No. 7102-02026

IN THE
Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

PENNY PARKER,
Respondent.

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

BRIEF FOR PETITIONER

Team 5
Counsel for Petitioner

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ISSUES PRESENTED

1. Was Agent Degg's modified *Miranda* warning sufficient under the Fifth Amendment and *Miranda v. Arizona,* 384 U.S. 436 (1966), and did this warning taint later statements made to Agent Mulder?

2. Can *Miranda* deficient statements presented in pre-trial proceedings qualify as "use in a criminal case," under *Chavez v. Martinez,* 538 U.S. 760 (2003)?

STATEMENT OF THE CASE

The United States of America requests that this Court reverse the Court of Appeals for the Fourteenth Circuit's reversal of the Respondent's Motion to Suppress evidence. There are two issues before this Court: (1) whether Agent Degg's modified *Miranda* warning was sufficient under the Fifth Amendment and *Miranda v. Arizona* and whether this warning tainted later statements made to Agent Mulder, and (2) whether self-incriminating statements used in pre-trial proceedings violate the Fifth Amendment.

Factual History

Penny Parker "Respondent" is a social media influencer who uses her platform to promote her so-called "vigilante journalism." R. at 1. On June 1, 2020, an angry mob stormed a neighborhood Bank and stole $200,000. R. at 2. Included in the mob was Respondent. *Id.* This is not the first riot that Respondent has been involved with. In fact, to gain national notoriety, Respondent has "embedded herself within the protest movement across several states." R. at 2. During the robbery, Respondent took videos and conducted interviews with the rioters. *Id.* One rioter even tagged the Respondent in his Instaglam post with the caption, "smashing the banks with #PennyParker!!." *Id.*

On June 3, 2020, the Respondent posted her own video of the crime. R. at 3. That same morning the Santa Jueves Police Department "SJPD" and federal agents arrested Respondent for inciting a riot and robbing a bank. R. at 3. On the way to the police station, Officer Degg stopped the car for roughly one hour. *Id.* It was at that point that Officer Degg gave the Respondent her *Miranda* warning. *Id.* Officer Degg stated, "you have the right to remain silent, anything you say will be used against you, you can get an attorney, we'll appoint one for you." *Id.* The Respondent replied by laughing in the officer's face and stating that she knew her rights. R. at 3-4.

At the police station Respondent was placed in an interrogation room where she was uncooperative with Officer Degg's questions. R. at 4. After Officer Degg asked if she had incited the break-in, Respondent replied, "sure, I incited a riot." *Id.* Officer Degg realized he was not getting anywhere with Respondent so he left the room. *Id.*

After some time passed, Agent Mulder entered the room and immediately apologized to Respondent about the situation. *Id.* Agent Mulder allowed Respondent to use the restroom and provided time for Respondent to collect her thoughts. *Id.* After Agent Mulder returned, he read Respondent her *Miranda* rights from a standard card. R. at 5. After the *Miranda* warning was re-administered to Respondent, Agent Mulder asked Respondent if she understood her rights and required her to answer affirmatively yes or no. *Id.* The Respondent said yes, she understood each of her rights. *Id.* Agent Mulder focused on building rapport and trust with Respondent. *Id.* Respondent finally invoked her right to counsel and Agent Mulder immediately complied. *Id.* When Agent Mulder was leaving he commented on the video she posted and Respondent proudly replied, "we really did smash that bank." *Id.*

Procedural History

Respondent was charged with one count of inciting a riot under 18 U.S.C. § 2101, and one count of bank robbery under 18 U.S.C. § 2113. R. at 5. Respondent's attorney filed a Rule 12 Pretrial Motion to Suppress, challenging the use of statements made to Officer Degg and Agent Mulder in pre-trial hearings and at trial. *Id.* Respondent argues that the *Miranda* warnings she was given were defective, violating the Self-Incrimination Clause of the Fifth Amendment. *Id.* The District Court for The Southern District of New Arintero denied Respondent's Motion to Suppress evidence holding that Officer Degg's *Miranda* warning was adequate and that later statements to Agent Mulder were not tainted. R. at 1. In addition, the court held that even if the

Miranda warnings were deficient, the privilege against self-incrimination is applicable only at trial and does not apply to pre-trial proceedings. R. at 9. The United States Court of Appeals for the Fourteenth Circuit reversed the District Court's decision. R. at 10.

SUMMARY OF THE ARGUMENT

The United States District Court for The Southern District of New Arintero correctly denied the Respondent's Motion to Suppress evidence because Officer Degg and Agent Mulder's *Miranda* warnings were sufficient under the Fifth Amendment and *Miranda v. Arizona.* The self-incriminating statements made to Officer Degg and Agent Mulder took place during a custodial interrogation. The totality of the circumstances demonstrate that the Respondent was not at liberty to terminate the interrogation and leave. In addition, the officers' questions were reasonably likely to elicit an incriminating response from Respondent. Because this was a custodial interrogation *Miranda* safeguards were required.

Officer Degg took appropriate safeguards at the beginning of the interrogation by providing a sufficient *Miranda* warning. Officer Degg did not state the exact words as stated in *Miranda v. Arizona.* However, he reasonably conveyed to the Respondent her rights as required by *Miranda.* After Officer Degg gave the *Miranda* warning the Respondent waived her Fifth Amendment privilege because she made a voluntary and knowing waiver of her rights.

Finally, even if this Court finds that Officer Degg's *Miranda* warning was deficient, the Respondent's self-incriminating statements made to Agent Mulder are admissible. Agent Mulder took appropriate safeguards before he questioned Respondent because he read the *Miranda* warning off of a standard card. The Respondent's statements were voluntarily made in an atmosphere that was not coercive. Thus, subsequent statements given to Agent Mulder, after a sufficient *Miranda* warning was given, were not tainted and are admissible.

Regarding the second issue, the Government does not violate a defendant's Fifth Amendment right against self-incrimination in a "criminal case" when *Miranda* deficient statements are used in pre-trial proceedings. The purpose of the Fifth Amendment is to prevent

defendants from being compelled to be witnesses against themselves in a "criminal case," ultimately resulting in their guilt by excluding such evidence from trial. The Self-Incrimination Clause is a right limited to the defendant's use only at trial. This is because the criminal trial is where a defendant's innocence or guilt is determined; not during pre-trial proceedings. Further, the Self-Incrimination Clause is not violated when *Miranda* deficient warnings yield voluntary self-incriminating statements.

For these reasons, this Court should affirm the District Court and reverse the Court of Appeal's decision to grant Respondent's Motion to Suppress evidence.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews the Fourteenth Circuit's reversal of the District Court's dismissal of Respondent's Motion to Suppress evidence. In reviewing a denial of a motion to suppress this Court reviews factual findings for clear error and legal conclusions *de novo*. *Ornelas v. United States,* 517 U.S. 690, 699 (1996). In the case before this Court, the facts are not in dispute, therefore *de novo* review is proper in reviewing the legal conclusions regarding the Fifth Amendment issues.

II. OFFICER DEGG'S *MIRANDA* WARNING WAS SUFFICIENT BECAUSE IT PROVIDED PROCEDURAL SAFEGUARDS AND DID NOT JEOPARDIZE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The Fourteenth Circuit incorrectly reversed the District Court's decision because Officer Degg's *Miranda* warning was adequate. When a suspect is deprived of her freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. That is not the case here, as procedural safeguards were employed to protect that privilege. An adequate *Miranda* warning is one that warns a suspect that, "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). However, *Miranda* warnings do not have to be stated in the exact terms described in *Miranda. Duckworth v. Eagan*, 492 U.S. 195 (1989); *see also California v. Prysock,* 453 U.S. 355 (1981)("The content of *Miranda* warnings need not be a virtual incantation of the precise language contained in the *Miranda* opinion; such a rigid rule is not mandated by *Miranda* or any other decision of the Supreme Court"). The warning "simply must reasonably convey to a suspect his rights."

Duckworth, 492 U.S. at 195. Because Officer Degg's *Miranda* warning reasonably conveyed to the Respondent her rights, the *Miranda* warning was adequate.

A. The Self-Incriminating Statements Made to Officers Took Place During a Custodial Interrogation.

Miranda warnings must be given prior to custodial interrogations. *See, e.g., Dickerson v. U.S.,* 530 U.S. 428, 435 (2000). A custodial interrogation occurs when questioning is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. Federal courts consider the totality of the circumstances to determine whether a person was in custody. *U.S. v. Ruiz,* 785 F.3d 1134, 1141 (7th Cir. 2015). Specifically, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane,* 516 U.S. 99, 112 (1995); *see, e.g., Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). An interrogation under *Miranda* includes express questioning and "any words or action on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis,* 446 U.S. 291, 292 (1980).

Here, after SJPD and federal agents arrested the Respondent and before reaching the station, Officer Degg stopped the car for roughly one hour to question the Respondent. A reasonable person in this situation would not have felt she was at liberty to terminate the interrogation and leave. In addition to the Respondent's inability to leave the vehicle, Officer Degg's line of questioning would likely evoke an incriminating response from the Respondent. Because this situation involved a custodial interrogation, *Miranda* safeguards were required.

B. Officer Degg Took Appropriate Safeguards at the Beginning of the Interrogation to Ensure That the Respondent's Statements Were the Product of Free Choice.

The Supreme Court in *Miranda v. Arizona* established a prophylactic measure to protect individuals' Fifth Amendment rights against self-incrimination during a custodial interrogation. However, Justice Ginsburg stated, "[t]he four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed." *Florida v. Powell,* 559 U.S. 50, 60 (2010); *see also Innis,* 446 U.S. at 297 (stating that *Miranda* warnings "or their equivalent" provide safeguards against self-incrimination). To determine whether police officers provided procedural safeguards, courts look at whether "the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda.*'" *Powell,* 559 U.S. at 60 (quoting *Prysock,* 453 U.S. at 361).

At issue in this case is whether Officer Degg's *Miranda* warning was sufficient under the Fifth Amendment and *Miranda v. Arizona.* Officer Degg's warning stated, "[y]ou have the right to remain silent, anything you say will be used against you, you can get an attorney, we'll appoint one for you." The Respondent alleges that the self-incriminating information she voluntarily provided was given prior to an adequate *Miranda* warning. The Respondent's allegation is contrary to what the Supreme Court has upheld for over thirty years.

In *Florida v. Powell,* the police provided a modified *Miranda* warning, specifically advising the defendant that he could have the assistance of counsel before answering any questions. 559 U.S. at 54. The defendant acknowledged that he was informed of his rights and then provided self-incriminating information. *Id.* The defendant claimed that the *Miranda* warnings were deficient because he was entitled to the assistance of counsel during the interrogation not solely before it began. *Id.* The Court decided that the officers did not "entirely omit any information *Miranda* required them to impart." *Id.* at 62. Thus, the Court reversed the lower court's decision

and determined that the officers' *Miranda* warnings reasonably conveyed the Respondent his rights required by *Miranda*. *Id.*

The facts of this case are similar to those in *Powell*, in that Officer Degg's modifications provided the four warnings required by *Miranda*. Officer Degg informed the Respondent that she had the right to remain silent, that anything she said would be used against her, that she could get an attorney, and that an attorney could be appointed for her. At first glance, it may appear that Officer Degg omitted "if you cannot afford an attorney, one will be appointed for you." However, it is encompassed in the warning "an attorney could be appointed for her." Although Officer Degg prefaced the *Miranda* warning with his own choice of words, the modified warning reasonably conveyed to the Respondent her rights. Like in *Powell,* Officer Degg did not entirely omit any information even though his modified warning was truncated. Thus, the Fourteenth Circuit incorrectly stated that Officer Degg substantially departed from the substance of *Miranda* by omitting section 5 entirely. The four warnings of *Miranda* were given. No case law to date states that for officers to comply with *Miranda,* they must include a statement after the four warnings are given to inform the Respondent that he or she can exercise the rights at any time.

The *Powell* opinion is not alone in recognizing that the exact words of *Miranda* do not have to be used in order to provide procedural safeguards against self-incrimination. Even if officers go off-script, as long as they convey the essence of *Miranda*, their warnings are sufficient under the Fifth Amendment. For example, in *California v. Prysock,* the Fifth Circuit decided that officers erred when providing the *Miranda* warnings because the officers did not explicitly inform the defendant of his right to have an attorney appointed before questioning began. 453 U.S. at 358. The Supreme Court stated, "[t]his Court has never indicated that the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant . . . [n]othing in

these observations suggests any desirable rigidity in the *form* of the required warnings." *Id. at* 359; *see also Duckworth,* 492 U.S. at 202 ("We have never insisted that *Miranda* warnings be given in the exact form described in that decision"). Ultimately, the Court held that the police provided an adequate *Miranda* warning because the officers conveyed to the defendant his rights as required by *Miranda.*

As it was in *Prysock,* Officer Degg conveyed to the Respondent her right to remain silent, that anything she said could be used against her, and that an attorney could be appointed for her. Even though Officer Degg went off-script, *Miranda* does not mandate that officers provide precise language identical to that used in *Miranda.* Instead, minor modifications to *Miranda* are permitted because "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures." *Id.* Thus, Officer Degg's modified warning adequately warned the Respondent of her procedural safeguards even though he did not use the precise language contained in *Miranda.*

It is worth being absolutely clear on the foundational point that the Supreme Court has held that warnings made before custodial interrogations must reasonably convey to a suspect her rights as required by *Miranda.* However, the Supreme Court has "not dictated the words in which the [warning] must be conveyed." *Powell,* 559 U.S. at 60. Thus, the Fourteenth Circuit erred in comparing this situation to the one in *Doody v. Ryan.* In *Doody,* the police officers *Miranda* warnings were not clear or understandable, as the officers' *Miranda* warnings consumed twelve pages of text. 649 F.3d 986, 1003 (9th Cir. 2011). Further, the officers "never clearly and reasonably informed [the defendant] that he had the right to counsel." *Id.* The facts of this case are different from *Doody* because, although Officer Degg downplayed the importance of the *Miranda* warnings, he clearly and understandably stated the warnings as required by *Miranda.* Officer Degg gave the four warnings as required by *Miranda* which counteracted the coercive

pressures inherent in custodial interrogations. Finally, the case at hand demonstrates that there is no allegation that the Respondent failed to understand the basic privilege guaranteed by the Fifth Amendment.

C. The Respondent Made a Voluntary, Knowing, and Intelligent Waiver of Her Rights.

After a *Miranda* warning is given a suspect can either waive her rights or invoke her right to counsel or right to remain silent. "[A] suspect may waive [her] Fifth Amendment privilege, 'provided the waiver is made voluntarily, knowingly and intelligently.'" *Colorado v. Spring*, 479 U.S. 564, 572 (1987)(quoting *Miranda,* 384 U.S. at 444). However, no court requires evidence that the waiver was wise or made after careful consideration. "The Constitution guards against compulsion by the state, not poor decision-making by defendants." *United States v. Rang*, 919 F.3d 113, 120 (1st Cir. 2019). To determine whether a waiver was made knowingly and voluntarily, the Court looks at whether it was a product of "free and deliberate choice rather than intimidation, coercion, or deception," and if the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 421 (1986). Finally, a waiver can be expressed or implied, in that it can be inferred from the words and actions of the suspect in custody. Here, the Respondent impliedly waived her rights.

First, Respondent's implied waiver shows a lack of coercion and intimidation. Even though Respondent may argue that the circumstances at the police station created a coercive environment, the officers did not use excessive physical or psychological force, make deceitful promises that they could not deliver, or make threats. *See, e.g., Greenwald v. Wisconsin,* 390 U.S. 519, 520 (1968)(officers refused to give medication and interrogated the defendant for over 18

hours without food or sleep). Further, the Respondent laughed in Officer Degg's face which indicated that she did not feel intimidated or coerced.

Second, there is no indication that the Respondent failed to understand her privilege guaranteed by the Fifth Amendment. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Spring,* 479 U.S. at 575. In *Berghuis v. Thompkins,* the Supreme Court stated that "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." 560 U.S. 370, 384 (2010). Just like an invocation of the right to counsel, invoking the right to remain silent must be made unambiguously and unequivocally. *Id.* at 381. The Court reasoned that "[i]f an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequences of suppression 'if they guess wrong.'" *Id.* at 382 (citing *Davis v. U.S.,* 512 U.S. 452, 461 (1994)).

The present case is similar to *Berghuis,* in that Respondent fully understood her rights and impliedly waived them by making voluntary statements to Officer Degg. The Respondent explicitly stated that she "kn[e]w her rights." During Officer Degg's questioning, Respondent never requested counsel or expressed her wish to remain silent, therefore, there need not be an inquiry into whether she made an unambiguous and unequivocal invocation of her rights. Officer Degg's warning conveyed to the Respondent the nature of her constitutional privilege and the consequences of abandoning it. The Respondent chose to abandon it and now argues that the self-incriminating information is inadmissible. Finally, as the Supreme Court stated, "giving the warnings and getting a waiver generally produces a virtual ticket of admissibility." *Missouri v.*

Seibert, 542 U.S. 600, 601 (2004). Officer Degg's *Miranda* warning and Respondent's implied waiver allow for the admissibility of Respondent's self-incriminating statements.

D. Even if This Court Finds That the First *Miranda* Warning Was Insufficient, Later Statements Made to Agent Mulder Are Admissible.

Miranda violations differ from Fourth Amendment violations with regard to the Exclusionary Rule because a *Miranda* warning is a procedural safeguard; it is not a constitutional right. *Oregon v. Elstad,* 470 U.S. 298 (1985). "The Self-Incrimination Clause of the Fifth Amendment does not require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect." *Id.* If this Court finds that Officer Degg's *Miranda* warning was inadequate, the voluntary confession given to Agent Mulder, after an adequate *Miranda* warning, is not the "fruit of the poisonous tree" and is admissible. *Id.* at 304. "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective." *Id.* at 309. Here, the passage of time and circumstances between Officer Degg and Agent Mulder's questioning make Respondent's confessions voluntary and admissible.

The Court in *Oregon v. Elstad* stated, "[w]hen a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Id.* at 310; *see also Lyons v. Oklahoma,* 322 U.S. 596, 604 (1944)(stating that even though a confession was the result of unconscionable methods of interrogation, the coercive effect of the confession could be dissipated with time). Here, if Officer Degg had any coercive effect on

Respondent, it was dissipated with time. Agent Mulder was a different officer who allowed the Respondent to use the restroom and provided time for her to gather her thoughts before he asked her any questions. Agent Mulder attempted to build trust with the Respondent by creating rapport. Further, Agent Mulder's *Miranda* warning was sufficient because it reasonably conveyed the essence of *Miranda* and he went so far as to explicitly ask the Respondent if she was okay with him asking her questions, at which time she answered yes. The actions taken by Agent Mulder demonstrate that the environment was not coercive. Recognizing if the car ride and subsequent detention were tense, the tension dissipated when Agent Mulder took over. Thus, because there was not a coercive environment, subsequent statements made after a sufficient *Miranda* warning was read, are not tainted and are admissible.

III. *MIRANDA* DEFICIENT STATEMENTS PRESENTED IN PRE-TRIAL PROCEEDINGS DO NOT QUALIFY AS "USE IN A CRIMINAL CASE," UNDER CHAVEZ V. MARTINEZ, 538 U.S. 760 (2003).

The Government does not violate a defendant's Fifth Amendment right against self-incrimination in a "criminal case" when *Miranda* deficient, but voluntary statements, are presented in pre-trial proceedings. "No person . . . shall be compelled in any *criminal case* to be a witness against himself." *U.S. Cont. Amend. V* (emphases added). "[A] violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." *Chavez v. Martinez*, 538 U.S. 760, 770 (2003).

To protect this constitutional right, the Supreme Court "created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Chavez*, 538 U.S. at 770. This rule was established in *Miranda v. Arizona*, 384 U.S. 436 (1966). Under the *Miranda* rule, "[s]tatements compelled by police interrogations . . . may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of Self-Incrimination

occurs." *Chavez*, 538 U.S. at 767. Police, however, "cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements." *United States v. Patane*, 524 U.S. 630, 643 (2004).

Following the Supreme Court's ruling in *Chavez v. Martinez*, the Court left unresolved the scope of "criminal case" as it relates to the Self-Incrimination Clause. This resulted in a circuit split regarding the extent to which *Miranda* deficient statements of the defendant may be used in pre-trial proceedings. The Third, Fourth, and Fifth Circuits adopted a narrower rule, holding that the Fifth Amendment right is limited exclusively to trial. Conversely, the Second, Seventh, Ninth, and Tenth Circuits adopted a broader rule, holding that the Fifth Amendment right extends to pretrial proceedings.

The Court should follow the narrower rule adopted by the Third, Fourth, and Fifth Circuits, limiting the Fifth Amendment right against self-incrimination to trial proceedings only. These rulings are the most consistent with the actual purpose of the Fifth Amendment; to prevent a defendant from being compelled to be a witness against himself in a "criminal case," ultimately resulting in his guilt by excluding such evidence from trial.

The use of *Miranda* deficient statements during pre-trial proceedings, such as preliminary hearings or bail hearings, does not violate a defendant's constitutional right against self-incrimination. The purpose of pre-trial proceedings is not to determine guilt or overcome the Eleventh Amendment's constitutional presumption of "innocent until proven guilty." *U.S. Cont. Amend. XI.* Those are functions of the criminal trial. Pre-trial proceedings are merely the beginning of the criminal process and ultimately lead up to the defendant's "criminal case" or trial. To extend the scope of the Self-Incrimination Clause to pre-trial proceedings would do nothing to further protect the right against compelled self-incrimination because it is not until the defendant's

trial that guilt or innocence is determined and the defendant becomes subject to punishment for crimes. For these reasons, this Court must reverse the Court of Appeal's ruling, and find that the Respondent's statements were properly presented during pre-trial proceedings.

A. The Self-Incrimination Clause of the Fifth Amendment is a Right Limited to the Defendant's Use Only at Trial.

The Self-Incrimination Clause of the Fifth Amendment "requires that '[n]o person . . . shall be compelled *in any criminal case* to be a *witness* against himself." *Chavez*, 538 U.S. at 766. (quoting *U.S. Cont. Amend. V* (emphases added)). The plain text of the Self-Incrimination Clause requires that two conditions be satisfied for the right to attach: 1) that the statement be compelled and 2) that the statement is self-incriminating upon the speaker. "[A] violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." *Id.* at 770.

In the *Chavez* plurality opinion, the Supreme Court declined to decide "the precise moment when a 'criminal case' commences." *Id.* at 767. In *Chavez*, the defendant was questioned at the hospital by a patrol supervisor while the defendant received treatment for gunshot wounds. *Id.* at 764. During the interview, the defendant made several self-incriminating statements; these statements included the defendant admitting to taking a gun from a police officer and pointing it at him and admitting to regularly using heroin. *Id.* "At no point during the interview was [the defendant] given warnings under *Miranda v. Arizona*." *Id.* The defendant "was never charged with a crime, and his answers were never used against him in any criminal prosecution." *Id.* Justice Thomas, writing on behalf of himself, Chief Justice Rehnquist, and Justices O'Connor and Scalia, held that "the absence of a 'criminal case' in which [the defendant] was compelled to be a 'witness' against himself defeat[ed] his core Fifth Amendment claim" against self-incrimination. *Id.* at 772-73.

As noted above, the Supreme Court did not articulate what constitutes a "criminal case," other than briefly stating that "[a] 'criminal case' at the very least requires the initiation of legal proceedings." *Id.* at 767. Nonetheless, the Court maintained that it is not until statements compelled by police interrogations are used "in a criminal case that a violation of the Self-Incrimination Clause occurs." *Id.* Justice Souter, joined by Justice Breyer, authored a concurring opinion in which he agreed with the plurality that "[t]he text of the Fifth Amendment focuses on *courtroom use* of a criminal defendant's compelled, self-incriminating testimony" and the right against self-incrimination is not violated until a defendant's statements are used against himself in a "criminal case." *Id.* at 777 (emphasis added).

"[T]he core of the guarantee against compelled self-incrimination is the exclusion of any such evidence." *Id.* This core guarantee is violated only when a defendant's "conviction is based, in whole or in part, on an involuntary confession." *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005). "In essence, the ultimate purpose of the Self-Incrimination Clause is to prevent compelled testimony from being used at trial to convict a defendant of a crime." Michael Votel, *What Is a "Criminal Case" Within the Meaning of the Self-Incrimination Clause? So Far, the Supreme Court Has Pleaded the Fifth*, 46 N.KY.L.REV. 87, 103 (2019). The Supreme Court has "created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Chavez*, 538 U.S. at 771. Most notably, the *Miranda* rule is a rule designed to "prevent violations of the right protected by the text of the Self-Incrimination Clause – the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning." *Id.* at 772. However, "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights." *Patane*, 542 U.S. at 641. This closely intertwined connection between the *Miranda* rule and the Self-Incrimination Clause supports limiting the right

against self-incrimination to trial. "Rules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself." *Chavez*, 538 U.S. at 772. The *Miranda* rule safeguards a defendant's right against self-incrimination by excluding coerced statements from evidence at trial. "[E]ven though pre-trial conduct by law enforcement officials may ultimately impair a defendant's right against self-incrimination," the right is only truly violated at trial. *Murray,* 405 F.3d at 285; Votel, 46 N.KY.L.REV. at 94.

The scope of a "criminal case" does not include pre-trial proceedings. "The Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only at trial." *Murray,* 405 F.3d at 285; *see also Renda v. King*, 347 F.3d 550, 559 (3rd Cir. 2003)(holding that it was not unconstitutional to use a coerced statement in obtaining an indictment because it is not part of a criminal trial); *Burrell v. Virginia*, 395 F.3d 508, 514 (4th Cir. 2005)(holding that the defendant's Fifth Amendment right was not violated because there was not "any trial action that violated [the defendant's] Fifth Amendment rights"). The purpose of a criminal trial is a truth-finding endeavor; to determine the guilt of the defendant for the crimes charged. Pre-trial proceedings are merely the beginning of the criminal process and the criminal trial is the final stage. It is at the point of the criminal trial, where a defendant's innocence or guilt is determined, that the right against self-incrimination takes effect. Extending the Fifth Amendment right against self-incrimination to pre-trial proceedings would inherently hinder the purpose of criminal trials by cutting off a criminal investigation before it was ever able to truly begin.

A broad definition of "criminal case" encompassing pre-trial proceedings does not enhance a defendant's right against self-incrimination. In *Sornberger v. City of Knoxville, Ill.*, the Seventh Circuit held that the Fifth Amendment protection applied to the pre-trial proceedings because the

"criminal prosecution was not only initiated, but commenced" due to the use of defendant's self-incriminating statements in a preliminary hearing to determine probable cause[1], used to set bail[2], and when the defendant entered a plea. 434 F.3d 1006, 1026-27 (7th Cir. 2006). In reaching this holding, the court stated that it was "conscious of language in *Chavez* suggesting that the Fifth Amendment is, at bottom, a trial protection." *Id.* at 1026. By extending the Fifth Amendment protection to the ceiling as a pre-trial protection, it does nothing to further protect a defendant's right against self-incrimination. These pre-trial proceedings noted by the Seventh Circuit do nothing to implicate or determine a defendant's guilt at trial. In fact, a defendant maintains his innocence up until and even through the resolution of the criminal trial; this assumption of innocence remains during pre-trial proceedings. Further, the purpose of a preliminary hearing is to establish probable cause to proceed with the case and the purpose of setting bail is to ensure that a defendant will actually show up for trial; neither of these pre-trial proceedings have anything to do with determining the defendant's guilt or subjecting the defendant to criminal punishment. In summary, because pre-trial proceedings do not determine guilt, the use of a defendant's statements cannot violate the self-incrimination right because the statements are not being used to incriminate the defendant.

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[1] In *Stoot v. City of Everett*, the Ninth Circuit held that "[a] coerced statement has been 'used' in a criminal case when it has been relied upon to file charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody states. Such uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding." 583 F.3d 910, 925 (9th Cir. 2009).

[2] The Second Circuit held that the defendant's right against self-incrimination was violated at a bail hearing where his compelled, self-incriminating statements were first used to file a criminal complaint against the defendant and then alluded to by the government in its bail argument. *Higazy v. Templeton*, 505 F.3d 161, 167 (2nd Cir. 2007). The court reasoned that "the status of bail hearings under other constitutional provisions supports the conclusion that such a hearing is part of a criminal case against an individual whom charges are pending." *Id.* at 172.

The Tenth Circuit takes a more historical approach in holding that the right against self-incrimination extends to pre-trial proceedings. In *Vogt v. City of Hays, Kansas*, the Tenth Circuit first relies on Noah Webster's 1828 dictionary "to determine the commonly understood meaning of the phrase 'criminal case' at the time of ratification" in 1791. 844 F.3d 1235, 1242 (10th Cir. 2017). The court found that the dictionary defined case as "a cause or suit in court, stating that the term is nearly synonymous with cause" and that cause is defined as "a suit or action in court." *Id.* at 1243. Relying on these vague definitions, the court held "the Fifth Amendment encompasses more than the trial itself" and had the Framers intended to restrict the right to trial, they would have done so more explicitly. *Id.* This definitional argument is theoretical and deceptive. The seemingly simple plain language of the Self-Incrimination Clause is generally ambiguous and does not lend itself well to resolution based upon simple dictionary definitions. Votel, 46 N.KY.L.REV. at 97. First, the dictionary definition relied upon by the court comes from a dictionary compiled thirty-seven years after ratification. Second, the definitions relied upon by the court to broadly expand the right against self-incrimination to pre-trial proceedings provide no substantive clarity regarding the actual scope of "criminal case." Finally, in *Chavez*, Justice Thomas used Black's Law Dictionary to define the term case as "a general term for an action, cause, suit, or controversy at law . . . a question contested before a court of justice." *Chavez*, 538 U.S. 766. This definition provided the Supreme Court with no more clarity regarding the scope of "criminal case" than the definitions relied upon by the Tenth Circuit.

The Tenth Circuit next argues that the right against self-incrimination extends to pre-trial proceedings because "[t]he amendment had been drafted by James Madison, who omitted the phrase 'criminal case.'" *Vogt*, 844 F.3d at 1244. It was only upon the insistence of Representative Laurance that "the phrase 'in any criminal case'" was added in order to avoid conflict with laws.

Id. The court notes that "[i]t is unclear which 'laws' Representative Laurance was talking about," but nevertheless conclude that "when Representative Laurance proposed to confine the Fifth Amendment to a 'criminal case,' there was a consensus that the right against self-incrimination was not limited to a suspect's own trial." *Id.* at 1245. This argument is nothing more than speculative at best. The court fails to explain the basis of this consensus and how it lends itself to the assumption that the Framers intended the phrase "criminal case" to extend the right against self-incrimination to more than the defendant's own criminal trial. Further, courts should not make legal precedent based on what might have been proposed language that did not actually get incorporated into the Constitution.

The phrase "criminal case" in the Self-Incrimination Clause is a right that is limited to trial and does not include pre-trial proceedings. Therefore, the Court should follow the narrow rule adopted by the Third, Fourth, and Fifth Circuits, and hold that the right against-self-incrimination is only a trial right.

B. The Self-Incrimination Clause of the Fifth Amendment is Not Violated When *Miranda* Deficient Warnings Yield Voluntary Self-Incriminating Statements.

As stated above, the right against self-incrimination is triggered when two conditions are satisfied; the statement obtained from the defendant must be compelled and the statement is self-incriminating. The core protection of the Self-Incrimination Clause is against the government compelling a criminal defendant to act as a witness against himself, subjecting that defendant to criminal punishment. This rationally leads to the conclusion that a defendant can voluntarily offer self-incriminating information. The "police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements." *Patane,* 542 U.S. at 643. "Mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights." *Id.* at 641. This naturally

leads to the conclusion that *Miranda* deficient self-incriminating statements that are made voluntarily by the defendant are not protected by the right against self-incrimination.

Here, the Respondent's Fifth Amendment right against self-incrimination was not violated because her self-incriminating statements were made voluntarily. While in this case, the Respondent may have been given a deficient *Miranda* warning, the Constitution is not explicitly violated for lack of a *Miranda* warning. Further, the Respondent explicitly stated to Officer Degg that she knew her rights. In fact, the Respondent's attitude and demeanor throughout the entire time she was in custody demonstrate that she did not feel intimidated or coerced into saying anything. Ultimately, the statements that the Respondent made to Officer Degg and Agent Mulder were made voluntarily and not as a result of police coercive tactics. Therefore, the Respondent's statements are not protected by the right against self-incrimination and are properly used to bring formal charges against her and presented in pre-trial proceedings.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals for the Fourteenth Circuit's holding and find that the Respondent's Motion to Suppress evidence should be denied.