IN THE
SUPREME COURT OF THE UNITED STATES

Docket No. 21-125

AUSTIN CODA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the United States

BRIEF FOR THE PETITIONER

Team 19
ATTORNEY FOR THE PETITIONER

QUESTIONS PRESENTED

I. Does the preindictment delay that caused Coda actual substantial prejudice violate The Due Process Clause of the Fifth Amendment to the United States Constitution if the delay has made it impossible for Coda to receive a fair trial, regardless of whether Coda has produced evidence showing bad faith on the part of the government to have caused the delay to gain a tactical advantage?

II. Does the admission of Coda's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Defendant-Petitioner, Austin Coda ("Coda"), owned and operated a hardware store in Plainview, East Virginia. R. at 1.

In January of 2002, Coda opened his hardware store which serviced both East Virginia and North Carolina. R. at 1. Being the only hardware store in the area, Coda's business was very successful. R. at 1. However, despite many profitable years, like many other businesses experiencing the 2008 recession, Coda's hardware store began to struggled financially. R. at 1. In 2009, a chain-store opened in the area, causing Coda to lose additional business. R. at 1. By 2010, with the combination of these two events, Coda's business faced hard times. R. at 1.

On December 22, 2010, Coda's hardware store was completely destroyed by a fire. R. at 2. Based on evidence, the Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") and fire investigators determined an old, faulty gas line had been adversely affected by cold weather, causing it to leak and destroy the premises. R. at 2.

Afterwards, a close friend and neighbor of Coda, Sam Johnson, contacted the Federal Bureau of Investigation ("FBI") claiming to have information about the fire. R. at 2. Johnson told the FBI that he had observed a decline in Coda's business. R. at 2. Johnson also told the FBI that he knew Coda had an insurance policy on his property and that he had observed Coda acting anxiously the week of the fire. R. at 2. Despite having evidence that identified the source of the fire, the FBI chose to bring Coda's case before the U.S. Attorney's Office. R. at 2.

Since Coda was being prosecuted for unrelated state charges, to avoid the inconvenience of transporting Coda back and forth, the U.S. Attorney's Office marked his case as "low priority." R. at 2. Even after the conclusion of Coda's state proceedings, the U.S. attorney's office chose to

prioritize other prosecutions, and did not change or remove the low priority status it had placed on Coda's case. R. at 2. As a result, Coda's case remained untouched and labeled as low priority for nearly a decade. R. at 2.

It was not until April 23, 2019, almost ten years after the fire, and upon an Assistant U.S. Attorney realizing the statute of limitations on Coda's case was about to expire, that the government took him into custody. R. at 2, 7. Directly after Coda's arrest, FBI Special Agent Park informed him of the charges against him. R. at 7. Coda remained silent. R. at 7. It was not until after Coda was transported to a detention center, and the FBI was ready to interrogate him, that law enforcement read Coda his *Miranda* warnings. R. at 7.

Subsequently, in May of 2019, the government indicted Coda under 18 U.S.C. § 844(i), which prohibited the malicious use of an explosive to destroy property affecting interstate commerce, under the proffered theory that he had intentionally destroyed his business to collect the insurance policy on it. R. at 3. In doing so, the government was just barely able to abide by the statute of limitations provided in 18 U.S.C. § 3295. R. at 3.

In response, Coda filed a motion to dismiss his indictment arguing the preindictment delay violated his constitutional rights under the Fifth Amendment Due Process clause. R. at 3. During the evidentiary hearing, Coda testified he intended to raise an alibi defense at trial, stating that he was not in East Virginia the night the fire occurred. R. at 3.

Coda testified he was on a Greyhound bus en route to New York. R. at 3. The night of the fire, December 22, was Coda's birthday, and up until 2015 he had traveled to New York every year on this day to celebrate with family. R. at 3. Coda's alibi could have been corroborated by two separate and distinct sources. R. at 3. However, due to the government's preindictment delay Coda informed the court he as no longer be able to produce the exonerating evidence and testimony

required to corroborate his alibi defense. R. at 3.

Since almost a decade had passed since the fire, the first source to corroborate his alibi, five members of his family, were no longer available. R. at 3. Instead, only one of the five family members Coda visited was still alive. R. at 3. However, this one surviving relative has dementia and is unable to provide confirmation of Coda's visit. R. at 3. Additionally, the second source to corroborate his alibi, Greyhound bus security camera footage, was also no longer available. R. at 3. Greyhound bus company only stored footage for three years, and since Coda's last trip was in 2015 the records that would corroborate his alibi are not available. R. at 3.

II. PROCEDURAL BACKGROUND

The District Court for the District of East Virginia. In May 2019, the FBI indicted Coda under 18 U.S.C. § 844(i). R. at 3. Coda tried to raise an alibi defense but was unable to because of the amount of time that had passed since the fire. R. at 3. Coda moved to dismiss the indictment claiming the government's preindictment delay violated his Fifth Amendment right to Due Process. R. at 3. Additionally, Coda moved to suppress the admission of his post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of his guilt claiming that its use violated his Fifth Amendment privilege against self-incrimination. R. at 7. On September 30, 2019, the District Court for the District of East Virginia denied Coda's motion to dismiss. R. at 6. On December 19, 2029, the District Court for the District of East Virginia denied Coda's motion to suppress. R. at 10.

The Court of Appeals for the Thirteenth Circuit. On August 28, 2020, Coda appealed the denial of both motions and sought to have his conviction overturned and charges dismissed. R. at 11. The Court of Appeals for the Thirteenth Circuit affirmed the district court's judgment. R. at 12. Coda appealed. R. at 16.

The Supreme Court of the United States. On July 9, 2021, the Supreme Court of the United States granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

I

The District Court improperly denied Coda's pretrial Motion to Dismiss his indictment for preindictment delay. Therafter, the Court of Appeals errored in adopting the District Court's analysis and affirming the lower court's decision. Coda sufficiently established his due process rights were violated after the government's unsupported preindictment delay caused him actual and substantial prejudice in his ability to mount a meaningful defense.

The District Court should have adopted a flexible balancing test that weighs the reasons for the government's preindictment delay against the actual prejudice to the defendant. The application of this weighted inquiry, in comparison to the strict two-prong approach applied by the District Court, is more in line with the fundamental prescriptions of the Due Process Clause and allows the defendant to receive a fair trial.

It is undisputed that Coda suffered actual and substantial prejudice from the government's delay. Coda was no longer able to prove his alibi defense after the passage of nearly a decade long delay caused both invaluable eyewitness testimony to be unattainable and exonerating evidence to be lost. Moreover, the lower courts erred in interpreting the holdings of both *Marion* and *Lovasco* to require a defendant to show that the government harbored a bad faith motive in delaying an indictment to gain a tactical advantage. Instead, the majority should have adopted a flexible balancing test in which it considered the actual prejudice to Coda, as well as the government's justifications for the delay. The Due Process Clause protects an individual's life, liberty, and property from governmental interference; however, Coda has now been deprived of each one of

those vested rights. This Constitutional infringement is due entirely to the government's delay in causing Coda to be unable to mount a meaningful defense to the charges levied against him.

This court should reverse the portion of the Court of Appeals for the Thirteenth Circuit that affirms the District Court of East Virginia's judgment denying Coda's Motion to Dismiss his indictment for preindictment delay.

II.

The District Court improperly denied Coda's pretrial Motion to Suppress his post-arrest but pre-*Miranda* and pre-interrogation silence. Further, the Court of Appeals errored in adopting the District Court's analysis and affirming the lower court's decision as Coda sufficiently invoked his privilege against self-incrimination.

The Fifth Amendment's privilege against self-incrimination protects an individual's right to not assist the prosecution in making a case against themselves. This privilege is deeply rooted in the history, tradition, and law of our nation and is considered a protected fundamental right. When the Government sought to use Coda's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of his guilt, it infringed upon Coda's constitutionally protected privilege against self-incrimination.

Substantive use of post-arrest but pre-*Miranda* and pre-interrogation silence usually finds support in *Thompkins v. Berghuis* and *Salinas v. Texas*; however, not only are the facts of those cases different from the case at hand, but they directly conflict with and burden an individual's privilege against self-incrimination. Therefore, this Court must not apply the logic of those cases, instead it should apply *Griffin v. California*.

Applying *Griffin v. California* is a natural extension of prior Supreme Court precedent and as such its application would protect individuals Fifth Amendment rights. Further, its application

would create clarity and uniformity among a divided circuit. Uniformity is needed so that defendants across the nation have proper access to their privilege against self-incrimination. Access to the privilege is necessary in ensuring that their constitutional rights are not violated by misapplied and conflicting logic.

Additionally, this Court should not apply *United States v. Love*. Not only is the facts of that case different from the case at hand, but doing so encourages individuals to draw substantive conclusions from common sense perceptions, which have often found to be incorrect.

Furthermore, even if *Thompkins* and *Salinas* are applied, the admission of Coda's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of his guilt remains unconstitutional because government error was not harmless.

Accordingly, this Court should overturn Coda's conviction and dismiss the charges against him.

ARGUMENT AND AUTHORITIES

Petitioner-Defendant, Austin Coda ("Coda"), appeals the denial of his motion to dismiss and the denial of his motion to suppress, seeking to have his conviction overturned and the charges dismissed. R. at 11. This appeal presents purely legal questions regarding the application of constitutional defenses to an indictment under 18 U.S.C. § 844(i). R. at 3. Thus, a *de novo* standard of review applies. *See United States v. Collins*, 811 F.3d 63, 65 (1st Cir. 2016) (when reviewing the denial of a motion to suppress…legal determinations [are reviewed] de novo); *see also Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843, 847 (5th Cir. 2016) (applying de novo review of application of substantive due process defense).

I. THE LOWER COURT ERRORED IN ITS DETERMINATION TO APPLY THE STRICT TWO-PRONG APPROACH TO AUSTIN CODA'S PREINDICTMENT DELAY CHALLENGE AND THUS VIOLATED HIS DUE PROCESS RIGHTS AFFORDED TO HIM UNDER THE FIFTH AMENDMENT.

The first issue addresses Coda's constitutional defense to the criminal indictment he received after the government's nearly decade long preindictment delay. R. at 3. Although the Government contends that that the statute of limitations acts as a defendant's primary protection against the unfairness of preindictment delays, this Court has acknowledged that "the Due Process Clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977). In the lower court's preindictment delay inquiry, it interpreted this Court's holdings in *Marion* and *Lovasco* to mean that this inquiry entails a strict two-pronged test in which a criminal defendant must show (1) that the prosecution's delay caused some actual prejudice to his defense; and (2) that the delay was occasioned by a bad faith prosecutorial motive. R. at 4. Though other federal courts may employ a slightly different standard for actual prejudice, it is undisputed that all federal courts require prejudice that is clear and not overtly speculative. *See United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996). However, the second inquiry in this rigid two-prong approach creates an insurmountable hurdle for a defendant who lacks the requisite information to counter the government's proffered reason for the delay. Accordingly, in the review of the case at hand, this Court should find that the bad faith requirement was an improper standard in the review of Coda's preindictment delay challenge. Instead, this Court should consider the procedural protections that the Due Process Clause affords against prejudicial preindictment delays, and weigh Coda's actual prejudice against the Government's justification for the delay.

A. The Strict Two Prong Analysis Employed by The Lower Courts Conflict With The Purpose Of The Due Process Clause And Hinders A Fair Defense.

The District Court, in denying Coda's Motion to Dismiss, relied heavily on this Court's previous interpretation of the strict two-prong approach in the seminal cases of *Marion* and *Lovasco*. In both cases, this Court found that the government's preindictment delay did not rise to the level as to violate the defendant's due process rights. In *Marion*, this Court concluded that a violation of due process consisted of both actual prejudice to the defendant and a bad faith motive on behalf of the government to intentionally delay the indictment for some tactical advantage. *United States v. Marion*, 404 U.S. 307, 324–25 (1971). Nevertheless, this Court conceded that it "could not now determine when and in what circumstances actual prejudice resulting from preaccusation delays requires dismissal of the prosecution," but that "[t]o accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *Id.* Even though nearly six years later this Court came to a similar holding in *Lovasco* — that a tactical delay on the part of the government would necessarily violate a defendant's due process rights — it did so sparingly. Suggesting in parts of its discussion that lower courts should assess the facts of each case individually instead of with a black-letter rule of hand. *See Lovasco*, 431 U.S. at 796–97. But again, this Court conceded that it "could not determine in the abstract the circumstances in which [preindictment] delay would require dismissing prosecutions," and that it "therefore leave[s] to the lower courts . . . the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 796–97.

Therefore, in both *Lovasco* and *Marion*, this Court indicated that the administration of justice and a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the unique circumstances of each case. In doing so, it asserted that a showing of an intentional tactical

delay by the government is one end of the spectrum that would necessarily violate due process. This would be a more appropriate interpretation of the closing remarks made by this Court in those two cases because due process at its core is not a strict technical evaluation, rather, its examination should change under the circumstances of each case, as well as with the change in societal norms. This conceptualization of a flexible due process examination should be no different for those situations in which a government has arbitrarily prejudiced a defendant through an excessive preindictment delay. In applying these settled principles of due process to the case at hand, this Court should not resort to an assumed black-letter test for determining unconstitutional preindictment delay, but instead weigh the actual prejudice suffered by Coda against the government's justification for its delay in conjunction with the basic due process inquiry established in *Lovasco*: "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions . . .'" *Lovasco*, 431 U.S. at 790.

The decision below adopted an inflexible standard that is not only at odds with the fundamental conceptions of justice, fairness, and the community's sense of fair play, but it also inhibited Coda from being able to mount a meaningful defense in response to the charges levied against him. In addition to the task of preparing an effective defense after the hands of time have impaired meaningful testimony or destroyed exonerating evidence, the bad-faith motive requirement forces a defendant to then attempt to proffer evidence of a prosecutor's improper motive. Absent conclusive evidence, it is nearly impossible for a defendant to disprove the prosecution's inevitable unsupported preindictment delay justification because of the high hurdle of proving subjective prosecutorial motivation to create a tactical delay. This hurdle inevitably ends in the court accepting these conclusory explanations without further investigation, leaving a

defendant helpless to do anything more to prove their innocence. For Coda, a showing of the government's bad faith motive is "easy to allege and hard to disprove." *Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998).

The Fourth Circuit in *Howell v. Barker* properly rejected the rigid bad faith inquiry because "[t]aking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred." 904 F.3d 889, 895 (4th Cir. 1990). Other circuits have also recognized that absent conclusive evidence, it is nearly impossible to prove subjective motive behind the government's delay, therefore the bad faith "standard for preindictment delay is nearly insurmountable." *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997). The lower courts in *Howell* interpreted the Supreme Court's holdings in both *Lovasco* and *Marion* to direct State and Federal courts to find a strict bad faith prosecutorial motive before dismissing a case for preindictment delay. *See Howell*, 904 F.2d at 894. Nevertheless, the Fourth Circuit believed that this was too strict of an approach and that the defendant's nearly two-and-a-half-year delay and the loss of key witnesses justified a more liberal interpretation of the Supreme Court's holding in *Lovasco* and *Marion*. *See id.* at 895. The Fourth Circuit believed instead that the Supreme Court stipulated the application of a case-by-case weighted inquiry into whether the defendant's prejudice so severely outweighs the government's justification for the delay. *See id.*

Similar to the lower courts in *Howell*, both the lower courts in the case at hand believed that the Supreme Court mandated a bad faith prosecutorial motive in order to justify dismissing Coda's indictment. Additionally, like the defendant in *Howell*, Coda has suffered an extreme delay of almost ten years and lost key witnesses that could have testified to his alibi and likely exonerated

him. Therefore, as adopted by the Fourth Circuit in *Howell,* this court should find that due to the severity of Coda's prejudice, the case-by-case weighted inquiry into whether the defendant's prejudice so severely outweighs the government's justification for the delay is a more appropriate standard

The lower courts erred in applying the rigid bad faith requirement and subsequently denying Coda's motion to dismiss his indictment because this inflexible approach not only reflects a profound unfairness in its application, but it is also contrary to "fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790. Therefore, this Court should apply a flexible and functional balancing test in determining whether the government's delay so severely prejudiced Coda's ability to receive a fair trial and as to warrant the dismissal of his indictment.

B. In Applying the Balancing Test, This Court Should Find That the Government's Preindictment Delay Violated Coda's Due Process Rights and Made it Impossible to Receive a Fair Trial.

The District Court acknowledged that there is no dispute as to whether Coda has shown that the government's preindictment delay caused actual and substantial prejudice to his defense. Therefore, when the court turned to the relevant inquiry — whether Coda's actual prejudice outweighed the government's reasons for the delay — their reasoning and analysis was wholly inconsistent with *Lovasco*, *Marion*, and general principles and protections of the Due Process Clause. The relevant inquiry that the lower courts should have implemented was to first "put the burden on the defendant to prove actual prejudice." *Howell*, 904 F.2d at 895. The burden should then be placed on the government to proffer their justifications for the delay, and then "balance

the defendant's prejudice against the government's justification for [the] delay" to see if the preindictment delay made it impossible for Coda to receive a fair trial. *Id.*

i. The district court was correct in finding that the government's preindictment delay resulted in actual prejudice.

The lower courts were correct in their finding that the government's preindictment delay caused Coda both actual and substantial prejudice to his defense. It is well established that "to establish a due process violation, the defendant must show that the delay 'caused him actual prejudice in presenting his defense.'" *Jones v. Angelone*, 94 F.3d 900, 906 (4th Cir. 1996) (quoting *United States v. Gouveia*, 567 U.S. 180, 192 (1984)); *see also United States v. Lovasco*, 431 U.S. 783, 789 (1977) ("[P]roof of actual prejudice makes a due process claim concrete and ripe for adjudication . . ."). Several circuit courts have demonstrated that a showing of actual substantial prejudice "will not be presumed because of a lengthy delay" but instead a showing of "actual prejudice and not merely 'the real possibility of prejudice'" that is "inherent in any extended delay" is required. *Stoner v. Graddick*, 751 F.2d 1535, 1544 (11th Cir. 1985); *see also United States v. Crouch*, 84 F.3d 1497, 1515 (5th Cir. 1996) (noting that "a mere loss of potential witnesses is insufficient absent a showing that their testimony 'would have actually aided the defense.'" (citing *United States v. Beszborn*, 21 F.3d 62, 66 (5th Cir. 1994))); *United States v. Bartlett*, 794 F.2d 1285, 1290 (8th Cir. 1986) (explaining that a "defendant must demonstrate that the prejudice actually impaired his ability to meaningfully present a defense.").

In *Graddick*, a Baptist church located in a residential area of Birmingham, Alabama, was badly damaged after a bomb went off on its property. *Graddick*, 751 F.2d at 1537. Subsequently, nineteen years after the explosion, appellant J.B. Stoner was extradited from Georgia, indicted, and subsequently found guilty of arranging the bombing *Id.* at 1537, 1546. Following the denial of multiple appeals, Stoner "filed for writ of habeas corpus" which again was denied by the district

court. *Id.* Finally, Stoner appealed to the Eleventh Circuit Court of Appeals, alleging, among other things, that he was "prejudiced by preindictment delay." *Id.* Stoner contends that his defense was prejudiced by the death of several witnesses and submitted affidavits stating his belief as to what the deceased witnesses would have testified at trial. *Id.* at 1544. In finding that the loss of witnesses during the preindictment delay did not result in actual substantial prejudice to Stoner, the court determined that of the potential witnesses that had passed away during the time of the delay, only one witness would have had the ability to exonerate Stoner, but that witnesses testimony would have been inadmissible because of its hearsay character. *Id.* at 1545.

To survive the first scrutiny of a preindictment delay inquiry, Coda needed to demonstrate that his defense was prejudiced by both the death of several key witnesses and the loss of Greyhound bus records that would have corroborated his alibi for the night of the explosion. Unlike Stoner's unsuccessful showing of prejudice from the preindictment delay, here, the District Court was correct in finding that Coda had in fact suffered actual prejudice from the preindictment delay. Unlike the lost witnesses in Graddick, Coda's family members were credible eyewitnesses that could have exonerated him because they could have testified to Coda's physical presence in New York at the time of the explosion. Additionally, Coda's inability to produce the Greyhound bus tickets, as a consequence of them being deleted from the system after three years, is a direct consequence of the government's delay, and, like the witnesses, would have been key evidence to Coda's defense.

In the application of the prejudicial standard expressed in both *Graddick* and similar circuit courts, the District Court was correct in concluding that Coda has proven that the government's preindictment delay caused actual and substantial prejudice in his ability to mount a successful defense.

ii. Under the applicable balancing test, the prejudice suffered by Coda outweighs the reasons offered by the government in its justification for the delay.

The District Court incorrectly denied Coda's Motion to Dismiss his indictment for preindictment delay. The decision below abstained from a balancing test in their determination of whether the government's preindictment delay violated Coda's due process rights, and instead, adopted a rigid rule that required, without exception, for Coda to show that the government intentionally delayed the indictment to gain a tactical advantage over him. Nevertheless, this court should find that the balancing standard is the proper inquiry and therefore conclude that the prejudice to Coda far outweighs any reasons that the government has proffered for the delay.

After proving actual prejudice, this Court, in fairly assessing Coda's challenge that the government's preindictment delay violated due process, must weigh the length of the delay against the government's proffered reasons for the delay. *United States v. Corona-Verbera*, 509 F.3d 1005, 1112 (9th Cir. 2007). The Fourth Circuit has similarly found that the more logical demonstration was to first place the burden on the defendant to show actual prejudice, and secondly, assuming the defendant made his prejudice showing, the court should "balance the defendant's prejudice against the government's justification for [the] delay." *Howell,* 904 F.2d at 895 (4th Cir. 1990); *see also United States v. Uribe-Rios*, 556 F.3d 347, 358 (4th Cir. 2009) (concluding that the court must first find that the defendant suffered actual prejudice from the delay and then balance the government's reason for their delay against the prejudice to the defendant). The Fourth Circuit in *Howell* chose to take issue with the other circuits that have applied the bad faith prosecutorial motive requirement, holding that this demand, on its face, violates fundamental conceptions of justice because "no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due

process violation has occurred." *Howell*, 904 F.2d at 895. The less rigid balancing test is not a new or novel application, in a similar case some twenty-two years before *Corona-Verbera*, the Ninth Circuit similarly found that the "second prong of the test requires the court to weigh the length of the delay with the reasons for the delay. . ." *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985).

In *Howell*, the appellee, Wilton Howell, asserted a due process violation after an approximate two-and-half-year governmental delay from the service of his arrest warrant and the return of an indictment. *Howell*, 904 F.2d at 891. Howell was subsequently convicted of armed robbery, and on appeal, the North Carolina Court of Appeals rejected Howell's contention of due process violation from preindictment delay after its reliance on authority advocating for the strict two-prong analysis. *Id.* at 891, 894. Howell appealed to the Fourth Circuit which refused to agree with the lower court's interpretation of the holdings in both *Marion* and *Lovasco*; that "a defendant in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation." *Id.* at 893, 895. The Fourth Circuit found that the lower court's reliance on *United States v. Gouveia* was also improper; and instead, interpreted the Supreme Court to have simply "establish[ed] [the] outer contour of unconstitutional preindictment delay." *Id.* at 894. The Fourth Circuit went on to hold that it believed the holdings in *Lovasco* and *Marion* left the "administration of justice" in the hands of State and Federal courts to "examine the facts [of each case] in conjunction with the basic due process" principles and protections instead of fastening upon the courts a strict two-prong approach. *Id.* at 895.

As part of its discussion in *Lovasco*, this Court distinguished an "investigative delay" by the government, from a "delay undertaken to solely 'gain tactical advantage over the accused.'" *Lovasco*, 431 U.S. at 795. In further elaboration, the Court noted that the government's subsequent

prosecution following an investigative delay will not violate the Due Process Clause, even if that delay has caused some prejudice to the defendant. *Id.* at 796. Nevertheless, it can hardly be said that the government's delay in our case rises to the level of an investigative delay that would have surely weighed heavily against the actual prejudice suffered by Coda. To the contrary, the near decade long delay afforded the government not one shred of new evidence from what investigators collected shortly after Coda's store exploded, but instead, three key witnesses who could have exonerated Coda had died and crucial evidence had been lost.

The second inquiry advocated by *Howell* demonstrates that once Coda has satisfied his burden of proving actual prejudice, the court is then to consider the government's reasons for the delay, in doing so, it should balance the prejudice to the defendant with the government's justification for the delay. Here, the government has put forward several justifications for its delay, however not a single excuse rises to the level of an "investigative delay" as established in *Lovasco*. The government marked Coda's case as "low-priority" and it was passed around the United States Attorney's office from one U.S. Assistant Attorney to another. R. at 2. Additionally, there is no indication that Coda's case ever progressed passed the initial stages of the FBI's investigation, or that any new evidence had been collected as a result of the delay. *Id.* The Government makes no assertion that Coda's case was particularly complicated, or that the U.S. Assistant Attorneys were engaged in any type of preindictment investigation; it simply asserts that Coda's case was low priority, and it was merely inconvenient for the office to indict Coda any sooner. *Id.* Because the government's proposed justifications are neither substantive nor go to this Courts definition of investigative delay, they do not rise to the level as to protect the government from lessened scrutiny or protection. In its balancing effort, this court should find that there has been no valid justification for the delay proffered by the government in this case, and therefore the actual prejudice suffered

by Coda severally outweighs the justification for the delay and thus violates society's fundamental conceptions of justice and fair play.

Under the decision below, the lower courts errored in its application of the strict bad-faith inquiry in determining the government's justification for its preindictment delay. Coda has been placed in the insurmountable position of either proving bad faith on the part of the government or attempting to mount an effective defense after the hands of time have destroyed exculpatory evidence. Due process demands this court to find that under the flexible balancing test, the actual prejudice that Coda suffered far outweighs the government's justification for the delay and goes as far as to offend the fundamental conceptions of justice which lie at the base of our civil and political institutions.

II. ADMISSION OF AUSTIN CODA'S POST-ARREST BUT RE-*MIRANDA* AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT VIOLATES HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The next issue addresses Coda's constitutional defense to the government's use of his post-arrest, but pre-*Miranda* and pre-interrogation silence as substantive evidence of his guilt in violating 18 U.S.C. § 844(i). R. at 3, 7. In the Government's view, *Thompkins* and *Salinas* should control the interpretation of whether Coda's post-arrest but pre-*Miranda* and pre-interrogation silence can be used as substantive evidence of his guilt. R. at 8. In the Government's view, an innocent person with an alibi defense would have disclosed it to police after being informed of the charges against them rather than remaining silent. R. at 7. But the Fifth Amendment provides "[n]o person…shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *see also Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (stating "there can be no doubt that the Fifth Amendment 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"). At

the core of the Fifth Amendment lies the principle that our Forefathers believed "it were better for an occasional crime to go unpunished than [for] the prosecution…[to] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954). By permitting the government to admit Coda's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence against him, the lower courts have completely undercut the effect of the Fifth Amendment's privilege against self-incrimination by placing an "impermissible burden upon the exercise of that privilege." *Combs v. Coyle*, 205 F. 3d 269, 283 (2000); *see United States v. Okatan*, 728 F.3d 111, 1116 (2d Cir. 2013) (stating the privilege against self-incrimination is only given full effect when individuals are "not forced to choose between making potentially incriminating statements and being penalized for refusing to make them"). Thus, Coda is entitled to have his conviction overturned and charges dismissed because the government's use of his post-arrest but pre-*Miranda* and pre-interrogation silence, as applied to the facts of this case, violates his Fifth Amendment privilege against self-incrimination.

A. *Thompkins* And *Salinas* Should Not Be Applied

In reviewing Coda's motion to suppress his post-arrest but pre-*Miranda* and pre-interrogation silence, the District Court for the District of East Virginia applied the logic of *Thompkins* and *Salinas*. R. at 7-10. The Court of Appeals for the Thirteenth Circuit followed the district court's logic thus incorrectly affirming the dismissal. *See Mitchell v. United States.*, 526 U.S. 314, 338 n.2 (1999) (Scalia, J., dissenting) ("[W]e did say in *Miranda* v. *Arizona* that a defendant's post[-]arrest silence could not be introduced as substantive evidence against him at trial"). The application of *Thompkins* and *Salinas* was inappropriate because doing so impermissibly interferes with and burdens the exercise of a fundamental right. This Court should

instead apply *Griffin v. California* to its interpretation of the facts at hand to find that post-arrest but pre-*Miranda* and pre-interrogation silence cannot be used as substantive evidence of guilt. Doing so would be a natural extension of Supreme Court precedent. Furthermore, applying *Griffin* would not infringe on the rights the Framers enshrined in the Constitution under the Fifth Amendment's privilege against self-incrimination.

i. Factual distinctions and conflicts with the purpose behind the privilege against self-incrimination make the application of Thompkins and Salinas inappropriate.

The District Court for the District of East Virginia and the Court of Appeals for the Thirteenth Circuit reviewed Coda's action by applying *Thompkins* and *Salinas*. R. at 8-9. This application impermissibly interferes with the exercise of a fundamental right and is therefore incorrect.

a. *The facts of the case at hand are fundamentally different than those in Salinas and Thompkins.*

Coda's pre-*Miranda* silence significantly differs from the pre-*Miranda* silence of the defendant in *Salinas*. First, *Salinas* addressed only pre-arrest silence; this case concerns post-arrest silence. R. at 7. Second, the defendant in *Salinas* was not in-custody. *See Salinas v. Texas*, 570 U.S. 178, 182 (2013) (stating all parties agreed defendant's interview with police was noncustodial); *see also Id*. (stating defendant had agreed to accompany police officers to the station and was free to leave at any point in time). Contrastingly, Coda was in-custody. R. at 7. *See Miranda* 384 U.S. at 384 (1966) (holding an individual is considered to be in police custody if they have been formally arrested or "otherwise deprived [of their] freedom of action in any significant way"); *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding a person is in-custody when freedom of action is curtailed to a degree associated with arrest).

Third, unlike the defendant in *Salinas*, Coda's silence was neither in response to an interrogation or interview with law enforcement. R. at 7-8. In *Salinas*, defendant was interviewed by police. *Salinas*, 570 U.S. at 193. Instead, here, FBI Special Agent Park arrested Coda and informed him of the charges against him. R. at 7. Fourth, Coda's silence occurred during the duration of his exchange with law enforcement. R. at 7-8. Contrastingly, the defendant in *Salinas* freely answered police questions until they asked him "whether the shotgun from his home 'would match the shells recovered at the scene of the murder,'" it was only then that he became silent. *Salinas*, 570 U.S. at 193.

Additionally, the facts of this case significantly differ from those in *Berghuis v. Thompkins*. The only similarity between the case at hand and *Thompkins* is that both defendants' silence occurred while they were in-custody. In *Thompkins v. Berghuis*, the government used the defendant's post-*Miranda* silence to show substantive evidence of guilt. 560 U.S. 370, 370 (2010). Here, the Government attempts to use Coda's pre-*Miranda* silence as substantive evidence of guilt. R. at 8-9.

The circuits are generally bound to follow prior circuit precedent unless "an intervening Supreme Court decision is 'clearly on point,'" *Thompkins* and *Salinas* are not. *Atl. Sounding Co.* v. *Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007). These cases are fundamentally different, thus their factual distinctions make their application inappropriate.

b. *The application of Thompkins and Salinas undermine the purpose behind the privilege against self-incrimination.*

In applying *Thompkins* and *Salinas*, to the facts of this case, the lower courts applied a narrower standard, one that unduly burdens defendants access to the privileges afforded to them under the Constitution. Such action directly conflicts with and undermines the purpose behind the Fifth Amendment's privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination has long been established as an essential safeguard of individual rights. *See, e.g.,* Leonard Levy, *Origins of The Fifth Amendment*, 481 (1968) ("The framers understood that without fair and regularized procedures to protect the criminally accused there could be no liberty. They knew that from time immemorial the tyrant's first step was to use the criminal law to crush his opposition"). Traced back to as early as the twelfth century, the privilege against self-incrimination was developed and adopted in response to a long history of oppression of the individual by controlling factions – first the British, then the Federal Government. *See, e.g.,* Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, Cleveland Bar Association, 25 Jour. 91, 97 (1954) ("[H]istory demonstrates that the fight for the privilege against self-incrimination was…an important part, of the great struggle against oppression of the individual by the…state"); *see also Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (the privilege against self-incrimination is the "[r]esult of a long struggle between opposing forces of the spirit of individual liberty on the one hand and the state on the other"). At the core of the privilege is the notion that the state may not penalize individuals for refusing to make potentially incriminating statements. *See Ullmann v. United States,* 350 U.S. 422, 510-11 (1956) (stating the Framers "decreed that the law could not be used to pry open one's lips and make him a witness against himself").

To rely on the Fifth Amendment's privilege against self-incrimination, the burden lies with the defendant to establish a clear invocation of that right when they are seeking to bar evidence of their "post-arrest, pre-*Miranda* silence in the absence of custodial interrogation." *People v. Tom*, 331 P.3d 303, 312 (Cal. 2014). Previously, this Court held an individual did not need to use the phrases 'Fifth Amendment' or 'right to remain silent' to clearly invoke their privilege against self-incrimination. See *Coppola v. Powell*, 878 F.2d 1562, 1563 (1st Cir. 1989) (finding an individual

invoked their privilege against self-incrimination by stating "I am not one of your country bumpkins…if you think I am going to confess to you, you're crazy."); *see also Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) ("silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted").

Thus, prior to 2010, this Court had consistently upheld decisions that bolstered defendants' Fifth Amendment protections and unhindered ability to claim the privilege against self-incrimination. However, this Court's decision in *Thompkins* departed from previous precedent establishing a narrower and more burdensome requirement which specified defendants only invoked their Fifth Amendment rights if they did so "unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). In developing this concept, the *Thompkins* court relied heavily on *Davis v. United States*, which held that an individual must "unambiguously" assert their right to counsel. 512 U.S. 452, 459 (1994). In applying the "unambiguous" standard from *Davis*, the *Thompkins* court significantly burdened a defendant's ability to claim their privilege against self-incrimination. This is directly seen in *Thompkins* when the court held the defendant had not invoked his privilege against self-incrimination because he had not said "'he wanted to remain silent' or that 'he did not want to talk with the police.'" *Thompkins*, 560 U.S. at 376.

Additionally, *Thompkins* departed from previous court precedent when it held a defendant implicitly waives their *Miranda* warnings by not unambiguously invoking their right to remain silent. *See Id*. at 384 (where defendant was found to have implicitly waived his rights when he remained silent). Previously, this Court held that a valid waiver is not presumed "simply from the silence of the accused." *Miranda,* 384 U.S. at 473-475. As highlighted by Justice Sotomayor in her dissent, the decision in *Thompkins* ironically concluded "that a suspect who wishes to guard

his right to remain silent against such a finding of "waiver" must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police." *Berghuis v. Thompkins*, 560 U.S. 370, 391(2010) (Sotomayor, J., dissenting).

Later in 2013, with the decision in *Salinas v. Texas*, this Court departed even further from its prior precedent, thus placing an even heavier burden on a defendant's ability to invoke their privilege again self-incrimination. The *Salinas* court held defendants had to expressly or affirmatively invoke their privilege against self-incrimination to claim its protection. *Salinas,* 570 at 191. Presently, Government suggests that Coda forfeited his privilege against self-incrimination because he did not expressly and "unambiguously" invoke the right. R. at 9-10. However, because of the factual differences in *Thompkins* and *Salinas*, this Court should not follow this suggestion. Instead, it should find that Coda invoked his privilege against self-incrimination because "no ritualistic formula is necessary in order to invoke the privilege." *Quinn v. Unites States*, 349 U.S. 155, 164 (1995); *see also Hoffman v. United States*, 341 U.S. 479, 479-87 (1951) (finding "the privilege is properly invoked whenever the witness's answers 'would furnish a link in the chain of evidence needed to prosecute' the witness for a criminal offense." Further, "it need only be evident from the implications of the question, in the setting in which it is asked, that a response answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result"); *see also Howes* v. *Fields*, 565 U.S. 499, 508–09 (2012) ("whatever the scope of the Fifth Amendment before custody, once in custody, a defendant is in 'circumstances that are thought generally to present a serious danger of coercion'").

Moreover, this Court has frequently recognized that express invocation of one's privilege against self-incrimination is counterintuitive and thus restricts the protections afforded to defendants in *Miranda*. *See Berghuis v. Thompkins,* 560 U.S. 370 (2010) (Sotomayor, J.,

dissenting); *See also Salinas v. Texas*, 570 U.S. 178, 200-01 (2013) (Stevens, J., dissenting) (finding express invocation is not needed as "much depends on the circumstances of the particular case"). The Government may suggest that Coda impliedly waived his rights when he did not speak; however, this is not true as Coda did not engage in a course of conduct that would indicate he waived his rights, he simply remained silent. R. at 7; *see also North Carolina v. Butler,* 441 U.S. 369, 373 (1979) (A waiver can only be implied through a defendant's silence when that silence is "coupled with an understanding of his rights and a course of conduct indicating waiver"). Therefore, the lower courts erred in applying the *Thompkins* standard for unambiguous invocation of the privilege against self-incrimination, and the *Salinas* requirement for affirmative invocation because doing so unduly burdened Coda's ability to claim his Fifth Amendment privilege.

The Government suggests that an innocent person with an alibi defense would have disclosed it to the police after being informed of charges pending against them. R. at 7. However, Coda was under no obligation to disclose his alibi defense. *See Patterson v. New York*, 432 U.S. 197, 215 (1977) ("a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant…such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause"); *see also Berger*, *supra note* 8, at 226 (By including the privilege against self-incrimination in the Bill of Rights, the framer's established that the power to compel individuals to incriminate themselves had potential for gross abuse and that as such it should be limited. As a result, it is the burden of the state to prove its case without help from the defendant); *see also United States v. Moore*, 104 F.3d 377, 387 (D.C. Cir. 1997) ("the silence of an arrested defendant, under *Griffin*, is an exercise of his Fifth Amendment

rights which the Government cannot use to his prejudice"). Thus, permitting the Government to use Coda's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of his guilt unduly burdens his Fifth Amendment right.

The application of *Thompkins* and *Salinas* is inappropriate because the case law is in direct conflict with the ideals of the Fifth Amendment privilege against self-incrimination. *See United States v. Okatan*, 728 F.3d 111, 116 (2d Cir. 2013) (holding forcing an individual to choose between "making potentially incriminating statements and being penalized for refusing to make them" strips the privilege against self-incrimination of its full effect). Accordingly, this Court should apply neither *Thompkins* nor *Salinas*.

ii. Declining to apply *Thompkins* and *Salinas* would be a natural extension of previous precedent and also resolve the circuit split.

This Court should review Coda's action by applying *Griffin* which protects an individual's privilege against self-incrimination, an important personal liberty protected under the Fifth Amendment.

a. *Applying Griffin is a natural extension of Supreme Court precedent.*

Through its previous precedent, this Court firmly established itself as a gatekeeper and defender of individual liberties. In 1924, this Court held in *McCarthy v. Arndstein* that Fifth Amendment privilege against self-incrimination also applies to defendants in civil cases where criminal prosecution might result from the defendant's disclosure. *See McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924). Later, in 1951, this Court further expanded Fifth Amendment protection by holding in *Hoffman v. United* that a witness not only has the Fifth Amendment right to refuse to testify when the testimony alone might support a criminal conviction but also when the witness has a reasonable fear that the testimony might assist the government in building a criminal case against the witness. *See Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). Then in 1955, this

Court held in *Emspak v. United States* that for a witness to be allowed to not answer a question on Fifth Amendment grounds they need not say any particular phrase. *See Emspak v. United States*, 349 U.S. 190, 194 (1955) ("[a]ll that is necessary is an objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege"). Again, in 1964, this Court expanded access to Fifth Amendment protection by holding in *Malloy v. Hogan* that the Fifth Amendment's privilege against self-incrimination, which had historically only applied to witnesses in federal trials, also protects individuals testifying in state court. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

In 1965, this Court again established itself as a defender of Fifth Amendment rights in in *Griffin v. California*, holding the Fifth Amendment right against self-incrimination not only permits a criminal defendant from taking the stand during trial, but also prohibits the prosecution from encouraging the jury to interpret the defendant's silence as an admission of guilt. This Court reasoned the privilege against self-incrimination would be meaningless if a defendant's exercise of the privilege could be used against him. *See Griffin v. California* 380 U.S. 609, 613-615 (1965) (prosecution's comments on a defendant's failure to testify at trial are "a penalty…[that cut] down on the privilege [against self-incrimination] by making its assertion costly"). A year later, in 1966, this Court held in the seminal case, *Miranda v. Arizona*, that the Fifth Amendment right against self-incrimination is not limited to in-court testimony but also applies to when a person is taken into police custody.

This history and past precedent applies "with equal force to Coda's case today." R. at 15; *See also Okatan*, 728 F.3d at 119 (the "[u]se of a defendant's invocation of the privilege imposes the same cost no matter the context in which that invocation is made"). Accordingly, this Court

should apply the logic of *Griffin* to the facts at hand because doing so would be a natural extension of this Court's past logic which supports and defends the privilege against self-incrimination.

b. *Following Griffin would create uniformity among the circuits.*

The circuits have taken different approaches as to whether the government may use post-arrest but pre-*Miranda* silence as substantive evidence of guilt. The Fourth, Eighth, and Eleventh Circuits have held that the prosecution may use post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Contrastingly, the Sixth, Ninth, and D.C. Circuits have forbidden the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt, holding that doing so violates the Fifth Amendment privilege against self-incrimination. The lack of uniformity and the depth of the circuit split needs to be rectified in order to ensure that defendants across the nation have proper access to their privilege against self-incrimination and that their constitutional rights are not violated by misapplied and conflicting logic.

The Government may suggest that this Court should not apply *Griffin* but instead refine the logic in *Salinas*; however, doing so would solve nothing. In refining *Salinas*, this Court would only be supporting Fourth, Eighth, and Eleventh Circuit ideology which burdens the Fifth Amendment's privilege against self-incrimination. *See United States v. Cabezas-Montano*, 949 F.3d 567, 617-19 (11th Cir. 2020) (Rosenbaum, J., concurring) (stating Eleventh Circuit precedent from *United States v. Rivera* transforms *Miranda* from a device used to protect the Fifth Amendment right to remain silent into a technicality that law enforcement can manipulate and use to subvert that right.). Following case law that results in the potential for *Miranda* to be used against defendants is illogical and thus illustrates that the Fourth, Eighth, and Eleventh side of the circuit split must not be followed. Additionally, refining *Salinas* would not resolve the circuit split. It has been more than seven years since *Salinas* was decided and the circuit split remains as

entrenched as ever.

To overcome the circuit split and establish uniformity, this Court should apply the logic of the Sixth, Ninth, and D.C. circuits as doing so would naturally extend its precedent in *Griffin*. *See United States v. Moore*, 104 F.3d 377, 386 (D.C. Cir. 1997) (holding prosecution's comments to the jury that if defendant was innocent, he "would have at least looked surprised" or said "I didn't know that was there" violated defendant's Fifth Amendment right because "a citizen's protection against self-incrimination [does not] only attach when officers recite a certain litany of…rights"). Furthermore, the case law and ideology of the Sixth, Ninth, and D.C. circuits has already permeated into other circuits. *See United States ex. rel. Savory Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (holding the prosecutor's use of defendant's prearrest silence as substantive evidence of guilt violated defendant's Fifth Amendment); *see also United States v. Okatan*, 728 F.3d 111, 119-22 (2d Cir. 2013) (holding defendant had invoked his right to remain silent by asking for a lawyer, thus the government's substantive use of his silence violated his Fifth Amendment right).

In the 230 years that have passed since its ratification, the Fifth Amendment's privilege against self-incrimination is still "one of [the] most cherished fundamental rights." *N. River Ins. Co.* v. *Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *see also Miranda,* 384 U.S. at 460. ("a noble principle often transcends its origins"). By rooting this privilege in the text of the Constitution, the Forefathers created the federally protected right of silence and "decreed that the law could not be used to pry open one's lips and make him a witness against himself." *Ullmann v. United States,* 350 U.S. 422, 510-11 (1956). Because of its deep roots in our nation's founding, it has been viewed as a hallmark principle of a free government. *Malloy* v. *Hogan*, 378 U.S. 1, 9 (1964). As such it must be "zealously guarded…against invasion." *Tucker v. United States*, 375 F.2d 363, 369 (8th Cir. 1967). Accordingly, this Court should decline to apply *Thompkins* and *Salinas*, and instead

apply *Griffin* to naturally extend its past precedent as doing so protects defendants' privilege against self-incrimination, resolves the circuit split, and champions the purpose of the Fifth Amendment.

B. *Love* Should Not Be Applied

In reviewing Coda's motion to suppress his post-arrest but pre-*Miranda* and pre-interrogation silence, the District Court for the District of East Virginia applied the logic of *United States v. Love*. R. at 9. The Court of Appeals for the Thirteenth Circuit followed district court logic and in doing so incorrectly affirmed the dismissal. This Court should not apply *Love* as the facts significantly differ from those of the case at hand.

In *Love*, law enforcement officers waited to apprehend defendants at a farm which had been involved in drug smuggling. *United States v. Love*, 767 F.2d 1052, 1058 (1985). Upon defendants' arrival, law enforcement officers informed them that if they provided police with information that would help the officers determine that the defendants were not involved in the drug smuggling operation the defendants could leave. *Id*. In response to the question, defendants remained silent. *Id*. After some time, defendants asked if they could go to restroom in the woods. *Id*. Subsequently, law enforcement officers inspected the areas in which defendants had used the restroom. *Id*. In doing so, officers discovered piles of torn up paper which tied defendants to the farm's drug smuggling operation. *Id*. Unlike *Love*, law enforcement did not ask Coda any questions or to provide any information. R. at 7. Instead, FBI Special Agent Park informed Coda of the charges against him. R. at 7. Additionally, the case at hand is unlike *Love* because no physical evidence was found to conclusively link Coda to either the crime scene or the crime charged. R. at 2. Rather, the post-fire investigation only produced evidence that cold weather caused an old, faulty gas line to leak and destroy Coda's business. R. at 2. Additionally, most conclusions drawn

from common sense perceptions have been found to be incorrect. *See Webster v. Daniels*, 784 F.3d 1123, 1143 (7th Cir. 2015) (stating it is dangerous to rely on "common sense…[because] social science reveals that common assumptions are wrong"). Accordingly, permitting the Government to apply *Love* is incorrect.

III. EVEN IF THIS COURT APPLIES *THOPKINS AND SALINAS*, THE ADMISSION OF AUSTIN CODA'S POST-ARREST BUT PRE-*MIRANDA* AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT REMAINS UNCONSTITUTIONAL BECAUSE GOVERNMENT ERROR WAS NOT HARMLESS THUS VIOLATING HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Per 28 U.S. Code §2111, "on the hearing of any appeal…in any case, the court shall give judgment after an examination of the record without regard to errors…which do not affect the substantial rights of the parties." Under the harmless-error review, when the error is of "constitutional dimension" the government has the burden to prove "that the assigned error did not contribute to the result of which the appellant complains." *United States v. Harakaly*, 734 F.3d 88, 95 (1st Cir. 2013); *see also Chapman v. California*, 386 U.S. 18, 23 (1967) (stating "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

Here, the lower courts' error in admitting evidence of Coda's post-arrest but pre-*Miranda* and pre-interrogation silence was not harmless error. *See Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding government's error was not harmless because defendant was convicted). The case at hand is like *Coppola*. In *Coppola*, the error was found not to be harmless as there was no conclusive evidence tying the defendant to the crime. *Coppola,* 878 F.2d at 1568. The court reasoned that defendant's statement may have been "the clincher," thus its admission was not harmless. *Id*. This case is not one of "overwhelming evidence of guilt." *Milton v. Wainwright*, 407 U.S. 371, 373 (1972). Rather, like *Coppola*, the evidence in this case that the Government

presented at trial, besides Coda's silence, was circumstantial and insufficient to prove guilt beyond a reasonable doubt. R. at 2,15.

Accordingly, the district court's error in admitting evidence Coda's post-arrest but pre-*Miranda* and pre-interrogation silence substantially affected the trial's outcome, thus the error was prejudicial and not harmless. *United States v. Ibarra*, 493 F.3d 526, 532 (5th Cir. 2007). To rectify this wrong, this Court should overturn Coda's conviction and dismiss the charges against him.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests the Court to reverse both portions of the Court of Appeals for the Thirteenth Circuit's judgment in which the majority adopts the District Court for the District of East Virginia's judgment denying both Coda's Motion to Dismiss his indictment for preindictment delay and his Motion to Suppress his post-arrest but pre-*Miranda* and pre-interrogation silence.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER