Team 14

No. 21-125

In the Supreme Court of the United States

AUSTIN CODA, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

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

BRIEF FOR THE RESPONDENT

September 13, 2021

Counsel for Respondent

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QUESTIONS PRESENTED

I. Under the Due Process Clause of the Fifth Amendment, does a due process claim fail to meet the bad faith requirement when the government's reason for preindictment delay is because of logistics and lack of resources?

II. Under the Self-Incrimination Clause of the Fifth Amendment, is an accused's post-arrest and pre-*Miranda* silence admissible as substantive evidence of guilt when the failure to invoke the privilege is voluntary and the silence is not compelled?

STATEMENT OF THE CASE

1. Statement of Facts

Austin Coda ("Petitioner") owned a hardware store in Plainview, East Virginia. R. at 1. Until the 2008 recession, Petitioner's business flourished as he developed a large client base from both North Carolina and Virginia. R. at 1. Following the recession, and after a large chain store opened in the same town as Petitioner's store, Petitioner began to struggle financially. R. at 1. On December 22, 2010, Petitioner's store was completely destroyed by an explosion. R. at 2. Initially, the Federal Bureau of Investigation believed that a leaking gas line caused the explosion. R. at 2. However, the FBI received a tip from Petitioner's close friend that Petitioner was suffering financially and had an insurance policy that covered the hardware store. R. at 2. Petitioner's close friend also informed the FBI that Petitioner seemed "very anxious and paranoid" the week of the explosion. R. at 2.

Following the tip, the FBI informed the U.S. Attorney's Office for the District of East Virginia ("Respondent" or "the Government") of Petitioner's potential involvement in the explosion. R. at 2. The Government decided to mark the matter as "low-priority" because Petitioner was being prosecuted in state court for unrelated charges. R. at 2. As such, it would have been inconvenient to transport him back and forth between courts. R. at 2. Following the state court proceedings, for unrelated reasons, the Government was forced to prioritize serious drug trafficking cases and also suffered from high turnover during this time. R. at 2. Consequently, Petitioner's case remained "low-priority" until April 2019, at which point the Government indicted Petitioner within the statute of limitations. R. at 3. Subsequently, the FBI arrested Petitioner and immediately informed him he was charged with violating 18 U.S.C. section 844(i) for maliciously destroying his store to collect insurance proceeds. R. at 7. Petitioner did not protest the charges or the arrest. R. at 7. Instead of asserting his alleged alibi

defense to the FBI, Petitioner remained silent. R. at 7. Once the FBI was ready to interrogate Petitioner, they issued him his *Miranda* warnings. R. at 7. At the evidentiary hearing, Petitioner testified—for the first time—that he intended to raise his alibi defense at trial. R. at 3. Petitioner claimed he lost access to bus records and witnesses who could provide critical testimony to support his alibi defense. R. at 3.

2. Procedural History

In May 2019, Petitioner was indicted for violating 18 U.S.C. section 844(i), which prohibits the malicious use of explosives to destroy property that affects interstate commerce. R. at 3. Following Petitioner's indictment, Petitioner filed a Motion to Dismiss in the District of East Virginia. R. at 1. An evidentiary hearing was held on September 15, 2019. R. at 1. On September 30, 2019, the district court denied Petitioner's Motion to Dismiss. The court held Petitioner failed to demonstrate the Government acted in bad faith by delaying the indictment as required under the Fifth Amendment. R. at 6. Petitioner also filed a Motion to Suppress, which the district court denied on December 19, 2019. In holding, the court reasoned that Petitioner's silence is admissible under the Fifth Amendment for two reasons: (1) Petitioner's failure to invoke his privilege against self-incrimination was voluntary, and (2) Petitioner remained silent during his arrest and prior to being issued *Miranda* warnings. R. at 8–9.

Petitioner then filed a notice of appeal to the Thirteenth Circuit Court of Appeals. R. at 11. On August 28, 2020, the Thirteenth Circuit upheld the district court's decision affirming the lower court's decision in favor of Respondent on both issues. R. at 12. Petitioner filed a petition for writ of certiorari with this Court, which this Court granted on July 9, 2021. R. at 16.

SUMMARY OF ARGUMENT

While Petitioner is rightfully afforded broad constitutional protections under the Fifth Amendment, those protections should not extend so far as to jeopardize society's interest in prosecuting criminal activity when the government follows procedure and acts in good faith. Petitioner urges this Court to adopt murky Fifth Amendment standards that would create an avalanche of litigation for both procedural due process and privilege against self-incrimination issues. This Court should not endorse Petitioner's standards.

With respect to due process, this Court's repeated insistence on a showing of governmental bad faith for constitutional claims favors the two-prong test adopted by a majority of circuit courts. That test, in part, requires Petitioner to show that a preindictment delay was due to the Government's deliberate intent to gain a tactical advantage. Petitioner failed to meet that burden because Respondent did not delay bringing the indictment to gain a strategic advantage over Petitioner. Rather, the Government was prevented from prioritizing Petitioner's case due to legitimate priorities and resource constraints. The majority two-prong test is a bright-line rule that not only ensures consistency in judicial outcomes, but also ensures the Government is not effectively penalized for when and how it decides to bring charges. The two-prong test also recognizes the fundamental principle that statutes of limitations are the primary safeguards against precisely the same grievances Petitioner brings before this Court.

Further, this Court should hold that Petitioner's silence is admissible as substantive evidence of guilt because Petitioner failed to expressly and unambiguously invoke his privilege and such failure was not coerced by any circumstances surrounding the arrest. In holding, this Court should also recognize the line of demarcation at *Miranda* warnings in admitting silence as substantive evidence of guilt. Such a recognition would extend the "custodial interrogation

trigger" to the Self-Incrimination Clause that this Court has established for impeachment evidence. By drawing the line at *Miranda* warnings and allowing the jury to assess all pre-*Miranda* silence, this Court's common-sense policy of only admitting unambiguous silence is fulfilled. Moreover, this allows the jury to assess a complete record of material facts and come to a fully-informed decision, thus enhancing society's interest in prosecuting criminal activity. This determination is true to the Fifth Amendment's intent and protects against any compulsion of self-incriminating testimony.

Accordingly, Respondent respectfully requests this Court to uphold the decision of both courts below in favor of the Government on both issues.

ARGUMENT

I. PREINDICTMENT DELAY DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT WHERE THERE IS NO EVIDENCE OF BAD FAITH BY THE GOVERNMENT.

Petitioner fails to demonstrate a viable Fifth Amendment due process claim because Respondent's preindictment delay was not attributable to bad faith. The Fifth Amendment affords private individuals protections for due process of law from actions by the federal government. U.S. Const. amend. V. Claims alleging constitutional injury arising from preindictment delay are evaluated under the Due Process Clause of the Fifth Amendment. *See United States v. Marion*, 404 U.S. 307, 325 (1971). The government does not infringe on an individual's due process rights unless it violates "fundamental conceptions of justice" that define a "community's sense of fair play and decency." *See United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)) (internal quotation marks omitted).

Proof of actual prejudice to a defendant—no matter how substantial—does not automatically validate a due process claim. *See Lovasco*, 431 U.S. at 783. Accordingly, proof of actual and substantial prejudice is only a threshold inquiry. *Id.* at 790 ("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim. . . ."). To succeed on a due process claim, Petitioner must show *both* that Respondent (1) caused actual and substantial prejudice, and (2) acted in bad faith in bringing the indictment. *See*, *e.g.*, *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996); *United States v. Ashford*, 924 F.2d 1416, 1419–20 (7th Cir. 1991); *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985).

Here, the parties do not dispute the first prong of the due process inquiry for preindictment delay.[1] R. at 6. Per *Lovasco*, however, actual prejudice to a defendant is not enough to trigger due process protection under the Fifth Amendment. With respect to the second prong, circuit courts have interpreted the *Marion* and *Lovasco* language in two ways. Nevertheless, consistent with both courts below and the majority of circuits, this Court should hold mere negligence is insufficient to fulfill the bad faith requirement imposed under *Marion* and *Lovasco*. Consequently, this Court should uphold the Thirteenth Circuit's decision denying Petitioner's Motion to Dismiss.

A. Under the Majority Test, Petitioner's Due Process Claim Fails Because Indictment Was Not Intentionally Delayed to Gain a Tactical Advantage.

Petitioner has failed to show how logistical concerns and competing administrative priorities render the Government's decision to delay his case violative of the Due Process Clause. A vast majority of circuits impose a burden on the defendant to show that the government deferred an indictment in bad faith to gain a tactical advantage. *See*, *e.g.*, *United States v. Madden*, 682 F.3d 920 (10th Cir. 2012); *United States v. Kenrick*, 221 F.3d 19 (1st Cir. 2000); *United States v. Cornielle*, 171 F.3d 748 (2d Cir. 1999). The government does not act in bad faith, even if a lengthy amount of time has passed, unless the government *intentionally* delays an indictment as a strategic choice. *See United States v. Seale*, 600 F.3d 473, 479 (5th Cir. 2010). Moreover, the government does not act in bad faith for investigative delays, including when investigations are deferred because of administrative constraints. *See United States v. Sowa*, 34 F. 3d 447, 451 (7th Cir. 1994). In this case, the Government neither sought a tactical advantage nor delayed Petitioner's indictment for an impermissible reason.

[1] The Government concedes actual prejudice to the Petitioner in this case because of his inability to provide corroborating evidence as a result of the preindictment delay. R. at 5–6.

1. Without intent, mere passage of time is insufficient to prevail on a due process claim for preindictment delay.

Although Petitioner emphasizes that ten years have passed since the incident date, the amount of time, in the absence of bad faith, is inconsequential. In *Lovasco*, this Court held that prosecuting a defendant following investigative delay does not constitute a deprivation of due process, even if the defendant's defense "might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796. In accordance with *Lovasco*, the Fifth Circuit held that a time delay alone is insufficient to establish a due process claim absent the government's intent to gain a tactical advantage—even when more than forty years elapsed between the date of the alleged crime and the indictment. *Seale*, 600 F.3d at 479.

The Fifth Circuit's reading of *Lovasco* is consistent with this Court's repeated insistence that constitutional claims for loss of evidence require deliberate bad faith by the government. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988); *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *Marion*, 404 U.S. at 324. Tellingly, this Court's holding in *Youngblood* a decade after *Lovasco* explicitly favors a bad faith requirement. Although *Youngblood* dealt with destruction of critical evidence from failure to preserve, this Court's reasoning should extend to loss of critical evidence due to preindictment delay. This is not to say that delays do not cause actual prejudice to the defendant because of the government's actions—only that not every delay is of constitutional moment. *United States v. MacDonald*, 688 F.2d 224, 226 (4th Cir. 1982) (noting that the government's "[l]aggardness in prosecuting a criminal charge" may be objectionable but falls short of constitutional injury.").

Further, the government is under no duty to bring an indictment as soon as possible, even when the government has sufficient evidence under the high standard of proving guilt beyond a reasonable doubt. *Lovasco,* 431 U.S. at 792. If the government may delay an indictment when it

has enough evidence to prove guilt, it arguably follows that the government may delay bringing an indictment when it has not yet compiled enough evidence due to administrative and logistical constraints. R. at 2; *see also Lovasco*, 431 U.S. at 790–91 (noting that prosecutors do not have to bring an indictment when it has probable cause nor when it has evidence beyond a reasonable doubt). This is particularly true given the numerous policy reasons why requiring the government to do so would produce results contrary to the fundamental conceptions of justice. *See Lovasco*, 431 U.S. at 791 (increase in unwarranted charges filed against defendants, loss of potentially useless sources of information for the government, scarce court resources consumed on insubstantial cases). "To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself[.]'" *Id.* (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

2. The government does not act for a tactical advantage when the reasons for its preindictment delay are investigative in nature.

Investigative delays are also "fundamentally unlike" strategic delays used to gain a tactical advantage. *Lovasco*, 431 U.S. at 795. Preindictment delays that are investigative in nature do not amount to a constitutional violation. *See Lovasco*, 431 U.S. at 796. Respondent was not able to charge Petitioner at an earlier date because Petitioner was being prosecuted for unrelated state charges. R. at 2. Thus, transporting Petitioner back and forth between federal and state court would have been administratively burdensome. R. at 2. When Petitioner's state proceedings finished, Respondent had to prioritize more serious offenses, such as drug trafficking, in its jurisdiction. R. at 2. Moreover, lack of resources led to a new Assistant U.S. Attorney repeatedly being assigned to Petitioner's case. R. at 2.

While it is true that the Government's reasons for delay are not investigative in nature because the Government did not investigate further during the preindictment period, this is

unavailing when similar cases have held otherwise. *See*, *e.g.*, *Harris v. State*, 242 Md. App. 655, 675 (2019) (rejecting defendant's contention that government's failure to amass any evidence during delay was a violation of due process). The fact that new evidence was not developed in the near ten-year period does not equate to the bad faith required to overcome the majority two-part test. *Id.*

At worst, Petitioner alleges negligence. Negligence attributable to the government, however, is not enough to hold the government liable for a violation of due process. *See United States v. Lively*, 852 F.3d 549, 567 (6th Cir. 2017). Petitioner argues that the Government decided to wait until the termination of his state prosecution as evidence of the Government's negligence. Nonetheless, the Government's decision to designate Petitioner's case "low-priority" because of logistical concerns is a valid exercise of prosecutorial discretion. *See Sowa*, 34 F. 3d at 451. The Government is well within its prosecutorial right to choose which cases should be charged first. *Crouch*, 84 F.3d at 1504 (noting the government's decision to assign priority to cases involving danger to human life and other ongoing offenses did not amount to bad faith).

Therefore, Petitioner has failed to meet his burden to overcome the majority two-part test absent any evidence that the Government's preindictment delay was in bad faith.

B. Public Policy Favors the Majority Test Requiring a Showing of Bad Faith on the Government's Part.

The Due Process Clause not only requires a showing of bad faith as a matter of law, but also as a matter of policy. Requiring bad faith supports society's interest in fairness, public safety, and protections for constitutional rights.

First, case outcomes are clearer when courts have a bright-line rule to apply across similar cases—a result that is also beneficial for the due process rights of defendants. Second,

requiring defendants to prove bad faith protects the government from needless litigation because of preindictment delay effectively outside of the government's control. Third, the statute of limitations already reflects the legislature's intent to protect against exactly the same harm Petitioner alleges here.

1. The majority test is a bright-line rule that encourages consistency in outcomes among the circuits.

The majority test is a bright-line rule that has practically advantageous effects for both the judicial system and defendants. By requiring bad faith in addition to actual prejudice, the majority test minimizes confusing line-drawing issues that will result from subjective balancing tests attempting to put a thumb on the scale between prejudice and reasons for delay.

The dissenting opinion admonishes the majority two-part test requiring bad faith as inherently unfair because criminal defendants have limited access to the inner workings of the federal prosecutor's office and cannot prove the government's intent behind delay. R. at 13. This is, in fact, contrary to established principles of due process. The due process guarantee applies to "*deliberate decisions* of government officials to *deprive* a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis added). Thus, "the Due Process Clause . . . is *not* implicated by the lack of due care of an official causing *unintended* injury to life, liberty or property." *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (emphasis added). As such, the majority two-prong test aligns with due process principles when the government does not make "deliberate decisions" to "deprive" the Petitioner of his right to liberty.

2. The majority test balances due process and public safety in a manner that takes into consideration the limited nature of public resources.

The majority test also strikes the appropriate balance between fairness to the defendant

and society's interest in public safety.[2] This interest includes the need to allow the government to enforce the law effectively. If courts use a subjective balancing test to determine whether a procedural due process violation occurred, the government would be held responsible for loss of evidence that it had no knowledge of—simply because of an undue delay. Effectively, the government would be penalized for its lack of resources. This is contrary to the twin goals of due process, which take into consideration not only the procedural rights of the accused, but also the state's interest in keeping communities safe. *See* Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 89 J. CRIM. L. & CRIMINOLOGY 1413 (1998-1999) ("Individual civil liberties, considered apart from their relationship to public safety and security, are [] labels on empty bottles.").

Moreover, this Court has consistently been reluctant to question when and how the government decides to bring charges. In both *Marion* and *Lovasco*, this Court aptly noted that "[a]llowing inquiry into . . . when the prosecutor could have charged would raise difficult problems of proof." *Marion*, 404 U.S. at n. 13; *see also Lovasco*, 431 U.S. at n. 14 ("[I]f 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."). Consequently, both the government and the judicial system would be forced to deal with an avalanche of litigation where public resources are already scarce. *See Lovasco*, 431 U.S. at n. 14 ("Maintaining daily records would impose an administrative burden on prosecutors, and reviewing them would place an even greater burden on the courts.").

[2] Due process is a process "reasonably designed to ascertain the truth, in ways *consistent with the other ends of the legal system*, as to *whether a violation [of law] has taken place*. . . ." JOHN RAWLS, A THEORY OF JUSTICE 239 (1971) (emphasis added).

The strain a subjective balancing test would have on already limited public resources is readily apparent in this case. Respondent's reasons for delay are a direct result of that scarcity. For example, Respondent had to prioritize higher level offenses. R. at 2. Expending resources on high priority cases also caused attrition, leading to Petitioner's case being reassigned multiple times. R. at 2. If this Court were to adopt the minority balancing test, it would undoubtedly require additional judicial and state resources—a cost that the taxpayers will ultimately bear.

3. The majority test reinforces the established principle that statutes of limitations are the primary safeguards against bringing overly stale criminal charges.[3]

Statutes of limitations are the primary protections against unlawful preindictment delay in criminal prosecutions. *Lovasco*, 431 U.S. at 788; *Marion*, 404 U.S. at 322. Statutes of limitations already represent the legislature's careful balancing of the government's interests relative to the defendant's right to due process. *See Marion*, 404 U.S. at 322; *see also Toussie v. United States*, 397 U.S. 112, 114–15 (1970) (noting that the legislature's purpose of statutes of limitations is to limit exposure to criminal prosecution to certain fixed periods of time); *St. Louis Pub. Sch. v. Walker*, 76 U.S. 282, 288 (1869) (noting statute of limitations were made for defendant and society's interest in the protection against loss of a defense). While the Due Process Clause certainly plays an integral role against oppressive delays, that role is limited. *Lovasco*, 431 U.S. at 789.

The Government concedes that the Fifth Amendment would require dismissal of the indictment in certain situations—such as if there was "substantial prejudice" to Petitioner's "right to a fair trial *and* . . . the delay was an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324 (emphasis added). However, that is not the situation in

[3] *See Ewell*, 386 U.S. at 122.

this case. Here, Petitioner asserts both the loss and impairment of critical witness testimony due to the lapse of time. R. at 3. But even the minority of courts who follow Petitioner's balancing test have emphasized that protection from lost testimony generally falls solely within the ambit of the statute of limitations. *See United States v. Pallan*, 571 F.2d 497, 501 (9th Cir. 1978). Moreover, this Court noted in *Marion* that the Sixth Amendment should not be invoked to protect against post-indictment delays that prejudice the defense when the statute of limitations already fulfills that purpose. *Marion*, 404 U.S. at 323. Likewise, this Court's reasoning can similarly be extended to the Fifth Amendment by considering indictments brought within the statute of limitations as timely in accordance with the Due Process Clause.

C. The Alternative Balancing Test Petitioner Proposes is Ill-Suited for a Due Process Claim Arising from Preindictment Delay.

A minority of courts have interpreted *Marion* and *Lovasco* as requiring courts to weigh the government's reasons for delay against actual prejudice to the defendant. However, the balancing test is inappropriate for a due process claim arising from preindictment delay for two reasons. First, the balancing test inappropriately instructs the courts to substitute their personal notions of fairness for the government's prosecutorial discretion during the preindictment period. Second, the balancing test, in effect, does not produce a result contrary to the more clear, bright-line majority test.

1. The balancing test inappropriately infuses subjective judicial preferences into the due process analysis.

The balancing test Petitioner proposes erroneously "seeks to compare the incomparable." *Crouch*, 84 F.3d at 1512. Respondent does not refute that the constitutional principles underlying due process call for a balanced "delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 325. Indeed, Petitioner correctly identifies that both *Marion* and *Lovasco*

emphasize that courts should consider "the constitutional significance of various reasons for delay." *Lovasco*, 431 U.S. at 797. However, Petitioner's interpretation of the "various reasons for delay" language is misplaced. Petitioner reads this language as permissive of a subjective balancing test, but such a test would be contrary to the "circumscribed" task of the judicial function. *See Lovasco*, 431 U.S. at 790 ("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.").

As this Court elucidated in *Lovasco*, "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *Id.* (quoting *Rochin*, 342 U.S. at 170). Courts should not substitute their judgment for the government's in deciding when to issue an indictment. *Lovasco,* 431 U.S. at 792. Rather, judicial review of due process imposes this Court to only ascertain whether the government's preindictment delay offends fundamental "canons of decency and fairness" and "notions of justice." *Lovasco,* 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) (quoting *Rochin*, 342 U.S. at 169) (internal quotation marks omitted).

If this Court were to adopt the minority balancing test, courts would be faced with the impossible task of weighing "adequate prosecutorial and investigative staffing" against prejudice to the defendant. *Crouch*, 84 F.3d at 1512. A subjective balancing test is ill-equipped for a judicial system that currently has no standards, principles, or "conversion tables" to aid the courts in determining when a preindictment delay becomes "too" prejudicial. *Id.* (noting there is virtually no body of precedent or historic practice for courts to look to for guidance).

2. Even under the balancing test, courts have held no violation of due process without any governmental culpability in factually similar scenarios.

Importantly, Petitioner mischaracterizes the balancing test. Even under the balancing test, courts have held that fundamental "canons of decency and fairness" remain in-tact when the government delays in bringing an indictment and the defendant suffers prejudice. Petitioner argues that government malintent or bad faith is not required under the balancing test, but that same test also dictates that mere negligence without any governmental culpability is not enough. *See United States v. Moran*, 759 F. 2d 777, 781–82 (9th Cir. 1985); *see also Sebetich*, 776 F.2d at 430. Circuit courts favoring the balancing test Petitioner proposes have failed to find that the government's delay violated due process when there was no showing of governmental culpability. *Moran*, 759 F. 2d at 783; *see also United States v. Swacker,* 628 F.2d 1250, 1254 n. 5 (9th Cir. 1980).

Petitioner asserts that he is no longer able to raise an alibi defense due to the loss of critical testimony resulting from preindictment delay. R. at 3. However, the loss of that evidence was a result of the government's decision, in part, to take an administratively more efficient approach during the preindictment phase. R. at 2. In *Moran*, one of the reasons for the government's preindictment delay was because it wanted to try all counts against the defendant in one trial. 759 F. 2d at 783. The Ninth Circuit, which subscribes to the minority balancing test, deemed the defendant's due process claims "bald assertions" because there was no evidence of any governmental culpability when the government made an administrative decision to delay the case. *Id.* Similarly, absent a showing of governmental culpability, Petitioner cannot overcome the bad faith prong required to prevail on a due process claim for preindictment delay.

Further, even circuits that employed the balancing test eventually transitioned to the majority two-part test. *See e.g.*, Crouch, 84 F.3d 1511–12. These courts have deemed "lack of

manpower and the low priority which this investigation was assigned" as "insufficient to outweigh the actual prejudice to [the defendants]." *Id.* at 483. In rejecting lack of manpower and low priority assignments as evidence of bad faith, the Fifth Circuit emphasized the "general contours" of the Due Process Clause prohibit judicial second guessing of preindictment conduct. *Crouch*, 84 F.3d at 1513 (5th Cir. 1996).

For the above reasons, this Court should uphold the Thirteenth Circuit's holding that Petitioner fails to overcome the bad faith standard as required under this Court's precedent.

II. THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT ALLOWS THE USE OF POST-ARREST, PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

The Self-Incrimination Clause of the Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To ensure that an individual is not compelled to self-incriminate, law enforcement is required to issue *Miranda* warnings prior to any custodial interrogation—questioning that follows a deprivation of freedom—because such questioning is inherently compelling. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).[4]

However, the Fifth Amendment only protects against compulsion of testimony and does not establish an absolute right to remain silent. U.S. Const. amend. V; *Salinas v. Texas*, 570 U.S. 178, 189 (2013). To be protected by the right to remain silent, an arrestee must expressly invoke the privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984); *United States v. Monia*, 317 U.S. 424, 427 (1943). Furthermore, to avoid difficulties of proof and to provide guidance to law enforcement, a defendant must expressly and unambiguously put law enforcement on notice of their reliance on this privilege. *Berghuis v. Thompkins*, 560 U.S. 370,

[4] Custodial interrogation is "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." *Id.*

380–82 (2010). Here, Petitioner failed to expressly invoke his right to remain silent and such failure was not the result of any coercion. R. at 7. Additionally, Petitioner was not compelled to remain silent by any of the circumstances surrounding the arrest. R. at 7. Therefore, this Court should affirm the Thirteenth Circuit's ruling that Petitioner's post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt. In doing so, this Court will reinforce the Fifth Amendment's intent to prevent compulsion of self-incriminating testimony while protecting society's interest in prosecuting criminal activity.

A. The Self-Incrimination Clause Does Not Establish an Absolute Right to Remain Silent and an Individual Must Expressly and Unambiguously Invoke the Privilege to be Protected by It.

At any point during criminal proceedings—pre-custodial, post-custodial, pre-arrest, post-arrest, pre-*Miranda*, or post-*Miranda*—an individual must expressly and unambiguously invoke their Fifth Amendment rights to be protected by them. *Murphy*, 465 U.S. at 427; *Berghuis*, 560 U.S. at 380–82. Barring any coercion, *see infra* Part A1, failure to expressly and unambiguously invoke the privilege against self-incrimination is considered voluntary and outside the "compulsion" that the Self-Incrimination Clause forbids. U.S. Const. amend. V; *Monia*, 317 U.S. at 427.

This Court's reasoning in *Berghuis* demonstrates why this requirement is so important. *See* 560 U.S. 370, 374–75. In *Berghuis*, after being issued *Miranda* warnings, the defendant decided to remain silent for the first two hours and forty-five minutes of the custodial interrogation. *Id*. at 375. After his long period of silence, the defendant decided to answer a few questions at the end that were used against him in trial. *Id*. The defendant failed to invoke his privilege against self-incrimination at any point during the interrogation and argued that his

silence invoked his rights. *Id*. at 381.[5] This Court rejected the defendant's contention, reasoning that law enforcement is not required to decipher ambiguous attempts to invoke the privilege against self-incrimination (*e.g.*, invocation by remaining silent) because it would inevitably result in a guessing game. *Id*. at 382; *Davis v. United States*, 512 U.S. 452, 461 (1994). If law enforcement officials guess incorrectly, they could risk the suppression of evidence at trial and society's interest in prosecuting criminal activity would be crippled. *See Berghuis*, 560 U.S. at 382; *see Davis*, 512 U.S. at 461.

In *Salinas v. Texas*, this Court re-emphasized the decision in *Berghuis* when it extended the unambiguous and express invocation requirement to an individual that was not in custody and had not been issued *Miranda* warnings. 570 U.S. 178, 185–86 (2013). There, the defendant voluntarily accompanied law enforcement to the police station for questioning. *Id*. at 185. The defendant was not read his *Miranda* rights because he was free to leave at any point, thus placing the questioning outside the scope of a custodial interrogation. *Id*. at 181. During the interview, the defendant answered each question until he was asked whether his shotgun would match the evidence found at the murder scene. *Id*. at 182. The defendant remained silent and such silence was used at trial to prove his guilt. *Id*. By admitting the silence, this Court reaffirmed the *Berghuis* court's decision that silence does not invoke the privilege against self-incrimination. *Id*. at 188; *Berghuis*, 560 U.S. at 381. The Court reasoned that if two hours and forty-five minutes of post-*Miranda* silence is insufficient to invoke the privilege against self-incrimination,

[5] In the post-*Miranda* context, if a witness fails to expressly invoke the right to remain silent, the Prosecution must also satisfy the heavy burden of proof of demonstrating waiver of *Miranda* rights in order to admit the silence as evidence. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Waiver does not need to be express, but mere silence is not enough. *Miranda*, 384 U.S. at 475. An individual's silence must be coupled with proof of an understanding of his rights and conduct that leads to an inference of waiver. *Butler*, 441 U.S. at 373.

then a brief moment of silence following one question in a non-custodial and pre-*Miranda* context is certainly insufficient to invoke the privilege. *Salinas*, 570 U.S. at 188.

Here, the same reasoning should apply in the post-arrest and pre-*Miranda* context. Immediately after Petitioner's arrest, the arresting officer informed him that he was arrested for maliciously destroying his hardware store and affecting interstate commerce, a violation of 18 U.S.C. section 844(i).[6] R. at 7. At no point during the arrest—or while being read his charges—did Petitioner argue or protest the arrest. R. at 7. Instead, Petitioner simply remained silent. R. at 7. Similar to *Salinas* and *Berghuis*, Petitioner's silence did not invoke his privilege against self-incrimination. *See Salinas*, 570 U.S. at 188; *see Berghuis*, 560 U.S. at 381. Therefore, this Court should hold in favor of Respondent to avoid the guessing game forewarned in *Berghuis*. *See* 560 U.S. at 382; R. at 7.

1. Defendant's silence was voluntary because it was not coerced by any circumstances surrounding the arrest.

While Petitioner failed to expressly and unambiguously invoke his privilege against self-incrimination, there are two exceptions to the rule that would still protect Petitioner's silence. *Salinas*, 570 U.S. at 184. Petitioner, however, qualifies for neither.

First, an individual does not need to take the stand during his own trial and assert his privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609, 613–15 (1965). Such a requirement would serve no purpose and would be a waste of time because it is well established that neither the prosecution nor the court can comment on a defendant's decision not to testify.

[6] 18 U.S.C. § 844(i) provides:

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

Id. at 615. Here Petitioner chose not to testify.[7] But the Government is not seeking to comment on his failure to testify, thus making this a non-issue.

The other exception to the general requirement of express invocation is if government coercion is the cause of an individual's self-incriminatory silence or testimony. *Salinas*, 570 U.S. at 184; *see Miranda*, 384 U.S. at 467–68.[8] The main form of coercion that this exception is designed to prevent is that of a custodial interrogation. *Miranda*, 384 U.S. at 467–68. When an individual is taken into custody and questioned, there are psychological pressures that jeopardize the privilege against self-incrimination. *Id*. at 470. For example, in each of the four cases in *Miranda*, the defendants' psychological pressures stemmed from being questioned in an isolated room, dominated by police, and their lack of knowledge regarding their Fifth Amendment rights. *Id*. at 445. While each interrogation in *Miranda* was successful in that they elicited oral admissions, none of the defendants had been informed of their rights at any point, thus causing the admissions to be inadmissible. *Id*. at 498–99. Therefore, to prevent further compulsion of self-incriminating testimony, this Court held that "*Miranda* warnings" are required at the outset of any custodial interrogation. *Id*. at 444–45.[9]

Here, given that Petitioner's arrest deprived him of his freedom in a significant way, it is undisputed that he was in custody at the time he remained silent. R. at 8. Unlike in *Miranda*, however, Petitioner was not coerced into an admission. 384 U.S. at 445; R. at 7. Instead, Petitioner's self-incriminating silence occurred immediately after his arrest while the arresting

[7] Petitioner and Respondent stipulated on August 28, 2021 via email; *see* 2021 Hassell Rule and Problem Interpretation Request Q and A.

[8] Failure to invoke the privilege is coerced if an individual is denied the "free choice to admit, to deny, or to refuse to answer." *Garner v. United States*, 424 U.S. 648, 656–57 (1976); *Lisenba v. California*, 314 U.S. 219, 241 (1941).

[9] "[An individual] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479.

officer simply read him his charges. R. at 7. The officer refrained from any questioning until she brought him to the detention center and issued *Miranda* warnings. R. at 7. Therefore, the inherently pressurized custodial interrogation is not at issue here.

Furthermore, there was no other form of compulsion because all that transpired before the interrogation was Petitioner's arrest, the arresting officer's reading of the charges, and Petitioner's transportation to the detention center. R. at 7. There is no evidence of physical abuse, threats, or any other form of coercion that would take away Petitioner's free choice of remaining silent.[10] Petitioner was therefore free to deny, admit, or refuse to speak. Consequently, Petitioner does not qualify for the second exception to the general rule of express invocation and his silence should be admissible for failure to expressly and unambiguously invoke his Fifth Amendment rights.

B. Post-Arrest, Pre-*Miranda* Silence Should Be Admissible as Substantive Evidence of Guilt Because it is Unambiguous, True to the Fifth Amendment's Intent, and Would be an Injustice to Society to Withhold Such Evidence.

Along with Petitioner's failure to expressly invoke his privilege against self-incrimination, Petitioner's silence also came before he was issued *Miranda* warnings and should thus be admissible as substantive evidence of guilt. R. at 7. While this Court has never addressed whether post-arrest, pre-*Miranda* silence is admissible as substantive evidence of guilt, it has consistently held that all pre-*Miranda* silence is admissible as impeachment evidence and post-*Miranda* silence is not. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982); *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1933). Various circuit courts,

[10] Defendant's silence is also not protected by other previously recognized forms of coercion. *See*, *e.g.*, *Leary v. United States,* 395 U.S. 6, 28–29 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 77–79 (1965) (members of the Communist Party not required to complete registration form "where response to any of the form's questions . . . might involve [them] in the admission of a crucial element of a crime"); *Salinas*, 570 U.S. at 185.

however, have addressed whether pre-*Miranda* silence is admissible as substantive evidence of guilt and are at a split. Andrew M. Hapner, *You Have the Right to Remain Silent, But Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas*, 66 FLA. L. REV. 1763, 1772–73 (2014) [hereinafter *Right to Remain Silent*] (discussing the circuit split of post-custodial, pre-*Miranda* silence from the D.C., Second, Seventh, and Ninth Circuits and the Fourth, Fifth, Eighth, and Eleventh Circuits).

This Court should settle the dispute and hold, as the Fourth, Fifth, Eighth, and Eleventh Circuits did, that all post-custodial, pre-*Miranda* silence is admissible as substantive evidence of guilt. *Id*. Such a decision would also include post-arrest, pre-*Miranda* silence because an individual is in custody immediately upon arrest. *Miranda*, 384 U.S. at 444; *Arrest*, MERRIAM-WEBSTER (last visited September 11, 2021), https://www.merriamwebster.com/dictionary/arrest. This would extend this Court's common-sense reasoning for impeachment evidence by supporting the implicit promise of the *Miranda* warnings and only admitting unambiguous evidence. *Doyle*, 426 U.S. at 618; *Brecht*, 507 U.S. at 628. Furthermore, the "custodial interrogation trigger" that this Court recognizes for impeachment evidence—and the Fourth, Fifth, Eighth, and Eleventh Circuits recognize for substantive evidence—is true to the textual meaning of the Self-Incrimination Clause. *See Salinas*, 570 U.S. at 192 (Thomas, J., concurring). To hold differently would be an injustice to society by preventing the jury from assessing a complete record of material facts.

1. A "custodial interrogation trigger" ensures the admission of unambiguous silence because such silence comes before the implicit promise of *Miranda* warnings.

The admissibility of pre-*Miranda* silence and inadmissibility of post-*Miranda* silence for impeachment purposes has recognized *Miranda* warnings as the line of demarcation that acts as a

"custodial interrogation trigger" to the Self-Incrimination Clause. *Doyle*, 426 U.S. at 619; *Brecht*, 507 U.S. at 628. This Court drew the line at *Miranda* warnings for two reasons: (1) to enforce the implicit promise of *Miranda* warnings, and (2) to promote a trustworthy factfinding process by admitting only unambiguous silence. *Doyle*, 426 U.S. at 619; *Brecht*, 507 U.S. at 628. This Court's reasoning in both *Doyle* and *Brecht* exemplifies why this Court should extend the "custodial interrogation trigger" to substantive evidence of guilt rather than following the arbitrary and confusing "custodial trigger" that some circuit courts have established. *Right to Remain Silent*, 66 FLA. L. REV. at 1773.

In *Doyle*, this Court held that post-*Miranda* silence is inadmissible for impeachment purposes. 426 U.S. at 611. There, the defendants were arrested and subsequently issued their *Miranda* warnings. *Id*. at 613. The defendants remained silent during their respective interrogations and then took the stand at trial and asserted the defense that they were framed. *Id*. at 612–13. Neither of the defendants had mentioned the exculpatory story at any point before trial. *Id*. at 614. Accordingly, the prosecution sought to impeach the defendants by asking why they had not told the story following their arrest. *Id*. This Court, however, determined that the silence was inadmissible because it had come after *Miranda* warnings had been issued. *Id*. at 617–18. This Court reasoned that while it is true that *Miranda* warnings do not expressly assure that silence will not carry any penalty, it is implicit in the warnings because they inform the arrestee that they have the right to remain silent and anything they say may be used against them. *Id*. at 618–19; *United States v. Hale*, 422 U.S. 171, 182–83 (1975) (White, J., concurring). This reasoning rests on common sense, as it would be counterintuitive to penalize an individual for remaining silent after explaining that they may remain silent. *Doyle*, 426 U.S. at 619. Moreover, it prevents the "insolubly ambiguous" post-*Miranda* silence from entering trial. *Id*. at 618.

While it could be argued that the defendant was thinking of an exculpatory story while remaining silent, it is equally plausible—if not more plausible—that the defendant is remaining silent because he was just informed via *Miranda* warnings that he has the right to do so. *Id*.

This Court subsequently re-emphasized this reasoning in *Brecht*, while explaining that pre-*Miranda* silence is proper for impeachment purposes. 507 U.S. at 628. In *Brecht*, the defendant took the stand and introduced his exculpatory story for the first time during trial. *Id*. at 624. The prosecution tried to impeach the defendant by asking him why he had failed to mention his exculpatory story to any of the pedestrians he came across before his arrest, or to the police during his post-*Miranda* custodial interrogation. *Id*. at 624–25. This Court recognized *Miranda* warnings as the line of demarcation and held that questioning the defendant about his silence to the pedestrians was admissible because it occurred pre-*Miranda* warnings, before any interrogation had commenced. *Id*. at 628. However, the question about failing to tell the story to the police violated *Doyle* and was inadmissible because it was post-*Miranda* warnings. *Id*.; *Doyle*, 426 U.S. at 619.

In *Brecht*, this Court's recognition of the "custodial interrogation trigger" was based on common sense, reasoning that the fear of ambiguous evidence entering a trial is not present when silence does not follow a statement telling an individual they may remain silent. 507 U.S. at 628. Instead, it is highly likely that the defendant in *Brecht* had thought of the exculpatory story after coming across the pedestrians. This effectively places such silence in the same realm as other circumstantial evidence that is consistently admissible. Ultimately, this Court's common-sense policy and efforts to exclude ambiguous evidence is why this Court should extend the "custodial interrogation trigger" to substantive evidence.

Ultimately, while the prevention of ambiguous silence should be the primary concern, other courts, such as the District of Columbia Circuit, have still disregarded this policy and believe a line of demarcation once an individual is in custody is fairer. *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). But this would undermine the clarity that the "custodial interrogation trigger" also allows for. Under the D.C. Circuit's view, all subsequent silence is inadmissible as substantive evidence of guilt once an individual is in custody. As aforementioned, an individual is in custody whenever they are deprived of their freedom. *Miranda*, 384 U.S. at 444. However, as this Court realized in *Salinas*, assessing whether someone is "deprived of their freedom" is not clear-cut. 570 U.S. at 181. Therefore, as this Court did in Salinas, a fact-specific inquiry must be conducted to determine whether an individual's silence came before or after a person was deprived of their freedom. *Id.* Thus, not only does the "custodial interrogation trigger" promote the elimination of ambiguous silence and is true to the implicit promises in *Miranda* warnings, but it allows courts to avoid the fact-specific inquiry and over-litigation that would result from accordance with the D.C. Circuit's view.

2. The Fifth Amendment's intent to protect against compulsion supports the line of demarcation at *Miranda* warnings.

Along with the elimination of ambiguous evidence, enhanced clarity for courts, and inherent fairness that the "custodial interrogation trigger" promotes, this line of demarcation would also protect against the compulsion that the drafters of the Fifth Amendment were concerned with. *Salinas*, 570 U.S. at 192 (Thomas, J., concurring). In holding that pre-*Miranda* silence is admissible as substantive evidence of guilt, the Fourth, Fifth, Eighth, and Eleventh Circuits each referenced the Fifth Amendment's intent to prevent compulsion of self-

incriminating testimony as a primary reason why they adopted the "custodial interrogation trigger." U.S. Const. amend. V.; *Right to Remain Silent*, 66 FLA. L. REV. at 1773.

The Eighth Circuit's analysis in *United States v. Frazier* best explains why each circuit court held as such. 408 F.3d 1102, 1111 (8th Cir. 2005). In *Frazier*, after being pulled over by law enforcement, the defendant allowed the officers to search his U-Haul. *Id*. at 1106–07. After discovering drugs in the bed of the U-Haul, the officers arrested the defendant and took him to the police station, where he was issued *Miranda* warnings prior to interrogation. *Id*. at 1107. The defendant remained silent and did not protest or react when he was arrested, and such silence was then used at trial to help prove his guilt. *Id*. at 1109. The Eighth Circuit reasoned that there was no Fifth Amendment violation because there was no compulsion by the arresting officers or by the surrounding circumstances (*e.g.*, the inherent pressures of a custodial interrogation). *Id*. at 1111. The arresting officers simply followed procedure by placing the defendant under arrest and issuing *Miranda* warnings prior to interrogation. *Id*.; *Miranda*, 384 U.S. at 444–45.

Here, the material facts are exactly the same as those in *Frazier*: (1) Petitioner's silence came before the issuance of *Miranda* warnings, (2) the arresting officer only made statements and did not ask any questions prior to the *Miranda* warnings, and (3) Petitioner was in custody at the time of his silence. *Id*. at 1106–09; R. at 7. There is no evidence of any compulsion by the arresting officer, nor is the environment inherently compelling like that of an interrogation room. R. at 7. Therefore, this Court should hold pursuant to the Fifth Amendment's purpose that Petitioner's silence is admissible as substantive evidence of guilt, thus establishing the "custodial interrogation trigger" for substantive evidence.

3. Public policy supports a "custodial interrogation trigger" because it reinforces society's interest in prosecuting criminal activity.

The "custodial interrogation trigger" is not only consistent with common sense and the Fifth Amendment's intent, but it also emphasizes society's interest in prosecuting criminal activity. The Fifth Amendment and *Miranda* warnings are two of many mechanisms in place to protect criminal defendants and their rights. U.S. Const. amend. V; *Miranda*, 384 U.S. at 444. These rights are an important part of the United States judicial system and should never be infringed upon by anyone. That being said, society has a profound interest in prosecuting criminal activity. To fully recognize this interest and protect law-abiding citizens, the jury must be able to assess a full record of material facts.

Accordingly, providing a jury with a full record of material facts is why the Federal Rules of Evidence carve an exception into the general exclusion against hearsay and allow an individual's silence to qualify as an adopted statement. FED. R. EVID. 801(d)(2)(B) advisory committee's note.[11] Pursuant to the FRE, silence can manifest as an adopted statement when a person hears an untrue statement and remains silent instead of protesting the statement. *Id.* The theory behind this rule is that it would be unnatural for a reasonable person to not protest a statement-against-interest. *Id.* Therefore, by remaining silent, it is a highly reasonable inference that the individual recognizes the statement as true and "adopted" the statement as their own. *Id.* Furthermore, such reasoning is also consistent with this Court's recognition in *Miranda* that confessions are inherently important in prosecuting criminal activity. 384 U.S. at 478.

Here, Petitioner's silence falls directly under the reasoning of the FRE and *Miranda*. *Id.*; FED. R. EVID. 801(d)(2)(B) advisory committee's note. Upon arrest, the arresting officer

[11] Hearsay is an out-of-court statement that a party offers into evidence to prove the truth of the matter asserted. FED. R. EVID. 801(c)

informed Petitioner that he was charged with destroying his hardware store to collect insurance proceeds. R. at 7. Petitioner heard the arresting officer's statement and simply remained silent. R. at 7. This is a highly unreasonable reaction because an individual in Petitioner's shoes that does not believe they are guilty would not simply allow themselves to be taken into custody without saying a single word. Moreover, a reasonable person with an alleged alibi defense would certainly voice the alibi to another party in order to clear their name and preserve evidence supporting that defense.

This Court should therefore admit the silence as substantive evidence of guilt, so the jury can assess a full record of material facts and draw whatever inferences they deem appropriate. In doing so, this Court would protect society's interest in prosecuting criminal activity because, with a complete record of facts, the jury will be able to make the most informed decision that it can. This Court's efforts to only admit unambiguous evidence, protect the inherent promises of the Miranda warnings, and prevent the compulsion that the Fifth Amendment forbids, are consistent with such a decision.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court uphold the Thirteenth Circuit's judgment affirming the district court's ruling on both issues.

Dated: September 13, 2021

Respectfully Submitted,

s/ Team 14

Counsel for Respondent