

No. 20-19042

**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 CIRCUIT COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT*

BRIEF FOR THE PETITIONER

Team 15

Counsel for the Petitioner

Oral Argument Requested

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QUESTIONS PRESENTED

- I. Does a lengthy preindictment delay that causes actual and substantial prejudice to an arrestee violate the Fifth Amendment to the United States Constitution when the government provides no reasonable justification for the delay?

- II. Does admitting an arrestee's silence as substantive evidence of guilt – before *Miranda* rights have even been read – offend notions of fundamental fairness and violate the Fifth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Statement of Facts

Austin Coda (“Coda”) had been the proud owner of a local hardware store in rural East Virginia since 2002. R. at 1. When the 2008 financial crisis struck, Coda’s business fell into hard times, rendering Coda unable to properly maintain the building. *Id.* In December 2010, an explosion destroyed Coda’s entire hardware store. R. at 2. After receiving an anonymous tip, the FBI suspected Coda may have caused the explosion to benefit economically from his insurance policy. R. at 2. Although the FBI informed the United States Attorney’s Office of their suspicions right away, the U.S. Attorney’s Office designated Coda’s case as “low priority” and “inconvenient” to prosecute. *Id.* The U.S. Attorney’s Office passed Coda’s case around from one U.S. Attorney to another, and the case never progressed. *Id.* After almost a decade of inaction, in May of 2019, the Government realized the statute of limitations was about to expire and finally indicted Coda under 18 U.S.C. § 844(i). R. at 2–3. By then, Coda had lost all corroborating evidence of his alibi defense. R. at 3.

Coda maintains that on the night of the explosion, he was celebrating his birthday in New York with five family members. R. at 3. However, due to the lengthy indictment delay, the five family members Coda visited were either dead or incapacitated. R. at 3. Moreover, Coda’s corroborating Greyhound bus records had since been expunged. R. at 3.

On April 23, 2019, FBI Special Agent Park arrested Coda and informed him of the charges against him from the nearly-decade-prior incident. R. at 2–3. In the face of the arrest, Coda remained silent and did not assert his alibi defense. R. at 7. After an unspecified period, the FBI took Coda to a detention center, read Coda his *Miranda* rights, and begun interrogation. *Id.*

Procedural History

Coda filed a Motion to Dismiss the indictment, challenging the pre-indictment delay violated the Fifth Amendment Due Process Clause. R. at 3. Coda also filed a Motion to Suppress Evidence, challenging that admission of his post-arrest, pre-*Miranda* silence would violate the Fifth Amendment. R. at 7. The district court denied both motions, holding on the motion to dismiss that Coda must show (1) actual prejudice and (2) bad faith to show a violation of the Due Process Clause because it is a “two prong” test. R. at 5–6. On the motion to suppress, the court held that post-indictment, pre-*Miranda* silence was admissible as substantive evidence of his guilt. R. at 8. Coda timely appealed this decision to the United States Court of Appeals for the Thirteenth Circuit. R. at 11. The Thirteenth Circuit agreed with the district court’s decision, accepting the lower court’s holding on both motions. R. at 12. Chief Judge Martz dissented on both decisions, pointing out that it is “inherently unfair for a defendant to lose his only defense merely because his case was ‘low priority’ to government officials for almost a decade” and the lower court misread *Marion* and *Lovasco* to require a showing of bad faith when actual prejudice and the reasons for delay should be weighed as a balancing test. R. at 12–13. Judge Martz also pointed out that the right to remain silent “should not be defined by the arbitrary line of when police explicitly give *Miranda* warnings” because this prevents defendants from truly being protected by the Fifth Amendment. R. at 14. This Court granted Austin Coda’s petition for a Writ of Certiorari. R. at 16.

SUMMARY OF ARGUMENT

This appeal concerns the preservation of Fifth Amendment rights. First, the Government’s preindictment delay violated Austin Coda’s Fifth Amendment rights because the

delay unjustly deprived him of his sole alibi defense which greatly outweighs the Government's reason for the delay.

This Court should adopt a balancing test because it properly protects Fifth Amendment rights, whereas a two-prong test creates a standard that is unreasonably difficult for defendants to meet. The Thirteenth Circuit errs in its interpretation of *Marion* and *Lovasco* to require bad faith on the part of the government because this Court only asks that the reason for the delay be considered in addition to prejudice. If this Court adopts a two-prong test, not only with Coda be left without any remaining evidence in his defense, but many other due process violations will occur due to the government's delay where defendants cannot prove malintent. The government's nearly nine-year delay violated Coda's right to due process because it caused extreme prejudice, which outweighs the government's reason for delay.

Second, admission of Coda's silence as evidence of guilt would violate his Fifth Amendment rights because custody – not interrogation – triggers the right to remain silent. The Fifth Amendment establishes an individual's privilege against self-incrimination. Using an uninformed arrestee's silence against him contradicts this nation's principles of fundamental fairness. Requiring defendants to expressly invoke their rights before they have been told *how or why* would deprive them of a fair criminal proceeding. This Court should hold that admitting an arrestee's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment because it contradicts the holding and rationale of *Miranda* and offends fundamental notions of fairness.

ARGUMENT

I. **THE GOVERNMENT’S PREINDICTMENT DELAY VIOLATED DUE PROCESS BECAUSE, UNDER A BALANCING TEST, THE ACTUAL AND SUBSTANTIAL PREJUDICE TO CODA OUTWEIGHS THE GOVERNMENT’S MEAGER EXCUSE FOR DELAY.**

The Government’s nearly nine-year delay violated Coda’s due process rights because Coda proved actual and substantial prejudice, while the government provided no justification. The Fifth Amendment guarantees an individual’s right to due process of law in all criminal cases. U.S. Const. amend. V. Statutes of limitations provide “the primary guarantee against bringing overly stale criminal charges.” *United States v. Marion*, 404 U.S. 307, 322 (1971). Because a statute of limitations cannot not fully define a defendant’s pre-indictment rights, the Due Process Clause protects individuals against oppressive delays. *Id.* at 465. Further, in *United States v. Lovasco*, this Court found that the “due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” 431 U.S. 783, 790 (1977). Therefore, this Court should find the Government violated Coda’s due process rights because its delay was oppressive.

A. **This Court Should Adopt a Balancing Test Because *Marion* and *Lovasco* Support a Holistic Evaluation and Proving Governmental Malintent is Unreasonably Difficult.**

Balancing evidence of actual prejudice against the government’s justification for delay is the correct approach because precedent requires both prejudice and *inquiry* into the reasons for delay. *See Lovasco*, 431 U.S. at 790. After establishing actual and substantial prejudice, courts must look to the government’s reason for delay based on the circumstances of each case. *Marion*, 404 U.S. at 324–25. Here, the government shifted Coda’s case from attorney to attorney without investigating or making any advancement on the case until all evidence of Coda’s alibi

disappeared. R. at 3. Therefore, this Court should find a clear due process violation because the Government unfairly disadvantaged Coda without good cause.

1. *Marion* and *Lovasco* support a balancing test because this Court has not held that proving bad faith is an absolute requirement.

The Thirteenth Circuit misinterpreted this Court’s ruling in *Marion* and *Lovasco* because – by the plain language of this Court – proving intention is sufficient but not necessary. *Marion*, 404 U.S. at 324. Most lower courts have misapplied *Marion* and *Lovasco* to require both that (1) the defendant faces substantial prejudice due to the delay, and (2) the delay was an intentional device to gain a tactical advantage over the accused. *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985); *United States v. Colonna*, 360 F.3d 1169, 1177 (10th Cir. 2004); *United States v. Alameh*, 341 F.3d 167, 176 (2d Cir. 2003); *United States v. Stokes*, 124 F.3d 39, 47 (1st Cir. 1997) (holding that the defendant “bears the heavy burden” of satisfying the two-prong test); *United States v. Crouch*, 84 F.3d 1497, 1523 (5th Cir. 1996); *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991). These lower courts misconstrue this Court’s precedent because this Court does not suggest that showing both prongs of the test is the only means by which a due process violation can occur. *See, e.g., Marion*, 404 U.S. at 324–35.

In contrast, the Fourth, Seventh and Ninth Circuits have properly concluded that *Lovasco* and *Marion* support a balancing test, where a preindictment delay violates due process if the actual and substantial prejudice suffered outweighs the government's reasons for its delay. *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Sowa*, 34 F.3d 447, 449 (7th Cir. 1994); *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979). Though a majority of circuits have applied an insurmountable

two-prong test, this Court should apply a balancing test because it correctly upholds this Court's rulings in *Marion* and *Lovasco*.

a. *Marion supports a balancing test.*

Marion supports a balancing test because this court held that justice and fairness require “a delicate judgment based on the circumstances of each case.” *Marion*, 404 U.S. at 324–35.

In *United States v. Marion*, this Court held that there was no due process violation where the defendant did not prove actual prejudice. *Id.* at 325. There, the government indicted the defendants over three years after the alleged crimes occurred. *Id.* at 308–10. The defendants asserted that the delay impacted their memories but did not allege any specific prejudice. *Id.* at 310. This Court held that preindictment delay violates due process and *necessitates* dismissal of the indictment if the defendant faces substantial prejudice due to the delay and the delay was an intentional device to gain a tactical advantage over the accused. *Id.* at 325. However, this Court explicitly refrained from creating a bright-line test, holding it would not determine precisely which prejudicial delays would necessitate dismissal. *Id.* at 324–25.

A balancing test best captures the holding in *Marion* because it allows judges to consider all reasons for the delay, not just malintent. Though *Marion* provides an example of an “investigative delay” versus delays “to gain a tactical advantage,” *Marion* does not imply that only bad faith delays necessitate a due process violation. Rather, due process infringements occur wherever the Government violates notions of justice, fair play, and decency. Therefore, a balancing test is needed to capture the myriad forms of due process violations.

b. *Lovasco supports a balancing test.*

This Court's holding in *United States v. Lovasco* supports a balancing test because this Court did not hold that an individual must prove an intentional delay; rather it asks to “consider

the reasons for the delay *as well as* the prejudice to the accused.” 431 U.S. at 790 (emphasis added). There, government indicted a defendant over eighteen months after he allegedly dealt stolen firearms. *Id.* at 784. This Court reasoned that the eighteen-month delay was not unreasonable given the circumstances because the government did not halt investigation. *Id.* at 790–92. Moreover, insisting on immediate prosecution would prevent the government from developing their cases and result in premature indictments. *Id.* at 793. Therefore, after a factual inquiry into the government’s reason for delay, this Court held there was no due process violation because the delay did not violate fundamental conceptions of justice. *Id.* at 790.

Here, the court errs in using a strict two-prong test because it misinterprets precedent to require proof of bad faith to make a due process violation determination. In *Lovasco*, this Court emphasized the importance of *considering* the government’s reasons for delay. *Id.* Though a showing of prejudice and bad faith would necessitate dismissal, this Court did not hold that bad faith was an absolute requirement. *See Lovasco*, 431 U.S. at 790; *see also Marion*, 404 U.S. at 324.

2. A balancing test upholds due process because it protects defendants from unreasonable delays, regardless of the government’s true intent.

A balancing test most properly aligns with fundamental conceptions of fairness because it allows courts to consider the unique facts of each case. Under a balancing test, once actual prejudice is proven, the burden shifts to the government to explain why the delay was necessary. *King*, 593 F.2d at 272. This rule protects defendants from having to bear the entire burden of both inquiries. By using a balancing test, “pre-indictment delay protection becomes more than an illusory promise to defendants who are able to demonstrate actual prejudice but cannot obtain proof of the government’s improper motive”. Michael J. Cleary, *Pre-Indictment Delay: Establishing a Fairer Approach Based on United States v. Marion and United States v. Lovasco*,

78 Temp. L. Rev. 1049, 1073 (2005). This Court has also introduced this policy concern in *Marion* and *Lovasco*, by emphasizing that the purpose of due process is to protect fundamental conceptions of fairness. *Lovasco*, 431 U.S. at 790. It is fundamentally unfair to require individuals without access government information to prove malintent. The two-prong test unfairly burdens due process rights because individuals do not have access to the innerworkings of the federal government. If the burden fell on defendants to prove improper motive, they would be severely limited in their efforts to obtain proof even by the very scope of discovery.¹ Thus, a balancing test would better safeguard due process because it allows a “fairer allocation of burdens of proof”. Cleary, *supra* at 1070.

The lower court expressed concern that a balancing test would allow judges to infuse their preferences into due process analysis. R. at 5. On the contrary, a balancing test would yield more accurate findings of due process violations because it would have courts consider the specific circumstances of each case. *Marion*, 404 U.S. at 325. Rather than adding subjectivity, a balancing test requires an assessment of additional elements external to a judge’s perception. Moreover, the test would yield more accurate findings because the government is best suited to provide the reasons for its delay.

While the lower court is correct in stating that prejudice and reasons for delay are distinct considerations, it is incorrect in concluding that weighing these distinct considerations would be “comparing the incomparable.” R. at 5 (citing *Crouch*, 84 F.3d at 1512). This criticism is an overstatement because “we expect courts to make exactly these kinds of judgments in crafting common law doctrine.” T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96

¹ “. . . [A] defendant’s pre-indictment delay claim is not the type of “defense” contemplated by Rule 16. As a result, it is unlikely that a defendant claiming pre-indictment delay can conduct discovery of the government’s documents pursuant to rule 16.” Cleary, *supra* at 1072.

Yale L.J. 943, 972 (1987). Although prejudice and government's reason for delay are distinct items, they can each be weighed in their severity and impact on a defendant's case. For example, a court can easily discern that a governmental delay due to laziness weighs moderately in a defendant's favor. Therefore, this test allows courts to balance the unique circumstances of each case to reach decisions that best support our fundamental conceptions of fairness.

B. Under a Balancing Test, the Preindictment Delay Violated Coda's Due Process Rights Because the Delay Caused Actual and Substantial Prejudice and the Government Failed to Provide Any Justification for the Delay.

The preindictment delay is unconstitutional because it destroyed Coda's sole alibi, while the government failed to investigate or make any progress in the case. Under a balancing test, the defendant must establish that the preindictment delay caused actual and substantial prejudice to the defendant's case; then the burden shifts to the government to explain why the delay was necessary. *King*, 593 F.2d at 272. Applying the test here weighs in favor of Coda because Coda suffered severe prejudice and the Government provided no justification for the nearly nine-year delay.

1. The nearly nine-year delay in this case caused substantial and actual prejudice because Coda lost out on his sole alibi due to the delay.

The lower court correctly held that Coda suffered actual prejudice because the delay caused all of Coda's evidence that corroborated his alibi to disappear. R. at 3. This Court held that the mere possibility of prejudice is insufficient. *United States v. Gouveia*, 467 U.S. 180, 191 (1984) (citing *Marion*, 404 U.S. at 321–22). Courts are uniform in requiring a showing of actual and substantial prejudice. *United States v. Martinez*, 77 F.3d 332, 336 (9th Cir. 1996) (holding that the prejudice caused by delay did not violate due process because potential prejudice was too speculative); *United States v. Huntley*, 976 F.2d 1287, 1288 (9th Cir. 1992) (holding that the defendant did not show adequate prejudice); *United States v. Bartlett*, 794 F.2d 1285, 1288 (8th

Cir. 1986) (holding that a five-year delay did not violate due process because there was no showing of actual prejudice to the defendant's fair trial); *Stoner v. Graddick*, 751 F.2d 1535, 1543–44 (11th Cir. 1985) (holding that the defendant was not substantially prejudiced by the lengthy delay); *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) (holding that the one-year delay did not result in constitutional harm because there was no showing of actual prejudice).

Here, the prejudice to Coda weighs heavily in his favor because it obliterated his sole alibi defense. First, four of Coda's family members, who could have corroborated his alibi died before the indictment. R. at 3. Second, a fifth family member developed dementia and no longer remembered the events. Third, the Greyhound bus agency purged its online records documenting Coda's journey to New York after three years. R. at 3. Therefore, the lower court correctly determined that the Government's preindictment delay caused actual and substantial prejudice because it prevented Coda from being able to provide corroborating evidence of his alibi. R. at 5.

2. The Government's delay was at least negligent because it made no progress on Coda's case and provided no reasonable justification for the nearly nine-year delay.

The Government's justification for the preindictment delay also weighs in Coda's favor because it provided no legitimate excuse. Once substantial prejudice is proven, courts must consider the government's justification for delay. *United States v. Automated Med. Lab'ys, Inc.*, 770 F.2d 399, 403–04 (4th Cir. 1985). Because there is no bright-line test, the Government's negligence may be sufficient to show a due process violation occurred. *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985).

Courts have found that even long investigative delays may not violate due process if the delay is not unreasonable given the circumstances. *Jones v. Angelone*, 94 F.3d 900, 902 (4th Cir. 1996) (holding that a delay was not oppressive where the government made numerous attempts to extradite and transport the defendant from another state); *Howell*, 904 F.2d at 895 (holding that the government’s negligent pre-indictment delay violated due process because it provided no justification and there was no evidence the case was complicated or that any investigation was done during the delay). For instance, in *Lovasco*, this Court found that because the delay was relatively short, and the government investigated during this period, the delay was not unreasonable. *Lovasco*, 431 U.S. at 796.

Here, unlike in *Lovasco*, the delay was unreasonable because the Government made no effort to investigate the case. *See* r. at 2. The Government does not allege it faced a complex investigation or lacked sufficient resources to indict Coda. The Government even admits to a high turnover rate and that it shuffled Coda’s case from attorney to attorney without progress. R. at 3. Thus, the Government demonstrates that its disorganization and lack of effort caused the delay rather than any reasonable excuse.

Next, the Government attempts to justify the delay by alleging that, because the state was prosecuting Coda on unrelated charges, it would be inconvenient to transport Coda for federal prosecution. R. at 2. However, this argument fails because mere inconvenience is not sufficient to justify a nearly nine-year delay. Moreover, the Government fails to explain why, over a nearly nine-year span, this inconvenience prevented it from making any progress in Coda’s case.

By unreasonably depriving Coda of his sole alibi, the Government violated the “fundamental conceptions of justice which lie at the base of our civil and political institutions.” *Lovasco*, 431 U.S. at 790–91 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Under a

balancing test, the actual and substantial prejudice to Coda's case greatly outweighs the Government's weak justification for delay. Therefore, though Coda did not prove bad faith, the Government's negligent preindictment delay violated the Fifth Amendment.

II. **ADMITTING POST-ARREST, PRE-MIRANDA SILENCE AS EVIDENCE OF GUILT WOULD UNCONSTITUTIONALLY DEPRIVE CODA OF HIS RIGHT TO REMAIN SILENT.**

Under the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination is momentous; this Court has long recognized the importance of procedural safeguards to protect it. *Griffin v. California*, 380 U.S. 609, 614 (1965) (holding that prosecutorial comment on a defendant's failure to testify at trial is unconstitutional because "[i]t is a penalty imposed by courts for exercising a constitutional privilege."). In the seminal case of *Miranda v. Arizona*, this Court established that the prosecution may not use statements obtained in custodial interrogation unless the arrestee has been warned of their right to remain silent, their right to an attorney, and that any statement may be used against them. 465 U.S. 436, 444 (1966). Yet over time, exceptions to the rule have whittled down the procedural safeguards *Miranda* once bestowed. For one, the prosecution may use post-*Miranda* silence to impeach a defendant's exculpatory defense. *Doyle v. Ohio*, 426 U.S. 610, 619–20 (1976). Second, pre-custodial silence may be admissible as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. 178, 186 (2013). Third, voluntary statements may constitute waivers of the privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

Despite the myriad cases interpreting, and too often restricting *Miranda*, this Court has not yet spoken on the use of a defendant's post-arrest, pre-*Mirada* silence as substantive evidence of guilt. While the Fourth, Eight, and Eleventh Circuits erroneously hold that such

evidence is admissible, the Ninth, Tenth, and D.C. Circuits have properly determined that admitting such evidence violates the Fifth Amendment. *See United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007); *United States v. Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991); *United States v. Moore*, 104 F.3d 377, 389 (D.C. Cir. 1997). *But see United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005); *United States v. Wilchcombe*, 838 F.3d 1179, 1190 (11th Cir. 2016). With the circuits divided, constitutional concerns hang in the balance as to the use of custodial silence prior to *Miranda* warnings. This Court should resolve this circuit split in favor of protecting our most vulnerable citizens’ privilege against self-incrimination.

A. This Court Should Preserve the Integrity of *Miranda* by Holding that Arrest Automatically Triggers the Right to Remain Silent.

Coda’s arrest triggered his right to remain silent because the arrest left him vulnerable to custodial pressures. In *Miranda v. Arizona*, this Court recognized the “inherently compelling pressures” a defendant faces in a custodial setting, where they have been detained or “otherwise deprived of his freedom of action in any significant way.” 384 U.S. at 444, 467. This Court emphasized various influences unique to the custodial setting: the false sense of privacy, feelings of powerlessness, police trickery, police display of hostility or confidence in the arrestee’s guilt, among other forms of psychological coercion. *Id.* at 448–52. This Court saw fit to impose stringent procedural safeguards, namely reading a defendant their *Miranda* rights, to protect the defendant from the compulsion to self-incriminate in this high-pressure custodial environment. *Id.* at 457.

Drawing upon this Court’s reasoning in *Miranda*, the Ninth, Tenth, and D.C. Circuits have all recognized that an arrestee’s Fifth Amendment rights are imperiled, not upon interrogation, but upon their placement in custody. *See, e.g., Moore*, 104 F.3d at 385. This is the

case because, upon arrest, defendants can feel many of the same pressures cited by this Court in *Miranda*. To protect arrestees against unfair pressures, circuit courts have determined that “[c]ustody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*.” *Id.*

Here, because Coda remained silent during the high-pressure moment of arrest, he deserves safeguards that protect his Fifth Amendment privileges. The moment of arrest can induce many of the psychological pressures enumerated in *Miranda*. See *Murphy*, 465 U.S. at 433 (“Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess.”) (citing *Miranda*, 384 U.S. at 456–457). Upon hearing charges, the accused may fear loss of freedom and punishment, unsure if anything they say may be used against them. Reasonably, arrestees may worry over how best to preserve their freedom. Moreover, a reasonable person indicted years after the alleged crime, as Coda was, could be too shocked to think clearly. Thus, any ordinary person might remain silent because they are not thinking clearly, out of shock, or out fear anything they said would be misconstrued to use against them.

Due to these compounding psychological pressures, Coda deserves procedural safeguards first instilled by this Court in *Miranda*. 384 U.S. at 485 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”). Thus, to embody this Court’s ruling and rationale in *Miranda*, this Court should hold that “custody not interrogation” triggers a defendant’s right to remain silent.

B. The Thirteenth Circuit Improperly Extends this Court’s Precedent to Invent a New Rule that Jeopardizes Defendants’ Right to Remain Silent.

Over five decades after *Miranda*, this Court has carefully carved out narrow exceptions to its holding and left few *primaie impressionis* to be addressed. Whether custodial, pre-*Miranda* silence may be used as substantive evidence of guilt remains as a lingering constitutional concern. The lower court has stretched precedent thin to fill this “grey area between *Salinas* and *Doyle*.” *See r.* at 8. This Court should recognize the material differences in *Salinas*, *Doyle*, and *Murphy*, and prevent lower courts from misapplying precedent to establish an unwarranted exception to *Miranda*.

1. The lower court mischaracterizes *Salinas* despite its irrelevance to the custodial setting.

The lower court errs in relying on *Salinas* – a case solely concerning the pre-custodial setting – because the issue at bar arises within the more coercive custodial setting. In *Salinas v. Texas*, this Court held that a defendant’s pre-custodial, pre-*Miranda* silence was admissible as substantive evidence of guilt. 570 U.S. at 186. There, the defendant voluntarily reported to a police station to answer questions about a homicide but fell silent when asked whether ballistics testing would link his weapon to the scene of the crime. *Id.* at 181. As the defendant was neither in custody nor undergoing formal interrogation, this Court found that he did not have the unqualified right to remain silent and would have had to expressly invoke his Fifth Amendment privilege to claim it. *Id.* at 183–84. Thus, admission of the defendant’s pre-custodial silence did not violate the Fifth Amendment because extra due process protections were only necessary under the “uniquely coercive nature of custodial interrogation”. *Id.* at 184–85.

Unlike *Salinas*, which dealt solely with pre-custodial silence, the case at bar deals exclusively with Coda’s silence upon arrest. *R.* at 7. Coda faced coercive custodial pressures

that this Court specifically distinguished in *Salinas* to justify requiring defendants to expressly invoke their privilege. *See* 570 U.S. at 183. The lower court thus misapplied the holding in *Salinas* by conflating the noncustodial and custodial settings. R. at 8. Therefore, this Court should not rely on *Salinas* to justify admitting evidence here; doing so would misapply a material fact crucial to the *Salinas* holding and contort the purpose of the *Miranda* holding.

2. The lower court overextends *Murphy* by requiring arrestees to expressly invoke their right to silence.

Though common sense dictates otherwise, the lower court maintains that if Coda wanted to remain silent, he should have said so. R. at 9. This Court has famously stated that those who “desir[e] the protection of the privilege . . . must claim it.” *Murphy*, 465 U.S. at 427. However, barring the narrow exception of *Salinas*, this principle has only applied affirmatively, where defendants make incriminating statements. *See id.* (incriminating statement made to probation officer in noncustodial setting was admissible because defendant failed to expressly invoke his privilege); *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (incriminating statement volunteered during custodial interrogation admissible because defendant’s long silence was insufficient to unambiguously invoke his privilege).

Here, however, precedent does not justify imposing a similar burden to protect one’s silence. Like the defendant in *Murphy*, Coda had not yet received his *Miranda* warnings. *See r.* at 7. Were Coda to have volunteered information to Special Agent Park before his arrest, *Murphy* would undoubtedly control, and Coda’s statement would be admissible. *See Murphy*, 465 U.S. at 427. However, Coda chose *not* to make a statement. *See r.* at 7. In tandem, Coda should *not* have to expressly invoke his privilege. Such a requirement would overextend *Murphy* and unduly burden the Fifth Amendment right to remain silent.

Next, the lower court errs in relying on *Berghuis* because there the defendant had been appraised of the rights he was waiving. In *Berghuis v. Thompkins*, unlike here, the defendant listened to his *Miranda* warnings before choosing to answer an incriminating question. 560 U.S. at 376. Where the defendant in *Berghuis* made an implicit waiver of his rights by speaking, *id.* at 381, Coda could not waive a protection he had not heard. Therefore, *Berghuis* does not have a bearing this case, and the need to affirmatively assert privilege should not apply where a defendant has merely remained silent.

In *United States v. Okatan*, the court stated, “the right to remain silent exists independently of the fact of arrest.” 728 F.3d 111, 118 (quoting *United States v. Nunez-Rios*, 622 F.2d 1093, 1100 (2d Cir. 1980)). Though in theory this principle remains true, in reality vulnerable arrestees may not know what rights they still possess. Therefore, it is vitally important not to burden access to a constitutional right by requiring pre-*Miranda* arrestees to affirmatively invoke their privilege.

3. The lower court errs in relying on *Doyle* because the impeachment exception does not apply here.

The “impeachment exception” does not apply because the Government seeks to introduce Coda’s silence as substantive evidence of guilt, not to impeach. R. at 7. Under this exception, this Court has recognized that, in limited circumstances, silence may be used to impeach an exculpatory defense raised at trial. *Brecht v. Abrahamson*, 507 U.S. 619, 622–23 (1993); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *Doyle*, 426 U.S. at 619–20. In *Jenkins v. Anderson*, this Court reasoned that the privilege against self-incrimination should not enable a defendant to remain silent while they fabricate a defense to use at trial. 447 U.S. at 237–38. There, a defendant waited two weeks before telling the police he had killed someone and then testified at trial that he made the killing in self-defense.

Id. at 234. This Court held that the defendant’s pre-arrest, pre-*Miranda* silence was admissible to impeach the defendant’s credibility because doing so advanced the “truth finding function of the criminal trial,” while not overburdening Fifth Amendment rights. *Id.* at 237, 239. Therefore, the impeachment exception hinges on a very narrow justification concerning the truthfulness of testimony.

Here, the Government mistakenly relies on impeachment-exception precedent, though it seeks to use Coda’s silence purely as substantive evidence of his guilt. R. at 7 (“ . . . any reasonable person with an alibi defense would have disclosed that defense to the agent”). In *Jenkins*, this Court carefully balanced the risk of burdening a constitutional privilege against the benefit of “advanc[ing] the truth-finding function of the criminal trial.” 447 U.S. at 238. Such a balancing would be inapplicable here because the government is not seeking to impeach Coda’s alibi. Thus, introducing evidence of Coda’s pre-*Miranda* silence would not advance the truthfulness of Coda’s testimony. Therefore, this Court should not burden Coda’s constitutional rights because the justifications relating to the impeachment exception do not extend to these circumstances.

C. Using Custodial Silence to Incriminate Violates This Nation’s Principles of Fairness and Informed Action.

Admitting Coda’s silence violates the Fifth Amendment because it takes advantage of uninformed and vulnerable arrestees. First, criminal defendants who have not heard their *Miranda* warnings cannot intelligently waive their right to remain silent. Second, using defendant’s uninformed silence against them is fundamentally unfair because it incentivizes the Government to delay interrogation, manipulate silence, and manufacture guilt. R. at 14 (Martz, C.J., dissenting).

1. By definition, pre-Miranda silence cannot be a knowing or intelligent waiver of the privilege against self-incrimination.

Silence is not a knowing or intelligent waiver of privilege because arrestees first need to know their rights before they can waive them. Key to the holding of *Miranda*, an arrestee's waiver of rights during custodial interrogation must be knowing and intelligent. *Miranda*, 384 U.S. at 475 (“ . . . a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.”). Momentously, this Court declined to presume a waiver of rights simply from an arrestee's silence. *Id.* at 498. Neither should this Court presume a pre-*Miranda* arrestee can knowingly waive their rights by remaining silent.

The Government will argue that Coda voluntarily waived his privilege by remaining silent. However, such a claim would contradict the holding of *Miranda*, where this Court declined to presume a voluntary waiver from a silent record. *See Miranda*, 384 U.S. at 475. Instead, this Court should presume Coda's custodial silence was uninformed because Special Agent Park had not read Coda his *Miranda* warnings. Moreover, the Government has not met its heavy burden to show that Coda knowingly and intelligently waived his privilege. R. at 7. No facts in the record even insinuate understood his constitutional rights. *Id.* Further, it is quite doubtful that Coda knew his silence could incriminate him because any informed actor in Coda's position could have effortlessly asserted the right to remain silent as a precaution. This Court should follow *Miranda* and hold that pre-*Miranda* arrestees cannot passively waive their right to remain silent because it is impossible to deduce whether they understand the danger of their silence.

2. Using Custodial Silence to Incriminate Raises Concerns of Fundamental Fairness and Erodes What is Left of *Miranda*.

Allowing Coda's post-arrest silence to incriminate would violate the fundamental conception of fairness because it would unjustly punish Coda for his procedural ignorance. *Miranda v. Arizona* became seminal part of the national culture, allowing ordinary citizens to understand their rights because they were provided an essential warning. Geoffrey S. Corn, *The Missing Miranda Warning: Why What You Don't Know Really Can Hurt You*, Utah L. Rev. 761, 762 (2011). Nonetheless, the nuances of the rule remain inaccessible to most laypeople, especially vulnerable criminal defendants. *Id.* Reportedly, criminal defendants have lower levels of education and literacy rates than the general population and, thus, struggle to comprehend their *Miranda* rights when they are read.² Consequently, criminal defendants who have not received their *Miranda* rights likely lack the knowledge to expressly invoke the right to remain silent.

Moreover, criminal defendants will not understand that the failure to expressly invoke their privilege could be incriminating. In *The Missing Miranda Warning: Why What You Don't Know Really Can Hurt You*, Geoffrey S. Corn argues that the *Miranda* warnings mislead uninformed criminal defendants to speak during custodial interrogations. *Supra* at 780. Corn contends that the average defendant will erroneously "equate a decision to remain silent with an implicit admission of guilt", despite receiving *Miranda* warnings. *Id.* Therefore, criminal defendants unwittingly forgo the right to remain silent to their legal detriment.³ *Id.*

² A 2003 survey of "federal and state prison populations showed that approximately 40% of the state inmates and 27% of the federal inmates did not have a high-school degree or its equivalent, compared with about 18% of the general population. Literacy levels for inmates are also significantly lower than the general population." Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1569 (2018).

³ "The Cassell and Hayman study examined a sample of over 200 cases in Salt Lake County, Utah, a large urban area, during the mid-1990s.⁹⁶ The results of this empirical study suggest that roughly 84% of all suspects who receive *Miranda* warnings waive their rights." Corn, *supra* at 781.

Conversely, it may be the case that a natural lay instinct misleads noncustodial defendants to refrain from invoking their rights upon arrest. While more studies must be conducted, a suspect might fear that immediately requesting a lawyer or stating they are choosing to remain silent would make them look guilty, as if they were actively trying to conceal the truth. Therefore, suspects like Coda might remain silent out of fear of expressly invoking their privilege. Further, criminal defendants, regardless of innocence, might assume they have the right to remain silent, pre-*Miranda* warnings, without expressly asserting their privilege.

This reality calls into question the Government's contention that pre-*Miranda* defendants can easily invoke their Fifth Amendment rights. Consequently, the Government's assertion that "any reasonable person with an alibi defense would have disclosed that defense to the agent" does not pass muster. As poignantly expressed in *Doyle v. Ohio*, "[e]very post-arrest silence is insolubly ambiguous." 426 U.S. at 617. Therefore, weaponizing a defendant's ambiguous and uninformed decision to remain silent offends notions of fundamental fairness at the heart of the Due Process Clause.

Finally, if this Court allows post-arrest, pre-*Miranda* silence to incriminate, the Government will have an incentive to delay interrogation to manufacture silence. R. at 14 (Martz, C.J., dissenting). Here, the record is silent as to how long Special Agent Park waited between arresting Coda and taking him into a detention facility to begin interrogation. R. at 7. This unbounded timespan is particularly concerning because police officers could purposefully prolong a defendant's silence, leaving the jury an exaggerated picture of a defendant's conduct and guilt. This potential for abuse offends the fundamental fairness of the criminal process because it puts the Government in control of the defendant's perception of innocence to the jury.

CONCLUSION

First, the Thirteenth Circuit erred by denying Coda's motion to dismiss the indictment because the government provided no reasonable justification for a nearly nine-year delay that caused actual and substantial prejudice and violated Coda's Fifth Amendment right to due process. This Court should adopt a balancing test rather than the insurmountable two-prong test, because a balancing test more accurately upholds due process. A wide spectrum of reasons for delay can trigger due process violations, and courts need to be able to assess the reasons for the delay to adjudicate due process violations on a case-by-case basis. The two-prong test is insurmountable because defendants have little access to prove the bad faith motives of the government. Furthermore, the bad-faith requirement erodes due process because many due process violations will occur absent government malintent. Therefore, this Court should REVERSE the Thirteenth Circuit's decision and GRANT Petitioner's motion to dismiss.

Second, the Thirteenth Circuit erred by denying Coda's motion to suppress his post-arrest, pre-*Miranda* silence because admitting Coda's silence as evidence of guilt would violate his Fifth Amendment rights. In *Miranda v. Arizona*, this Court took a stand against criminal procedures which overburden defendants' exercise of their Fifth Amendment rights. The principle of *Miranda* remains true in the context of this case: without providing adequate warning, the Government should not be permitted to admit an arrestee's silence as substantive evidence of guilt. This Court should not burden the Fifth Amendment by requiring uninformed arrestees to expressly invoke a privilege they may not comprehend. Therefore, this Court should REVERSE the Thirteenth Circuit's decision and GRANT Coda's motion to suppress his post-custodial, pre-*Miranda* silence as substantive evidence of guilt.

Dated: September 13, 2021

Respectfully submitted,

s/ Team 15

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