No. 21-2125

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Attorneys for Respondent

Team 28

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Questions Presented

I. Whether the dismissal of an indictment is required under the Due Process Clause of the Fifth Amendment of the Constitution when there was a ten-year delay between the originating incident and the indictment, alleged alibi witnesses died, and irrecoverable evidence lost.

II. Whether the Government's use of the Defendant's post-arrest, pre-*Miranda*, and pre-interrogation silence in its case-in-chief violates Fifth Amendment due process when the Defendant voluntarily remained silent in response to agents' informing the Defendant of his charges upon arrest, and where agents never interrogated the Defendant.

Statement of the Case

I. The Ten-Year Pre-Indictment Delay Between Incident and Indictment That the Defendant Alleges Incurably Harmed His Defense

Defendant Austin Coda opened a hardware store in Plainview, East Virginia. R. at 1. Plainview sits on the border between East Virginia and North Carolina, so he could conduct business with residents of both states. R. at 1. The business was successful up until the 2008 recession and by 2010 it barely generated enough income to remain open or properly upkeep the building. R. at 1. On December 22, 2010, a sudden explosion occurred at the store on December 22, 2010. R. at 2. The building was a total loss by the time firefighters were able to extinguish the blaze. R. at 2. At the time, the evidence suggested cold weather caused a gas line leak, subsequently obliterating the ramshackle building. R. at 2.

However, the Federal Bureau of Investigation (FBI) later received a tip from Sam Johnson—a neighbor and close friend of the Defendant—who claimed to have knowledge surrounding the explosion. R. at 2. Johnson stated that Coda's business and personal finances were in decline but more importantly, Coda maintained an insurance policy covering his business in the event of a total loss. R. at 2. Johnson further stated that the week of the explosion, the Defendant seemed "very anxious and paranoid." R. at 2. Following this information, the FBI later developed another lead that the Defendant may be responsible for the explosion and ultimately informed the U.S. Attorney's Office. R. at 2.

The case was initially filed "low-priority" because of the Government's desire not to disturb the Defendant's prosecution on unrelated state charges. R. at 2. By the time the state charges concluded, the U.S. Attorney's Office began to prioritize cases involving drug trafficking and other related offenses. R. at 2. The sharp change in focus led to a high rate of turnover. R. at 2. The Defendant's case did not escalate or progress during this time because it was assigned to

multiple Assistant U.S. Attorneys. R. at 2. In April 2019, the Assistant U.S. Attorney most recently assigned to the Defendant's case noticed the impending statute of limitations. R. at 2. Complying with its congressional time limit, the Government quickly apprehended the Defendant, charging and indicting him under 18 U.S.C. § 844(i). R. at 3. The statute prohibits malicious use of an explosive to destroy property affecting interstate commerce. R. at 3. Notably, the Defendant did not, and does not, contest that the facts as alleged present a prosecutable offense. R. at 3 n.2.

Between the time of the explosion and the resulting indictment, a little under ten years passed. R. at 3. The Defendant filed a Motion to Dismiss the indictment, alleging that the delay prejudiced his defense. R. at 3. His claims included the deaths of family members who may have been able to corroborate an alibi, and the expiration of Greyhound bus records. R. at 3. Thus, the Defendant claims, he cannot corroborate his alibi and the Due Process Clause of the Fifth Amendment demands dismissal. R. at 3.

The District Court held an evidentiary hearing where the Defendant raised the above claims and filed for dismissal. R. at 1, 3. The District Court denied the motion, holding that the Defendant did not satisfy the requisite "two-prong" test, specifically the "bad faith element." R. at 4–6. Further, the District Court dismissed the Defendant's contention that a "balancing test" should be applied in consideration of his prejudice versus the reasons for the Government's delay. R. at 4–5. The Defendant appealed. R. at 11.

The Thirteenth Circuit affirmed, adopting the District Court's "thorough analysis" in full. R. at 12. Chief Judge Martz dissented. R. at 12. Chief Judge Martz claims, without citation to Supreme Court precedent, that the essential issue is not the intent behind the Government's delay but rather where the delay has made a fair defense "impossible." R. at 12. Chief Judge Martz agrees

with the Defendant that the balancing test should control. R. at 12. She cites the Defendant's burden under the two-prong test and information asymmetry as support. R. at 12–13.

II. The Defendant's Post-Arrest, Pre-*Miranda* Silence That Occurs in Response to the Charges Against Him

When FBI Special Agent Park arrested the Defendant, she notified the Defendant of the charges against him. R. at 7. The Defendant "remained silent" in response to Special Agent Park's statement of the charges. R. at 7, 8. When the Defendant later testified at an evidentiary hearing, he stated he intended to raise the defense of an alibi at trial. R. at 3. But he did not mention this alibi defense during his arrest. R. at 7.

Even though the FBI did not give the Defendant his *Miranda* warnings upon arrest, the Defendant was given his *Miranda* warnings at the detention center and again before the agents "were ready to interrogate him." R. at 7. However, the agents never actually interrogated the Defendant. R. at 8. The record cites a lack of evidence that the Government ever coerced or compelled the Defendant at any time. R. at 9.

The Defendant filed in the District Court for the District of East Virginia a Motion to Suppress his post-arrest, pre-*Miranda* silence. R. at 7. The District Court denied the motion, finding that "the jury must weigh all evidence," and excluding this evidence "[was] an obstacle to the pursuit of justice[.]" R. at 10. This factor is especially poignant because, at trial, the Defendant did not take the witness stand. *See* R. at 11. The Government presented the Defendant's post-arrest, pre-*Miranda* silence in its case-in-chief and in closing argument. *See* R. at 11. A jury convicted the Defendant, and he was later sentenced to ten years in prison. R. at 11. The Defendant appealed to the Thirteenth Circuit the denials of the Motion to Suppress and the Motion to Dismiss the indictment. R. at 11. In a divided panel, the Thirteenth Circuit affirmed the District Court's denial of both motions, fully adopting the District Court's "thorough analysis." R. at 12. The Defendant

filed a Petition for Writ of Certiorari to U.S. Supreme Court. R. at 16. The Court granted the Petition. R. at 16.

Summary of the Argument

The statute of limitations is the premier safeguard against prosecutors presenting overly stale charges against defendants. However, one congressional safeguard does not fully encompass defendants' rights under the Due Process Clause. Especially when there is a substantial delay before the indictment for an alleged crime.

Addressing pre-indictment delay risks conflating the role of the judiciary with that of its legislative and executive counterparts. To avoid conflation, the Supreme Court has stated that when evaluating a claim for violation of the Due Process Clause, the Constitution asks (1) whether the delay caused actual prejudice to the defense, and (2) that the delay was the product of deliberate action by the government designed to gain a tactical advantage over the defendant.

An alternative view, held by an exceedingly small minority, advocates for a "balancing test" that weighs the reasons for any excessive government delay against the inherent prejudice against the accused. This test has come under fire for seeking to compare incomparable ideas, drawing not only the judiciary into a factfinding role but also pulling the Fifth Amendment from its Constitutional grounding.

Here, the Defendant cannot articulate any "bad faith" or other tactical advantage that the Government would have obtained by delaying ten years between the incident and the indictment. In contrast, the Government can readily articulate not one, but multiple, reasons for the delay. Thus, regardless of the test applied, extending the Due Process Clause to demand dismissal is ungrounded.

Moreover, judicial restraint cautions judges against applying their personal biases and preferences towards pre-indictment delay. Notwithstanding doing so would openly fly in the face of established Supreme Court precedent, it would apply an entirely subjective review to when and how prosecutions should proceed. Lack of judicial restraint would burden the courts with essentially being forced to observe the day-to-day proceedings of an investigation, as well as strain prosecuting agents. Finally, because the essential ingredient into a due process violation inquiry is orderly expedition and not mere speed, the Government's indictment of the Defendant should not be dismissed on constitutional grounds.

The Fifth Amendment protects against compulsion from law enforcement. By contrast, the Defendant voluntarily went silent when the FBI informed him of his charges upon arrest.

Miranda rights automatically attach to defendants during custodial interrogations—not after arrest—because mere arrest does not induce a defendant to remain silent. Custodial interrogations maintain an inherently coercive environment, so *Miranda* warnings guard this protection from law enforcement's tactics that can force confessions out of defendants. Here, however, the Government never interrogated the Defendant, and the Defendant did not present any evidence that officers coerced him at any time.

Under most circumstances, the privilege against self-incrimination under the Fifth Amendment is not self-executing. If defendants are not testifying at their own trial or subject to a custodial interrogation, defendants must invoke the privilege against self-incrimination. Remaining silent does not explicitly or implicitly invoke the privilege against self-incrimination. The Defendant did not invoke this privilege by merely remaining silent upon arrest. Because he was not at trial or in a custodial interrogation, the Defendant's privilege against self-incrimination did not automatically attach until invoked, for his silence to be inadmissible. No invocation

occurred. Because the Defendant did not invoke his privilege, the Government has the right to use his silence in its case-in-chief.

Argument

I. The Defendant's Motion to Dismiss Is Meritless Because the Due Process Clause Neither Demands nor Supports Dismissal Merely for a Prolonged Delay, and the Government Acted Without Bad Faith Towards the Defendant nor His Defense.

When evaluating injury as a result of pre-indictment delay, courts have applied one of two tests. This Court should adhere to the two-prong test, the test adopted by the majority of circuit courts. This test requires "(1) that the delay caused actual prejudice to the conduct of his defense, and (2) that the delay was the product of deliberate action by the government designed to gain a tactical advantage." *United States v. Lindstrom*, 698 F.2d 1154, 1157 (11th Cir. 1983) (citations omitted); *see also United States v. Lovasco*, 431 U.S. 783, 790 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971).

The second test, adhered to only by the Ninth and Fourth Circuits, is a "balancing test" weighing the reasons for the delay against "fundamental concepts of justice or . . . fair play." *Jones v. Angelone*, 94 F.3d 900, 910 (4th Cir. 1996) (citation omitted); *see also id.* at 911 (Murnaghan, J., concurring) (writing separately to clarify "what the record establishes as what fact and what is speculation"). Though the exact parameters of this line are unclear, the *Jones* court stated that delays for the "mere convenience" of the prosecution are deemed to cause irrecoverable injury. *Id.* at 911 (majority opinion). However, other circuits remarked that not only does this test "seek to compare the incomparable" but also that "general allegations of loss of witnesses and failure of memories are insufficient to establish substantial prejudice." *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996) (en banc); *United States v. Hendricks*, 661 F.2d 38, 40 (5th Cir. 1981) (citations omitted).

Regardless of which test is applied, courts concur that the "statute of limitations . . . is . . . the primary guarantee against overly stale criminal charges." *Marion*, 404 U.S. at 322 (alteration in original) (citation omitted). Consequently, "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789.

The Supreme Court also stated that "proof of prejudice is a necessary but not sufficient element of a due process claim[.]" *Id.* at 790 (discussing *Marion*, 404 U.S. at 324–25). Rather, the second element—bad faith— is a "nearly insurmountable" burden borne by the defendant, not the government. *United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018) (citation omitted); *see Lovasco*, 431 U.S. at 789–90. The mere passage of time is not "bad faith" regardless of length, because "the right to a speedy trial is . . . fundamental" but also "necessarily relative" to outside influences. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). It falls to the defendant to articulate the particular injury due to the government's bad faith. *Lovasco*, 431 U.S. at 789–90.

The Government does not contest actual prejudice against the Defendant's alibi. R. at 5. The Defendant lost loved ones to both disease and injury. R. at 3. Moreover, electronic receipts that would have aided his alleged alibi have consequently become unavailable. R. at 3. However, the Defendant remains unable to articulate the Government's bad faith. No page, sentence, or implicit assertion within the record indicates that the United States Attorney's Office deliberately delayed their case. As *Lovasco* and *Marion* stated, there is a distinct difference between mundane or investigative delays and "delay undertaken by the Government solely 'to gain tactical advantage over the accused[.]'" *Lovasco*, 431 U.S. at 795 (quoting *Marion*, 404 U.S. at 324). Mirroring the "deliberate delay" requirement above, the record is silent as to what tactical advantage the

Government could have possibly been seeking to attain by not elevating the status of the Defendant's case in light of the pressures before the United States Attorney's Office.

Because of this standard, the Due Process Clause does not, and cannot, demand dismissal of the Government's case against the Defendant.

A. The Due Process Clause Does Not Demand Dismissal Merely for a Prolonged Delay and Its Inherent Risks.

Under a due process analysis, "the essential ingredient is orderly expedition and not mere speed." *Smith v. United States*, 360 U.S. 1, 10 (1959). In *Smith*, the U.S. Supreme Court addressed a lower court decision that was raised on appeal three separate times. *Id.* at 4. Among the myriad list of problems before the Supreme Court was the "inordinate speed that . . . caused many of the difficulties which led the court below to conclude that petitioner had been deprived of due process of law." *Id.* at 10.

Further, as explained in *Beavers*, "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." 198 U.S. at 87. The mere passage of time, along with the inherent dangers of prolonged delay, are a known and consistently recurring danger of criminal prosecution. *See Marion*, 404 U.S. at 325–26 (finding a 38-month delay between incident and indictment did not violate fair concepts of justice when "neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment" and "[a]ppellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost"). However, these prolonged delays do not violate the fundamental concepts of justice. *Id.* at 326. To do so would impose personal lines on law enforcement that may change based on innumerable unforeseen factors, thus dissolving the fundamental conception of due process in its entirety. *Crouch*, 84 F.3d at 1507 (citation omitted).

Here, the Defendant's case was marked as "low-priority." R. at 2. Under this designation, the Defendant's case was shuffled from one new attorney to the next, with no change in designation nor progression. R. at 2. In this time, however, the Defendant was never arrested nor charged for the incident. R. at 2–3. These facts align with *Marion*, where the defendants were also not subjected to any form of "formal restraint prior to indictment." The Defendant cannot claim he was prejudiced post-indictment, given that his case had a pre-trial evidentiary hearing—an event that precedes advancement to a full trial. Therefore, like the defendants in *Marion*, the Defendant is forced to rely solely on "the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence will be lost." Just as in that precedent, so too must the claim fail here.

Additionally, the Supreme Court specifically rejected the argument of a constitutional requirement to file charges promptly "once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt[.]" *Lovasco*, 431 U.S. at 792. In fact, the Court went on to state "if courts were required to decide in every case when the prosecution should have commenced, it would be necessary for them to trace the day-by-day progress of each investigation," thus burdening both prosecutors and courts. *Id.* at 793 n.14.

Here, the Government was fully prepared to move to trial within the provided statute of limitations. Upon realization that the statute of limitations was about to run, the U.S. Attorney's Office not only arrested but also indicted the Defendant within the prescribed timeframe. R. at 2–3. In fact, the Defendant's Motion to Dismiss was raised at a pre-trial evidentiary hearing, a step undertaken just before trial proceedings. R. at 3.

Additionally, "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an

indictment." *Lovasco*, 431 U.S. at 790. Here, the United States Attorney's Office cited multiple reasons for their delay: unprecedented turnover, redirected office focus, and even allowing unrelated state proceedings against the Defendant to continue unabated. R. at 2. To subject these reasons to the scrutiny of every judge who may ever hear them, or others like them, fundamentally unmoors the Due Process Clause from its constitutional base.

B. Defendant Remains Unable to Articulate Bad Faith of the Government, Thus Failing to Meet His Burden in a Due Process Claim.

To prevail on a due process claim regarding pre-indictment delay, most courts require that the Defendant prove (1) that the government intentionally delayed the case to gain some tactical advantage over him; and (2) that this intentional delay caused the defendant actual prejudice. *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985) ("To invoke the extreme sanction of dismissal of the indictments under the Due Process Clause, the defendants must prove 'that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.'" (first quoting *United States v. Gouveia*, 467 U.S. 180, 192 (1984); then citing *Lovasco*, 431 U.S. at 789–90; and then citing *Marion*, 404 U.S. at 324)); *Crouch*, 84 F.3d at 1500, 1513, 1518–20 (holding a nearly ten-year delay, including loss of alleged alibi witnesses, did not invoke the Due Process Clause because "the Due Process Clause . . . is not implicated by the lack of due care of an official causing unintended injury to life, liberty[,] or property" (citation omitted)). Mere negligence does not rise to the standard. *Sebetich*, 776 F.2d at 430.

Additionally, precedent distinguishes between "investigative delay" and "delay due to bad faith" because the two are "fundamentally unlike" one another. *Lovasco*, 431 U.S. at 795. *United States v. Gouveia* frames the controlling Supreme Court precedent, in dicta, as: "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of

limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him . . . .” 467 U.S. at 192.

Crouch readily provides not only in-depth analysis into the matter of pre-indictment delay but also a nearly perfectly comparable set of facts. In *Crouch*, the alleged bank fraud was a series of bad loans all of which closed in 1985. 84 F.3d at 1500. However, the two defendants in *Crouch* were not indicted until November 12, 1992: similar to the nearly ten-year delay here. *Id.* Additionally, the case concerned dismissal for pre-indictment delay and the prejudice that delay caused to the defendants, just like in this case. *Id.* The nearly thirty pages within *Crouch* hold that while neither *Lovasco* nor *Marion* provide “crystal clear” lines, the “better” reading “is that the Supreme Court, in instances where the statute of limitations has not run, has refused to recognize a claim of preindictment delay absent some bad faith or improper purpose on the part of the prosecution.” *Id.* at 1510.

Precedent is not without examples of actual bad faith, however. *Brady v. Maryland* demonstrates an intentional bad faith design by the prosecution where government attorneys deliberately withheld evidence that would have been beneficial to the defense. 373 U.S. 83, 87 (1963). During *Brady*, the prosecution withheld an extrajudicial statement that contained a confession to the crime for which the petitioner had been duly tried, convicted, and sentenced to death. *Id.* at 84. A motion for new trial was brought by the petitioner solely on the grounds of the evidence suppressed by the prosecution. *Id.* Though the question of Brady’s guilt was ultimately affirmed, the Supreme Court unambiguously stated, “suppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .” *Id.* at 87. The *Brady* court went on to highlight that the particular point at issue was the “misdeeds of [the prosecution]” that do not “comport with standards of justice.” *Id.* at 87–88.

A second example, *Mooney v. Holohan*, refers to an incident where not only did prosecutors knowingly use perjured testimony, but they also then suppressed evidence that would have impeached and refuted the offending testimony. 294 U.S. 103, 110 (1935) (per curiam). In *Mooney*, the petitioner sought a writ of habeas corpus alleging that he was being unlawfully held without due process of law based on the prosecution's "knowing use" of perjured testimony and the "deliberate suppression" of impeaching counter-evidence. *Id.* While addressing these "serious" charges, the *Mooney* court held that due process "is a requirement that cannot be deemed to be satisfied . . . if a state has contrived a conviction . . . through a deliberate deception of the court . . . ." *Id.* at 112.

In contrast, the delay regarding the Defendant's case here is attributable to multiple factors. First, the Defendant was already being prosecuted on unrelated state charges, and demanding transport back and forth would have been unreasonably burdensome both to the federal courts and state courts. R. at 2. Second, by the time the state had finished its proceedings against the Defendant, the U.S. Attorney's Office had changed priorities, focusing on prosecuting drug trafficking, the traffickers themselves, and other related offenses. R. at 2.

This large change in priorities came with a high degree of unprecedented turnover where the Defendant's "low-priority" case was turned over between attorneys for some time. R. at 2. However, once the U.S. Attorney's Office became aware of the impending statute of limitations, they immediately moved to indict, arrest, and try the Defendant. R. at 2–3. Even with the ten-year delay, the Government undertook and completed all the necessary pre-trial steps Congress's provided statute of limitations.

Here, the Government readily identified multiple reasons for the delay and still prepared itself to proceed to trial within its congressional limits. R. at 2–3. Further, the Government did not

rely on knowingly fraudulent testimony, as the error in *Mooney*, nor is there any indication within the record that the U.S. Attorney's Office withheld exculpatory evidence, as in *Brady*. Thus, while the Government does not contest the harm to the Defendant's alibi, the facts of the case remain sharply distinguishable from disreputable precedent, and the "bad faith" prong of a due process inquiry remains unsatisfied.

C. Judicial Restraint Cautions Against Personal Interpretations of When and How the Law Should Be Applied, Specifically to Avoid Conflating the Role of the Judiciary.

If this Court remains unpersuaded by both of the above tests, and the absence of bad faith on behalf of government employees, then perhaps the words of caution that interweave most—if not all—of the precedent surrounding pre-indictment delay will prove more persuasive. Circuits nationwide caution that "[j]udges are not free, in defining 'due process,'" but rather must avoid inserting "'personal and private notions' of fairness . . . ." *Crouch*, 84 F.3d at 1507 (quoting *Lovasco*, 431 U.S. at 790). Indeed, the Supreme Court went so far as to say, "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Lovasco*, 431 U.S. at 790. Instead, "[judges] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions[.]'" *Id.* (citation omitted).

Notwithstanding one's personal preferences towards either necessity or efficiency of prosecutorial delay, "statutes of limitations . . . provide 'the primary guarantee against overly stale criminal charges.'" *Id.* at 789 (quoting *Marion*, 404 U.S. at 322). Therefore, the burden lies with Congress—not the judiciary—to evaluate the statute of limitations. *Crouch* phrases the issue as, "'a length of the Chancellor's foot' will ensue" demanding that the scales of justice tilt towards whomever happens to be wearing the heaviest shoe that day. *Crouch*, 84 F.3d at 1512. Judicial

restraint cautions against such a haphazard approach to legal interpretation. Instead, judges are cautioned to adhere to the foundational understanding that only Congress can disturb these lines so as to not conflate the roles of the judiciary with those of their legislative counterparts.

Therefore, this Court should affirm the courts below and uphold the denial of the Motion to Dismiss.

II. Admitting the Defendant's Post-Arrest, Pre-*Miranda*, and Pre-Interrogation Silence in the Government's Case-in-Chief Does Not Violate Fifth Amendment Due Process Because Law Enforcement Did Not Compel the Defendant to Silence, and the Defendant Did Not Invoke His Privilege Against Self-Incrimination.

The Defendant voluntarily went quiet when Special Agent Park informed him of his charges upon arrest. He did not fall silent for fear of compulsion or self-incrimination. Nor did he fall silent in response to a question during a custodial interrogation after a law enforcement officer told him his *Miranda* rights.

The Fifth Amendment protects against "only self-incrimination obtained by a 'genuine compulsion of testimony.'" *United States v. Washington*, 431 U.S. 181, 187 (1977) (quoting *Michigan v. Tucker*, 417 U.S. 433, 440 (1974)). Compulsion can also occur when a witness is forced to "answer [questions] over his valid claim of privilege" against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). The Fifth Amendment does not give defendants an absolute right to remain silent; it protects them against incrimination and "goes no further than that." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

These protections attach during custodial interrogations, as opposed to upon arrest. *Miranda v. Arizona*, 384 U.S. 436, 457–58 (1966). Such interrogations are inherently coercive, and "[r]equiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right." *New York v. Quarles*, 467 U.S. 649, 654 (1984) (citation omitted). Coercion by police officers—not a constitutional obligation—is why *Miranda*

requires police officers to tell people their rights, especially before interrogation. *Miranda*, 384 U.S. at 467–68; *see also Quarles*, 467 U.S. at 654 ("The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure [sic] that the right against compulsory self-incrimination [is] protected.'" (first and third alterations in original) (quoting *Tucker*, 417 U.S. at 444)).

The Supreme Court has rightfully forbidden the government from using post-*Miranda* silence against a defendant in the government's case-in-chief and for impeachment purposes. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (during impeachment); *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) (during case-in-chief). Post-*Miranda* silence is not probative because this silence "is insolubly ambiguous because of what the State is required to advise the person arrested." *Doyle*, 426 U.S. at 617 (citation omitted).

But this Court has allowed prosecutors to use pre-*Miranda* silence as both substantive evidence of guilt and for impeachment. *Salinas v. Texas*, 570 U.S. 178, 182–83, 191 (2013) (affirming judgment of courts below allowing pre-arrest, pre-*Miranda* silence as substantive evidence of guilt); *Jenkins v. Anderson*, 447 U.S. 231, 240–41 (1980) (allowing pre-arrest, pre-*Miranda* silence to impeach a testifying defendant). The Court has even permitted prosecutors to use post-arrest, pre-*Miranda* silence to impeach a criminal defendant. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam). Unlike silence after *Miranda* warnings, pre-*Miranda* silence is probative because it "does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (citing *Jenkins*, 447 U.S. at 239).

The Defendant remained silent "only" in response to the agent's statement of the charges against him. R. at 7, 8. His silence occurred before they reached the detention center for

interrogation. R. at 7. The Defendant's voluntary silence also occurred before the FBI read him his *Miranda* rights. R. at 7. None of this silence was a product of compulsion. R. at 9. Therefore, as this Court has held in other cases relating to pre-*Miranda* silence, the Government's use of the Defendant's silence in its case-in-chief does not violate due process.

A. The Defendant Did Not Have the Right to Remain Silent upon Arrest Because the Government Never Interrogated the Defendant, and the Defendant Was Not Compelled to Remain Silent.

Miranda rights do not attach on defendants simply because they have been arrested. *Rhode Island v. Innis*, 446 U.S. 291, 299–301 (1980) (reasoning that custodial interrogation causes an individual's subjugation "to the will of his examiner," thus inherently invoking concerns of *Miranda*, as opposed to the mere coercion that may be present in arrest (quoting *Miranda*, 384 U.S. at 457)). Instead, the safeguards in *Miranda* protect defendants during custodial interrogations, which the Court has 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." *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) (per curiam) (quoting *Miranda*, 384 U.S. at 444).

Further, arrest by itself does not induce a defendant to remain silent. *Fletcher*, 455 U.S. at 603–04, 606–07 (finding prosecution's use of post-arrest, pre-*Miranda* silence to impeach a testifying criminal defendant did not violate due process where the officer did not immediately read the defendant his *Miranda* rights upon arrest and when he took the witness stand at trial because the Supreme Court rejected the circuit court's finding that arrest by itself induces a defendant to remain silent as "unsupported" by the Court's decisions after *Doyle v. Ohio*, 426 U.S. 610 (1976)). Furthermore, where the government does not compel a defendant to speak or remain silent, the prosecution's use of that defendant's silence does not violate due process. *United States*

v. Frazier, 408 F.3d 1102, 1107, 1111 (8th Cir. 2005) (finding prosecution's use of defendant's post-arrest, pre-*Miranda* silence did not violate due process where the defendant "did not say anything" upon arrest and was "neither angry, surprised, nor combative" because the defendant was not "under any compulsion" to speak and was not remaining silent during an interrogation).

The circuit courts that prohibit the use of silence that occurs after arrest and before the administration of *Miranda* warnings in the prosecution's case-in-chief incorrectly find that the right to remain silent happens at custody, not custodial interrogation. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) (finding custody, "not interrogation," as the point when the right to remain silent under *Miranda* attaches), *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001) (en banc) (finding individual has right to remain silent "once the government places an individual in custody"). *But see Innis*, 446 U.S. at 300 ("It is clear therefore that the special procedural safeguards outlined in *Miranda* are required *not* where a suspect is *simply taken into custody*, but rather where a suspect in custody is subjected to interrogation." (emphasis added)).

Here, Special Agent Park notified the Defendant of his arrest charges, and the Defendant remained silent. R. at 7. The FBI read the Defendant his *Miranda* rights before the inherently coercive environment of a custodial interrogation once they "were ready to interrogate him." R. at 7. Therefore, contrary to what the circuit courts said in *Moore* and *Velarde-Gomez*, the agents satisfied the threshold required by this Court in *Innis* and *Mathiason*. Thus, the FBI properly administered the Defendant's rights before custodial interrogation.

In addition, the Government did not compel the Defendant to remain silent upon arrest. Just as in *Frazier*, where the defendant "did not say anything" when the officer arrested him, the Defendant here "remained silent" in response "only to the agent's statements of the charges against him." R. at 7–8. The Defendant also provided "no evidence" that the Government compelled him

to give up his rights. R. at 9. Here, just as the Eighth Circuit held in *Frazier*, the Defendant's silence in this case was voluntary, and the Government had every right to use this silence in its case-in-chief.

Miranda was intended to protect against the abusive practices that police officers used to get confessions out of defendants. Not a single one happened here. The Government never even interrogated the Defendant. R. at 8. Making post-arrest, pre-*Miranda* silence inadmissible would require police officers to become mind-readers to determine why a particular defendant is silent and thus abandon their common sense, training, and experience. *See, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010).

B. Because No Custodial Interrogation Occurred, the Defendant Was Required to Invoke His Privilege Against Self-Incrimination for *Miranda* to Apply, Which Did Not Happen.

"The Fifth Amendment privilege against compelled self-incrimination is not self-executing." *Roberts v. United States*, 445 U.S. 552, 559 (1980). However, two exceptions exist to this rule. *Salinas*, 570 U.S. at 184–85 (plurality opinion). First, a criminal defendant does not have to testify at his own trial. *Griffin v. California*, 380 U.S. 609, 610–11, 615 (1965) (finding prosecution's comment of defendant's refusal to testify at trial violated Fifth Amendment due process because "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"). *But see Salinas*, 570 U.S. at 188 n.3 (plurality opinion) ("[B]ut that rule [prohibiting prosecution's comment on defendant's silence after hearing *Miranda* warnings] does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him." (citing *Jenkins*, 447 U.S. at 240)).

Second, a criminal defendant has *Miranda* rights during a custodial interrogation. *Miranda*, 384 U.S. at 477 (finding the familiar *Miranda* protections occur when an individual "is first subjected to police interrogation while in custody at the station"). Neither exception occurred here, so the law required the Defendant to invoke his privilege against self-incrimination.

i. The Defendant's Silence Was Not Enough to Invoke the Privilege Against Self-Incrimination.

Silence is not enough to invoke the privilege against self-incrimination. *Thompkins*, 560 U.S. at 374, 375–76, 381–82 (finding defendant did not invoke privilege against self-incrimination where he remained silent for two hours and forty-five minutes of a three-hour interrogation because he did not "unambiguously" invoke it by saying he wanted to remain silent or did not want to talk to police). "[A] witness does not [invoke the privilege against self-incrimination] by simply standing mute." *Salinas*, 570 U.S. at 181 (plurality opinion). In *Salinas v. Texas*, the defendant answered questions from police officers about a murder. *Id.* Although the defendant was not in custody during this questioning, he also did not receive any *Miranda* warnings. *Id.* at 182 When an officer asked whether any casings of shotgun shells would match the defendant's shotgun, the defendant went silent for "a few moments[.]" *Id.* at 181, 182. Officers then arrested the defendant. *Id.* at 182. The defendant did not testify at trial, and the prosecution used the defendant's pre-*Miranda* silence in its case-in-chief. *Id.*

Salinas affirmed the judgment of the courts below, holding that the prosecution's use of the defendant's pre-arrest, pre-*Miranda* silence as substantive evidence of guilt did not violate the Fifth Amendment. *Id.* at 182–83, 191. The Court found that the defendant did not invoke the privilege against self-incrimination because his silence did not "put police on notice" that he was relying on the Fifth Amendment. *Id.* at 188. Furthermore, the Court also found no Fifth Amendment violation because the defendant could have still voluntarily invoked the privilege, and

the police did not "deprive [the defendant] of [his] ability to voluntarily invoke the privilege[.]" *Id.* at 186, 191.

Silence that occurs before the defendant receives *Miranda* warnings can mean something other than relying on a privilege under the Constitution. *Id.* at 189 (noting defendant may be silent "because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else"). As a result, courts have found that the prosecution can comment on a defendant's silence before the defendant receives *Miranda* warnings. *See, e.g., United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991).

In *Rivera*, a customs inspector asked the defendant and others to examine their luggage at a border crossing. *Id.* at 1565. While examining the luggage, the officer found the suitcase had a "false bottom" lined with cocaine. *Id.* The defendant and the others showed "no surprise, agitation, or protest" while the officer was inspecting the luggage. *Id.* The officer then arrested the defendants and informed them of their *Miranda* rights. *Id.* at 1565–66, 1568 n.12. The officer testified at trial that one of the defendants had a "deadpan" reaction and did not appear interested or upset. *Id.* at 1566. The prosecution commented on the defendants' silence during closing argument. *Id.* at 1567.

The Eleventh Circuit upheld the prosecution's use of the defendants' post-arrest, pre-*Miranda* silence in its case-in-chief. *Id.* at 1569. The circuit court found that "both logic and common sense dictate that 'silence' is more than mere muteness[.]" *Id.* (seeing "no definite outer boundary" on what types of nonverbal conduct that prosecutors can comment on without violating *Miranda*). In addition, the court reasoned that because the defendants had not yet received their *Miranda* warnings, the government could comment on this silence. *Id.* at 1568 ("[T]he government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings

are given." (citing *Fletcher*, 455 U.S. 603)). The court also noted that suspects "can act silent in many ways that may be inconsistent with innocent knowledge." *Id.* at 1569 (citation omitted).

This Court has made it clear that defendants do not invoke the privilege against self-incrimination by remaining silent. If the defendant in *Thompkins* did not invoke the right to remain silent by staying silent for two hours and forty-five minutes of a three-hour interrogation, then the Defendant's silence in response to Special Agent Park's statement of the charges against him also did not invoke the privilege against self-incrimination. R. at 8.

Similarly, the Government can use the Defendant's silence because it occurred pre-*Miranda*. Just as the defendants in *Rivera* fell silent upon arrest, before receiving their *Miranda* warnings, the Defendant's silence here coincided with his arrest. R. at 8. The Eleventh Circuit found that the prosecution could comment on post-arrest, pre-*Miranda* silence because this kind of silence can mean anything, as noted by the Court in *Salinas*. The Government should have the same opportunity to use this silence in its case-in-chief because the jury can weigh the defendant's credibility and determine whether the Defendant's silence was probative. The Defendant had an opportunity to invoke his privilege against self-incrimination or deny the charges. He did neither.

ii. The Defendant Did Not Assert His Privilege Against Self-Incrimination.

Unless refusing to testify or in a custodial interrogation, defendants must invoke the privilege against self-incrimination in a timely manner. *Roberts*, 445 U.S. at 559. In *Roberts*, the defendant went to the police station to answer a few questions about a case where he was not a suspect. *Id.* at 553. The officers gave the defendant *Miranda* warnings and told the defendant that he was "free to leave." *Id.* at 553–54. The defendant then admitted that he had delivered heroin to the primary suspect and confessed that he had discussed transactions with the suspect. *Id.* at 554. The defendant then went silent when asked to name drug suppliers, even though the officers

warned him that lack of cooperation could affect his future charges. *Id.* The officers then arrested the defendant. *See id.* (indicted on charges to distribute heroin).

The Supreme Court found that, under these circumstances, the defendant still had to invoke the privilege against self-incrimination. *Id.* at 560. The defendant was not under custodial interrogation because he could leave, and the defendant "[did] not claim that he was coerced." *Id.* at 561. The Court reasoned that the defendant voluntarily confessed and still had a "free choice to admit, to deny, or to refuse to answer" throughout the interview. *Id.* (quoting *Garner v. United States*, 424 U.S. 648, 657 (1976)).

Although no specific formula is required to invoke the privilege against self-incrimination, defendants successfully invoke this privilege by asking for an attorney or affirmatively refusing to answer police questions. *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1015, 1017, 1019 (7th Cir. 1987) (finding error, though harmless based on the evidence, by admitting defendant's post-arrest, pre-*Miranda* silence where he told police that he "[didn't] want to talk about it" because he had a right to remain silent); *United States v. Okatan*, 728 F.3d 111, 114, 118 (2d Cir. 2013) (finding prosecution cannot use even pre-arrest, pre-*Miranda* silence as substantive evidence of guilt where the defendant responded to an officer by asking for an attorney upon falling silent after being put under arrest because the defendant "successfully asserted the privilege" when he asked for a lawyer).

Here, the Defendant needed to assert his privilege against self-incrimination. As this Court held in *Roberts*, because the Defendant was not refusing to testify at his own trial and was not in a custodial interrogation when he remained silent, the Defendant was required by law to invoke the privilege against self-incrimination, which he did not. Instead, the Defendant "delayed asserting his right[.]" R. at 9. Unlike in *Lane*, where the defendant refused to talk to police by

saying that he "[didn't] want to talk about it," the Defendant stayed silent. R. at 7. Unlike the defendant in *Okatan*, who asked for a lawyer before his arrest, thus invoking the privilege against self-incrimination, the Defendant did not. Rather, the Defendant here, just as the defendant in *Roberts*, still had a "free choice to admit, to deny, or to refuse to answer," including asserting the alibi defense that he intended to assert at trial. R. at 3. But he did not. R. at 7. Therefore, because the Defendant did not invoke the privilege against self-incrimination, the prosecution can use his silence as substantive evidence of guilt.

Therefore, this Court should affirm the courts below and uphold the denial of the Defendant's Motion to Suppress.

Conclusion

The Government's pre-indictment delay did not violate the Due Process Clause because the Government did not delay the case in bad faith. Additionally, the Government can readily identify a number of credible reasons to explain the delay. Furthermore, the prosecution's use of the Defendant's post-arrest, pre-*Miranda* silence in its case-in-chief did not violate the Due Process Clause of the Fifth Amendment. Because mere silence is not enough to invoke the privilege against self-incrimination, the Defendant's silence did not invoke this privilege. The Defendant also did not automatically possess *Miranda* rights upon arrest because the Defendant's silence did not occur during an interrogation. Therefore, this Court should affirm the judgment of both the Thirteenth Circuit and the District Court.

Respectfully submitted,

/s/ *Team 28*

Team 28

Counsel for the Respondent

Appendix

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, fined under this title or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.