No. 7102-02026

IN THE

SUPREME COURT OF THE UNITED STATES

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, UNITED STATES OF AMERICA

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1. The Supreme Court in *Miranda v. Arizona* held that in order to protect an in-custody suspect against Self-Incrimination under the Fifth Amendment, certain safeguards must be provided to make the suspect aware of his or her constitutional rights. Nevertheless, can it be said that where a defendant was read *Miranda* warnings that reasonably conveyed their meaning and the suspect expressed an understanding of her rights, that a voluntary statement cannot be made?

2. Can it also be said, in the event the above question is answered in the affirmative, that a new standard reading of *Miranda* by a second officer, whom which dissipated the potentially hostile environment of the former interrogating officer, cannot bring about a new voluntary statement?

3. Can *Miranda* deficient statements presented in pre-trial proceedings qualify as "use in a criminal case," under *Chavez v. Martinez* and as a violation of the Fifth Amendment Self-Incrimination Clause?

STATEMENT OF FACTS

Respondent Penny Parker (hereinafter "Ms. Parker") is a social media "influencer" on ViewTube and Glitch known for what she refers to as "vigilante journalism." R. at 1. Ms. Parker's signature style incorporates death-defying "parkour" with high-flying close drone footage of government and industrial facilities typically not available to the public's view. A recent video, posted on January 25, 2020, got over two million views. The video depicted a montage of Santa Jueves Police Department (hereinafter "SJPD") officers turning off their body worn cameras. An SJPD Union representative referenced another instance in which Ms. Parker admitted to mistakenly alleging officer were tampering with evidence and claimed Ms. Parker had "digitally manipulated" the video and was "inciting unrest." R. at 2. The officers were not disciplined in either case. Her videos have prompted accusations of criminal trespassing.

The video that directly pertains to the case as issue was posted on June 1, 2020 and depicted the events of the incident. R. at 2. Around the time of the video, there were nationwide protests against police killings. Ms. Parker took this movement as a chance to become a famous journalist and embedded herself in the protests that took place across different states. R. at 2. On June 1, 2020, Ms. Parker took part in a protest in Santa Jueves. After several protesters were injured by a police cruiser driving into the crowd, the crowd became very angry. Around 11:30 p.m., surveillance footage shows Ms. Parker among the front of a crowd of protesters broke into a nearby bank. R. at 2. Ms. Parker and the other protesters flipped over ATM's inside the bank and extracted money from them when they were unable to access the secured section of the bank. $200,000 was reported stolen by the bank. R. at 2. In an image posted to Instaglam at 11:38 p.m., Ms. Parker was mentioned in an image with the caption: "smashing the banks with #PennyParker!!" R. at 2.

A subsequent video was posted on June 3, 2020 arguing that the individuals she interviewed were only resorting to crime because of environmental factors and desperation. Around this time, federal agents suspected the $200,000 that was stolen from the bank during the protest was a coordinated effort. R. at 3. The FBI had already been monitoring Ms. Park due to unrelated alleged criminal activity and took note of her presence on social media trends related to the bank's break in. The FBI obtained a warrant to search and arrest Ms. Parker in connection with suspected incitement of a riot and subsequent bank robbery. R. at 3.

SJPD Officer Brad Degg and FBI Agent Jerek Derringer arrested Ms. Parker at 6:00 a.m. on June 3, 2020 in an FBI owned car. Officer Degg has previously appeared in one of her videos. Before reaching the station, Officer Degg stopped the car for a period of an hour. During this time, he called Ms. Parker "a spoiled crook" who "was pretending to be an activist for clicks." R. at 3. He demanded to know if she knew where the money stolen from the bank was. With prompting from Agent Jerek Derringer, Officer Degg read Ms. Parker her *Miranda* rights. R. at 3. Officer Degg pulled out his standard SJPD issued *Miranda* card. R. at 3. There were instances where he went off script and referred to the *Miranda* card as a formality. He also told Ms. Parker there were photos placing her at the scene of the crime. He also made some promises of leniency if she were to cooperate. Officer Degg took the liberty to also make a promise of leniency if she were to admit to doctoring the video she had took of him previously. This prompted Ms. Parker to laugh and say, "I didn't doctor shit. So what if I played to the crowd a little—it's not a crime to be a journalist. They were mad anyway. I may have into it with those guards when they got aggressive with us, but I'm not guilty of anything. I know my rights." R. at 3-4.

Ms. Parker was transported to the police station and was placed in an interrogation room at 8:00 a.m. In a search incident to arrest, police found a crumpled receipt in her pocket showing

a $500 deposit was made the morning of June 2, 2020 but the account details were illegible. Ms. Parker requested to use the bathroom at 9 a.m. Officer Degg continued to interrogate Ms. Parker. At one point, Officer Degg offered to let Ms. Parker use the bathroom in exchange for the truth of what had happened. Ms. Parker responded, "What's the endgame here? Is it illegal to pick money up off the ground? So what if I did pick some up? You can't prove I actually took shit. That's not even my receipt. I just happened to pick up some litter." R. at 4. At 8:30 p.m., Ms. Parker was allowed to use the restroom when the lead federal agent, Agent Redd Mulder, arrived to question her in connection to the incident. R. at 4.

Agent Mulder was apologetic for her treatment until this point and claimed the interrogation was "not consistent with typical procedure." R. at 4. After Ms. Parker had used the restroom, he apologized again and made pleasantries with Ms. Parker. Agent Mulder left the interrogation room for about twenty minutes after telling her he was going, "to make sure these guys don't screw anything else up." R. at 4. Ms. Parker was alone for the twenty minutes. R. at 4.

When Agent Mulder returned, he read Ms. Parker her *Miranda* rights from the standard card: "You have the right to remain silent. Anything you say can be used against you in the court of law. You have the right to talk to a lawyer and her present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you?" R. at 5. Ms. Parker nodded and then said, "yes" after being prompted to say it out loud. R. at 5. Then, Agent Mulder said, "just some closing questions. Are you okay with speaking to me?" Ms. Parker said, "yes." R. at 5.

Agent Mulder's interrogation style was aimed at building trust rather than intimidation. R. at 5. Eventually, Ms. Parker asked to speak to a lawyer. Agent Mulder said, "Of course. Also—nice video—I can honestly say I've never seen anything like it." R. at 5. Ms. Parker beamed, saying, "we really did smash that bank." R. at 5. Mulder took notes of these comments and told her he would contact the Public Defender. After the Public Defender, Polly Prudence, arrived, Ms. Parker said nothing further to the police.

On June 4, 2020, Ms. Parker was charged with the following: (1) one count of inciting a riot under 18 U.S.C. §2101 and (2) one count of bank robbery under 18 U.S.C. §2113, subd. (a). Ms. Prudence filed a timely Rule 12 Pretrial Motion to Suppress challenging both the statements made to Officer Degg and Agent Mulder in both probable cause hearings, the preliminary hearing, and the trial. Also, Ms. Prudence claimed that Ms. Parker's Fifth Amendment right against Self-Incrimination had been violated. The District Count found in favor of the Government and the Fourteenth District Court of Appeals reversed.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's ruling that Officer Degg's *Miranda* warning, which reasonably conveyed to Ms. Parker her rights, was inadequate and did not taint a future interrogation with Agent Mulder. This Court should also reverse the Fourteenth Circuit's ruling that Ms. Parker's statements, if coerced, cannot be used in preliminary hearings because the decision goes against long standing precedent in not only this court, but in the majority of the circuits, which hold that pretrial hearings are not within the meaning of a "criminal case."

In *California v. Prysock,* the Supreme Court held that an in-custody suspect must be given their *Miranda* warnings – or their equivalent – prior to questioning and that it is the duty of the interrogating officer to only "reasonably convey" to the suspect their rights. Upholding the

Fourteenth Circuit's ruling would require law enforcement agencies to compel suspects to listen through an incomprehensible list of warnings that run the risk of further needless litigation. Suspects, because of their varying levels of education, social awareness, etc., may not be able to understand a list of warnings detailing every procedure in which their statements may be used. Officer Degg's reading of *Miranda* to Ms. Parker did what the court in *Miranda* sought to establish.

In *Westover v. United States*, the Supreme Court held that where a second interrogating officer is not the beneficiary of a prior coercive interrogation, it cannot be said that the second incriminating statement is tainted. Agent Mulder successfully started a new interrogation with Ms. Parker after providing her with a standard set of *Miranda* warnings. Agent Mulder's interrogation was distinguishable from that of Officer Degg's and these distinguishing factors were made clear to Ms. Parker. It is our contention that no potential taint, if any, created by Officer Degg transferred to Agent Mulder's interrogation for the following reasons: (1) Agent Mulder allowed her to use the restroom; (2) Agent Mulder gave Ms. Parker the time to be alone and to regain a sense of security; (3) enough time had passed between the two interrogations; (4) Agent Mulder reminded Ms. Parker of her rights by Mirandizing her a second time; and (5) Ms. Parker's difference in demeanor, actions, and responsiveness from the first interrogation to the second is evidence in itself that the second interrogation was not tainted. R. 4-5.

The Fifth Amendment protects a suspect's coerced statements from being used in a "criminal case". In *U.S. v. Verdugo-Urquidez*, the Supreme Court said in dicta that a criminal proceeding does not start until trial. Dicta made by the Supreme Court of the United States is just as powerful as a Supreme Court holding on the lower courts. Despite a circuit split as to the meaning of a "criminal case," the vast majority of the circuits hold that the Fifth Amendment's

Self-Incrimination Clause does not apply to criminal pre-trial proceedings and that it is a right that can only be invoked during a criminal trial. As such, we respectfully request that the court reverse the Fourteenth Circuit's decision.

STANDARD OF REVIEW

A decision on a motion to suppressed uses a mixed standard of review. Before the court, the first issue of whether a specific reading of *Miranda* warnings satisfied the Fifth Amendment as to allow for a voluntary waiver is a mixed question of law and fact. As such, the court will review this issue *de novo*. Payne v. State of Ark., 356 U.S. 560 (1958). *See also* Miller v. Fenton, 474 U.S. 104, 115 (1985). In doing so, this court must view the evidence "in the light most favorable to the Government." *United States v. Yepa*, 862 F.3d 1252 (10th Cir. 2017). If the answer to this issue is "yes", then the defendant's case is dismissed because there is no constitutional violation. Where this court should hold "no", *de novo* review also applies to issue of whether *Miranda* deficient statements presented in pre-trial proceeding qualify as "use in a criminal case," under *Chavez v. Martinez*, 538 U.S. 760 (2003). *U.S. v. Patane*, 542 U.S. 630 (2004).

ARGUMENT

I. OFFICER DEGG'S *MIRANDA* WARNING REASONABLY CONVEYED PROPER SAFEGUARDS THAT PROTECTED MS. PARKER FROM AN IMPROPER WAIVER OF HER RIGHT AGAINST SELF-INCRIMINATION.

The Fifth Amendment provides in part, "[no] person shall be compelled in any criminal case to be a witness against himself…." USCS Const. Amend. V. The Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) explained that "proper safeguards effective to secure the privilege against self-incrimination," must be given to suspects in custodial interrogations to uphold the virtue of the Fifth Amendment. More specifically, the Supreme

Court provided that special instructions, subject to no strict formulation, must inform suspects in custody of (1) the "right to remain silent," (2) "that anything said can be used against the individual in court," (3) of the right to have counsel present during questioning prior to trial, and (4) if the individual could not afford an attorney, one will be appointed. *Id.* Even so, this court has not provided us with the precise formulation for which these safeguards must be conveyed, providing only that they be "reasonably conveyed." *Duckworth v. Eagan*, 492 U.S. 195 (1989) (quoting *California v. Prysock*, 453 U.S. 355, 361 (1981)). In *Duckworth*, the Supreme Court argued that the addition of the phrase, "if and when you go to court" in relation to a suspects *Miranda* rights, did not render the warning ineffective because in the totality of the circumstances, the warning reasonably conveyed the essential safeguards. *Id* at 205.

Here, Ms. Parker wishes the Court to believe that she did not understand her rights. However, the circumstances of the case prove that this was not the case at all. Ms. Parker is known on the internet for attempting to expose police misconduct and exposing her own criminal trespassing through means of specialized equipment. R. at 2. On the night of robbery, the Ms. Parker interviewed several individuals who took money and went as far as to blur their faces, shielding them from potential police interrogation. R. at 2-3. Ms. Parker's conduct in protecting other's rights and her statement, "I know my rights," supports the conclusion that the Ms. Parker understood her rights as Officer Degg provided them. For the reasons provided below, we respectfully request that the court uphold long standing precedent that Officer Degg's *Miranda* warning was reasonably conveyed in such a fashion that allowed for a proper waiver of the Ms. Parker's rights.

A. Officer Degg Reasonably Conveyed Each of the Four Safeguards Required by Miranda.

The court must first hold that Officer Degg's Miranda warning reasonably conveyed each of the four safeguards as required by *Miranda v. Arizona.* In *Florida v. Powell*, 559 U.S. 50, 60 (2010), the Supreme Court upheld that they "have not dictated the words in which the [*Miranda* warnings] must be conveyed." The Supreme Court in *Powell* argued that the addition of the phrase "at any time during the interview", in regard to the application of the defendant's Fifth amendment rights, did not create an ambiguity as to when the suspect could invoke their rights because in combination with the other given warnings, a reasonable person would take it to mean the defendant could invoke their rights at any time before, during, and after questioning. *Id* at 62. Similarly, in *California v. Prysock*, 453 U.S. 355, 360 (1981), the Supreme Court held that suspects in custodial interrogations must be provided with, "the now familiar Miranda warnings… *or their equivalent*." *Prysock*, 453 U.S. 355, 360 (quoting *Rhode Island v. Innis*, 446 U.S. 290, 297 (1980)). In *Prysock*, the Supreme Court held that a reading of *Miranda* must not necessary conform to the formulation set out in *Miranda v. Arizona* and that a warning is not deemed deficient where it is said out of order because a plain reading of the warning would reasonably convey the same message. *Prysock*, 453 U.S. 355 at 361.

Here, Officer Degg provided Ms. Parker with the following warning, "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." R. at 3. In determining the adequacy of the safeguards provided, this court must ask whether Ms. Parker's rights under *Miranda* were reasonably conveyed when given a commonsense reading. *Powell*, 559 U.S. 50, 62.

Officer Degg's warnings to Ms. Parker are reasonably conveyed. The right to remain silent is simply put; no other reasonable inference can be drawn about the meaning of that

statement. The phrase, "anything you say will be used against you," left no room for interpretation either.

The defense may argue that the setting in which her statements may be used is ambiguous and, thus, resulting in a deficient warning. However, this argument is not persuasive and is inconsistent with well-settled law.

When looking at how this specific warning was formulated in *Miranda*, the court provided, "anything said can be used against the individual in court." *Miranda*, 384 U.S. 436, 444. A holding that requires a similar recitation will lead to needless litigation because defendants will try to suppress statements when their *Miranda* warning did not lay out every possible circumstance in which their statement may be used. Statements taken, even those taken in violation of *Miranda* or the Sixth Amendment, have been used to impeach defendants, see *Kansas v. Ventris*, 556 U.S. 586 (2009), used in sentencing hearings, see *United States v. Nichols*, 438 F.3d 437 (4th Cir. 2006), and have even been used in finding and using tangible evidence, see *United States v. Patane*, 542 U.S. 630 (2004). Requiring more of Officer Degg's recitation of this specific warning will leave us in the realm of *Doody v. Ryan*, where the court held that *Miranda* warnings were deficient for being too long. *Doody v. Ryan*, 649 F.3d 986, 992 (9th Cir. 2011).

We then turn to the interpretation of the following statements: "you can get an attorney; we'll appoint one for you." Like the two made prior, these statements are reasonable. In *Eagan*, the Supreme Court reversed the court of appeals' decision to exclude incriminating statements allegedly made in violation of *Miranda,* stating the warning that the state would appoint an attorney "if and when" the prisoner went to court was not deficient and that it touched the basis of the safeguards provided in *Miranda*. *Duckworth v. Eagan*, 492 U.S. 195, 204 (1989). Most

recently in *Powell,* the Supreme Court held that a warning advising a suspect of the right to counsel "*before answering*… questions" reasonably conveyed the safeguards provided in *Miranda. Powell*, 559 U.S. 50, 62 (2010) (emphasis added). The court held that while the agent's recitation of the safeguards "were not the *clearest possible* formulation of *Miranda*," given a commonsense reading, any reasonable person would comprehend and be able to conclude that the right to counsel applied at all times. *Id* at 63.

"You can get an attorney," reasonably conveyed that Ms. Parker had the right to counsel at all times during the interrogation with Officer Degg. Unlike cases previously presented to this court, Officer Degg's warning did not attempt to confuse Ms. Parker with language seemingly restricting her right to counsel to any particular time nor contingent on any future event. It cannot be said that the phrase "we'll appoint one for you" given right after "you can get an attorney," conveyed anything else other than Ms. Parker's right to have counsel appointed by the state. In *Powell,* the court held that the warnings, despite minor deviations from the warnings provided in *Miranda*, were in their "totality" reasonably conveyed. *Id* at 62. Officer Degg's warnings were not deficient under *Miranda* and the standard set in *Powell* because the very nature of the warnings, "you have the right to remain silent" and "anything you say can and will be used against you" along with the other two, in their totality, leave no room for a deficient interpretation.

The defense relies on the case of *Doody v. Ryan*, where the officer providing the *Miranda* warning provided the suspect with a "twelve-page exposition" which, coupled with statements made by the officer, diluted the effects of *Miranda*. *Doody v. Ryan*, 649 F.3d 986 (9th Cir. 2011). However, *Doody* is incomparable to our own. The Court of Appeals misconstrued the facts in *Doody* and failed to look at their effect in the totality. For example, the Court of Appeals

compared the Officer's statement in *Doody* regarding *Miranda* merely being a "formality", to the seemingly similar comment made by Officer Degg. However, it was not the comment about the formality on its own that led the Ninth Circuit to rule the way they did. The officer in *Doody* made multiple assurances to the defendant suggesting he was not a major person of interest to any of their current investigations. *Id* at 1002. Furthermore, the officer blatantly misinformed the defendant about his right to counsel, explaining that it only applied if the defendant was in fact involved in a crime. *Id* at 1003.

Most concerning about the Court of Appeal's application of *Doody*, is their failure to emphasize that the defendant in that case was juvenile, entitled to greater scrutiny in determining the adequacy of his *Miranda* warnings. See *Fare v. Michael C.*, 442 U.S. 707 (1979)(explaining that the court must inquire into a juvenile's age, experience, education, background, and intelligence.) See also *Haley v. Ohio*, 332 U.S. 596 (1948). Ms. Parker, because she is not a minor, is not entitled to the same scrutiny provided in *Doody.* Ms. Parker clearly understood her rights as they were read to her because her statement, "I know my rights," did more than just suggest she understood her rights as they were read to her. This statement, followed by her silence, tells this court that she didn't need her rights explained further. This conduct, in the totality of the circumstances, along with commonsense readings of the warnings provided by Officer Degg, can leave no doubt that the four safeguards required by *Miranda* were in fact reasonably communicated to the defendant.

B. The Defendant Knowingly and Voluntarily Waived Her Rights When Engaging in Active Dialogue with Officer Degg.

Ms. Parker's statements made to Officer Degg should be deemed voluntary because they were made following a waiver made voluntarily, knowingly and intelligently. The Supreme Court in *Miranda* held that a "defendant may waive [rights under *Miranda*], provided the waiver

is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. 436, 444 (1966). In *North Carolina v. Butler*, 441 U.S. 369, 373 (1976), the Court upheld precedent that a defendant's rights may be knowingly and voluntarily waived through an implied waiver. The defendant in *Butler* had initially acknowledged understanding his rights and explicitly refused to sign a waiver. *Id* at 371. Despite never signing a formal waiver or expressing a verbal waiver, the court held that the defendant made an implied waiver by voluntarily responding to statements made by police. *Id* at 375.

After Officer Degg read Ms. Parker her *Miranda* rights, she made an implied waiver by simply replying with an incriminating statement followed by an acknowledgement of her rights. This implied waiver is supported by Ms. Parker's consent to be questioned by Agent Mulder after a standard *Miranda* warning after the defendant had used the bathroom. Ms. Parker was given ample time to request counsel after acknowledging two sets of *Miranda* warnings and failed to do so.

In further assessing whether the defendant's waiver of her rights was made voluntarily, knowingly, and intelligently, the Court must determine whether Ms. Parker's will was overborne through means of physical or psychological coercion, manipulation, deceit, or trickery, or whether there was a blatant refusal of a defendant's request to exercise her rights. *Spano v. New York*, 360 U.S. 315 (1959). Respondents have failed to provide any evidence suggesting the Ms. Parker's will was overborne.

In *Spano*, numerous police officers began to question the defendant through the long hours of the night and after multiple requests to have counsel present during questioning were rejected, the defendant confessed to murder. *Id* at 319. The Supreme Court held that given the totality of the circumstances, weighing in evidence of an untimely interrogation, psychological

manipulation through a friend of the defendants, refusal of counsel, and sleep deprivation, it cannot be said that defendant's statements to police were made voluntarily. *Id* at 323. Ms. Parker was never interrogated by multiple officers at once and the only other time where a second officer was present, was when Agent Derringer reminded Officer Degg about reading the defendant her *Miranda* rights. While the Government does not agree with Officer Degg's decision to not allow Ms. Parker to use the restroom, cases with similar circumstances have not found this interrogation tactic to be unduly coercive. In *Reck v. Pate*, 367 U.S. 433, 441 (1961), the Supreme Court held that where the defendant was subject to multiple interrogations ranging between six to seven hours while under physical pain, any confession obtained was coerced and inadmissible because under the circumstances, a voluntary waiver could not be achieved. *Pate*, 367 U.S. at 443 (1961). In *Ashcroft v. Tennessee*, 322 U.S. 143, 153 (1944), the Supreme Court held an admission was involuntary after the defendant was held in interrogation for 36 hours without a break. In *Payne v. State of Ark.*, 356 U.S. 560 (1958), the Supreme Court again held an admission involuntary where the defendant was deprived of food for 24 hours. It cannot, with any truth, be said that the defendant was subject to any of the turmoil which this very Court has deemed inconsistent with due process protections. It is for those reasons that we respectfully request that this court hold Ms. Parker's statements were made knowingly and voluntarily without police coercion.

C. Assuming the Defendant's Statements Were Made Involuntary, the Court Must Nonetheless Deem Them Admissible Under the Harmless Error Exception Because Other Evidence is Overwhelmingly Powerful in Serving to Convict the Defendant.

In *Arizona v. Fulminante*, 499 U.S. 279, 297 (1991), the Supreme Court held that a coerced confession may still be admitted where the fact finder did not rely on the statement for the conviction. *See also* *Mitchell v. Esparza*, 540 U.S. 12, 19 (2003). It is our contention that

evidence outside of Ms. Parker's statements would have been enough to convict her, allowing this court to apply the harmless error exception. At around 11:30 PM the night of June 1st, 2020, $200,000 were stolen from an atm inside a Santa Jueves bank. R. at 2. Security footage shows Ms. Parker entering the bank at around 11:30 PM as employees were being scared off suggests Ms. Parker's participation in stealing the money because the footage shows her at the front of crowd, rather than indecently somewhere in the middle. This would not be the only time Ms. Parker has snuck into restricted areas. She published a video on her ViewTube channel where she uses webbed gloves to execute criminal trespassing. R. at 2. It is our contention that Ms. Parker used the same stealthy tactics used in her videos to hide among the crowd of protestors and gain access to the stolen money.

On Ms. Parker was a receipt for a bank deposit of $500 time stamped June 2nd, at 4:00AM. R. at 18. It is our contention that the 4:00 AM time stamp suggests Ms. Parker stole $500 from the bank during the protests and was in a hurry to get rid of the evidence. The defense's argument that she just happened to pick up the receipt as litter is unreasonable because during an out of control protest, no reasonable person would stop to think to pick up litter while police are attempting to take control.

Social media posts posted by Ms. Parker's fans depict her at the bank at 11:38 PM with the caption "smashing the banks with #PennyParker!!" R. at 2. This post alone confirms statements already made to Agent Mulder. In *United States v. Williams*, 61 Fed. Appx. 847, 849 (4th Cir. 2003), the Fourth Circuit held that a defendant's involuntary statement was subject to harmless error where his co-defendant's testimony cohobated the statement. Ms. Parker's uploaded videos to ViewTube further cohobate her statements as they place her at the scene of the crime with the people who posted pictures of her online. As such, even if the Court finds that

Ms. Parker's statements to either Officer Degg or Agent Mulder were coerced, the statements are still admissible under the harmless error exception.

II. AGENT MULDER'S STANDARD MIRANDA WARNING AND RELATIONSHIP WITH THE DEFENDANT DISSIPATED ANY POTENTIAL TAINT CREATED BY OFFICER DEGG.

If this Court holds Ms. Parker's statements made to Officer Degg inadmissible, it is our contention that her statement made to Agent Mulder was "sufficiently [a product] of free will to purge the primary taint". *Brown v. Illinois*, 442 U.S. 590, 601-3 (1975). As such, the Court must determine that Agent Mulder, in obtaining the defendant's incriminating statement, was not "the beneficiary of the pressure applied by the local in-custody interrogation." *Westover v. United States*, 384 U.S. 436, 497 (1966).

We first draw the Court's attention to the circumstances under which Agent Mulder interrogated the defendant. It is our contention that Agent Mulders statements towards the defendant, dissipated any possible taint by Officer Degg. The defense and the Court of Appeals relied on two cases once before this court in arguing Agent Mulder's interrogation was tainted by Officer Degg. In *Westover v. United States*, the defendant made incriminating statements to a local police officer and was immediately then questioned by an FBI agent. *Id* at 495. In that case, the FBI officer sought to dissipate the taint of the earlier confession by simply uncuffing the defendant and reading him his *Miranda* rights. *Id.*

In our case, Agent Mulder was immediately apologetic towards Ms. Parker and explained that Ms. Parker's previous interrogation with Officer Degg was against procedure. R. at 4. This tells the Court that Agent Mulder was assuring Ms. Parker that an interrogation with Agent Mulder would be substantially different than that by Officer Degg and would follow

standard procedure. In *Westover*, the defendant was only given *Miranda* warnings by the FBI agent and not the initial interrogating officer, further distinguishing our case. *Id.*

In *Leyra v. Denno*, 347 U.S. 556, 559 (1954), a defendant's initial incriminating statement was substantially tainted by the use of a hypnotist. The Court of Appeals wrongfully applied the facts in *Leyra* to our case here today. After being hypnotized, the defendant's admissions were described by the Supreme Court to be "mind dazed and bewildered". *Id* at 560. Time and time again the defendant in *Leyra* complained about his sleep deprivation and how the hypnosis did not allow him to think clearly. *Id.* It was while the defendant was in this state of hypnosis that the state sought yet another incriminating statement. It is needless to say that the Supreme Court held both statements inadmissible, the latter by taint of the first one. Officer Degg's only questionable behavior was not allowing Ms. Parker to use the restroom. It cannot be said, with any amount of conviction, that not being able to relieve yourself amounts to the same psychological effect that hypnosis carries along with sleep deprivation.

Agent Mulder's quarrel with a local officer on behalf and in front of Ms. Parker again substantially dissipated any taint created by Officer Degg because Agent Mulder made Ms. Parker feel like someone was advocating for Ms. Parker. After Ms. Parker was allowed to use the restroom, Agent Mulder again apologized for Officer Degg's behavior and Ms. Parker and Agent Mulder even exchanged a joke together. R. at 4. Before Agent Mulder proceeded to read the defendant her *Miranda* rights again, Agent Mulder left Ms. Parker alone for 20 minutes "to make sure these guys don't screw anything else up." R. at 4. This statement again assures Ms. Parker that Agent Mulder sought to make Ms. Parker as comfortable as possible.

We lastly draw the courts attentions to Agent Mulder's reading of Ms. Parker's *Miranda* rights. The warning went as follows:

> "[y]ou have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to talk to a lawyer and have her present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you?"

R. at 5.

Ms. Parker responded to the warning with a simple nod. R. at 5. In order to avoid any ambiguity, Agent Mulder requested Ms. Parker to either answer with a verbal "yes" or "no" to which Ms. Parker said "yes"; Ms. Parker understood her rights. R. at 5. Agent Mulder then proceeded to ask Ms. Parker whether Ms. Parker was okay with speaking to Agent Mulder, to which again Ms. Parker responded, "yes." R. at 5. Agent Mulder's careful administration of *Miranda* can clearly be said to have removed any possible taint. The Supreme Court in *Oregon v. Elstad* held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving [her] rights and confessing after [she] has been given the requisite *Miranda* warnings." *Oregon v. Elstad*, 470 U.S. 298, 318 (1985).

In the event the Court holds that Officer Degg's *Miranda* warning was deficient, it must still uphold the admissibility of Ms. Parker's statements because Agent Mulder provided a clear, step-by-step walkthrough of Ms. Parker's rights. We ask the court to hold that the relationship between Ms. Parker and Agent Mulder along with Ms. Parker's expressed waiver allowed Ms. Parker to make a knowing and voluntary statement to Agent Mulder.

III. MIRANDA DEFICIENT STATEMENTS PRESENTED IN PRE-TRIAL PROCEEDINGS DO NOT QUALIFY AS USE IN A "CRIMINAL CASE".

A. United State Supreme Court Precedent Mandates That the Fifth Amendment's Self-Incrimination Clause is a Fundamental Right Invoked Only at Trial, Not Pretrial Proceedings

Chavez v. Martinez, 538 U.S. 760 (2003) is the most recent United States Supreme Court Decision to rule on when coerced or compelled statements can be used against a defendant and when it is a violation of the Fifth Amendment's Self-Incrimination Clause.

In *Chavez,* a patrol supervisor interrogated respondent while being treated for gunshot wounds after having been shot by a police officer during an altercation with the police. The gunshot wounds were enough to leave respondent permanently blind and paralyzed from the waist down. A criminal case was never brought against respondent. Still, respondent brought a claim against the patrol supervisor that the interrogation was a violation of his rights under the Self-Incrimination Clause of the Fifth Amendment.

The Self-Incrimination Clause protects criminal defendants from having to be a witness against themselves. *Id.* at 760. "Statements compelled by police interrogation may not be used against a defendant in a criminal case, but it is not until such use that the Self-Incrimination Clause is violated." *Id.* The Court said that in order for there to be a "criminal case" there must be at the very least "the initiation of legal proceedings." *Id.* Further, even if a criminal case has commenced, mere compulsive questioning does not violate the Constitution *Id.* Coercive interrogations are also not enough to violate the Fifth Amendment. *Id.* at 761.

Under this rationale, the first two circumstances must be present to successfully bring a Fifth Amendment Self-Incrimination Clause violation: (1) an improperly obtained statement; and (2) that statement being used against them in a criminal case beginning no earlier than the initiation of legal proceedings.

Chavez did not specifically define "initiation of legal proceedings." However, this is because the *Chavez* Court didn't have to because criminal charges were never brought against Chavez. A closer look reveals that they relied on dicta from United States Supreme Court precedent stating that the initiation of criminal proceedings begins at trial. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990). The *Verdugo-Urquidez* Court, while citing to United States Supreme Court binding precedent *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Kastigar v. United States*, 406 U.S. 441 (1972), clearly stated in plain language that, "The privilege against self-incrimination guaranteed by the Fifth Amendment is a **fundamental trial right** of criminal defendants. Although conduct by law enforcement officials prior to trial may impair that right, a constitutional violation occurs only at trial." *Id.* at 264 (emphasis added).

Chavez did not criticize or discredit the dicta in *Verdugo-Urquidez—Chavez* cited to *Verdugo-Urquidez* and relied upon the notion that the initiation of legal proceedings has the same meaning as the start of a trial. Chavez also did not overturn, criticize, or discredit *Malloy* nor *Kastigar*'s holdings that the correct invocation of the Self-Incrimination Clause of the Fifth Amendment is at trial, not pre-trial proceedings.

Dicta, ordinarily, is authoritative but not binding. However, Supreme Court dicta is just as influential as a Supreme Court holding. Moreover, *Verdugo-Urquidez*'s discussion of the Self-Incrimination Clause in dicta is grounded in century old United States Supreme Court Precedent.

In *Bram v. United States*, 168 U.S. 532, 537 (1897), two of the errors the Supreme Court of the United States considered were questions raised preliminary to trial and questions raised during trial. There, a detective had interrogated the defendant with no witnesses and later testified that all statements made by the defendant were purely voluntary. It was the word of the

detective versus the word of the defendant—triggering the defendant's fundamental right of the Fifth Amendment's Self-Incrimination Clause. As to questions raised during trial, the Court said, "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution of the United States commanding that no person 'shall be compelled to in any criminal case to be a witness against himself.'" *Id.* at 542. In other words, involuntary statements cannot be used against the defendant during the trial. As to the questions raised preliminary to the trial, the Court considered errors, but none included defendant's involuntary statements since that was only an issue during the trial phase.

While *Miranda* was not decided until much later, the United States Supreme Court has made itself clear that *Miranda* is not a fundamental constitutional right. *Miranda* is a prophylactic safeguard. Within the scope of this discussion, the only fundamental right in existence is the Self-Incrimination Clause of the Fifth Amendment right that can only be invoked at trial.

Here, Ms. Parker's statements were not coerced as previously discussed. In addition, according to the rationale of stare decisis, the Fifth Amendment Self-Incrimination Clause cannot be invoked during probable cause hearings and preliminary hearings, only at trial. Therefore, Ms. Parker cannot successfully bring a Fifth Amendment Self-Incrimination Clause violation claim.

Still, there remains a circuit split among the Appellate Circuits as to when a criminal case begins. Some circuits read *Chavez* to include pretrial proceedings as part of a criminal case. However, an overwhelming majority of the circuit courts disagree and read *Chavez* to begin no earlier than the start of trial.

B. The Circuit Split Has No Authority Over Settled United States Precedent that the Fifth Amendment Right Against Self-Incrimination is a Trial Right.

1. The Second, Ninth, Tenth and Fourteenth Circuits Contend a Criminal Case Includes Pretrial Hearings

The Circuit Courts in the minority view that the Fifth Amendment right applies to pre-trial proceedings, rely on the *Mitchell v. U.S.*, 526 U.S. 314 (1999) decision that held that sentencing proceedings fall within the scope of a "criminal case."

In *Mitchell v. U.S.*, 526 U.S. 314 (1999), one of the issues before the Supreme Court of the United States was whether a guilty plea waives the Fifth Amendment Self-Incrimination privilege in the sentencing phase of the case. The Court said that it is common sense for sentencing proceedings to be a part of a "criminal case" because sentencing proceedings determine the consequences of a guilty verdict after the trial has already commenced or a guilty plea. *Id.* at 327, (citing to Rule 32(d)(1) of the Federal Rules of Criminal Procedure).

If the Supreme Court had meant to broaden the earliest point the Fifth Amendment trial right can be invoked, they would have. Instead, the Court did not negatively impact the authority of the Verdugo-Urquidez dicta and only felt it was common sense to extend the trial right to sentencing hearings—a post-trial hearing.

Out of the four circuits, only two circuits discuss the Fifth Amendment Self-Incrimination Clause in the context of probable cause hearings.

a. Probable Cause Hearings

In *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006), the Seventh Circuit acknowledged that *Chavez* does not recognize probable cause hearings as falling within the scope of a "criminal case." They equate *Miranda* deficient statements being admitted at trial to establish a verdict with those same statements being brought against a defendant to establish

whether there is probable cause for the trial in the first place. The Court reasoned that, because a defendant would be a witness against himself at trial, he would also be a witness against himself in a probable cause hearing.

However, a trial and a probable cause hearing are very different and have very different consequences. Also, inadmissible evidence is often heard at probable cause hearings whereas it will never be presented to a jury during trial just as inadmissible evidence can also be considered during sentencing hearings. Moreover, there are different standards of proof at a probable cause hearing than a trial. Probable cause is found when it was more likely that not while a criminal trial is held at a much higher standard—beyond a reasonable doubt.

The Tenth Circuit, in *Vogt v. City of Hays, Kansas*, 844 F.3d 1235 (10th Cir. 2017) disagreed with the District Court's decision that the Fifth Amendment's Self-Incrimination Clause cannot be invoked because no incriminating statements were used at trial because the Tenth Circuit believes the phrase "criminal case" used in *Chavez* includes probable cause hearings. *Id.* at 1239.

The Tenth Circuit acknowledged the *Verdugo-Urquidez* dicta relied upon in *Chavez* but did not consider the precedent that *Verdugo-Urquidez* cited to that gave credibility to what the Supreme Court said in dicta. Further, the Tenth Circuit completely disregarded their own precedent holding United States Supreme Court Dicta is treating with the same authority as a holding. The Tenth Circuit said, "This dicta would ordinarily guide us, for Supreme Court dicta is almost as influential as a Supreme Court holding." *Id.* at 1241. (citing *Indep. Inst. v. Williams*, 812 F.3d 787, 798 (10th Cir. 2016).

The Tenth Circuit argued that the Supreme Court "retreated" from its dicta in *Verdugo-Urquidez* in *Mitchell v. United States*, 526 U.S. 314 (1999) when the Court held that the right

against self-incrimination extends to sentencing hearings. This is a gross mischaracterization of the *Mitchell* decision. There is nothing in the *Mitchell* decision to suggest a retreat from the *Verdugo-Urquidez* dicta.

2. The Majority of the Circuit Courts (First, Third, Fourth, Fifth, Sixth, Eighth, Eleventh Circuits) Contend a Criminal Case Excludes Pretrial Hearings

An overwhelming majority of the Circuit Courts follow the *Verdugo-Urquidez* Supreme Court dicta that a Fifth Amendment right against self-incrimination is a trial right. All seven circuits read the *Chavez* decision to mark the earliest criminal proceeding a Fifth Amendment right against self-incrimination can be invoked is at the beginning of a criminal trial. All seven circuits expressed the view that the Self-Incrimination Clause may not be violated by the use of a compelled statement at a pretrial proceeding.

a. Coerced Statements Made in a Probable Cause Hearing to Obtain an Indictment Does NOT Violate the Constitution.

In *Renda v. King*, 347 F.3d 550 (3d Cir. 2003), the Third Circuit applied the *Chavez* decision to the case before them. The only factual difference is that the *Chavez* defendant was never charged with a crime while the *Renda* defendant was charged but had those charges dropped after they were suppressed as statements obtained in violation of *Miranda. Id.* at 558-59. The Court said while the compelled statement was used "in a criminal case in one sense (i.e., to develop probable cause sufficient to charge her) . . . **it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution**." *Id.* (emphasis added).

Even in the unlikely case the Court makes a finding that all of Ms. Parker's statements were compelled, they have not been used against her in a criminal trial. Therefore, none of Ms. Parker's constitutional rights have been violated.

CONCLUSION

Ms. Parker's statements were not *Miranda* deficient, and the substance of those statements would still be admissible under the harmless error doctrine. Since the statements were not compelled and a trial has not commenced, Ms. Parker's Fifth Amendment right against self-incrimination was not violated. Therefore, we respectfully ask the Fourteenth Circuit Court's decision be reversed.