

Brief on the Merits  
No. 21-125

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**IN THE SUPREME COURT  
OF THE UNITED STATES**

October Term, 2021

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**AUSTIN CODA,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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Team 30  
*Counsel for Respondent*

## QUESTIONS PRESENTED

1. Whether a pre-indictment delay which causes actual prejudice violates the Fifth Amendment to the United States Constitution, despite the absence of evidence of bad faith on the Government's part.
2. Whether admission of an accused's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment privilege against self-incrimination, absent a showing that such evidence was compelled and testimonial.

## TABLE OF CONTENTS

|   |     |
|---|-----|
| QUESTIONS PRESENTED.....  | i   |
| TABLE OF CONTENTS.....  | ii  |
| TABLE OF AUTHORITIES.....   | iii |
| STATEMENT OF THE CASE.....  | 1   |
| SUMMARY OF ARGUMENTS.....   | 4   |
| ARGUMENT.....   | 6   |
| I. THE GOVERNMENT’S DELAY DID NOT CREATE A DUE PROCESS VIOLATION BECAUSE THERE WAS NO EVIDENCE OF BAD FAITH ON THE GOVERNMENT’S PART.....   | 6   |
| A. The Government’s delay was not an intentional tactical maneuver to gain an advantage over the Petitioner, therefore the Petitioner failed to establish one of the required elements for a Due Process violation.....   | 7   |
| B. Even if the Pre-indictment delay was found to be a result of negligence or recklessness, precedent supports the conclusion that the delay still does not rise to the level of a Constitutional violation.....  | 9   |
| II. ADMISSION OF THE PETITIONER’S POST-ARREST BUT PRE- <i>MIRANDA</i> AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT DOES NOT VIOLATE THE FIFTH AMENDMENT BECAUSE THE PETITIONER FAILED TO MAKE A TIMELY AND UNAMBIGUOUS ASSERTION OF THE PRIVILEGE ..... | 10  |
| A. The Petitioner failed to prove that the two “well-defined” exceptions to the general principle must apply in this matter. ....   | 13  |
| i. The first exception to the general rule is inapplicable here because the Petitioner was not required to take the stand at his own trial.....   | 14  |
| ii. The Petitioner’s failure to invoke the Fifth Amendment privilege must not be excused because the Petitioner was under no compulsion to speak.....   | 15  |
| B. The admission of Petitioner’s post-arrest but pre- <i>Miranda</i> and pre-interrogation silence as substantive evidence of guilt furthers common sense considerations and public policy.....   | 17  |
| CONCLUSION.....   | 18  |

## TABLE OF AUTHORITIES

### **UNITED STATES SUPREME COURT**

|  |                   |
|--|-------------------|
| <i>Berghuis v. Thompkins</i> ,<br>560 U.S. 370 (2010).....     | 11                |
| <i>Davis v. United States</i> ,<br>512 U.S. 452 (1994).....    | 11                |
| <i>Fletcher v. Weir</i> ,<br>455 U.S. 603 (1982).....          | 16                |
| <i>Griffin v. California</i> ,<br>380 U.S. 609 (1965).....     | 14                |
| <i>Jenkins v. Anderson</i> ,<br>447 U.S. 231 (1980).....       | 15,16             |
| <i>Minnesota v. Murphy</i> ,<br>465 U.S. 420 (1984).....       | 12,13             |
| <i>Roberts v. United States</i> ,<br>445 U.S. 552 (1980).....  | 17                |
| <i>Salinas v. Texas</i> ,<br>570 U.S. 178 (2013) .....         | 11,12,13,14,15,17 |
| <i>United States v. Ewell</i> ,<br>383 U.S. 116 (1966) .....   | 6                 |
| <i>United States v. Lovasco</i> ,<br>431 U.S. 783 (1977) ..... | 6,7,8             |
| <i>United States v. Marion</i> ,<br>404 U.S. 307 (1971) .....  | 6,7,8,10          |

### **UNITED STATES COURT OF APPEALS**

|   |   |
|---|---|
| <i>Parker v. Burt</i> ,<br>595 F. App'x 595 (6th Cir. 2015) ..... | 9 |
| <i>Payne v. Rees</i> ,<br>738 F.2d 118 (6th Cir. 1984) .....      | 8 |

|   |       |
|---|-------|
| <i>United States v. Baltimore</i> ,<br>482 F. App'x 977 (6th Cir. 2012)) .....  | 7     |
| <i>United States v. Banks</i> ,<br>27 F. App'x 354 (6th Cir. 2001) .....        | 10    |
| <i>United States v. Brown</i> ,<br>959 F.2d 63 (6th Cir. 1992) .....            | 10    |
| <i>United States v. Crouch</i> ,<br>84 F.3d 1497 (5th Cir. 1996) .....          | 6,7   |
| <i>United States v. Frazier</i> ,<br>408 F.3d 1102 (8th Cir. 2005).....         | 13,15 |
| <i>United States v. Jackson</i> ,<br>22 F. App'x 396 (6th Cir. 2001) .....      | 10    |
| <i>United States v. Lindstrom</i> ,<br>698 F. 2d 1154 (11th Cir. 1983) .....    | 9     |
| <i>United States v. Rivera</i> ,<br>944 F.2d 1563 (11th Cir. 1991) .....        | 16    |
| <i>United States v. Rogers</i> ,<br>118 F.3d 466 (6th Cir. 1997) .....          | 10    |
| <i>United States v. Sebetich</i> ,<br>776 F.2d 412 (3d Cir. 1985) .....         | 8,9   |
| <br><b><u>OTHER CASES</u></b>   |       |
| <i>People v. Tom</i> ,<br>59 Cal. 4th 1210 (2014).....                          | 14,15 |
| <i>People v. Schollaert</i> ,<br>194 Mich. App. 158 (1992) .....                | 17    |
| <i>State v. Johnson</i> ,<br>811 N.W.2d 136 (Minn.Ct.App.2012).....             | 16,17 |
| <i>United States v. Burks</i> ,<br>316 F. Supp. 3d 1036 (M.D. Tenn. 2018) ..... | 7     |

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. V .....11

**STATUTES**

18 U.S.C. §844(i) .....2

## **STATEMENT OF THE CASE**

The Petitioner, Austin Coda, owned a hardware store in the small rural town of Plainview, which was on the border between East Virginia and North Carolina. R. at 1. The Petitioner opened the hardware store in January 2002 and was the only store serving the area at the time. R. at 1. Due to the ideal location of the business, the business became profitable and gained a large customer base. R. at 1. Unfortunately, the profitability of the hardware store declined significantly due to the 2008 recession and the opening of a large chain store nearby. R. at 1. By 2010, the declining profit margin made it difficult for the Petitioner to generate enough revenue to preserve the building and conduct the business. R. at 1.

In December of 2010, an explosion destroyed the hardware store. R. at 1. Thereafter, the local fire investigators and Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) agents commenced an investigation into the cause of the explosion. R. at 2. The initial investigation suggested that the fire was caused by an old, faulty gas line. R. at 2. However, the Federal Bureau of Investigation (FBI) received information from Sam Johnson, the Petitioner's neighbor, and close friend, suggesting that the Petitioner may have intentionally caused the explosion. R. at 2. Johnson informed the FBI of the Petitioner's exhausted personal and business finances, and that the Petitioner obtained an insurance policy that covered the store in cases of total loss. R. at 2. Johnson also informed the FBI of the Petitioner's behavior during the week of the accident and described him as being "very anxious and paranoid." R. at 2. Based on this information, the FBI reasonably believed that the Petitioner may have had some involvement in the explosion and immediately informed the United States Attorney's Office. R. at 2.

Upon receiving the information from the FBI, the U.S. Attorney's Office marked the case as "low-priority" because, at the time, the Petitioner was being prosecuted for unrelated state charges and the Attorney's Office believed it would be inconvenient to transport him during that time. R. at 2. At the conclusion of the Petitioner's state proceedings, there was a shift in political pressures which prioritized prosecuting drug-related offenses. R. at 2. Although the Petitioner's case never increased in priority, it was reviewed and passed among Assistant U.S. Attorneys (AUSA) in the department. R. at 2.

In 2019, the AUSA assigned to the Petitioner's case noticed that the statute of limitation was about to end and immediately ordered the Petitioner's apprehension and indictment. R. at 2. During the Petitioner's arrest, Special Agent Park informed him of the charges against him. R. at 7. Ironically, instead of asserting an alibi defense, Coda remained silent. R. at 7. The Agents subsequently read the Petitioner his *Miranda* rights once they reached the detention center. R. at 7.

The indictment alleged, based on the testimony of his close friend, that the Petitioner destroyed his store to claim insurance proceeds. R. at 3. The Petitioner was indicted under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. R. at 3. The Petitioner moved to dismiss the indictment on the grounds that the pre-indictment delay violated the Fifth Amendment Due Process Clause. R. at 3. During the evidentiary hearing, the Petitioner proffered testimony that he would be unable to produce testimony or records because during the delay the bus records were no longer stored and individuals who could have served as alibis passed away or were diagnosed with dementia. R. at 3. The Petitioner also moved to suppress the evidence of his silence on the grounds that its



admission would violate his Fifth Amendment right. R. at 6-7. The Government seeks to admit the Petitioner's silence as substantive evidence of his guilt. R. at 7.

The U.S. District Court for the District of East Virginia denied the motion to dismiss the indictment, ruling that the government's pre-indictment delay does not violate the Due Process Clause because there is no evidence of governmental malintent. R. at 6. The court also denied the motion to suppress the Petitioner's silence as substantive evidence of guilt because of its relevance and potentially incriminating nature. R. at 10. The U.S. Court of Appeals for the Thirteenth Circuit adopted the District court's thorough analysis on both issues and affirmed the rulings. R. at 12.

## SUMMARY OF THE ARGUMENT

This case involves an overreaching Petitioner grasping to minimal evidence in hopes of obtaining a motion to dismiss the indictment and a motion to suppress his silence as substantive evidence of guilt. In order to adhere to long standing precedent, the lower courts' denial of the Petitioner's frivolous pre-trial motions must be affirmed.

The Petitioner's Due Process claim deriving from a pre-indictment delay warrants dismissal because the Petitioner failed to prove bad faith. Admittedly, there is no dispute that there has been actual prejudice due to the unintentional pre-indictment delay, however, precedent requires the Petitioner to prove actual prejudice and bad faith, which he failed to do. Here, the Petitioner made no attempt to prove bad faith. To the contrary, the record only references governmental oversight and the government's authority to prioritize cases as it deems fit. However, none of this amounts to establishing bad faith. Furthermore, the Petitioner failed to prove that the Government intentionally delayed indictment to gain a tactical advantage. Absent a showing of bad faith, the Government's pre-indictment delay does not rise to the level of a Due Process violation. Even if this Court found that the Government's delay was negligent or reckless, the Petitioner's claim would still be unsuccessful because the delay was neither purposeful nor intentional, therefore, it is insufficient to establish a Due Process violation.

Moreover, the Petitioner's Fifth Amendment claim vis-à-vis the admission of his silence warrants no merit before this Court. According to this Court's long held belief, the Fifth Amendment privilege against self-incrimination requires a witness to assert the benefit clearly and unambiguously. This Court has consistently ruled that maintaining silence is insufficient to invoke the privilege against self-incrimination. Here, the Petitioner maintained his silence when the agent informed him of the charges against him, which is insufficient to invoke the privilege

against self-incrimination. Moreover, the exceptions to the general rule does not excuse the Petitioner's failure to invoke the privilege. First, the Petitioner was not required to testify at his own trial. Second, the Petitioner was under no compulsion to speak at the time he maintained his silence. Therefore, the Fifth Amendment is not violated because, as this Court consistently ruled, the suspect must clearly assert his privilege against self-incrimination, which the Petitioner failed to do.

This Court should affirm the lower court's ruling because the Petitioner unsuccessfully established that the Government's pre-indictment delay amounted to a Due Process violation and the introduction of the post-arrest but pre-*Miranda* silence violated his Fifth Amendment privilege against self-incrimination.

## ARGUMENT

### **I. THE GOVERNMENT’S DELAY DID NOT CREATE A DUE PROCESS VIOLATION BECAUSE THERE WAS NO EVIDENCE OF BAD FAITH ON THE GOVERNMENT’S PART.**

The Government’s indictment of the Petitioner, Austin Coda, was both valid and just.

This Court’s analysis in *United States v. Ewell* emphasized that the statute of limitations establishes “the primary guarantee against bringing overly stale criminal charges.” 383 U.S. 116, 122 (1966). The indictment, in this case, was within the statute of limitation and the circumstances surrounding the delay did not give rise to a Due Process violation. Therefore, the Petitioner is not entitled to the dismissal of legitimate charges due to pre-indictment delay.

Congress has adopted statutes of limitations for the purpose of safeguarding boundaries relating to unfair delay. This indictment fell within the statute of limitations and therefore Congress’ intent to avoid unjust delay was fulfilled. This Court in *United States v. Marion* and *United States v. Lovasco*, recognized that statute of limitations only defines the outer limits of prosecution “beyond which there would be an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.” 404 U.S. 307 (1971); 431 U.S. 783 (1977). Clearly, this is not the case here. This Court ruled that “in instances where the statute of limitations has not run. . . a claim of pre-indictment delay absent some bad faith or improper purpose” is not recognized. *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996). The Petitioner cannot claim, prove, or demonstrate that the indictment was outside of the statute of limitation or that the delay was done in bad faith or for an improper purpose.

The Petitioner’s claim for pre-indictment delay simply fails to clear the hurdles needed to prove a constitutional violation. To establish a successful Due Process violation for pre-

indictment delay, the Petitioner must show (1) actual prejudice and (2) bad faith. It is undisputed that the pre-indictment delay caused, albeit actual prejudice, however the prejudice alone is not enough to satisfy the cause of action. R. at 5. However, this Court in *Marion*, 404 U.S. 307 (1971), and *Lovasco*, 431 U.S. 783 (1977), emphasized the existence of a “two-prong test” which required proof of bad faith. The court in *United States v. Crouch* emphatically stated that the two prongs are incomparable. 84 F. 3d 1497, 1512 (5th Cir. 1996). The court further found that “there is no body of precedent or historic practice to look to for guidance” to determine whether the government’s justification outweighs the defendant’s prejudice.” *Id.* However, this Court consistently ruled that “proof of prejudice is necessary but not [a] sufficient element [for] a due process claim.” *Lovasco*, 431 U.S. at 790; *see also Marion*, 404 U.S. at 307. This Court’s precedent has emphasized the need to satisfy the second prong of the test. Since “a defendant must meet both parts of the test to warrant dismissal of the indictment, a court need only address one part if the defendant’s showing on that part is not sufficient’ and that includes focusing solely on the second part of the test.” *United States v. Burks*, 316 F. Supp. 3d 1036 (M.D. Tenn. 2018) (citing *United States v. Baltimore*, 482 F. App’x 977, 981 (6th Cir. 2012)). Here, the Petitioner made no attempt to address the bad faith prong of the analysis or to prove malice on the part of the Government. R. at 3. Therefore, the Petitioner’s claim falls short of the required analysis and fails to establish a Due Process violation.

**A. The Government’s delay was not an intentional tactical maneuver to gain an advantage over the Petitioner, therefore the Petitioner failed to establish one of the required elements for a Due Process violation.**

The Petitioner failed to satisfy the elements required to establish a Due Process violation. The pre-indictment delay must not only be intentional but must also be done in bad faith. According to precedent, this Court and several Circuit courts only recognize Due Process

violations where the delays were caused by “an intentional device to gain [a] tactical advantage.” *Marion*, 404 U.S. at 465. In *Lovasco*, this Court unambiguously ruled that “the government’s delay, which was not occasioned by a desire to gain a tactical advantage over defendant, [does not] violate fundamental conceptions of justice” or violate the defendant’s right to a speedy trial. 431 U.S. at 790-92. Here, the Government’s desire was in no way occasioned by a desire to gain a tactical advantage nor was the delay intentionally manufactured. Plainly, the U.S. Attorney’s Office has the authority to prioritize its cases as it deems fit. The record indicates the changing considerations surrounding governmental work that contributed to the delay. R. at 2.

Furthermore, the Constitution, prior court rulings, and “the Due Process Clause [do] not permit courts to abort criminal prosecution simply because they disagree with a prosecutor’s judgment as to when to seek an indictment.” *Lovasco*, 431 U.S. at 790. Prioritizing cases and managing the ongoing political pressures beyond their control cannot be seen as intentional devices aimed at manufacturing tactical advantages over the Petitioner. R. at 2. More importantly, this commonplace phenomenon must not provide the Petitioner the opportunity to circumvent criminal prosecution.

Proof of the Government’s intent is a crucial factor when assessing whether the pre-indictment delay was done in bad faith. The Petitioner must show either that “the government [had] no valid reason for the delay or that there was some tactical advantage sought to be obtained by the delay.” *Payne v. Rees*, 738 F.2d 118, 122 (6th Cir. 1984). The court’s reasoning in *United States v. Sebetich* carries particular emphasis where, as here, a claim predicated on inadequate governmental oversight failed to establish a Due Process violation. 776 F.2d 412, 430 (3d Cir. 1985) (confirming that the Petitioner must prove that the government’s delay was a deliberate device to gain an advantage, absent such proof there can be no bad faith). The

defendants in *Sebetich*, analogous to the Petitioner in this case, “have produced no evidence tending to suggest that the delay was a deliberate tactical maneuver by the government.” 776 F.2d at 430 (citing *United States v. Lindstrom*, 698 F. 2d 1154, 1158 (11th Cir. 1983)). The pre-indictment delays, in both our present case and *Sebetich*, were because of government happenstance. Therefore, there was no presence of ill intent or a deceptive maneuver to gain an advantage.

To avoid the unwarranted dismissal of criminal charges, the courts have placed safeguards surrounding the Due Process violation inquiry that need to be met. The Petitioner fails to proffer the necessary evidence to establish bad faith, thereby leaving half of the inquiry untouched, unaddressed, and unanswered. The evidence presented during the evidentiary hearing makes no mention of the Government’s intent to gain a tactical advantage but rather focuses solely on the Petitioner’s inability to produce an alibi. R. at 3. Absent such proof, the Petitioner unequivocally failed to prove one of the two required elements for dismissal. Therefore, this Court should uphold the lower court’s ruling and deny the motion to dismiss the indictment on the grounds of pre-indictment delay.

**B. Even if the Pre-indictment delay was found to be a result of negligence or recklessness, precedent supports the conclusion that the delay still does not rise to the level of a Constitutional violation.**

Even if the Court found that the governmental oversight was negligent or reckless, the Petitioner’s claim still does not satisfy the bad faith element. The court in *Sebetich* found that a mere governmental mix-up, like the one in our present case, was not enough to fulfill the bad faith prong of the analysis or warrant dismissal of charges. 776 F. 2d at 430. While the alleged facts “may support an inference of negligence or recklessness, these mental states are insufficient to show improper intent” on the part of the Government. *Parker v. Burt*, 595 F. App'x 595, 601

(6th Cir. 2015). The pre-indictment delay must be clearly purposeful or intentional, therefore allegations of reckless or negligent delay are simply insufficient. *Id.*; *see also United States v. Jackson*, 22 F. App'x 396 (6th Cir. 2001); *United States v. Rogers*, 118 F.3d 466, 476 (6th Cir. 1997). Moreover, precedent suggests that delays due to “simple negligence are not a concerted effort by the government to gain an advantage,” and do not create the existence of a Due Process violation. *United States v. Banks*, 27 F. App'x 354 (6th Cir. 2001); *see also United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992). The intent behind the governmental delay is a crucial component of the analysis and the Petitioner cannot prove malintent.

Although there is a split in the Circuit courts’ rulings, this Court’s analysis and ruling in *Marion* supports the long held standard that negligence is not enough to purport a constitutional violation. 404 U.S. 307 (1971). In *Marion*, the defendant argued that the delay was due to the government’s negligence, however, this Court ultimately held that the defendant failed to show that the pre-indictment delay violated the Due Process Clause. *Id.* at 310. Furthermore, this Court stated that the lack of proof that the “Government intentionally delayed to gain some tactical advantage over appellees” created no constitutional violation. *Id.* at 325. Thus, absent proof of some sort of deceptive intent or purpose, the Petitioner fails to satisfy the bad faith prong of the analysis and therefore fails to adequately purport a constitutional violation. Accordingly, this Court should uphold the ruling of the lower court.

## **II. ADMISSION OF THE PETITIONER’S POST-ARREST BUT PRE-MIRANDA AND PRE-INTERROGATION SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT DOES NOT VIOLATE THE FIFTH AMENDMENT BECAUSE THE PETITIONER FAILED TO MAKE A TIMELY AND UNAMBIGUOUS ASSERTION OF THE PRIVILEGE.**

In addition to the Petitioner’s failure to prove that the Government’s pre-indictment delay amounted to a Due Process violation, the Petitioner’s challenge to the admission of the post-



arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt must fail because the admission does not trigger the privileges guaranteed by the Fifth Amendment of the Constitution.

The Fifth Amendment provides, in relevant part, that “[n]o person [shall] be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. However, this privilege is not absolute and unqualified. Furthermore, the Fifth Amendment “concerns itself primarily with the admission of statements, not the exclusion of silence.” *Salinas v. Texas*, 570 U.S. 178, 183 (2013). The scope of the Fifth Amendment’s privilege against self-incrimination must not be expanded to accommodate the Petitioner’s misplaced demand to excuse a compelling aspect of the Government’s case.

According to precedent, this Court and several Circuit courts have consistently upheld the general principle that the Government is entitled to everyone’s testimony. *See generally Davis v. United States*, 512 U.S. 452 (1994) (“[A] suspect who wishes to invoke the right to counsel during a custodial interview must do so unambiguously.”); *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (“there is no principled reason to adopt different standards for determining when an accused has invoked the right to remain silent and the right to counsel at issue in *Davis*. [Thus,] an accused who wants to invoke the right to remain silent must likewise do so unambiguously.”).

Admittedly, this general principle is set aside for only two well-defined exceptions, which the Petitioner fails to prove. First, the general principle is inapplicable if the Petitioner was required to take the stand and assert the privilege at his or her own trial. The first exception is irrelevant to the facts and circumstances of this case because the Government did not require the Petitioner to assert the privilege at his own trial. Second, the general principle is excused if the Petitioner was under compulsion to speak. As the record indicates, the petitioner was under no

compulsion to speak; thus, the protections of the Fifth Amendment were not triggered. R. at 7. Therefore, the lower court properly denied Petitioner's motion to suppress the evidence, which this Court should affirm.

This Court, in *Salinas*, ruled that the general principle "prevents the privilege against self-incrimination from shielding information not properly within its scope," which justifies this Court's long held principle that a witness that "desires the protection of the privilege must claim it" at the time he relies on it. 570 U.S. at 183 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). In *Salinas*, the petitioner, without being placed in custody and pre-*Miranda*, voluntarily answered the police officer's questions about a murder, but immediately fell silent when asked about ballistics testing. *Id.* at 178. At trial, the prosecution introduced the petitioner's silence as evidence of guilt, which led to the petitioner's conviction. *Id.* This Court ruled that the petitioner's Fifth Amendment claim failed because he did not expressly invoke the privilege against self-incrimination in response to the officer's questions. *Id.* at 181. This Court reasoned, "insisting witnesses [to] expressly invoke the privilege 'assures that the Government obtains all the information to which it is entitled.'" *Id.* at 184. Furthermore, this Court upheld the norm that a "suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." *Id.* at 188.

Here, the Petitioner's Fifth Amendment claim warrants dismissal because he failed to clearly invoke the privilege against self-incrimination. As the lower court properly ruled, *Salinas* controls because the Petitioner's post-arrest but pre-*Miranda* silence coincides with the Petitioner's arrest. The Petitioner maintained his silence immediately after the FBI agent informed him of the charges against him. The Petitioner's Fifth Amendment claim is unsuccessful because he did not expressly invoke his privilege against self-incrimination in

response to the agent informing him of the charges. This Court, in *Salinas*, ruled that the privilege against self-incrimination is not self-executing, and thus, a witness who intends to benefit from the privilege must unambiguously claim it. *Id.* at 181; *see also Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). As this Court has noted, there is no ritualistic formula required to invoke the privilege but merely standing mute is far from sufficient to invoke the privilege. *See Salinas*, 570 U.S. at 181 (2013).

The Petitioner, on the other hand, argues that it is unfair to require the accused to assert the privilege against self-incrimination because, unlike law enforcement agents, the accused are not knowledgeable about the particulars of the legal doctrine. However, the Petitioner's argument is misguided because it unreasonably broadens the scope of the Fifth Amendment. As this Court addressed in *Salinas*, the Fifth Amendment guarantees that “no one may be ‘compelled in any criminal case to be a witness against himself;’[furthermore] it does not establish an unqualified ‘right to remain silent.’” 570 U.S. at 189. Therefore, a witness' constitutional right to “refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.” *Id.* The privilege against self-incrimination was not established to ease the potential burdens of a witness. The “core protection afforded by the Fifth Amendment is [solely] a prohibition on compelling a criminal defendant to testify against himself at trial,” which is not the case here. *United States v. Frazier*, 408 F.3d 1102, 1109 (8th Cir. 2005).

Therefore, the Fifth Amendment is not violated because, as this Court expressly ruled in *Salinas*, the suspect must clearly assert his privilege against self-incrimination, which the Petitioner failed to do.

**A. The Petitioner failed to prove that the two “well-defined” exceptions to the general principle must apply in this matter.**

The Petitioner’s Fifth Amendment claim must fail because the exceptions to the general principle are inapplicable in this case. The general principle, which requires a witness who intends to rely on the privilege against self-incrimination to clearly invoke it, has two well-defined exceptions. *People v. Tom*, 59 Cal. 4th 1210, 1228 (2014). First, a criminal defendant need not take the stand and assert the privilege at his or her own trial. *Id.* Second, “‘a witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary.’” *Id.* (quoting *Salinas*, 570 U.S. at 184).

**i. The first exception to the general rule is inapplicable here because the Petitioner was not required to take the stand at his own trial.**

The Petitioner’s reliance on the first exception is inappropriate because it is not relevant in this case. As the record indicates, the Petitioner was not required to take the stand and assert the privilege against self-incrimination at his own trial. R. at 7. This Court, in *Griffin v. California*, held that a “criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an ‘absolute right not to testify.’” 380 U.S. 609, 613–15 (1965). Here, the Petitioner’s absolute right not to testify at trial was not at issue when he maintained his silence, thus, the first exception is inapplicable. As this Court consistently upheld, the general principle requires the Petitioner to unambiguously assert the privilege immediately after notification of the charges against him instead of remaining mute. The first exception must not safeguard the Petitioner’s failure to invoke the privilege because the Petitioner had no unqualified right during the interaction with the FBI agent to remain silent, thus, his silence falls beyond the clear bounds of the *Griffin* exception. *See Salinas*, 570 U.S. at 184.

**ii. The Petitioner’s failure to invoke the Fifth Amendment privilege must not be excused because the Petitioner was under no compulsion to speak.**

Furthermore, the Petitioner’s reliance on the second exception is erroneous because he was under no compulsion to speak when the general principle required him to clearly invoke the privilege. According to the second exception, a “witness’ failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. This exception applies when the government forces a choice between self-incrimination and some important public benefit.” *Tom*, 59 Cal. 4th at 1230 (citing *Salinas*, 570 U.S. at 184).

The Eighth Circuit in *United States v. Frazier* ruled that the government's use in its case-in-chief of a defendant's post arrest but pre-*Miranda* silence as evidence of guilt did not violate a defendant's Fifth Amendment rights. 408 F.3d 1102, 1111 (8th Cir. 2005). In *Frazier*, police officers stopped a truck driven by the defendant. *Id.* at 1106. After the defendant gave the officers permission to search the vehicle, the officers found boxes filled with illegal substances. *Id.* at 1106–07. At trial, the arresting officer testified that the defendant did not say anything when officers told him he was being arrested for possession of a controlled substance. *Id.* at 1107. Following his jury-trial conviction, the defendant argued that the use of the defendant's post-arrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. *Id.* at 1109. The court focused on the concurring opinion by Justice Stevens in *Jenkins*, in which Justice Stevens noted that “the ‘privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no compulsion to speak.’” *Frazier*, 408 F.3d at 1110 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 241(1980) (Stevens, J., concurring)). The court reasoned that “the crux of the issue before it was to determine at what point a defendant is under official compulsion to speak because silence in the face of such

compulsion constitutes a ‘statement’ for purposes of a Fifth Amendment inquiry.” *Id.* The court concluded that the defendant was under no compulsion to speak at the time he maintained his silence. *Id.* The court found that although “[the] defendant was under arrest, there was no governmental action at that point inducing his silence [, and it was] not as if [the defendant] refused to answer questions in the face of interrogation.” *Id.* at 1111.

Similarly, the Petitioner was under no compulsion to speak, therefore, the use of his post-arrest, pre-*Miranda* silence as substantive evidence of guilt does not constitute an impermissible use under the Fifth Amendment. *See id.* at 1110–11. Although the Petitioner was under arrest, there was no governmental action that induced his silence. This Court, in *Fletcher v. Weir*, noted that an arrest by itself is not governmental action that implicitly induces a defendant to remain silent. 455 U.S. 603, 606 (1982). Here, the Petitioner maintained his silence when the agent informed the Petitioner of the charges against him. Presumably, the notification of the charges against the Petitioner does not amount to governmental compulsion. *See also State v. Johnson* 811 N.W.2d 136, 148 (Minn. Ct. App. 2012) (“the arrestee was under no government-imposed compulsion to speak, [thus,] evidence of his silence did not implicate the Fifth Amendment.”). Therefore, the Fifth Amendment does not bar the introduction of the Petitioner’s post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt because the Petitioner was not under governmental compulsion. *See generally United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (“Where ‘no governmental action induce[s] the defendant to remain silent[,]’ the *Miranda*-based fairness rationale does not control.”); *Jenkins v. Anderson*, 447 U.S. 231, 243-44 (1980) (“When a citizen is under no official compulsion whatever, ether 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.”); *State v. Johnson*, 811 N.W.2d at 148 (“the state did not

compel Johnson ‘to speak at the time of his silence.’”); *People v. Schollaert*, 194 Mich. App. 158 (1992) (“because ‘defendant’s silence did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings, it was not a constitutionally protected silence.”).

**B. The admission of Petitioner’s post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt furthers common sense considerations and public policy.**

Public policy concerns and common-sense considerations also demand that the Petitioner’s Fifth Amendment claim fail.

In terms of common-sense considerations, any reasonable person in the Petitioner’s position would have immediately informed the agent of his alibi defense rather than maintaining his silence upon notification of the charges against him. As the lower courts properly concluded, common sense suggests that the petitioner maintained his silence because, at the time of his arrest, he did not have an alibi defense. It would be a gross injustice if the jury did not have the full facts of the events, including the officer’s common-sense perceptions.

Furthermore, public policy justifies the admission of Petitioner’s post-arrest but pre-*Miranda* silence. Public policy demands that triers of fact are presented with a full case prior to deliberating on a matter. *See Salinas*, 570 U.S. at 183-84; *see also Roberts v. United States*, 445 U.S. 552, 560 (1980) (“A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give”). Moreover, the Petitioner’s argument that requiring the accused to invoke the Fifth Amendment privilege would create an incentive for police to delay interrogation to manufacture silence is misplaced. An accused can simply assert his Fifth Amendment right to remain silent, which undermines any incentive to manufacture silence. The Petitioner’s unwarranted fear must not circumvent the jury’s duty to consider all evidence properly within its authority, including an agent’s common-sense observations.

## **CONCLUSION**

For the foregoing reasons, this Court must affirm the Thirteenth Circuit's ruling, and dismiss the Petitioner's unsuccessful claims.

Respectfully submitted,

*Team 30*