prosecution prioritized other cases; Coda should not be asked to pay the price. See *Alderman*, 423 F. Supp. at 857.

The delay severely prejudiced Coda’s defense, and that prejudice to Coda outweighs the minimal motivation behind the government’s delay: convenience, political pressure, and turnover.

II. ADMISSION OF AN ACCUSED’S POST-ARREST BUT PRE-MIRANDA SILENCE IS A VIOLATION OF THE FIFTH AMENDMENT.

This Court should reverse the decision of the Court of Appeals for the Thirteenth Circuit, because admission of an accused’s post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violates the Fifth Amendment of the United States Constitution. Under the Fifth Amendment, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V. The doctrine set forth in *Miranda v. Arizona* then established that an individual’s “privilege against self-incrimination is jeopardized” when that individual “is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning.” 384 U.S. 436, 478 (1966). Thus, “[p]rior to any

questioning, the person must be warned that he has a right to remain silent,” but “[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.” *Id.* at 444.

While the question presented in this case concerning post-arrest but pre-*Miranda* silence has not been formally resolved by the U.S. Supreme Court, the precedent of this Court and multiple federal circuits, as well as the purpose and design of the Fifth Amendment, support the claim that admission of post-arrest but pre-*Miranda* and pre-interrogation silence violates the Fifth Amendment. The Ninth and D.C. Circuits have already held that admission of such silence as substantive evidence of guilt is a violation of the Fifth Amendment. *United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997). The First, Second, Sixth, and Seventh Circuits have held that even pre-arrest and pre-*Miranda* silence are inadmissible as evidence of substantive guilt. *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013); *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1049 (7th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 560 (6th Cir. 2000); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989). While some circuits have held admission of such silence constitutional, their reasoning is not persuasive, and the circuits in favor of inadmissibility better capture the spirit of this Court’s previous holdings and the Fifth Amendment itself. *See, e.g., United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (reasoning that because the defendant was under no legal compulsion to speak at the time of silence, admission of the silence is constitutional).

Coda was in custody under formal arrest without the provision of his *Miranda* warnings, and so his right against self-incrimination was jeopardized. There was no waiver of his right to remain silent, and because he had not yet been questioned, he had no reasonable opportunity to formally invoke his rights. Therefore, the purpose of his silence, either as an intended exercise of

his rights or as an implicit admission of guilt, is too ambiguous to be discerned accurately by a court.

Admission of such silence weakens the central protections of the Fifth Amendment right against self-incrimination. Asking a jury to focus on the defendant's silence creates pressure for an accused to break his or her silence before or during trial to prevent the admission of that silence as evidence of guilt, or potentially to counteract the effects of the admission on the jury. Failing to protect that silence also provides adverse incentives for police officers to delay interrogation and the provision of *Miranda* warnings, which seriously impairs the existing Fifth Amendment jurisprudence's clear goal of protecting an individual's right to avoid self-incrimination.

- A. The need to protect pretrial silence is triggered by custody, not the start of interrogation, and so custodial silence prior to interrogation, absent valid waiver, is protected by the Fifth Amendment.

This Court should hold that admission of custodial silence prior to interrogation, absent a valid waiver, is unconstitutional. An accused's right against self-incrimination is in jeopardy once custody begins. Even prior to the *Miranda* warnings and interrogation, custodial silence is insolubly ambiguous, meaning it is too difficult to solve its ambiguity by determining whether the silence is an exercise of the accused's right to remain silent or probative evidence of guilt. "[E]very post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). Prior to receiving *Miranda* warnings, an accused who wishes to exercise the right against self-incrimination "must claim it," and the accused cannot claim the privilege "by simply standing mute." *Salinas v. Texas*, 570 U.S. 178, 180 (2013). However, "no ritualistic formula is necessary in order to invoke the privilege." *Quinn v. United States*, 349 U.S. 155, 164 (1955). Further, "[d]ue to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege 'unless [he] fails to claim [it] after being suitably warned.'" *Salinas*, 570 U.S. at 184-85

(quoting *Minnesota v. Murphy*, 465 U.S. 420, 429-30 (1984)). Coda was in custody under formal arrest, where his speech risked self-incrimination, but had not received his *Miranda* warnings and the police did not ask any questions upon arrest. Given these circumstances, Coda's silence was insolubly ambiguous, just as if he had received his *Miranda* warnings, and thus admission of his silence violates his Fifth Amendment right against self-incrimination.

1. *The right to remain silent exists prior to the reading of Miranda, and the privilege against self-incrimination is in jeopardy prior to interrogation if the accused's post-arrest, pre-Miranda silence is admissible as substantive evidence of guilt.*

Although Coda had not been subjected to formal interrogation, his privilege against self-incrimination, embodied here in his right to remain silent, was in jeopardy. The right to remain silent, and therefore the right against self-incrimination, "exists independently of the fact of arrest." *Okatan*, 728 F.3d at 118 (quoting *United States v. Nunez-Rios*, 622 F.2d 1093, 1100 (2d Cir. 1980)). The *Miranda* warnings, which are required prior to interrogation, are "a prophylactic means of safeguarding Fifth Amendment rights," *Doyle*, 426 U.S. at 617, but "they are not the genesis of those rights," *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001). As the Supreme Court stated in *Miranda v. Arizona*, "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467. As such, an accused possesses the rights provided by the Fifth Amendment prior to hearing the *Miranda* warnings, and the threat of self-incrimination may exist even without police questioning.

In *Minnesota v. Murphy*, the U.S. Supreme Court held that the accused's confession to his probation officer, as a response to the officer's questions, did not violate the accused's Fifth Amendment rights, even though the officer did not provide *Miranda* warnings. *Murphy*, 465 U.S.

at 440. During a meeting with his probation officer, Murphy confessed to a crime and did not claim his right to remain silent to protect himself from self-incrimination. *Id.* at 424-25. The trial court found the confession admissible, but the Minnesota Supreme Court reversed, holding that because of the compulsory nature of the meeting, the accused's obligation to tell the truth, and the likely incriminating nature of the discussion, the officer should have warned Murphy, who was not in custody, of his *Miranda* rights. *Id.* at 425. The U.S. Supreme Court disagreed, reasoning that outside of custodial interrogation, an accused still possesses the privilege against self-incrimination, but it is not self-executing. *Id.* at 430. No *Miranda* warnings are necessary, and so the accused must personally claim their right to remain silent. *Id.* at 434. Therefore, while it is not self-executing, the privilege against self-incrimination extends beyond custodial interrogation, with certain procedural requirements for its activation.

In this case, the accused, Coda, was arrested following an investigation by the FBI into an explosion that destroyed Coda's hardware store. R. at 2-3. The ATF determined that an "old, faulty gas line" had caused the explosion. *Id.* at 3. But because Coda had financial troubles, had been anxious the week of the explosion, and had recently taken out an insurance policy on his hardware store, the FBI arrested Coda on April 23, 2019. *Id.* at 3, 7. Coda was in custody under formal arrest without *Miranda* warnings, but was not subjected to interrogation. *Id.* at 7. After an officer read Coda his charges, Coda remained completely silent. *Id.* Even though no interrogation had taken place, the prosecution used Coda's response, or lack thereof, to the situation and his charges against him as substantive evidence of guilt. *Id.*

As the Court in *Murphy* pointed out, whether or not the individual is in custody plays a large role in whether the circumstances are coercive enough to justify requiring *Miranda* warnings prior to questioning. *See Murphy*, 465 U.S. at 429 n.5. Coda was indisputably under the inherently

coercive environment of custodial arrest, and so the issue at stake is whether Coda's responses to an officer's speech are admissible, regardless of whether questions were asked. In such a context, it is clear that the right to remain silent was available for exercise, and such exercise could have avoided self-incrimination. However, the arresting officer did not ask any questions, and so Coda had no meaningful opportunity to invoke his right to remain silent, nor to waive his right unless he voluntarily spoke to the police. Coda was not subject to voluntary questioning during routine investigation, nor did Coda begin answering questions only to suddenly fall silent in response to a potentially incriminating one. *Cf. Salinas*, 570 U.S. at 182 (holding the witness's pre-arrest silence admissible when witness answered most questions but fell silent after a question about the crime scene).

Coda remained silent from the point of arrest until he was subject to interrogation. Yet the government has designated Coda's complete silence as evidence of guilt rather than an exercise of his right to remain silent, or at the very least general caution against self-incrimination since an attorney was not present. Without any action of his own, and likely against his reasonable expectations, Coda's silence was actually causing Coda to incriminate himself. He was in a position where invoking his right to remain silent was seemingly unnecessary, and where waiver had not occurred, and yet Coda was at risk of involuntarily incriminating himself as the result of an arbitrary distinction between pre and post-*Miranda* silence. Therefore, the facts demonstrate that Coda's privilege against self-incrimination was in jeopardy following his arrest and protection of his silence should have been triggered by his custodial arrest.

2. *Before custodial interrogation begins and the accused receives Miranda rights, whether the accused has invoked or waived the right to remain silent is ambiguous, because there is an implicit understanding that an accused's silence is protected.*

An accused's silence after the point of arrest or custody but before *Miranda* and interrogation is inadmissible as substantive evidence of guilt, because such silence is insolubly ambiguous. This Court's precedent has established that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle*, 426 U.S. at 617. Therefore, the use of a defendant's silence post-arrest and post-*Miranda* for impeachment purposes violates the Fifth Amendment. *Id.* at 619. However, the rule in *Doyle* does not exclude protection of silence in other circumstances, because the use of silence for impeachment purposes is only "an exception to an exception to the general rule." *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997). The general rule is that "a defendant's silence . . . cannot be used." *Id.*; see *Griffin v. California*, 380 U.S. 609, 614 (1965).

In *United States v. Hale*, the Court held that a defendant's post-arrest, post-*Miranda* silence during police interrogation was insolubly ambiguous. 422 U.S. 171, 181 (1975). The defendant in that case took the stand at trial and provided an exculpatory alibi, but on cross-examination, the prosecution asked why the defendant had not offered this alibi during his interrogation. The Supreme Court held that allowing use of his post-*Miranda* silence for impeachment was a Fifth Amendment violation. *See id.* at 181 (holding that admission of the silence for impeachment was prejudicial error). The Court explained that silence is usually "so ambiguous that it is of little probative force." *Id.* at 176. It is often difficult to determine accurately why the defendant remained silent, particularly after *Miranda* warnings. *See id.* at 177. For instance, an individual might remain silent out of intimidation, confusion, or a fear of incriminating someone else. *Id.* In many cases, an individual might view silence as merely an expression of their right to remain silent. *Id.*

Therefore, the silence during custodial interrogation was inadmissible for impeachment of trial testimony because such silence was insolubly ambiguous. *See id.* at 181.

In *United States v. Moore*, the D.C. Circuit held that admission of post-arrest but pre-*Miranda* and pre-interrogation silence was a violation of the Fifth Amendment. 104 F.3d at 391. In that case, an officer found guns and drugs in the accused's vehicle. *Id.* at 384. At the time of arrest, the accused provided no explanation for the guns or drugs and did not give an alibi. *Id.* The prosecution brought this fact out when questioning a witness and during closing argument. *Id.* The court held that admission of this silence was unconstitutional, explaining that no precedent suggests that the rights articulated in *Miranda* only attach "upon the commencement of questioning as opposed to custody." *Id.* at 385. The *Miranda* warnings do not clearly state that an arrestee's silence is immune to prosecutorial comment, but there is an "implicit" assurance that silence will not be used against the arrestee. *Id.* An individual familiar with his rights could reasonably assume his silence would be protected, and that remaining silent would prevent self-incrimination. *See id.* Such motives are likely indistinguishable from silence resulting from a feeling of guilt. *See id.* Therefore, the arrestee's silence prior to *Miranda* warnings is insolubly ambiguous and thus inadmissible. *See id.* at 391.

In this case, Coda was arrested, the arresting officer read Coda his charges, and Coda was taken for interrogation. R. at 7. In response to hearing his charges, Coda remained completely silent, and the officer did not ask Coda any questions to which a response was necessary or reasonably expected. *Id.* The silence used against Coda in this case occurred post-arrest but prior to his receiving *Miranda* warnings, just like the accused in *Moore*, but unlike the accused in *Hale*. *See id.* Nonetheless, the same principles articulated in both cases above apply here. As expressed by the Supreme Court in *Hale*, an accused in custody might remain silent out of fear, confusion,

or as an assumedly valid exercise of the right to remain silent. 422 U.S. at 177. This Court has already determined that attempting to differentiate between valid and invalid motives for silence following *Miranda* warnings is an unnecessary exercise, as such silence is insolubly ambiguous and therefore protected. *See Doyle*, 426 U.S. at 617. But Coda's silence should be protected for the same reasons.

There is an "implicit" assurance that silence is protected, and an individual could reasonably believe that remaining silent in the face of arrest and hearing his charges would be the best method of avoiding self-incrimination, even if the individual is innocent. There is no evidence to even demonstrate that Coda was not already aware of the accusations, regardless of their truth, and so Coda's lack of surprise is not necessarily tied to any feelings of guilt. This is not a case where the accused voluntarily offered incriminating information unprompted, but became silent when asked a follow-up question. In such a case, a clearer invocation of the right to remain silent might be necessary to make the accused's motive for silence clearer, or ensure the accused has not revoked a valid waiver of the right to remain silent. *See Salinas*, 570 U.S. at 180. Coda's silence in this case could very easily be an exercise of his right to remain silent, and he gave no indication that he intended to waive that right. The affirmative right to remain silent should protect Coda against the risk of self-incrimination while in custody, whether or not interrogation has begun. Therefore, Coda's silence was insolubly ambiguous and thus inadmissible as substantive evidence of guilt.

B. Allowing prosecutorial comment on post-arrest but pre-*Miranda* silence weakens the protection of an accused's Fifth Amendment rights.

This Court should reverse the decision of the Thirteenth Circuit, because admission of post-arrest but pre-*Miranda* and pre-interrogation silence weakens the protections against self-incrimination guaranteed by the Fifth Amendment. While an accused must assert the right to

remain silent, there is no “ritualistic formula is necessary in order to invoke the privilege.” *Salinas*, 570 U.S. at 181 (internal citation omitted). The protections of the Fifth Amendment can be waived by the accused, but only if such “waiver is made voluntarily, knowingly and intelligently.” *Miranda*, 384 U.S. at 444. An accused can be held to have waived the privilege after giving an “unsolicited admission or statement,” but silence alone is insufficient to establish waiver. *Moore*, 104 F.3d at 385. Because no valid waiver took place in this case, and there was no appropriate opportunity to affirmatively invoke the right to remain silent, admission of post-arrest but pre-*Miranda* and pre-interrogation silence eviscerates the protections of the Fifth Amendment.

1. *Failing to protect post-arrest but pre-Miranda and pre-interrogation silence creates an affirmative duty to present an alibi upon arrest and pressure to take the stand to counteract the prosecution’s use of the accused’s post-arrest silence.*

Admission of Coda’s silence in this case not only violated his right to remain silent, but it actually inverted the right, creating instead a duty to provide a statement to the police prior to receiving *Miranda* warnings or to the court after prosecutorial comment on the accused’s silence. The right to remain silent is independent of both arrest and custodial interrogation. *Nunez-Rios*, 622 F.2d at 1100 (citing *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979)). The *Miranda* warnings inform the accused of, rather than create, “his right to remain silent and assure him, at least implicitly, that his silence will not be used against him.” *Anderson v. Charles*, 447 U.S. 404, 407-08 (1980). As a result, an accused has no legal obligation to speak to and provide potentially incriminating information to the police following arrest. *See id.* In this case, however, the holding of the Thirteenth Circuit Court of Appeals creates exactly such an obligation.

If the prosecution comments on an accused’s pre-trial silence, the accused, at trial, will be pressured to take the stand and provide an explanation for his actions and justify his custodial silence. In *United States v. Moore*, the prosecution at trial referenced the defendant’s failure to

provide an explanation upon arrest for the presence of contraband in the vehicle. 104 F.3d at 384. The defendant then chose not to take the stand and testify in his own defense at trial. *Id.* at 389. The jury found the defendant guilty. *Id.* at 380. The problem, the court explained, was that prosecutorial comment on custodial silence “unduly burdens” the defendant’s right to remain silent. *Id.* at 385. Comment on custodial silence “calls a jury’s ... attention to the fact that [the defendant] has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread.” *Id.* A judge concurring in the judgment agreed with this analysis, pointing out that the defendant in that case was actually penalized for not taking the stand because of the prosecution’s comments concerning the defendant’s custodial but pre-trial silence. *Id.* at 396 (Tatel, J., concurring). Because the defendant had not previously provided an exculpatory explanation to the arresting officer, the defendant’s subsequent failure to exculpate himself at trial carries the potential to affirmatively harm the defendant’s case. *See id.* Therefore, admission of custodial silence weakens the protections provided by the Fifth Amendment and was unconstitutional. *See id.* at 391.

Other federal circuits have taken the opposite view. The Eighth Circuit held in *United States v. Frazier* that admission of the defendant’s post-arrest but pre-*Miranda* silence was not unconstitutional. 408 F.3d 1102, 1111 (8th Cir. 2005); *see also United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding post-arrest, pre-*Miranda* silence admissible under U.S. Supreme Court precedent). In that case, the prosecution included in its case-in-chief evidence that the defendant was silent upon arrest and did not appear confused or surprised or provide any exculpatory explanation. *See id.* at 1109. The court reasoned that because no government action induced the defendant’s silence, and the defendant was under no compulsion to speak, the silence was admissible. *Id.* at 1111. The court distinguished situations where an accused refuses to answer

questions during interrogation, as such a refusal could be an invocation of the right to remain silent. *Id.* But without government action inducing or compelling the defendant to be silent, there is no constitutional problem with admission. *Id.* Therefore, the post-arrest but pre-*Miranda* silence was admissible. *Id.*

In this case, Coda was silent when he was arrested and chose not to respond to the arresting officer after Coda heard his charges. R. at 7. The officer asked no questions, and the facts do not reference any questions from interrogation in which Coda waived his right to remain silent. *See id.* Nonetheless, Coda's silence was admitted at trial as substantive evidence of guilt. *Id.* Considering these facts and the circumstances Coda faced before and after trial, the Eighth Circuit's reasoning misses an important consequence of its holding. By allowing admission of an accused's post-arrest but pre-*Miranda* silence, the law creates an implicit obligation on the part of the accused or defendant to present an alibi. At trial, there is now pressure to take the stand to remove the "taint" of pre-trial silence. *See Moore*, 104 F.3d at 385 (reasoning that defendants will feel pressured to take the stand at trial if they did not provide an alibi before trial and that silence was used as evidence of guilt). But even before trial, an accused is presented with a decision when he is arrested: (1) exercise the right to remain silent to avoid risking self-incrimination, or (2) provide an exculpatory explanation upon arrest to prevent silence from being used as substantive evidence of guilt. While the Eighth Circuit was particularly concerned with government action compelling silence, its holding now creates a subtle but nonetheless dangerous government compulsion for the accused to break his silence. *See Frazier*, 408 F.3d at 1111. This Court has specifically recognized the right of an accused to remain silent in the face of potentially incriminating questions, or to voluntarily waive the privilege and speak in the accused's own defense. *Murphy*, 465 U.S. at 429. *But see Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding

post-arrest but pre-Miranda silence admissible to impeach a defendant who takes the stand). To admit an accused's custodial but pre-Miranda silence as *substantive* evidence is to render the voluntariness of waiving the privilege meaningless.

In addition, Coda had no meaningful opportunity to invoke or waive his right to remain silent after his arrest but before receiving *Miranda* warnings. *See* R. at 7. The officer did not ask any questions, and so Coda had no reason to believe that he was required to vocally invoke his right to remain silent, when there was no clear risk to self-incrimination unless he spoke. Instead, his very silence was deemed incriminating, and so in reality, Coda had no option to completely avoid self-incrimination, despite the guarantees of the Fifth Amendment. As a result, the holding of the Thirteenth Circuit Court of Appeals weakens the protections of the Fifth Amendment by creating an affirmative duty to present an alibi after the arrest or on the stand at trial.

2. *Allowing comment on post-arrest but pre-Miranda silence provides adverse incentives for police officers.*

If an accused's custodial silence, prior to *Miranda* warnings and interrogation, is admissible as substantive evidence of guilt, another problem arises. The prosecution's case will be stronger if there is admissible silence between the point of arrest and provision of the *Miranda* warnings. This provides an incentive for police officers to delay interrogation and *Miranda* warnings in an effort to manufacture a "guilty" silence.

This Court has reasoned before that the exclusionary rule applies to evidence gathered in violation of the Fifth Amendment. *Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974). And the primary purpose of the exclusionary rule is to "deter future unlawful police conduct," which applies in the context of both the Fourth and Fifth Amendments. *Id.* Providing opportunities for police officers to maneuver around protections of an accused's silence promotes inappropriate police behavior. *See id.* The holdings of the lower court and the federal circuits in support of

admitting post-arrest but pre-*Miranda* silence allow for adverse incentives to develop. It is then in the best interest of the State for police officers to delay *Miranda* warnings until the initiation of interrogation rather than providing the warnings immediately upon arrest. *See United States v. Cabezas-Montano*, 949 F.3d 567, 612 (11th Cir. 2020) (Rosenbaum, J., concurring) (arguing that admission of custodial silence before receiving *Miranda* warnings “eviscerates the purpose of *Miranda*,” and incentivizes police delaying provision of the warnings).

But this Court has developed Fifth Amendment jurisprudence to promote the protection of an accused’s Fifth Amendment rights and to deter police misconduct that jeopardizes those rights. This Court should not the create a new rule that incentivizes intentional delays to *Miranda* warnings or interrogation simply to allow the admission of ambiguous silence as substantive evidence of guilt. With little probative value, such silence is more likely to cause unfair prejudice than it is to provide valuable insight into the guilt of the accused. To prevent these adverse incentives, this Court should hold admission of post-arrest but pre-*Miranda* silence unconstitutional.

CONCLUSION

Almost ten years ago, a leaky gas pipe caused an explosion in Coda’s hardware store. However, the government received a tip that Coda might have burned his own store down for insurance money. In the nine years following receipt of that information, the government did nothing. They didn’t pursue any leads, they didn’t follow up with witnesses, and they didn’t investigate where Coda had been on the night in question. If they had, Coda could have presented his alibi and verified his location through several witnesses. Instead, they waited until the statute of limitations was about to run, and then brought charges, ensuring that Coda was exposed to the very threats to justice the statute of limitations had been designed to ward off. When Coda was

arrested, Coda remained silent while in custody until interrogation began, and the government attempted to his post-arrest but pre-*Miranda* silence as substantive evidence of his guilt.

Through these two injustices, Coda's defense was substantially prejudiced by the unjustified investigative delay, and the defense he did have was tainted by the admission of Coda's silence as evidence of guilt. Because both of these issues amount to violations of Coda's Fifth Amendment rights, Petitioner respectfully requests that this Court reverse the holding of the Thirteenth Circuit and find that the preindictment delay and admission of his silence violated Petitioner's Fifth Amendment rights.

Respectfully Submitted,

_____/s/_____

Team 7

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