
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 PETITIONER

Team 18
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED.....	viii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT AND AUTHORITIES.....	6
I. PRE-INDICTMENT DELAY THAT CAUSES ACTUAL PREJUDICE VIOLATES DUE PROCESS REGARDLESS OF THE GOVERNMENT’S MOTIVE	6
A. This Court Should Adopt the Balancing Approach, as Opposed to the Rigid “Two-Prong” Test, When Assessing the Constitutionality of Prejudicial Pre-Indictment Delay.....	7
1. The balancing approach follows this Court’s pronouncements that the due process inquiry should be flexible.....	10
2. The balancing test follows the case-by-case approach this Court uses to assess delays in similar contexts.....	11
3. Although this Court has held that the prosecutors’ improper motive can establish a due process violation, this Court has never held that an improper motive is <i>required</i>	13
B. Under the Balancing Approach, Coda’s Charges Should Be Dismissed, Because Extreme Pre-Indictment Delay Has Resulted in Actual Prejudice.....	14
1. Coda has no way of <i>really</i> proving the government’s reasons or motives for delaying indictment	15
2. Extreme prosecutorial delay strips Coda of the ability to present a viable defense.....	16
a. <i>Witnesses die or become unavailable</i>	16
b. <i>Memories fade</i>	17
c. <i>Evidence is lost</i>	17

II. THE ADMISSION OF CODA’S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT VIOLATES HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION	18
A. This Court Should Protect the Fifth Amendment Privilege Against Self-Incrimination by Removing the Verbal Invocation Requirement as Outlined in <i>Salinas</i>	20
B. This Court Should Extend Fifth Amendment Protections to Post-Arrest but Pre- <i>Miranda</i> Situations to Avoid Misconduct by Arresting Officers Who Withhold <i>Miranda</i> Warnings to Induce Silence as Evidence of Guilt	23
C. Admitting Silence as Evidence of Guilt Prejudicially Skews the Adversarial Balance in Favor of the Prosecution Because the Only Way to Challenge the Evidence Would Be to Compel the Defendant to Take the Stand Against Himself, Directly Violating the Fifth Amendment	27
CONCLUSION.....	30

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

Barker v. Wingo,
407 U.S. 514 (1972).....11, 16

Berghuis v. Thompkins,
560 U.S. 370 (2010).....22

Betterman v. Montana,
136 S. Ct. 1609 (2016).....13

Dickey v. Florida,
398 U.S. 30 (1970).....16

Doyle v. Ohio,
426 U.S. 610 (1976).....23

Griffin v. California,
380 U.S. 609 (1965).....28, 30

Hoo v. United States,
484 U.S. 1035 (1988).....8

Klopper v. North Carolina,
386 U.S. 213 (1967).....16

Mathews v. Eldridge,
424 U.S. 319 (1976).....7, 10, 11

Minnesota v. Murphy,
465 U.S. 420 (1984).....22, 25

Miranda v. Arizona,
384 U.S. 436 (1966).....22, 23, 25, 26

Murdock v. Pennsylvania,
319 U.S. 105 (1943).....29

Old Chief v. United States,
519 U.S. 172 (1997).....29

<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988).....	6
<i>Quinn v. United States</i> , 349 U.S. 155 (1955).....	20
<i>Rothgery v. Gillespie County</i> , 554 U.S. 191 (2008).....	15
<i>Salinas v. Texas</i> , 570 U.S. 178 (2013).....	19, 20, 21, 26
<i>United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency</i> , 461 U.S. 555 (1983).....	12
<i>United States v. Hale</i> , 422 U.S. 171 (1975).....	29
<i>United States v. Leon</i> , 468 U.S. 897 (1984).....	15
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977).....	7, 8, 13, 14
<i>United States v. Marion</i> , 404 U.S. 307 (1971).....	7, 13, 16
<i>United States v. Valenzuela-Bernal</i> , 458 U.S. 858 (1982).....	17
<i>Wainwright v. Greenfield</i> , 474 U.S. 284 (1986).....	23

UNITED STATES COURTS OF APPEALS CASES:

<i>Howell v. Barker</i> , 904 F.2d 889 (4th Cir. 1990)	8, 9, 12, 14
<i>Stoner v. Graddick</i> , 751 F.2d 1535 (11th Cir. 1985)	9

<i>United States v. Beckett</i> , 208 F.3d 140 (3d Cir. 2000).....	8
<i>United States v. Benson</i> , 846 F.2d 1338 (11th Cir. 1988)	16
<i>United States v. Breeden</i> , 366 F.3d 369 (4th Cir. 2004)	6
<i>United States v. Brown</i> , 959 F.2d 63 (6th Cir. 1992)	8
<i>United States v. Cornielle</i> , 171 F.3d 748 (2d Cir. 1999).....	8
<i>United States v. Crouch</i> , 84 F.3d 1497 (5th Cir. 1996) (en banc)	8
<i>United States v. DeClue</i> , 889 F.2d 1465 (6th Cir. 1990)	15
<i>United States v. Engstrom</i> , 965 F.2d 836 (10th Cir. 1992)	8
<i>United States v. Frazier</i> , 408 F.3d 1102 (8th Cir. 2005)	19
<i>United States v. Hernandez</i> , 476 F.3d 791 (9th Cir. 2007)	19
<i>United States v. Irizarry-Colon</i> , 848 F.3d 61 (1st Cir. 2017).....	8
<i>United States v. Jackson</i> , 446 F.3d 847 (8th Cir. 2006)	8
<i>United States v. Love</i> , 767 F.2d 1052 (4th Cir. 1985)	25
<i>United States v. Mills</i> , 925 F.2d 455 (D.C. Cir. 1991).....	8
<i>United States v. Moore</i> , 104 F.3d 377 (D.C. Cir. 1997).....	24

<i>United States v. Moran</i> , 759 F.2d 777 (9th Cir. 1985)	8
<i>United States v. Okatan</i> , 728 F.3d 111 (2d Cir. 2013).....	19
<i>United States v. Rogers</i> , 118 F.3d 466 (6th Cir. 1997)	15
<i>United States v. Wetherald</i> , 636 F.3d 1315 (11th Cir. 2011)	8

STATE CASES:

<i>State v. Oppelt</i> , 257 P.3d 653 (Wash. 2011).....	10
<i>State v. Stokes</i> , 248 P.3d 953 (Or. 2011)	12

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. V.....	1, 7, 18, 20, 21
---------------------------	------------------

STATUTES:

18 U.S.C. § 844(i).....	2, 3, 18, 22
18 U.S.C. § 3295.....	2, 18

FEDERAL RULES:

Fed. R. Evid. 403	29
-------------------------	----

SECONDARY SOURCES:

Phyllis Goldfarb,
*When Judges Abandon Analogy: The Problem of
Delay in Commencing Criminal Prosecutions*,
31 Wm. & Mary L. Rev. 607 (1990)14

7 *Jones on Evidence* § 61:4 (7th ed. 2004)17

QUESTIONS PRESENTED

- I. Where pre-indictment delay has caused actual prejudice to the accused's ability to present a viable defense, does the Due Process Clause of the Fifth Amendment require (1) the defendant to prove the prosecution had an improper motive to gain a tactical advantage; or (2) that courts balance the weight of the prejudice to the defendant against the reasons (or lack thereof) for the delay?

- II. Where the government uses post-arrest but pre-interrogation and pre-*Miranda* silence as evidence of guilt, does the Self-Incrimination Clause of the Fifth Amendment prevent this evidence from being admitted as substantive evidence of the defendant's guilt?

STATEMENT OF THE CASE

The Fifth Amendment to the U.S. Constitution. The Fifth Amendment articulates procedural safeguards to protect the rights of the criminally accused. One such articulation is the Self-Incrimination Clause, which protects persons accused of committing a crime from being forced to be a witness against themselves. U.S. Const. amend. V. Another articulation is the Due Process Clause, which seeks to preserve and protect fundamental rights and ensure that any deprivation of life, liberty, or property occurs in accordance with procedural safeguards. U.S. Const. amend. V. Due process demands that each U.S. citizen is entitled to fair and equitable treatment through the judicial process. U.S. Const. amend. V.

Petitioner Austin Coda. Austin Coda (“Coda”) is a small business owner from a humble town in Eastern Virginia. R. at 1. He opened his hardware store in 2002 and enjoyed the success of his profitable business until he fell victim to the 2008 financial crisis. R. at 1. His financial difficulties were further exacerbated in 2009 when a large chain store opened nearby, taking away many of his remaining customers. R. at 1. By 2010, Coda was barely generating enough money to keep his business open or maintain the building. R. at 1.

The Explosion. On December 22, 2010, Coda’s hardware store exploded. R. at 2. After investigating the root cause of the fire, the Federal Bureau of Alcohol, Tobacco, and Firearms found evidence that cold weather caused a faulty gas line to leak, causing the explosion. R. at 2. After the investigation, Coda’s friend contacted the Federal Bureau of Investigation (FBI) to suggest Coda may have intentionally destroyed the building to cash in on his insurance policy. R. at 2. The FBI passed this information along to the U.S. Attorney’s Office. R. at 2. The U.S. Attorney’s Office marked the case “low-priority,” and did not seek an indictment against Coda at that time. R. at 2.

Pre-Indictment Delay. The U.S. Attorney’s Office realized the statute of limitations was about to run out in Coda’s case under 18 U.S.C. § 3295. R. at 2, 3. The government then indicted Coda nine years and five months after the explosion. R. at 2, 3. The prosecution provided two justifications for the pre-indictment delay: Coda’s case being “low-priority” and the high employee turnover within the U.S. Attorney’s Office. R. at 2.

Coda’s Alibi Defense. During the evidentiary hearing, Coda testified that he planned on raising an alibi defense at trial to prove that he was not in the vicinity at the time of the explosion. R. at 3. Coda further testified that every year until 2015, he traveled on a Greyhound bus to visit his family in New York to celebrate his birthday on December 22nd. R. at 3. Coda asserts that he was in New York celebrating his birthday on the night of the explosion. R. at 3. Unfortunately, during the pre-indictment delay, four of Coda’s alibi witnesses died, and the surviving alibi witness has dementia. R. at 3. Moreover, records of his Greyhound bus ticket that would prove he was in New York on the night of the explosion are no longer retrievable. R. at 3. Almost ten years after the explosion, Coda no longer has any evidence to corroborate his alibi. R. at 3.

Arrest and Conviction. On April 23, 2019, Coda was arrested by the FBI and brought into custody. R. at 7. The arresting agents informed Coda of the charges against him under 18 U.S.C. § 844(i) while transporting him to the detention center. R. at 3, 7. Coda was not interrogated when placed under arrest or when being transported to the detention center. R. at 7. While under custodial arrest at the detention center, the arresting agents waited to interrogate Coda. R. at 7. Before interrogation began, Coda invoked his Fifth Amendment right to remain silent. R. at 7. The officers subsequently read Coda his *Miranda* rights. R. at 7.

The prosecution alleges that Coda destroyed his small business to collect insurance money. R. at 3. It is further alleged that Coda's invocation of his Fifth Amendment privilege against self-incrimination is substantive evidence of his guilt. R. at 7. Coda's silence was admitted as evidence of guilt in the prosecution's case-in-chief. R. at 10. Other than Coda's silence, the evidence presented at trial was circumstantial and insufficient to prove guilt beyond a reasonable doubt. R. at 15. At trial, Coda was convicted under 18 U.S.C. § 844(i) for maliciously destroying property with an explosive and was sentenced to ten years in prison. R. at 11.

Procedural Background. Coda filed two pretrial motions to the United States District Court for the District of East Virginia: a (1) Motion to Dismiss for a prejudicial pre-indictment delay that violated the Due Process Clause, and a (2) Motion to Suppress evidence of his post-arrest but pre-interrogation and pre-*Miranda* silence. R. at 11. Coda's Motion to Dismiss was denied by the United States District Court for the District of East Virginia on September 30, 2019, and his Motion to Suppress was denied shortly after on December 19, 2019. R. at 11. The lower court held that although Coda proved the government's pre-indictment delay caused actual and substantial prejudice, he failed to prove the government acted in bad faith. R. at 6. The court also held that admitting Coda's post-arrest, but pre-interrogation and pre-*Miranda* silence did not violate the Fifth Amendment because Coda did not verbally invoke the privilege. R. at 8–10. Coda appealed the trial court's denial of both motions, seeking to have his conviction overturned and charges dismissed. R. at 11. The United States Court of Appeals for the Thirteenth Circuit adopted the district court's analysis and affirmed the trial court's rulings on both issues. R. at 12.

Order Granting Writ of Certiorari. Coda submitted a Petition for Writ of Certiorari to the U.S. Supreme Court, which was granted on July 9, 2021. R. at 16. Coda contends that the government's pre-indictment delay caused substantial prejudice and violated the Fifth

Amendment Due Process Clause, regardless of the prosecutorial motive for the extensive delay. R. at 3. Coda also contends that using his post-arrest but pre-interrogation and pre-*Miranda* silence as substantive evidence of guilt violates his Fifth Amendment privilege against self-incrimination. R. at 7.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of East Virginia incorrectly denied Coda's Motion to Dismiss and Motion to Suppress, leading to violations of Coda's Fifth Amendment right to due process and his privilege against self-incrimination. This Court should reverse the judgment of the United States District Court for the District of East Virginia and dismiss the charges.

Due Process. The Fifth Amendment guarantees a defendant the right to equitable treatment through the judicial process, regardless of innocence or guilt. This Court has held that when a defendant has been unduly prejudiced due to extreme pre-indictment delay, the criminal charges should be dismissed, regardless of the prosecution's motives. In addition, this Court has consistently held that the due process inquiry demands a flexible balancing test, not any rigid "two-prong" test. The rigid "two-prong" test adopted by the lower courts is misaligned with the flexible due process inquiry and goes against the balancing approach this Court has adopted in similar contexts.

Even though this Court has held that proof of an improper motive by the prosecution can establish a due process violation, this Court has never held that an improper motive is required. And requiring a defendant to prove the government's motives for delaying prosecution is unreasonable and places an insurmountable burden on the defendant. Finally, extreme pre-

indictment delay strips the accused of his right to present a viable defense, especially when all of his evidence was destroyed during the delay.

Self-Incrimination. The Fifth Amendment also provides that persons involved in a criminal case should be protected against self-incrimination. This Court has recognized the importance of this protection in trial settings. It has also extended this constitutional right to pre-trial settings, like custodial interrogations, due to their inherently coercive nature. Currently, a divide exists amongst the circuit courts on when exactly Fifth Amendment protections begin in a criminal case.

To access the privileges afforded under the Fifth Amendment, this Court held that those facing criminal charges needed to verbalize the invocation of their constitutional right. This requirement, however, does not align with the explicit language of the Self-Incrimination Clause, which only requires that the person invoking their right be involved in a criminal case. Because of this requirement, the prosecution has been allowed to introduce an accused's invocation of silence as substantive evidence of guilt if the right is not verbally expressed. The adversarial balance is prejudicially skewed in favor of the prosecution by admitting silence as evidence of guilt. Furthermore, it leaves the door wide open for misconduct by arresting officers that may withhold *Miranda* warnings to elicit silence from the accused as evidence of guilt.

This Court should correct the errors of the lower courts by (1) adopting the balancing approach as the proper test for assessing due process violations for pre-indictment delay; and (2) reconsidering the verbal requirement for invoking the right to remain silent for persons facing a criminal case. Under the balancing approach, Coda's case should be dismissed because of the extreme prejudice and the government's inability to provide any real reasons for such a long delay. Because the Fifth Amendment protects persons facing criminal charges, the admittance of

Coda's silence as evidence of guilt directly violates the constitutional protection against self-incrimination. Therefore, this Court should reverse the judgment of the district court and dismiss the charges.

ARGUMENT AND AUTHORITIES

This case involves questions of law, so the standard of review is *de novo*. *United States v. Breeden*, 366 F.3d 369, 373 (4th Cir. 2004). The questions of law at issue are whether there were Fifth Amendment violations of the Due Process Clause and the Self-Incrimination Clause in the prosecution of Austin Coda. Questions of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. PRE-INDICTMENT DELAY THAT CAUSES ACTUAL PREJUDICE VIOLATES DUE PROCESS REGARDLESS OF THE GOVERNMENT'S MOTIVE.

After nine years and five months of delay, Austin Coda was indicted for allegedly burning down his hardware store to collect insurance money. R. at 2–3. On the date of the incident, Coda claimed to be out of the state and thus had a strong alibi that would have removed him from these proceedings. R. at 3. He had five witnesses and the Greyhound Bus ticket he purchased to travel out of state to corroborate his alibi. *Id.* During the pre-indictment delay, four witnesses died, and the surviving witness was diagnosed with dementia. *Id.* And the records of his Greyhound bus ticket are no longer retrievable. *Id.*

Yet, Coda is still expected to defend himself. This delay has resulted in an undue amount of prejudice towards Coda. The prosecution has no valid reason for the delay, other than his case was marked “low priority,” and there was high turnover in the U.S. Attorney's Office. *Id.* Coda should not have to prove the prosecution's improper motives to prove there has been a due process violation. And this Court has never required such a showing even under the “two-prong”

test. *See United States v. Lovasco*, 431 U.S. 783 (1977). Prosecuting Coda for this alleged crime, at this stage, is unduly burdensome and a violation of his constitutional right to due process.

The Due Process Clause may be implicated when the statute of limitations has not yet run. And although the statute of limitations alone generally governs the extent of permissible pre-indictment delay, extraordinary circumstances may trigger due process implications. It is pertinent that “the statute of limitations does not fully define [a party’s] rights with respect to the events occurring prior to the indictment.” *United States v. Marion*, 404 U.S. 307, 324 (1971).

Furthermore, “the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that . . . pre-indictment delay . . . caused substantial prejudice . . .” regardless of the relevant statute of limitations. *Id.* The sole fact that the statute of limitations has not yet run does not mean there has not been a Due Process violation.

This Court should adopt the balancing test for examining constitutional violations in the context of pre-indictment because it aligns with the demands of the due process inquiry. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *see also Lovasco*, 431 U.S. 783.

A. This Court Should Adopt the Balancing Approach, as Opposed to the Rigid “Two-Prong” Test, When Assessing the Constitutionality of Prejudicial Pre-Indictment Delay.

The Due Process Clause expressly “guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.” U.S. Const. amend. V. Every United States citizen charged with a criminal offense is guaranteed the right to a fair trial. If due process has been violated, the charges should be dismissed.

Historically, courts have adopted two competing approaches to consider how the Due Process Clause applies to excessive pre-indictment delay. Supreme Court Justice White

acknowledged that the federal circuits were in “continuing conflict” over “the correct test for determining if prosecutorial pre-indictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment.” *Hoo v. United States*, 484 U.S. 1035, 1035–36 (1988) (White, J., dissenting from denial of certiorari). The split between the circuit courts and state courts is between the rigid “two-prong” test¹ and the balancing approach.²

Under the two-prong test, a defendant must prove two elements to show a due process violation has occurred. A defendant must show (1) that the prosecution’s delay has caused some actual prejudice to his defense; and (2) that the delay was occasioned by “an improper prosecutorial motive.” *Hoo*, 484 U.S. at 1036 (White, J., dissenting from denial of certiorari). To satisfy the second prong, a defendant must prove that the prosecution’s delay was to gain a tactical advantage over the defendant or for some other improper purpose. Under this test, if the prosecution’s delay is for any other reason, the prejudice is irrelevant, and the delay cannot have violated due process.

In the years following *Lovasco*, courts applying the “two-prong” test have concluded that “the constitutional significance of various reasons for delay” is *zero* unless there is proof of intentional or reckless misconduct. 431 U.S. at 797. Some of these courts justify the adoption of the improper motive requirement because this Court has not “recognize[d] a claim of pre-indictment delay absent some bad faith or improper purpose.” *United States v. Crouch*, 84 F.3d

¹ *United States v. Irizarry-Colon*, 848 F.3d 61, 70 (1st Cir. 2017); *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999); *United States v. Beckett*, 208 F.3d 140, 150–51 (3d Cir. 2000); *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (en banc); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006); *United States v. Engstrom*, 965 F.2d 836, 838–39 (10th Cir. 1992); *United States v. Wetherald*, 636 F.3d 1315, 1324 (11th Cir. 2011); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991).

² *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

1497, 1510 (5th Cir. 1996) (en banc); *Stoner v. Graddick*, 751 F.2d 1535, 1541–42 (11th Cir. 1985) (adopting the improper motive requirement because even though this Court did not expressly require that the delay was due to bad faith by the prosecution to gain a tactical advantage it “implied” and “strongly hinted” support for it). The improper motive requirement fails to address the case-by-case analysis that due process demands and thus does not provide Coda his constitutional protections.

Like the courts that follow the strict two-prong test, the courts that have adopted the balancing approach “put the burden on the defendant to prove actual prejudice.” *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). But, these courts then “balance the defendant’s prejudice against the government’s justification for delay.” *Id.* These courts do not consider the prejudice and the prosecution’s reasons for delay as two isolated inquiries. Instead, these courts balance both inquiries simultaneously and draw a conclusion by balancing the evidence on a case-by-case basis. As a result, these courts can consider whether there has been some actual prejudice to the defendant *and* consider the degree of prejudice as delay becomes more extreme. Furthermore, these courts weigh the “particular prejudice” against the prosecution’s “reasons for delay.”

In addition, these courts have rejected the improper motive requirement as unduly rigid and strict. They further reasoned that this Court’s adjudications of pre-indictment delay cases have alluded to a “case-by-case inquiry based on the circumstances of each case” rather than “a black-letter test for determining unconstitutional pre-indictment delay.” *Howell*, 904 F.2d at 895. The Fourth and Ninth Circuits have adopted the balancing approach. The highest courts of Florida, Hawaii, Illinois, Louisiana, Maine, Montana, New Hampshire, Ohio, Oregon, South Carolina, Washington, and West Virginia have also adopted the balancing approach.

This Court should adopt the balancing approach because it mirrors the flexible due process inquiry and prevents unfair administration of justice. In addition, it will allow for lower courts to follow the same test when making judgments about prejudicial pre-indictment delays. Further, this Court needs to establish a clear test because due process should not be based on the state where a defendant is charged with a crime or whether the delay involved state versus federal indictments.

1. The balancing approach follows this Court’s pronouncements that the due process inquiry should be flexible.

Due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews*, 424 U.S. at 334. Rather, it “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* It would be inconsistent with the Fifth Amendment’s Due Process Clause to apply a rigid approach and require that a defendant prove two strict elements to show there has been a due process violation. A balancing test is an appropriate mechanism for assessing due process violations because each case is distinct and demands an all-encompassing inquiry that looks at case-specific facts. Coda’s constitutional protections should be assessed based on the circumstances of his unique case.

Under the rigid two-prong test applied by the lower court, even where there has been a prejudicial nine-year delay between the alleged crime and the indictment, because Coda could not prove the prosecution had an “improper motive” for delaying the indictment, the court found there had been no due process violation. This result goes against the flexible due process inquiry. And the inflexible requirement is the antithesis of the “flexible” due process inquiry. *Id.*; see *State v. Oppelt*, 257 P.3d 653, 660 (Wash. 2011) (rejecting the improper motives requirement as unduly “formalistic and rigid”).

2. The balancing test follows the case-by-case approach this Court uses to assess delays in similar contexts.

In similar contexts, this Court has adopted a balancing test. A balancing approach has been implemented in these various contexts because due process demands a multi-factored balancing approach, unlike any rigid or formalistic test. *Mathews*, 424 U.S. at 334. The test for a due process violation in the context of a prejudicial pre-indictment delay should be no different.

For example, to determine when a *post*-indictment delay violates the Sixth Amendment's Speedy Trial Clause, this Court adopted a balancing test that assesses the particularized circumstances of the delay. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). This balancing test "depends upon circumstances," which is the opposite of a strict requirement that requires proof of improper motive for the delay in prosecution. *Id.* In *Barker*, this Court "rejected . . . inflexible approaches" for assessing a Sixth Amendment speedy trial claim and "accept[ed] a balancing test, in which the conduct of both the prosecution and the defendant are weighed . . . compel[ling] courts to approach speedy trial cases on an ad hoc basis." *Id.* at 529–30. Opposed to a "rigid approach," this Court adopted a multifactor test that includes the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.*

This Court recognized the prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Id.* This right includes limiting "the possibility that the defense will be impaired," which is gravely serious "because the inability of a defendant to prepare his case skews the fairness of the entire system." *Id.* at 532. If a defendant cannot present a defense substantially due to delays in the criminal process, then the prejudice is obvious. *Id.*

Similarly, to determine whether the government's delay in bringing a forfeiture proceeding violates the Fifth Amendment's Due Process Clause, this Court has again adopted a balancing test that assesses particularized circumstances of the delay, not any rigid rule. *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 564 (1983). This Court determined that post-seizure delay in bringing forfeiture proceedings "mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.* And, although the Sixth Amendment does not apply in the context of forfeiture, this Court held that these types of delays violate the Fifth Amendment's Due Process Clause. *Id.* This Court concluded that the balancing inquiry used in *Barker* lays out the proper framework for assessing "whether the delay . . . violate[s] the due process right." *Id.*

This Court has never established "a black-letter test for determining unconstitutional pre-indictment delay," which would detach the inquiries of prejudice and justification and then restrict due process to some particular showing of improper motive. *Howell*, 904 F.2d at 895. This Court has clarified that the administration of justice . . . necessitates a case-by-case inquiry based on the circumstances of each case. A flexible approach weighing all factors is more "faithful to the court's due process jurisprudence," which "favors multi-factor tests and balancing over bright-line rules." *State v. Stokes*, 248 P.3d 953, 962 (Or. 2011).

In sum, this Court has consistently adopted a balancing approach in similar contexts when assessing the constitutionality of delays in the criminal process, and the pre-indictment delay context should be no different.

3. Although this Court has held that the prosecutors' improper motive can establish a due process violation, this Court has never held that an improper motive is required.

In *United States v. Marion*, the court recognized “that even pre-arrest—a stage at which the right to a speedy trial does not arise—the passage of time ‘may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.’” *Betterman v. Montana*, 136 S. Ct. 1609, 1615 (2016) (quoting *Marion*, 404 U.S. at 321). Even though the Sixth Amendment does not apply to pre-indictment, “the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the delay was an intentional device to gain tactical advantage over the accused.” *Marion*, 404 U.S. at 324.

This Court did not find that these were exclusive requirements; instead, it was left to lower courts to “determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.” *Id.* This Court reasoned that “[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case,” and further made it clear that “[i]t would be unwise at this juncture to attempt to forecast our decision in such cases.” *Id.* at 325.

This Court deliberately avoided a strict two-prong approach to the due process inquiry in *United States v. Lovasco*, 431 U.S. 783. In *Lovasco*, the defendant argued that under *Marion*, “due process bars prosecution whenever a defendant suffers prejudice as a result of pre-indictment delay.” *Id.* at 789. This Court rejected the argument and found that “proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid.” *Id.* “*Marion* makes clear 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. This Court found that even if there was prejudice to the defendant, the mere investigative delay was not *necessarily* unconstitutional. The major distinction by the Court was between investigative delays and delays employed solely “to gain tactical advantage over the accused.” *Id.* at 795–96.

This Court never said that improper motive is always *necessary* to prove a due process violation, only that it was *sufficient*. And by alluding to two ends of the spectrum, this Court did not intend to require proof of improper motive to prove a violation of due process for a pre-indictment delay. Moreover, this Court “provided an illustration of one egregious situation that such a standard would likely proscribe.” Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 Wm. & Mary L. Rev. 607, 622–23 (1990); see *Howell*, 904 F.2d at 894 (stating that *Marion* and *Lovasco* “merely restate[d] in *dicta* the outer contour of unconstitutional pre-indictment delay”). This Court consciously left this issue to lower courts to flesh out the “circumstances in which preaccusation [sic] delay would require dismissing prosecutions” under the Due Process Clause. *Lovasco*, 431 U.S. at 796.

B. Under the Balancing Approach, Coda’s Charges Should Be Dismissed, Because Extreme Pre-Indictment Delay Has Resulted in Actual Prejudice.

Unsurprisingly, prejudicial pre-indictment delay has put Coda and his attorneys in an impossible position. They are forced to prove a prosecutor’s motives and defend against criminal charges where the passage of time has destroyed exculpatory evidence. Due process requires more, and this Court should clarify the need for a balancing approach when assessing the constitutionality of prejudicial pre-indictment delays.

1. Coda has no way of *really* proving the government’s reasons or motives for delaying indictment.

The burden on the defendant to prove the prosecution’s subjective motives for delaying an indictment is virtually impossible to overcome. For this reason, courts have recognized that the improper motives “standard for pre-indictment delay is nearly insurmountable.” *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997).

This Court has consistently rejected tests that depend on the state of mind of government officials. In the context of the Fourth Amendment, this Court has held “that sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.” *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). This Court has also rejected tests that rely on the prosecutors’ motives. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008); *see also United States v. DeClue*, 889 F.2d 1465, 1469 (6th Cir. 1990) (finding that defendant could not establish that delay “was an intentional device on the part of the government to gain a tactical advantage in its prosecution”).

Where the defendant faces the burden of proving prosecutorial motive, defendants are invariably faced with sweeping explanations by the prosecution that delay was simply for investigative purposes. Coda’s ability to disprove the prosecution’s reasons for delay is nearly impossible. Often after these lengthy “investigative delays” by the prosecution, there will be no evidence of new discoveries or additional evidence to help prove their case. Similarly, in the nine years and five months following Coda’s alleged crime, the prosecution has no new evidence to prove their case.

Here, the prosecution cited two reasons for the delay, neither of which can be reasonably contested by Coda or any lay citizen for that matter. The only way to be certain of an improper prosecutorial motive is if the prosecution admits to it or there is smoking-gun evidence of

improper motives. And why would the prosecution ever admit to having improper motives for delaying indictment? Requiring Coda to prove the prosecution's motives for delaying indictment places an unfair burden on him, violating his right to due process.

2. Extreme prosecutorial delay strips Coda of the ability to present a viable defense.

“The passage of time by itself . . . may dangerously reduce [a defendant's] capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His own memory and the memories of witnesses may fade.” *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). The prejudice defendants encounter when faced with an extreme delay in the criminal process is well documented in American jurisprudence. *See Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

a. Witnesses die or become unavailable.

Long delays in the criminal prosecution process “deprive the defendant of witnesses.” *Marion*, 404 U.S. at 321. “If witnesses die or disappear during a delay, the prejudice is obvious.” *Barker*, 407 U.S. at 532. “Every day that passes after an allegedly criminal act occurs will probably hinder a defense to some degree.” *United States v. Benson*, 846 F.2d 1338, 1342 (11th Cir. 1988). Vital witnesses can die or become unavailable and severely affect a defendant's ability to present a viable defense. For example, the death of witnesses can destroy a defendant's ability to establish an alibi, implicate alternate suspects, and flush out the details of the initial investigation.

Here, four of the five witnesses that the defendant alleged would corroborate his alibi died during the pre-indictment delay. The last living witness has dementia and cannot testify due to his diminished capacity. By the time the defendant was indicted, his ability to prove his alibi was

gone. The passage of time between the alleged crime and the indictment has resulted in extreme prejudice to the defendant.

b. Memories fade.

“Memory loss about a crime or other event is highest immediately after the crime occurs and then slows over time.” 7 *Jones on Evidence* § 61:4 (7th ed. 2004). Courts have commonly faced situations where lengthy pre-indictment delay impaired the defense by causing witnesses’ memories to fade. For example, in *Oppelt*, the government’s six-year delay in charging the defendant was prejudicial because key witnesses developed mental conditions affecting memory. Like this case, the only surviving witness who could have corroborated Coda’s alibi has been diagnosed with dementia. Coda’s faded memory and the diminished memory of his sole surviving witness have resulted in severe prejudice. The prosecution did not investigate Coda’s alibi during its initial investigation; otherwise, Coda may have been proved innocent over nine years ago.

c. Evidence is lost.

This Court has recognized that “when the Government has been responsible for delay resulting in a loss of evidence to the accused, . . . a constitutional violation [occurs] . . . when loss of the evidence prejudiced the defense.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982). Evidence is frequently lost or destroyed because of delay. For example, Coda could have presented evidence of his Greyhound Bus ticket that would have corroborated his alibi; however, it was lost because of the significant pre-indictment delay. As a result of the extensive preindictment delay, evidence corroborating Coda’s alibi was lost.

II. THE ADMISSION OF CODA'S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT VIOLATES HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Almost ten years after the explosion of Coda's business, the prosecution brought charges against Coda under 18 U.S.C. § 844(i) to avoid his case being dismissed under 18 U.S.C. § 3295. R. at 3. Through no fault of his own, Coda's pre-indictment delay substantially put him at a prejudicial disadvantage at trial due to the loss of pertinent evidence in his favor. R. at 2, 3. Due to the severe delay in trying Coda's case, the prosecution's case-in-chief, also lacking in pertinent evidence, solely relied on Coda's post-arrest but pre-interrogation and pre-*Miranda* silence as substantive evidence of guilt. R. at 8–10. The additional evidence presented against Coda at trial was circumstantial and insufficient to prove guilt *beyond a reasonable doubt*. R. at 15.

While under custodial arrest and after being read the charges against him, Coda exercised his Fifth Amendment right to remain silent. R. at 7. To expel incriminating evidence from Coda, the arresting officers held off on interrogating him and reading *Miranda* warnings. R. at 7. Coda's silence is the only substantive evidence the government has against him. R. at 15. Because the Fifth Amendment explicitly protects those facing criminal charges, admitting silence as evidence of guilt flagrantly violates Coda's Fifth Amendment protection against self-incrimination.

The Fifth Amendment protects the people from abuses of governmental authority with one such protection providing that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This Court has continually recognized the importance of this protection in trial settings, sanctifying the constitutional protection of one's right not to take the stand against oneself. This Court has yet to explicitly guide one's right to

remain silent in a post-arrest but pre-interrogation and pre-*Miranda* setting, and whether that silence can be admitted as evidence of guilt in the prosecution's case-in-chief.

Currently, the circuit courts are split on this issue. The United States Court of Appeals for the Eighth Circuit held that using silence in the prosecution's case-in-chief did not violate the defendant's Fifth Amendment rights because "an arrest by itself is not a governmental action that implicitly induces a defendant to remain silent." *United States v. Frazier*, 408 F.3d 1102, 1118–19 (8th Cir. 2005). Contrarily, in *United States v. Hernandez*, the United States Court of Appeals for the Ninth Circuit held that the defendant's Fifth Amendment rights were violated when the government presented in its case-in-chief testimony relating to the defendant's post-arrest but pre-*Miranda* silence. 476 F.3d 791, 796 (9th Cir. 2007). Years later, the United States Court of Appeals for the Second Circuit held in *United States v. Okatan* that the defendant's privilege against self-incrimination was violated when he was "forced to choose between making potentially incriminating statements and being penalized for refusing to make them." 728 F.3d 111, 112–13 (2d Cir. 2013). The current circuit split on this issue demonstrates the increasing demand for this Court's guidance about post-arrest but pre-interrogation and pre-*Miranda* silence as substantive evidence of guilt.

In *Salinas v. Texas*, this Court sought to remove the uncertainty surrounding pre-*Miranda* silence as substantive evidence of guilt. 570 U.S. 178 (2013). The defendant in *Salinas* willingly went with police to answer questions about a murder in which he was a suspect. *Id.* While at the station, the defendant answered several questions without being read *Miranda* warnings. *Id.* at 181–82. While responding to the officers' questions, the defendant became silent when asked about the murder weapon. *Id.* During trial, the defendant did not take the stand, and the prosecution could not use the evidence of his silence to impeach him. *Id.* The prosecution then

used the defendant's pre-custodial and pre-*Miranda* silence as evidence of his guilt during closing arguments. *Id.* This Court held that because the defendant did not verbally invoke his right to remain silent, he was "in no position to complain that he was compelled to give testimony against himself." *Id.* at 204.

Salinas now requires an express invocation from the accused to be afforded Fifth Amendment protection against self-incrimination: "a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." *Id.* This verbal invocation directly contradicts this Court's opinion in *Quinn v. United States*, which allows the accused to invoke the right to remain silent if his intention to do so was clear; "no ritualistic formula is necessary to invoke the privilege." 349 U.S. 155, 163-64 (1955). While *Salinas* tried to provide more explicit instructions as to when the Fifth Amendment privilege attaches to the accused, requiring a verbal invocation goes against the intention outlined in the language of the Fifth Amendment, as well as its precedent outlined in *Miranda v. Arizona*.

Though this Court's rulings sought to clarify the perimeters of the Fifth Amendment, uncertainty abounds amongst the lower courts regarding post-arrest but pre-interrogation and pre-*Miranda* silence as substantive evidence of guilt. Thus, this Court should reevaluate the express invocation requirement dictated in *Salinas* and find that because Coda was facing criminal charges, he lawfully invoked his privilege against self-incrimination by remaining silent post-arrest.

A. This Court Should Protect the Fifth Amendment Privilege Against Self-Incrimination by Removing the Verbal Invocation Requirement as Outlined in *Salinas*.

The plain language of the Fifth Amendment's Self-Incrimination Clause does not align with this Court's holding in *Salinas*. This Court should recognize that once a person is arrested,

as in Coda's case, they are involved in a criminal case as explicitly defined by the Fifth Amendment. As such, they are afforded the constitutional privilege against self-incrimination regardless of how the right is invoked. In *Salinas*, this Court held that the defendant's Fifth Amendment claim failed because he did not verbally express the right to remain silent: "the privilege is generally not self-executing and that a witness who desires its protection must claim it." 570 U.S. at 181. But the language of the Fifth Amendment is unmistakably clear: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. By compelling a defendant to testify to his post-arrest but pre-interrogation and pre-*Miranda* silence, he would then be a witness against himself. Once a defendant takes the stand, the possibility of self-incrimination is overwhelming and blatantly unconstitutional.

Though the defendant in *Salinas* was not under arrest as in Coda's case, both were accused of criminal offenses, invoked their Fifth Amendment protection against self-incrimination by remaining silent, and then used their silence as evidence of guilt. In Coda's case, he was arrested by the FBI and accused of destroying his building with an explosive. R. at 7, 11. Coda was informed of the charges against him by the arresting officer during custodial arrest and then invoked his constitutional privilege against self-incrimination by remaining silent. R. at 7. The prosecution then relied on Coda's silence as substantive evidence of guilt in their case-in-chief, arguing that a reasonable person with an alibi defense would have disclosed that information to the arresting officers. R. at 7.

The standard for invoking the Fifth Amendment's protection is not reasonableness; the standard is being involved in a criminal case. The language of the Self-Incrimination Clause does not include additional requirements, though *Salinas* now requires those involved in a criminal case to invoke this privilege verbally. By adopting this verbal requirement, this Court has added

new meaning to the Fifth Amendment with language that does not exist. In Coda's case, he was arrested and faced charges in a criminal case under 18 U.S.C. § 844(i). R. at 3. Therefore, he was well within his right to invoke his Fifth Amendment protection against self-incrimination. Coda was not required by the language of the Constitution to verbally express this right; his invocation was easily understood from his post-arrest silence. R. at 3.

The prosecution argues that if Coda was not guilty of the charged offense, he would have offered evidence to prove that he did not commit the crime, and, in line with *Salinas*, Coda's silence could then be used as evidence of his guilt. Further, the prosecution argues that had Coda intended to protect his Fifth Amendment privilege, he would have unambiguously asserted that right. *Berghuis v. Thompkins*, 560 U.S. 370, 380–83 (2010). This Court has also held that those who want the protection of the Fifth Amendment privilege must claim it. *Minnesota v. Murphy*, 465 U.S. 420, 427–28 (1984). Aside from the apparent conflict with the Sixth Amendment, this argument fails to address why the plain language of the Fifth Amendment does not apply in Coda's case. Coda was under custodial arrest for a criminal offense and had the right to invoke his constitutional privilege against self-incrimination, as the language of the Fifth Amendment allows that. The privilege “serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).

The Fifth Amendment extends to all those facing criminal charges, regardless of how they invoked their constitutional privilege. Therefore, Coda lawfully invoked the privilege by remaining silent in the face of criminal charges. This Court should acknowledge that the Fifth Amendment explicitly protects those facing criminal charges against self-incrimination, and

Salinas' verbal invocation requirement provides a constitutional barrier to accessing the Self-Incrimination Clause's privileges.

B. This Court Should Extend Fifth Amendment Protections to Post-Arrest but Pre-Miranda Situations to Avoid Misconduct by Arresting Officers Who Withhold *Miranda* Warnings to Induce Silence as Evidence of Guilt.

Adding a limitation on Fifth Amendment access to only those who expressly verbalize their invocation encourages misconduct by government actors. In *Miranda v. Arizona*, the constitutional protection against self-incrimination was extended to coercive government situations, and statements made by a defendant during a custodial interrogation without being read *Miranda* warnings became inadmissible at trial. 384 U.S. at 467. By adopting this procedural safeguard, this Court recognized the “compulsion inherent in custodial surroundings” and protected individual liberties from being penetrated by “the mischief against which it seeks to guard.” *Id.* at 458–59.

In *Doyle v. Ohio*, the prosecution's use of the defendant's post-arrest silence as evidence of guilt during cross-examination violated the defendant's Fourteenth Amendment right to due process. 426 U.S. 610, 619 (1976). This Court acknowledged that *Miranda* warnings serve “as a prophylactic means of safeguarding Fifth Amendment Rights.” *Id.* Once in custody, a person should be alerted to their right to remain silent. *Id.* Moreover, this Court noted that “silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights.” *Id.* at 617. This Court has also concluded that the prosecution's use of “defendants' post-arrest, post-*Miranda* warnings silence to impeach their trial testimony” is fundamentally unfair, violating the defendant's due process rights. *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986).

Miranda recognized that the propensity for self-incrimination in an intimidating pre-trial custodial situation could make its way into the courtroom during a defendant's trial and was pivotal in extending the privilege against self-incrimination to coercive custodial interrogations. The interrogation trigger, however, has the potential to create harmful incentives for the government to the detriment of an accused's Fifth Amendment rights. If arresting officers can offer silence as evidence of guilt to the prosecution, this gives officers an incentive to withhold interrogation to manufacture silence from an accused.

The defendant in *United States v. Moore* was arrested and in custody when he invoked his Fifth Amendment right to remain silent by not speaking. 104 F.3d 377, 380 (D.C. Cir. 1997). During his trial, the prosecution introduced the defendant's silence as evidence of guilt. *Id.* On appeal, the defendant argued that introducing silence as evidence of guilt violated his constitutional rights. *Id.* Still, the government responded that a violation had not occurred because the defendant was not interrogated. *Id.* The United States Court of Appeals for the District of Columbia Circuit held that "neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody." *Id.* at 385. Furthermore, the court explained that custody is the trigger to invoke silence in a pre-*Miranda* situation, not an interrogation. *Id.* The court reasoned that an interrogation requirement would incentivize delaying interrogation "to create an intervening silence that could then be used against the defendant." *Id.*

The issue at hand in *Moore* is analogous to Coda's case; Coda was arrested, and after reading the charges against him, the arresting officers waited to interrogate Coda. R. at 7. Because the arresting officers waited to interrogate Coda after arresting him and taking him into custody, the officers manufactured Coda's silence to produce self-incriminating evidence, as the

prosecution had no other sufficient evidence to implicate Coda in the charged crime. R. at 15. In the same vein that the government believes Coda's silence is evidence of his guilt, it also is highly believable that the arresting officers waited to see if Coda would provide the only evidence the government could use to prosecute him; this is the kind of government misconduct that this Court sought to prevent in *Miranda*. See 384 U.S. 436.

Respondent argues that police officers have enough common sense to determine guilt, and therefore, Coda's silence should be used as evidence at trial. In *United States v. Love*, the court held that the arresting officer's testimony is admitted as substantive evidence of guilt because the defendant had not been read any *Miranda* warnings, so the defendant could not have invoked his Fifth Amendment privilege. 767 F.2d 1052, 1063–64 (4th Cir. 1985). Similarly, the lower court in Coda's case reasons that because Coda was never interrogated, using his silence as evidence of guilt does not violate the Fifth Amendment and could properly be admitted at trial. R. at 8. Further, the court reasoned that commonsense perceptions of an officer suggest that Coda remained silent because he did not have an alibi defense and that a reasonable person in his place would want to inform the agents of his alibi. R. at 9.

An accused's rational basis for invoking his constitutional right to silence should not be subject to an unchecked commonsense judgment from an arresting officer. Using an officer's common sense as definitive proof of an accused's guilt offers a high probability of government misconduct, leaving no protection against officers who may manufacture silence to produce evidence. This Court has held that if an accused asserts his self-incrimination privilege, he may remain silent if "some rational basis" for believing self-incrimination is at stake. *Minnesota v. Murphy*, 465 U.S. at 429. Coda's commonsense invocation of his Fifth Amendment right was motivated by this same rational basis reasoned in *Murphy* and therefore is protected under the

Constitution. Because the prosecution lacked sufficient evidence to convict Coda, they manufactured his silence to create evidence to use against him. Due to the high possibility of misconduct against the accused, commonsense perceptions from police officers violate the Fifth Amendment and should not be admitted as evidence.

Respondent also contends that when a defendant's post-arrest but pre-*Miranda* silence coincides with a defendant's arrest, then *Salinas* should control. R. at 8. The lower court agreed, reasoning that no evidence presented proves that the arresting officers coerced Coda into voluntarily relinquishing his rights because Coda's rights did not begin until receiving *Miranda* warnings. R. at 9. *Salinas* did not acknowledge the inherent coerciveness of being in custody or interrogated by government officers and how that impacts whether the accused will explicitly invoke his constitutional right, especially without being read *Miranda* warnings. See 570 U.S. 178. *Miranda*, however, has addressed the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" and has installed procedural safeguards to prevent the inherently coercive custodial environment from compelling an accused to self-incriminate. 384 U.S. at 466-68.

After Coda was arrested and charged with a crime, he was brought by the arresting officers to a detention center to be interrogated. R. at 7. Coda was not free to leave at any point during the interaction with arresting officers and was likely feeling the inherently compelling pressures to compel him to speak. *Miranda*, 384 U.S. at 466-68. Therefore, it was reasonable for him to feel he was in a coercive environment. That Coda's silence coincided with his arrest does not remove the governmental pressure to self-incriminate, nor is it evidence of anything aside from Coda invoking his Fifth Amendment protections. The arbitrary line Respondent seeks to draw in

Coda's case attempts to invalidate the protections the Fifth Amendment and *Miranda* affords an accused.

Though Coda was not interrogated by the arresting officers as often required under *Miranda*, *Moore* explains why the interrogation trigger leaves the door wide open for government misconduct. By withholding interrogation, arresting officers may seek to coerce an accused into involuntarily relinquishing his constitutional rights to compel evidence against him. The arresting officers delayed interrogating Coda, hoping that he would provide self-incriminating evidence, namely his silence, that the government desperately needed for the prosecution's case-in-chief. As a natural extension of *Miranda*, this Court should adopt the reasoning outlined in *Moore* and make custody the trigger for Fifth Amendment protection.

C. Admitting Silence as Evidence of Guilt Prejudicially Skews the Adversarial Balance in Favor of the Prosecution Because the Only Way to Challenge the Evidence Would Be to Compel the Defendant to Take the Stand Against Himself, Directly Violating the Fifth Amendment.

The admission of an accused's silence as evidence of guilt in the prosecution's case-in-chief severely skews the adversarial balance in favor of the government. Suppose post-arrest but pre-*Miranda* and pre-interrogation silence is to be admitted as substantive evidence of guilt. Those faced with criminal charges will be compelled to testify to assert their innocence, which is in direct violation of the Fifth Amendment. Suppose an accused's silence is admitted as evidence of guilt and he later chooses not to take the stand in his defense, the adversarial balance will be skewed in favor of the prosecution to the detriment of an accused; there will be no way for the defense to rebut the evidence without the defendant taking the stand. In either situation, the imbalance negatively affects a defendant's right to due process and erodes his Fifth Amendment protection against self-incrimination.

Griffin v. California found that despite the lack of explicit compulsion to testify on his behalf, the defendant's Fifth Amendment rights were violated. 380 U.S. 609 (1965). In *Griffin*, the defendant did not testify during trial, and the prosecution implied in closing arguments that the jury could infer from the accused's silence he was guilty of murder. *Id.* The judge also instructed the jury to infer that the defendant could have reasonably denied or explained the silence as evidence of his guilt. *Id.* This Court then held that the Fifth Amendment prohibits the prosecution or the court from commenting on the defendant's silence as substantive evidence of guilt and ruled that the government violated the defendant's Fifth Amendment protection against self-incrimination. *Id.* at 614. The reasoning in *Griffin* was that by allowing silence to be evidence of guilt, those who invoked their right to remain silent were penalized for "asserting a constitutional privilege." *Id.*

Like the defendant in *Griffin*, Coda's silence was used as evidence of guilt in the prosecution's case-in-chief. *Griffin's* reasoning for excluding the silence as evidence should apply to Coda's case because Coda did not take the stand. Therefore, admitting his silence as evidence violated Fifth Amendment protection against self-incrimination. Allowing the prosecution to include Coda's silence as evidence of his guilt puts the defense at a constitutional crossroads: should Coda be compelled to testify against himself in direct violation of the Fifth Amendment, or should Coda not testify and face an adversarial disadvantage inherent within the invocation of his post-arrest silence? Because this Court held in *Griffin* it is a direct Fifth Amendment violation to comment on the defendant's silence as evidence of guilt, Coda's rights were then violated when the prosecution used Coda's post-arrest silence as evidence of guilt. *See* 380 U.S. 609.

The prosecution argues that introducing Coda's silence as evidence is permissible because the jury will consider and weigh its probative value during trial. R. at 9. This argument fails because the probative value of evidence is not a question for the jury. Fed. R. Evid. 403. Introducing Coda's silence at trial creates unfair prejudice because his constitutional right to invoke silence in the face of criminal charges does not prove or disprove guilt. Unfair prejudice has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 174 (1997). Admitting Coda's silence as evidence of guilt induces an unfair prejudice because its only relevance is to show that Coda invoked his Fifth Amendment privilege against self-incrimination. It misleads the jury to infer that invoking this privilege is substantive evidence of Coda's guilt and does not prove Coda's guilt *beyond a reasonable doubt*.

In *United States v. Hale*, this Court held that the defendant's silence during interrogation "lacked significant probative value" and reference to his silence during trial was prejudicial. 422 U.S. 171, 171-72 (1975). The defendant's right to silence during interrogation did not hold probative value as evidence because he "was clearly a potential defendant" when he invoked his right to silence. *Id.* Like the defendant in *Hale*, it was apparent from the circumstances that Coda was a potential defendant in a criminal case. His Fifth Amendment invocation was not only appropriate, but the arresting officers knew that he was invoking that privilege. R. at 7. This Court has held that the government "may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 106 (1943). By including Coda's silence as evidence of guilt in the prosecution's case-in-chief, the government not only violates his Fifth Amendment rights but also seeks to punish him for partaking in those rights.

This Court further reasoned in *Griffin* that “comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice,” and a defendant has a right to the presumption of innocence. 380 U.S. at 612–14. In applying *Salinas*, as the lower court did, Coda has two options: be compelled to self-incriminate by taking the stand or have the prejudicial evidence of his post-arrest silence be admitted without the ability to disavow its admission during trial. In either instance, by introducing Coda’s post-arrest silence as evidence of guilt, his constitutional right to avoid self-incrimination is destroyed, leaving the adversarial balance in favor of the government. Furthermore, Coda’s constitutional right to remain innocent until proven guilty is violated even before the trial begins. Therefore, this Court should not admit Coda’s silence as evidence of guilt because it prejudicially skews the adversarial balance in favor of the prosecution to the detriment of his Fifth Amendment protection against self-incrimination.

CONCLUSION

Petitioner respectfully requests this Court REVERSE the judgment of the United States District Court for the District of East Virginia and DISMISS the charges.

Respectfully submitted,

TEAM 18
COUNSEL FOR PETITIONER