

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 2021**

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AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER

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## **QUESTIONS PRESENTED**

1. Whether the State's preindictment delay violated Coda's Due Process rights under the Fifth Amendment when Coda proved actual and substantial prejudice, and the State acted with reckless disregard of the circumstances while failing to investigate the alleged crime.
2. Whether the State's use of Coda's post-custody, pre-*Miranda* silence as substantive evidence of guilt violated his Fifth Amendment privilege against self-incrimination when the privilege was triggered upon arrest and it was unreasonable to suggest Coda would have offered his alibi at that time.

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## STATEMENT OF THE CASE

### Factual History

On December 22, 2010, an explosion destroyed Austin Coda's hardware store in the small, rural town of Plainview, East Virginia. R. at 1. Coda opened the store in 2002, and while it was initially very profitable, business slowed following the 2008 recession and with the opening of a competing hardware store in 2009. *Id.* Coda struggled with maintaining upkeep of the building while generating enough revenue to stay open. *Id.*

In investigating the explosion, local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms found evidence suggesting cold weather caused an old, faulty gas line to leak and destroy the building. *Id.* at 2. The Federal Bureau of Investigation (FBI) suspected Coda was responsible for the fire after receiving a tip from his close friend and neighbor, Sam Johnson. *Id.* Johnson told the FBI that Coda was struggling financially, maintained an insurance policy that covered the hardware store in case of a total loss, and had appeared anxious and paranoid the week of the incident. *Id.* The FBI informed the United States Attorney's Office of its theory. *Id.*

The U.S. Attorney's Office marked Coda's case as "low-priority." *Id.* The government believed that Coda's involvement at that time in an unrelated state charge would make it too inconvenient to prosecute him for the case at bar. *Id.* Coda was still not apprehended after his separate state proceedings wrapped, as "political pressure caused the [U.S. Attorney's Office] to prioritize prosecuting drug trafficking and other related offenses." *Id.* The government also cited high turnover from political pressure as a reason that Coda's case was "passed from one Assistant U.S. Attorney to another" for nine years. *Id.* The office never increased the priority of Coda's case, and the case never progressed. *Id.*

## Criminal Proceedings

It was only when the government realized that the statute of limitations was about to run on Coda's case that it brought the indictment forward. *Id.* at 2-3. On April 23, 2019, Coda was formally apprehended and brought into custody for violating 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. *Id.* at 3. Immediately after arresting Coda, an FBI agent informed Coda of the charges against him. *Id.* at 7. Coda did not say anything in response to the agent's statement. *Id.* The FBI did not read Coda his *Miranda* rights until after he reached the detention center and they were to ready to interrogate. *Id.*

Charges were brought forth in the United States District Court for the District of East Virginia. *Id.* at 1. Coda submitted two pretrial motions to the court. *Id.* Coda moved to dismiss the indictment for preindictment delay on grounds that it violates the Fifth Amendment Due Process Clause. *Id.* at 4. Coda told the District Court that the government's delay in prosecuting the case caused him to lose witnesses and records that would have corroborated his alibi defense at trial. *Id.* at 3. Coda testified that he was in New York, with family on the night the explosion occurred. *Id.* Coda claimed that he spent every December 22—his birthday—there, up until 2015. *Id.* Since the incident, four out of the five family members Coda claims to have visited on December 22, 2010, have died (in 2015, 2017, and 2018). *Id.* The fifth family member was diagnosed with dementia and cannot remember whether Coda was in New York that day. *Id.* Coda also cannot produce his Greyhound bus records because they are stored online for only three years, and he made his last bus trip in 2015. *Id.* The United States District Court for the District of East Virginia denied the motion to dismiss the indictment on September 30, 2019. *Id.* at 6.

Coda also moved to suppress the evidence of his post-custody but pre-*Miranda* silence, arguing that admission would violate the Fifth Amendment. *Id.* at 7-8. The District Court denied the motion to suppress his silence on December 19, 2019.

### Procedural History

Coda was convicted under 18 U.S.C. § 844(i). *Id.* at 11. Coda did not testify during trial. R.; *see* Rule 1.9. Having properly preserved both errors, Coda appealed to the United States Court of Appeals for the Thirteenth Circuit. *Id.* On August 28, 2020, the Thirteenth Circuit upheld the District Court’s ruling. *Id.* The courts held that preindictment delay in Coda’s case did not violate the Due Process Clause under the Fifth Amendment, because despite showing actual and substantial prejudice, Coda did not prove the government acted with the purpose to delay prosecution to gain an unfair advantage. *Id.* The courts held that use of Coda’s silence as substantive evidence of guilt did not violate his Fifth Amendment privilege against self-incrimination, and was admissible. *Id.* at 10. Coda timely appealed the order and on July 9, 2021, the Supreme Court of the United States granted certiorari. *Id.* at 16.

### **SUMMARY OF THE ARGUMENT**

Coda’s indictment should be dismissed because the State’s preindictment delay violated his rights under the Due Process Clause of the Fifth Amendment. The delay in prosecution caused Coda actual and specific prejudice. In the nine years between the incident and indictment, Coda lost exculpatory witnesses and documents that would have corroborated his alibi at trial. Further, the State acted in reckless disregard of the circumstances because it had knowledge of Coda’s case and did not continue the investigation. While prosecutors have broad discretion to investigate cases, the State’s reasons for Coda’s preindictment delay—convenience and political pressure—do not justify the substantial risk to his defense that it caused. This Court should uphold the fairness

principles of the Due Process Clause by dismissing Coda's indictment. If it does not find that Coda's rights were violated, this Court should remand this case to the Thirteenth Circuit, which is better suited for fact intensive preindictment delay inquiries.

The use of Coda's post-custody but pre-*Miranda* silence as substantive evidence of guilt violates his Fifth Amendment privilege against self-incrimination. Coda's right to remain silent triggered when he was taken into custody. The Thirteenth Circuit applied a "reasonable person" standard that was unsupported by legal precedent and was misapplied in Coda's case. It was reasonable for Coda to remain silent throughout the custodial proceedings when the charge stemmed from an incident that occurred nearly 10 years prior. Additionally, the State's use of Coda's silence drew jury attention to the fact that he did not take the stand at trial, diminishing his constitutional privilege against self-incrimination. Because the prosecution's error was not harmless beyond a reasonable doubt, this Court should suppress Coda's post-custody, pre-*Miranda* silence.

## **ARGUMENT**

### **I. The State Violated Coda's Due Process Rights.**

A. The Due Process Clause of the Fifth Amendment preserves the adversary system of justice.

The Due Process Clause of the Fifth Amendment to the United States Constitution states in pertinent part, "No person . . . shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fundamental purpose of the Fifth Amendment is "the preservation of an adversary system of criminal justice." *Garner v. United States*, 424 U.S. 648, 655 (1976). The adversarial system features prosecutors who investigate and bring forth criminal charges, and citizens accused of those same crimes. *Id.* "The system is undermined when the government deliberately seeks to avoid the burdens of independent investigation." *Id.*

B. Prosecutorial decisions based on unconstitutional motives are a Due Process violation.

Prosecutors' broad discretion is a defense against a Due Process violation. Sandra Caron George, *Prosecutorial Discretion*, 39 Geo. L.J. Ann. Rev. Crim. Proc. 740, 742 (2010). Prosecutors hold great power and have access to sophisticated investigative techniques allowable under federal code. *See, e.g.* 18 U.S.C. § 2518 (1994) (governing the use of wiretaps); 18 U.S.C. §§ 6001-6004 (the federal immunity statute). For much of the twentieth century, this Court presumed trust in prosecutors. "Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers,' even when the consequences are far more drastic than they are under the provision of law before us." *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (citing *Nash v. United States*, 229 U.S. 373, 378 (1913)).

Prosecutorial decisions are "particularly ill-suited to judicial review" and "threaten to chill law enforcement." *Wayte v. United States*, 470 U.S. 598, 607 (1985). These decisions weigh factors such as case strength, deterrence value, enforcement priorities, and the case's relationship to the government's overall enforcement plan. *Id.* However, as Justice Stewart dissented, "[t]he government ... suggested that prosecutorial discretion would take care of the problem. Proper construction of a criminal statute, however, cannot depend upon the good will of those who must enforce it." *Scarborough v. United States*, 431 U.S. 563, 580 n.1 (1977) (Stevens, J. dissenting).

Prosecutorial discretion is not unlimited. Discretion is subject to constitutional constraints. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979).

This Court too has its responsibility. Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness....These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as

fundamental, or are implicit in the concept of ordered liberty. *Rochin v. California*, 342 U.S. 165, 169 (1952) (internal citations omitted).

Prosecutorial decisions that are based on unconstitutional motives or executed in bad faith deserve a thorough examination by the courts. *See generally United States v. Goodwin*, 457 U.S. 368, 369–70 (1982).

This Court's scant interpretations of the Due Process Clause to the criminal pretrial phase deprive a defendant of their constitutional rights. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 *Yale L. & Pol'y Rev.* 1, 17 (2006); *see e.g. Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (holding that a defendant's rights under the Constitution are limited prior to the initiation of formal prosecutorial proceedings).

C. The Due Process Clause applies to preindictment delay as shown in *United States v. Marion* and *United States v. Lovasco*.

This Court first considered application of the Due Process Clause to preindictment delay in the case of *United States v. Marion*. *See United States v. Marion*, 404 U.S. 307, 324 (1971). In *Marion*, the Sixth Amendment right to a speedy trial was determined inapplicable to preindictment delay. *Id.* While statutes of limitations act as the primary protection of a defendant's Due Process rights, they are not dispositive. *Id.* The Court found that the Fifth Amendment was more appropriate for determining whether a preindictment delay violated the Due Process Clause. *Id.*

*Marion* provided no clear test to determine when a preindictment delay would violate a defendant's Fifth Amendment rights. This Court instead offered limited language to provide flexibility to the lower courts and guidance for government actors.

The Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay *in this case* caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. *Id.* at 324 (emphasis added).

Additionally, this Court determined Due Process claims that *speculate* to lost memories, witness unavailability, or lost evidence, which are inherent to extended delays, are premature. *Id.* at 326 (emphasis added).

The *Marion* decision is broad and was never intended carry the weight it does now in consideration of preindictment delays. This Court clarified the intention in the text—“administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.” *Id.* at 325. The decision does not foreclose alternative facts and circumstances that might rise to a Fifth Amendment Due Process violation.

In *United States v. Lovasco*, which followed *Marion*, a defendant claimed that prejudice caused by preindictment delay was presumptively unconstitutional. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). This Court interpreted *Marion* to reject the presumption of prejudice. The *Lovasco* decision clarified *Marion*, yet resisted devising a concrete test. “*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *Id.* at 790.

*Lovasco* harkened precedent by setting limitations on the judiciary overseeing the decision on when prosecutors seek indictment. “We are to determine only whether the action complained of here . . . violates . . . ‘the community’s sense of fair play and decency.’” *Id.* (quoting *Rochin* 342 U.S. at 173). Much of the decision discusses a prosecutor’s discretion involving investigation strategy and access to evidence sufficient to indict. *See id.* “Investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused, precisely because investigative delay is not so one-sided.” *Id.* at 795 (internal citation omitted).

Applicability of the Fifth Amendment in *Lovasco* presumed that the prosecutor was moving the investigation forward to establish guilt beyond a reasonable doubt. *Id.* at 794. The government did not provide reasons for the delay in *Lovasco*. *Id.* The government’s representations were “that the *investigation continued* during the time that [they] deferred taking action against respondent” and “that the delay was caused by [their] efforts to identify persons.” *Id.* at 795 (emphasis added). The investigative delay and tactical advantage distinction are explained in footnote seventeen.<sup>1</sup> “A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.” *Id.* at 795 n.17.

This Court affirmed what *Marion* established, preindictment delay dismissals cannot be determined in the abstract. *Id.* at 796. The inquiries are fact and case specific and constitutional determinations should be left to the lower courts. *Id.* With no clear test, this Court directed lower courts to apply generally “the settled principles of due process.” *Id.* This was a problematic prescription for the lower courts. The *Lovasco* decision foreshadowed a deepening circuit split and resulting inequities. “Indeed, in the intervening years [since *Marion*] so few defendants have established that they were prejudiced by the delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay.” *Id.* at 796-97. The absence of a clear test has resulted in unchecked prosecutorial discretion and a lack of accountability for preindictment delays.

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<sup>1</sup> Case footnotes may be given full legal effect. As Judge Posner has stated, a “court’s holdings are authoritative wherever they appear on the page.” Richard A. Posner, *The Federal Courts: Challenge and Reform* 352 Harvard University Press, PP. XIV, 413 (1996).



D. The circuits have devised two different tests to determine whether a Due Process violation has occurred.

Prior to the *Marion* and *Lovasco* decisions, the D.C. Circuit invoked the fairness principle of the Due Process Clause through a balancing test. *See generally Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965). “Although it has not been directly decided, due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused.” *Id.* (citing *Nickens v. United States*, 323 F.2d 808, 810 n.2 (D.C. Cir. 1963)). The court rejected the government’s strategic reasons for the delay. *Id.* at 211. “[T]here was an undue subordination of [the] appellant’s interests which should not ... result in a sustainable conviction.” *Id.* at 212. Those interests included the defendant’s availability for arrest prior to the delay, and the witnesses’ lost memory of the events to the accused crime. *Id.*

The lower courts application of this Court’s preindictment delay precedent post-*Marion* and post-*Lovasco* has resulted in two distinctive tests. Michael J. Cleary, *Preindictment Delay: Establishing A Fairer Approach Based on United States v. Marion and United States v. Lovasco*, 78 Temp. L. Rev. 1049, 1059 (2005).

*i. The majority of circuits apply a two-prong test.*

The majority of circuits have adopted a bright-line test, despite this Court’s case-by-case prerogative set forth in *Marion* and *Lovasco*. *Id.*; *See e.g. United States v. Acevedo*, 842 F.2d 502 (1st Cir. 1988); *United States v. Ray*, 578 F.3d 184 (2d Cir. 2009); *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985); *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996); *United States v. Lively*, 852 F.3d 549 (6th Cir. 2017); *United States v. Gladney*, 474 F.3d 1027 (8th Cir. 2007); *United States v. Revada*, 574 F.2d 1047 (10th Cir. 1978). This test requires a defendant to prove 1) actual and substantial prejudice and 2) that improper motive by the prosecution caused the intentional delay. *Id.* In other words, the second prong is an inquiry of “bad faith” on behalf of the

government. In the majority circuits, the burden fully rests on the defendant. *Id.* In every circuit case mentioned above, the defendant failed to prove actual prejudice, so determining the government's motive for delay was unnecessary.

*ii. The minority of circuits apply a balancing test.*

Alternatively, a minority of circuits reject this narrow reading of *Marion* and *Lovasco* and engage in a balancing test similar to the D.C. Circuit's *Ross* decision. *Id.*; *See e.g. Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996); *United States v. Ball*, 711 F.App'x 838 (9th Cir. 2017). This balancing test weighs the defendant's actual prejudice against the government's explanation for the delay. *Id.* The burden begins with the defendant, then shifts to the government. *Id.* The Fourth Circuit criticized the two-prong majority test. Taken to its "logical conclusion, ... no matter how egregious the prejudice to a defendant and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred." *Howell v. Barker*, 904 F.2d 885 (4th Cir. 1990), *cert. denied*, 498 U.S. 1016 (1991).

*iii. Both tests weigh various factors to prove prejudice and bad faith.*

The factors considered to meet prejudice vary in courts and cases. Generally, for a defendant to prove prejudice due to witness unavailability, they must 1) identify the witness, 2) relate the substance of his or her testimony, 3) make efforts to locate, 4) show that missing testimony is not available through substitute sources, and 5) show that the witness would have been exculpatory. *See* 42 C.J.S. Indictments § 31 (internal citations omitted). In order to prove prejudice from loss of documents, the accused must 1) relate the information contained in the lost documents in sufficient detail, 2) demonstrate how the documents are connected to the defense, 3) show that there is no substitute for the information in the documents, and 4) establish

that the loss of the documents is directly traceable to the prosecution's delay. *Id.* at § 32 (internal citations omitted).

There is little discussion on what constitutes bad faith, improper motive, or recklessness on behalf of government actors because the prejudice prong is rarely satisfied. *See Lovasco*, 431 U.S. at 796-97. The lower courts inquiries into prosecutorial reasons for delay exaggerate discretion in favor of the government. Negligence generally does not rise to a violation of the Due Process Clause in the majority of circuits. Nolan S. Clark, *A Circuit Split on the Proper Standard for Preindictment Delays with Governmental Negligence*, 50 *Cumb. L. Rev.* 529, 559–60 (2020) (citing *Napowski v. Adams*, No. SA CV 16-00391 VBF, 2017 WL 907606 (Cal. Dist. Ct. App. Jan. 30, 2017)). The minority circuits consider negligence a weighted factor. *Id.* In *Sebetich*, the Third Circuit held failure to exercise diligence in keeping track of a case did not rise to the level of bad faith. *Sebetich* 776 F.2d at 430. In *United States v. Townley*, the Fifth Circuit found the government's reasons for delay—low-priority designation and staff changes—did not amount to a Due Process violation. *See United States v. Townley*, 665 F.2d 579 (5th Cir. 1982). In *Jones v. Angelone*, the Fourth Circuit court held that a prosecutor's unsuccessful extradition was sufficient reason for delay. *Angelone*, 94 F.3d at 910. “The [defendant] was at least as blameworthy for the delay as the respondent.” *Id.*; *See e.g. Ray*, 578 F.3d at 186.

E. The lack of a defined test from this Court causes inequities and confusion throughout the circuits.

The lack of guidance from this Court is most evident in the Seventh Circuit where conflicting decisions and frustration exist. *See Eli DuBosar, Pre-Accusation Delay: An Issue Ripe for Adjudication by the United States Supreme Court*, 40 *Fla. St. U. L. Rev.* 659, 671 (2013).

In *Sowa*, the Seventh Circuit combined the two-prong and balancing test. *United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994). The misconception of which test to apply was due to the lack

of previous cases in which the defendant successfully proved prejudice. *Id.* at 450. The district court ruled that the defendant presented sufficient evidence to show prejudice, thus requiring the appeals court to continue to the next phase of the analysis. *Id.* The *Sowa* opinion states intentional, tactical delay is required, but it also asserts that “once the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay.” *Id.* at 454. “The government's reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process.” *Id.*

The Seventh Circuit justified the balancing test, calling the defendant’s proving of prejudice a “monumental hurdle.” *Id.* at 450. Given the government’s standard practice of responding to motions, an explanation for a preindictment delay should not be burdensome. *Id.* at 450. In *United States v. Anagnostou*, the Seventh Circuit was uncomfortable with expansive prosecutorial discretion. “The government here attributes the delay to its excessive workload and to staff turnover .... Nothing about that excuse suggests bad faith, but it is hardly a compelling justification for such a long delay.” *United States v. Anagnostou*, 974 F.2d 939, 943 (7th Cir. 1992). The Seventh Circuit abandoned this hybrid test for the majority’s two-prong test. *See United States v. Wallace*, 326 F.3d 881, 886 (7th Cir. 2003). Regardless of the tests applied, the consistency in these lower court decisions can only be found in the outcome. Rarely is a defendant successful in proving actual prejudice, as this Court forecasted in *Lovasco*.

F. This Court should adopt a two-prong test true to the *Marion* and *Lovasco* decisions.

The deepening circuit split and current inequities in preindictment delay determinations may be resolved by the adoption of a test that applies the precedents set forth in *Marion* and *Lovasco*. The Thirteenth Circuit was correct when it determined that prejudice to the defendant and the government’s reasons for delay are distinct considerations. R. at 5 (citing *Crouch*, 84 F.3d

at 1512) (stating that a balancing test “seeks . . . to compare the incomparable”). A modification of the majority’s two-prong test is required. This modified test would embrace the fairness principles of the Due Process Clause and respect prosecutorial discretion. To compliment the current body of decisions in the circuits, the burden would rest solely on the defendant to prove both prongs of the new test.

The broad reading of *Marion* does not require a defendant to prove an intentional device to gain a tactical advantage, as the majority circuits suggest. It was the government that suggested delayed indictment to gain a tactical advantage would be a clear Due Process violation. This Court agreed with that premise, but in no way foreclosed the possibility of other avenues to a Due Process violation.

The intention of the *Marion* and *Lovasco* decisions was to evaluate how the actions of the government impact the *defendant* under the Due Process Clause. As Chief Judge Martz dissented in the Thirteenth Circuit Court of Appeals decision, “the majority erroneously accepts the trial court’s conclusion that *Marion* and *Lovasco* require a bad faith requirement.” R. at 13. The term “malice” does not appear anywhere in either the *Marion* or *Lovasco* decisions. This is the major interpretation error of the majority circuits.

This proposed test would replace the incorrect bad faith standard with the more appropriate reckless disregard standard. This standard is offered by this Court in *Lovasco*. The reckless disregard standard rises above negligence, but below malice. The key distinction is when the government’s knowing and intentional acts result in substantial risk to the defendant’s defense. “The essential issue is not the intent of the government actors but whether the government’s delay has made it impossible for Coda to receive a fair trial.” R. at 12 (Chief Judge Martz dissenting).

Prosecutors maintain broad discretion when the circumstances are due to investigative delays, as in *Lovasco*. If prosecutors are making strategic decisions to gather evidence sufficient for an indictment, that is equally in the best interests of the defendant. It is appropriate to direct the determination of whether the delay was investigative to the lower courts. This test also does not nullify the statute of limitations. If the delay results in an indictment approaching the statute of limitations, that is not dispositive, as in *Marion*. This test imposes accountability on prosecutors to keep cases and investigations moving forward.

Thus, this test would maintain the defendant's burden to prove 1) actual and specific prejudice (*Marion*) and 2) the prosecutor's reckless disregard of the circumstances, known to the prosecution, that resulted in a substantial risk to the defendant's defense (*Lovasco*).

G. In light of this proposed two-prong test, the Thirteenth Circuit wrongly decided Coda's appeal.

The State violated Coda's Due Process rights. Coda was prejudiced and the government showed reckless disregard of the circumstances while there was no ongoing investigation. Coda was indicted on charges of 18 U.S.C. § 844(i) in May of 2019, nine years after the 2010 incident. Coda testified that he intended to raise an alibi defense at trial, claiming that he was in New York the night the explosion occurred. Coda's defense is unavailable due to the State's preindictment delay.

*i. Coda was prejudiced by the State's delay.*

Coda meets the *Marion* and Criminal Justice System specificity requirements to prove actual prejudice due to the loss of exculpatory witnesses and documents. Every year until 2015, Coda traveled to New York by Greyhound bus to visit his family on his birthday. On his birthday in 2010—the night of the incident—Coda was in New York with five family members. Coda provided the court with 1) the identity of his five witnesses, 2) their testimony to his alibi, 3)

information that four had died, 4) the fact that the fifth witness had dementia and could not remember whether Coda visited the family in New York the day of the explosion, and 5) the fact that if the witnesses were available, they would testify to Coda's innocence. Coda is also unable to corroborate his alibi due to lost documents. Coda related to the court 1) the specific bus records that were unavailable, 2) that the bus records would have corroborated his alibi, 3) that there was no substitute for the travel documents, and 4) that but for the delay, the records would have been available, as they were stored online for only three years, and he made his last trip in 2015. Without the available evidence, Coda is left without a defense to his charged crime.

*ii. The State acted with reckless disregard and failed to investigate the crime.*

Coda meets the *Lovasco* burden of proving the government acted recklessly. This case does not turn on the facts of low-priority status, high office turnover, or the statute of limitations. It turns on the fact that the government knowingly and intentionally delayed Coda's case because of convenience and politics. Coda 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. Once Coda's state proceedings were finished, political pressure caused the office to prioritize prosecuting drug trafficking and other related offenses. The actions of the State fall out of bounds with the Due Process Clause. These acts were not negligent. They were not done with malice. They were done with complete disregard for Coda's Due Process rights.

The government cannot now claim investigative delay to cover for their convenience and political motivations. This Court in *Lovasco* made it clear that prosecutors who are actively investigating a crime have discretion on when to bring forth charges. The government had knowledge of the arson case. Cases of arson are notoriously difficult to investigate because they require extra due diligence and timeliness on the part of the prosecutor. *See* Parisa Dehghani-Tafti,

*Flawed Forensics and Innocence Symposium: Folklore and Forensics: The Challenges of Arson Investigation and Innocence Claims*, 119 W. Va. L. Rev. 549, 552 (2016). Yet, there was no ongoing investigation in this case, unlike in *Lovasco*. The U.S. Attorney’s Office “never increased the priority of Coda’s case, and his case never progressed.” R. at 2. Nothing in the facts suggest that Coda was responsible for the delays, unlike in *Angelone*. Once the government realized the statute of limitations was going to run in April, they apprehended Coda and took him into custody on April 23, 2019. R. at 7. The State had knowledge of Coda’s location and Coda did not resist arrest. *Id.* There is nothing in the record that indicates the State failed to keep track of the case, as in *Sebetich*. The U.S. Attorney’s office “passed Coda’s case from one Assistant U.S. Attorney to another” and chose not to further the investigation until right before the statute of limitations had run. R. at 2.

*iii. This case should be remanded to the Thirteenth Circuit.*

If this Court does not find that the State violated Coda’s Due Process rights, this Court should remand this case to the Thirteenth Circuit with the directive of applying the proposed two-prong test. *Marion* and *Lovasco* made clear that preindictment delay inquiries are fact intensive and require a case-by-case analysis. Consistency will be achieved when the lower courts are armed with a test that grants prosecutors broad discretion and protects a defendant’s constitutional rights.

## **II. The State Violated Coda’s Privilege Against Self-Incrimination.**

A. The Self-Incrimination Clause of the Fifth Amendment ensures that personal liberties are not trumped by the enforcement of criminal law.

The Fifth Amendment of the United States Constitution provides that “[n]o person shall...be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. This protection against self-incrimination acts as an exception to the general principle that the government has a right to everyone’s testimony. *Garner v. United States*, 424 U.S. 648, 658



(1976). It is a safeguard, having been “added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.” *Hoffman v. United States*, 341 U.S. 479, 485–86 (1951) (quoting *Feldman v. United States*, 322 U.S. 487, 489 (1944)).

B. The privilege against self-incrimination protects silence in both investigatory and adjudicatory proceedings, provided that the privilege has been invoked or an exception to the invocation applies.

The right to remain silent carries the implicit guarantee that silence will not be penalized. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). The privilege against self-incrimination allows individuals to remain silent in the face of government questioning intended to elicit information to support a conviction. *Blau v. United States*, 340 U.S. 159, 161 (1950). The invocation of the privilege can be asserted at any time during an investigatory or adjudicatory proceeding. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

The right to remain silent must be definitively claimed, *Salinas v. Texas*, 570 U.S. 178, 183 (2013), though a party does not need to use any special combination of words in doing so. *Quinn v. United States*, 349 U.S. 155, 162 (1955). Nevertheless, this Court has carved out exceptions to this rule, holding that in some circumstances, the express invocation of the right to remain silent is not required. See *Griffin v. California*, 380 U.S. 609 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966).

First, criminal defendants do not have to take the stand to assert their privilege against self-incrimination at their own trials. *Griffin* 380 U.S. at 613–615. To fully execute this protection, this Court decided that “the fifth amendment. . . forbids. . . comment by the prosecution on the accused’s silence,” during a trial. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) (citing *Griffin*, 380 U.S. at 615). This Court has since made clear that the prohibition is also meant

to encompass certain pretrial silences, including those arising during custodial interrogation. *Moore*, 104 F.3d at 385 (quoting *Miranda* 384 U.S. at 468) (internal quotation marks omitted).

Second, defendants who fail to assert their right to remain silent due to governmental coercion have not waived their privilege against self-incrimination. *Miranda*, 384 U.S. at 467–468. In *Miranda v. Arizona*, this Court recognized the “uniquely coercive nature of custodial interrogation” and asserted that a party in custody must be properly informed of their right to remain silent before a custodial interrogation begins. *Salinas*, 570 U.S. at 184–85 (citing *Miranda*, 384 U.S., at 467–468). “Custodial interrogation” is a term of art, which has been traditionally interpreted to be “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*, 384 U.S. at 444.

C. The use of silence at trial applies to specific instances as outlined in *Doyle v. Ohio* and *Jenkins v. Anderson*.

This Court has determined a number of situations in which a defendant's silence may be used against them at their trial; however, the use of such silence depends on whether 1) the defendant was in custody, 2) the defendant had received *Miranda* warnings, and 3) the silence was to be used for impeachment or substantive use.

In *Doyle v. Ohio*, this Court held that using a defendant’s post-custody, post-*Miranda* silence to impeach a defendant’s testimony violated the Due Process Clause of the Fourteenth Amendment. *Doyle*, 426 U.S. at 618. There, officers arrested two men for selling illegal narcotics. *Id.* at 611. The men stood in silence after receiving their *Miranda* warnings, refusing to answer police questions. *Id.* at 617. However, at trial, they each took the stand to claim a third party had framed him. *Id.* at 613. On cross-examination, the prosecution argued that the story was likely fabricated because the parties had not made such claims to the arresting officer. *Id.* at 616. The

*Doyle* Court relied, in part, on *United States v. Hale*, where, just a year before, this Court had articulated that “[a]t the time of arrest and during custodial interrogation, innocent and guilty alike—perhaps particularly the innocent—may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision.” *United States v. Hale*, 422 U.S. 171, 177 (1975).

In light of this language, this Court struck down the prosecutorial comment on post-custody, post-*Miranda* silence, holding that “every post-arrest silence is insolubly ambiguous.” *Id.* at 613. The Court reasoned,

[t]he warnings mandated by [*Miranda*], as a prophylactic means of safeguarding Fifth Amendment rights, require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. *Id.* at 617.

Therefore, “it would be fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.” *Id.* at 618.

Since *Doyle*’s evaluation of post-custody, post-*Miranda* silence, this Court has emphasized that the “fundamental unfairness” of using silence for impeachment hinges, primarily, on whether the defendant had received the *Miranda* warnings. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980). In *Jenkins v. Anderson*, this Court allowed the prosecution’s use of the defendant’s pre-custody, pre-*Miranda* silence to impeach, holding that it did not overstep the Due Process Clause or the Fifth Amendment protections against self-incrimination. *Id.* at 238-240.

In doing so, this Court focused on the fact that the *Miranda* warnings had not been given. *Id.* at 239. The defendant had not been taken into custody or given *Miranda* warnings; therefore, he had not received any assurances that his silence would not be penalized. *Id.* at 240. Additionally, this Court upheld the use of the defendant’s pre-arrest, pre-*Miranda* silence to impeach his

credibility because in choosing to “cast aside his cloak of silence” and take the stand, he had willingly opened himself up to attack via cross-examination. *Id.* at 238.

This Court declined to focus on *Miranda* and instead began focusing the question of the admissibility of silence on custody in *Salinas v. Texas*. *Salinas*, 570 U.S. at 191. *Salinas* concerned the admissibility of pre-custody, pre-*Miranda* silence; however, the court did not meet the issue head-on, and decided that the Fifth Amendment privilege claim failed because the defendant had not expressly invoked it. *Id.* at 191 (Thomas, J., concurring).

The *Salinas* decision shifted this Court’s evaluation of silence admissibility from *Miranda*, where it had rested in *Doyle* and *Jenkins*, and instead pointed to custody as the determining factor. *See id.* at 186 (“[t]he critical question is whether, under the “circumstances” of this case, [the defendant] was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not.”) *see also United States v. Wilchcombe*, 838 F.3d 1179, 1191 (11th Cir. 2016) (“The fact that the *Salinas* defendant was not in custody at the time of his silence was central to the Court’s determination that his silence could be used as substantive evidence of guilt”).

Therefore, this Court had the opportunity to admit the silence based solely on the fact the defendant had not received the *Miranda* warnings “and its decision would have been arguably supported by precedent.” Adam M. Hapner, *You Have the Right to Remain Silent, but Anything You Don't Say May Be Used Against You: The Admissibility of Silence As Evidence After Salinas v. Texas*, 66 Fla. L. Rev. 1763, 1774 (2014) (footnote omitted) (hereinafter “Hapner”). “But by shifting the primary focus away from *Miranda* warnings and towards custody... *Salinas* implied that it would be deficient and problematic to use *Miranda* warnings as the dispositive factor for determining the admissibility of silence as evidence of guilt under the Fifth Amendment.” *Id.*

D. The circuits differ in their interpretations and application of *Doyle* and *Jenkins* to post-custody, pre-*Miranda* silence as substantive evidence of guilt.

This Court has left open the question as to whether a defendant's post-custody, pre-*Miranda* silence may be used as substantive evidence of guilt, which has created a deep, entrenched circuit split. "The split among the circuit courts is primarily predicated on a disagreement over whether administering *Miranda* warnings must trigger the right to remain silent, and whether a constitutional distinction between the use of silence evidence for impeachment and its use as evidence of guilt actually exists." Hapner at 1772.

*i. The Fourth, Fifth, Eighth, and Eleventh Circuits hold that the use of post-custody, pre-Miranda silence is admissible.*

The Fourth, Fifth, Eighth, and Eleventh Circuits have held that post-custody, pre-*Miranda* silence may be used as substantive evidence of guilt. *See United States v. Love*, 767 F.2d 1052 (4th Cir. 1985); *United States v. Garcia-Gil*, No. 03-41142, 2005 WL 1274503, at \*1 (5th Cir. 2005); *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991); *United States v. Cabezas-Montano*, 949 F.3d 567, 583 (11th Cir. 2020), *cert. denied sub nom. Palacios-Solis v. United States*, 141 S. Ct. 162, 207 (2020). These circuits interpret *Doyle* and *Jenkins* to mean *Miranda* warnings are the genesis of the right to remain silent. *See e.g. Frazier*, 408 F.3d at 1107. Additionally, they take the narrow holdings of *Doyle* and *Jenkins* and admit the defendant's silence beyond impeachment. *See e.g. Frazier*, 408 F.3d at 1109.

These views were embodied in *United States v. Frazier*, where the court determined that silence is not constitutionally burdened, so long as the defendant did not receive *Miranda* warnings. *Frazier*, 408 F.3d at 1109-1110. In *Frazier*, officers arrested the defendant seconds after finding illegal narcotics in his vehicle. *Id.* at 1107. At that time, the defendant remained silent. *Id.* However, after he was given his *Miranda* warnings, he tried to explain that the vehicle and the accompanying drugs were not his. *Id.* At trial, the prosecution used the silence in the space between

the arrest and *Miranda* warnings as evidence of the defendant's guilt. *Id.* at 1109. The court examined *Doyle* and its progeny, despite the cases centering around impeachment rather than evidentiary use. *Id.* at 1111. Because the defendant had not received *Miranda* warnings, his post-custody, pre-*Miranda* silence was admissible as substantive evidence of guilt. *Id.*

ii. *Like Salinas, the D.C., Seventh, and Ninth Circuits hold that the use of post-custody, pre-Miranda silence is a violation of defendants' Fifth Amendment privilege against self-incrimination.*

The D.C., Seventh, and Ninth Circuits have held that the use of a defendant's post-custody, pre-*Miranda* silence as substantive evidence of guilt infringes upon the Fifth Amendment's privilege against self-incrimination. *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001); *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000); *Moore*, 104 F.3d at 377; *United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991). These circuits explain that the right to remain silent flows from the Constitution, not from *Miranda* warnings, and find custody to be the determining factor in whether silence is protected. *See e.g. Velarde-Gomez*, 269 F.3d at 1029 ("the right to remain silent derives from the Constitution and not from the *Miranda* warnings"). "[C]ustody is known as the triggering mechanism for Fifth Amendment protection, *Miranda* warnings are merely prophylactic rules created by the Court in the 1960s to protect the privilege against self-incrimination." Hapner at 1772 (footnote omitted).

Further, these circuits view reliance on *Doyle* and its progeny as misplaced, as they only address use of silence for *impeachment* rather than substantive evidence of guilt. *Moore*, 104 F.3d at 384 (emphasis added). The decisions took a more "analytical and comprehensive approach to the issue," allowing for "better-reasoned opinions than their counterparts that permitted the use of such silence." Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of A Defendant's Post-Arrest, Pre-Miranda Silence As Evidence of Guilt*, 59 Okla. L. Rev. 357, 386–87 (2006).

In *United States v. Moore*, the D.C. Circuit held that custody, rather than *Miranda* warnings, triggers the right to pretrial silence. In *Moore*, the prosecutor used the arresting officer's testimony that the defendant had said nothing after the discovery of illegal narcotics and firearms led to his arrest at a traffic stop. *Moore*, 104 F.3d at 384. The D.C. Circuit explained that it was unwilling to stretch the contours of *Doyle* outside of the realm of impeachment cases. *Id.* (quoting *Doyle*, 426 U.S. at 617) ("the State does not suggest petitioners' silence could be used as evidence of guilt"). The circuit refused to place the inception of the right to remain silent on the timing of the *Miranda* warnings. The court reasoned,

[a]lthough in the present case, interrogation per se had not begun, neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. While a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, *the defendant who stands silent must be treated as having asserted it.* *Id.* at 385 (emphasis added).

To support this holding, the court upheld the self-incrimination protections preserved in *Griffin*. *Id.*; *See Griffin* 380 U.S. at 240. The D.C. Circuit found that the use of post-custody silence would draw "a jury's . . . attention to the fact that [the defendant] has not [taken the stand] to remove whatever taint the pretrial but post-custodial silence may have spread." *Id.* Wary of the potential for police misconduct, *Moore* held that using custody as a trigger was essential to avoid "creat[ing] an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant." *Id.* This Court should affirm the right against self-incrimination is invoked at the time of custody.

E. Coda's Fifth Amendment right against self-incrimination was triggered when he was taken into custody.

The State violated Coda's Fifth Amendment right against self-incrimination. Coda was arrested and taken into custody on April 23, 2019. This action, as suggested in *Salinas* and held in

*Moore*, triggered Coda’s right to remain silent, which he silently invoked. It was not until after his arrest that Coda was informed of the charges against him. However, the record does not reflect the level of detail the officer used while informing Coda of his charges. R. at 7. Coda was not read his *Miranda* rights until officers were ready to interrogate him at the detention center. *Id.* Again, the record does not indicate how much time elapsed between Coda’s arrest and the subsequent *Miranda* warnings. Coda remained steadfast in his silence throughout the proceedings. *Id.* At no time did Coda waive his right to remain silent, which had attached when he was taken into custody. Therefore, the State’s use of Coda’s post-custody, pre-*Miranda* silence as substantive evidence of his guilt was an affront to his Fifth Amendment privilege against self-incrimination.

F. A reasonable person in Coda’s situation may not have declared an alibi upon arrest.

The Thirteenth Circuit erroneously held that a “reasonable person” would have informed the arresting officer of an alibi defense at the time of arrest. The Thirteenth Circuit fails to cite any case law regarding a reasonable person standard as it applies to any use of post-custody, pre-*Miranda* silence. The court conflates the admissibility of Coda’s silence, a legal question, with the question of substantive guilt, reserved for the jury’s “common sense.”

Even if this Court were to accept this erroneous standard, it was still misapplied in Coda’s case. It was unreasonable to assume he would have asserted an alibi defense upon arrest. Unlike in *Moore* and *Frazier*, where a defendant was arrested seconds after the crime was discovered, Coda was suddenly faced with a decade-old charge, which may have been delivered via statutory jargon. It is unreasonable to assume that Coda would immediately understand the charge, recognize the situation to which it referred, and declare an alibi. As this Court noted in *Hale*, there are a multitude of reasons that a party, whether innocent or guilty, may remain silent—particularly when so many Americans distrust the police. *Hale*, 422 U.S. at 177 (1975); *see also* Aimee Ortiz,



*Confidence in Police Is at Record Low, Gallup Survey Finds*, New York Times (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html>.

G. The admissibility of Coda’s post-custody, pre-*Miranda* silence diminished Coda’s Fifth Amendment right to remain silent at his own trial.

The prosecution's use of Coda’s post-custody, pre-*Miranda* silence as substantive evidence of his guilt drew jury attention to the fact that Coda did not take the stand to testify at his trial, and therefore diminished his Fifth Amendment right against self-incrimination. In using this silence, the prosecution put forth evidence that Coda could rebut only by taking the stand. Therefore, Coda was placed in a no-win situation where the only way he could explain that he had silently invoked his privilege against self-incrimination was to testify and give up that same right at his trial. Consequently, the effect here is the same as it was in *Griffin*—the prosecution’s comment accentuated the fact that Coda did not take the stand.

H. The lower court’s erroneous decision to admit evidence of Coda’s post-custody, pre-*Miranda* silence as substantive evidence of guilt was determinative in the outcome of his case, and was therefore not a harmless error.

“[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 23 (1967). This Court provided that the party who benefited from the error, has the burden to prove that it was harmless beyond a reasonable doubt. *Velarde-Gomez*, 269 F.3d at 1035 (citing *Chapman*, 386 U.S. at 24). Where “there is a reasonable possibility that the evidence complained of might have contributed to the conviction” a federal constitutional error is not harmless. *Chapman*, 386 U.S. at 23 (quoting *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87 (1963)).

As the benefited party, it is the State’s burden to prove that admitting Coda’s post-custody, pre-*Miranda* silence was harmless error beyond a reasonable doubt. However, Coda’s silence was not a mere needle in a haystack of incriminating evidence. As Chief Judge Martz dissented in the

Thirteenth Circuit, the government's case against Coda was riddled with insubstantial, shaky evidence, which is best exemplified through the government's unwillingness to claim this was a harmless error. R. at 15 n.1. The prosecution relied on nearly ten-year-old circumstantial evidence concerning the state of Coda's business while it was adjusting to a new competitor in the market, and an alleged friend's vague testimony. R. at 15. Thus, the silence acted as a substantial portion of the case against Coda and his conviction must be reversed, because the prosecution's error was not harmless beyond a reasonable doubt.

### **CONCLUSION**

For the aforementioned reasons, Coda respectfully requests this Court reverse and remand the Thirteenth Circuit's decision, and hold that Coda's Fifth Amendment rights were violated by 1) preindictment delay and 2) the use of his post-custody, pre-*Miranda* silence as substantive evidence of guilt.

Dated: September 13, 2021

Respectfully Submitted,

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Team 25  
Attorneys for Petitioner