No. 21-125

IN THE

SUPREME COURT OF THE UNITED STATES

October 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 PETITIONER

Team 12

Counsel for Petitioner

QUESTIONS PRESENTED

I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where there is no evidence of bad faith on the part of the government?

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

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STATEMENT OF THE CASE

I. Statement Of Facts

Austin Coda is a hardworking American Businessman in the small town of Plainview, East Virginia. R. at 1. Plainview is a rural town on the border between East Virginia and North Carolina, hence allowing Austin to conduct significant business with residents from both states. *Id*.

In January 2002, Austin began to follow his American Dream by opening his hardware store. *Id*. Austin's store was very successful and profitable for many years. *Id*. Unfortunately, during the 2008 recession his business began to suffer like the businesses of many other hardworking Americans in Plainview and the entire United States. *Id*. The opening of a large chain store in 2009 did not make it any easier for Austin's small business. *Id*. By 2010, even after all his hard work, Austin's business was generating just enough revenue to stay open. R. at 1. This struggle to keep the business open meant that Austin did not have enough funds to maintain proper upkeep of the building. *Id*.

On December 22, 2010, a disastrous explosion at Austin's hardware store occurred. R. at 2. By the time firefighters were able to distinguish the blaze, the blaze had destroyed eight years of work in just one night. *Id*. Local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") opened an investigation into the cause of the explosion. *Id*. They concluded that the evidence suggested that cold weather caused an old and damaged gas line to leak and destroy Austin's small business. *Id*.

After this determination the Federal Bureau of Investigation ("FBI") took a tip from Sam Johnson. *Id.* Mr. Johnson alleged that he had claims regarding the destroyed business. *Id*. Mr. Johnson was one of Austin's many friends and neighbors. R. at 2. Mr. Johnson told the FBI that Austin's small business and personal finances were on the decline. *Id*. He also discussed an

insurance policy that covered the hardware store in the event of misfortune. *Id*. Mr. Johnson lastly told the FBI that he believed Austin to have been "very anxious and paranoid" the week of the explosion. *Id*. The FBI used Mr. Johnson's info to create a belief that alleged Austin might be responsible for the explosion at his business and then informed the United States Attorney's Office. *Id*.

The U.S. Attorney's Office marked Coda's case as "low-priority." *Id*. They have attempted to provide several justifications for this designation. R. at 2. Austin was being prosecuted for unrelated state charges, and the U.S. Attorney's Office believed that it would be inconvenient to transport him. *Id*. Additionally, once those proceedings were finished, political pressure caused the office to prioritize other issues while also creating large amounts of turnover in the office. *Id*. As a consequence, Austin's case was passed on and forgotten from one U.S. attorney to another. *Id*. The office never increased the priority of Coda's case, and his case never progressed. *Id*.

In April 2019, the Assistant U.S. Attorney assigned to his case happened to notice that the statute of limitations was about to run. *Id*. This gave rise to the government apprehending Austin and taking him into custody. R. at 2-3. Austin chose to remain silent and did not assert a defense to federal agents. R. at 7. The FBI did not inform Austin of his *Miranda* rights until after reaching the detention center when they were ready to interrogate him. *Id*. The government indicted Coda under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. R. at 3. The government used this long-delayed opportunity to allege Austin had destroyed his store to claim insurance proceeds. *Id*. Although the incident occurred in December 2010, the government did not indict Austin until May 2019—nearly ten years later, barely within the statute of limitations provided by 18 U.S.C. § 3295. *Id*.

At the evidentiary hearing, Austin testified that he intended to raise an alibi defense at trial, claiming that he was in New York the night the explosion occurred. *Id*. Austin additionally testified that December 22, 2010—the night of the explosion—was his birthday. *Id.* Austin described how every year until 2015, he took a Greyhound bus to visit his family in New York on his birthday. *Id*. Since the government has delayed Austin's case, he has had to inform the Court that he is unable to produce critical testimony to corroborate his defense. R. at 3. Since the incident, four out of the five family members Austin visited in 2010 had died. *Id*. Two died from chronic disease (in 2015 and 2017), and two died in a car accident in 2018. *Id*. The fifth family member was diagnosed with dementia and cannot remember whether Austin visited the family in New York on the day of the explosion. *Id*. Lastly, Austin is unable to produce his Greyhound bus records because they are only stored online for three years, and his last trip was in 2015 causing the records to be unavailable. *Id*.

II. Procedural History

On September 30, 2019, the United States District Court for the District of East Virginia denied Petitioner's motion to dismiss indictment for preindictment delay. R. at 1. The District Court held that the defendant must show 1) actual prejudice and 2) bad faith in order to successfully bring a Due Process Challenge to preindictment delay. R. at 4. The District Court in making this decision chose not to accept the balancing test accepted by some Circuit Courts and asserted by Petitioner regarding a preindictment delay. *Id.*

On December 19, 2019, the United States District Court for the District of East Virginia denied Petitioner's motion to suppress his post-arrest but pre-*Miranda* silence. R. at 7. The District Court held that the decision in *Salinas v. Texas*, which addressed pre-custodial silence, should extend post-arrest but pre-*Miranda* silence. R. at 8; *Salinas v. Texas* 570 U.S. 178, (2013). The

court further asserted that a defendant must actively and in a timely manner voice their rights "sooner" if they intend to protect their silence, even without any police action. R. at 9-10.

On August 28, 2020, the Thirteenth Circuit Court of Appeals affirmed the decisions of the District Court. R. at 11. In a Dissent, Chief Judge Martz argued that the Circuit Court should adopt the balancing test, the government's delay against the harm done to the defendant, asserted by Petitioner in the District Court. R. at 12. The Chief Judge asserted that the important element of the Due Process Clause is that the defendant receives a fair trial, which he believes the Petitioner did not because the delay made it impossible to present his defense. *Id*. The Chief Judge additionally asserts that the Circuit Court should follow other circuits in their finding that the right to remain silent extends to post-arrest but pre-*Miranda* silence. R. at 14. Further stating, "the right to remain silent should not be defined by the arbitrary line of when police explicitly give *Miranda* warnings. Otherwise, the Fifth Amendment does not truly protect citizens from testifying against themselves." *Id*.

On July 9, 2021, this Court granted certiorari and directed the parties to address the following issues: "I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where there is no evidence of bad faith on the part of the government?" and "II. Does admission of an accused's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?" R. at 16.

SUMMARY OF THE ARGUMENT

Austin's Fifth Amendment rights were stripped from him when he was indicted - even after showing that he had suffered an actual prejudice – solely because he was unable to prove bad faith on the government's part. Circuit and state courts are split when it comes to deciding whether to dismiss charges due to pre-indictment delay based on due process grounds. Some courts have required defendants to prove bad faith, burdening them with showing that the government delayed bringing charges against them to gain a tactical advantage for the prosecution. This two-prong test is substantially unfair, as it requires a defendant to understand the inner workings and motivations of the prosecutor, and to disprove any justification the prosecution may have.

The better reasoning is followed by the minority courts, which looks to the balancing test that this Court has referred to in past cases. If the balancing factors weigh in favor of the defendant, the charges are recognized as unfair, requiring a dismissal of the case. This Court should resolve the Circuit split by adopting the balancing test, therefore establishing a clear and understandable standard for trial courts to follow. Further, this standard would grant discretion to trial courts to determine, rightfully, when a defendant's right to due process resulted in harm and a prejudicial delay that violates the Fifth Amendment, even when there is no evidence of bad faith.

Next, if post-arrest and pre-*Miranda* silence is allowed, it will leave a large gap in the protection that the Fifth Amendment has offered to the people. Austin' post-arrest and pre-*Miranda* silence should be barred, under the Federal Rules of Evidence 403 because thee probative value is substantially outweighed by unfair prejudice, misleading the jury, and presenting cumulative evidence. The admission of his silence would unfairly prejudice him because his silence would possibly make some jurors to believe that he was guilty. Further, Austin's post-arrest and pre-*Miranda* silence is inadmissible because under FRE 402 states that even relevance

evidence is inadmissible if it provides otherwise in the Constitution. The Fifth Amendment protects the right to remain silence, and because the Amendment is vague on where the right begins, it should be inadmissible.

The Circuits are split on whether post-arrest and pre-*Miranda* speech is admissible. The Fourth, Eighth, and Eleventh Circuits allowed post-arrest and pre-*Miranda* silence. Their decisions were about how the prosecution's comment on the defendants' silence did not warrant a mistrial or reversal, and the silence would not have changed jury's decision on the guilt of the defendants. In comparison, some Circuits have held that the use of post-arrest and pre-*Miranda* silence as substantive evidence of guilt because it violates the Fifth and Fourteenth Amendment. The comment on a defendant's exercise of his right to remain silent is unconstitutional.

ARGUMENT

I. Preindictment Delay That Causes A Defendant Actual Prejudice Violates The Fifth Amendment Even When There Is No Evidence Of Bad Faith From The Government

Some courts, including the Thirteenth Circuit, incorrectly follow the line of reasoning that "a defendant must show: (1) actual prejudice to a defendant's right to a fair trial resulting from the delay; and (2) that the delay was a result of the bad faith by the Government." R. 4. *United States v. Gomez*, S91 Cr. 451 (SWK), 1991 U.S. Dist. LEXIS 18719 (S.D.N.Y. Dec. 26, 1991).

Other courts look to the balancing test that this Court referenced in *United States v. Lovasco*, 431 U.S. 783, 790 (1977). This balancing test shifts the burden of proof to the prosecution, requiring it to show the reasoning behind a delay and then looking at the prejudice that the delay imposes on the defendant. *Lovasco*, 431 U.S. 783, 790. This Court should resolve the Circuit split by adopting the balancing test it promulgated in *Lovasco*.

A. The Courts Are Split In How To Interpret *Marion* and *Lovasco* In Regard To Testing Prejudicial Preindictment Delay

This Court first addressed pre-indictment delay in *United States v. Marion*, 404 U.S. 307 (1971). This Court held that the right to a speedy trial, under the Sixth Amendment is triggered only after a criminal prosecution has begun and after the person has been formally accused. *Id* at 325. Defendants in that case were indicted on April 19, 1970, on claims of fraud committed from March 15, 1964, until February 6, 1967. *Id* at 309-310. None of the defendants were arrested, charged, or otherwise subjected to formal restraint prior to indictment. *Id* at 325. Defendants moved to dismiss on the ground that the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses," and that the delay deprived them of their rights to due process of law and a speedy trial as secured by the Fifth and Sixth Amendments. *Id* at 310. While asserting no specific prejudice, defendants contended that the indictment required memory of specific acts and conversations occurring several years earlier and that the delay was due to the prosecutor's negligence or indifference in investigating the case. *Id*. The District Court granted defendants' motion and dismissed the indictment for "lack of speedy prosecution," having found that the defense was "bound to have been seriously prejudiced" by the three-year delay. The Government took a direct appeal to the Supreme Court of the United States. *Id*.

This Court held that a lengthy preindictment delay is irrelevant, since only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge" engage the protections of that provision. *Id* at 320. Statutes of limitations, which provide limits on prosecutorial delay, provide the primary guarantee against bringing overly stale criminal charges. *Id* at 322. *Marion* made 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. *Lovasco*, 431 U.S. 783, 790. This

Court did not conclude with a specific test, leaving lower courts to decipher the decision and apply it in their own way, resulting in the split circuits. *Marion*, 404 U.S. 307.

More recently, in *United States v. Lovasco*, this Court held that a prosecution during a prejudicial preindictment delay can violate the Due Process Clause, although still not establishing a standard or a test to use. *Lovasco*, 431 U.S. 783. Instead, this Court decided to defer their judgment on a test to another time, leaving it to lower courts to apply their favored test. *Id* at 797.

Defendant, Lovasco, was charged 18 months after the alleged offenses had taken place. *Id* at 784. Lovasco moved to dismiss the indictment due to delay, stating that it was prejudicial because his only two witnesses had died during the government's delay. *Id* at 785. The District Court dismissed the charges after finding that the government had the information needed to indict Lovasco within a month of the alleged crime and because the government was not able to explain why there was an extra 17-month delay in bring charges against Lovasco. *Id* at 786-787. The Eighth Circuit affirmed this finding, although it noted that the delay was because of the government's open investigation. *Id* at 788.

This Court reversed the lower court's ruling because the delay was based on a good faith police investigation and Lovasco did not show how the testimony of the two decedent witnesses would have helped his case. *Lovasco*, 431 U.S. at 786-788. This Court therefore distinguished between "investigative delay" and "delay undertaken by the Government solely 'to gain a tactical advantage over the accused,'" finding that if the delay is because of an open investigation, the defendant is not deprived of due process. *Id* at 762-763; *quoting United States v. Marion*, 404 U.S., at 324. *Lovasco* concluded that, "*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; *see Marion*, 404 U.S. at 324-325.

1. Some Courts Have Interpreted The Two Cases To Use A Two-Prong Test

The Thirteenth Circuit wrongly asserted that *Marion* and *Lovasco* require the two-prong test that includes proof of bad faith. R. 4. Jurisdictions that similarly have interpreted *Marion* and *Lovasco* include the Third Circuit, which ruled that a defendant was unable to show bad faith or intentional delay when defendants were indicted one day before the statute of limitations expired. *United States v. Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985). The delay was the result of a "mix-up between federal and state authorities," as both governments were unsure of who would be prosecuting. *Id* at 430. Once the United States Attorney determined that it would be prosecuting, it reopened the case, returning an indictment within six months. *Id*. The Third Circuit held that the "district court properly denied appellants' motions to dismiss the indictments on the grounds of pre-indictment delay because the appellants have failed to establish that the delay was designed by the government to give some tactical advantage over appellants." *Id*. The Third Circuit sidestepped the claim of actual prejudice to defendants, who had lost witnesses during the time between the offense and indictment by noting that because the defendants were unable to prove an intent by the government, the Court would not need to determine whether an actual prejudice occurred. *Id*.

Sebetich is an example of the narrowness and inflexibility of the two-prong test, which fails to allow a defendant to have access to a fair trial under the Due Process Clause of the Fifth Amendment. *Sebetich*, 776 F.2d 412, 429. The Third Circuit was forgiving of the prosecution's mishap but not of the actual prejudice or deprivation of liberty suffered by defendant. If the balancing test had been used, the district court would have the discretion to consider the prejudice resulting from lost witnesses.

Other circuits have used a similar rationale when interpreting *Lovasco* and *Marion*, using tasking the defendants with the burden of proving that the government's delay was due to a specific intent to gain a tactical advantage over or harass the defendant. *United States v. Glist*, 594 F.2d 1374 (10th Cir. 1979); *United States v. Steiner*, 847 F.3d 103 (3d Cir. 2017); *United States v. Foxman*, 965 F.2d 836 (11th Cir. 1996). This inflexible interpretation is based on past precedent of this Court in cases decided under other fact patterns and other contexts. For example, in *United States v. Gouveia*, 467 U.S. 180, 192 (1984), prison inmates were held in administrative detention while the authorities investigated the murder of a fellow inmate. In that case, this Court explained that:

> The Fifth Amendment [due process guarantee] 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 and that it caused him actual prejudice in presenting his defense.

Id. (emphasis added); *see also Lovasco*, 431 U.S. at 795 ("Investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" (*quoting Marion*, 404 U.S. at 324)); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

2. Other Courts Have Interpreted The Two Cases To Use A More Fair Balancing Test

In comparison, the Ninth Circuit considered and weighed the prejudiced to a defendant and applied a test "which balances the factors in the individual situation," in *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977). In *Mays*, the prosecutor delayed bringing two indictments, containing forty-two (42) counts, by over four years. The defendants "asserted that their defense had suffered actual prejudice due to the pre-indictment delay caused by the government." *Id* at 673. They stated

that two forms of prejudice had occurred – the deaths of three material witnesses and the dimming of memories of many of the live witnesses. *Id*. The district court dismissed the indictments, finding that the delay was "unusual and unnecessary," and that the defendants suffered actual prejudice. *Id* at 673-674. On appeal, the Ninth Circuit reversed. The Ninth Circuit recognized that there must an initial demonstration of actual prejudice resulting from the delay, which could mean a loss of witnesses, impairment of memory, or tampering of evidence. *Id*. The burden of showing this would fall onto the defendant, who would also need to show how the loss was prejudicial to him or her. *Id*; *Marion*, 404 U.S. 307; *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975). The mere showing of a missing witness "being useful does not show the 'actual prejudice' required by Marion." *United States v. Galardi*, 476 F.2d 1072, 1075 (9th Cir. 1973).

Mays held that following the initial proof of actual prejudice, the defendant would next have to prove the length of the delay. *Mays*, 549 F.2d 670 at 678. Assuming proof of these first two elements, the third part of the balancing test required the prosecution to show the reasoning behind the delay. As *Mays* explained, "[w]here the defendant has established actual prejudice due to an unusually lengthy government-caused pre-indictment delay, it then becomes incumbent upon the government to provide the court with its reason for the delay." *Id*. The Ninth Circuit concluded that "[t]he greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice. *Id*. However, despite the degree of actual prejudice, for a judgment in favor of dismissal, there must be some culpability on the government's part either in the form of intentional misconduct or negligence." *Id*.

Other courts have followed the Ninth Circuit's rationale to determine similar issues regarding preindictment delay. *See Hoo v. United States,* 484 U.S. 1035 (1988); *Jones v. Angelone,* 994 F.3d 900, 904 (4th Cir. 1996). For example, the Fourth Circuit ruled:

> The burden [falls] on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. "The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'"

Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (*quoting United States v. Automated Med. Lab.*, 770 F.2d 399, 404 (4th Cir. 1985)). Further, in *United States v. Moran*, the Ninth Circuit held that a defendant was not deprived of due process following an investigative delay, as the government was able to show the need for a delay. *United States v. Moran*, 759, 783 F. App'x 831 (10th Cir. 2014). Using this balancing approach allows the trial courts to look at the facts of each individual case and apply the elements of the test sensibly and rationally, rather than requiring the defendant to be clairvoyant and prove the intentions of the prosecution. The sliding scale advocated by the Ninth Circuit allows the trial court to consider either intentional or reckless conduct by the prosecution as an essential ingredient in rendering the proper decision. If negligent conduct by the prosecutors is asserted, then the delay and/or prejudice suffered by the defendant must be greater than that in cases where recklessness or intentional governmental conduct is alleged. *Lovasco*, 431 U.S. at 790; *Mays*, 549 F.2d at 677. After making the balancing determination, a pre-indictment delay should be permissible unless it violates fundamental conceptions of justice which lie at the base of our civil and political institutions. *Lovasco*, 431 U.S. at 790.

B. This Court Should Adopt The Balancing Test In Order To Establish A Standard For Lower Courts When Determining Prejudicial Delay

The Thirteenth Circuit found that a defendant must show (1) actual prejudice and (2) bad faith to bring a successful Due Process challenge to preindictment delay. As discussed above, Austin urges this Court to find that these situations must be considered on a case-by-case basis, rather than the strict requirements of the two-prong test. *Moran* and other courts persuasively assert that while proof of prejudice makes a due process claim ripe for adjudication, it does not automatically validate the claim; the reasons for the delay must also be considered. *Moran*, 759 F. App'x 831; *Lovasco*, 431 U.S. 783.

This Court has explained that the government "expand[ed]" its prior concession and admitted that a Due Process violation might even occur when a delay was 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." *Lovasco*, 431 U.S. at 795 n.17 (describing how a "tactical delay" by the government would violate one's Due Process). Further, "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. The proper standard in determining whether a case should be dismissed for pre-indictment delay requires a demonstration of actual prejudice resulting from the government's delay and consideration of the length of and reason for the delay. *Mays*, 549 F.2d at 677-678.

Although the two-prong test is used by the majority, it can be nearly impossible to prove, constituting a valid reason for the courts to adopt the balancing test. In the Thirteenth Circuit's opinion, Chief Judge Martz wrote a dissent regarding the lower court's ruling, which had affirmed the District Court's decision in denying Austin's pretrial motions to dismiss. R. at 12. He argues

that there is a need to "adopt the balancing test that weighs reason for the government's preindictment delay against the harm to the defendant." *Id*. The Chief Judge's dissent is correct in noting that the majority is erroneously requiring a defendant to show bad faith. R. at 13. He is also correct in noting that the Supreme Court has not laid out a definite answer on this issue, and states that they should interpret *Lovasco* and *Marion* today to fully require the balancing test. *Id*. Chief Judge Martz states that there are two major reasons for adopting a balancing test rather than the two-prong test:

> First, criminal defendants have limited access to the inner workings of a federal prosecutor's office, which will disable them from effectively proving the government's intent. And if the government has already delayed in bad faith, it is likely they would continue to act in bad faith to conceal that fact. Second, the government can almost always assert some alternate justification for its delay, which leaves the court in the difficult[,] if not impossible[,] position of psychoanalyzing the government's true intentions.

Id. Like the cases stated in the previous section, this Court should apply the facts of Austin's case to the balancing test. *United States vs. Crouch* states that the balancing test "seeks… to compare the incomparable," and here, Austin seeks to do just this. *United States v. Crouch,* 84 F3d 1497, 1512 (5th Cir. 1996). If this Court were to rule in favor of the balancing test, there would be a concrete test for lower courts to follow, resulting in a different outcome for Austin. If pre-indictment delay affects a defendant's ability to have a fair trial, as it does here, there may be grounds to dismiss the charges against the accused. *Marion,* 404 U.S. 307 at 324-325.

In applying the balancing test, this Court should first look at the actual prejudice Austin has suffered. Austin's case was first marked as "low priority," in 2010 and put on pause while he

was being prosecuted for unrelated state charges. R. at 2. Once these proceedings finished, the U.S. Attorney's Office continued to overlook Austin's case, as the office was focused on other issues and turnovers within the office. *Id*. It wasn't until 2019, when the Assistant U.S. Attorney assigned to Austin's case realized the statute of limitations was about to run, when Austin was taken into custody for the explosion in 2010. R. at 2-3. Due to the time between the explosion and Austin's arrest, multiple necessary witnesses were unable to testify in support of Austin's alibi. R. at 3. Every year on his birthday, until 2015, Austin had taken a Greyhound bus to New York to visit his family. *Id*. In 2010, his birthday was the same day as the explosion of his store, but due to the government's delay, four out of five family members he had visited had died by the time he was prosecuted. *Id*. The fifth family member had been diagnosed with dementia and was unable to remember if Austin had visited his family in 2010 on the day of the explosion. *Id*. Further, Austin was unable to produce the Greyhound bus records due to the company's policy to keep the records stored for three years – meaning that he was six years too late to request them. *Id*. Due to the loss of his family's testimony in support of his alibi and the loss of the Greyhound bus records, Austin is unable to provide his only corroborating evidence. *Id*. Therefore, Austin has proven that he suffered an actual prejudice due to the lengthy delay of the government.

Next, this Court should look to the government's reasoning behind the delay. Per the Ninth Circuit, "[t]he greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice. However, despite the degree of actual prejudice, for a judgment in favor of dismissal, there must be some culpability on the government's part either in the form of intentional misconduct or negligence." *Mays*, 549 F.2d 670, 678. It is undisputed that the government delayed Austin's indictment from 2010 until 2019, creating a nine-year gap between

the time of the explosion and the arrest. R. at 3. The government has not provided any other reasoning for the delay besides deeming his case "low priority" and prioritizing other issues before getting to Austin's. R. 2. Although the statute of limitations had not yet run, it was extremely close, less than a year away from running out. R. at 2-3. The government had plenty of time to prioritize Austin's case, rather than finally coming to the realization that it hadn't been tried, nine years later. *Id*. There was not an investigative delay, nor a tactical advantage for the delay. It was due to the negligence of the government that Austin suffered from an actual prejudice from their pre-indictment delay. Given there has been no support or valid reasoning for the delay, this Court should look at how the government's negligence has affected Austin's case. There is where the balancing test would be applied, looking at how the government's negligence in the case, affected Austin's ability to receive a fair trial.

It is undisputed that Austin has suffered an actual prejudice due to the pre-indictment delay of the government. The next step in the balancing test is to weigh this against the reasoning for the government's delay. The government has not raised a valid reason for the delay, noting other political priorities and turnovers within the U.S. Attorney's Office. R. 2. The actual prejudice Austin suffered outweighs the excuses made by the government. Because of this, this Court must rule in favor of Austin when applying the balancing test to the current facts. As previously stated, there is an opportunity here to expand the test to let defendants show that more can constitute a preindictment delay. Rather than only letting a government's intent or bad faith determine a prejudice to a defendant, this would allow for a case-by-case analysis, resulting in a fair standard for courts to follow. A fair trial is necessary in the justice system, requiring a defendant and government to have equal opportunities to prove their case, as the balancing test here would provide.

C. As A Matter Of Public Policy, This Court Should Adopt A Policy That Discourages The Delay Of Justice While Also Protecting The Due Process Rights Of A Defendant

The delay of justice for an individual leads to a larger delay in the justice system. The delays seen in the justice system have only expanded beyond civil suits in large cities but have expanded to criminal proceedings as well. *See generally* Hans Zeisel, Harry Kalven Jr. & Bernard Buchholz, *Delays in the Court* (2d ed. 1959). Generally, when there is a delay in the justice system it tends to make the system less effective in achieving the purpose of preventing crimes. K.N.C. Pillai, *Delay in Criminal Justice Administration—A Study Through Case Files*, 49 J. Indian L. Inst. 525 (2007). Notably, the longer it takes for a justice system to administer justice the less of an impact the system will have on the commission of crimes. *Id.* During the most recent year, COVID-19 has put even a greater delay on criminal cases in places like New York City which has 49,000 pending criminal cases. Melissa Chan, *'I Want This Over.' For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts*, TIME (Feb. 22, 2021), https://time.com/5939482/covid-19-criminal-cases-backlog/. Add that to the mountain of more than 1.1 million stalled criminal cases in the state of Florida. *Id.* It only makes sense that the Court should adopt a policy that encourages prosecutors, like the U.S. Attorney's Office, to stay on top of their cases. To have such long delays frustrates the purpose of the courts to administer justice in the fairest way possible. William K. Weisenberg, *Why our judges and courts are important*, ABA Journal (Feb. 1, 2018), https://www.abajournal.com/news/article/why_our_judges_and_courts_are_important. The justice system exists to protect our liberties and our most fundamental rights. *Id.* Across the nation, however, thousands of individuals wait in jail cells for their cases to be heard. Jim Rogers, *Justice delayed: COVID-19's staggering criminal-case backlog*, The Seattle Times (April 8, 2021), https://www.seattletimes.com/opinion/justice-delayed-covid-19s-staggering-criminal-case-backlog/. "If human nature were magically changed, and not a single new crime was committed

starting tomorrow, we'd still be at least three years behind." *Id.* This case is an opportunity for the Court to set the country's justice system down the right path, letting prosecutors know that delays cannot be tolerated while the Due Process Clause continues to exist.

In *Lovasco* this Court held that the Due Process Clause "protect[s] against oppressive delay." *Lovasco*, 431 U.S. at 789; *see also Marion*, 404 U.S. at 324. If there is a delay, the Court should adopt a policy that balances the adverse effects of the delay to the defendant against the government's reasoning for the delay. The Sixth Amendment and the right to a speedy trial does not apply to a defendant until indictment. *See Marion*, 404 U.S. at 307. Therefore, without applying the Fifth Amendment to unnecessary delays by the prosecution, a defendant may not have the means to accurately defend themselves and have a fair trial as guaranteed to them by the justice system. A large and critical part of the Due Process Clause is the guarantee that the defendant will have a chance to "prepare his defense." *United States v. Britton*, 107 U.S. 655, 661 (1883). This ideal previously held by the Court shows its importance in a case like Austin's where the delay by the government has prohibited any defense he might have. R. at 3. Thus, the rule we ask the Court to adopt today does not focus necessarily on misdeeds by a prosecutor, but rather the fairness of the trial for the accused.

Fairness at trial is not a new concept for this Court as it held in *Brady v. Maryland* that the goal of the courts is to avoid an unfair trial for the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Mooney v. Holohan*, 294 U.S. 103 (1935). Again, this Court reaffirmed its commitment to a fair trial for the defendant when it compared the actions of the prosecution against the adverse effects of the trial in *United States v. Agurs*. *United States v. Agurs*, 427 U.S. 97, 110 (1976). The idea of a fair trial is not the same as a perfect trial, nor does a defendant necessarily get a "sporting chance." Danny J. Boggs, *The Right to a Fair Trial*, 1998 Univ. Chi. Legal F. 1

(1998). "The fair trial is still a search for truth, with the appropriate pro-defendant discount where the defendant runs the risk of the deprivation of his liberty, a result we do not take lightly in a free society." *Id.* at 23. However, in Austin's case, he doesn't just run the of a deprivation of his liberty…it is a near guarantee without access to any defense based on delay.

This case provides the Court with a prime opportunity to strengthen the already strong jurisprudence on the Due Process Clause. The permittance of indictment delays would lead to an abundance of questions regarding the validity and protections of the Fifth Amendment, overloading the court system and creating a rampant distrust of the justice system. Thus, to further public policy the Court should act to discourage indictment delay and support individual rights under the Due Process Clause.

II. The Thirteenth Circuit's Decision Should Be Reversed Because The Admission Of Post-Arrest And Pre-*Miranda* Silence As Substantive Evidence Of Guilt Into The Government's Case-In-Chief Is Substantially Prejudicial And Misleading And This Court Should Rule That Post-Arrest And Pre-Miranda Silence Violates The Right To Remain Silent

"It simply cannot be the case that citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *United States v. Moore*, 104 F.3d 377, 386 (D.C. Cir. 1997). The Fifth Amendment is supposed to protect the silence of the accused. If the Fifth Amendment does not protect post-arrest and pre-*Miranda* silence, the courts comment on the silence and it will lead to a presumption of guilt, which is highly prejudicial and unjust to a defendant's presumed innocence.

A. The Admission of Post-Arrest and Pre-*Miranda* Silence as Substantive Evidence of Guilt into the Government's Case-In-Chief Is Substantially Prejudicial and Misleading

The United States Supreme Court held that the admissibility in evidence of any statement given during custodial interrogation of a suspect depended on whether the police provided the

suspect with *Miranda* warnings. *Miranda v. Arizona,* 384 US 436 (1966). "It simply cannot be the case that citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Moore,* 104 F.3d at 386. The Fifth Amendment is meant to protect the public from self-incrimination. The Fifth Amendment provides that "no person…shall be compelled in any criminal case to be a witness against himself…" To further protect the accused the Fifth Amendment forbids comment by the prosecution on the accused's silence or instruct that the silence is evidence of guilt. *Griffin v. California,* 380 U.S. 609, 615 (1965). Furthermore, it is held that "in criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment … commanding that no person." *Bram v. United States,* 168 U.S. 532, 542 (1897).

"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…The defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion would unduly burden the Fifth Amendment privilege." *Akard v. State,* 924 N.E.2d 202, 209 (Ind. Ct. App.) Austin was arrested on April 23, 2019. R. at 7. Agent Park arrested Austin and informed him of the charges against him. However, Agent Park did not read Austin his *Miranda* rights until they reached the detention center. R. at 7. The FBI, eventually read Austin his *Miranda* rights after he was taken to the detention center. *Id*. His rights were only read to him once they were read to interrogate him. *Id*.

In *Salinas v. Texas,* Salinas was arrested and questioned. Salinas was silent when he was questioned with possibly incriminating questions. *Salina v. Texas,* 570 U.S. 178, 181 (2013). Salinas did not remain silent through all the post-arrest and pre-*Mirandized* questioning. Therefore, the Supreme Court established that pre-custodial silence is admissible as substantive evidence of

guilt. *Salinas*, 570 U.S. at 186-91; R. at 8. However, there are some key differences in the cases. Austin remained silent throughout the time he was arrested to being *Mirandized*. Salinas remained silent on possibly incriminating questioning and answered other questions. Salinas did not fully enforce his right to remain silent. Salinas only asserted it when it was favorable to him. However, Austin did not volunteer any information or answer any questions. He fully asserted his right and did not waver. The government should only be allowed to use his post-arrest and pre-*Miranda* silence as substantive evidence. R. at 8.

The government has argued that "law enforcement officers are not required to divest their skills and common sense during an arrest more than they are required to do so before the arrest." R. at 9. However, the government argues that "a reasonable person with an alibi defense would inform the agents off his alibi. Because common sense suggest that Coda remained silent because he did not have an alibi defense, jurors should be able to consider and weight this information." *Id*. The government further argues that if "Coda intended to protect his silence, he should have unambiguously asserted that right sooner." *Berghuis v. Thompkins*, 560 U.S. 370, 380-82, (2010). The government asserted that a law enforcement officers do not have to act reasonably and with common sense when arresting and *Mirandizing* a person, but a regular citizen does have to act reasonably and with common sense. The government is asserting that a government agent does not have to act reasonably, however, a lay person needs to. This assertion is ludicrous. A law enforcement agent should be held to a higher standard to uphold and follow the law. Also, law enforcement needs to be able to common sense and their wits when dealing with the public.

When Austin had been arrested, it had nearly been nine years since the incident had occurred. R. at 8. Although, the incident, itself, is something unforgettable. The happenings that occurred on the date in question is something that a reasonable person would not remember.

Therefore, it is reasonably understandable the Austin did not put fourth his alibi defense at the time of his arrest. R. at 7. Austin most likely did not remember exactly what happened nine years prior. Also, even if Austin did remember the events of that day, it would be reasonable for a person to not be able to recite it at the time of arrest, in fear of misstating what happened that day. Then, those misstated statements being used against in court.

For the Fifth Amendment to truly protect the citizens of the United States "custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda." Moore*, 104 F.3d at 385; R. at 14. An "interrogation trigger" to Fifth Amendment's self-incrimination clause will create an adverse incentive for law enforcement. *Id.* As previously stated, the law enforcement needs to be the party that acts reasonably. With interrogation being the trigger to the Fifth Amendment application, it allows law enforcement a substantial amount of time to either coerce or intimidate the accused. These are extreme adverse effects that would negatively impact the accused. The government has argued that "Coda provides no evidence that the government coerced him into involuntarily relinquishing his rights." R. at 6. *Miranda* holds that when there is failure to invoke the privilege against self-incrimination is waived when there is coercion that makes that failure involuntarily. *Miranda*, 384 U.S. at 467-68; R. at 9. It is unknown whether there was coercion in this case, there is duress and stress. Austin was arrested several years later, with no warning. A highly stressful and intimidating event that law enforcement prolonged by not reading Austin his *Miranda* rights, which allows for law enforcement coercion and intimidation.

The Fifth Amendment forbids prosecutors from commenting on a defendant's failure to testify at trial. *Griffin*, 380 U.S. at 612; R. at 14. These comments are a "penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id*. at 614. R. 14. Moreover, the "use of a defendant's invocation of the privilege imposes

the same cost no matter the context in which that invocation is made." *United States v. Okatan*, 728 F.3d 111, 119 (2d. Cir. 2013); R. at 15. Austin had asserted his right to remain silent when he was in a high-stress and detrimental situation. Although Austin was made aware of his charges. The stress and anxiety that comes along with a police officer physically detaining a person and being thrown in the back of police cruiser, Austin was not thinking about what had occurred on the exact date and time for what he was being alleged to have done. His emotions were getting the best of him. A result that would be reasonable for anyone to have.

Moreover, post-*Miranda* silence is inadmissible as substantive evidence of guilt. *Doyle v. Ohio,* 426 U.S. 610, 616-620 (1976). R. at 8. The government's attempt to use post-arrest but pre-*Miranda* silence as substantive evidence is not defined by *Salinas* or *Doyle.* R. 8. However, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). "The prosecution may not use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation…under police custodial interrogation." U*nited States v. Moore, 104 F.3d 377, 386 (D.C. Cir. 1997) (quoting Miranda,* 384 U.S. at 468). Under policy custody, Austin had done what any reasonable person would have done. He remained mute after his arrest.

Under Federal Rules of Evidence Rule ("FRE") 401, it explicitly states that, "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 403. In FRE 103(a) "a party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party." Fed. R. Evid. 103. Moreover, FRE 103(d) states that, "To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." *Id.* The admission of Austin's silence is not relevant. It is

irrelevant because the silence does not prove any fact more or less probable. Austin's silence is not helpful in proving his guilt. There is error in the ruling to admit Austin's silence in the previous courts because this error has substantial effected a right of his.

In FRE 403, it states, "the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Lastly, in FRE 402 states, "Relevant evidence is admissible unless any of the follow provides otherwise: The United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible." Fed. R. Evid. 402. The government's use of the Austin' post-arrest and pre-*Miranda* silence should be barred because the probative value is substantially outweighed by unfair prejudice, misleading the jury, and presenting cumulative evidence. The admission of his silence would unfairly prejudice him because his silence would possibly make some jurors to believe that he was guilty. When there is several possibly several different explanations for his silence. Even if the defense were able to point out those explanations, it is extremely possible and likely the jurors would not be able to differentiate his silence and his alleged accusation.

Also, Austin's post-arrest and pre-*Miranda* silence is inadmissible because under FRE 402 states that even relevance evidence is inadmissible if it provides otherwise in the Constitution. The Fifth Amendment protects the right to remain silence, and because the Amendment is vague on where the right begins, it should be inadmissible. Therefore, to ensure that there is no prejudicial evidence being admitted and Austin's constitutional rights are not being violated.

This Court has completely failed to protect Austin's constitutional right. If post-arrest and pre-*Miranda* silence is allowed, it will leave a large gap in the protection that the Fifth Amendment has offered to the people.

B. This Court Should Follow the Ninth, Tenth, and D.C. Circuits, And Rule That Post-Arrest And Pre-Miranda Silence Violates The Right To Remain Silent

The "right to remain silent exists independently of the fact of arrest." *Okatan*, 728 F.3d at 118; R. at 14. If this is not the fact, then the Fifth Amendment does not protect the citizen from testifying against themselves. *Moore*, 104 F.3d at 385. Chief Judge Martz dissented stating, "this Court should follow other circuits that hold that the right to remain silent extends to post-arrest but pre-*Miranda* silence. *Coppola v. Powell*, 878, F.2d 1562, 1568 (1st Cir. 1989); R. at 14. The courts are split on whether the prosecution can use post-arrest and pre-*Miranda* silence in its case-in-chief as evidence of the Austin's guilt.

The Fourth, Eighth, and Eleventh Circuits have held that post-arrest and pre-*Miranda* silence may be used as substantive evidence of guilt in the prosecution's case. In *United States v. Cornwell*, Cornwell argued that the district court violated his Fifth Amendment rights when it admitted video footage of his silence when he was arrested and allowed counsel for the Government to comment on it during the closing argument. *United States v. Cornwell*, 418 F.App'x 224, 226 (4th Cir. 2011). Cornwell had not received *Miranda* warnings at the time he was being recorded, however, the court held the district court did not violated Cornwell's Fifth Amendment right by admitting the video. *Id*. There is a major difference in that case and Austin's case. Cornwell was being recorded; Austin was not. The prosecution commented on his demeanor and his bodily actions. In Austin's case, there was no recording. The prosecution commented on his silence, not his demeanor or his bodily actions.

In *United States v. Frazier*, Frazier was convicted by a jury for knowingly or intentionally possessing pseudoephedrine with the knowledge or reasonable belief that the pseudoephrine would be used in the manufacture of methamphetamine. *United States v. Frazier,* 408 F.3d 1102, 1105 (8th Cir. 2005). Frazier appealed the district court for the government's use of post arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. *Id*. at 1106. The issue at hand is at what point a defendant is under "official compulsion to speak" because silence being brought by compulsion constitutes a "statement" for purposes of Fifth Amendment inquiry. *Id*. at 1110. Although, in *Frazier,* the Court ruled in the admission of the silence. However, it was not the main issue in this proceeding. The court was not even completely convinced that the prosecution's reference to Frazier's silence was improper. *Id*. at 1111.

In *United States v. Rivera,* the two defendants were arrested and convicted for conspiracy to import, importation of, conspiracy to possess with intent to distribute, and possession with intent to distribute in excess. *United States v. Rivera,* 944 F.2d 1563, 1565 (11th Cir. 1991). The court concluded that the government's comment on Rivera's silence was harmless error beyond a reasonable doubt. *Id.* at 1570. Similarly, to *Frazier,* in *Rivera*, the court did not ultimately change their decision because it was harmless beyond a reasonable doubt. The court admitted that the government's comment Rivera's silence was an error.

In *United States v. Wilchombe,* Mario Wilchombe appealed a judgement from the United States District Court. The jury trail convicted all the defendants of conspiring to possess with intent to distribute and possessing with intent to distribute five kilograms or more of cocaine and 100 kilograms or more of marijuana while on a vessel and failing to obey a lawful order to heave his vessel. *United States* v. *Wilchcombe,* 838 F.3d 1179, 1183 (11th Cir. 2016). The decision was that if any error caused by the government's comment on the defendant's pre-*Miranda* silence would

not warrant a reversal. *Id.* at 1192. Similarly, to *Frazier* and *Rivera,* the court did not mention that there may have been error by the admission of the evidence, however, it would not have warranted a reversal in the case. *Id*.

On the other side, the Ninth, Tenth, and D.C. Circuits have held that the use of post-arrest and pre-*Miranda* silence as substantive evidence of guilt because it violates the Fifth and Fourteenth Amendment. The comment on a defendant's exercise of his right to remain silent is unconstitutional, which is given whether or not the *Miranda* warnings were actually given. *United States v. Whitehead,* 200 F.3d 634, 638 (9th Cir. 2000).In *Whitehead,* Timothy Whitehead appealed his jury conviction for importation of marijuana, and importation of marijuana with intent to distribute because the government violated his Fifth Amendment right to remain silent. *Whitehead,* 200 F.3d at 636. More specifically, he argued that the district court erred in admitting in evidence of his post-arrest and pre-*Miranda* silence during the government's case-in-chief and in during closing arguments. Under controlling Ninth Circuit law, the government's violated Whitehead's exercise of his right to remain silent when commenting on it. *Id*. at 637. The use of the post-arrest and pre-*Miranda* silence was an error. However, it was decided that it did not affect his substantial rights because other evidence proved his guilt.

In *United States v. Burson,* Burson was convicted of attempting to evade the payment of income taxes. *United States v. Burson*, 952 F.2d 1196, 1198 (10th Cir. 1991). Burson argued that the prosecution violated his Fifth Amendment right by introducing his pre-arrest silence as substantive evidence. *Id*. at 1201. He argued that the trial court should have excluded the pre-arrest because it failed to weigh its probative value against the possibility for prejudice under Federal Rules of Evidence 403. *Id.* The court concluded that the admission of Burson's silence was plain error. *Id*. The admission of Austin's silence would be extremely prejudicial. The probative value

of the admission of his silence is outweighed. There are several explanations for Austin's silence that the jury was unable to distinguish with the admissibility of his silence.

Although, the Fourth, Eighth, and Eleventh Circuits allowed post-arrest and pre-*Miranda* silence, the courts did not reverse their decisions because the admission of the post-arrest and pre-*Miranda* silence would not have resulted in a mistrial or reversal. In reality, *Frazier, Rivera,* and *Wilchombe* did not decide on the admissibility of post-arrest and pre-*Miranda* silence. Their decisions were about how the prosecution's comment on the defendants' silence did not warrant a mistrial or reversal, and the silence would not have changed jury's decision on the guilt of the defendants.This Court should follow the Ninth, Tenth, and D.C. Circuits because allowing post-arrest and pre-*Miranda* silence would be a clear and detrimental violation of Austin's right to remain silence. The Fourth, Eighth, and Eleventh Circuits only proved that the admission of the silence was not the cause for a guilty verdict. Therefore, this Court should reverse their decision.

C. As A Matter Of Public Policy, This Court Should Uphold The Critical Right To Remain Silent And Adopt The Maxim Of "*Nemo Tenetur Seipsum Accusare*" To Be Applicable At All Times

No one questions the right to remain silence on dozens of crime dramas (Such as: Dragnet, Hawaii Five-O and Law and Order) watched every day, yet the government now asks this Court to ignore a right that is not only engrained, but overly engrained in society. "A plain-meaning reading of the Fifth Amendment means the government cannot require a person to be a witness against himself in any criminal case." Tracey Maclin, *The Right to Silence c. the Fifth Amendment*, 2016 Univ. Chi. Legal F. 255, 284 (2016). This Court adopted in *Malloy* that "the Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty…for such silence*" Malloy*, 378 U.S. at 8. There are many circumstances where the accused, guilty or not guilty would benefit from silence. Such was the assertion of Justice Thurgood Marshall in *United*

States v. Hale saying, "In most circumstances silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176 (1975).

The right to remain silent as supported by this Court allows for important individual values such as personal dignity, free will, and freedom from government coercion to be upheld. Shmuel Leshem, *The benefits of a right to silence for the innocent*, 41 Rand J. Econ. 398, 399 (2010). Such imperative personal rights cannot be limited by some form of trigger to activate the accused individual's ability to enact their Fifth Amendment right. As such, this Court's adoption of the use of silence pre-*Miranda* and pre-interrogation would create an adverse incentive for law enforcement officers. In fact, this court held in a plurality opinion by Justice Alito in Salinas that, "a criminal defendant has an 'absolute right not to testify.'" *Salinas*,133 S. Ct. (2013) (quoting *Turner v. United States*, 396 U.S. 398, 433 (1970) (Black, J., dissenting)). Public policy of protecting an individual's right from self-incrimination would be for naught if the use of post-arrest, pre-*Miranda* silence is used as substantive evidence of guilt. *Miranda* makes it clear that an individual can stop answers questions at any time. *Miranda*, 384 U.S. at 473-74. If an individual's silence can be held against them before their rights are read to them, as they have arisen from *Miranda*, the entire purpose of *Miranda* and the Fifth Amendment would be frustrated. "The Supreme Court has consistently described the Fifth Amendment privilege as including a right to remain silent, regardless of the context in which it is exercised." Michael Avery, *You Have a Right to Remain Silent*, 30 Fordham Urb. L.J. 571, 586 (2002). In *Miranda*, the Court even looked to the right to remain silent as a way for the government to "…accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance'…". *Miranda*, 384 U.S. at 460.

Beyond the rulings of the Court, the Fifth Amendment protection from self-incrimination was sourced from the maxim "*nemo tenetur seipsum accusare*," that "no man is bound to accuse

himself." *Fifth Amendment—Rights of Persons*, govinfo (Last Visited Sept. 12, 2021), https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-6.pdf. There is a plethora of cases that have addressed an accused individual's silence such as *Miranda* and they have explained that the Fifth Amendment includes a right to silence "regardless of the context in which it is exercised." Avery, *supra*. Therefore, the right identified by this Court in *Malloy* has come full circle. *Malloy*, 378 U.S. at 8. In order to protect the "dignity and integrity of an individual" the federal government cannot infringe on "the right of a person to remain silent" and "suffer no penalty" for such an action. *Miranda*, 384 U.S. at 460; *Malloy*, 378 U.S. at 8.

If this Court were to allow the use of post-arrest, pre-*Miranda* pre-interrogation silence, the Court would be allowing for the frustration of not only *Miranda* protections, but also the basic foundations of the Fifth Amendment. This would lead to an abundance of questions regarding the validity and protections of the Fifth Amendment, not only overloading the court system, but creating a rampant distrust of the justice system. Thus, to further public policy the use of post-arrest, pre-*Miranda* pre-interrogation silence should be prohibited.

CONCLUSION

WHEREFORE, Petitioner Austin Coda, asks this Court to reverse the decision of the Thirteenth Circuit and remand for further proceedings.

Respectfully submitted,

Team 12
Counsel for Petitioner

APPENDIX A

AMENDMENT V

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

APPENDIX B

FEDERAL RULES OF EVIDENCE 103
RULINGS ON EVIDENCE

(a). Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the contest; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve to claim of error or appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

APPENDIX C

FEDERAL RULES OF EVIDENCE 401
TEST FOR RELEVANT EVIDENCE

Evidence is relevant if:

(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.

APPENDIX D

FEDERAL RULES OF EVIDENCE 402
GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

Relevant evidence is admissible unless any of the following provides otherwise:

The United States Constitution;

A federal statute;

These rules; or

Other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

APPENDIX E

FEDERAL RULES OF EVIDENCE 403
EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.