No. 21-125

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team 11
Counsel for Respondent

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QUESTIONS PRESENTED

I. Was the Court of Appeals correct when it held the government's preindictment delay did not violate the Due Process Clause because there was no evidence that the government acted in bad faith?

II. Did the Court of Appeals correctly hold that Petitioner's post-arrest, pre-*Miranda*, and pre-interrogation silence was admissible and did not violate the Fifth Amendment?

STATEMENT OF THE CASE

Factual Background

Petitioner's Hardware Store. In 2002, Petitioner opened a hardware store in a small town on the border of East Virginia and North Carolina. R. at 1. It was the only one in the area, so it quickly attracted numerous customers from both states. *Id.* Until the recession in 2008, the business flourished. *Id.* In 2009, a large chain opened a hardware store in the same town as Petitioner's, causing him to lose even more business. *Id.* By 2010, Petitioner's profit margins had diminished, and he could no longer afford to properly maintain his business or the building it sat in. *Id.*

The Explosion. On December 22, 2010, Petitioner's hardware store was destroyed by a fire that started with an explosion. *Id.* at 2. Local fire authorities and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) opened an investigation. *Id.* Based on the evidence that was available at that time, they thought the explosion occurred after cold weather caused a faulty gas line to leak. *Id.* However, shortly after that preliminary investigation, the Federal Bureau of Investigation (FBI) received a tip from one of Petitioner's neighbors and close friends, Sam Johnson, who informed them that Petitioner's business and personal finances were in shambles. *Id.* Mr. Johnson recalled that Petitioner had been acting strangely and was extremely anxious and paranoid. *Id.* Mr. Johnson notified the FBI that all of that made him suspicious because he also knew Petitioner maintained an insurance policy on the store that would cover it in the case of a total loss. *Id.* This likewise made the FBI believe that Petitioner could have been responsible for the explosion, so it informed the United States Attorney's Office of the situation. *Id.*

Petitioner's Prosecution. For a variety of reasons, the U.S. Attorney's Office marked Petitioner's case as "low priority." *Id.* For example, Petitioner was being prosecuted for unrelated state charges, so it would have been inconvenient to transport him back and forth at that time. *Id.*

There was also outside pressure on the U.S. Attorney's Office to prioritize more heinous crimes, such as drug trafficking and other related offenses. *Id.* Additionally, there was high turnover in the U.S. Attorney's Office, which caused cases to pass from attorney to attorney, further delaying those prosecutions. *Id.* However, in April 2019, prior to the running of the ten-year statute of limitations, the U.S. Attorney's Office had the authorities take Petitioner into custody. *Id.* at 3. They then indicted him in May 2019 under 18 U.S.C. § 844(i), which prohibits the malicious damaging of property that is used in or affects interstate commerce by use of fire or an explosive. *Id.*

Petitioner's Defense. At his evidentiary hearing, Petitioner testified that he had an alibi for the night of the explosion. *Id.* He stated that the night of the explosion was his birthday, and he was in New York celebrating with his family. *Id.* Since then, four of the five family members who were allegedly present that night had died—two from chronic disease in 2015 and 2017 and two in a car accident in 2018. *Id.* The fifth family member had dementia and was unable to remember the events of that night. *Id.* Petitioner also stated that he took a Greyhound bus to the city; however, he was unable to produce those records because Greyhound only stores them for three years, making them unavailable in 2019. *Id.*

Procedural History

United States District Court for the District of East Virginia. Prior to his trial, Petitioner filed a Motion to Dismiss for preindictment delay. R. at 1. The United States District Court for the District of East Virginia denied that Motion because, although Petitioner lost evidence supporting his alleged alibi due to the delay, the delay was not a result of the government acting in bad faith as it did not act with malice or have any strategic intentions. *Id.* at 6.

Petitioner also filed a Motion to Suppress evidence of his post-arrest, pre-interrogation silence in his trial. *Id.* at 7. The district court also denied that Motion. *Id.* The Fifth Amendment

privilege against self-incrimination and the rights guaranteed by the Court in *Miranda* only apply in custodial interrogations, not just when the accused is in custody, so silence may be taken as evidence of guilt and may be presented to the jury. *Id.* at 10.

A jury then convicted Petitioner of maliciously destroying property with an explosive under 18 U.S.C. § 844(i) and sentenced him to ten years in prison. *Id.* at 11.

United States Court of Appeals for the Thirteenth Circuit. Petitioner appealed his conviction, claiming that the trial court erred in denying both his Motion to Dismiss for preindictment delay and his Motion to Suppress evidence of his post-arrest, pre-*Miranda* silence. *Id.* He sought to have his conviction overturned and asked that the appellate court drop all of the charges against him. *Id.* However, the Thirteenth Circuit adopted the trial court's analysis on both issues in their entirety, affirmed its rulings on both motions, and upheld Petitioner's conviction. *Id.* at 12.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeals' ruling affirming the trial court's denial of Petitioner's Motion to Dismiss his indictment for preindictment delay. Petitioner did not put forth sufficient evidence to establish that he was actually prejudiced by the delay and that the government acted in bad faith in causing the delay.

First, although there was some delay, the government indicted Petitioner within the applicable limitations period. The ten-year statute of limitations was carefully selected by the legislature and should not be ignored in a case like this one, where Petitioner is unable to show that the passage of time led to his inability to defend himself.

Second, Petitioner did not satisfy either prong of the due process analysis. He did not provide sufficient evidence to demonstrate substantial, actual prejudice. More specifically, he was

unable to prove that the government's preindictment delay caused him to lose access to evidence that he could not get elsewhere. Although he claims to have lost the entirety of his alibi because his family members died in the time between the explosion and the indictment and Greyhound only keeps its records for a limited period of time, Petitioner fails to show that he could not have obtained other evidence, such as pictures, other witnesses, or bank records to corroborate the elements of his defense. Petitioner also failed to provide sufficient evidence to demonstrate that the government acted in bad faith in causing the delay. Instead, the evidence showed that the government had legitimate reasons for the delay, including high turnover rates, other higher priority cases, and political pressure. Thus, there was no indication that the government intended to gain any kind of tactical advantage over Petitioner by waiting to indict him. Even if the Court were to perform a balancing test in lieu of the two-prong analysis, the government's justifications for the delay would still outweigh Petitioner's prejudice.

This Court should also affirm the Thirteenth Circuit's ruling affirming Petitioner's Motion to Suppress his post-arrest, pre-*Miranda* silence and uphold his subsequent criminal conviction. The appellate court correctly held that Petitioner's silence was admissible because he was not involved in a custodial interrogation, and he failed to unambiguously invoke his Fifth Amendment privilege. A reasonable person in Petitioner's position would have responded to the agent informing him of the charges against him at the time of his arrest by stating that he had an alibi or even that he wanted an attorney. However, because Petitioner did not do that, and because the situation was not in any way hostile or coercive, the arresting officer should be able to testify of Petitioner's silence at the time of his arrest, and the jury should be able to take that silence into account as evidence of Petitioner's guilt.

ARGUMENT

I. The Thirteenth Circuit Court of Appeals was correct when it held that the U.S. Attorney's Office's preindictment delay did not violate the Due Process Clause because the government did not act in bad faith.

In order to successfully challenge preindictment delay on due process grounds, a defendant must show: (1) he was actually prejudiced by the delay, *and* (2) the government acted in bad faith in causing the delay. R. at 4. The Court has previously indicated "that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Consequently, it is not enough to merely show prejudice. *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985). Instead, a defendant must also show that the government acted in "bad faith" or caused an "intentional" delay to gain some tactical advantage over the defendant. *Id.* The majority of jurisdictions view these two considerations as part of a two-prong test instead of a balancing test because doing so more appropriately takes into account the statute of limitations as the predominate procedural safeguard against unfair delay, provides a clear standard for courts to apply, and ensures objectivity in courts' due process analyses. R. at 4–5.

A. The statute of limitations provides sufficient protection against unfair delay.

The Supreme Court has previously held, "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966). "Such statutes represent the legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defen[s]e.'" *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *St. Louis Pub. Schs. v. Walker*, 76 U.S. 282, 288 (1869)).

In *United States v. Marion*, the Court reversed the district court's dismissal of the appellees' criminal prosecutions. *Marion*, 404 U.S. at 326. In that case, the appellees were not "arrested, charged, or otherwise subjected to formal restraint prior to indictment," and "the 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations." *Id.* at 325. As a result, the appellees could not successfully claim undue delay. *Id.* at 326. Likewise, in *State v. King*, the Supreme Court of Vermont held that the government's three-year delay in filing sexual assault charges against the defendant fell within the applicable limitations period and was therefore permissible. *State v. King*, 165 A.3d 107, 118 (2016). In a similar case, the Supreme Court of Wisconsin held that a thirty-six-year delay in a case with no statute of limitations was not barred because the government's delay was caused by logistical issues and without malintent. *State v. McGuire*, 786 N.W.2d 227, 237–39 (2010). Finally, a Georgia appellate court held that a delay of over six years between a robbery and the defendant's arrest was permissible because the passage of time did not amount to actual prejudice and fell within the applicable limitations period. *Billingslea v. State*, 716 S.E.2d 555, 558 (2011).

In the present case, Petitioner was convicted under 18 U.S.C. § 844(i) for maliciously destroying property with an explosive. R. at 11. The applicable statute of limitations for that crime is located in 18 U.S.C.A. § 3295, which states, "No person shall be prosecuted, tried, or punished for any non-capital offense under . . . subsection . . . (i) of section 844 unless the indictment is found . . . not later than *10 years* after the date on which the offense was committed." 18 U.S.C.A. § 3295 (West) (emphasis added). The explosion at Petitioner's store occurred in December 2010, and the government indicted him in May 2019. R. at 3. Similar to *Marion*, *King*, *McGuire*, and *Billingslea v. State*, there was some delay between the incident and the indictment in this case;

however, Petitioner's indictment occurred after approximately eight and a half years, which was well within the ten-year period set forth by the legislature. *Id.* Therefore, the Government in this case likewise did not delay Petitioner's case for an unjust or unlawful period of time. *See* 18 U.S.C.A. § 3295 (West). "[I]t is Congress which . . . must establish what is a facially reasonable time for the bringing of prosecutions." *United States v. Bland*, 485 F.2d 1, 5 (5th Cir. 1972). As the Court indicated in *St. Louis Public Schools v. Walker*, the legislature carefully determines that "facially reasonable" time limit in order to protect members of the public in the administration of justice. *St. Louis Pub. Schs.*, 76 U.S. at 288. Consequently, it would be improper for the Court to go against the legislature in this case, where the government indicted Petitioner within the appropriate limitations period. R. at 3.

B. Even if the Court were to hold that the statute of limitations in this case does not by itself provide sufficient protection, the government's preindictment delay still did not violate the Due Process Clause.

The statute of limitations for a particular cause of action may "not fully define (defendants') rights with respect to the events occurring prior to indictment." *Lovasco*, 431 U.S. at 789 (citing *Marion*, 404 U.S. at 324). Instead, the Due Process Clause can also play a role in protecting against oppressive delay. *Id.* Therefore, a preindictment delay that falls within the limitations period may violate due process if (1) the delay caused actual prejudice to the defendant's right to a fair trial, and (2) the government caused the delay in bad faith. R. at 4. The Court has cautioned that the Due Process Clause's role is limited, and it "does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek indictment. . . . [Courts] are to determine only whether the actions complained of . . . violate those fundamental conceptions of justice which lie at the base of [their] civil and political institutions, and which define the community's sense of fair play and decency." *United States v. Pallan*, 571 F.2d 497,

500 (9th Cir. 1978) (citing *Rochin v. California*, 342 U.S. 165, 170 (1952); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) (internal quotation marks omitted).

1. The Court should apply a two-prong test and not a balancing test when performing its due process analysis.

Whether a defendant has suffered actual prejudice and whether the government was justified in delaying a case are two distinct considerations. *See United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996) (en banc). Thus, the balancing test from the Fourth and Ninth Circuits is ineffective, as it "seeks . . . to compare the incomparable" because "[t]he items to be placed on either side of the balance . . . are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most." *Id.* Consequently, trying to make that determination would lead to judges "weighing by their own 'personal and private notions' of fairness.'" *Id.* (internal quotation marks omitted). Likewise, "grounding a due process violation on the basis of good faith but inadequate . . . personnel . . . leading to preindictment delay runs counter to two basic constitutional principles." *Id.* at 1513. First, due process violations have historically been found when the government intentionally deprives an individual of life, liberty, or property. *Id.* (citing *Daniels v. Williams*, 464 U.S. 327, 331 (1986)). That means that "the Due Process Clause . . . is not implicated by the lack of due care," but instead by some deliberate act on the part of the government; however, the balancing test would find a violation even when the government took no such act. *Id.* (quoting *Davidson v. Cannon*, 474 U.S. 344, 347 (1986)). The balancing test also brings about separation of powers concerns because the courts would be interjecting in legislative and executive functions by declaring that the prioritization of or manpower allocated to certain cases is insufficient to outweigh the prejudice that might be caused by a delay. *Id.*

The Court's precedents also indicate that a two-prong test, and not a balancing test, is proper. *See generally Marion*, 404 U.S. 307; *Lovasco*, 431 U.S. 783. In *Marion*, the Court established "only that proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Lovasco*, 431 U.S. at 789. The Court further indicated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay *as well as* the prejudice to the accused." *Id.* at 790 (emphasis added). Thus, "Where the indictment is not barred by the statute of limitations, dismissal for pre-indictment delay requires an appropriate showing not only of prejudice *but also* that the prosecution purposely delayed the indictment to gain tactical advantage or for other bad faith purpose." *Crouch*, 84 F.3d at 1500 (emphasis added); *see also Marion*, 404 U.S. at 324 (holding that dismissal is required on due process grounds only "if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial *and* the delay was an intentional device to gain a tactical advantage over the accused") (emphasis added). The majority of jurisdictions have adopted this two-prong approach for determining whether a government-caused preindictment delay has violated a criminal defendant's right to due process. *Crouch*, 84 F.3d at 1511. The Court likewise appears to have endorsed this approach and rejected the balancing test when it made no mention of the "'balancing' or 'weighing' of the extent of prejudice against the relative merit of the reasons for the delay" in either *Marion* or *United States v. Lovasco*. *Id.* at 1510. It made the same considerations in later cases dealing with claims regarding due process and preindictment delay. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 192 (1984) (holding that a dismissal is proper where "the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense").

2. Petitioner did not suffer actual prejudice as a result of the government's delay.

In performing their analyses, the first question courts must answer is whether the defendant suffered prejudice as a result of the government's preindictment delay. *Marion*, 404 U.S. at 324. So long as the indictment was brought within the statute of limitations, courts do not "presume that the defendant has been prejudiced by delay between commission of the offense and arrest or indictment." *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996). Therefore, the burden is on the defendant to establish that he has suffered prejudice as a result of such a delay. *Id.* As the Court indicated in *Marion* and *Lovasco*, actual and not presumptive prejudice must be shown when a defendant complains about preindictment delay. *See Marion*, 404 U.S. at 325; *see also Lovasco*, 431 U.S. at 789–90. The actual prejudice determination "will necessarily involve a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325. This is a heavy burden on the defendant because he must "show that any actual prejudice was *substantial*—that he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Angelone*, 94 F.3d at 907 (citing *Marion*, 404 U.S. at 324; *Crouch*, 84 F.3d at 1511–12, 1515; *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1996); *Stoner v. Graddick*, 751 F.2d 1535, 1547 (11th Cir. 1985); *Wilson v. McCaughtry*, 994 F.2d 1228, 1234 (7th Cir. 1993); *United States v. Bartlett*, 794 F.2d 1285, 1290 (8th Cir. 1986). "Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient." *United States v. Beszborn*, 21 F.3d 62, 67 (5th Cir. 1994). "[T]o establish prejudice based on lost witnesses or documents, the defendant must demonstrate that the 'information . . . could not otherwise be obtained from other sources.'" *Crouch*, 84 F.3d at 1515 (quoting *Beszborn*, 21 F.3d at 67). The

defendant must also be able to show that there exists a reasonable probability that, absent the delay, the result of the proceeding would have been different. *Angelone*, 94 F.3d at 908.

In *United States v. Crouch*, the Fifth Circuit held that substantial prejudice did not exist where the government's delay allegedly caused the defendant to lose the testimony of six witnesses who died before his hearing. *Crouch*, 84 F.3d at 1518. As to three of the witnesses, they may have died "prior to any delay having become even arguably undue, and hence their 'loss' could not be attributable to any improper delay." *Id.* Those witnesses died an estimated two to three years after the completion of the crimes the government accused the defendant of committing. *Id.* Likewise, the defendant did not prove that he could not have established the contents of their alleged testimony by other means, such as documentation or other witness testimony. *Id.* As a result, he had not shown any actual, substantial prejudice resulting from the delay. *Id.*

Petitioner contends that he suffered actual, substantial prejudice because the government's preindictment delay caused him to lose the entirety of his alibi. R. at 3. Petitioner claims that he was in New York celebrating his birthday on the night of the explosion. *Id.* He first states that the government's delay made him unable to produce witness testimony to corroborate his defense because four of the five family members he claims to have visited died before he was indicted—two from chronic disease in 2015 and 2017 and two in a car accident in 2018. *Id.* The fifth family member was also supposedly unable to testify because he was diagnosed with dementia and did not remember whether Coda was in New York on the particular night in question. *Id.* Although those witnesses may have been able to corroborate Petitioner's story about him going to New York, he, like the defendant in *Crouch*, did not necessarily prove the information they would have provided could not have been obtained from other sources, including but not limited to: photos from the night in question, friends who knew his typical routine of going to New York on his

birthday, people he told he was going to New York, or witnesses who saw him leave the store or his home that evening. *Id.* Petitioner likewise states he is unable to produce evidence of his bus trip because Greyhound only preserves their online records for three years; however, he fails to provide any evidence showing that he could not have gotten proof of his bus trip from anywhere else, such as surveillance footage from the bus station, a physical ticket stub, or bank records showing the purchase of the ticket. *Id.* Therefore, like the defendants in *Jones v. Angelone* and *Crouch*, Petitioner did not provide sufficient evidence to establish actual, substantial prejudice based on the loss of witnesses or documents. *See Crouch*, 84 F.3d at 1515. Additionally, even if the government had brought the case several years earlier, Petitioner would have still had problems with his alleged alibi: evidence of the Greyhound trip would have been gone within three years, and his family members became unavailable within five, seven, and eight years respectively. *See* R. at 3. All of those things occurred well within the statute of limitations, and although it is inconvenient and unfortunate, the government cannot be held liable for the unforeseen circumstances that led to the destruction of Petitioner's alibi when they occurred well within the applicable limitations period. *See id.*

3. The government did not act in bad faith in causing the delay.

The second question for courts to consider is whether the government acted in bad faith in causing the preindictment delay. *Marion*, 404 U.S. at 324. Courts have held that the government acts in bad faith when it delays bringing charges to a grand jury as a "deliberate tactical maneuver." *Sebetich*, 776 F.2d at 430. The defendant must show that the government used time to "gain tactical advantage" over a defendant. *Lindstrom*, 698 F.2d at 1158. There are a vast number of legitimate reasons for the government to delay an arrest and the subsequent presentation of a case to a grand jury. *See generally* Anthony G. Amsterdam, *Speedy Criminal Trials: Rights and Remedies*, 27

Stan. L. Rev. 525, 527–28 (1975). The Court has held, "delay caused by a good faith ongoing investigation will not offend 'fundamental conceptions of justice.'" *Lindstrom*, 698 F.2d at 1158 (quoting *Lovasco*, 431 U.S. at 791). That is because "investigative delay is fundamentally unlike delay undertaken by the government solely to gain tactical advantage over the accused." *Id.* at 793.

In *United States v. Sebetich*, the Third Circuit held that the delay, caused by a misunderstanding between state and federal authorities, was unintentional and did not amount to bad faith. *Sebetich*, 776 F.2d at 430. In *United States v. Lindstrom*, the government stated it delayed the indictment because the case was complex and involved a significant number of documents and it had to spend a lot of time locating parties. *Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983). The appellants in that case provided no evidence suggesting that the government's delay was intentional, nor did they allege any tactical advantage the government might have hoped to gain in causing the delay. *Id.* As a result, the government did not act in bad faith and its delay was permissible. *Id.* Finally, in *United States v. Rogers* the Sixth Circuit held that the government did not act in bad faith when it delayed Rogers' case for two years, during which time, his co-conspirator died. *United States v. Rogers*, 118 F.3d 466, 474 (6th Cir. 1997). Rogers' contentions that the government knew or should have known of the witness' health problems were not sufficient to establish that the government purposely delayed his case to gain a tactical advantage over him. *Id.* at 476.

Here, after the FBI investigated Petitioner, the U.S. Attorney's Office marked his case as "low-priority" for several reasons. R. at 2. First, Petitioner was being prosecuted for unrelated state charges, and it would have been both inconvenient and inefficient to transport him back and forth, so he could be present for both prosecutions. *Id.* Once those proceedings were resolved, the U.S. Attorney's Office was facing outside pressure to prioritize cases that posed a greater risk to the

community including drug trafficking and other related offenses. *Id.* Finally, there was a significant rate of turnover in the U.S. Attorney's Office, which caused Petitioner's case to pass from attorney to attorney and eventually get lost in the shuffle. *Id.* Once the attorney assigned to Petitioner's case realized the statute of limitations was near its tolling period, he had Petitioner brought into custody and indicted within approximately one month. *Id.* at 3. As was the case in *Rogers*, there is also no indication that the government was aware of Petitioner's family members' chronic illnesses or dementia, and Petitioner has failed to provide any evidence that the government intentionally waited to indict him until they could no longer corroborate his alibi. *See* R. at 2–3. Like in *Sebetich*, the facts of the present case provide no evidence of malintent on the part of the government, nor do they indicate that the government gained any advantage over Petitioner as a result of the delay. *Id.* at 6. Instead, the record reflects that the government had legitimate reasons for delaying Petitioner's indictment, and, due to staffing issues, the government's claims against him eventually "fell between the chairs." *Id.* at 3; *Sebetich*, 776 F.2d at 429. As was indicated by the trial court, the government's inadequate oversight of Petitioner's case amounted to negligence *at most*, which does not fulfill the bad faith requirement of the due process analysis. R. at 6.

C. Even if the Court were to hold that a balancing test is proper, Petitioner would still be unsuccessful because the government's justification for the delay outweighs Petitioner's alleged prejudice.

If the Court were to decide that the balancing test would better serve due process inquiries, the Court would have to weigh the reason for the government's preindictment delay against any harm suffered by the defendant. *See United States v. Moran*, 759 F.2d 777, 781–82 (9th Cir. 1985). In order to prevail, the defendant would have to show that the delay "violate[d] fundamental

conceptions of justice or the community's sense of fair play and decency" when compared to the state's reasons for the delay. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990).

In *United States v. Moran*, Moran contended that he was actually prejudiced because five witnesses who would have been available to testify on his behalf at the time the drug conspiracy occurred in 1980 were no longer available 1983 when the government indicted him. *Moran*, 759 F.2d at 782–83. The Ninth Circuit stated, "We have serious doubts whether Moran has made any showing of prejudice beyond that which the statute of limitations is designed to control." *Id.* at 783. However, the court did not make a sure determination regarding substantial prejudice because "the record . . . is absent any culpability" and "shows that the 23 month delay . . . was caused by the government's investigation of new evidence and its decision to try all the counts in one trial." *Id.* Therefore, the government's justification for the delay outweighed the alleged prejudice and was permissible. *Id.*

In *Angelone*, preindictment delay was also permitted when the government's good faith efforts to gain custody over Jones proved fruitless because the government is not required to "consume [their] limited resources" for the convenience of the parties, especially when a cause of action is still within the limitations period. *See Angelone*, 94 F.3d at 910. That case can be easily contrasted with cases like *Howell v. Barker* or *Pitts v. North Carolina*, where the government delayed indictments for the "mere convenience of local officials" and "fail[ed] to take even the slightest step" to move the cases forward. *Id.* at 911 (citing *Howell*, 904 F.2d at 895) (quoting *Pitts v. North Carolina*, 395 F.2d 182, 187 (4th Cir. 1968)).

Here, like the defendant in *Moran*, Petitioner claims that he was prejudiced because of the loss of witnesses who could corroborate his alibi by testifying he was in New York on the night his store caught on fire. R. at 3. That potential prejudice is designed to be controlled by the statute

of limitations. *Moran*, 759 F.2d at 783. However, it is also outweighed by the government's justifications for the delay. *See* R. at 2. Unlike the state governments in *Howell* and *Pitts*, the government did not sit by idly and ignore the fact that Petitioner's case existed for its own convenience. *Id.* Instead, the government made logistical decisions in response to the needs of the community as a whole, political pressure, high turnover rates, and other management issues. *Id.* The U.S. Attorney's Office should not be required to consume its limited resources to prosecute a case like this immediately when it has other issues to address and has adhered to the limitations period the legislature carefully set. *See Angelone*, 94 F.3d at 910. Thus, the government's justifications for the delay outweigh Petitioner's prejudice. If the Court were to consider the government's justifications here and hold to the contrary, that they were insufficient to outweigh Petitioner's prejudice, the Court would essentially be dictating the level of priority that should be assigned to certain cases, how manpower in a prosecutor's office should be spent, and the amount of time in which cases should be brought. *See Crouch*, 84 F.3d. at 1513. Each of those determinations has been left to the legislative and executive branches, and the judiciary's intervention would constitute a breach in the separation of powers. *Id.*

II. The Thirteenth Circuit Court of Appeals correctly held that evidence of Petitioner's post-arrest, pre-interrogation silence was admissible as evidence of guilt and did not violate the Fifth Amendment.

The Fifth Amendment to the United States Constitution states, "no person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. That privilege, the privilege against self-incrimination, is a "fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964); *Kastigar v. United States*, 406

U.S. 441, 453 (1972)). Whether the government may use post-arrest, pre-*Miranda* silence as substantive evidence of a criminal defendant's guilt at trial falls within a "gray area" that the Supreme Court has yet to clarify. R. at 8. However, the Court has established that pre-custodial silence is admissible as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. 178, 186–91 (2013). Meanwhile, post-*Miranda* silence is only admissible as impeachment evidence and may not be used by prosecutors as substantive evidence of guilt. *Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993); *Doyle v. Ohio*, 426 U.S. 610, 616–20 (1976). Thus, the question for the Court in this case is how to proceed where the silence at issue *coincides* with an arrest. *See* R. at 8.

A. Fifth Amendment protections generally do not begin until government agents place the accused in a setting that is coercive in nature.

In *Miranda v. Arizona*, the Court established the well-known rule that the government cannot use statements that result from a custodial interrogation unless it demonstrates its agents' use of certain procedural safeguards that are "effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). It is important to note that rule only applies to custodial *interrogations* because the Court has held those to be inherently coercive; therefore, one accused of a crime may be more likely to be deprived of his ability to invoke the Fifth Amendment in those situations. *See id.* However, that inherent coerciveness does not exist before custody or at the time of an arrest. *See generally Salinas*, 570 U.S. 178; *see also Minnesota v. Murphy*, 465 U.S. 420, 429–30 (1984). As a result, if an individual who is suspected of committing a crime has been arrested—but not mirandized—and makes statements or remains silent without invoking his privilege under the Fifth Amendment, prosecutors should be allowed to use his words or silence as substantive evidence against him at trial.

1. *Salinas* should control when a defendant's post-arrest, pre-*Miranda* silence coincides with his arrest.

When an individual voluntarily answers questions and then chooses to stop talking, his silence may be used by prosecutors to demonstrate guilt to the jury. *See Salinas*, 570 U.S. at 186–91. In *Salinas*, the defendant voluntarily answered several questions the police asked him but remained silent in response to an incriminating one. *Id.* at 182. There, the Court held that if a defendant is silent before government agents take him into custody, that silence is admissible as substantive evidence of guilt. *Id.* at 190.

In the present case, Petitioner argues that the trial court improperly allowed the government to use his post-arrest, pre-*Miranda* silence as substantive evidence of guilt, stating that the admission of that evidence violated his Fifth Amendment privilege. R. at 7–8. When Petitioner was arrested in 2019, the FBI agent who took him into custody informed him that he was being arrested because he was suspected of intentionally causing the explosion at his hardware store in 2010. *Id.* at 7. At that time, Petitioner remained completely silent and made no mention of his alleged alibi. *Id.* Once they reached the detention center, FBI agents read Petitioner his *Miranda* rights and proceeded with their interrogation. *Id.*

Like the defendant in *Salinas*, Petitioner was not being interrogated when he chose not to speak. R. at 8. In that situation, his silence would have undoubtedly been inadmissible as anything other than impeachment evidence until he was mirandized at the detention center. *Id.* at 8–9. Instead, his silence was in response to the FBI agent's statements of the charges against him at the time of his arrest, and it occurred at a time when a reasonable person would have at least stated that he had an alibi. *Id.* The situation was not inherently coercive, and the agent did not ask Petitioner any questions. *Id.* at 8. As was stated by both of the lower courts in this case, common sense suggests that Petitioner remained silent because he did not have an alibi, and justice may

only be served if the jury is provided with a clear description of the events that occurred—including an arresting agent's common-sense perception of those events. *Id.* at 9. Consequently, the trial court was correct to allow Petitioner's silence as evidence of his guilt. *See id.*

2. The Court should follow the Eleventh and Fourth Circuits, which have held that post-arrest, pre-*Miranda* silence is admissible as substantive evidence and not just impeachment evidence.

The Supreme Court has long held "that testimony concerning a defendant's silence 'at the time of arrest and after receiving *Miranda* warnings' is inadmissible." *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (quoting *Doyle v. Ohio*, 426 U.S. 610 (1976)). However, when a defendant is silent in the time immediately after his arrest before receiving any warnings, that silence should be admissible as both impeachment evidence and substantive evidence of guilt. *Id.* (citing *Fletcher v. Weir*, 455 U.S. 603 (1982)).

In *United States v. Wilchcombe*, the Coast Guard intercepted the defendants' boat while they were in the process of transporting drugs. *United States v. Wilchcombe*, 838 F.3d 1179, 1183–85 (11th Cir. 2016). The Coast Guard eventually took the defendants into custody and did not give them *Miranda* warnings. *Id.* at 1180. They avoided questioning the defendants, and the defendants remained silent. *Id.* At trial, the government "referred to the defendant's silence . . . to make the argument that, if the defendants were on the ship under duress, as Rolle had testified, they would have sought help by trying to speak with members of the Coast Guard." *Id.* at 1190. The Eleventh Circuit held that the prosecution was entitled to use the defendants' "post-arrest, pre-*Miranda* silence as direct evidence that may tend to prove the guilt of the defendant." *Id.* (citing *United States v. Rivera*, 994 F.2d 1563, 1568 (11th Cir. 1991). The Fourth Circuit came to the same conclusion in *United States v. Love*, where the defendants "made no effort to explain their presence at the Lee farm on the night of their arrest." *Love*, 767 F.2d at 1063. The arresting agent told the

defendants they could leave if they could give him an innocent reason, outside of the drug smuggling operation, for their presence at the farm; however, they did not respond. *Id.* at 1058. Although the majority of jurisdictions have not yet adopted this approach, it is necessary for the Court to set a clear standard regarding when silence may be admissible as substantive evidence. *Wilchcombe*, 838 F.3d at 1190.

Like the defendants in both *Wilchcombe* and *Love*, Petitioner remained silent when the authorities arrested him. R. at 7. When Petitioner was informed of the charges against him, he could have mentioned his alibi or invoked his Fifth Amendment privilege; however, he chose not to. *Id.* As a result, common sense led the government to believe Petitioner was guilty because they generally expect that a reasonable person with an alibi would inform them of that defense. *Id.* at 9. Because justice is best served when witnesses provide the jury with a clear description of the events that occurred, the observations of Petitioner's silence—and the arresting agent's impressions based off of that silence—should be admissible as substantive evidence. *Id.*

B. In order to preserve his Fifth Amendment privilege, Petitioner should have unambiguously asserted his right to silence when he was taken into custody.

The government is generally entitled to everyone's testimony, so it has the ability to gather all of the information it needs to effectively prosecute crimes. *Garner v. United States*, 424 U.S. 648, 655 (1976). However, the privilege against self-incrimination is an exception to that principle. *Id.* at 658. "To prevent the [Fifth Amendment] privilege from shielding information not properly within its scope, [the Court has] long held that a witness who 'desires the protection of the privilege . . . must claim it' at the time he relies on it." *Murphy,* 465 U.S. at 427. Thus, the Fifth Amendment does not establish an unqualified right to remain silent. *Salinas*, 570 U.S. at 190. A witness' constitutional right to do so "depends on his reasons for doing so, and courts need to know those

reasons to evaluate the merits of a Fifth Amendment claim." *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951). Consequently, a defendant cannot invoke his Fifth Amendment privilege by merely remaining silent, and "[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." *Salinas*, 570 U.S. at 188. "[N]o ritualistic formula is necessary in order to invoke the privilege," but a witness is still required to unambiguously assert the privilege to subsequently benefit from it. *Quinn v. United States*, 349 U.S. 155, 164 (1955); *Salinas*, 570 U.S. at 181.

In *Berghuis v. Thompkins*, the Court held that the defendant, who did not explicitly invoke his right to remain silent then answered one of the later questions asked by police, did not invoke his Fifth Amendment privilege, and his statements could be used against him in a court of law. *Berghuis v. Thompkins*, 560 U.S. 370, 386 (2010). Thus, merely staying silent is not enough to invoke the protections provided by the Fifth Amendment. *Id.* at 382. Instead, an individual who wishes to invoke his Fifth Amendment right to silence "must claim it" and must do so unambiguously. *Murphy*, 465 U.S. at 427.

In the present case, Petitioner did not expressly invoke his right to remain silent. R. at 7. Instead, he merely remained silent when the FBI agent placed him under arrest and informed him of the charges against him. *Id.* Consequently, like the defendant in *Berghuis*, Petitioner did not claim his Fifth Amendment privilege and is therefore not entitled to its protection when it comes to the silence in question. *See id.* at 9–10.

1. Petitioner's failure to expressly invoke his Fifth Amendment privilege was not excusable by an exception.

A witness' failure to expressly invoke his Fifth Amendment privilege may only be excused in two circumstances. *Salinas*, 570 U.S. at 184 (citing *Griffin v. California*, 380 U.S. 609, 613–15 (1965)). First, a criminal defendant does not have to assert the privilege at his own trial because

he has an absolute right to refuse to testify against himself in court. *Griffin*, 380 U.S. at 613–15; *Turner v. United States*, 396 U.S. 398, 433 (1970) (Black, J., dissenting); *United States v. Patane*, 542 U.S. 630, 630–37 (2004). Second, if a witness involuntarily forfeits the privilege because of coercive acts taken by the government, like an unwarned custodial interrogation, his failure to invoke will be excused. *Miranda*, 384 U.S. at 467–68. "The principle that unites [these exceptions] is that a witness need not expressly invoke the privilege where some form of official compulsion denies him 'a free choice to admit, to deny, or to refuse to answer.'" *Salinas*, 570 U.S. at 185 (quoting *Garner*, 424 U.S. at 656–57) (internal quotation marks omitted). Therefore, "the critical question is whether, under the 'circumstances' of this case, petitioner was deprived of the ability to invoke the Fifth Amendment." *Id.* at 186.

The first of those exceptions does not apply in this case because Petitioner did not—and was not asked to—take the stand at his trial. R. at 11. Likewise, the second exception does not apply because the government did not engage in any coercive tactics. *Id.* at 9. Petitioner has provided no evidence that the FBI agent who arrested him acted aggressively or coercively towards him. *Id.* at 7. Similarly, that agent followed protocol and this Court's precedent by not asking Petitioner any questions or attempting to elicit any information from him until after Petitioner was at the detention center and had been read his *Miranda* rights. *Id.* As a result, under the circumstances of this case, there was no "form of official compulsion" that denied Petitioner a "free choice to admit, to deny, or to refuse to answer" questions, thus the government did not deprive Petitioner of his ability to invoke the Fifth Amendment. *Garner*, 424 U.S. at 656–57.

2. The Court should not create a third exception to the rule that in order to invoke his Fifth Amendment privilege, one must expressly and unambiguously assert it.

As has been established, the Court has held that defendants typically cannot invoke their Fifth Amendment privilege by merely remaining silent. *See generally Roberts v. United States*, 445 U.S. 552 (1980). Instead, a witness must unambiguously invoke the privilege to benefit from it. *Murphy*, 465 U.S. at 429. Therefore, it would not make sense or follow precedent for the Court to adopt a third exception to that general rule, which would provide that "the invocation requirement does not apply where a witness is silent in the face of official suspicions." *Salinas*, 570 U.S. at 188. Doing so would "plac[e] a needless new burden on society's interest in the admission of evidence that is probative of a criminal defendant's guilt." *Id.*

Petitioner, like the defendant in *Salinas*, would have the Court adopt a third exception. R. at 8. However, allowing this gray area to become an exception would "needlessly burden the Government's interest in obtaining testimony and prosecuting criminal activity" by making it more difficult for prosecutors to admit evidence that is probative of a criminal defendant's guilt. *Salinas*, 570 U.S. at 186. As a result, the Court should avoid straying from its precedent and "decline petitioner's invitation to craft a new exception to the 'general rule' that a witness must assert the privilege to subsequently benefit from it." *Id.* (citing *Murphy*, 465 U.S. at 429).

C. Even if the trial court improperly admitted evidence of Petitioner's silence, doing so was harmless error.

Not all "trial errors which violate the Constitution automatically call for reversal." *Chapman v. California*, 386 U.S. 18, 23 (1967). Instead, the Court only considers harmful "those constitutional errors that 'affect the substantial rights' of a party." *Id.* Generally, to warrant reversal, the error must be a structural one "that affect[s] the entire conduct of the [proceeding] from beginning to end." *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (internal quotation

marks omitted). That is because "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsadall*, 475 U.S. 673, 681 (1986). Therefore, the legislature has determined, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C.A. § 2111 (West). Thus, so long as the trial court's admission of the improperly admitted evidence did not change the overall outcome of a case in light of the government's other "ample evidence of [the defendant's] guilt," the error is harmless and does not warrant reversal. *Wilchcombe*, 838 F.3d at 1191.

In *Chapman v. California*, the petitioners chose to invoke their Fifth Amendment privilege and did not testify at their trial. *Chapman*, 386 U.S. at 19. In response, "the State's attorney prosecuting them . . . fill[ed] his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom." *Id.* The Court held, "the state prosecutor's argument . . . repeatedly impressed the jury that from the failure of petitioners to testify . . . the inferences from the facts in evidence had to be drawn in favor of the state—in short, that by their silence petitioners had served as irrefutable witnesses against themselves." *Id.* at 25. The government could not demonstrate that the prosecutor's statements regarding the petitioners' silence did not lead to their convictions. *Id.* at 26. "Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession." *Id.*

In the present case, the government had several pieces of evidence that led to Petitioner's conviction. R. at 1–2. First, the prosecution presented circumstantial evidence of Petitioner's financial situation and explained that Petitioner was unable to stay afloat after the recession and

the opening of a competitor's store nearby. *Id.* at 1. It also informed the jury of Petitioner's insurance policy that covered the store in the event of a total loss. *Id.* at 2. Additionally, the government presented Sam Johnson's testimony that Petitioner was extremely anxious and paranoid the week of the accident, and that Mr. Johnson believed Petitioner was responsible for the explosion. *Id.* Unlike the state prosecutor in *Chapman*, the U.S. Attorney responsible for prosecuting Petitioner presented ample evidence outside of Petitioner's silence to warrant his conviction. *Id.* at 1–2. The prosecutor in this case also made no effort to use Petitioner's refusal to testify at his trial against him, as doing so would have inarguably been impermissible under the Fifth Amendment. *See id.* at 8. As a result, the trial court's admission of Petitioner's silence as evidence was at most a non-structural error that did not affect his substantial rights. That admission therefore amounts to harmless error, making reversal inappropriate.

CONCLUSION

Statutes of limitations are the primary means of protecting citizens from the government bringing overly stale charges against them. The Due Process Clause also plays a limited role in providing such protection. In order to establish that a government-caused preindictment delay violated the Due Process Clause, a defendant must bear a heavy burden and show: (1) that he suffered actual, substantial prejudice as a result of the delay, and (2) that the government acted in bad faith in causing the delay in order to gain some unfair advantage over the defendant. The evidence Petitioner presented suggests that he suffered some prejudice in the form of lost witnesses; however, whether that amounts to actual, substantial prejudice is questionable because he did not show that he could not corroborate his alibi by other means. Even if the Court were to hold that Petitioner did suffer such prejudice, Petitioner still cannot prevail on his due process claim, as he provided no evidence establishing that the government acted maliciously or with the

intention of gaining a tactical advantage over Petitioner when it delayed his indictment. Instead, it had legitimate reasons for the delay, including logistical and staffing issues. Mere negligence in the oversight of a case does not amount to bad faith; therefore, Petitioner failed to meet his burden on the second prong of the due process analysis. As a result, the Court should affirm the lower court's decision to uphold the indictment because the delay did not violate the Due Process Clause.

Petitioner likewise should not prevail on his second claim that the use of his post-arrest, pre-*Miranda* silence was inadmissible as substantive evidence of his guilt and that its use violated his Fifth Amendment privilege against self-incrimination. When Petitioner was arrested, he was informed of the charges against him, and he did not say anything about his alibi in response. He also did not expressly invoke his Fifth Amendment privilege at that time. In order to invoke the privilege, Petitioner would have had to unambiguously assert it. The arresting officer did not attempt to interrogate Petitioner at the time of the arrest and did not take any action that would have placed a coercive taint on the interaction. Therefore, Petitioner's failure to unambiguously invoke his privilege was not covered by any exception, and his silence should be admissible as substantive evidence against him. Thus, this Court should affirm the judgment of the Thirteenth Circuit Court of Appeals and uphold Petitioner's conviction.

CERTIFICATE OF SERVICE

We certify that a copy of Respondent's brief was served upon the Petitioner, Austin Coda, through the counsel of record by certified U.S. mail return receipt requested, on this, the 13th day of September 2021.

/s/ Team 11

Attorneys for Respondent