No. 2021-125

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

BRIEF FOR PETITIONER

TEAM 1
Attorneys for Petitioner

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QUESTIONS PRESENTED

I. Whether compelling a severely prejudiced defendant to stand trial after the government recklessly delayed their indictment for nearly a decade, without any legitimate investigative purpose, violates the Fifth Amendment of the United States Constitution.

II. Whether allowing a jury to weigh the ambiguity of a defendant's custodial silence as evidence of substantive guilt, when he was neither read his *Miranda* rights nor subjected to police interrogation, strips him of his right to a fair trial under the Fifth Amendment.

STATEMENT OF THE CASE

I. Opinions Below

The opinions of the United States District Court for the District of East Virginia appear in the record at pages 1-10. The opinion of the United States Court of Appeals for the Thirteenth Circuit appears in the record at pages 11-15.

II. Constitutional and Statutory Provisions Involved

This case involves the Fifth Amendment to the United States Constitution. *See* Appendix A. This case also involves 18 U.S.C. § 3295 and 18 U.S.C. § 844(i). *See* Appendix B.

III. Summary of Facts

Petitioner Austin Coda ("Mr. Coda") was a prominent business owner of a hardware store in Plainview, East Virginia. R. at 1. Following the 2008 recession, Mr. Coda experienced extreme financial hardship, and by 2010, he struggled to maintain enough revenue to operate his business. R. at 1. On December 22, 2010, an explosion tragically destroyed Mr. Coda's store. R. at 2. Both local fire investigators and the Federal Bureau of Alcohol, Tobacco, and Firearms determined that the explosion was caused by a faulty gas line leak. R. at 2.

Following the investigations, the Federal Bureau of Investigations ("FBI") received a tip from a neighbor, Sam Johnson, who claimed that Mr. Coda was experiencing financial hardship, maintained an active insurance policy on his business, and had appeared "anxious and paranoid." R. at 2. Based on that tip alone and despite the lack of findings following two independent investigations, the FBI assumed Mr. Coda was responsible for the explosion and informed the United States Attorney's Office ("USAO"). R. at 2. The USAO designated Mr. Coda's case as "low-priority," in part due to high office turnover and because it was "inconvenient" to transport him between facilities pending his prosecution for unrelated state charges. R. at 2. However, even after the state proceedings concluded, the USAO continued to disregard Mr. Coda's case

and instead centered its attention on other offenses. R. at 2. The investigation never progressed, and the case never increased in priority. R. at 2. For nearly a decade, Mr. Coda's case was simply unloaded by one government attorney onto another. R. at 2. Then, upon realizing the ten-year statute of limitations for arson provided under 18 U.S.C. § 3295 was on the cusp of expiration, the FBI arrested Mr. Coda on April 23, 2019. R. at 2-3, 7. The government even failed to indict Mr. Coda under 18 U.S.C. § 844(i) until a month after the arrest in May of 2019. R. at 3.

Immediately following his arrest, the FBI informed Mr. Coda of the charges against him yet elected to wait and read him his *Miranda* rights until they were ready to interrogate him. R. at 7. The FBI did not question him until after they reached the detention center. R. at 7. Having been arrested nearly ten years after the incident, Mr. Coda remained silent upon arrest and did not assert an alibi. R. at 2. The government used Mr. Coda's silence in response to the charges as evidence of substantive guilt. R. at 7. At the evidentiary hearing, Mr. Coda testified that he was in New York on the night of the explosion visiting family for his birthday. R. at 3. Due to delay in bringing the indictment, Mr. Coda was unable to produce critical testimony to corroborate his defense. R. at 3. Four family members Mr. Coda visited on the night of the explosion had died, while the last had been diagnosed with dementia. R. at 5. In addition, the bus records supporting his alibi could no longer be obtained as they were stored for only three years. R. at 3.

IV. Nature of Proceedings

The District Court of East Virginia denied Mr. Coda's Motion to Dismiss his indictment because he could not prove that the government intentionally caused his preindictment delay. R. at 6. Further, the District Court found no violation of the Fifth Amendment and denied Mr. Coda's Motion to Suppress his post-arrest but pre-*Miranda* and pre-interrogation silence as evidence of substantive guilt. R. at 7. The Thirteenth Circuit affirmed. R. at 12.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Thirteenth Circuit incorrectly held that the government's actions did not violate Mr. Coda's constitutional rights under the Fifth Amendment. The judgment of the Court of Appeals should be overturned.

I.

The District Court erred in applying the two-prong test to Mr. Coda's case. Compelling him to stand trial after the government delayed his indictment for nearly ten years violates his fundamental right to prompt and fair justice enshrined in our Constitution. This Court should adopt the balancing approach rather than the two-prong test because the bad-faith requirement places too high of a burden on a defendant since few government actors would admit that they intentionally delayed their investigation to gain a tactical advantage. On the other hand, the balancing approach allows for truly prejudiced defendants to avoid prosecution when they have lost all exculpatory evidence due to delayed government indictments.

However, should this Court adopt the two-prong test, public policy dictates that the bad-faith requirement be expanded to include government negligence, recklessness, and indifference in situations of lengthy, unwarranted delay. At the very least, in the interest of fairness, it should be the government who provides justification for their delay, not the prejudiced defendant.

II.

Fairness demands that post-arrest, but pre-*Miranda* and pre-interrogation silence not be used as substantive evidence of guilt at trial. Allowing prosecutors to use such evidence against defendants nullifies the protections afforded under the Fifth Amendment.

First, a defendant is not required to formally invoke his right to remain silent once he has been arrested because the custodial setting implies sufficient government coercion to make his silence inadmissible. Second, the probative value derived from post-arrest silence is substantially

outweighed by the prejudice caused to defendants who simply avail themselves of their constitutionally protected right. Such evidence is too ambiguous to serve as any indication of guilt. Further, allowing such an inference permits the prosecution to effectively speak on behalf of the defendant, thus impeding the truth-seeking objective of trials and further misleading juries into putting too much stock into mere silence. As a result, custodial silence should only be allowed as evidence for impeachment if the defendant testifies at trial. Lastly, allowing silence as evidence of substantive guilt will have other unintended consequences, such as altering custodial procedures by enticing law enforcement to delay the delivery of *Miranda* warnings, and luring defendants into incriminating themselves in fear that even their silence will be used against them.

As such, this Court should reverse the Thirteenth Circuit's holding in all respects.

ARGUMENT

I. A Preindictment Delay of Nearly Ten Years Violates the Fifth Amendment When the Government's Egregious Misconduct Causes a Defendant to Lose All Exculpatory Evidence and Leaves Him Without Any Redress.

A nearly ten-year preindictment delay destroys the notions of fair play and justice on which this country was founded. The Fifth Amendment of the United States Constitution states that "[n]o person shall be held to answer for a capital . . . crime . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend V. The Amendment confers an individual the right to fair, orderly, and just judicial proceedings, while statutes of limitations protect defendants from "overly stale criminal charges." *United States v. Marion*, 404 U.S. 307, 322 (1971). In safeguarding the liberty of citizens, due process requires "that state action . . . be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

Although statutes of limitations set a maximum time limit for filing charges, they do not safeguard against all injustice, and there are many circumstances in which preindictment delays strip defendants of their constitutional protections. This Court expressly recognized that the administration of justice under the Fifth Amendment requires a careful judgment based on the circumstances of each case. *See Marion*, U.S. 404. at 324. Accordingly, an indictment must be dismissed when the prejudice of the accused outweighs the government's reasons for the delay. *Id.* at 325-26. While legitimate investigative delays do not run afoul of the Constitution, tactical delays taken by the government to gain a prosecutorial advantage are clear due process violations. *See United States v. Lovasco*, 431 U.S. 783, 792 (1977).

In the absence of clear guidance from this Court, a split has developed "among the states on the issue of preindictment delay, with over half of the states adopting the strict two-prong test and the other half either rejecting the strict two-prong test or lacking a clear position on the issue." *See* Danielle M. Rang, *The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials*, 66 S.D. L. Rev. 143, 154-55 (2021). At the federal level, some courts apply the two-prong test and hold that due process is violated when (1) the prosecution's delay caused actual prejudice to the defendant, and (2) the government intentionally delayed indictment to gain a tactical advantage. *See United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996); *United States v. Solomon*, 686 F.2d 863 (11th Cir. 1982); *United States v. Ismaili*, 828 F.2d 153 (3d Cir. 1987); *United States v. Crooks*, 766 F.2d 7 (1st Cir. 1985). Other circuits apply the balancing test, weighing the reasonableness of the delay against the prejudice suffered by defendants, but do not require them to prove a deliberate attempt by the prosecution to gain an advantage. *See United States v. Mays*, 549 F.2d 670 (9th Cir. 1977); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990); *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976).

The District Court erred when it applied the two-prong test to Mr. Coda's claim because the extreme prejudice he suffered, coupled with the extent and reasons for the government's delay, demand the application of the balancing test. Overlooking the circumstances of Mr. Coda's case, the court failed to recognize that public policy is best served under the balancing approach as it is the sole test that conforms with the community's sense of fair play inherent in the Fifth Amendment. However, should this Court apply the two-prong test, a lower standard of culpability should be allowed to prove bad faith, or, at the very least, the burden should rest with the government to justify its reasons for the delay.

A. Fundamental Conceptions Of Public Policy And Fairness Enshrined In The Fifth Amendment Demand That This Court Apply The Balancing Test.

Compelling Mr. Coda to stand trial, after stripping him of his *only* viable defense, violates the "fundamental principles of liberty and justice" that guide our judicial, civil, and political institutions. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). Due process cannot be confined to specific standards or rigid rules, nor can it be served by methods that offend "a sense of justice." *Rochin v. California*, 342 U.S. 165, 173 (1952). The balancing test guarantees that prosecutors do not infringe on a defendant's right to a fair trial, while the two-prong test invalidates any standard of justice and fairness that this Court has zealously protected. Under the two-prong test, the bad faith element places an "impossible threshold over the defendant" since "[n]o defendant can get into the mind of a prosecutor to determine why a case was delayed, and certainly no prosecutor will ever admit to such bad faith purposes." *United States v. Sabath*, 990 F. Supp. 1007, 1018 (N.D. Ill. 1998). On the other hand, the balancing approach guarantees that defendants who truly prejudiced at the hand of the government do not stand trial without any means to defend themselves. *See United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985).

1. The two-prong test disregards the intended protections of statutes of limitations expressly recognized by this Court in *Marion*.

Time is not a neutral feature when it comes to the preservation of evidence. This Court has recognized the potential for prejudice resulting from the passage of time between incident and arrest and has referenced the statute of limitations as the key mechanism for preventing injustice. *Marion*, U.S. 404 at 323. Statutes of limitations should "encourage law enforcement to investigate suspected criminal activity promptly." *Id.* at 324. However, these statutes do not protect against "stale charges" when exculpatory evidence is destroyed by the passage of time, nor do they serve as the sole mechanism to protect against prosecutorial prejudice. *Id.* at 324-25. The fair administration of justice demands that courts assess the individual circumstances of each case. *Id.* at 325-26. The two-prong test offers no ability to weigh such circumstances or nuances. In the words of the First Circuit, "a defendant must do more than allege that witnesses' memories had faded or that evidence had been lost that might have been helpful to him." *United States v. Muñoz-Franco*, 487 F.3d 25, 58 (1st Cir. 2007). A defendant's ability to prove actual prejudice is limited to the effects of the government delay on his defense. *See United States v. Jackson*, 446 F.3d 847 (8th Cir. 2006).

The balancing test is the *sole* approach that adopts the crucial case-by-case analysis required in situations like Mr. Coda's, where the statute of limitations is long, and the risk of exculpatory evidence vanishing over time is inherent. Even under this more reasonable standard, substantial prejudice is an extremely high burden to meet, and for good reason. The appellees in *Marion* failed to prove actual prejudice resulting from their preindictment delay and their due process claims were therefore speculative and premature. 404 U.S. at 325-26. In fact, in the first twenty-three years following *Marion*, no defendant had ever proved substantial prejudice in the entire Seventh Circuit. *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994). Here, Mr. Coda

has met this incredibly high burden. The District Court found that the preindictment delay caused actual and substantial prejudice to Mr. Coda's defense, R. at 6, because the bus tickets proving his trip to New York were no longer available, and all family members that could attest to his whereabouts could no longer testify. R. at 2. Unlike in *Muñoz-Franco*, where the defendant was not prejudiced by the loss of nineteen witnesses because of other corroborating evidence, 487 F.3d at 58, the unavailability of witnesses and lack of other exculpatory evidence completely destroyed Mr. Coda's defense. R. at 3. However, under the current bad faith requirement, Mr. Coda is still not entitled to dismissal despite having proved substantial prejudice. In the interest of justice, this case demands that this Court apply that "delicate judgment" stressed in *Marion*, 404 U.S. at 325, which can only be served under the balancing test.

2. Proving that the government deliberately delayed an indictment is a nearly insurmountable burden and seeking such proof from a lay defendant is a violation of due process.

The two-prong test is overly burdensome because it is virtually impossible for an already prejudiced defendant to read the minds of prosecutors and prove their true intent. Though a defendant may meet the high burden of showing actual prejudice, the second prong requires that he also demonstrate that the government's purpose for the delay was to gain a tactical advantage. *See Solomon*, 686 F.2d at 873; *Crouch*, 84 F.3d at 1508.

Requiring proof of intent to gain an advantage means that, no matter how egregious the prejudice to a defendant nor the length of the preindictment delay, no due process violation occurs unless the defendant shows an improper prosecutorial motive. Here, although the prosecutor's office alleged that a heavy criminal docket caused Mr. Coda's case to shift from one attorney to another, R. at 2, there was no actual investigative delay. Unlike the government's justified delay in *Lovasco*, the government in Mr. Coda's case failed to produce a shred of additional evidence to support its decade-long delay in indicting him. R. at 2. In fact, the

government's own concession reveals that Mr. Coda's case was paused for nearly ten years while the government played politics and shifted its focus on other crimes. R. at 2. As Chief Judge Martz emphasized in his dissenting opinion, defendants have limited access to the inner workings of federal prosecutors' records and cannot therefore prove their true intentions. R. at 13. Further, all the government is required to do is to assert a different justification for the delay, which forces defendants to chase the impossible. R. at 13. Thus, for Mr. Coda to succeed under the improper motive prong, he would be forced to unearth evidence of prosecutorial misconduct which he has no way of accessing, unless the government voluntarily comes forward and states clearly that it engaged in bad faith, which is implausible. As a result, no matter the length of delay nor the prejudice to the accused, all that is needed for a defendant to be deprived of his right to a fair trial is the court taking the prosecutor on his word.

3. The specific intent requirement ignores countless defendants who are substantially prejudiced by governmental recklessness, negligence, or indifference.

The bad faith requirement unfairly shields government incompetence and misconduct while prosecuting severely prejudiced defendants merely because they cannot prove the government's specific intent to gain a tactical advantage. Undoubtedly, a deliberate government delay has been recognized as a *per se* violation of the Fifth Amendment. *See Marion*, 404 U.S. at 324. However, requiring specific intent falls short of affording defendants the necessary means to prove governmental misconduct. In line with Justice Brennan's concerns, "a negligent failure by the government to ensure speedy trial is virtually as damaging . . . as an intentional failure; when negligence is the cause, the only . . . concern to [is to] prevent [the] deliberate misuse of the criminal process by public officials." *Dickey v. Florida*, 388. U.S. 30, 51-52 (1979).

Egregious, negligent failures must be afforded the same considerations in the context of preindictment delays but are excluded under the current two-prong test. The Ninth Circuit has

recognized "that delays caused by negligent conduct on the part of the government would be considered under the balancing test because the ultimate responsibility for such circumstances must rest with the government." *Moran*, 759 F.2d at 781. In *Moran*, the court found that prejudice suffered from mere governmental negligence must be greater than that caused by intentional bad faith or recklessness. *Id.* The Eighth Circuit applies a similar standard, emphasizing that "[a] more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered." *Barket*, 530 F.2d at 193.

The failure to show bad faith should not encourage the government to gamble with the faith of defendants' cases designated as low priorities. *See Jackson*, 446 F.3d at 847. The two-prong test allows for such a gamble when it leaves government indifference and negligence unchecked. In this case, "the combination of events reek with the type of prejudice that can only result in an unfair trial." *Sabath*, 990 F. Supp. at 1015. Unlike in *Marion* and *Lovasco*, Mr. Coda has made a clear showing of substantial prejudice while the government has failed to demonstrate any legitimate reasons for its delay. In *Howell*, following a lengthy governmental delay, the defendant was unable locate a crucial alibi witness and as a result was able to prove substantial prejudice. 904 F.2d at 895. During trial, the government conceded that the delay was the result of mere convenience and the court therefore determined that the government acted negligently and dismissed the case. *Id.* Like the prosecution in *Howell*, the government here did not offer a meaningful explanation as to why there was a nine-and-a-half-year delay. The incident giving rise to Mr. Coda's indictment occurred on December 22, 2010, and shortly thereafter, the government received the necessary tip from Sam Johnson to bring forth charges against him. R. at 2. Between the incident and the indictment, the government failed to continue its investigation into the fire at Mr. Coda's store. R. at 2. This unexcused delay is similar to the

mere "inconvenience" proffered by the government in *Howell*. 904 F.2d at 890. In this case, the USAO designated Mr. Coda's file as "low priority" and simply found it too "inconvenient" to transport him between state and federal facilities. R. at 2. Conflicting political priorities and high office turnover simply cannot excuse a decade-long delay. R. a 2.

On the other hand, the two-prong test deprives defendants of their due process rights when governmental negligence or recklessness is the sole reason for indictment delays. In *Sebetich*, the appeals of two defendants' motions to dismiss were denied for lack of bad faith under the stricter test when all their alibi witnesses had passed away following the alleged crime. *See United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985). Though the FBI had closed its case years earlier, there was a miscommunication between which state and federal department would take the case, and the indictment was filed five days before the expiration of the statute of limitations. *Id.* The court could not find a violation of due process even when the government's justification for the delay was simply that it "just sort of fell between the chairs." *Id.* at 429. The similarities between the government's case mismanagement and resulting tactical advantage in *Sebetich* and Mr. Coda's case are clear: the government opted against prosecution for nearly a decade, failed to increase the case priority, and transferred the file between various prosecutors, only to franticly revive it just before the statute of limitations expired. R. at 2.

As long as the requirement of bad faith stands, defendants will have no power to prove due process violations. By demonstrating indifference or negligence in prosecuting egregious crimes, the government not only fails prejudiced defendants but also the greater public interest. *See Jackson*, 446 F.3d at 852. The prosecutorial behavior in Mr. Coda's case was, at the very least, reckless, and public policy demands that this Court apply the balancing test which considers the government's recklessness, negligence, and indifference.

4. The balancing test is a safeguard against due process violations, not an expansion of judicial powers.

The balancing approach ensures that judges protect the rights of defendants guaranteed under the Due Process Clause and hold government officials responsible for egregious inefficiencies and delays. Judicial review ensures that the rights of the people shall be supreme over the will of the government. *See* The Federalist No. 78, at 404 (Alexander Hamilton) (Gideon ed., 2001). "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

While this Court expressed its concerns that law enforcement's limited resources would be exhausted by requiring officers to indict immediately upon probable cause, *Lovasco*, 431 U.S. at 792, such concerns are unjustified when human liberty is at risk. The worry that courts will be involved in grading or evaluating the merits of resource allocation and management decisions, and thus crossing the province of the executive and legislative branches, *Crouch*, 84 F.3d at 1515, is similarly unwarranted because ensuring that the prejudice is balanced against unnecessary delays on a case-by-case basis is the sole province of the judiciary.

The concerns for judicial overreach when adopting the balancing test is illusory. Prioritizing government resources over human liberty ignores the devastating impact that both government deficiencies and inefficiencies can have on people who have fewer resources and much more to lose if their cases are delayed. The fear associated with prolonged governmental delay is showcased by Mr. Coda's case who effectively lost his only defense, merely because the government used its resources to handle political pressures and prosecute other offenses. R. at 2. The balancing approach affords judges the necessary authority to ensure due process in similar instances where a governmental delay leaves a defendant rudderless in a storm.

B. Should This Court Adopt The Two-Prong Test, It Must Allow for Lower Standards of Culpability, Or The Burden Should Rest Squarely On The Government's Shoulders, Not Those Of The Prejudiced Defendant.

A determination as to whether an individual's due process rights are violated should not be confined to the boundaries of an arbitrary test. This Court has acknowledged that "a due process violation might also be made . . . [by] reckless disregard of circumstances known to the prosecution suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Lovasco*, 431 U.S. at 795 n.17. Accordingly, this Court has recognized that recklessness is a factor to consider in assessing the government's culpability in causing the delay. Consistent with this Court's jurisprudence, the bad-faith requirement must be modernized to include governmental negligence, recklessness, or indifference in situations of lengthy, unwarranted indictment delay. At the very least, in the interest of fairness to prejudiced defendants who have already met the high burden required under the first prong, it should be the government who provides justification for its unreasonable delay, not the defendant.

1. Bad faith cannot be the sole requirement to counter injustice and should include other forms of government misconduct.

This Court has long recognized the damaging effects associated with a negligent failure by the government to ensure a defendant is provided with a fair and just trial. *See Dickey*, 388. U.S. at 51-52. While an intentional or purposeful delay is unjustifiable, "[t]he same may be true for any governmental delay that is unnecessary, whether intentional or negligent in origin." *Marion*, U.S. 307 at 334 (Justice Brennan concurring).

Should this Court choose the two-prong test, it should expand the standard of culpability when the length of delay violates public policy, and find that government recklessness, negligence, and indifference are sufficient to satisfy the bad faith requirement. The balancing test inherently weighs other forms of government culpability against a defendant's prejudice. *See*

Moran, 759 F.2d at 781; *Barket*, 530 F.2d at 195; *Howell*, 904 F.2d at 890. In contrast, the traditional two-prong test excludes other forms of government culpability that can be equally prejudicial to a defendant. *See Sebetich*, 776 F.2d at 430.

This Court left "to the lower courts . . . the task of applying the settled principles of due process . . . to the particular circumstances of individual cases." *Lovasco*, 431 U.S. at 797. However, the circuit courts that apply the stricter interpretation simply got the law wrong and misinterpreted *Lovasco*. This Court has not had the opportunity to truly consider governmental bad faith. The analyses in *Lovasco* and *Marion* stop short of assessing the second prong because neither of the two cases warranted a bad-faith analysis: in one, the defendants did not prove substantial prejudice, *Marion*, at 325-26, while, in the other, the government demonstrated a legitimate investigative delay. *See Lovasco*, 431 U.S. at 796. The Ninth Circuit offered the correct interpretation when it stated that "[t]he language from these two cases merely acknowledges governmental concessions that intentional or reckless conduct would or might be considered Due Process violations if actual prejudice had been shown." *Moran,* 759 F.2d at 781.

This case is one of first impression. Never has this Court encountered such egregious circumstances, and a proper application of the two-prong test must consider governmental recklessness as an unequivocal violation of Mr. Coda's due process rights. The proper reading of *Lavasco* and *Marion* demands the conclusion that a showing of substantial prejudice, such as that suffered by Mr. Coda, coupled with the governmental recklessness and lack of legitimate investigatory delay violates the Fifth Amendment. Justice Douglas could not have been more clear in stressing the deficiencies of unwarranted indictment delays: "[w]hen there is no formal accusation, . . . the State may proceed methodically to build its case while the prospective defendant proceeds to lose his." *Marion*, 404 U.S. at 331 (Douglas, J., concurring).

2. The government should be required to prove a lack of bad faith for its indictment delay, rather than requiring defendants to show it.

The central issue with the bad faith requirement is that it imposes too high a burden on a defendant who otherwise would virtually never be able to prove bad faith, absent the government disclosing the true reason for its delay. In essence, a defendant such as Mr. Coda will never have a fair trial, and thousands of other similarly situated Americans will be at the discretion and mercy of the government's justification alone.

An ordinary defendant has no way to gather evidence of prosecutorial misconduct because the government simply will not provide proof showing that it intentionally delayed the case. The *Lovasco* dissent validly criticized the majority's reliance on the prosecutor's testimony that there was no bad faith. 431 U.S. at 799 (Stevens, J., dissenting). Justice Stevens refused to assume that "the Constitution imposes no constraints on the prosecutor's power to postpone the filing of formal charges to suit his own convenience." *Id.* Where prosecutors provide little justification for their delay, defendants such as Mr. Coda are left to suffer.

A more equitable standard requires that, once a defendant shows actual prejudice, the government should come forward and show a legitimate reason for their delay. *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 679 (1990). The burden shifting approach "is commanded not only by precedent, but by logic . . . How else is the defendant to know why the government waited so long to indict him?" *Sowa*, 34 F.3d at 451. Against the dissent's warning, R. at 13, the Thirteenth Circuit resisted this logic and ruled that Mr. Coda must pursue the impossible mission of proving intentional government misconduct without access to government records. R. at 12. Due process demands that the burden of proving a lack of bad faith be squarely shouldered on the government, rather than the disempowered defendant.

II. The Admission of Post-Arrest but Pre-*Miranda* Silence as Substantive Evidence of Guilt Allows for Incrimination Through Silence in Direct Contradiction with The Core Purpose of The Fifth Amendment.

Requiring a defendant to first speak in order to invoke the privilege of silence goes against common sense and strikes at the core of what the Fifth Amendment is designed to prohibit. The Fifth Amendment's states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend V. The right to remain silent lies at the foundation of the privilege against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This Court has expressly recognized that the right against self-incrimination is a fundamental principle of a free government. *See Malloy v. Hogan*, 378 U.S. 1, 9 (1964). A prosecutor may not comment on a defendant's independent refusal to testify at trial. *See Griffin v. California*, 380 U.S. 609, 615 (1965). Similarly, a prosecutor is prohibited from commenting on a defendant's silence when he asserts the privilege during his criminal trial. *See Jenkins v. Anderson*, 447 U.S. 231, 235 (1980). This Court has already said what lower courts have depended on for generations: that a defendant in custody can stand mute, regardless of whether he "claimed his privilege." *Miranda*, 384 U.S. at 468, n.37.

Although the Supreme Court has yet to rule on the issue of whether post-arrest, pre-*Miranda* and pre-interrogation silence can be used as evidence of substantive guilt, circuit and state courts disagree on whether the Fifth Amendment bars the government from using such evidence. On the one hand, the Fourth, Eighth, and Eleventh Circuits have held that pre-*Miranda* silence is admissible. *See United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). On the other hand, the Ninth, Tenth, and D.C. Circuit Courts have held that it is not. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001); *United*

States v. Burson, 952 F.2d 1196 (10th Cir. 1991); *United States v. Moore*, 104 F.3d 377, 385-86 (D.C. Cir. 1997). At the state level, an overwhelming majority of courts have held that prosecutors cannot use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt.[1] Only a few state courts have held to the contrary.[2]

Allowing prosecutors to use post-arrest silence against defendants nullifies the protections afforded by the Fifth Amendment and contradicts this Court's long-standing precedent. First, custody implies coercion such that express invocation of a defendant's right to remain silent is not required. Second, any probative value of post-arrest silence is substantially outweighed by the prejudice it causes to defendants who simply avail themselves of their constitutionally protected right. Lastly, allowing the use of custodial silence as proof of substantive guilt will have the unintended consequence of altering custodial procedures by enticing law enforcement agents to delay the delivery of *Miranda* warnings, and luring defendants into incriminating themselves in fear that their silence will be used against them. As such, this Court should hold that Mr. Coda's post-arrest, pre-*Miranda* and pre-interrogation silence cannot be used as substantive evidence of guilt.

A. This Court's Long-Standing Precedent And The Unique Features Of The Post-Arrest Setting Do Not Support An Express Invocation Requirement.

The Constitution guarantees a right against self-incrimination and does not condition it on the government having informed the arrestee that he has such a right, nor does it require an express invocation while in custody. In a pre-custodial setting, a defendant must invoke his right

[1] *E.g., State v. Moore*, 965 P.2d 174 (Idaho 1998); *People v. Welsh*, 58 P.3d 1065 (Colo. App. 2002); *State v. Cassavaugh*, 12 A.3d 1277 (N.H. 2010); *State v. Rowland*, 452 N.W.2d 758 (Neb. 1990); *Commonwealth v. Thompson*, 725 N.E.2d 556 (Mass. 2000); *State v. Boston*, 663 S.E.2d 886 (N.C. Ct. App. 2008); *State v. Lovejoy*, 89 A.3d 1066 (Me. 2014); *State v. Leach*, 807 N.E.2d 335 (Ohio 2004).
[2] *E.g., State v. Lopez*, 279 P.3d 640 (Ariz. Ct. App. 2012); *State v. Borg*, 806 N.W.2d 535 (Minn. 2011); *State v. Masslon*, 746 S.W.2d 618 (Mo. Ct. App. 1988); *State v. LaCourse*, 716 A.2d 14 (Vt. 1998).

against self-incrimination. *See Salinas v. Texas*, 570 U.S. 178, 181 (2013). However, this Court's decision in *Salinas* deals exclusively with pre-arrest selective silence and does not extend to the custodial setting. *Id.* As the Eleventh Circuit recognized, "[t]he fact that the *Salinas* defendant was not in custody at the time of his silence was central to the Court's determination that his silence could be used as substantive evidence of guilt." *United States v. Wilchcombe*, 838 F.3d 1179, 1191 (11th Cir. 2016). A defendant's post-arrest silence is not admissible as evidence of substantive guilt due to the inherently coercive nature of the custodial setting. Accordingly, a suspect in custody who has neither been read his *Miranda* rights nor been subject to interrogation is not required to formally invoke his constitutional right to silence.

1. *Salinas* does not control in a post-arrest setting where coercion is inherent.

Custody is the triggering mechanism for the right to remain silent, and a constitutionally protected privilege attaches once an accused is arrested. This Court has defined "arrest" to encompass both "formal arrest" and a sufficient "restraint on freedom of movement." *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Due to the uniquely coercive nature of custody, an arrestee cannot be said to have voluntarily waived the privilege against self-incrimination unless he fails to assert it after properly warned. *See Minnesota v. Murphy*, 465 U.S. 420, 430 (1984). Additionally, "[n]either *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody." *Moore*, 104 F.3d at 385 . Once in custody, a defendant is in "circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508-09 (2012). Thus, following arrest, "regardless whether the *Miranda* warnings were actually given, comment on the defendant's exercise of his right to remain silent [is] unconstitutional." *United States v. Whitehead*, 200 F.3d 634, 638-39 (9th Cir. 2000) .

Government custody is categorically different from a pre-custodial setting where a suspect has not been deprived of his liberty. In *Salinas*, this Court recognized the difference between a non-custodial and custodial setting. 570 U.S. at 185. In the former, the defendant is not in custody and is therefore free to leave at any time. *Id.* Although *Salinas* requires invocation in the context of voluntary police interviews, such finding does not equally translate to the post-arrest setting, where coercion is inherently present. *Id.*

Coercion does not involve only express governmental action. In a custodial setting, regardless of *Miranda* warnings, suspects likely feel compelled to speak once detained. By definition, "a necessary element of compulsory self-incrimination is some kind of compulsion." *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978). Arrest introduces some "inherently compelling pressures" into a suspect's decision-making process that do not exist in any other types of police-suspect interactions. *Salinas*, 570 U.S. at 185-86 (quoting *Miranda*, 384 U.S. at 467-68 and n.37). The Eighth Circuit similarly stressed that the relevant inquiry should be whether an individual would feel under an "official compulsion to speak." *Frazier*, 408 F.3d at 1110.

The nature of the post-arrest setting is inherently problematic, and the analysis depends on the extent to which a reasonable person under similar circumstances would be expected to say something. Unlike Mr. Coda, the defendant in *Salinas* was not placed in custody, voluntarily met with the police, and was subject to extensive questioning. 570 U.S. at 182. Salinas was largely responsive to the questions asked during the interview and remained silent only after he was questioned about the shotgun used in the homicide. *Id.* Further, unlike Mr. Coda, defendant Salinas demonstrated physical demeanor evidence such as the fact that he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.* at 182. After a few short moments of silence, the officer asked subsequent questions,

which Salinas answered. *Id.* Unlike Salinas, Mr. Coda was placed under arrest by the FBI and was no longer free to leave. R. at 7. In stark contrast to Salinas, Mr. Coda did not manifest any demeanor evidence and did not practice selective silence. R. at 7. In fact, he remained silent from the moment he was informed of the charges against him, which proves his reliance on the right to remain silent guaranteed under the Fifth Amendment. R. at 7. Mr. Coda chose to avail himself of his constitutional right, and therefore, his silence should not be used against him.

2. Requiring express invocation while in custody, in the absence of *Miranda* warnings and investigatory questioning, defies logic.

An arrestee should not be required to first speak in order to claim his right to remain silent or use some "magic words" to claim a constitutionally guaranteed right. This Court explained more than half a century ago that the Fifth Amendment does not need to be explicitly invoked. *See Quinn v. United States*, 349 U.S. 155, 162 (1955). Thus, there is no "ritualistic formula required" to invoke the Fifth Amendment. *Id.* at 164. An arrestee's invocation of their right against self-incrimination occurs when law enforcement agents can reasonably infer an invocation under the circumstances. *Id.* Accordingly, a defendant who remains silent at arrest must be treated as having asserted the right to stay silent. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976). The *Miranda* warnings serve as "a prophylactic means of safeguarding the Fifth Amendment rights." *Id.* Thus, the right to remain silent in the face of arrest is independent of the prophylactic right to cut off police questioning under *Miranda*. 384 U.S. at 474.

Express invocation is impracticable for pre-*Miranda* custody because an individual might be aware of the privilege against self-incrimination and choose to exercise it. As Chief Justice Rehnquist's famously stated, the *Miranda* warnings have become "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). This Court has wisely noted that, "[a]t this point in our history virtually every schoolboy is familiar with the concept, if not the language,"

of the *Miranda* warnings. *Michigan v. Tucker*, 417 U.S. 433, 439 (1974). Every American with a television has likely heard the phrase "you have the right to remain silent" on every crime show imaginable. Richard A. Leo, *Panel Three:* Miranda*'s Irrelevance: Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 Mich. L. Rev. 1000, 1001 (2001). Accordingly, a defendant may know that he is under no duty to speak or declare his innocence to the police and that any statement he makes can be used against him at his trial.

On the other hand, if an arrestee has not been read his *Miranda* rights, he cannot be required to invoke them by using a specific combination of words that a lay defendant simply does not know. One might not know that to effectively invoke the right to remain silent, one must first speak up. *See Salinas*, 570 U.S. at 181. Requiring express invocation of a right that a defendant has not been told he has is "formalism of the absolute kind" and creates "a trap for the unwary." Hugh B. Kaplan, *Evidence of Pre*-Miranda*, Pre-Arrest Silence Is Admissible to Prove Guilt, Prosecutors Say*, Stanford L. Sch. (Apr. 24, 2013). If custodial silence is to be allowed as evidence of substantive guilt, *Miranda* warnings should be changed and defendants must be told that, "[i]f you say anything, it will be used against you; if you do not say anything, that will be used against you." *McCarthy v. United States*, 25 F.2d 298, 299 (6th Cir. 1928).

The invocation rule is meaningless in the absence of police interrogation. This Court has expressly held that suspects who are *Mirandized* and who face government inquires seeking incriminating information must assert the privilege to protect their Fifth Amendment rights. *See Berghuis v. Thompkin*s, 560 U.S. 370, 380 (2010). However, invoking the privilege to officers who are not looking for information is not "materially different from simply remaining silent." *People v. Tom*, 331 P.3d 303, 324 (Cal. 2014) (Liu, J., dissenting). For example, defendants might not know to whom and how to express their desire to invoke the Fifth Amendment. *Id.* To

require invocation prior to *Miranda* warnings and police interrogation creates a paradoxical scenario where a defendant will be forced to approach random law enforcement officers and express his invocation. *Id.* As Justice Liu rightly recognized, a defendant should not be required to publicly announce that he does not wish to speak, neither should a defendant be placed in circumstances where he would have to invoke his right to remain silent each time he interacts with a new law enforcement officer. *Id.* Thus, when a defendant has simply remained silent upon arrest, has not been subjected to interrogation, and *Miranda* warnings have not been administered, the burden should not lie with the arrestee to affirmatively claim his right not to speak in order to avoid having his silence used against him at trial. *Id.*

Demanding an objective and unambiguous expression of the desire to remain silent here would have the perverse effect of a "formalistic requirement" that this Court sought to avoid. *Quinn*, 349 U.S. at 162. If most people are at least generally aware of their right to remain silent, it follows that a reasonable person might naturally exercise it upon arrest, even before express warning is given. The District Court's reasoning that Mr. Coda remained silent because he did not have an alibi defense, R. at 9, overlooks the possibility that he was aware of his right and chose to exercise it. In addition, the District Court dismissed the fact that Mr. Coda was not formally *Mirandized*, such as to make him aware of his rights, and that an invocation was expected. Thus, prior to being administered his *Miranda* warnings, and in the absence of police interrogation, Mr. Coda should not be required to invoke a right he has yet to be informed of. Mr. Coda is an ordinary defendant who did not have a lawyer present at his arrest and all he likely knew was that he needed to remain silent. Lay defendants, such as Mr. Coda, are unaware of the precise technical legal requirements for a valid invocation and should not be forced to call the Fifth Amendment by name in order to be protected by it. Unlike in all other cases where this

Court required an express invocation, there was no interrogation here and Mr. Coda never spoke such as to confuse law enforcement on whether he was relying on his right to remain silent. R. at 7. If an arrestee must wait for the police to read his rights in order to benefit from the protections of the Fifth Amendment, then the right against self-incrimination ceases to be an automatic individual right. Rather, it becomes a privilege granted at the discretion of the government.

B. Prosecutorial Comment on Post-Arrest Silence Erodes the Purpose of the Right Against Self-Incrimination.

Allowing post-arrest silence as substantive evidence of guilt would force a defendant to choose between incrimination through speech and incrimination through silence. Prosecutorial comment on the defendant's post-arrest, pre-*Miranda* silence pressures the defendant to incriminate himself, thereby undermining "the central purpose of the privilege—to protect a defendant from being an unwilling instrument of his or her own condemnation." *Mitchell v. United States*, 526 U.S. 314, 329 (1999). Such evidence serves little to no probative value in contrast with the unfair prejudice it causes to the defendant. Further, it impedes the truth-seeking objective of criminal trials by causing juries to attach too much weight to such evidence than is warranted. As a result, custodial silence should only be allowed for impeachment purposes when a defendant takes the stand at trial.

1. Post-arrest, pre-*Miranda* silence is ambiguous and any probative value it may offer is greatly outweighed by the prejudice it causes to the defendant.

The admission of a defendant's custodial silence proffers little probative value as an indication of guilt. This Court expressly held that "[e]very post-arrest silence is insolubly ambiguous," *Doyl*e, 426 U.S. at 617, and is not "sufficiently probative . . . to warrant admission of evidence thereof." *United States v. Hale*, 422 U.S. 171, 180 (1975). As Justice Scalia surmised, this Court in *Miranda* found that post-arrest silence should "not be introduced as

substantive evidence against [a defendant] at trial." *Mitchell*, 526 U.S. at 338. Similarly, Justice Marshall stressed that the probative value of silence, when used to imply the defendant's guilt, is extremely low, stating that "silence is commonly thought to lack probative value on the question of whether the person has expressed tacit agreement or disagreement with contemporaneous statements of others." *Hale*, 422 U.S. at 176.

There can be a myriad of reasons why a defendant might remain silent upon arrest; reasons that have nothing to do with a defendant's guilt. Silence at the time of arrest may be "motivated by . . . [the] realization that 'anything you say may be used against you.'" Fed. R. Evid. 801(d)(2)(B) advisory committee's note. As this Court emphasized, "[a]t the time of arrest … innocent and guilty alike—perhaps particularly innocent—may find the situation so intimidating that they may choose to stand mute." *Hale*, 422 U.S. at 177.

Silence is equivocal at best and cannot be used to reliably determine guilt. Although a defendant's failure to come forward with an exculpatory version of events prior to trial may reflect negatively upon the veracity of his testimony, his prior silence may also be attributable to a variety of reasons that are unrelated to the truth or falsity of his testimony. Defendants may refrain from speaking to the police, not because they are guilty of some crime, but rather because they are simply fearful of encountering those whom they regard as antagonists.

Accordingly, silence is simply too ambiguous to offer any legitimate proof of guilt and is likely to lead to unfair bias against the defendant. The various reasons for Mr. Coda's silence fail to affirmatively prove any culpability for the charge against him. For example, Mr. Coda may have reasonably believed that once arrested, he had a constitutional right to remain silent. He may have believed that any statement made to the police, whether claiming his innocence or not, would be used against him at his trial. Considering that almost ten years have elapsed since the

alleged incident, R. at 2, any reasonable person would remain silent as a result of being confused or shocked, neither of which indicate guilt or innocence. Further, Mr. Coda may simply have been trying to recollect the events that took place nearly a decade ago. R. at 2-3. Thus, evidence of silence does not serve as an indication of guilt because silence has innumerable permutations and, in the face of arrest, the one sanctuary an innocent defendant has is simply not to talk.

2. Allowing the use of custodial silence as substantive evidence of guilt will impede the truth-seeking function of trials by causing a jury to attach far more weight to such evidence than is warranted.

Encouraging the government to use post-arrest, but pre-*Miranda* and pre-interrogation silence against a defendant will allow the prosecution to make the defendant's case and will conscript him as a product of his own demise. This Court has previously held that a suspect's post-arrest silence has a highly prejudicial effect upon a jury because of unwarranted negative inferences jurors draw about the defendant. *See Hale*, 422 U.S. at 180; *see also Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986); *Doyle*, 426 U.S. at 617-19. Further, "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin*, 380 U.S. at 614. This Court expressly held that "[t]he defendant's right to hold the prosecution to proving its case without his assistance is not to be impaired by the jury's counting the defendant's silence at trial against him." *Portuondo v. Agard*, 529 U.S. 61, 67 (2000). Further, prosecutorial comment on a defendant's post-custodial silence will cause the jury to attach even greater weight to his silence if he does not take the stand at trial to rebut the prosecutor's inference of guilt. *See Moore*, 104 F.3d at 385. Such evidence is highly prejudicial to a defendant and will hinder the primary function of a trial: to seek the truth. *See Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000).

If a prosecutor is allowed to ask the jury to draw a direct inference of guilt from silence, it will allow the government, in effect, to argue that silence is inconsistent with innocence. *See Doyle*, 426 U.S. at 633-35 (Stevens, J. dissenting). In fact, the use of post-arrest silence "does not enhance, but may even frustrate the truth-seeking function of the trial [because] evidence of silence obfuscates the truth." Marcy Strauss, *Silence*, 35 Loy. L.A. L. Rev. 101, 151 (2001). Further, the state may have a relatively weak case against a defendant, but the silence might play a material role in influencing a jury's assessment of a major factual issue. This in turn will affect the outcome of a criminal trial. *See United States v. Ibarra*, 493 F.3d 526, 532 (5th Cir. 2007). Therefore, not allowing prosecutors to comment on defendants' custodial, pre-*Miranda* silence provides defendants greater protections, especially in situations where a defendant's guilt is not overwhelmingly supported by evidence, and the prosecutorial comment becomes the tipping point for the jury in finding the defendant guilty.

Evidence of a defendant's pretrial silence cannot be justified because it creates a "disproportionate impact upon the minds of the jurors." *People v. Conyers*, 52 N.Y.2d 454, 459 (N.Y. 1981) (accord *Hale*, 422 U.S. 171). In Mr. Coda's case, the government's evidence against him was his neighbor's belief that he had insurance on his busines and that he appeared anxious and paranoid, R. at 2, which can both be related to a myriad of reasons other than guilt. In fact, the case against Mr. Coda was so weak that investigators quickly dismissed any assumption of foul play. R. at 2. As the dissent noted, the government conceded that the admission of Mr. Coda's silence was not a harmless error. R. at 15. Moreover, the evidence presented by the government, other than his silence, was circumstantial and insufficient to prove Mr. Coda guilt beyond a reasonable doubt. R. at 15. Accordingly, the admission of such evidence was prejudicial because it clearly affected the outcome of the trial. R. at 15; *see also Ibarra,* 493 F.3d

at 532. When such weak circumstantial evidence is proffered by the prosecution, while Mr. Coda was deprived of his only defense, R. at 3, the jury attached far too much weight to his post-arrest silence. Without evidence of his custodial silence, Mr. Coda would not have been convicted beyond a reasonable doubt. The fact that the jury placed so much weight to Mr. Coda's silence, enough to overcome such a high threshold of proof, only supports the finding that a defendant's post-arrest silence as evidence of substantive guilt is highly prejudicial.

3. Under this Court's clearly established precedent, evidence of prior silence can only be admissible for impeachment purposes when a defendant chooses to take the stand at trial.

Silence may only be used to impeach a defendant's credibility when he takes the stand at trial. As this Court emphasized, "[i]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth finding function of the criminal trial." *Jenkins*, 447 U.S. at 238. While this Court has yet to address the prosecution's use of a defendant's pre-*Miranda* silence as substantive proof of guilt, this Court has held that a defendant's *pre-arrest* silence is admissible for impeachment when a defendant later testifies in his own defense. *Id.* at 240. This Court has also held that the use of *post-arrest*, pre-*Miranda* silence for impeachment purposes does not violate a defendant's due process rights. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982). A prosecutor's reference to a defendant's pre-*Miranda* silence is entirely proper, is probative for impeachment purposes, and does not rest on any implied assurance by law enforcement agents that it will not be used against him at trial. *See Brecht v. Abrahamson*, 597 U.S. 619, 628 (1993). Thus, once a defendant voluntarily takes the stand in his own defense, he is "under an obligation to speak truthfully and accurately." *Jenkins*, 447 U.S. at 238. Only in such a scenario can a defendant's prior silence be used against him.

While evidence of prior silence is admissible for impeachment, post-arrest silence cannot be used as substantive evidence of guilt when a defendant asserts his constitutional right not to testify at his own trial. Here, Mr. Coda did not take the stand at trial and was therefore not in a position to be impeached by the prosecution. Thus, his custodial silence, whether for impeachment purposes or as substantive evidence of guilt, cannot be admitted into evidence.

C. Allowing Custodial Silence As Evidence Of Substantive Guilt Would Incentivize Law Enforcement Officers To Withhold The Delivery Of *Miranda* Warnings And Lure Defendants Into Incriminating Themselves.

Permitting the use of custodial evidence will have further negative repercussions on the behavior of both law enforcement and defendants. This Court expressly recognized in *Miranda* "that a person taken into custody be advised *immediately* that he has the right to remain silent." *Doyle*, 426 U.S. at 617 (emphasis added). Allowing the prosecution to use post-arrest, pre-*Miranda* and pre-interrogation silence as substantive evidence of a defendant's guilt will incentivize officers to delay the reading of *Miranda* warnings and will pressure arrestees to incriminate themselves, knowing that their silence could become more damaging in court than any statements they may make while in custody.

1. The use of custodial silence as evidence of substantive guilt will encourage police to manipulate the delivery of *Miranda* warnings.

Allowing post-arrest, pre-*Miranda* silence creates the risk that law enforcement officers will deliberately withhold *Miranda* warnings to obtain a confession first. *See Missouri v. Seibert*, 542 U.S. 600, 609 (2004). As a result, law enforcement may delay their warnings in order to observe the defendant's conduct in an attempt to obtain incriminating silence. *See United States v. Nunez-Rios*, 622 F.2d 1093, 1101 (2d Cir. 1980). Additionally, allowing such evidence "would create an incentive for arresting officers to delay interrogation to create an intervening 'silence' that could then be used against the defendant." *Moore*, 104 F.3d at 385. While not required to

administer the *Miranda* warnings before interrogation, the problem caused by withholding them in a post-arrest setting is that pre-*Miranda* silence is effectively treated as a "statement" if the silence is allowed as substantive evidence of guilt. *See* Megan E. Wamsley, *You [Might] Have the Right to Remain Silent: Examining the* Miranda *Problem (*United States v. Wright*, 777 F.3d 769 (5th Cir. 2015))*, 84 U. Cin. L. Rev. 923, 934 (2016).

Intentionally delaying *Miranda* warnings to obtain incriminatory silence would turn *Miranda* from a device to protect the Fifth Amendment right to remain silent into a technicality law enforcement can manipulate to subvert that right. Further, the inadmissibility of custodial pre-*Miranda* and pre-interrogation silence will not burden law enforcement authorities because, even if officers feel some pressure to administer *Miranda* warnings sooner, empirical studies show that most defendants waive their rights and agree to interrogation after receipt of *Miranda* warnings.[3] Thus, law enforcement practices will continue without any impediment, even if post-custodial silence is not allowed to be used as evidence of substantive guilt.

2. Equating silence with guilt will undermine existing protections by pressuring defendants into incriminating themselves through silence.

Inferring meaning from the words a defendant never spoke enables the prosecution to speak on his behalf, effectively placing the defendant on a virtual stand. As a result, the defendant will be forced to make the impossible choice between having either his silence or his testimony used against him at trial. *See* Marty Skrapka, Comment, *Silence Should Be Golden: A Case Against The Use of a Defendant's Post-Arrest, Pre-*Miranda *Silence as Evidence of Guilt*, 59 Okla. L. Rev. 357, 398 (2006). A defendant will be more inclined to speak if they know that their silence will be used against them, thus "creating something akin to an inquisitorial system

[3] *See* Saul M. Kassim et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 Law & Hum. Behav. 381, 394 (2007) (reporting that approximately 80 percent of interrogated suspects waived their rights after being warned).

of justice." Jane E. Notz, Comment, *Prearrest Silence As Evidence of Guilt: What You Don't Say Shouldn't Be Used Against You*, 64 U. Chi. L. Rev. 1009, 1034 (1997). Adverse comment on silence forces the defendant to speak at the risk of incriminating himself, which demeans individual dignity and effectively makes the defendant "an unwilling instrument of his or her own condemnation." *Mitchell*, 526 U.S. at 329. The pressure created from prosecutorial comment on a defendant's post-arrest, pre-*Miranda* silence may result in forcing him to take the stand to refute the meaning of his silence. *Tom*, 331 P.3d at 328. As a result, the probability of perjury increases when the defendant is forced to explain himself when he knows that his silence will be used as an inference of guilt. *See Combs*, 205 F.3d at 285.

Mr. Coda should not be punished for availing himself of a constitutional right. His reliance on his Fifth Amendment right was justified, regardless of whether formally read his *Miranda* rights or whether an interrogation had commenced. *Miranda* guarantees that a defendant has the right to remain silent, and that anything he *says* can be used against him in a court of law, not that anything he *does not say* can be equally used to seal his fate. Should prosecutorial ventriloquism become the new norm, many defendants, like Mr. Coda, will have already been tried and found guilty once the police knock on their door.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Thirteenth Circuit in all respects.

Respectfully submitted this 13th day of September, 2021,

/s/ Team 1

ATTORNEYS FOR PETITIONER

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APPENDIX A

Constitutional Provisions

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

Relevant Statutes

18 U.S. Code § 3295. Arson offenses

No person shall be prosecuted, tried, or punished for any non-capital offense under section 81 or subsection (f), (h), or (i) of section 844 unless the indictment is found or the information is instituted not later than 10 years after the date on which the offense was committed.

18 U.S. Code § 844(i). Penalties

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.