
No. 21-125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021

AUSTIN CODA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit*

BRIEF FOR RESPONDENT

TEAM 17
Counsel for Respondent

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QUESTIONS PRESENTED

- I. Whether a defendant claiming a due process violation from preindictment delay must show government bad faith caused the delay.
- II. Whether the admission of an accused's post-arrest, pre-*Miranda* pre-interrogation silence violates the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Fire. Petitioner, Austin Coda (“Coda”), owned a hardware store in Plainview, East Virginia which burned to the ground following an explosion on December 22, 2010. R. at 1–2. The initial investigation performed by the Federal Bureau of Alcohol, Tobacco, and Firearms suggested that cold weather caused an old, faulty gas line to leak and destroy the building. R. at 2. The Federal Bureau of Investigation (“FBI”) then commenced their investigation and based on reliable information provided by Coda’s neighbor and close friend, Sam Johnson (“Johnson”), the FBI suspected that Coda was responsible for the explosion. R. at 2. Based on this information, the FBI informed the United States Attorney’s Office where the case was marked as “low-priority.” R. at 2.

The Investigation. The United States Attorney’s Office had several justifications for why it had marked Coda’s case “low-priority,” including Coda’s prosecution for unrelated state charges, and the U.S. Attorney’s Office belief it would be inconvenient to transport him back and forth during that time. R. at 2. After the unrelated state proceedings were finished, the U.S. Attorney’s Office prioritized prosecuting drug trafficking and other related offenses due to political pressure, which caused high turnover at the U.S. Attorney’s Office. R. at 2. Due to these developments, Coda’s case did not progress and the priority for the case did not increase. R. at 2.

The Charges. In April 2019, nine years after the explosion, the U.S. Attorney’s Office moved forward with the case and apprehended Coda and took him into custody. R. at 2–3. The government indicted Coda under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. R. at 3. The government

concluded that Coda destroyed his store to collect on insurance proceeds and indicted him on those claims within the ten-year statute of limitations. R. at 3.

Coda moved to dismiss the indictment, arguing that the nine-year delay in indicting him violated the Fifth Amendment Due Process Clause, even though the indictment was within the statute of limitations. R. at 3. At the evidentiary hearing, Coda testified that he intended to raise an alibi defense but due to the government's preindictment delay, he could not produce testimony to corroborate his defense. R. at 3. Interestingly though, Coda did not assert the alibi defense to the arresting agents after he was informed of the charges against him. R. at 7. Instead of asserting his alibi defense, Coda remained silent before his *Miranda* rights were read to him. R. at 7.

II. PROCEDURAL HISTORY

The District Court. Following his indictment, Coda brought two motions to the district court. Coda first moved to dismiss the indictment for preindictment delay. R. at 1. The district court denied Coda's motion because it failed to articulate that the government acted in bad faith with the intent to gain an unfair advantage. R. at 6. Coda then brought forth a motion to suppress his post-arrest but pre-*Miranda* silence. R. at 7. Coda claimed that admission of his silence would violate the Fifth Amendment, but again, Coda's motion was denied. R. at 7. The district court concluded that Coda's silence in response to the charges against him is relevant and potentially incriminating evidence. R. at 10. The district court further articulated that this evidence needs to be weighed with all the other evidence presented to determine whether there was guilt beyond a reasonable doubt. R. at 10.

The Court of Appeals. The United States Court of Appeals for the Thirteenth Circuit affirmed the district court's judgment. R. at 12.

Chief Judge Martz wrote a dissent that the Thirteenth Circuit should have reversed Coda's conviction and dismiss the charges against him. R. at 15. Judge Martz believed that the trial court should have applied the balancing test when determining preindictment delay. R. at 12. Judge Martz also stated that prohibiting the government from using a defendant's post-arrest, but pre-*Miranda* silence is a "natural extension of Supreme Court precedent." R. at 12.

SUMMARY OF THE ARGUMENT

I.

The lower courts properly denied Coda's motion to dismiss based on preindictment delay. The district court applied the correct standard, requiring Coda to prove intentional and purposeful government delay that was intended to gain a tactical advantage over him. This correct standard applied by the district court was laid out by this Court on two separate occasions, both of which required evidence of governmental bad faith. That standard recognizes that the primary protection for lost evidence is provided by the statute of limitations, not the Due Process Clause.

The district court did not limit the evidence on what type of tactical advantages the defendant could present—Coda simply did not provide such evidence. To the extent that Coda urges this Court to apply a new and different test applied by a minority of circuit courts for preindictment delay claims, this Court should not deviate from its long-standing precedent applied by the majority of the circuit courts. Coda provides no principled reason for the Court to deviate from its existing test. This Court's precedent requires that indictments not be brought in haste, so the government does not bring forth unjustified allegations. In this instance, the Government's preindictment delay did not cause Coda actual substantial prejudice and there is no evidence that the government caused the delay to gain a tactical advantage over Coda.

Regardless, even if this Court were to adopt Coda's standard, the Government's justification for its preindictment delay outweighs Coda's alleged prejudice.

II.

The lower courts properly denied Coda's motion to suppress his post-arrest but pre-*Miranda* silence because it did not violate the Fifth Amendment. Because Coda did not invoke his privilege against self-incrimination, nor met any of its exceptions, the district court properly determined his silence to be admissible. The first exception is not met because the prosecutor is not drawing adverse inferences from Coda's refusal to testify at trial. Coda's silence occurred during a pre-trial interaction with law enforcement and before the commencement of custodial interrogation and the reading of his *Miranda* rights. Coda also did not meet the second exception to the invocation requirement because he was under no government-induced compulsion to speak immediately following his arrest and before being interrogated. To the extent that Coda requests this Court to find a new exception to the invocation requirement, this Court should not deviate from its past precedent and should follow that the invocation requirement and the issuance of *Miranda* warnings to be the triggering mechanism for invoking the privilege against self-incrimination. By comporting with this bright-line rule that should be adopted by this Court, this clear standard will protect an individual's constitutional rights, will promote law enforcement and judicial efficiency, and will alleviate courts from undergoing extensive, constitutional case-by-case analysis. Coda provides no principled reason for the Court to not follow this clear standard.

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews the district court's findings of fact for clear error and its conclusions of law de novo. *United States v. Comosona*, 614 F.2d 695, 697 (10th Cir. 1980).

I. EVIDENCE OF GOVERNMENT BAD FAITH IS REQUIRED FOR PREINDICTMENT DELAYS TO VIOLATE DUE PROCESS.

Coda claims he was deprived of due process because of the Government's delay in indicting him for the offense. Although an indictment was issued nine years after the offense was committed, the charges were brought within the applicable statute of limitations.

Criminal statutes of limitations are meant to "represent legislative assessments of relative interests of the state and the defendant in administering and receiving justice." *United States v. Marion*, 404 U.S. 307, 322 (1971). Such statutes are intended to "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." *Toussie v. United States*, 397 U.S. 112, 114 (1970). Specifically on the issue of preindictment delay, this Court has stated that "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'primary guarantee, against bringing overly stale criminal charges.'" *Marion*, 404 U.S. at 322 (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

An unreasonable delay between the time an offense is committed and the time an indictment is issued may implicate due process even when the charges are brought within the statute of limitations. But this circumstance is exceedingly rare: "Only the most egregious pre-indictment delay 'that which transgresses fundamental notions of justice and the community's sense of fair play and decency'" violates a defendant's due process rights. *Wilson v.*

McCaughtry, 994 F.2d 1228, 1233 (7th Cir. 1993) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

Before finding a due process violation when the statute of limitations has not run, the majority of circuit courts apply a two-prong test requiring the defendant to prove 1) actual prejudice and 2) the government intentionally delayed to gain a tactical advantage.¹ Only two circuit courts apply a balancing test which requires the court to weigh the alleged prejudice to the defendant against the justification from the government for the delay. Here, the United States Court of Appeals for the Thirteenth Circuit correctly affirmed the district court’s application of the two-prong standard used by the majority of circuit courts. R. at 12.

A. This Court Should Adopt the Majority Circuits’ Approach That Government Bad Faith Is Necessary for a Preindictment Delay to Cause a Due Process Violation.

In *Marion*, this Court held that to make out a claim of prejudicial pre-indictment delay, the defendant must prove “actual prejudice to the conduct of the defense” and that the government “intentionally delayed to gain some tactical advantage over [the defendant] or to harass [him or her].” 404 U.S. at 325. In *Marion*, the appellant alleged preindictment delay when the government prolonged their investigation by three years. *Id.* at 310. The government justified its delay by stating that United States Attorney’s office was “not sufficiently staffed to proceed as

¹ The federal appellate courts for the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia Circuits have adopted the two-prong analysis. *See United States v. Acevedo*, 842 F.2d 502 (1st Cir. 1988); *United States v. Ray*, 578 F.3d 184 (2d Cir. 2009); *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985); *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996); *United States v. Lively*, 852 F.3d 549 (6th Cir. 2017); *United States v. Jimenez-DeGarcia*, 2007 WL 4226369 (7th Cir. Nov. 30, 2007); *United States v. Sprouts*, 282 F.3d 1037 (8th Cir. 2002); *United States v. Woodard*, 817 F. App’x 626 (10th Cir. 2020); *United States v. Barragan*, 752 F. App’x 799 (11th Cir. 2018); *United States v. Reed*, 2017 WL 3208458 (D.C. Cir. July 27, 2017). The Fourth and Ninth Circuits have not used the two-prong analysis used by the majority opinion, instead opting for a balancing test. *See Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996); *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985).

expeditiously as desir[ed] and that priority had been given to other cases.” *Id.* at 334–35. Ultimately, the Court concluded that there was no preindictment delay because, “[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.” *Id.* at 325. Thus, *Marion* provided the framework for which the majority of the circuit courts followed.

A few years later, this Court further reinforced *Marion*’s two-prong framework and what’s necessary to meet that framework in *Lovasco*. The Court stated, “*Marion* makes clear that proof of prejudice is generally a necessary but not a sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *Lovasco*, 431 U.S. at 790. The Court cited the *Marion* standard of delay “to gain tactical advantage over the accused” in holding that the delay in *Lovasco* did not rise to the level necessary to constitute a Due Process violation. *Id.* at 795.

Given the reasoning and focus in both *Marion* and *Lovasco* on whether the defendants had shown that they were prejudiced, and that the prosecutor had an improper “tactical” reason for the delay, the circuit courts’ interpretation of *Marion* and *Lovasco* rest on sound reasoning and this Court should affirm that interpretation.

Coda argues that the district court should set aside the majority circuits’ interpretation of this Court’s precedent from *Lovasco* and *Marion*, in favor of the test employed by *Jones v. Angelone*, 94 F.3d 900, 904 (4th Cir. 1996). R. at 4. Specifically, the *Jones* court opined that *Lovasco* and *Marion* imply that courts “must carefully consider each situation on a case-by-case basis.” R. at 4. As the district court noted, policy considerations support the inclusion of a bad faith analysis. R. at 5. This is because pre-indictment delay, whether it is a product of further

investigation of the case or simple inertia, additional facts may come to light showing that the person originally under suspicion was not actually involved in the matter being investigated, that no criminal conduct occurred, or that the case is an appropriate one for a discretionary decision not to prosecute. *See United States v. Finkelstein*, 526 F.2d 517, 526 (2d Cir. 1975) (“The deliberate pace of the investigation redounded to society’s benefit in two ways: it protected an innocent party and ferreted out two who were culpable.”). Thus, delaying an indictment may serve to avoid placing a suspect in the position of having been accused publicly of criminal activity even if the individual is ultimately indicted. Further, the delay may shorten the period between the bringing of charges and the defendant’s opportunity to secure an acquittal on those charges.

By ignoring these considerations, Coda’s requested standard for assessing preindictment delay would encourage haste on the part of law enforcement personnel at the expense of deliberateness designed to avoid unjustified accusations and of the societal interest in requiring persons guilty of criminal offenses to answer for their conduct. *See United States v. Feinberg*, 383 F.2d 60, 67 (2d Cir. 1967) (“[F]ear of forfeiting a prosecution would frequently induce unreasonable speed which ‘would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.’”) (citation omitted). Indeed, the reason for the bad faith standard was articulated by *Lovasco* because courts cannot “abort criminal prosecutions simply because they disagree with a prosecutor’s judgment,” but, instead, they should grant a motion to dismiss only where the delayed indictment violates “those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community’s sense of fair play and decency.” 431 U.S. at 790. The statute of limitation here already acted as procedural safeguards against unfair delay. R. at 5.

Additionally, prejudice to the defendant and the government's reasons for delay are different and cannot be compared through a balancing test. *See United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996). In *Crouch*, the Fifth Circuit held that the "balancing test purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's 'good faith reasons' for the delay deviate from what the court believes to be appropriate." *Id.* The court reasoned that the items needed to be balanced were already imprecise themselves and are different from each other. *Id.* Specifically, the court noted that "[n]ot only is there no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice, there are no recognized general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look to for guidance." *Id.* Inevitably, then as the court noted, judges will define due process by weighing their own "personal and private notions of fairness," contrary to *Lovasco*. *Id.*

This interpretation of *Lovasco* and *Marion* from the Fifth Circuit (and nine other circuits) follows this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay to obtain a tactical advantage. *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.

In *Youngblood*, this Court stressed "the importance for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." 488 U.S. at 57. Coda contends he lost all evidence that would aid in his defense because of the Government's delay. R. at 3. As this Court stated in *Marion*, however,

there needs to be an intentional delay “to gain some tactical advantage over the accused.” *Lovasco*, 431 U.S. at 795.

Coda’s definition of “delay” puts prosecutors at risk of violating the Fourth Amendment if they act too soon in arresting persons suspected of criminal conduct and of violating the Fifth Amendment if they wait too long and evidence is lost. This Court recognized a similar dilemma in *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the petitioner argued that since he would have had a right to counsel under the Sixth Amendment had the government taken him into custody and charged him with an offense, he should have been entitled to that right to counsel the exact moment the police had sufficient evidence to arrest him. However, this Court rejected that argument, and stated:

There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Id. at 309–10 (footnote omitted). It is exceedingly difficult to square this Court’s assessment in *Hoffa* of the government’s responsibility formally to accuse persons suspected of criminal conduct with the view of that responsibility taken by Coda in this case. Accordingly, based on established precedent, good or bad faith from the Government is required when the claim is based on loss of evidence, as it is here.

B. The Preindictment Delay Does Not Rise to the Level Needed to Violate the Fifth Amendment Because There Was No Actual Prejudice, and the Government Did Not Gain a Tactical Advantage.

Coda’s hardware store exploded, and the FBI received a tip that Coda had motive to create the explosion because of the decline of his personal finances. R. at 2. The FBI alerted the U.S.

Attorney's office, and the case was marked as low priority. *Id.* Nine years later, the Government became aware the statute of limitations under 18 U.S.C. § 3295 was about to expire. *Id.* at 3. The Government then moved forward in investigating this case. The government proffered reasons for the nine-year delay including the fact that Coda was being prosecuted for unrelated state charges and transporting Coda between state court and federal court would be too costly or burdensome. *Id.* at 2. Thus, there was no intent to gain a tactical advantage and the preindictment delay was within the statute of limitations.

At the district court's evidentiary hearing, Coda only offered evidence as to why he thought the preindictment delay was prejudicial to *him*—he did not offer evidence for prosecutorial misconduct. As the Court explained in *Marion*, which involved a 38-month pre-indictment delay, the defendants failed to “demonstrate[] that the preindictment delay by the Government violated the Due Process Clause.” 404 U.S. at 325. The defendants in that case not only failed to prove actual prejudice, but also “there [was] no showing that the Government intentionally delayed to gain some tactical advantage over [the defendants] or to harass them.” *Id.* Additionally, the Tenth Circuit in *United States v. Comosona*, recognized “[i]t is important to observe that something more than ordinary negligence on the part of Government representatives must be shown, no matter how high the actual proof of prejudice is. The Government's delay must be intentional and purposeful.” 614 F.2d at 696 n.1; *see also United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979) (same). Coda has not demonstrated that the delay was intentional and purposeful—more specifically, that it was more than ordinary negligence.

As the trial court noted, Coda did not provide sufficient evidence to show that the government had acted with bad faith. R. at 6. The only evidence Coda provided included arguments that four of his five potential witnesses were dead and the last was unavailable to

testify on his behalf, and that the bus records of his travel on the day of the explosion were unavailable. Neither of these indicates government bad faith or intent to gain an advantage over Coda. None of the evidence offered by Coda to the trial court can be attributed to the government. Instead, as the trial court noted, the evidence Coda presented only “shows that, at most, the government’s inadequate oversight amounts only to negligence, which is insufficient to satisfy the bad faith requirement.” R. at 6; *see also United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985) (holding five-year delay between robbery and indictment did not alone show bad faith).

1. The preindictment delay did not cause Coda actual substantial prejudice.

In *Marion*, this Court ruled a defendant cannot prove a due process violation by relying “solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost.” 404 U.S. at 325–26. A defendant’s “speculative and premature” claims do not amount to a due process violation. *Id.* at 326. A “defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources.” *United States v. Jackson*, 549 F.3d 963, 969 (5th Cir. 2008); *see also United States v. Muñoz-Franco*, 487 F.3d 25, 58 (1st Cir. 2007) (finding the unavailability of nineteen witnesses because of the five-year preindictment delay did not give rise to a due process violation).

The prejudice “not only must be actual, rather than presumed or potential, but must also be ‘substantial.’” *Crouch*, 84 F.3d at 1515 (quoting *Marion*, 404 U.S. at 324); *see also United States v. West*, 58 F.3d 133, 136 (5th Cir. 1995) (“actual and substantial prejudice”). This is a “heavy burden,” the “proof must be definite and not speculative, and the defendant must demonstrate

how the loss of a witness and/or evidence is prejudicial to his case.” *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *see, e.g., State v. Mouser*, 806 P.2d 330, 337 (Alaska Ct. App. 1991) (“By actual prejudice we mean a particularized showing that the unexcused delay was likely to have a specific and substantial adverse impact on the outcome of the case.”).

Admittedly, there is some prejudice to Coda because of the preindictment delay. But this Court has noted that memory fading because of an extended delay is “speculative” and does not amount to a due process violation. Further, as this Court stated in *Marion*, actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant’s case should abort a criminal prosecution. *Marion*, 404 U.S. at 324–25. Thus, a defendant must offer more than faded memories or misplaced documents to show an actual loss of evidence.

2. No evidence suggests the Government caused delay to gain a tactical advantage.

To show the government acted in bad faith, Coda must prove that the government engaged in conduct that violates “fundamental conceptions of justice which lie at the base of our civil and political institutions,” and which define “the community’s sense of fair play and decency.” *Lovasco*, 431 U.S. at 790. Under this standard, a defendant must show that the government intentionally delayed indictment “*for the purpose of* rendering unavailable evidence favorable to the defense or which would tend to undercut the government’s case” and only then would he satisfy his burden to prove bad faith. *Crouch*, 84 F.3d at 1515 n.23 (emphasis added). Thus, where a defendant can prove that the delay was used as “*an intentional device* to gain tactical advantage over the accused” it would be considered bad faith on part of the government and impermissible. *Marion*, 404 U.S. at 324 (emphasis added); *see Lovasco*, 431 U.S. at 795 n.17; *see also United States v. Crooks*, 766 F.2d 7, 11 (1st Cir. 1985) (stating that preindictment delay

violates due process “only if the delay significantly prejudices the defendant and the government ‘intentionally delayed’ the indictment ‘to gain an unfair tactical advantage or for other bad faith motives’”) (citation omitted).

Here, the government’s justification for the delay was not to render unavailable evidence for Coda, nor was it an intentional device to gain a tactical advantage over Coda. Indeed, there was no such intent to gain a tactical advantage because the government had marked Coda’s case as “low-priority.” The government was focusing its efforts on prosecuting drug trafficking and other related offenses. R. at 2. Coda was also being prosecuted on unrelated state charges and the government did not want to transport him between state custody and federal custody. R. at 2. None of these proffered reasons indicated government bad faith or intent to gain a tactical advantage over Coda. The government was also not reckless in their behavior. This preindictment delay amounts to nothing more than mere negligence on part of the government. Indeed, Coda does not even attempt to argue that the Government engaged in a tactical delay because there is no such evidence.

C. Even Under a Balancing Approach, the Government’s Justification for the Delay Outweighs Coda’s Alleged Prejudice.

Coda contends that the balancing test applied by only two federal circuits is the correct standard the trial court should have applied. R. at 4. The conflict of authority that Coda seeks to show, however, is not that deep. Under the balancing test, the defendant must still “prove actual prejudice” at the outset. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). If the defendant can do so, “then the court must balance the defendant’s prejudice against the government’s justification for delay,” whatever it might be, to assess “whether the government’s action in prosecuting after substantial delay violates fundamental conceptions of justice or the community’s sense of fair play and decency.” *Id.*

When the defendant fails to show that the government delayed the indictment to obtain a tactical advantage or for some other bad faith reason, or when the record affirmatively shows that the government did not delay the proceedings to obtain a tactical advantage over the accused, the courts that apply the balancing test have to date uniformly denied relief. *See, e.g., United States v. Bracy*, 67 F.3d 1421, 1427 n.3 (9th Cir. 1995); *United States v. Canoy*, 38 F.3d 893, 903 (7th Cir. 1994); *United States v. Automated Med. Lab 'ys, Inc.*, 770 F.2d 399, 404 (4th Cir. 1985).

Specifically, Coda urged the trial court to follow the holding of the Fourth Circuit in *Jones v. Angelone*. R. at 4. The Fourth Circuit, in *Jones*, acknowledged that every other circuit but the Ninth had adopted the balancing test, but recognized that it could not overrule its prior panel precedent in favor of the two-prong test without an en banc proceeding. 94 F.3d at 904–05. There, the court found it was unnecessary to consider en banc review because the defendant could not show actual prejudice, and thus could not establish a due process violation even under the balancing test. *Id.* at 905.

Conversely, even balancing jurisdictions recognize that the prosecutorial reason for the delay must be “culpable” or “unjustified” for dismissal to be warranted. *See, e.g., Moran*, 759 F.2d at 783 (“[O]ur cases clearly require some showing of governmental culpability to prove a deprivation of due process.”); *State v. Stokes*, 248 P.3d 953, 960 (Or. 2011) (stating that “some level of government culpability” is necessary to make out a claim of unconstitutional pre-indictment delay, and that legitimate “investigative delay never violates a defendant’s due process rights”); *State v. Luck*, 472 N.E.2d 1097, 1105 (Ohio 1984) (“[L]ength of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable.”). Some courts have even found dismissal appropriate where the prosecution fails to proffer a reason for the delay. *See, e.g., State v. Whiting*, 702 N.E.2d 1199,

1201 (Ohio 1998). That is not a result of the substantive balancing test, per se, but is a result of a burden-shifting procedure that is ordinarily, but not exclusively, applied in balancing jurisdictions.

Here, the nine-year indictment delay was not to obtain a tactical advantage, it was not bad faith on part of the government, nor was it reckless. Admittedly, this delay comes down to simple negligence. The government allowed nine years to go by without prosecuting Coda, which caused him prejudice in his defense. But mere negligence is not enough. Even the jurisdictions that apply the balancing test have also noted that the government must still be culpable to constitute a due process violation that warrants dismissal. That burden was not met by Coda.

II. ADMITTING POST-ARREST, PRE-MIRANDA, AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT COMPORTS WITH THE FIFTH AMENDMENT.

Coda next challenges the use of his silence during the government's case-in-chief. Specifically, the government presented evidence that Coda had not offered an alibi defense when he was arrested, when the charges were read to him, and when he was driven to the detention center. According to the government, a reasonable person with an alibi defense would not have remained silent under the circumstances.

The district court's judgment that Coda's post-arrest, but pre-*Miranda* and pre-interrogation silence does not violate the Fifth Amendment is proper because Coda did not expressly invoke the privilege, did not meet an exception to the invocation requirement, and did not provide a principled reason for the district court to hold otherwise. The Self-Incrimination Clause of the Fifth Amendment, which states that "no person . . . shall be compelled in any criminal case to be a witness against himself," is undoubtedly one of the most commonly known constitutional rights instilled into every citizen. U.S. Const. amend. V. Additionally, the privilege

“is an exception to the general principle that the Government has the right to everyone’s testimony.” *Garner v. United States*, 424 U.S. 648, 658 n.11 (1976). But, as this Court has long held, the privilege “generally is not self-executing” and an arrestee who seeks its protection “must claim it.” *Minnesota v. Murphy*, 465 U.S. 420, 425, 427 (1984) (quoting *United States v. Monia*, 317 U.S. 424, 427 (1943)). By requiring individuals to invoke the privilege against self-incrimination if they seek its protection, this rule will provide guidance to arresting officers in the face of ambiguity and will give “courts tasked with evaluating a Fifth Amendment claim a contemporaneous records establishing the witness’ reasons for refusing to answer.” *Salinas v. Texas*, 570 U.S. 178, 183–84 (2013). The establishment of a clear standard regarding this area of uncertain law will not only create uniformity in future cases about silence admissibility, but also will protect and preserve one of our most foundational constitutional rights. Here, the United States Court of Appeals for the Thirteenth Circuit correctly affirmed the district court’s analysis in regard to the admissibility of post-arrest, pre-*Miranda* and pre-interrogation silence. R. at 12.

A. Coda’s Fifth Amendment Right Against Self-Incrimination Was Not Violated Because Coda Did Not Meet the Express Invocation Requirement nor Meet Any of Its Exceptions.

Contrary to Coda’s argument that his silence is inadmissible and outside of *Salinas*’s limited exception, the district court’s judgment regarding that *Salinas* should control in this context is proper because for a witness to invoke the privilege against self-incrimination then he “must claim it.” *Murphy*, 465 U.S. at 427. The express invocation requirement “ensures that the Government is put on notice” so it can determine whether a witness’ testimony “could not be self-incriminating,” or that it could “cure any potential self-incrimination through a grant of immunity.” *Salinas*, 570 U.S. at 183. Additionally, the Court noted there is no “ritualistic formula” to invoke the privilege, but it would decline to enforce the privilege if a suspect was

“simply standing mute.” *Id.* at 181. The express invocation requirement also applies when “an official has reason to suspect that the answer to his question would incriminate the witness.” *Id.* at 187. By comporting with this requirement, the government is able to have access to the needed information to evaluate a witness’ stance regarding Fifth Amendment protection.

Alternatively, this Court has held that a witness’ silence is inadmissible or violates the Fifth Amendment and need not invoke his privilege against self-incrimination if a person is “compelled to incriminate themselves.” *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“[W]ithout proper safeguards, the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine . . . and to compel him to speak where he would not otherwise do so freely.”). Thus, when a suspect faces custodial interrogation, the suspect does not waive the privilege “unless [he] fails to claim [it] after being suitably warned.” *Murphy*, 465 U.S. at 429–30. And the Court has consistently held this safeguard “does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.” *Roberts v. United States*, 445 U.S. 552, 560 (1980). Additionally, “absent some officially coerced self-accusation,” the privilege is not violated and does not preclude all incriminating testimony from a suspect “by even the most damning admissions” because “admissions of guilt by wrongdoers . . . are inherently desirable.” *United States v. Washington*, 431 U.S. 181, 187 (1977).

Even though this Court is under first impression regarding the admission of post-arrest, but pre-*Miranda* and pre-interrogation silence, the Court should deem this silence admissible given past precedent. In *Salinas*, the Court held that under a pre-arrest, pre-*Miranda* setting, the defendant’s silence was admissible to prove guilt and did not violate the Fifth Amendment. 570 U.S. at 186. The Court reasoned that the admission of this silence did not violate the Fifth

Amendment because there was “no allegation that petitioner’s failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer’s question on Fifth Amendment grounds.” *Id.* Because Salinas was silent and did not *voluntarily* invoke the privilege, Salinas’s claim failed. *Id.* Salinas argued that a new exception should be adopted to the express invocation requirement when a person is silent in front of official suspicions, but the Court concluded this “would do little to protect those genuinely relying on the Amendment privilege while placing a needless new burden on society’s interest in the admission of evidence that is probative.” *Id.* at 188. Lastly, Salinas argued that he was silent in reliance of the privilege, but the Court found this meritless because Salinas could have been thinking of an alibi and reasoned that “not every possible explanation of silence is protected by the Fifth Amendment.” *Id.* at 189.

Here, Coda’s silence in response to the charges against him would have required him to unambiguously invoke the privilege if he wanted to be protected by it. Like in *Salinas*, Coda tries to carve out a new exception to the express invocation requirement by just remaining silent in the face of official suspicions, but this would fail because a person does not invoke the privilege by “simply standing mute.” 570 U.S. at 181. Additionally, Coda’s argument on reliance of the privilege would not stand because not every possible explanation of silence is protected by the privilege. If Salinas’ silence is admissible while being questioned about a murder in police interview, then surely Coda’s silence in the face of no police interrogation would be as well. Although Coda could have been relying on the privilege during his silence, there is a plausible argument that Coda could have been fabricating an alibi to his defense because his memory was hazy—especially when the explosion to his business occurred almost a decade before his indictment. R. at 3.

In addition, even in post-*Miranda* settings a defendant's silence *sometimes* does not invoke the privilege against self-incrimination. *Berghuis v. Thompkins*, 560 U.S. 370, 387 (2010). There, Thompkins was subjected to police interrogation, read his *Miranda* rights, and stayed silent for almost three hours. *Id.* at 375. Thompkins then voluntarily answered a question but argued that being silent for a sufficient period should have invoked his privilege and ceased the interrogation. *Id.* The Court found this unpersuasive because Thompkins never invoked his right to remain silent unambiguously. *Id.* at 381. By requiring an unambiguous invocation of the privilege, this gives officers "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)).

Other jurisdictions have found that post-arrest, pre-*Miranda* silence settings require invocation. *People v. Tom*, 331 P.3d 303, 320 (Cal. 2014). The California Supreme Court in *People v. Tom* held that the burden to invoke the privilege relied on the defendant at the time after arrest. *Id.* at 312. The prosecutor, after eliciting testimony from the responding officers, admitted into evidence Tom's post-arrest, pre-*Miranda* silence when Tom failed to inquire about the well-being of the other people involved in the accident. *Id.* at 305. The California Supreme Court applied the *Salinas* invocation requirement along with its exception and held that Tom satisfied none of them. *Id.* The case was later remanded to the lower court to determine whether Tom unambiguously invoked the privilege, but the court nonetheless applied the invocation requirement in *Salinas* and held that it would not have violated the Fifth Amendment for Tom's post-arrest, pre-*Miranda* silence.

Coda could have invoked his privilege against self-incrimination and because he failed to do so, he was not protected. Like in *Berghuis*, Coda's invocation, if any, is ambiguous and would

be difficult for the arresting officers to determine whether he relied on the privilege and how to proceed from thereafter. Similarly in *Tom*, the California Supreme Court required invocation for a post-arrest, pre-*Miranda* silence which is exactly the scenario that Coda is in. The court in *Tom* applied the exact invocation requirement in *Salinas*. Thus, Coda could have invoked the privilege but because he failed to do so, his post-arrest, pre-*Miranda* silence would be admissible. Moreover, *Salinas*, *Berghuis*, and *Tom* exhibit all three possible scenarios for a suspect's silence and all three cases applied the invocation requirement. Absent the possibility of meeting an exception, Coda's silence would be admissible and not violate the Fifth Amendment.

1. The *Griffin* exception to the express invocation requirement does not apply to Coda's silence because it applies only to refusing to testify at trial and not to pre-trial interactions with police.

Notwithstanding the express nature of the invocation requirement, Coda's claim that his silence is inadmissible and violates the Fifth Amendment also fails under the first exception of the rule. In the lower court of appeals, the dissent proffers that the *Griffin* exception "is a natural extension of Supreme Court precedent," and that it prohibits the government from admitting a defendant's post-arrest but pre-*Miranda* silence. R. at 14. This argument holds no weight because the exception applies only to in trial settings and not with pre-trial, pre-interrogational interactions with police, or admissions of pre-trial silence as evidence of guilt.

This Court has held that the first exception to the invocation requirement is that "a criminal defendant need not take the stand and assert the privilege at his own trial." *Salinas*, 570 U.S. at 184. If a prosecutor or judge comments on a defendant's reliance upon his right to refuse to testify at his trial, the Court has declared this as "a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). But the Fifth Amendment Self-Incrimination Clause

states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Thus, “the sole concern of the Fifth Amendment, on which *Miranda* is based, is governmental coercion.” *Colorado v. Connelly*, 479 U.S. 157, 171 (1986). This Court found such governmental coercion when the prosecutor advises the jury to draw adverse inferences from a defendant’s right to refuse to testify at trial. *Griffin*, 380 U.S. at 609. And, although the *Griffin* court held that the Fifth Amendment prohibits prosecutorial comments or instructions by the judge on a defendant’s silence as evidence of guilt, this Court has explicated that the “broad dicta in *Griffin* . . . must be taken in the light of the facts of that case”—which are prosecutorial comments on the right not to testify *at trial*. *United States v. Robinson*, 485 U.S. 25, 34 (1988). Here, Coda does not take the stand, and the evidence of his guilt is not referring to his refusal to *testify*. The substantive use of Coda’s silence occurred *before* trial and in the police car on the way to the detention center *before* custodial interrogation commenced.

Even if Coda relies on footnote 37 of the *Miranda* opinion as a way for the *Griffin* rule to extend outside the trial setting and into pre-interrogational procedures, this will ultimately fail as well. Footnote 37 of *Miranda* states: “It is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.” 384 U.S. at 468 n.37. This footnote relates not only to custodial interrogation, but also to the *Miranda* warnings that coincide with the “fundamental fairness” aspects of Due Process set out in *Doyle*. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Thus, a muteness or silence violation would raise Due Process concerns and not the rules set out in *Griffin*. *Id.* So, contrary to Coda’s potential argument, Coda’s claim for a *Griffin* extension would fail because

he was not compelled to custodial interrogation and the Court's precedent would not align with such a claim.

This Court applies Fifth Amendment principles rather than the *Griffin* rule when dealing with such pre-trial admissions. *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966) (“We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances.”). The Court concluded this when Schmerber refused to take a breathalyzer test and the evidence of his refusal was admitted and commented on by the prosecutor in closing argument. *Id.*

Here, Coda's argument that *Griffin* should extend to his situation would be meritless because *Griffin* applies to the trial setting and not to circumstances pre-trial, especially those circumstances following arrest and before custodial interrogation. To justify Coda's erroneous claim, Justice Thomas said, “I have previously explained that the Court's decision in *Griffin* ‘lacks foundation in the Constitution's text, history, or logic’ and should not be extended.” *Salinas*, 570 U.S. at 192 (Thomas, J., concurring) (quoting *Mitchel v. United States*, 526 U.S. 314, 341 (1999) (Thomas, J., dissenting)).

2. Coda was not interrogated and was under no government-induced compulsion to testify against himself to make his forfeiture of the privilege involuntary.

In addition to the *Griffin* exception, Coda does not meet the second exception to the express invocation requirement because he was under no government-induced compulsion to speak. “[W]e have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture involuntary.” *Salinas*, 570 U.S. at 184. Because Coda was under no governmental coercion to speak and his assertion of the privilege was not

involuntary, then his failure to timely assert the privilege against self-incrimination would make his post-arrest, but pre-*Miranda* and pre-interrogation silence admissible.

“The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion.” *Connelly*, 479 U.S. at 170. Additionally, the privilege against self-incrimination does not concern itself “with moral and psychological pressures to confess emanating from sources other than official coercion.” *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). This Court has also held that a defendant subjected to the “inherently compelling pressures of unwarned custodial interrogation” is exempt from invoking the privilege. *Salinas*, 570 U.S. at 184. But, to eliminate “the overbearing compulsion . . . caused by isolation of a suspect in custody,” the Court in *Miranda* required that self-incriminating testimony be excluded during custodial interrogation unless the defendant failed to claim the privilege after being read his *Miranda* rights in conjunction with the consequences thereof. *Murphy*, 465 U.S. at 430 (quoting *Washington*, 431 U.S. at 187 n.5). Thus, Coda’s silence, occurring *before* issuance of his *Miranda* rights and interrogation, is admissible because he was not in an interrogation setting. Even though being arrested and charged with a crime can affect an individual psychologically, the privilege does not concern itself “with moral and psychological pressures to confess” outside being interrogated. *Elstad*, 470 U.S. at 305.

This Court has also touched on the ambiguity regarding whether an arrest arises to some sort of compulsion. For example, in *Fletcher v. Weir*, the Court rejected that ““an arrest, by itself, is governmental action which induces a defendant to remain silent”” and held that it is “not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.” 455 U.S. 603, 606 (1982) (quoting *Weir v. Fletcher*, 658 F.2d 1126, 1131 (6th Cir. 1981)). Here, this relates almost consistently with Coda’s silence because he was only read

the charges against him, was silent in the car on the way to the detention center and was then read his *Miranda* rights before the commencement of interrogation. R. at 7. There is no evidence that the arresting officers elicited or intended to elicit any testimony from Coda. Indeed, the arresting officers were suspicious that Coda did not state an alibi, like a reasonable innocent person would in the face of arrest, but also did not inquire into this any further. By not trying to elicit any incriminating evidence from Coda, the officers did nothing in their capacity to compel Coda to incriminate himself.

Moreover, this Court has deemed many instances where silence can be used in court as a way to either attack a defendant's credibility or evidence of guilt. Even though some instances involve using a suspect's silence for impeachment, the reasoning behind the Court's judgment, like in *Salinas*, can be applied to the substantive use of silence in a prosecutor's case-in-chief. For example, this Court has held that a defendant's post-arrest, post-*Miranda* silence is inadmissible for impeachment or substantive evidence of guilt because it violates Due Process. *Doyle*, 426 U.S. at 619. The Court reasoned that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives such warnings." *Id.* at 618.

Alternatively, this Court has held that pre-arrest, pre-*Miranda* silence and post-arrest, pre-*Miranda* silence is admissible to impeach. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (holding that the fundamental unfairness in *Doyle* was not present for pre-arrest, pre-*Miranda* silence because the defendant was not induced to remain silent absent *Miranda* warnings); see *Fletcher v. Weir*, 455 U.S. at 606–07 (holding that absent *Miranda* warnings, post-arrest silence does not violate due process to impeach a defendant when he takes the stand). The Court reasoned that the "implicit assurance' upon which we have relied in our *Doyle* line of cases is

the right-to-remain-silent component of *Miranda*” and that the “Constitution does not prohibit the use for impeachment purposes of a defendant’s silence prior to arrest, or after arrest if no *Miranda* warnings are given.” *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (quoting *Jenkins*, 447 U.S. at 239). In light of this reasoning, the Court has noted that “[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.” *Brecht*, 507 U.S. at 628.

Thus, the substantive use of a defendant’s post-arrest, pre-*Miranda* silence lies in the realm of uncertainty, but the Court can conclude that such evidence is admissible because of the Court’s constitutional analysis provided in these cases. The impeachment and *Doyle* line of cases rest their holdings on fundamental fairness and Due Process concerns heavily relying on whether there has been an issuance of *Miranda* warnings, while the *Salinas* line of cases rest more on the invocation requirement and whether a defendant has been governmentally compelled to self-incriminate themselves. Therefore, given that *Miranda* warnings and custodial interrogation normally occur simultaneously, the substantive use of a defendant’s post-arrest, pre-*Miranda* silence should be admissible and would not violate the Fifth Amendment. In the concurrence with this view, Justice Stevens noted:

When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

Jenkins, 447 U.S. at 243–44 (Stevens, J., concurring). Because the police officers who arrested Coda did not ask questions where Coda could have incriminated himself, then Coda was under no compulsion to speak. Without issuing *Miranda* warnings and the compulsory elements of

custodial interrogation, Coda's silence is probative, admissible and does not violate the Fifth Amendment.

B. Allowing the Admission of Post-Arrest, Pre-Miranda and Pre-Interrogation Silence for Substantive Use Will Provide the Court with a Bright-Line Rule to Promote Efficiency for Law Enforcement Officers While Still Protecting One's Constitutional Rights.

This Court has yet to rule on whether the admissibility of a defendant's post-arrest, pre-*Miranda* and pre-interrogation silence for substantive use violates the Fifth Amendment of the United States Constitution. The need for a bright-line rule in this uncertain category of law is apparent, and the establishment of a rule will allow police officers to efficiently perform their duties while giving courts a starting basis to adjudicate a defendant's claim without going into a deep-dive of a constitutional analysis.

Currently, the Fourth, Fifth, Eighth, and Eleventh Circuits have all held that post-custody, pre-*Miranda* silence is admissible as evidence of guilt and that the issuance of *Miranda* rights should be the dispositive factor. Andrew M. Harper, *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 (2015). Thus, absent any government-induced compulsion that arises before custodial interrogation, the issuance of *Miranda* warnings should be the bright-line rule to apply in such a context because it not only reconciles with this Court's past precedent but will also provide clarity and efficiency to our legal justice system. For example, as set out in *Salinas v. Texas*, the Court justified the application of the invocation requirement and the issuance of *Miranda* warnings to be controlling because without clear notice of establishing the privilege, an arresting officer would be at a disadvantage to give a defendant the opportunity to "cure any potential self-incrimination through a grant of immunity." 570 U.S. at 183–84. Additionally, this "gives courts tasked with evaluating a Fifth Amendment claim a

contemporaneous record establishing the witness' reasons for refusing to answer." *Id.* By comporting with this rule, it also lets officers "avoid difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity." *Berghuis*, 560 U.S. at 381.

The need for a clear standard regarding admissibility of post-arrest, pre-*Miranda* and pre-interrogation silence is necessary in order to achieve this goal. Without overruling this Court's previous holding in *Salinas* and absent any form of compulsion before interrogation, the Court can establish that the invocation requirement and the issuance of *Miranda* warnings should be the bright-line rule because it will promote a clear, straightforward standard without having to do a case-by-case analysis into every situation regarding silence evidence. This not only will be clear and easy for courts to reconcile, but will also allow officers to perform their duties without having to guess if a defendant's ambiguous act invokes the privilege or not. This rule will protect a defendant's constitutional rights, will eliminate costly litigation, and will eliminate the need for the Court to overrule past precedent regarding the issue.

In contrast, the Second, Seventh, Ninth, and District of Columbia Circuits have all held that the admissibility of post-arrest, pre-*Miranda* silence violates the Fifth Amendment and that the privilege against self-incrimination is triggered at the outset of arrest. *Harper*, *supra*, at 1773–74. This should not be the bright-line rule adopted by the Court because of the Court's past precedent regarding the issuance of *Miranda* warnings and the invocation requirement set out in *Salinas*. Most opinions this Court and the federal circuits have issued on this uncertain topic have gone through extensive case-by-case and constitutional analysis. This is not only costly to the Court by preventing it from resolving other important issues, but also creates ambiguity to one of our country's most sacred constitutional rights. Additionally, Coda and these circuits believe that

if custody isn't the trigger mechanism for establishing your Fifth Amendment rights then police will delay interrogating suspects to manufacture silence. R. at 9–10.

This argument fails for a few reasons. First, as the district court properly found, “[a]n arrestee can simply assert his Fifth Amendment right to remain silent.” R. at 10. By doing this, it automatically ceases any further comments by police or interrogating officers. Second, by barring anything the defendant says at the outset of arrest, this would discourage suspects from eliciting crucial information or confessing to a crime, which would be beneficial to our justice system. Lastly, all evidence, especially silence evidence, that can be admitted in court is crucial to derive a fair verdict and “silence is often evidence of the most persuasive character.” *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–54 (1923).

Absent any governmental compulsion, this bright-line rule of requiring invocation of the privilege against self-incrimination and requiring the issuance of *Miranda* warnings is essential because it promotes law enforcement and judicial efficiency, protects an individual's constitutional rights, and produces predictable and consistent results in its application. Because Coda did not expressly or implicitly invoke his privilege against self-incrimination, did not meet any exceptions under the invocation requirement, and the arresting officers did not give Coda the implicit assurance from *Miranda* warnings, his post-arrest, pre-*Miranda* and pre-interrogation silence is admissible, and this Court should affirm the district court's analysis by adopting this clear standard to resolve this controversial issue.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeal for the Thirteenth Circuit in all respects.

Respectfully submitted,

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