

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 Supreme Court of The United States*

BRIEF FOR THE RESPONDENT

TEAM NO. 20
Attorneys for Respondent

QUESTIONS PRESENTED

- I. Whether preindictment delay that caused the Petitioner actual prejudice, violates the Fifth Amendment to the United States Constitution when the government does not act in bad faith in creating the delay.
- II. Whether admission of post-arrest but pre-*Miranda* and pre-interrogation silence violates the Fifth Amendment, when the Petitioner did not expressly invoke the right against self-incrimination and that does not fall within recognized exceptions.

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OPINIONS BELOW

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves legal questions concerning the Due Process Clause and the Self-Incrimination Clause under the Fifth Amendment to the United States Constitution. The Due Process Clause states: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall be deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V. The Self-Incrimination Clause states: “[No person] shall the be compelled in any criminal case to be a witness against himself[.]” U.S. CONST. amend. V.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case is about a malicious explosion of a hardware store in financial ruin, a business owner’s attempt to recover insurance proceeds from an “accident”, and the U.S. Attorney’s Office delayed response. R. at 1-3. The facts of this case center around the delayed arrest and indictment due to the government’s push to prosecute drug trafficking and other high-priority crimes. R. at 2. The Petitioner, Austin Coda, alleges that the delay prevented him from raising an alibi defense at trial and his post-arrest but pre-Miranda silence should not be used substantively because he never began voluntarily answering questions.

The Hardware Store. The Petitioner owned and operated a hardware store in Plainview, East Virginia which is located on the border of East Virginia and North Carolina. R. at 1. Since the hardware store was in a small town with no competition, the Petitioner's store was very profitable and attracted customers from East Virginia and North Carolina. Id. From 2002 to 2008, the hardware store was very successful. Id.

In 2008, an economic recession caused the previously successful hardware store to lose customers. R. at 1. Then, in 2009, a large chain hardware store opened, which caused the Petitioner's business to significantly dwindle. Id. At this point, the hardware store was barely generating enough revenue to keep its doors open. Id. The hardware store began to deteriorate due to improper maintenance. Id.

The Explosion Investigation. On December 22, 2010, an explosion occurred at the hardware store. R at 2. The explosion caused a fire which destroyed the entire store. Id. Local fire fighters and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") concluded that the cold weather caused a faulty gas line to leak which caused the explosion to occur. Id.

After the investigation closed, the Federal Bureau of Investigation ("FBI") received a tip from a close friend and neighbor, Sam Johnson, of the Petitioner. Id. The week following the "accident," Johnson observed the Petitioner being "very anxious and paranoid." Johnson was aware that the Petitioner's business and personal finances were in significant decline. Id. Johnson also knew that the Petitioner had an insurance policy which would cover the hardware store in case of a total loss, like a fire destroying the entire store. Id. After speaking with Johnson, the FBI informed the United States Attorney's Office that the Petitioner might be responsible for the explosion. Id.

The Government's Response. After receiving the information from the FBI, the U.S. Attorney's Office marked the Petitioner's case as "low-priority." Id. This designation occurred because the Petitioner was being prosecuted for unrelated state charges at the same time. Id. The U.S. Attorney's Office determined that it would be inconvenient to transport the Petitioner between proceedings since his case was designated as "low-priority." Id. There was also significant political pressure to prioritize drug trafficking and "high-priority" related offenses. Id. High political pressure to prosecute drug trafficking cases led to a high turnover rate within the U.S. Attorney's Office. Id. Due to the high turnover, the Petitioner's case continued to be given to one Assistant U.S. Attorney to another and designated as "low-priority." Id.

The Assistant U.S. Attorney assigned to the case in April 2019, realized that the statute of limitations was about to run out and had the Petitioner apprehended April 23, 2019. R. at 2, 7. Immediately after the arrest, the FBI Special Agent Informed the Petition of the charges. R. at 7. The Petitioner did not assert any defense at the time of arrest but remained silent. Id. Once the FBI reached the detention center with the Petitioner, he was subsequently read his *Miranda* rights. Id. The Petitioner was indicted in May 2019 under 18 U.S.C. § 844(i) which provides:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years.

R. at 3. The government indicted the Petitioner within the ten-year statute of limitations provided by 19 U.S.C. § 3295. The government alleges that the Petitioner destroyed his store, which was engaged in interstate commerce, to claim the insurance proceeds. Id.

The Petitioner's Reaction. The Petitioner, Austin Coda, opened the hardware store in January 2002. R. at 1. Due to the proximity to East Virginia and North Carolina border, the

store attracted a lot of customers and generated a lot of business. Id. However, the 2008 recession and new competition caused the hardware store to fall on hard times. Id. The hardware store generated enough revenue to stay open and later fell into disrepair. Id.

The Petitioner claims that the night of the explosion, December 22, 2010, he took a Greyhound bus to visit his family in New York for his birthday. R at 3. The Petitioner further claims he did this every year until 2015. Id. Since being indicted for the crime, four of the five family members the Petitioner claims to have visited in 2010 have died. Id. The fifth family member has dementia and cannot remember if the Petitioner visited the family in December 2010. Id. Additionally, Greyhound bus records are only maintained for three years, so records for the 2010 trip are unavailable. Id.

On April 23, 2019, the Petitioner was arrested and brought into custody. R. at 7. The Petitioner was informed of his charges by the arresting FBI Special Agent Park. Id. The Petitioner did not inform the FBI agent regarding his alleged alibi defense after he was arrested. Id. The Petitioner, after arrest, was brought to the detention center, then read his *Miranda* rights. Id.

II. NATURE OF THE PROCEEDINGS

The District Court for District of East Virginia. The Petitioner filed for a Motion to Dismiss the indictment for preindictment delay. R. at 1. On September 30, 2019, the district court denied the motion to dismiss. R. at 6. The Petitioner did not contest the governments facts present a prosecutable offense under 18 U.S.C. § 844(i) but that the preindictment delay violated his Fifth Amendment Due Process Clause. R. at 3. The Petitioner filed a Motion to Suppress his post-arrest but pre-*Miranda* silence. R. at 7. On December 19, 2019, the district

court denied the motion to suppress. R. at 10. The Petitioner was convicted and sentenced to 10 years in prison under 18 U.S.C. § 844(i) for maliciously destroying property with an explosive. R. at 11.

The Court of Appeals for the Thirteenth Circuit. The United States Court of Appeals for the Thirteenth Circuit affirmed the district court’s decision on the denial of the motion to dismissed based on preindictment delay and motion to suppress evidence of the post-arrest but pre-*Miranda* silence. R. at 11. The Thirteenth Circuit adopted the district court’s analysis in full on both issues. R. at 12.

SUMMARY OF THE ARGUMENT

I.

The government did not violate the Petitioner’s Fifth Amendment right to due process by delaying his indictment. In order to receive Fifth Amendment protections for a due process challenge to an indictment delay, an accused must show (1) actual prejudice, and (2) that the government acted in “bad faith” by delaying the indictment. The Petitioner sufficiently showed that he suffered “actual prejudice” in being able to defend himself. This “actual prejudice” was incurred as the Petitioner has been unable to establish an alibi for his alleged crime because of missing Greyhound Bus records and the witnesses that could have attested to his whereabouts are either dead or suffers from mental incompetency.

Nevertheless, while the petitioner has shown “actual” prejudice, he has failed to identify a “bad faith” reason for the government’s delay. The government’s delay in the Petitioner’s case was due to a shift in prosecutorial prioritization at the United States Attorney’s Office, and a good faith effort by the government to allow the Petitioner to finish state proceedings for unrelated criminal conduct. These bases were not conducted with any tactical advantage, or done so in “bad

faith.” Furthermore, this court risks impairing the balance between branches with a determination that the U.S. Attorney’s Office prioritization of cases was done in a “bad faith” regard to the Petitioner’s case. Especially, when this change in case prioritization was occurring during a time of increase drug usage and death.

This this court should affirm and find that the government’s preindictment delay did not infringe on the Petitioner’s constitutional right to due process.

II.

The government did not violate the Petitioner’s Fifth Amendment right against self-incrimination by admitting the post-arrest but pre-*Miranda* silence as substantive evidence of guilt. In order to claim Fifth Amendment protections, a witness must expressly state their intent to invoke the privilege. The right against self-incrimination is not self-executing and staying silent does not invoke this privilege. The Petitioner did not expressly invoke his Fifth Amendment right to remain silent at the time of arrest. His silence was in direct response to the statement of charges providing evidence of his guilt. The Petitioner claims an alibi defense, however, never asserted the alibi defense to the arresting officer nor stated his intent to invoke his Fifth Amendment rights.

Even if the Fifth Amendment did apply to post-arrest but pre-*Miranda* silence, the express invocation requirement only accounts for two exceptions: 1) implicit coverage when a criminal defendant fails to testify and 2) where governmental coercion forced the criminal defendant to involuntarily relinquish their rights. The government did not seek to use failure to testify as substantive evidence of guilt. The facts of this case do not meet the first exception. The Petitioner did not indicate any facts that the government coerced him, in any way, to relinquish his Fifth Amendment right to remain silent. Therefore, the facts do not meet the second exception to the express invocation requirement.

The Petitioner’s final argument, that an “interrogation trigger” creates an opportunity for police to manufacture silence by delaying the interrogation, fails because the Petitioner could still assert his Fifth Amendment right to remain silent. Preemptively asserting his Fifth Amendment rights, prevents any ability by the police to manufacture incriminating silence. Extending the invocation requirement under the Fifth Amendment to the post-arrest but pre-*Miranda* silence provides a consistent ruling and puts the government on notice if a witness wishes to invoke their right to remain silent. This Court should affirm and find the government’s admission of post-arrest but pre-*Miranda* silence was constitutional.

ARGUMENT AND AUTHORITIES

This Court should affirm the lower courts’ decision to deny the Petitioner’s motion to dismiss and motion to suppress. The issues in this case deal with constitutional interpretation of the Fifth Amendment. “Constitutional interpretation is [. . .] a question of law,” that requires a *de novo* standard of review. *Arbon Steel & Service Co., Inc. v. U.S.*, 315 F.3d 1332, 1334 (Fed. Cir. 2003).

I. THE GOVERNMENT DID NOT VIOLATE THE PETITIONER’S FIFTH AMENDMENT RIGHT TO DUE PROCESS

The government did not violate the Petitioner’s Fifth Amendment Due Process right for his preindictment delay because their reasons for the delay were not in “bad faith” The Petitioner claimed that the disputed delay prevented him from establishing an adequate alibi defense at trial. While its role in such disputes is limited, the Due Process Clause to the Fifth Amendment of the United States Constitution holds a right for accused persons subjected to delayed action on the part of the government. *U.S. v. Lovasco*, 431 U.S. 783, 789 (1977). Specifically, it provides: “[No person shall be] deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. One element required for this determination is “proof of prejudice.” *Lovasco*, 431 U.S.

at 790. However, case law from this Court suggests that prejudice is not the only element that must be met, but rather the defendant must show something more. *Id.* Particularly, under a two-pronged test, the Petitioner must show “actual prejudice,” and that the government did not have any bad faith reasons for the delay. *U.S. v. Sebetich*, 776 F.2d 412, 490 (3d Cir. 1985). Because, the government did not act in bad faith by delaying the Petitioner’s indictment, we ask that the court affirm the decisions of the District Court for the District of East Virginia and the United States Court of Appeals for the Thirteenth Circuit. R. at 6, 11.

A. A Fifth Amendment Due Process Challenge to a Preindictment Delay Requires More than Actual Prejudice.

This Court has already established that a sole showing of prejudice is inadequate to succeed on a due process challenge to preindictment delay. The Court first considered this issue implicitly in *U.S. v. Marion*. See *U.S. v. Marion*, 404 U.S. 307 (1971). In *Marion*, two appellees were suspected of fraudulently conducting business. *Id.* at 308-09. The last of the appellee’s crimes in dispute occurred three years before any indictments were issued. *Id.* Subsequently, at the trial court, the appellee moved to dismiss the indictment “for failure to commence prosecution of the alleged offenses charged therein within such time as to afford the (them their) right to due process.”¹ *Id.* at 309. Specifically, appellees claimed the Due Process Clause was violated because of the passage of time between the alleged crime and the indictment. *Id.* at 323-24. Ultimately, the Court held that at the present time the appellees’ claims were speculative rather than “actual.” *Id.* at 326.

However, in coming to their holding the court also highlighted that in addition to inadequately showing “actual” prejudice, the appellees also failed to show “that the Government intentionally

¹ *U.S. v. Marion*, also considered whether the preindictment delay was a violation of the defendant’s Sixth Amendment’s guarantee to a Speedy Trial. The Court denied the defendant relief on this basis, and its explanation is excluded here, as it is irrelevant to the Petitioner’s Due Process Clause rights.

delayed to gain some tactical advantage over appellees or to harass them.” *Id.* at 324. Furthermore, in discussing actual prejudice the court stated that it “and no one suggests that every delay caused detriment to a defendant’s case should abort a criminal prosecution.” *Id.* at 324-25. The language used by this Court suggests that a due process violation requires more than just the existence of actual prejudice and delay.

Several years after *Marion*, this court again considered the constitutionality of preindictment delay under due process in *U.S. v. Lovasco*. In the case, the defendant was indicted for firearm related crimes occurring 18 months before his indictment. *Lovasco*, 431 U.S. at 784. The defendant alleged the delay precluded him from bringing testimony of two material witnesses, who died between the delayed period. *Id.* at 785-86. The defendant argued that “due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay.” *Id.* at 789. However, Justice Marshall referring *Marion* explained that “proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid.” *Id.* Furthermore, the Court provided that “clear 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. In determining that the preindictment delay was for investigative purpose, the Court held that the delay was not fundamentally unfair and that the indictment should stand. *Id.* at 795-97.

In this case, the underlying facts are considerably similar to *Marion* and *Lovasco*. At its core the facts show, the petitioner has been accused of a crime occurring years before his indictment, impacting his ability to raise a defense disputing evidence of his involvement. The United States District Court for the Eastern District of Virginia, credited this argument by finding the delay prevented the Petitioner’s testimony regarding his whereabouts on the night of the crime, which

caused actual and substantial prejudice. R. at 6. However, as demonstrated in the aforementioned cases, this prejudice only makes the Petitioner's claim "ripe for adjudication," and the "reasons for delay" must be considered. Thus, the Petitioner's actual prejudice alone is insufficient to find a Due Process Clause violation.

B. The "Two-Prong" Test for Due Process Challenges to Preindictment Delay Applies.

The majority of circuit courts do not dispute that a due process violation to preindictment delays require more than actual prejudice, rather they dispute how the government's reasons should be applied under the inquiry. The majority view among these courts endorse an analysis that in addition to actual prejudice, a dismissal for pre-indictment delay requires a showing that "the prosecution purposely delayed the indictment to gain tactical advantage or for other bad faith purpose." *See e.g., U.S. v. Lebron-Gonzales*, 816 F.2d 823 (1st Cir. 1987) (stating "the standard imposed by *United States v. Marion* to test preindictment delay is a dual one . . . there must be an intent by the prosecution to gain a tactical advantage."), *U.S. v. Cornielle*, 171 F.3d 748 (2d Cir. 1999) (stating "an indictment brought within the time constraints of the statute may nevertheless violate due process where preindictment delay . . . was an intentional device to gain a tactical advantage over the accused."), *U.S. v. Ismaili*, 828 F.2d 153 (3d Cir. 1987) (stating "in order to obtain a dismissal of charges . . . a defendant must bear the burden of proving two essential facts: (1) that the government intentionally delayed bringing the indictment in order to gain some advantage over him . . ."), *U.S. v. Crouch*, 84 F.3d 1497 (5th Cir. 1996) (stating "the delay must also have been intentionally undertaken by the government."). Alternatively, the Petitioner supports the minority view. This view rejects the majority's approach and favors a balancing test, which "balance[es] the prejudice to the defendant with the government's justification for the delay." *See e.g., U.S. v. Valentine*, 783 F.2d 1413 (9th Cir. 1986) (stating "[s]econd, he must show

that the length of the delay when balanced against the government’s reasons for the delay . . .”), *U.S. v. Automated Med. Lab., Inc.*, 770 F.2d 399 (4th Cir. 1985) (stating “[i]f the threshold requirement of actual prejudice is met, the court must then consider the Government’s reasons for the delay, balancing the prejudice to the defendant . . .”). In balancing the two considerations, minority courts make their determination on whether the delay violates the fundamental conception of justice, decency, and fair play. *Valentine*, 783 F.2d at 1416.

Contrary to Petitioner’s contention, this Court should reject the balancing approach because it is impractical, and its application under a due process analysis will lead to inconsistent results. First, under neither of its previous precedents in *Marion* and *Lovasco*, has the Court referred to “balancing” or “weighing” prejudice against the reasons for delay. Rather, the origin for the conflict comes from language in *Lovasco*, where the court determined a “due process inquiry must consider *the reasons for the delay* as well as the prejudice to the accused.” The flaw with the balancing test rests in its risk for misapplication. For example, in *U.S. v. Crouch*, the Fifth Circuit rejected a balancing test when considering whether a preindictment delay was violative of a defendant’s right to due process. *Crouch*, 84 F.3d at 1512. In rejecting the balancing approach, the court stated:

What this test seeks to do is compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which “weighs” the most. Not only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historical practice to look for guidance. Inevitably, then, a “length of the Chancellor’s foot” sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own “personal and private notions’ of fairness,” contrary to the admonition of *Lovasco*.

Id.

Furthermore, the balancing test the Petitioner requests not only holds the risk of arbitrary outcomes based on the judge's individual notion of fairness, but it also risks absolving a criminal defendant for evidence unbeknownst to the government at trial. As one author provided the difficulty with balancing tests is that:

Any test that simply compares prejudice to the defendant with the prosecutor's reason for a delay runs the risk of holding the government responsible for the loss of testimony or items about which it had no knowledge, and more importantly, no intention of removing from the body of evidence available at trial.

Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wn. U. L. Q. 713, 779 (1999).

Additionally, providing a less stringent standard for the defendant to absolve themselves from prosecution on the basis of due process is contrary to how the right has been historically considered. "Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property," and not to "unintended injury to life and property." *Crouch*, 84 F.3d at 1513. Yet, in implementing a balancing test, one could find a "due process violation where the government acted in good faith and did not deliberately seek to prejudice the party ultimately accused."

Lastly, applying a balancing test under such circumstances could implicate concerns of separation of powers. The separation and distinct functions of each branch of the government, i.e., the judiciary, the legislature, and the executive, "is necessary to secure the liberty of the people." Matthew E. Glassman, *Separation of Powers: An Overview*, CONG. RES. SERV. 1, 4 (Jan. 8, 2016), <https://sgp.fas.org/crs/misc/R44334.pdf>. According to John Locke, to "leave one man as both lawmaker and judge" invites tyranny. *Id.* Thus, the independence between the branches serve as a check on the court's ability to intrude

into making their own determination on administrative or bureaucratic justifications for preindictment delay. The issue as explained in *Crouch* is that:

[S]erious separation of powers concerns are implicated. Here, for example, the panel concluded that the reasons for the delay – “lack of manpower and the low priority which this investigation was assigned” – were insufficient to outweigh the actual prejudice to Crouch and Frye. Finding these reasons “insufficient” is in substance determining that greater manpower should generally have been allocated to investigation and that and prosecution in that jurisdiction, and that a higher priority should have been assigned to this particular investigation. Yet those decisions are ones essentially committed to the legislative and executive branches, and the case for judicial second guessing is particularly weak where it is directed at preindictment conduct and is supported not by any specific constitutional guaranty or by any long-established tradition of judicial oversight, but only by the general contours of the due process clause.

Crouch, 84 F.3d at 1513.

Alternatively, the two-pronged approach is not a sliding scale analysis like the balancing test. This limits the potential for arbitrary decision-making, by making the contemplated prejudice and justifications independent of each other. Furthermore, the two-pronged approach would not interfere with fundamental concepts of our nation’s tradition or intrude upon the executive’s function of government, as it would require the Court to only consider whether the government’s action was executed in “bad faith,” a common determination for this Court with governing principles for its analysis. *See e.g., Lee v. U.S.*, 432 U.S. 23, 34 (1977) (holding that a prosecutor’s drafting error was at most “negligent” and not in bad faith, thus not violating the Double Jeopardy). Thus, we ask that the court affirm the Thirteenth Circuit’s ruling, favoring a two-prong approach for due process challenges to preindictment delays.

C. Petitioner Coda’s Delayed Indictment was not the Result of Prosecutorial “Bad Faith.”

Having established that the two-prong test is the appropriate standard for considering due process challenges to preindictment delay, the Petitioner is unable to show that the indictment was due to “bad faith” efforts by the government. As noted by this Court, it is “obvious” the Fifth Amendment does not impose a requirement on the government to seek an indictment the moment they have probable cause the accused is guilty. *Lovasco*, 431 U.S. at 791. Rather, in *Marion*, this Court in finding the defendant failed to meet the two-pronged test, explained the defendant did not show “that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.” *Marion*, 404 U.S. at 325. Courts have interpreted this statement to require that a defendant show the purpose for the government’s delay was in “bad faith.” This burden falls on the defendant, because the statute of limitations already provides the primary guarantee of over stale criminal charges. *U.S. v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994). Furthermore, this Court has also taken the position that delay for investigative purposes fail to meet this standard. *Lovasco*, 431 U.S. at 796. Investigative delay will not suffice to violate a defendant’s due process rights, “even if [his] defense might have been somewhat prejudiced by the lapse in time.” *Id.* Under current case law, these are the only two circumstances, in which this Court has discussed in context of preindictment delays. Here, we do not contend that the government’s delay in bringing an indictment was the result of “investigative delay.” Rather, we contend that the government’s stated reasons for the delay – (1) giving deference to Petitioner’s state proceedings for another offense, and (2) the USA Attorney’s Office prioritization of drug related crimes – were not done in “bad faith” or intended to “gain some tactical advantage over appellees or to harass them.” Since, the government’s actions were not deliberate, *Marion* requires that the defendant fail on this prong on the Due Process analysis.

1. The prosecutorial deference by the United States Attorney’s Office to Petitioner’s State proceedings does not equate to “bad faith.”

One of the justifications attributed to the Petitioners preindictment delay was that he was “being prosecuted for unrelated state charges, and the U.S. Attorney’s Office believed that it would be inconvenient to transport him back and forth during that time.” R. at 2. Nonetheless, the federal government’s deference to the state proceedings does not constitute “bad faith.”

The First Circuit case, *U.S. v. Marler*, provides some justification for this. In *Marler*, the appellant (former state police officer) appealed his trial court conviction for willfully depriving a man of his civil rights. *U.S. v. Marler*, 756 F.2d 206, 208 (1985). In the case, the defendant was off-duty at a bar with an acquaintance, when he was told by the bartender that someone removed a package from his friend’s car. *Id.* After receiving a description of the suspect’s identity, the defendant investigated the incident, which led him to another bar. *Id.* At the establishment, the defendant confronted the suspect, which led to an ensuing altercation that resulted in the suspect falling into a nearby harbor. *Id.* at 208-09. As a result of the fall, the suspect drowned and died. *Id.* at 209. Subsequently, two weeks later, the defendant was indicted in state court for manslaughter and battery/assault. *Id.* Eventually, after a second state trial the defendant was found guilty of the battery and assault charges. *Id.* Shortly thereafter, federal authorities began investigating the incident, before indicting the defendant. *Id.* This indictment came four years after the incident occurred, and as a result the defendant unsuccessfully moved to dismiss the indictment on due process grounds.² *Id.* In holding that the defendant failed to meet the two-pronged test required to show a due process violation, the court found that “the government’s sole reason for the long delay

² *U.S. v. Marler*, also considered whether the preindictment delay was a violation of the defendant’s Sixth Amendment’s guarantee to a Speedy Trial. The Court denied the defendant relief on this basis, and its explanation is excluded here, as it is irrelevant to the Petitioner’s Due Process Clause rights.

. . . the ‘dual prosecution policy’” was not the “type of abusive, bad faith decision that the *Lovasco* Court was concerned about.”³ *Id.* at 215.

Likewise, support for not finding “bad faith” in decisions of federal prosecutors to wait until after a state proceeding is found in the Fifth Circuit case *U.S. v. Byrd*. In *Byrd*, the defendant had requested to receive child pornography and merchandizing in the mail. *Byrd*, 31 F.3d at 1332 (5th Cir. 1994). Following his request, the government conducted a “sting” operation, before ultimately arresting defendant. *Id.* In addition to arresting the defendant, interviews were conducted with his foster sons, in which they told officers that the defendant would “fondle” and “paddle” the boys. *Id.* at 1333-34. Subsequently, state prosecutors brought charges against the defendant for criminal charges of sexual battery. *Id.* at 1334. These charges were eventually dismissed. *Id.* Approximately eight months later (three years after the occurrence) the defendant was indicted on a federal charge of knowing receipt of child pornography. *Id.* The defendant on appeal of his conviction, argued that the preindictment delay violated his constitutional right to due process. *Id.* at 1339. In rejecting the defendant’s claim of improper preindictment delay, the court stated that the facts showed “that the federal government deferred prosecution because the state of Louisiana was pursuing charges against Byrd in connection with the same course of conduct,” and that a delay on those grounds “does not show intentional delay for a tactical advantage.” *Id.* at 1340.

Here, the case before the court is factually similar to *Marler* and *Byrd*. Like in cases, the accused suffered delay due to governmental deference towards the state court. Here, the U.S. Attorney’s Office found it appropriate to wait until after the Petitioner’s state proceedings to indict

³ The ‘dual prosecution policy’ provides in part that “[a] federal prosecution will not be authorized unless authorized unless the state proceeding left substantial federal interests demonstrably unvindicated. Even so, a dual prosecution is not warranted unless a conviction is anticipated and – if the state proceeding resulted in a conviction – normally will not be authorized unless an enhanced sentence in the federal prosecution is anticipated.” *Marler*, 756 F.2d at 215 (citing to United States Department of Justice, *United States Attorneys’ Manual* § 9, c. 2 pp. 18–20 (Jan. 3, 1980) (Title 9 Criminal Division)).

him. R. at 2. Thus, like the aforementioned cases, this Court should find that this was not done for the purpose to receive a tactical advantage at trial against the Petitioner. The Petitioner could likely argue that these cases should not be controlling, because unlike the aforementioned cases, here the state proceeding was unrelated to the conduct federal prosecutors indicted him for. However, that argument fails to incorporate the governing standard – which is was the government’s purpose for delay was done *intentionally* for *tactical advantage*. Here, not only does preexisting case law support a finding in favor of the government, but it could be argued that the delay was done in “good-faith” for the benefit of the defendant. Particularly, the government justifies their delay in waiting on the state proceeding, because it would have been “inconvenient to transport him back and forth during that time.” R. at 2. This convenience is both-sided at the very least. In indicting the defendant after the state proceeding, the government allowed the defendant to focus on defending each charge one-by-one, rather than putting the defendant through the burden of defending two actions at the same time with different sets of discovery of evidence. Taking this into consideration, we urge this court to affirm the decision of the lower courts and affirm that the defendant has not proved that the government acted in bad faith by delaying his federal indictment.

2. Preindictment delay resulting from the United States Attorney’s Office’s prioritization in cases does not equate to “bad faith.”

While part of the delay in the defendant’s indictment was due to giving deference to the state’s ongoing criminal proceeding, this doesn’t wholly justify a ten-year delay. However, this was not the only justification, the government provided. The second justification brought forth by the government regarding the Petitioner’s extended preindictment delay was that “political pressure caused the office to prioritize prosecuting drug trafficking and other related offenses.” R. at 2. These political pressures also generated a lot of turnover, and as a result, the lack of manpower caused the Petitioner’s case to be “passed from one Assistant U.S. Attorney to another.” R. at 2.

This kept Petitioner's case "low priority" and prevented it from progressing. R. at 2. While the result of these decisions prejudiced the Petitioner, it nevertheless, was not executed in "bad faith."

Preindictment delays resulting from "low priority" classifications of an accused person's case are insufficient to show "bad faith." This was illustrated in *U.S. v. Collamore*. In *Collamore*, the defendant had been suspected of firearm related crimes, after breaching a confidential informant agreement with state prosecutors for other crimes he had been prosecuted for. See *U.S. v. Collamore*, 751 F. Supp. 1012, 1016-20 (D. Maine 1990). However, the defendant was not indicted for the crimes until four years after the last occurrence. *Id.* As a result, among other defenses, the defendant sought to dismiss the federal indictment as the extensive delay was a violation of his due process right. *Id.* at 1025. In explaining the reason for the delay, the government explained that the ATF agents that were handling a portion of the investigation classified the defendant as "low priority," since at the time the "defendant was incarcerated on state charges and thus posed no immediate danger to society." *Id.* at 1026. As a result, the investigating ATF agent "first completed other cases and took his scheduled vacation," before delving into defendant's matter. *Id.* The case was then further delayed in the US Attorney's office due to "pressing caseload." *Id.* Nevertheless, the court held that while they did not condone these reasons for delay, the underlying justifications fail to show a "abusive or bad faith motive behind them." *Id.* at 1027.

Furthermore, preindictment delay due to lack of manpower is insufficient to find "bad faith." This notion is best illustrated in *U.S. v. Bouthot*, a case decided in the Massachusetts District Court. In the case, the defendants were charged for crimes involving the possession of a firearms. *U.S. v. Bouthot*, 685 F. Supp. 286, 288 (D. Mass. 1988). The underlying crime in this case occurred almost a year before an indictment was issued. *Id.* at 291. As a result, the defendants moved to dismiss

their indictment alleging that the delay was in violation of due process.⁴ *Id.* at 287. Contrary to the defendants' position, the court held that the defendants failed to show a due process violation as they failed to meet the two-pronged test. *Id.* Specifically, the court held that the defendants had not satisfied their showing that the delay was the "result of an intentional effort by the government to gain tactical advantage." *Id.* Specifically, the court reasoned:

[I]t would be inappropriate to dismiss on Due Process grounds because the preindictment delay at issue was caused by the assignment of manpower, reflecting the priority of investigations established by the U.S. Attorney's office. There are, unfortunately more violations of federal than the government can investigate and prosecute. Some discretion is required. The establishment of law enforcement priorities is an executive function, not a judicial function. Indeed, such priorities are often major issues in Presidential campaigns. It would not only be inappropriate but also injurious to the administration of justice if the operation of executive law enforcement priorities and related allocations of manpower became litigable issues.

Id. at 298.

Here, in this case the Petitioner's preindictment delay was partially attributed the "low priority" classification of his case assigned to him by the U.S. Attorney's Office. This classification was the result of political pressures that required the office to prioritize drug related offenses. The shift in the office's prioritization reflects a demographic shift in drug use. According to the Centers for Disease Control and Prevention National Center for Health Statistics, there were 70,237 drug overdose deaths in the United States. Holly Hedegaard et al., *Drug Overdose Deaths in the United States, 1999-2017*, U.S. DEP'T OF HEALTH AND HUMAN SERV. (Nov. 2018), <https://www.cdc.gov/nchs/data/databriefs/db329-h.pdf>. Between 2009 and 2017, overdose death rates rose by double. *Id.* Naturally, in an effort to reduce these occurrences, the government sought to put more emphasis on prosecuting these crimes. Furthermore, as reflected in *Bouthot*, this Court

⁴ *U.S. v. Bouthot*, also considered defenses raised by the defendant regarding constitutional and other infirmities relating to double jeopardy and their right to a Speedy Trial. A discussion pertaining to those issues have been omitted here.

has no authority to infringe upon the executive's decision making in prioritizing these issues. Thus, a ruling by this court suggesting that the government's reasons for delay due to a shift in a decision made by the executive, is contrary to the court's "judicial function" powers and this democracy's separation of powers concerns.

Additionally, because of the shifts in political priorities, the U.S. Attorney's office faced "high turnover." R. at 2. This turnover resulted in the Petitioner's case being passed from one person to another. R. at 2. As a result, no one at the U.S. Attorney's office had the opportunity to focus an investigation into the Petitioner's case. While this may have prevented significant inconvenience to the Petitioner's defense, it was not done with the intention of "gaming" him for an advantage at trial. Thus, as a result we ask this Court to follow *Collamore* and *Bouthot*, and affirm the lower court's determination that the government did not act in "bad faith."

Thus, in sum, because the Petitioner is unable to show anything more than actual prejudice under the majority "two-pronged" test for due process violations, this Court should affirm the denial of the Petitioner's Motion to Dismiss.

II. THE GOVERNMENT DID NOT VIOLATE THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The Petitioner claims that the U.S. Attorney's Office ("the government") violated his Fifth Amendment right against self-incrimination when they sought to substantively introduce his post-arrest but pre-*Miranda* silence in response to the charges against him. The Fifth Amendment protects the right that no one may "be compelled in any criminal case to be a witness against himself." *See* U.S. CONST. amend. V. However, "a witness who desires its protection" must expressly invoke the privilege to receive its protections. *Salinas v. Texas*, 570 U.S. 178, 181 (2013).

The United States District Court for the District of East Virginia and the United States Court of Appeals for the Thirteenth Circuit found the substantive use of the post-arrest but pre-Miranda silence as evidence of guilt did not violate the Fifth Amendment. R. at 8, 12. The district court and Court of Appeals correctly found that the Petitioner's silence was in response to the statement of charges against him, use of that silence does not violate the Fifth Amendment, and asserting his Fifth Amendment right to remain silent would prevent any police incentive to manufacture incriminating silence. R. at 8, 10.

a. **The Fifth Amendment Does Not Apply to Post-Arrest but Pre-Miranda silence because the Petitioner did not Expressly Invoke the Privilege Against Self-Incrimination.**

The Petitioner's Fifth Amendment violation claim fails because the Petitioner never expressly invoked his right to remain silent when an arresting agent informed him of the charges against him. The Fifth Amendment "serves to protect persons ... 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, 467 (1966). However, a witness must expressly state their intent to access this privilege. *Salinas*, 570 U.S. at 181. A witness cannot invoke the privilege against self-incrimination merely by standing mute. *Quinn v. United States*, 349 U.S. 155, 164 (1955). Since the Petitioner did not expressly invoke his right against self-incrimination after being informed of his charges, the government was within their right to substantively introduce the post-arrest but pre-Miranda silence. R. at 8.

Once a person invokes the privilege to remain silent, a statement taken after "cannot be [anything] other than the product of compulsion." *Miranda*, 384 U.S. at 436. After a *Miranda* warning is received and a person is silent following instruction of their rights, the silence cannot be used substantively as evidence of their guilt. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). This

Court refined this rule, “permitting testimony concerning a defendant’s silence where the defendant has not ‘received any *Miranda* warnings during the period in which he remained silent immediately after his arrest.’” *U.S. v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (quoting *Fletcher v. Weir*, 455 U.S. 603 (1982)). This Court expanded the rule established in *Doyle*, to permit post-arrest silence to impeach a criminal defendant that did not assert his affirmative defense to police at the time of arrest. See *Fletcher*, 455 U.S. at 607. Like *Fletcher*, the Petitioner did not assert his affirmative defense, remained silent after the charges, and did not inform the police of his intent to use his Fifth Amendment rights against self-incrimination. *Id.*

Invoking the right to remain silent must be “unambiguous.” *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010). It should follow that the unambiguous assertion of the right to remain silent applies “before or after the suspect receives a *Miranda* warning.” *Sessoms v. Grounds*, 776 F.3d 615, 621 (9th Cir. 2015) (holding that “requirement of an unambiguous invocation of a right to counsel applies to pre-*Miranda* statements”). It follows that a post-arrest but pre-*Miranda* silence, as established to impeach a criminal defendant in *Fletcher*, should be extended to show substantive evidence of guilt. *Love*, 767 F.2d at 1063.

Circuit courts are split on post-arrest but pre-*Miranda* silence, arguing that custody is the “triggering mechanism” and the criminal defendant has the right to remain silent when they do not have the ability to “terminate the inspection,” *United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007), however, *Miranda* highlights that in-custody interrogation triggers the right to remain silent. See *Miranda*, 384 U.S. at 467. A *Miranda* warning does not have to be issued at the time of arrest, but the rights are triggered during custodial interrogation. *Id.* at 444, 467. In this case, the Petitioner was not in the process of a custodial interrogation. R. at 7. Since he was not being

interrogated by the agent, his *Miranda* rights did not trigger, and he would need to expressly invoke them to be protected by the Fifth Amendment.

This Court outlined the invocation requirement to claim Fifth Amendment protection against self-incrimination. *See Salinas*, 570 U.S. at 183. In *Salinas*, the Petitioner was charged with the murder of two brothers. *Id.* at 181-82. The Petitioner answered the officer's questions through majority of the noncustodial interview, except when the officer asked a question regarding the shotgun shells found at the scene. *Id.* at 182. The Petitioner remained silent to that specific question but continued answering other questions. *Id.* The Petitioner argued that "use of his silence...violated the Fifth Amendment." *Id.* This Court reasoned that, even in pre-custodial police questioning, the Petitioner had to expressly state the intention to access Fifth Amendment protection because it ensures that the government is informed of all the information it is entitled to. *Salinas v. Texas*, 570 U.S. 178, 184 (2015) (quoting *Garner v. United States*, 424 U.S. 648 (1976) (holding that the "government has the right to everyone's testimony")). This Court established that pre-arrest and pre-*Miranda* silence is admissible as substantive evidence of guilt. *Salinas*, 570 U.S. at 183. This Court stated, "A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." *Id.* at 189.

In this case, the Petitioner remained silent to the charges against him. R. at 7. Aligning with *Salinas*, the government never interrogated the Petitioner. The Petitioner's silence, like the questions in *Salinas*, were only in response to the arresting officer's statement of charges. After being arrested, the Petitioner either had to opportunity to assert his alibi defense or his Fifth Amendment rights against self-incrimination. Instead, the Petitioner remained silent, without asserting his rights against self-incrimination, and this Court has long held that these rights are not self-executing. Since the statement of charges corresponded with the arrest but before the *Miranda*

warning, *Salinas* controls. The government did not violate the Fifth Amendment right against self-incrimination when introducing the Petitioner's silence after arrest but before *Miranda* rights were read.

This Court based their reasoning of pre-arrest and pre-*Miranda* invocation requirement on a three-hour interview that occurred after *Miranda* instruction. *Berghuis*, 560 U.S. at 376. During the police interview, after *Miranda* rights were read and understood, the petitioner remained largely silent. *Id.* The police asked questions regarding the petitioner's faith and if they wanted them to pray for him after "'shooting that boy down.'" *Id.* The Petitioner replied, "yes." *Id.* The petitioner argued that he invoked his right to remain silent by not responding to police questioning for a significant period of time. *Id.* at 381. This Court rejected that argument, reasoning "unambiguous invocation of *Miranda* rights" does not put police on notice and provides no direction to officers. *Id.* If the petitioner wished to assert his Fifth Amendment rights, he should have unambiguously stated his intent. *Id.* at 382.

The Petitioner, like *Berghuis*, remained mute when he was arrested and informed of the charges against him. R. at 7. Even after police questioning for almost three hours, in custody, and informed of his *Miranda* rights, this Court still held that standing mute does not trigger the Fifth Amendment privilege against self-incrimination. In both pre-custodial and custodial police questioning, remaining mute to questions or statements, required the Petitioners to expressly assert their Fifth Amendment rights to remain silent. While the government never interrogated the Petitioner, the silence occurred during and immediately after the statement of charges. Since the silence occurred after the arrest, his silence was a response to the statement of charges and indicates his guilt. After hearing the charges against him and being arrested for a crime, a reasonable person

in that situation would assert an alibi defense. A reasonable person could infer that the Petitioner remained silent because he did not have an alibi defense at the time. R. at 9.

This Court has established that to be protected by the Fifth Amendment, the Petitioner must expressly state their intent to invoke this privilege and merely standing mute does not satisfy the invocation requirement. See *Salinas*, 570 U.S. at 188. Like the non-custodial police questioning in *Salinas*, the Petitioner stood mute to the charges against him. R. at 7. Since the silence occurred with the arrest, the silence could only be inferred as a reaction to the statement of charges which indicates guilt. This Court should find that the Fifth Amendment was not violated because the Petitioner never expressly stated his intent to invoke his right against self-incrimination.

b. Even if the Fifth Amendment Did Apply to the Post-Arrest but Pre-*Miranda* Silence, Neither Recognized Exception to the Express Invocation Requirement Applies.

The Petitioner asserts that his Fifth Amendment rights were violated when the government sought to introduce his post-arrest but pre-*Miranda* silence as substantive evidence of guilt. R. at 7, 8. However, the Petitioner never asserted his Fifth Amendment rights against self-incrimination, and the situation falls into neither exception to the express invocation requirement, his claim fails. See *Salinas*, 570 U.S. at 184.

This Court has recognized two exceptions to the invocation requirement of the Fifth Amendment: 1) implicit protection when a criminal defendant chooses not to testify at trial, see *Griffin v. California*, 380 U.S. 609, 613-615 (1965) and 2) “a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary.” See *Salinas*, 570 U.S. at 184. Neither of these situations occurred to excuse the Petitioner from expressly asserting his Fifth Amendment rights against self-incrimination.

i. The Petitioner’s failure to testify.

In this case, the government is not seeking to use the Petitioner’s failure to testify as proof of guilt. Refusing to testify is a constitutional right articulated by the Fifth Amendment self-incrimination clause. *Griffin*, 380 U.S. at 613-614. A criminal defendant does not need to disclose at trial his reasons for remaining silent because it is immaterial to their constitutional rights. *Salinas*, 570 U.S. at 184. Since these reasons are immaterial, expressly invoking the privilege against self-incrimination “would serve no purpose.” *Id.*

Like in *Salinas*, where the government is seeking to introduce silence after arrest and not in the failure to testify, the silence falls outside the *Griffin* exception. *Id.* A non-custodial police interview did not provide the criminal defendant with the “comparable unqualified right” for protection under this exception. *Id.* Since the silence is in response to the charges against the Petitioner and not the failure to testify, this silence falls outside the first exception.

ii. The Petitioner was not coerced to involuntarily relinquishing his rights.

The Petitioner’s arrest does not constitute as government coercion and the government did not force the Petitioner to involuntarily relinquish his rights. This Court has held that, “a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary.” *Salinas*, 570 U.S. at 184. Under *Miranda*, an in-custody interrogation can subject a criminal defendant to “inherently compelling pressures” which can “undermine the individual’s will to resist and compel him to speak where he would not otherwise do so freely.” *Miranda*, 384 U.S. at 467. Under *Moran v. Burbine*, 475 U.S. 412, 421 (1986), “[The] relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and the Petitioner does not

show that the government intimidated, coerced, or deceived him into relinquishing his rights against self-incrimination. *Moran*, 475 U.S. at 421.

To determine whether a statement was involuntary under the Due Process Clause, this Court analyzes if, “the confession was ‘extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.’” *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (quoting *Bram v. United States*, 168 U.S. 532, 542-543 (1897)). Examples of governmental coercion were “incapacita[tion] and a sedated suspect, sleep and food deprivation, and threats.” *Berghuis*, 560 U.S. at 387 (quoting *Colo v. Connelly*, 479 U.S. 157, 163-164 (1986) (holding that “coercive police activity is a necessary predicate to the finding that a confession is not “voluntary...”)).

Like in *Berghuis*, where this Court found that a three-hour interrogation conducted in a standard room, the Petitioner’s arrest lacked any facts which made the situation “inherently coercive.” *Berghuis*, 560 U.S. at 386-387. The Petitioner does not provide any evidence to suggest that when he was brought into custody, the agent coerced him into involuntarily relinquishing rights. Further, the Petitioner remained silent to his charges without instruction from the arresting agent. R. at 7. At no point did the arresting agent use force, unapproved interrogation tactics, or threats that would have prevented the Petitioner from expressly invoking his Fifth Amendment rights to remain silent. There was no evidence that the government coerced the Petitioner to involuntarily relinquish his rights. The government was not seeking to introduce failure to testify as evidence of guilt and the government did not coerce the Petitioner to relinquish his rights. Therefore, neither exception to the express invocation requirement applies and the Petitioner was required to assert his intent to be covered under the protection of the Fifth Amendment.

c. Applying the Express Invocation Requirement to Post-Arrest but Pre-Miranda Silence Would Not Create an Incentive to Delay a Police Investigation to Manufacture Silence.

Having resolved that the express invocation requirement under the Fifth Amendment applies to post-arrest but pre-*Miranda* silence and neither exception applies, this Court must examine whether extending the invocation requirement would create an incentive for police to manufacture incriminating silence. Both lower courts found that asserting the right to remain silent would “dismantle any police incentive to manufacture silence.” R. at 10. The Petitioner incorrectly applies the “interrogation trigger” to occurring at custody instead of during a custodial interrogation. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). Regardless, during or immediately following the arrest, the Petitioner could have asserted his Fifth Amendment right to remain silent and doing so would demolish any police incentive to “manufacture silence.”

This Court has rejected a similar argument, as the Petitioner in the current case, in *Salinas*. *Salinas*, 570 U.S. at 191. This Court rejected the argument that, “an express invocation requirement will encourage police officers to “unfairly “tric[k]”” suspects into cooperating.” *Salinas v. Texas*, 570 U.S. 178 (quoting *South Dakota v. Neville*, 459 U.S. 553, 566 (1983)). Similar to the express invocation requirement, the formal interrogation trigger requirement, would not create an incentive for police to manufacture silence by a delayed interrogation or “trick” arrestees. R. at 9, 10. Both lower courts correctly state that the petitioner can circumvent manufactured “silence” issue by unambiguously expressing his Fifth Amendment right to remain silent. R. at 10.

This Court reasoned that the express invocation requirement “has not proved difficult to apply.” *Salinas*, 570 U.S. at 190-191. Similarly, extending the express invocation requirement to post-arrest but pre-*Miranda* silence would prove workable in practice and cure any issues of manufactured silence. In this case, the arresting agent informed the Petitioner of the charges against

him. R. at 7. At this point, the Petitioner could have asserted his Fifth Amendment right against self-incrimination and forfeited the governments right to use the silence as evidence of guilt. *See Doyle*, 426 U.S. at 618. Asserting the Fifth Amendment right after arrest would prevent the police from manufacturing silence and the arrestee would receive the Fifth Amendment protection.

Silence in response to the statement of charges implicates, but does not conclusively establish, the Petitioner's guilt. R. at 10. Since the post-arrest silence but pre-*Miranda* warning does not violate the Fifth Amendment, a jury should have the opportunity to weigh the information and use it to determine whether the Petitioner is guilty beyond a reasonable doubt. Preventing the jury from hearing all the evidence, especially an arresting agent's observations during arrest, is an obstruction to justice. R. at 10.

In conclusion, the Petitioner's Fifth Amendment violation claim fails because he never expressly invoked the right to remain silent. The facts of this case do not apply to either exception to the express invocation requirement of the Fifth Amendment. Simply asserting the Fifth Amendment right to remain silent after the arrest, but before *Miranda* rights were read, would demolish any police incentive to manufacture silence. This Court should affirm the denial of the Petitioner's Motion to Suppress.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeals for the Thirteenth Circuit as to the Fifth Amendment claims.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT