Docket No. 21-125

In The

Supreme Court of the United States

AUSTIN CODA

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TEAM 21
Counsel for Respondent

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I. In analyzing a dismissal due to a pre-indictment delay, the Supreme Court has held that courts should consider (1) actual prejudice to the defendant, and (2) the Government's reasons for the delay. Many courts, including the Supreme Court, have interpreted the second prong of this test to require a showing of bad faith on the part of the Government. Within the applicable statute of limitations period of ten years, the Government indicted Petitioner in May 2019—nine years after his offense occurred. Does a pre-indictment delay violate the Fifth Amendment right to due process where there is no bad faith on the part of the Government?

II. The Supreme Court has held that in order to enjoy the Fifth Amendment protection of the right to remain silent, one must unequivocally assert that right, even in a non-custodial setting. Additionally, courts have held that the prosecution may use one's post-arrest, but pre-*Miranda* silence when there is no custodial interrogation and the arrestee is under no compulsion to speak as substantive evidence of guilt. When Petitioner was arrested, he remained silent while an agent informed him of the charges against him; the prosecution sought to introduce this silence in their case-in-chief. Did the admission of Petitioner's post-arrest, but pre-*Miranda* silence as substantive evidence of guilt violate his Fifth Amendment rights?

STATEMENT OF THE CASE

A. Statement of Facts

In 2002, Austin Coda ("Coda" or "Petitioner") opened a hardware store in Plainview, Virginia. R. at 1. While the store had been profitable for some time, the 2008 recession, along with additional competition presented by a new store nearby resulted in Petitioner's business barely making enough revenue to stay open. *Id*. On December 22, 2010, an explosion occurred within Petitioner's hardware store, causing a massive blaze that entirely destroyed it. *Id*. at 2

While early evidence suggested cold weather may have caused the explosion, the Federal Bureau of Investigations ("FBI") received a tip from one of Petitioner's close friends, Sam Johnson ("Johnson") suggesting otherwise. *Id*. Johnson informed the FBI that prior to the explosion, Petitioner's business and personal finances had declined. *Id*. Johnson further disclosed that Petitioner maintained an insurance policy that provided coverage in cases of total loss. *Id*. Johnson noted that the week prior to the explosion, Petitioner appeared agitated, describing him as "very anxious and paranoid." *Id*. The FBI then alerted the United States Attorney's Office of Petitioner's possible involvement with the 2010 explosion. *Id*.

While developing their prosecution for Petitioner's involvement in the explosion, the U.S. Attorney's Office marked Petitioner's case as "low-priority" given that Petitioner was already being prosecuted in state court for unrelated charges, and it would be inconvenient and burdensome to transport him back and forth. *Id*. As the Government was prosecuting other cases, Petitioner's

case related to the explosion was transferred between several different Assistant U.S. Attorneys due to high turnover that was taking place internally. *Id.*

On April 23, 2019, notably within the statute of limitations, the Government took Petitioner into custody. *Id*. at 2–3, 7. Immediately after being arrested, an FBI agent informed Petitioner of the charges against him. *Id*. at 7. During this time, Petitioner remained silent instead of asserting an alibi defense, something he had years to secure and that he later attempted to raise. *Id*. Following Petitioner's arrival at the detention center, the FBI subsequently read Petitioner his *Miranda* rights. *Id*. The Government sought to use Petitioner's post-arrest, but pre-*Miranda* silence as evidence of his guilt. *Id.* Petitioner moved to suppress the evidence, arguing it violated his Fifth Amendment rights. *Id.* at 7–8.

At the evidentiary hearing, Petitioner stated that although he intended to raise an alibi defense, a pre-indictment delay by the Government rendered him unable to produce testimony critical to his defense. *Id*. at 3. Petitioner claimed on the night of the explosion he took a Greyhound bus to New York for his birthday as he allegedly did every year until 2015. *Id*. Petitioner submits that he has no evidence of his trip from 2010 for several reasons. *Id*. Petitioner argues that because Greyhound only stores its bus records online for three years, any evidence of his trip to New York in 2010 is now unavailable. *Id*. Additionally, four of the five family members Petitioner visited in 2010 have since died—two in a car accident, and two from battles with chronic diseases. *Id*. The fifth family member has been diagnosed with dementia and does not remember Petitioner visiting on the night of the incident. *Id*. Consequently, Petitioner argues that he is left unable to adequately present a defense. *Id*.

B. Procedural History

In May 2019, Petitioner was indicted under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. *Id*. at 3. Petitioner moved to dismiss the indictment, stating that the Government's delay to indict in 2019 while still within the statute of limitations, violated the Fifth Amendment Due Process Clause. *Id*. Petitioner further argued that the use of his post-arrest, but pre-*Miranda* silence as substantive evidence of guilt similarly violated his Fifth Amendment rights. *Id*. at 7

Subsequently, Petitioner was convicted under § 844(i) and sentenced to ten years in prison. *Id*. at 11. The District Court for the District of East Virginia denied Petitioner's pretrial motions to dismiss based on pre-indictment delay and to suppress evidence of his post-arrest, but pre-*Miranda* silence. *Id*. Petitioner appealed the denial of both motions. *Id.*

The Thirteenth Circuit Court of Appeals adopted the District Court's analysis on both issues in full and affirmed, with one judge dissenting on the matter, finding that the Government's timely indictment and use of Petitioner's post-arrest, but pre-*Miranda* silence did *not* violate his constitutional rights. *Id*. at 12.

SUMMARY OF THE ARGUMENT

I. Pre-Indictment Delay Issue

This Court should affirm the Thirteenth Circuit's holding that the Government did not violate the Due Process Clause of the Fifth Amendment because it did not act in bad faith and Petitioner did not suffer actual prejudice. This Court's precedent requires dismissal due to a pre-indictment delay when a defendant proves (1) actual prejudice, and (2) that the Government deliberately delayed the indictment in bad faith. While the Fourth and Ninth Circuits hold that a defendant need not prove bad faith on the part of the Government, this Court's decision in *United*

States v. Gouveia clarifies the importance of bad faith in analyzing violations of constitutional rights. Thus, this Court should follow its *Gouveia* interpretation and clarify this standard in accordance with the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits by requiring a defendant to show bad faith on the part of the Government in order to grant dismissal due to pre-indictment delay.

This Court has emphasized the role that the applicable statute of limitations serves in safeguarding against the prosecution of overly stale charges and ensuring preservation of evidence. Further, prosecutors are under no duty to seek an indictment as soon as they are legally able to do so, but are granted discretion in choosing to file charges when they are satisfied in their ability to establish a suspect's guilt beyond a reasonable doubt. Petitioner does not argue that the facts do not present a prosecutorial offense, but rather, that the Government's 2019 indictment resulted in a prejudicial delay. Contrary to Petitioner's position, the applicable statute of limitations required the prosecution to seek an indictment no later than ten years after the date of the offense—here, December 22, 2010. The Government indicted Petitioner in May of 2019, a full seven months before the statute of limitations would expire. The 2019 indictment was more than reasonable on the part of the Government as they were considering Petitioner's unrelated state proceedings, facing high turnover rates, and prioritizing other crimes within their office. Thus, the Government most certainly did not delay Petitioner's indictment to intentionally gain a tactical advantage over him, but rather, had a good faith reason to bring the indictment in 2019.

Even if this Court finds the Government's actions to constitute a pre-indictment delay, Petitioner has not, and cannot, meet his burden of demonstrating actual prejudice as a result of that delay. When proving actual prejudice, courts require defendants to show that lost information could not otherwise be obtained from other sources. This Court has specifically found that the

possibilities of dimming memories, inaccessible witnesses, and lost evidence are insufficient in demonstrating a violation of due process. Indeed, courts have considered facts strikingly similar to Petitioner's, holding that the loss of witnesses or document evidence is insufficient to establish actual prejudice. Although four of the family members Petitioner claims to have visited in 2010 have since died and his Greyhound bus online records have since become unavailable, it is a far stretch to suggest that this evidence stands as the *only* evidence of the travels he purportedly took *every year* until 2015. Further, Petitioner's loss of testimony and evidence is in no way attributable to the Government's decision to seek an indictment in 2019. Rather, two of Petitioner's family members died in a car accident, two of chronic illness, and his bus records were removed from Greyhound's online system after three years. Petitioner's loss of evidence is in no way attributable to the Government's timely indictment. For these reasons, this Court should affirm the Thirteenth Circuit's holding that any pre-indictment delay on the part of the Government did not violate Petitioner's right to due process.

II. Post-Arrest, Pre-*Miranda* Silence Issue

This Court should affirm the Thirteenth Circuit's decision and hold that the admission of Petitioner's post-arrest, but pre-*Miranda* silence in the prosecution's case-in-chief did not violate Petitioner's Fifth Amendment rights. While the circuit courts vary on their approach to this issue, this Court should adopt the approach taken by the Fourth, Eighth, and Eleventh Circuits as it most closely mirrors how this Court has previously treated silence in light of one's Fifth Amendment rights—that the privilege is not self-executing. By adopting this approach, the Court would be reaffirming the longstanding principle that in order to enjoy the protection of the Fifth Amendment, one must affirmatively assert their right to remain silent. This holding would also eliminate any

concerns over officers unduly delaying the administration of *Miranda* rights because it allows the person holding the privilege to claim it and end any delay that might be taking place.

Furthermore, this Court should not adopt the approach taken by the Ninth, Tenth, and D.C. Circuits because it misconstrues and stretches the boundaries of prior precedent from this Court. Previously, this Court has only recognized two exceptions to affirmatively asserting the right to remain silent. These circuits' approach would create a third exception that extends the exceptions beyond the basic idea protected by the Fifth Amendment—that a defendant should not be compelled to be a witness against himself. Instead, this exception would act as a bar on testimony that the Government is legally entitled to. Additionally, the precedential cases in these circuits are factually distinct from Petitioner's as they deal with arrestees who were subject to custodial interrogation and remained silent. Contrastingly, Petitioner was not confronted with any sort of formal or informal questioning.

Finally, Petitioner's Fifth Amendment rights were not violated when the prosecution used his post-arrest, but pre-*Miranda* silence as substantive evidence of guilt because Petitioner was not under compulsion to speak at the time, he was silent and his *Miranda* rights had not yet been triggered. Petitioner was under no compulsion to speak because when he was arrested the FBI agent simply read Petitioner the charges against him. There were no questions asked or pressure placed by the Government for Petitioner to make any sort of statement. Instead, the FBI agent testified only about what was observed during the arrest. Furthermore, the Government should be permitted to comment on Petitioner's silence because his *Miranda* rights had not yet been triggered by a custodial interrogation. Without such an interrogation, the rights that *Miranda* seeks to protect are not present and thus, an officer's observation on such silence would not violate one's Fifth Amendment rights. For these reasons, this Court should affirm the Thirteenth Circuit's holding

that admission of Petitioner's post-arrest, but pre-*Miranda* silence did not violate his Fifth Amendment rights.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S HOLDING THAT THE GOVERNMENT DID NOT VIOLATE THE DUE PROCESS CLAUSE BECAUSE IT DID NOT ACT IN BAD FAITH AND PETITIONER DID NOT EXPERIENCE ACTUAL PREJUDICE.

The Due Process Clause of the Fifth Amendment provides protection to defendants against oppressive pre-indictment delay within the applicable limitations period. *See* U.S. Const. amend. V; *United States v. Marion*, 404 U.S. 307, 323 (1971); *United States v. Lovasco*, 431 U.S. 783, 789 (1977). Actual prejudice upon a defendant is a necessary, but not a sufficient element of a due process claim, and the inquiry "must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790. To invoke the "extreme sanction of dismissal of the indictments under the Due Process Clause," a defendant must show (1) actual prejudice, and (2) that the government intentionally delayed the indictment to gain an unfair tactical advantage or for other bad faith motives. *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (citing *Lovasco*, 431 U.S. at 789–90; *Marion*, 404 U.S. at 324). Moreover, the Due Process Clause does not "impose a presumption of prejudice in the event of lengthy pre-indictment delay." *Jones v. Angelone*, 94 F.3d 900, 906 (4th Cir. 1996).

Traditionally, decisions on questions of law are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 522, 558 (1988); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

A. There Was No Pre-indictment Delay By The Government Because Petitioner Was Timely Indicted.

In *Gouveia*, this Court interpreted *Marion* and *Lovasco* to require bad faith on the part of the Government in order to dismiss an indictment due to delay. 467 U.S. at 192 (citing *Lovasco*, 431 U.S. at 789–90) ("the Fifth Amendment requires the dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him . . . ."). Moreover, this Court has noted that while actual prejudice may make a due process claim ripe for adjudication, it does not "make[] the claim automatically valid." *Lovasco*, 431 U.S. at 789. Accordingly, a majority of circuits have held that in order to establish that a lengthy pre-indictment delay rises to the level of a due process violation, a defendant must show "not only actual substantial prejudice, but also that 'the government intentionally delayed the indictment to gain an unfair tactical advantage or for other bad faith motives.'" *Jones*, 94 F.3d at 905 (recognizing that the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh circuits require an analysis of whether the government deliberately delayed indictment in bad faith).

Because this Court's precedent favors the prosecutor's judgment in bringing an indictment and values the primary guarantee of the statute of limitations set by Congress, this Court should adopt the majority approach which requires a defendant to prove that the Government acted deliberately and with bad faith in delaying an indictment.

1. Petitioner has not established a lengthy pre-indictment delay because he was indicted within the statute of limitations.

This Court has recognized that the applicable statute of limitations serves as the primary guarantee against the prosecution of overly stale criminal charges. *United States v. Ewell*, 383 U.S. 116, 121 (1966). Even courts that adopt the minority balancing approach acknowledge that protection from lost testimony "falls solely within the ambit of the statute of limitations." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *see Jones*, 94 F.3d at 906 (citing *Marion*, 404

U.S. at 322) (recognizing the safeguard provided by the applicable statute of limitations period). Furthermore, delaying prosecution is a tactical consideration for the Government, which carries the burden of proving criminal charges beyond a reasonable doubt. *Ewell*, 383 U.S. at 121.

Prosecutors are to follow their own judgment as to when to seek an indictment and are "under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 791. It is not the role of a judge to define due process by imposing their "'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *Id*. at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). Requiring prosecutors to initiate prosecutions as soon as they are legally entitled to do so would significantly compromise several interests. *Lovasco*, 431 U.S. at 792–95 (identifying numerous problems including complicating cases involving more than one person or more than one illegal act, pressuring prosecutors to resolve doubtful cases in favor of early or unwarranted prosecutions, and precluding the Government from fully considering the desirability of not prosecuting specific cases).

Here, rather than arguing that the facts do not present a prosecutable offense under 18. U.S.C. § 844(i) (see Appendix I), Petitioner argues that he experienced a pre-indictment delay on the part of the Government. R. at 3, n. 2. Under 18 U.S.C. § 3295 (see Appendix I), Congress has specified that there shall be no prosecution of any offense under section 844 unless the indictment is filed no later than ten years after the date on which the offense was committed. The explosion that destroyed Petitioner's entire hardware store and gave rise to his prosecution occurred on December 22, 2010. R. at 2. In May 2019, the Government indicted Petitioner under 18 U.S.C. § 844(i)—a full seven months before the statute of limitations would expire. R. at 2. Thus, Petitioner's argument of a pre-indictment delay is misplaced. The Government acted accordingly

and well within the guidelines established by Congress in prosecuting Petitioner in a timely manner, leaving no "delay" in question. Should policy considerations warrant a shorter statute of limitations for offenses under 18 U.S.C. § 844(i), the legislature, not the Court, should amend 18 U.S.C. § 3295 accordingly.

2. Even if the Government's actions constitute a delay, Petitioner has failed to show such delay was intentionally aimed at gaining a tactical advantage.

This Court has held that dismissal of an indictment, even if brought within the applicable statute of limitations, is only proper if the defendant can prove that the Government used a delay in bringing the indictment as a "deliberate device to gain an advantage over him." *Gouveia*, 467 U.S. at 192 (citing *Lovasco*, 431 U.S. at 789–90). A pre-indictment delay on the Government's part must not be purposeful or oppressive. *Pollard v. United States*, 352 U.S. 354, 361 (1957). To be sure, this Court's precedent has stressed the importance of good or bad faith on the part of the Government in deciding constitutional issues based on loss of evidence attributable to the Government. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). For example, this Court noted that an investigative delay before formal indictment did not deprive a defendant of due process even if a lapse of time resulted in prejudice. *Lovasco*, 431 U.S. at 795. The Court's justification noted that an investigative delay is distinguishable from delay taken by the Government solely to gain tactical advantage over the accused. *Id*. Similar to Petitioner's facts, courts have also considered how simultaneously pending state prosecutions against a defendant can complicate investigation. *United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) (holding that the government's decision to wait until the termination of state proceedings is a "valid exercise of prosecutorial discretion"). In *Lovasco*, this Court recognized that the goal in prosecution is "orderly expedition" rather than "mere speed." 431 U.S. at 795 (quoting *Smith v. United States*, 360 U.S. 1, 10 (1959)).

Should this Court find that the May 2019 indictment resulted in a delay, Petitioner has not, and cannot, meet his burden of demonstrating that the Government acted in bad faith. In *Marion*, this Court found no showing of intentional delay on the part of the Government to gain some tactical advantage or otherwise harass the defendants. 404 U.S. at 325. Indeed, the standard is high—courts have held where confusion between whether the state or federal government would prosecute caused the case to "f[a]ll between the chairs," there was still no evidence that the delay in indictment was a "tactical maneuver by the government." *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985). Similarly, in *Pollard*, this Court found no intentional or deliberate delay by the Government where an accidental and promptly remedied error was discovered. 352 U.S. at 361. Even in cases where prosecutors are unable to proffer good reason for a delay, courts have not found the Government to have acted in bad faith. *See Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir. 1985) (holding that no bad faith reason existed despite the prosecutor's inability to provide a reason for a nineteen-year pre-indictment delay); *United States v. Benson*, 846 F.2d 1338, 1343 (11th Cir. 1988) (holding that the government's negligence resulting in an eight-year pre-indictment delay was insufficient in showing "bad faith" on the part of the government).

Here, it is clear that any delay in indicting Petitioner was not an intentional or deliberate device used by the Government in an attempt to gain a tactical advantage over him. Rather, similar to *Sowa*, the Government considered Petitioner's prosecution for unrelated state charges in choosing not to transport him back and forth. R. at 2. Although Petitioner may argue the Government further delayed indictment after his state proceedings concluded, the political pressure that caused high turnover and reprioritizing in the U.S. Attorney's Office offers an additional valid and reasonable explanation for the delay and thus fails to demonstrate bad faith on the part of the Government. *Id*. The District Court described the Government's actions as an

"oversight." R. at 6. A mere "oversight" is a far cry from the Government intentionally and deliberately delaying Petitioner's indictment in order to gain a tactical advantage over him. *See United States v. Perez-Alcatan*, 376 F.Supp.2d 1253, 1257 (D.N.M. 2005) (holding that an administrative oversight by the Government does not constitute an intentional delay). Similar to *Sebetich*, where an oversight caused inattention to the defendant's prosecution, such an oversight here is insufficient in establishing bad faith.

Moreover, the Government has presented adequate evidence as to why Petitioner was indicted in 2019—seven months *within* the applicable statute of limitations. The Government acted reasonably in waiting for Petitioner's unrelated state proceedings to conclude, and likewise in deciding what prosecutions to prioritize as they responded to political pressure. R. at 2. In *Marion*, the United States Attorney excused the alleged delay with evidence that his office had been understaffed at the time and had placed priority on different types of crimes. *Marion*, 404 U.S. at 327 (Douglass, J., concurring). In the instant case, the U.S. Attorney's Office was similarly faced with high turnover, causing Petitioner's case to be passed to multiple U.S. Attorneys. R. at 2. It was more than reasonable for each U.S. Attorney assigned to Petitioner's case to fully take the time needed in order to fully review and analyze Petitioner's charges. Thus, even under the minority balancing approach, the Government's justifications for indicting Petitioner in 2019 weigh against a violation of due process.

B. Even If This Court Finds The Government's Actions To Constitute A Pre-Indictment Delay, Petitioner Has Not Suffered Actual Prejudice.

Prejudice from a delay is not to be presumed; rather, the defendant bears the burden of proving prejudice by pre-indictment delay. *Jones*, 94 F.3d at 907 (quoting *United States v. Baker*, 424 F.2d 968, 970 (4th Cir. 1970)). A defendant must show actual prejudice, rather than mere speculative prejudice, and must also show that such prejudice was *substantial*—"that he was

meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Jones*, 94 F.3d at 907 (citing *Marion*, 404 U.S. at 324 ("substantial prejudice")). Indeed, this Court recognized this heightened standard in noting that so few defendants have established that they were prejudiced by a pre-indictment delay. *Lovasco*, 431 U.S. at 796–97; *see United States v. Burks*, 316 F.Supp.3d 1036, 1039 (M.D. Tenn. 2018) (citing *United States v. Rogers*, 118 F.3d 466, 477 (6th Cir. 1997)) (holding that the standard "is nearly insurmountable").

1. The death or dimming memories of potential witnesses or loss of physical documents does not qualify as actual prejudice.

In demonstrating actual prejudice against a defendant as a result of a pre-indictment delay, "vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient." *United States v. Beszborn*, 21 F.3d 62, 67 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 330 (1994); *see United States v. Spears*, 159 F.3d 1081, 1085 (7th Cir. 1998) (holding that the loss of possible physical evidence like employment records is insufficient in proving actual prejudice). Accordingly, courts have found that contentions that the memories of witnesses faded as a result of the delay "falls short of the requisite showing of actual prejudice." *Marion*, 404 U.S. at 325–26 (holding that the defendant's due process claims were "speculative and premature"); *see Sebetich*, 776 F.2d at 430; *United States v. Ramos*, 586 F.2d 1078, 1089 (5th Cir. 1978) ("diminished recollection alone does not constitute substantial prejudice."); *United States v. Honorable Judges of the Cir. Ct. of Cook Cnty.*, 138 F.3d 302, 310 (7th Cir. 1998) (noting that the faded memories of witnesses due to the passage of time is "not enough"). Moreover, to establish that a defendant has been actually prejudiced based on lost witnesses or documents, they must show that the information lost could not otherwise be obtained from other, additional sources. *Beszborn*, 21 F.3d at 67.

In *Marion*, this Court found that the real possibilities of dimming memories, inaccessible witnesses, and lost evidence are "not in themselves enough" to demonstrate a violation of due process. 404 U.S. at 325–26. Following this Court's precedent, the Fifth Circuit similarly found no actual or substantial prejudice where the defendants' proposed witnesses died within the alleged pre-indictment delay period. *United States v. Crouch*, 84 F.3d 1497, 1518 (5th Cir. 1996); *see United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) (holding that death of a potential witness alone is insufficient). Similarly, in *Sebetich*, although the defendants argued the deaths of potential witnesses and the adverse effect on the memories of actual witnesses during a pre-indictment delay violated their due process rights, the Third Circuit found "serious doubt" as to actual prejudice. 776 F.2d at 430.

Petitioner argues that because four of his family members have died, a fifth has been diagnosed with dementia, and the Greyhound bus records have become unavailable, the timely execution of his indictment in 2019 violates due process. R. at 3. Petitioner is wrong. Similar to the decisions in *Marion*, *Crouch*, and *Sebetich*, Petitioner's loss of witnesses and documents is insufficient in proving actual prejudice. While Petitioner may argue that the evidence he intended to use from these witnesses and documents is otherwise unavailable, this argument is misplaced. Petitioner claims he visited New York every year in December for his birthday. R. at 3. Although the family that Petitioner visited in 2010 are unable to testify as to his visit that year, the record on appeal is silent as to Petitioner's ability to produce evidence of his visits prior to 2010, and likewise his annual visits up until 2015. Petitioner is free to use evidence of his trips prior to, and following 2010, in developing a pattern of travel to New York to aid in his defense. It is a far stretch to suggest that the testimony of Petitioner's five family members stands as the only evidence of travels he purportedly took *every* year until 2015. Further, although Greyhound may only store

bus records online for three years and Petitioner's last trip was in 2015, the record on appeal is silent as to whether these online records are the only available evidence regarding his Greyhound trips. Thus, it is unlikely that Petitioner is left completely unable to present his defense that he was in New York on the evening in question through other means.

2. Even if Petitioner establishes prejudice, any prejudice experienced is not attributable to the Government.

Even if this Court finds that Petitioner's loss of evidence constitutes actual prejudice, Petitioner cannot prove that this prejudice was a direct result of the Government's choice to indict him in 2019. *See Jones*, 94 F.3d at 907 (requiring a defendant to prove prejudice *by a pre-indictment delay*) (emphasis added). Courts have considered strikingly similar facts to the instant case. In *Crouch*, the court held that while the defendant may have had six potential witnesses die within the five years prior to indictment, their loss "could not be attributable to any improper delay." 84 F.3d at 1518. Moreover, in considering lost documents, courts have held a defendant must show that such lost records would have been exculpatory, and their loss was a result of the Government's delay. *United States v. Carruth*, 699 F.2d 1017, 1019 (9th Cir. 1983).

While Petitioner may argue that the outcome of his trial would have been different had his witnesses been able to testify and his bus records produced, the loss of this evidence was not caused by the Government's decision to indict Petitioner in 2019—within the statute of limitations. Rather, Petitioner's position is similar to the defendants in *Crouch*. Although Petitioner's family members that he visited on the night in question have died before the indictment in 2019, their loss is in no way attributable to the Government's actions. To be sure, two of Petitioner's family members died in an unanticipated car accident in 2018. R. at 3. Further, two more of Petitioner's proposed witnesses died from *chronic* disease in 2015 and 2017. *Id*. Similarly, the Government's actions have no effect on Greyhound's decision to remove online bus records after three years.

Thus, although Petitioner may have lost evidence that would have strengthened his defense while the Government worked to execute his indictment, he has not, and cannot prove that its loss is attributable to the Government's actions.

Therefore, this Court should affirm the Thirteenth Circuit's holding that any pre-indictment delay did not violate due process because Petitioner has not met his burden in proving actual prejudice and bad faith by the Government.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S HOLDING THAT THE ADMISSION OF PETITIONER'S POST-ARREST, BUT PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT DID NOT VIOLATE THE FIFTH AMENDMENT.

This Court should follow the Fourth, Eighth, and Eleventh Circuits and hold that Petitioner's post-arrest, but pre-*Miranda* silence may be used as direct evidence that may tend to prove his guilt. The Fifth Amendment to the Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. A core right protected by the Fifth Amendment is a prohibition on compelling a criminal defendant to testify against himself at a trial. *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion). One of the main ways this right is protected is through the issuance of *Miranda* warnings, which prevents the prosecution from using statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001) (en banc) (stating that *Miranda* warnings are "a prophylactic means of safeguarding Fifth Amendment rights" and that an "individual has a right to remain silent in the face of [custodial] government questioning, regardless of whether the *Miranda* warnings are given" (internal quotations marks omitted)).

Specifically, this Court has defined several parameters for how *Miranda* rights impact one's Fifth Amendment right to remain silent. First, and most basically, this Court has held that the Fifth Amendment prohibits prosecutors from commenting on an individual's silence where that silence amounts to an effort to avoid becoming a witness against oneself specifically when a defendant refuses to testify at trial. *See Miranda*, 384 U.S. at 468, n. 37 (stating that "the prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation" when he was "under police custodial interrogation"); *Griffin v. California*, 380 U.S. 609, 615 (1965) ("The fifth amendment . . . forbids . . . comment by the prosecution on the accused's silence."). Furthermore, post-*Miranda* silence is inadmissible as impeachment evidence or substantive evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 616–20 (1976). On the other hand, this Court does not prohibit the use of one's silence prior to arrest, or after arrest if no *Miranda* warnings are given for impeachment purposes. *See Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993). Finally, this Court has established that pre-custodial silence is admissible as substantive evidence of guilt. *See Salinas v. Texas*, 570 U.S. 178, 186–91 (2013) (plurality opinion).

Despite the clear precedent on the admissibility of silence, courts continue to vary on their approach to the admissibility of post-arrest, but pre-*Miranda* silence as substantive evidence of guilt. *See United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that post-arrest, but pre-*Miranda* silence is admissible as substantive evidence of guilt); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (same); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (same). *But see United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007) (holding that post-arrest, but pre-*Miranda* silence is inadmissible as substantive evidence of guilt); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997) (same); *United States v. Burson*, 952

F.2d 1196, 1200–01 (10th Cir. 1991) (same). This Court should follow the approach of the Fourth, Eighth, and Eleventh Circuits as the use of Petitioner's silence does not violate his Fifth Amendment rights because he was under no compulsion to speak at the time of his silence, and his *Miranda* rights were not triggered by a custodial interrogation.

Whether there has been a violation of one's Fifth Amendment rights is reviewed de novo. *See United States v. Washington*, 318 F.3d 845, 854–55 (8th Cir. 2003); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002).

A. This Court Should Adopt The Fourth, Eighth, And Eleventh Circuits' Approach To Post-Arrest, But Pre-*Miranda* Silence Because It Most Closely Follows This Court's Prior Guidance On The Admissibility Of Silence.

When deciding which circuits' approach to post-arrest, but pre-*Miranda* silence to adopt, this Court should look at its past precedent and how it has treated silence protected by the Fifth Amendment for direction.

1. It is well established Fifth Amendment precedent that to enjoy the protection of the right to remain silent one must unequivocally assert that right.

This Court has repeatedly held that in order to enjoy the Fifth Amendment protection that is encompassed in the right to remain silent, then the one who desires the protection of the privilege must claim it. *See Minnesota v. Murphy*, 465 U.S. 420, 427 (1984); *United States v. Monia*, 317 U.S. 424, 427 (1943). For example, in *Berghuis v. Thompkins*, this Court held that the fact that the defendant was silent, instead of stating that he wanted to remain silent or that he did not want to talk to the police, for almost three hours during an interrogation was insufficient to invoke his right to remain silent under *Miranda*. 560 U.S. 370, 381–82 (2010). Instead, this Court noted that "[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do unambiguously." *Id*. at 381.

Recently, this Court again affirmed the idea of expressly invoking the right to remain silent in a non-custodial interview in *Salinas v. Texas*. 570 U.S. at 184 (holding that pre-custodial silence is admissible as substantive evidence of guilt). There, the Court noted that "[i]t has been long settled that the privilege 'generally is not self-executing' and that a witness who desires its protection 'must claim it.'" *Id.* at 181. The Court continued to reason that "so long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation." *Id.* at 191. By insisting that the defendant expressly invoke their right to remain silent, the Court was ensuring that the Government obtained all the information that it was entitled to. *Id.* at 184. Finally, the Court expressly made clear that "popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be 'compelled in any criminal trial to be a witness against himself;' it does not establish an unqualified right to remain silent." *Id.* at 189. Extending the reasoning in *Salinas* to post-arrest, but pre-*Miranda* silence as evidence of substantive guilt would be a natural extension of the precedent already established as Petitioner failed to affirmatively claim the privilege and there were no actions by the police that deprived Petitioner of his opportunity to claim its protection.

Additionally, by requiring one to affirmatively claim their right to remain silent, the fear that an officer might unduly delay the administration of *Miranda* rights is eliminated. *See, e.g*, *Moore*, 104 F.3d at 387 (holding that custody and not interrogation is the triggering mechanism for the right to remain silent under *Miranda* and "[a]ny other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant"). This puts the power of the privilege in the hands of the person who actually holds the privilege. By letting an arrestee simply assert his Fifth Amendment right to remain silent, any police incentive to manufacture silence is disassembled.

B. This Court Should Not Adopt The Approach Taken By The Ninth, Tenth, and D.C. Circuits Because It Misinterprets Prior Supreme Court Precedent and Petitioner's Case Is Distinguishable From The Cases In These Circuits.

The approach adopted by the Ninth, Tenth, and D.C. Circuits should not be adopted by this Court because it misinterprets prior precedent from this Court and over extends the right to remain silent to a point that limits the Government's right to everyone's testimony. Additionally, the cases in these circuits that established that post-arrest, but pre-*Miranda* silence is inadmissible as substantive evidence of guilt are distinguishable from Petitioner's case.

1. The approach taken by the Ninth, Tenth, and D.C. Circuits is incorrect because it is inconsistent with prior precedent from this Court.

By holding that post-arrest, but pre-*Miranda* silence is inadmissible as substantive evidence of guilt, this Court would be overextending the protection that is recognized by the right to remain silent. In *Salinas*, this Court emphasized that the right to remain silent is not all encompassing, but is instead limited to protect people who claim its protection. 570 U.S. at 181. The Court has only recognized two exceptions to this long standing principle—(1) that a criminal defendant need not take the stand and assert the privilege at his own trial and (2) that a witness's failure to invoke the privilege must be excused where government coercion made his forfeiture of the privilege involuntary. *Id.* at 184; *Griffin*, 380 U.S. at 613–15; *Miranda*, 384 U.S. at 467–68. Creating an exception that someone need not affirmatively claim their right to remain silent post-arrest, but pre-*Miranda* extends this constitutional right beyond what is contemplated in the current precedent.

Extending the boundaries of the current exceptions to the right to remain silent would create an exception that is entirely different from the two currently recognized exceptions. The two current exceptions go to the core of the Fifth Amendment—that a defendant should not be compelled to be a witness against himself. Contrastingly, a post-arrest, but pre-*Miranda* exception

instead extends Fifth Amendment protection beyond this basic protected idea. Instead, it serves as a restriction on the Government's rightful access to everyone's testimony. *See Garner v. United States*, 424 U.S. 648, 658, n. 11 (1976) (stating that the Fifth Amendment privilege against self-incrimination serves as "an exception to the general principle that the Government has the right to everyone's testimony"). Thus, this Court should hold that post-arrest, but pre-*Miranda* silence is admissible as substantive evidence of guilt.

2. The Ninth, Tenth, and D.C. Circuits' approach should not be controlling because Petitioner's case is distinguishable from the controlling precedent in these circuits.

The holdings in the Ninth, Tenth, and D.C. Circuits should not be controlling because Petitioner's circumstances are distinguishable from their precedent. For example, in *United States v. Hernandez*, the Ninth Circuit held that Hernandez's post-arrest, but pre-*Miranda* silence was inadmissible as substantive evidence of guilt. 476 F.3d at 796. The court reasoned that the silence was inadmissible because despite not having been read his *Miranda* rights, Hernandez was still facing "custodial interrogation." *Id.* There, Hernandez was subject to a pat-down at a port of entry. *Id.* at 794. During the pat-down, an officer pulled an opaque bag out of Hernandez's front pants pocket and asked "what is this?". *Id.* at 795. Hernandez gave no response. *Id.* At trial, the prosecution had the officer testify to this silence in its case-in-chief. *Id.* The court ultimately held that an individual has a right to remain silent "in the face of custodial government questioning" regardless of whether *Miranda* warnings were given. *Id.* at 796; *see also Velarde-Gomez*, 269 F.3d at 1029 ("[O]nce the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given.").

Hernandez and *Velarde-Gomez* should not be controlling or persuasive in this situation because they are factually distinguishable from Petitioner's case. Unlike in *Hernandez* and

Velarde-Gomez where a government officer was questioning the defendant, here the agent only arrested Petitioner and informed him of the charges against him. R. at 7. The agent then transported Petitioner to the detention center where he was read his *Miranda* rights. *Id.* At no time post-arrest, but pre-*Miranda* was Petitioner questioned or placed in a situation that would be remotely considered "custodial interrogation."[1] Instead, the prosecution simply commented that Petitioner failed to tell the arresting agent his alibi defense in response to being read his charges. Thus, this case is distinguishable and should not be controlled by *Hernandez* and *Velarde-Gomez.*

Furthermore, Petitioner's situation is also distinguishable from *United States v. Burson*, where the Tenth Circuit held that silence exhibited in a non-custodial interrogation was protected by the Fifth Amendment. 952 F.2d at 1200–01. There, Burson was approached by two criminal investigators who were inquiring into Burson's knowledge about certain criminal activity regarding another person. *Id.* at 1200. When they approached Burson, instead of answering the investigators' questions, Burson began asking the agents about their authority. *Id.* At trial, the prosecution asked the investigator if Burson ever answered their specific questions regarding the criminal activity of the third party, and they responded no. *Id.* Burson argued that this testimony violated his Fifth Amendment right to remain silent, and the court agreed reasoning that it was clear from Burson's conduct that he did not want to be questioned and that he was not going to answer the investigators questions thus invoking his right to remain silent regardless of whether he was in custody. *Id.* at 1200–01.

Again, Petitioner's situation is distinguishable from *Burson* because there is a distinct lack of custodial or non-custodial interrogation. R. at 7. Instead, the prosecution here was simply

[1] Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 385 U.S. at 444.

making a comment on their observation that Petitioner failed to assert his alibi defense in light of being read his charges. *Id.* The act of reading Petitioner his charges and subsequently transporting him to the detention center do not rise to the level of "interrogation" that was recognized in either the Ninth or Tenth Circuits thus making Petitioner's situation distinguishable from both.

Thus, the Ninth, Tenth, and D. C. Circuits holdings should not be controlling as Petitioner's circumstances present a question more analogous to the holdings in the other circuits where there was no custodial interrogation triggering one's Fifth Amendment right to remain silent.

C. Petitioner's Fifth Amendment Rights Were Not Violated When The Government Used His Post-Arrest, But Pre-*Miranda* Silence As Substantive Evidence of Guilt.

This Court, following the approach of the Fourth, Eighth, and Eleventh Circuits, should hold that Petitioner's Fifth Amendment rights were not violated when the government used his post-arrest, but pre-*Miranda* silence as substantive evidence of guilt because Petitioner was under no compulsion to speak at the time of his silence and his *Miranda* rights were not triggered by a custodial interrogation.

1. Petitioner's Fifth Amendment rights were not violated because he was not under compulsion to speak at the time of his silence.

When looking to see whether one's Fifth Amendment right to remain silent has been violated in a post-arrest, but pre-*Miranda* situation, this Court should ask "the question [of] whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment." *Jenkins v. Anderson*, 447 U.S. 231, 244 (1980) (Stevens, J., concurring). Specifically, Justice Stevens noted that "[w]hen a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment." *Id.* at 243–44.

This idea was further illustrated in *United States v. Frazier*. 408 F.3d 1102, 1111 (8th Cir. 2005). There, Frazier was suspected of drug activity and subsequently arrested after officers found what they believed to be pseudoephedrine in Frazier's U-Haul. *Id.* at 1107. At trial during the prosecution's case-in-chief, the arresting officer testified that when Frazier was arrested (and before he was read his *Miranda* rights) he did not say anything when the officers told him why he was being arrested. *Id.* There, the court determined that the more precise question to be answered was whether Frazier was under any compulsion to speak at the time of his silence. *Id.* at 1111. If there was government compulsion to speak, there would be a Fifth Amendment violation, but if there was no government compulsion to speak then the admission of post-arrest, but pre-*Miranda* silence did not violate Frazier's Fifth Amendment right. Ultimately, the court held that there was no government compulsion because "an arrest by itself is not government action that implicitly induces a defendant to remain silent." *Id.* (citing *Fletcher v. Weir*, 455 U.S. 603, 606 (1982)).

Like *Frazier*, Petitioner was also under no compulsion to speak and thus there was no Fifth Amendment violation. Similar to *Frazier* where the defendant did not say anything when told why he was being arrested, Petitioner here also said nothing when the agent informed him of the charges against him. R. at 7. Thus, like in *Frazier*, this Court should hold that Petitioner faced no compulsion to speak and that no Fifth Amendment violation occurred because the government actors were not questioning or interrogating Petitioner. There was no pressure one way or another to be compelled to speak or remain silent; rather, it was a choice that Petitioner made that the government has a right to comment on at trial in order to give the jury a full picture of the facts of the arrest. To hold otherwise would deprive the government of testimony that they are rightfully entitled to since Petitioner's Fifth Amendment rights had not been violated. Thus, this Court

should affirm the Thirteenth Circuit's holding that the prosecution's comment on Petitioner's silence is admissible.

2. Petitioner's Fifth Amendment rights were not violated because one's *Miranda* rights are triggered during custodial interrogation, not at arrest.

Generally, one's *Miranda* rights are triggered during custodial interrogation. *Miranda*, 384 U.S. at 444. Furthermore, in *Fletcher v. Weir* the argument that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent" was explicitly rejected. 455 U.S. at 605. The Court there further explained that *Doyle v. Ohio* only applies when a defendant has been given his *Miranda* warnings. *Id.* at 606. Thus, any argument that the language in *Doyle v. Ohio* should be controlling on this issue is misplaced. In *Doyle*, this Court stated that the right to remain silent carried an "implicit assurance" that silence will carry no penalty. *Doyle*, 426 U.S. at 618. However, this implicit assurance was directly attached to when *Miranda* warnings were given. *Id.* Here, where no *Miranda* warnings have been given, there is no legal "implicit assurance" for Petitioner to mistakenly rely on. Thus, Petitioner's Fifth Amendment protection and right to remain silent would not have been triggered until a custodial interrogation began.

For example, in *United States v. Rivera*, the court held that the prosecution could comment on a defendant's silence that occurred while the defendant was in custody because there was no custodial interrogation taking place that would trigger her *Miranda* rights. 944 F.2d at 1568. There, the defendant was taken into custody after an agent suspected her of transporting cocaine in her suitcase. *Id.* at 1568, n. 12. The agent then inspected the defendant's luggage and found the suspected drugs. *Id.* At trial, the prosecution commented that during the inspection, the defendant remained silent and did not seem upset. *Id.* at 1567. The court held that the comments on the defendant's silence were proper because the defendant had not yet been given her *Miranda* rights—an "implicit assurance that her silence would not be used against her." *Id.* at 1568, n. 12.

Furthermore, in *United States v. Love*, the Court held that the defendant's silence post-arrest, but pre-*Miranda* was admissible as substantive evidence of guilt because he had not been given his *Miranda* warnings at the time that the agent observed his silence. 767 F.2d at 1063. There, the defendant argued that the agent's testimony about the defendant's silence regarding his presence at a drug operation the night of his arrest should have been inadmissible. *Id.* The court held that unlike in *Doyle* where *Miranda* warnings had been given and thus testimony about silence was inadmissible, testimony about the defendant's silence was admissible here because the defendant had not "received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." *Id.* (citing *Fletcher v. Weir*, 455 U.S. 603 (1982)).

Like *Rivera* and *Love*, Petitioner's Fifth Amendment rights were not violated because he was not under custodial interrogation. The testimony the Government seeks to use as evidence simply concerns the fact that Petitioner remained silent when the agent informed him of the charges against him. R. at 7. The testimony was not about Petitioner remaining silent when the agent was asking him potentially incriminating questions or any questions at all. It was, rather, a comment on the officer's observations of Petitioner's silence just like the officers were permitted to testify about *Rivera* and *Love*'s silence. Thus, Petitioner's Fifth Amendment rights were not violated and the Thirteenth Circuit's holding should be affirmed.

CONCLUSION AND RELIEF SOUGHT

For these reasons, this Court should affirm the decision of the Thirteenth Circuit and hold that any pre-indictment delay did not violate due process and that the use of Petitioner's post-arrest, but pre-*Miranda* silence as substantive evidence of guilt did not violate his Fifth Amendment rights.

Respectfully submitted,

APPENDIX I

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

Statutes:

18 U.S.C. § 844(i):

> 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.

18 U.S.C. § 3295:

No person shall be prosecuted, tried, or punished for any non-capital offense under section 81 or subsection (f), (h), or (i) of section 844 unless the indictment is found or the information is instituted not later than 10 years after the date on which the offense was committed.

CERTIFICATION

Team 21 certifies that the team members and the coach(es) have read and understand the rules of the Competition, the brief has been prepared in accordance with the Rules of the Competition, and the brief represents the work product solely of the team's members.