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 13

Attorneys for Respondent

Oral Argument Requested

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QUESTIONS PRESENTED

I. Does the Fifth Amendment to the United States Constitution prohibit the finding that a preindictment delay, which has caused the accused actual prejudice, is a violation of the defendant's Due Process rights where there is no evidence of bad faith or intentional delay on the part of the government?

II. Does the Fifth Amendment permit the government to use post-arrest, pre-Miranda silence at trial as substantive evidence of guilt when the evidence is more similar to when pre-Miranda silence that is allowed for impeachment purposes than post-Miranda silence, the defendant did not properly invoke his right to remain silent and is unable to show coercion, and the circuit courts are split on whether the evidence is admissible?

STATEMENT OF THE CASE

Statement of Facts

Defendant owned a hardware store in Plainview, East Virginia that burned down due to an explosion on December 22, 2010. R. at 1-2. An investigation was opened into the cause of the fire by the local Federal Bureau of Alcohol, Tobacco, and Firearms (ATF). R. at 2. Shortly after the ATF opened its investigation, the FBI received a tip that Defendant was struggling financially and that he had an insurance policy on the store in case of total loss. *Id.* The tip also reported that Defendant was "very anxious and paranoid" the week of the accident. *Id.* The FBI informed the United States Attorney's Office (U.S.A.O.) of the tip as it believed Defendant might have been responsible for the explosion. *Id.*

Once the U.S.A.O. received this information, it marked Defendant's case as low priority because of the unrelated state charges pending against him and political pressure to prioritize other offenses, amongst other reasons. *Id.* A high turnover rate in the Office meant that Defendant's case was assigned to multiple attorneys over the next few years. *Id.* In April 2019, the government, believing Defendant caused the explosion to receive the insurance money, arrested Defendant under 18 U.S.C. §844(1), which prohibits maliciously using an explosive to destroy property involved in interstate commerce. R. at 3. During his arrest, Defendant was informed of the charges against him and remained silent. R. at 7. Defendant did not attempt to make his alibi known to officers during his arrest. *Id.* The FBI Mirandized Defendant after this silence, but before interrogation began. *Id.* Defendant was indicted in May 2019, within the ten-year statute of limitations set by 18 U.S.C. §3295. *Id.*

At the evidentiary hearing, for the first time, Defendant claimed that he intended to raise an alibi that he was in New York during the incident and could not have been responsible for the explosion. R. at 3. Unfortunately, during the time between the incident and the arrest, those who

would have been able to corroborate this alibi were unavailable due to death or illness. *Id.* Additionally, the Greyhound ticket that Defendant took to New York was no longer in the company's system because they are only stored online for three years. *Id.*

Procedural History

On September 30, 2019, the United States District Court of the District of East Virginia denied Defendant's Motion to Dismiss the indictment for preindictment delay. R. at 1, 6. Defendant sought to dismiss the charges against him because of the delay, arguing it violated the Due Process Clause. R. at 4. The District Court denied Defendant's Motion to Dismiss because, while Defendant could show actual prejudice, he failed to show bad faith on the government's part. R. at 5-6.

On December 19, 2019, The District Court also denied Defendant's Motion to Suppress his post-arrest, pre-Miranda silence. R. at 7. Defendant sought to exclude evidence of his silence during the time after his arrest and before he was Mirandized. *Id.* The District Court denied Defendant's Motion to Suppress because the silence in response to the charges against him being read is relevant and potentially incriminating evidence that Defendant was unable to show violated his right against self-incrimination. R. at 9-10.

Defendant appealed the District Court's decision. R. at 11. On August 28, 2020, the Thirteenth Circuit Court of Appeals affirmed the District Court's denial of both the Motion to Dismiss and the Motion to Suppress and adopted the lower court's analysis. R. at 11-12. Chief Judge Martz, in his dissent, had argued that while there was no intentional delay, the government's decision to assign the case as a low-priority was a sole purpose for the delay. R. at 12. The dissent argued that the low-priority assignment was an improper purpose. Id. Defendant appealed, and this Court granted Defendant's petition for certiorari for the October 2021 Term. R. at 16.

SUMMARY OF THE ARGUMENTS

The Fifth Amendment provides that "[n]o person 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." U.S. Const. amend. V. This Honorable Court has had occasion to contemplate instances where bad faith on the part of the government, particularly intentional delays where the government seeks to gain a tactical advantage over the criminal defendant, violate the Due Process rights of a criminal defendant. This Court has not had occasion, however, to examine whether the government can infringe on a defendant's Due Process rights when there is no alleged bad faith on the part of the government. The circuit courts have split as to whether bad faith is unambiguously required for a criminal defendant to successfully argue that his Due Process rights were infringed. This Court should find that Defendant's rights were not infringed by a delay that was not caused by bad faith on the government's part.

It does not violate the Fifth Amendment for the government to utilize post-arrest, pre-Miranda silence as substantive evidence of guilt at trial because the evidence is not categorically barred, Defendant did not properly invoke his rights, and the Court's precedent shows this type of evidence should be allowed. Post-arrest, pre-Miranda silence is admissible and can be admitted for impeachment purposes without running afoul of the Constitution. Furthermore, Defendant did not unambiguously invoke his right to remain silent after his arrest. Without an unambiguous invocation of his rights, he should not be allowed to rely on them. Especially since Defendant cannot show he was coerced into giving up his rights. Finally, while the circuit courts are split on whether this silence is admissible, the courts that have allowed it fall in line with the Court's precedent. In contrast, the circuit courts that have barred post-arrest, pre-Miranda silence have done so based on an improper extension of the Court's precedent and the Miranda rights.

ARGUMENT

Standard of review:

The issue on appeal that asked where preindictment delay violates the Fifth Amendment is a question of law, which are traditionally reviewable under a *de novo* standard. *See Williams v. Taylor*, 529 U.S. 362, 400 (2000). Insofar as factual questions may be implicated, factual findings are reviewable for only for clear error. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge LLC*, -- U.S. --; 138 S.Ct. 960, 966 (2018). Fifth Amendment issues involving the right to remain silent are subject to a *de novo* standard of review. *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010). Under *de novo* review, the Court reviews the issue anew, giving no deference to the lower court's decision. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 562 (2014).

I. A PREINDICTMENT DELAY, REGARDLESS OF PREJUDICE CAUSED, DOES NOT VIOLATE THE FIFTH AMENDMENT WHERE THERE IS NO EVIDENCE OF BAD FAITH ON THE PART OF THE GOVERNMENT.

The statute of limitations is "'the primary guarantee against bringing overly stale criminal charges.'" *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)). A statute of limitations is the clear legislative intent, enacted only after the legislature has carefully balanced the interests of the State against the interests of the defendant. *Id.* at 322. While the statute of limitations is not the sole source of a criminal defendant's preindictment rights, *id.* at 324, any role that the Fifth Amendment might play in these preindictment rights is limited. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977). It is undisputed that when the government delays indictment in an attempt to gain a tactical advantage over a criminal defendant, it is an unconscionable violation of the Fifth Amendment and relief is proper. *United States v. Gouveia*, 467 U.S. 180, 192 (1984). Other delays, such as investigative

delays, do not necessarily invoke Fifth Amendment protections. *See Lovasco*, 431 U.S. at 796. Regardless of prejudice suffered, it remains unclear what role, if any, the Fifth Amendment plays in unintentional preindictment delays. The United States Circuit Courts take two different stances on the Fifth Amendment's role in a criminal defendant's preindictment rights.

The majority of circuit courts have adopted a narrow, two-prong test. *See, e.g., United States v. Sebetich,* 776 F.2d 412, 430 (3d Cir. 1985). A minority of circuits have adopted a balancing test. *See, e.g., Jones v. Angelone*, 94 F.3d 900, 904 (4th Cir. 1996); *United States v. Moran*, 759 F.2d 777, 781–82 (9th Cir. 1985). As the legislature's faithful servant, this Court seeks to interpret and enforce the legislature's intent. *See* The Federalist No. 78 (Alexander Hamilton); Ethan J. Leib & James J Brudney, *Legislative Underwrites*, 103 Va. L. Rev. 1487, 1488 (2017). As such, this Honorable Court should institute the narrow two-prong test favored by the majority of circuit courts. This Court's precedent, paired with the legislature's intent obviated by statutes of limitation, compels a two-prong test that bars preindictment relief where the government has not acted in bad faith.

A. A Narrow Two-Prong Test is Proper in Light of This Honorable Court's Holdings and the Obvious Intent of the Legislature as Demonstrated by Statutes of Limitations and the Legislature's Silence.

The narrow two-prong test, which is favored by the majority of circuit courts, is the faithful interpretation of the legislature's intent. Under the two-prong test, a defendant seeking preindictment relief before the statute of limitations has run bears the burden of meeting both prongs. *See. Sebetich,* 776 F.2d at 430. The defendant must first show that the alleged preindictment delay caused substantial prejudice to his right to a fair trial. *See, e.g., United States v. Henson*, 945 F.2d 430, 439 (1st Cir. 1991). *See also United States v. Sprouts*, 282 F.3d 1037, 1041 (8th Cir. 2002) (requiring a showing of "actual and substantial prejudice"); *United States v.*

Crouch, 84 F.3d 1497, 1500 (5th Cir. 1996) (requiring a showing of actual prejudice). If the defendant can meet that first element, then he must show that the government intentionally delayed the indictment in an attempt to gain a tactical advantage over him. *See, e.g.*, *Crouch*, 84 F.3d at 1500; *Henson*, 945 F.2d at 439; *United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018). If the defendant cannot satisfactorily show that the government delayed in bad faith, then Fifth Amendment relief is improper. *See Sebetich*, 776 F.2d at 430.

The statutes of limitations, enacted by the democratically elected officials of Congress, are the fundamental safeguard against unjust preindictment delays. *See Marion*, 404 U.S. at 322. Any judicial injection of Due Process rights contrary to the statutes of limitations is limited to "protecting against oppressive delay." *See Lovasco*, 431 U.S. at 789. Indeed, where the government forces a delay "to gain [a] tactical advantage" in the defendant's trial, such a delay is unjustifiable. *Marion*, 404 U.S. at 324. When the government does not act in bad faith, however, there is no need for Fifth Amendment intervention. *See Lovasco*, 431 U.S. at 790-91 (holding that the Fifth Amendment provides protection only where the government's reasons for delay are inadequate in light of "fundamental conceptions of justice"). The applicable statutes of limitations are congressionally designed to be the "predictable, legislatively enacted" limits on improper prosecutorial delay. *Id.* at 789.

This Honorable Court bears a heavy burden to interpret and enforce the legislature's actual intent. Therefore, where the Court seeks to supplant the legislature's enacted guidelines, something more than ordinary governmental negligence ought to be shown. Dismissal of an indictment brought within the legislatively enacted statute of limitations is a "drastic remedy." *United States v. Batie*, 433 F.3d 1287, 1293 (10th Cir. 2006). Therefore, something more severe than ordinary negligence should be shown, "no matter how high the actual proof of prejudice is." *United States*

v. Comosona, 14 F.2d 695, 696 n.1 (10th Cir. 1980). *See also Crouch*, 84 F.3d at 1505-06 (holding that clear negligence on the part of the government is insufficient for a judicial grant of relief). This Court has contemplated the severity of government infractions that warrant this drastic remedy of dismissing otherwise statutorily valid indictments. This Court's analysis in *Marion* explicitly examined the evils of an intentional delay. 404 U.S. at 325 (noting, in addition to the lack of prejudice demonstrated, that "there is no showing that the Government intentionally delayed to gain some tactical advantage").

Prosecutors are given broad discretion to investigate, indict, or even dismiss cases, so long as the government complies with legislatively enacted guidelines. The act of waiting until state prosecution has terminated is a valid exercise of prosecutorial discretion. *United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994). It is well-established that prosecutors enjoy broad discretion in determining when to seek an indictment. *United States v. Baxt*, 74 F. Supp. 2d 425, 429 (D.N.J. 1999) (citing *Lovasco*, 431 U.S. at 796). Prosecutors have the established discretion to delay indictment even where sufficient evidence for a conviction has been gathered. *Id.*; *Lovasco*, 431 U.S. at 792-94. Indeed, intruding upon a prosecutor's discretion gives rise to concerns that she will be subjected to pressures to try doubtful cases and robbed of the opportunity to fully assess the desirability of not prosecuting a particular case. *Lovasco*, 431 U.S. at 793-94. This Court has addressed the irrationality of requiring a prosecutor to bring an indictment the moment that probable cause has been established. *See Marion*, 404 U.S. at 325 n.18 (citing *Hoffa v. United States*, 385 U.S. 293, 310 (1966)). Ultimately, any holdings that invade the prosecutor's province of discretion will "subordinate the goal of orderly expedition to that of mere speed." *Lovasco*, 431 U.S. at 795.

Furthermore, if the legislature intended for a remedy that runs freely astray of established statutes of limitations and prosecutorial discretion, the legislature would have enacted such guidance. This Honorable Court has not heard preindictment delay cases for nearly half a century since the seminal decisions in *Marion* and *Lovasco*. *See* Nolan S. Clark, *A Circuit Split on the Proper Standard for Pre-Indictment Delay with Governmental Negligence*, 50 Cumb. L. Rev. 529, 535 (2020). The Circuit split has proliferated in that time, providing ample notice to Congress. *See generally, id.* Indeed, Congress has had cause to examine where criminal defendant protections are lacking. *See* 18 U.S.C. §§ 3161-3174 (2018) (increasing a defendant's rights *after* indictment but remaining silent on a defendant's *preindictment* rights). Congress's decision to remain silent on the matter urges an inference that the Legislature does not wish to advance preindictment protections. This inference is reinforced by the ample notice of preindictment delay issues provided in the formative cases of *Marion* and *Lovasco*. Congress's resolute silence supports the inference that the legislature does not reject this Court's dicta concerning intentional preindictment delays but does not intend to extend any further protections beyond the statute of limitations. As such, the narrow two-prong test, which requires such a showing of an intentional delay, is the proper standard for judicial relief in preindictment delays.

It is undisputed in the present case that the prosecution has complied with the statute of limitations established in 18 U.S.C. § 3295. R. at 3. It is also undisputed that Defendant was actually prejudiced by the preindictment delay. R. at 6. What remains in dispute is whether the government's purpose for the preindictment delay warrants the extraordinary remedy of relief pursuant to the Due Process Clause in the Fifth Amendment. *See* R. at 16. This Honorable Court took it upon itself to set a clear boundary—an intentional delay that seeks to disadvantage a criminal defendant is impermissible, regardless of the statute of limitations. *Lovasco,* 431 U.S. at

795. However, an intentional delay is the only delay that this Honorable Court has identified as reasonably permitting judicial relief for preindictment delays.

A balancing test is unwarranted. The legislature, composed entirely of democratically elected officials, has already balanced the interests of a criminal defendant against the inherent risk of prejudice that comes with any passage of time. *See Marion*, 404 U.S. at 322 n.14 (stating that statutes of limitations "represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights"). In the present statute of limitations, Congress clearly intended that prosecutors have ten (10) years to contemplate, investigate, and ultimately indict a criminal defendant being charged under subsections (f), (h), or (i) of section 844. 18 U.S.C. § 3295. Congressional deliberation is evident where Congress designed the statute of limitation to attach to only three (3) of several crimes outlined in the same section. *See* 17 U.S.C. § 844. The nuances of the alleged evil, in this case, malicious destruction by means of fire of property used in interstate commerce, have clearly already been measured by the legislature when it assigned the applicable statute of limitations. *Id.* Lesser evils have been found to warrant shorter statutes of limitations. *See, e.g.*, 18 U.S.C. § 402 (establishing a one year statute of limitations for contempt of court); 31 U.S.C. § 333 (establishing a three years statute of limitations for misuse of Treasury Department names and symbols); 15 U.S.C. § 77x (establishing a six years statute of limitations for violations of the Securities Act). In this Court's ambitions to faithfully uphold the democratically elected legislature's intent, a subversion of a clearly well-contemplated statute of limitations cannot be done lightly.

The two-prong test favored by the majority of the United States Circuit Courts resonates with this Honorable Court's precedents, faithfully maintains the legislature's apparent intent, and preserves the policies of judicial restraint while granting criminal defendant's protection from

malicious government acts. This test requires an absolute showing of the government's bad faith by requiring that the criminal defendant show that the government intentionally delayed the indictment. The government has not delayed intentionally or in bad faith. As such, a preindictment delay, regardless of actual prejudice, does not violate the Fifth Amendment of the United States Constitution where there is no such evidence of bad faith on the part of the government. Therefore, this Honorable Court should affirm the Thirteenth Circuit.

B. Even if This Honorable Court Adopts the Minority Balancing Test, a Delay That Results From the Exercise Of Prosecutorial Discretion in Prioritizing Cases and Assigning Manpower is a Permissible Purpose for Delay.

It is Respondent's position that a balancing test that seeks to weigh a defendant's prejudice against the government's purpose for delay seeks to "compare the incomparable." *See Crouch*, 84 F.3d at 1512. Should this Honorable Court, nevertheless, adopt the minority balancing test, the results are substantially similar to that of a two-prong test that requires a showing of the government's intentional delay. A balancing test still requires that a criminal defendant prove the requisite prejudice. *See, e.g., United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (requiring substantial prejudice to the defendant's ability to present a defense); *United States v. Tornabene*, 687 F.2d 312, 316 (9th Cir. 1982) (requiring an analysis of "actual prejudice to the defendant" alongside other balancing factors). Once a criminal defendant has made such a showing, the court is then tasked with balancing the relevant factors: the length of the delay and the government's reason for the delay. *See, e.g.*, *Ray*, 578 F.3d at 199; *Tornabene*, 687 F.2d at 316–17. The balancing test must examine whether the government's action in prosecuting after the alleged substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790 (internal quotations omitted). *See also Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990). While this balancing test does not require an intentional or tactical delay,

this Court's holding in *Lovasco* suggests that improper reasons for the delay are necessary to establish a due process violation. *See United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) (citing *Lovasco*, 431 U.S. at 790).

A delay resulting from the prioritization of a case is proper because prioritization is fully and properly within the government's discretion. In *United States v. Bouthot*, the court measured the government's purposes for delay where the case was not listed as a high priority and the U.S. Attorney's office was facing manpower problems. 685 F. Supp. 286, 298 (D. Mass. 1988). An indictment was not brought for over a year after the alleged larceny and firearm violations. *See id.* at 288, 291. Over the course of this year, the case assignment was reassigned to various Assistant U.S. Attorneys. *Id.* at 291. Indeed, a case that is designated a low priority and shuffled around a busy U.S. Attorney's office does not constitute an attempt "to obtain a tactical advantage" nor is it "any other improper reason." *Id.* at 292. The court found that "the passage of time between receipt of the . . . report and seeking an indictment resulted solely from the ordinary operation of a busy office and the fact that this matter was not treated as an especially high priority." *Id.* While the District Court applied the two-prong test, its analysis of the mandatory discretion within a U.S. Attorney's office is poignant. There are "more violations of federal law than the government can investigate and prosecute. Some discretion is required." *Id.* at 298.

This Honorable Court has not suggested that the assignment of manpower and investigative priorities are negative factors in any Due Process analysis. *See id. See also United States v. Bullard*, No. 91-5132, 1991 WL 154345, at *2 (4th Cir. Aug. 15, 1991) (applying a balancing test and holding that while low prioritization causing a delay is "certainly less than laudable," such reasons "do not reflect an improper purpose, or even a reckless disregard for a known risk of loss of evidence or witnesses"); *United States v. Shaw*, 555 F.2d 1295, 1299 (5th Cir. 1977) (applying a

balancing test and holding that the necessity of the allocation of manpower and assignment of priorities among investigations "is not such a deviation from elementary standards of fair play and decency or so inimical to our fundamental conceptions of justice as to deprive defendant of due process of law").

However, the government's delay is improper when the government cannot provide a valid justification for the delay. In *United States v. Sabath*, the district court examined a case where the defendant was not indicted until six (6) years after the alleged offense, while the investigation was, by the government's own admission, complete within one (1) year of the alleged offense. 990 F. Supp. 1007, 1019 (N.D. Ill. 1998). The court found that a motion to dismiss was proper and that the government had violated the defendant's Fifth Amendment rights where the government itself admitted that the investigation had been complete four (4) years before the actual indictment was sought. *Id.* at 1017. In support of this finding, the court highlighted the lack of investigative efforts *after* the investigation had been complete: no new witnesses nor documentary evidence had been sought or uncovered. *Id.* at 1016. All evidence that was used at the indictment had been ready four (4) years earlier. *Id.* at 1016–17. Consequently, the court classified the government's conduct as "reckless," *id.* at 1017, because in the balancing analysis, the investigation was "'so detrimental to the defendant's case as to be patently unfair,'" *id.* (quoting *United States v. Williams*, 783 F.2d 172, 175 n.2 (7th Cir. 1984)). While the government's conduct, in this case, was "reckless," the court nevertheless emphasized how "substantial" the government's conduct must be to override the legitimate and preferable deference to prosecutorial discretion. *See id.*

In the present case, every purpose for the government's delay can be attributed to a legitimate exercise of prosecutorial discretion. The U.S. Attorney's Office in this case finds itself in the company of heavily burdened Attorney's Offices nationwide, including those in *Bouthot*,

Shaw, and *Bullard*. It is a logistical inevitability that Assistant U.S. Attorneys must prioritize the caseload that is given to them. As the District Court in *Bouthot* recognized, there are far more federal crimes in this country than can be properly investigated and prosecuted. 685 F. Supp. at 298. The time-honored judicial deference to prosecutorial discretion is designed to accommodate this harsh reality. *See id.* Where a court is tasked with balancing the actual prejudice experienced by a defendant against the government's reasons for that delay, that court must measure the latter in terms of a "community's sense of fair play and decency." *Lovasco*, 431 U.S. at 490. A community's sense of fair play and decency requires that courts protect the prosecutorial discretion that permits prioritizing the most heinous and urgent crimes, as established by congressionally enacted statutes of limitations.

Circuits courts that apply the balancing test recognize that the assignment of manpower in a busy office and the priority categorization that facilitates investigation are *necessities*, rather than unfair or indecent decisions. *See Shaw*, 555 F.2d at 1299 (expressly stating that the logistical necessity of assigning priorities among investigations "is not such a deviation from elementary standards of fair play and decency"). The record is devoid of any suggestion that the prioritization of this case was based on any nefarious or even unfair purpose. Instead, it is undisputed that the U.S. Attorney's Office marked Defendant's case as a "low-priority" in light of logistical issues with a state charge and drug crimes that demanded higher priority. R. at 2. Furthermore, a high turnover rate in the U.S. Attorney's office resulted in assigning the case to various Assistant U.S. Attorneys. *Id.* At no point does Defendant nor the dissent in the case below suggest that these actions are anything beyond the unfortunate, yet unavoidable, realities of prosecuting crimes. A balancing test, while broader than the two-prong test, does not sweep so extensively as to punish every U.S. Attorney's office that cannot overcome logistical barriers despite their success and

diligence in indicting a defendant within the congressionally enacted statutes of limitations, as is the case here.

The balancing test is designed to provide a procedural safeguard to criminal defendants where the government lacks any justification for its delay. In this case, there is no proper allegation that the government has failed to provide justification for the preindictment delay. allegation that the government has failed to provide justification for the preindictment delay. The lower court's dissent argues that there is no evidence that the government delayed in an attempt to obtain a strategic advantage, and that the prejudice in this case, namely the loss of an alibi defense, is solely because of a "low-priority" designation. R. at 12. While such a designation and reality is "less than laudable," *Bullard*, No. 91–5132, at *2, it is not reckless, *see Sabath*, 990 F. Supp. at 1017. *United States v. Sabath* demonstrates an instance where the government can offer no legitimate purpose for its delay, no further investigation was required, no state action was pending, and, unconscionably, the investigation had already been complete some years earlier. *Id.* at 1016. Defendant cannot point to analogous conduct in this case. *Sabath* maintained that the purpose for a delay is reckless where it is so detrimental as to render the case patently unfair. The record here is clear that the U.S. Attorneys relied on their discretion to respect the completion of pending state charges and to prioritize and assign work as public policy required. R. at 2. Here, the government brought the case in as timely a matter as logistical pressures would permit: the antithesis to recklessness.

A balancing test inherently risks the infusion of a non-democratically elected official's opinion. R. at 5. However, an exacting standard that refuses to punish the government for its proper and rational use of discretion in the necessary prioritization of cases and assignment of manpower can shield courts from that risk. Even if this Court adopts the minority view that a balancing test

is appropriate, a preindictment delay that causes actual prejudice yet lacks bad faith or improper motivation on the part of the government does not violate the Fifth Amendment of the United States Constitution. Therefore, this Honorable Court should affirm the Thirteenth Circuit.

II. DEFENDANT'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE PROSECUTION'S USE OF HIS POST-ARREST, PRE-MIRANDA SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

The Fifth Amendment to the U.S. Constitution guarantees that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This is a closely held and one of the most well-known rights. In *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966), the Court recognized the importance of the Fifth Amendment guarantee against self-incrimination and held that a suspect must "first be informed in clear and unequivocal terms that he has the right to remain silent" upon his arrest. The Court held that suspects must be informed of their right because "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id.* at 469. These warnings, called the Miranda warnings or Miranda rights, insure that a defendant is aware of and can properly invoke his rights.

Usually, when a defendant is given his Miranda rights, any statements or silence that comes after is protected and cannot be used by the government during trial. *See Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993). However, there are instances where pre-Miranda silence can be used by the prosecution at trial. For example, in the absence of Miranda warnings, a defendant's silence can be used for impeachment purposes. *See Jenkins v. Anderson*, 447 U.S. 231, 240 (1980). The use of pre-Miranda silence for impeachment purposes is similar to its use as evidence of guilt. In both cases, the defendant was not made the promise that his silence would not be used against him.

There is no bar on allowing silence to be used for impeachment purposes, and nor should there be for allowing it as evidence of guilt.

Furthermore, the Fifth Amendment rights are "generally is not self-executing," they must be properly invoked for the defendant to claim the privileges assured to him by the Miranda warnings. *Minnesota v. Murphy*, 465 U.S. 420, 425, 427 (1984). This Court has held that a "requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that 'avoid[s] difficulties of proof and ... provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)). The reasoning behind this is that if police officers were required to stop at any ambiguous invoking of a Miranda right, then officers would be "required to make difficult decisions about an accused's unclear intent and face the consequence of suppression" if mistaken. *Berghuis*, at 382. However, if there was coercion, courts may hold that the waiver was involuntary and ban the use of evidence collected at trial. *Miranda*, 384 U.S. at 457–58. *See also United States v. Washington*, 431 U.S. 181, 188 (1977) (defining the test for coercion as whether "considering the totality of the circumstances, the free will of the witness was overborne.").

Additionally, some circuit courts have allowed post-arrest, pre-Miranda silence to be used as substantive evidence of guilt. *See United States v. Garcia-Gil*, 133 F. App'x 102, 108 (5th Cir. 2005);*United States v. Frazier*, 408 F.3d 1102, 1110 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1569 (11th Cir. 1991). In these circuit courts, there is no prohibition on the use of the post-arrest, pre-Miranda silence as evidence of guilt. However, some circuit courts have incorrectly held that pre-Miranda silence cannot be used as evidence of guilt. *See United States v. Bushyhead*, 270 F.3d 905, 912 (9th Cir. 2001) (extending the protection of *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), and holding that arrest is the triggering factor of when Miranda rights apply);

United States v. Moore, 104 F.3d 377, 385 (D.C. Cir. 1997) (extending Miranda rights back as far as the time of custodial interrogation). The circuit courts that have prohibited post-arrest pre-Miranda silence from being used as evidence of guilt have done so based on an improper extension of the Miranda rights and this Court's precedent.

In the present case, the government's use of Defendant's post-arrest, pre-Miranda silence was proper because it did not violate his constitutional rights and because Defendant was not coerced into relinquishing his rights. The use of Defendant's post-arrest, pre-Miranda silence is analogous to use of silence for impeachment and thus should be allowed. Defendant did not properly invoke his right to remain silent and was not coerced into forfeiting it, so he cannot rely on the Miranda protections retroactively. Therefore, this Court should affirm the lower court's decision.

A. Defendant's Post-Arrest, Pre-Miranda Silence is Similar to Silence for Impeachment and Therefore Should be Admissible as Substantive Evidence of Guilt at Trial.

The use of Defendant's post-arrest, pre-Miranda silence does not violate his right to remain silent because it is more similar to pre-Miranda silence, which can be used for the purpose of impeachment, than post-Miranda silence. Pre-Miranda silence can already be introduced for impeachment purposes. *See Jenkins*, 447 U.S. at 240. Pre-Miranda silence has been allowed under the theory that the defendant has not yet been made the promise of the Miranda rights. *See Brecht*, 507 U.S. at 628 . Without the promise of the Miranda rights, there is not a fundamental unfairness by allowing pre-Miranda silence to be used for impeachment. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986). Similarly, without the promises of the Miranda rights, there is no unfairness in using silence as evidence of guilt.

The issue of whether a defendant's silence can be used as substantive evidence of guilt has not been addressed by this Court. However, this Court has provided guidance on other issues involving a defendant's silence and the Fifth Amendment's protection. Generally, the Miranda rights guarantee that a defendant's silence will not be used against them. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982). The reasoning behind this prohibition on the use of post-Miranda silence for impeachment purposes was that it "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Brecht*, 507 U.S. at 628 (internal quotations omitted). However, the Court further held that these assurances do not apply to a defendant's silence prior to Miranda rights being given. *Id.* (citing *Jenkins*, 447 U.S. at 239). *See also United States v. Salinas*, 480 F.3d 750, 756 (5th Cir. 2007) (holding that "due process does not prohibit the prosecution from impeaching a defendant's trial testimony by referring to the defendant's pre-arrest, or post-arrest, but pre-Miranda, silence."); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (holding that comments on the defendant's pre-arrest, pre-Miranda silence were proper).

It would be improper for the Court to allow the government to comment on a defendant's silence after receiving the Miranda warnings. For example, *Doyle*, 426 U.S. at 619, the Court held that it was improper for the prosecution to ask about the defendants' post-arrest, post-Miranda silence for impeachment purposes. The defendants had already received their Miranda Rights and were under no obligation at the time of the arrest to provide the police officers with their defense. *Id.* at 616-17. Therefore, it was improper for the prosecution to ask them about their silence because "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights." *Id.* at 617. Similarly, the Court has prohibited the prosecution from

commenting on a defendant's silence at the trial as a violation of the Fifth Amendment for the same reasoning. *See Griffin v. California*, 380 U.S. 609, 613-14, 615 (1965) (holding that there may be other reasons that a defendant refuses to take the stand at trial, so the inference of guilt is improper.) It would be fundamentally unfair to allow the prosecution to comment on the refusal of the defendant to take the stand as the defendant has already been assured his silence will not be held against him.

In the present case, Defendant's silence is more similar to pre-Miranda silence being used for impeachment purposes than post-Miranda silence. The reasoning behind the prohibition outlined by the Court is that the fundamental unfairness of promising a defendant that silence will not be used against him, and then letting his silence be used for impeachment. *See Wainwright*, 474 U.S. at 291. However, in this case, the silence the government references is not protected by the assurances of the Miranda warnings. The silence that is referenced by the government in its case-in-chief and during closing arguments is the silence that occurred just after the arrest, but prior to the Miranda warnings being given to Defendant. This period of silence would be admissible for other purposes, such as impeachment. It is not improper or fundamentally unfair for the government to reference this silence because the assurances of the Miranda warnings had not been given to Defendant. He had not been Mirandized and promised his silence would not be used against him, similar to cases allowing the silence for impeachment.

Furthermore, the government is not seeking to introduce evidence of post-Miranda silence, which would be barred. In *Doyle*, the Court held that it was improper for the prosecution to use the defendant's post-arrest, post-Miranda silence for impeachment purposes. 426 U.S. 617. Silence after the Miranda warnings have been given may be not more than the defendant invoking these rights. However, the silence that was referenced during the trial is not this prohibited silence. The

government is not using silence that would be barred, like post-Miranda silence. The promise of silence not being used against Defendant had not been made yet. Therefore, because there the

silence occurred pre-Miranda warnings, it is more similar in this case to when the silence is admissible for impeachment purposes and thus should be admissible as evidence of guilt.

B. Defendant did not Unambiguously Invoke his Miranda Rights and Therefore he Cannot Rely on the Protections Guaranteed by the Miranda Rights Because he is Unable to Show Coercion.

The Miranda rights are not self-activating; they need to be properly invoked for a suspect to rely on them. It is well established that "a criminal defendant must affirmatively and unambiguously invoke his right to remain silent." *Hurd v. Terhune*, 619 F.3d 1080, 1088 (9th Cir. 2010). Similarly, in *Davis*, the Court held that if a defendant wanted to invoke his right to counsel, he must do so unambiguously. 512 U.S. at 459 (holding that having the same standard for the right to remain silent and the right to have counsel was only logical). Therefore, if a defendant wants to invoke his right to silence, it is held to the same standard: an unambiguous invocation is required. *Berghuis*, 560 U.S. at 381 ("[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously.").

If a defendant does not unambiguously invoke his rights, he should be unable to rely on them unless he is able to show coercion. For a waiver[1] of Miranda rights to be invalid, it needs to have been induced by government coercion. *See Colorado v. Connelly*, 479 U.S. 157, 169 (1986). The voluntariness of this waiver depends on "absence of police overreaching" and not any other factors. *Id.* If a defendant wants to argue that the waiver of his rights was induced by coercion, he has to show that it was made in response to police overreaching or it was induced by the

[1] Miranda rights can be waived by the defendant, either explicitly or implicitly. *See Berghuis*, 560 U.S. at 384.

government. Arrest alone, however, is not enough to coerce the defendant into relinquishing his right to remain silent. *Frazier*, 408 F.3d at 1110-11. The purpose of the Miranda rights is to "protect[ ] defendants against government coercion leading them to surrender rights protected by the Fifth Amendment." *Connelly*, 479 U.S. at 170. It does not extend to any statement or action the defendant finds harmful to his case. In this case, Defendant cannot show that he unambiguously invoked his right to remain silent before he was given his Miranda rights or that he was coerced into relinquishing his rights.

i. Defendant did not unambiguously invoke his Miranda rights and therefore should be barred from relying on the Miranda rights to protect his silence.

An unambiguous invocation of the defendant's rights results in an objective inquiry that can provide guidance to police officers. *Berghuis*, 560 U.S. at 381. Police officers will not have to guess when a defendant is attempting to or is ambiguously seeking to enforce his rights. Making police officers do so "would place a significant burden on society's interest in prosecuting criminal activity" and on the officers to make determinations as to when rights are invoked. *Id.* at 382. While allowing an ambiguous invocation of a defendant's right to remain silent may "add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," it is simply not practical. *Moran v. Burbine*, 475 U.S. 412, 425 (1986). Allowing an investigation to cease simply because the accused remains largely silent in response to questions does not add any protection to the accused not already encompassed in the Miranda rights. *See Berghuis*, 560 U.S. at 382.

For example, in *United States v. Rodriguez*, 518 F.3d 1072, 1074 (9th Cir. 2008), The Circuit Court held that the defendant had not unambiguously invoked his Miranda rights after they were read to him. The defendant was arrested and read his Miranda rights. *Id.* 1074-75. In response

to the officer informing the defendant of his rights and being asked if he would like to speak with the officer, the defendant responded, "I'm good for the night." *Id.* at 1075. The Ninth Circuit found this statement to be ambiguous as to whether the defendant was invoking his right to remain silent. *Id.* 1077. The court explained that not all waivers of Miranda rights need to be express, but they must still be unambiguous. *Id.* at 1080. Even in circumstances where Miranda rights were given, the defendant needed to unambiguously invoke them to be able to rely on them. *See also United States v. Okatan*, 728 F.3d 111, 119 (2d Cir. 2013) (the defendant affirmatively invoked his right to silence before being silent, so he could rely on that privilege); *Rivera*, 944 F.2d at 1569 (holding for Miranda purposes, "silence is more than mere muteness").

In this case, Defendant did not invoke his Miranda rights, ambiguously or otherwise. In response to the officer informing Defendant why he was under arrest, Defendant simply stayed silent. R. at 7. It would not further the goal of the Miranda rights to allow Defendant to claim that this silence was protected like post-Miranda silence is. Similar to *Rodriguez*, Defendant's silence was ambiguous as to whether he was invoking his Miranda rights. Allowing Defendant to rely on his ambiguous invocation would place a significant burden on law enforcement and on the social interest in prosecuting criminal activity. Officers would never be able to conduct investigations if defendants are able to ambiguously invoke their rights. The requirement for an unambiguous invocation is to protect the rights of the accused as well. It makes sure that questioning stops when rights are invoked. Defendant did not properly invoke his rights and he should not benefit from that ambiguity. If Defendant intended to rely on his right to remain silent, then he should have informed Police at the earliest possibility to protect that right.

ii. Defendant is unable to show government coercion that led to him forfeiting his right to silence.

For a defendant to prevail on a coercion claim, he must show actual conduct by the government that led to him forfeiting his rights. Arrest alone is not enough to coerce the defendant into relinquishing his right to remain silent. *See Fletcher*, 455 U.S. at 606. In *Frazier*, 408 F.3d at 1110–11, the Eighth Circuit held that the prosecutor's comments on the defendant's silence before and during the arrest, but pre-Miranda, were not a violation of the Fifth Amendment. When the defendant was told why he was being arrested, he did not say anything. *Id.* at 1107. The Eight Circuit held that although the defendant was in custody when he was silent, there was no government action that compelled him to be silent. *Id.* at 1111. Therefore, the use of the defendant's silence, before the receipt of Miranda rights, as substantive evidence of guilt was not a violation of the Fifth Amendment. *Id.* For a defendant to relinquish a right, "the relinquishment . . . must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421. The totality of the circumstances surrounding the interrogation has to show that the defendant was coerced or unaware of the consequences for waiving his rights. *Id. See also Salinas v. Texas*, 570 U.S. 178, 181, (2013) (holding that the Fifth Amendment was not violated by using the defendant's pre-arrest silence because the defendant has voluntarily spoken with the police and answered their questions). Therefore, he could not claim that he had been coerced by the government into forfeiting his privilege involuntarily

In the present case, Defendant had not been given his Miranda right nor had he been exposed to government coercion that may have led to him forfeiting his rights. In *Salinas*, the Court held that because the defendant did not explicitly invoke his Fifth Amendment right against self-incrimination, he could not claim it applied retroactively. 570 U.S. at 181. Similarly,

Defendant did not explicitly claim his right to remain silent after being placed under arrest. R. at 7. Defendant did not state his wish to invoke his right or anything that would defend him against the charges. After being placed under arrest, Defendant did not give the police officers any indication that he was attempting to invoke his rights.

Furthermore, there was no action by the officers during this post-arrest, pre-Miranda time where Defendant was coerced into relinquishing his right to remain silent. In *Frazier*, the Circuit Court held that arrest is not enough to show government coercion. 408 F.3d at 1111. To show government coercion into relinquishing his rights, Defendant would have to show that the circumstances surrounding his arrest were coercive, such that he involuntarily relinquished the right or was unaware of the consequences. Neither of these circumstances are present in the record. *See* R. at 7. Officers were not coercive to Defendant in an attempt to make him waive his rights. Instead, the officer informed Defendant of the charges, to which he remained silent. *Id.* There was no government action that compelled Defendant's silence and the arrest alone is not enough.

C. Circuit Courts are Split on Whether to Allow Post-Arrest, Pre-Miranda Silence as Substantive Evidence of Guilt, but Those That do Fall in Line With This Court's Precedent.

Circuit courts are split on whether to allow post-arrest, pre-Miranda silence to be used as substantive evidence of guilt. The Fourth, Fifth, Eighth, and Eleventh Circuits all allow it as constitutionally permissible under the Fifth Amendment. *See Garcia-Gil*, 133 F.App'x at 102; *Frazier*, 408 F.3d 1102; *Rivera*, 944 F.2d 1563; *United States v. Love*, 767 F.2d 1052 (4th Cir. 1985). Conversely, the First, Seventh, Ninth, and the D.C. Circuits have barred it as being a violation of the Fifth Amendment. *See United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000); *Moore*, 104 F.3d 377 ; *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989). The circuit courts have disagreed on when and how

the Miranda protections apply to a defendant who has been taken into custody. However, this Court's precedent makes it clear that in the absence of Miranda rights, silence is admissible for some legitimate purposes, such as impeachment. Therefore, the circuit courts that allow pre-Miranda silence to be used should guide this Court's decision.

In *Love*, the Fourth Circuit considered whether the prosecution could reference the defendant's pre-Miranda silence via the questioning of a DEA agent. 767 F.2d. at 1063. The Circuit Court relied on *Doyle* in determining that the use of the silence was permissible because the silence in question was pre-Miranda silence. *Id.* The Court in *Doyle* had been clear that the only silence that was inadmissible was post-arrest, post-Miranda silence, not pre-Miranda silence. *Id.* The Fourth Circuit also referenced *Fletcher*, finding that the Supreme Court "refined its rule in Doyle to permit testimony concerning a defendant's silence where the defendant has not 'received any Miranda warnings during the period in which he remained silent immediately after his arrest.'" *Id.* (quoting *Fletcher*, 455 U.S. at 606). *See also Rivera*, 944 F.2d at 1568, 1569 (holding that the government can comment on the defendant's silence post-arrest, pre-Miranda during the trial without running afoul of the Fifth Amendment).

Similarly, in *Garcia-Gil*, the Fifth Circuit held that the use of the defendant's post-arrest pre-Miranda silence did not violate the Fifth Amendment. 133 F.App'x at 108. The Fifth Circuit held that the defendant was unable to show there was a distinction between silence used as impeachment evidence or as substantive evidence of guilt. *Id.* Furthermore, the Fifth Circuit held that the use of pre-Miranda silence is not necessarily unconstitutional and that the silence is probative. *Id.* The use of the pre-Miranda silence did not violate the defendant's constitutional rights because the constitution does not preclude "proper evidentiary use and prosecute comment about every communication or lack thereof by the defendant which may give rise to an

incriminating inference." *Id.* at 107-108. *See also Frazier*, 408 F.3d at 1110 (holding that the use of the defendant's silence did not violate his Fifth Amendment rights)

In contrast, in *Bushyhead*, 270 F.3d at 911-12, the Ninth Circuit held that the introduction of the defendant's post-arrest, pre-Miranda silence was a Fifth Amendment violation. The court held that regardless of when the rights are read to the defendant, comment on his exercising of those rights is impermissible. *Id.* at 912. Additionally, the court explained that comments by the government on the defendant's silence had the same effect as violating his right to remain silent. *Id. See also United States v. Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001) (holding that post-arrest, pre-Miranda silence could not be used as substantive evidence of guilt because it would be impermissible to allow silence in the face of pre-Miranda questioning to be used against a defendant); *Whitehead*, 200 F.3d at 639 (extending the protections of *Doyle* to the post-arrest, pre-Miranda context, regardless of whether the warnings are actually given).

Along the same lines, in *Moore*, the D.C. Circuit extended the protections of the Miranda rights as far back as custodial interrogation. 104 F.3d at 385. This extension of the Miranda rights barred the prosecution introducing evidence of the defendant's post-arrest, pre-Miranda silence. The Circuit Court reasoned that there was no case law that suggested that the protections only attach when questioning begins. *Id.* The Circuit Court also held that it "simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Id.* at 386. However, this Court has been clear that the rights must be invoked before they can be relied upon. *See Berghuis*, 560 U.S. at 381; *Moran*, 475 U.S. at 425.

The Ninth Circuit overextended *Doyle* beyond what this Court intended. In *Doyle*, this Court held that it would be impermissible to use post-arrest, post-Miranda silence for impeachment purposes only. *See* 426 U.S. at 619. However, in *Jenkins*, 447 U.S. at 240, this Court clarified that

pre-Miranda silence could be used for impeachment purposes. Additionally, in *Fletcher*, 455 U.S. at 607, the Court held that in the absence of the assurances of the Miranda rights, it does not violate the Constitution for the state to be able to ask about post-arrest silence for impeachment purposes. The Ninth Circuit's overextension of *Doyle* directly goes against this precedent because pre-Miranda silence is not categorically barred from admission at trial. The circuit courts that have followed similar rules have also overextended the protections of Miranda. Additionally, it would place a significant burden on society's interest in prosecuting criminal activity because it would unnecessarily burden police investigations. Extending the Miranda rights this way may marginally add to its purpose, but it is impractical in nature. Overextending the right does not provide any extra protection for the accused that is not already included in the Miranda rights.

When considering this Court's precedent, it is obvious that Miranda rights need to be invoked to apply to Defendant's pre-Miranda silence and that they do not apply before their invocation. In *Berghuis*, 560 U.S. at 381, this Court held that the Miranda rights must be unambiguously invoked by the defendant for him to claim their protections. Similarly, in *Murphy*, 465 U.S. at 425, 427, this Court held that the Miranda rights were not self-executing; the defendant must invoke them and cannot merely remain silent. The circuit courts that have extended Miranda rights protections to pre-Miranda silence have gone against this precedent. They overextend the cases they rely upon to include silence that is not protected. The D.C. Circuit improperly extended the right against self-incrimination to all custodial interrogations. However, this Court has not held that custody is so inherently coercive that suspects need any added protection. In fact, the Court held in *Moran*, 475 U.S. at 425, that it would be impractical to attach the Miranda rights protections to custody when they are not invoked because of the burden it would place on police officers.

The Fourth, Fifth, Eighth, and Eleventh Circuits fall more in line with this Court's precedent than the other circuit courts. These circuit courts paint a holistic picture of when and how post-arrest, pre-Miranda silence can be used as substantive evidence of guilt. Without the promises of the Miranda rights, or an invocation by the defendant, it would be improper to attach its protections to the defendant's silence. There is no fundamental unfairness in referencing this silence because there were no assurances made to Defendant it would not be used against him. Additionally, without Defendant unambiguously invoking his right, by merely being mute, it is unclear if he is intending to invoke these rights. Without the unambiguous invocation, the police officers are left to guess when a defendant wishes to use his rights. Allowing post-arrest, pre-Miranda silence to be used as substantive evidence of guilt falls in line with this Court's precedent. Therefore, this Court should affirm the Thirteenth Circuit's holding.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the ruling of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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/s/ Team 13

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