

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
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
EAST VIRGINIA.

BRIEF FOR THE RESPONDANT

TEAM 33
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS **II**

TABLE OF AUTHORITIES **III**

QUESTIONS PRESENTED **VII**

STATEMENT OF THE CASE..... **1**

I. STATEMENT OF THE FACTS..... **1**

II. PROCEDURAL HISTORY..... **2**

SUMMARY OF THE ARGUMENT **3**

ARGUMENT..... **4**

I. DUE PROCESS IS NOT VIOLATED BY PRE-INDICTMENT DELAY ABSENT BAD FAITH ON THE PART OF THE GOVERNMENT...... **4**

A. The bad faith intentional delay standard protects due process rights by preventing unnecessary and rushed indictments. **6**

B. The two-prong pre-indictment delay standard promotes separation of powers by respecting the legislature’s authority to establish statutes of limitations..... **9**

C. Adoption of the bright line test for pre-indictment delay promotes consistency within the judiciary. **10**

D. Even under the balancing approach, the Government’s good faith reasons for pre-indictment delay prevail over Coda’s lack of substantial prejudice..... **12**

 i. Coda failed to provide evidence of substantial prejudice. **13**

 ii. The Government’s justification for delay is substantial due to Coda’s state proceedings and the proper prioritization of Government resources..... **15**

II. THE GOVERNMENT’S USE OF POST-ARREST BUT PRE-MIRANDA SILENCE AS EVIDENCE OF SUBSTANTIVE GUILT DOES NOT VIOLATE THE FIFTH AMENDMENT..... **16**

A. The Government did not compel Coda to renounce his Fifth Amendment rights post-arrest but before receiving the Miranda warning. **18**

B. A defendant must unambiguously assert his Fifth Amendment rights. **20**

C. The Government made no implicit assurance that Coda’s silence would not be used against him...... **22**

CONCLUSION **23**

APPENDIX..... **24**

TABLE OF AUTHORITIES

Constitutional Amendments

U.S. Const. Amend. V..... *passim*
U.S. Const. Amend VI..... 4
U.S. Const. Amend. XIV..... 17

Federal Statutes

18 U.S.C. § 844(i)..... 2
18 U.S.C § 3295..... 2, 10

Supreme Court Cases

Arizona v. Youngblood,
488 U.S. 51 (1988)..... 6
Berghuis v. Thomkins,
560 U.S. 370 (2010) 20, 21
Daniels v. Williams,
474 U.S. 327 (1986)..... 6
Davis v. United States
512 U.S. 452 (1994) 20
Doyle v. Ohio,
426 U.S. 610 (1976)17, 22
Fletcher v. Weir,
455 U.S. 603 (1982) *passim*
Griffin v. California,
380 U.S. 609 (1965)..... 16
Jenkins v. Anderson,
447 U.S. 231 (1980)..... 17, 18
Minnesota v. Murphy,
465 U.S. 420 (1984) 20

<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	16, 17, 18
<i>Mooney v. Holohan</i> , 294 U.S. 103 (1935)	4
<i>Rochin v. California</i> 342 U.S. 165 (1952)	11
<i>Roberts v. United States</i> , 445 U.S. 552 (1980).....	16, 18, 20
<i>Salinas v. Texas</i> , 570 U.S. 178 (2013)	<i>passim</i>
<i>United States v. Ewell</i> , 383 U.S. 116 (1966).....	7
<i>United States v. Gouveia</i> , 467 U.S. 180 (1984).....	9
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	<i>passim</i>
<i>United States v. Marion</i> , 404 U.S. 307 (1971).....	4, 5, 6, 9
<i>United States v. Monia</i> , 317 U.S. 424 (1943).....	20
<i>Federal Appellate Cases</i>	
<i>Howell v. Barker</i> , 904 F.2d 889 (4th Cir. 1990)	5, 12, 15
<i>Jones v. Angelone</i> , 94 F.3d 900 (4th Cir. 1996)	9, 13
<i>Stoner v. Graddick</i> , 751 F.2d 1535 (11th Cir. 1985).....	13
<i>United States v. Brown</i> , 667 F.2d 566 (6th Cir. 1982).....	5
<i>United States v. Crooks</i> , 766 F.2d, 7 (1st Cir. 1985)	15

<i>United States v. Crouch</i> , 84 F.3d 1487 (5th Cir. 1996).....	5, 11
<i>United States v. Engstrom</i> , 965 F.2d 836 (10th Cir. 1992).....	15
<i>United States v. Frazier</i> , 408 F.3d 1102 (8th Cir. 2005)	17, 19
<i>United States v. Hernandez</i> , 948 F.2d 316 (7th Cir. 1991).....	17
<i>United States v. Love</i> , 767 F.2d 1052, 1063 (4th Cir. 1985)	17
<i>United States v. McGough</i> , 510 F.2d 598 (5th Cir. 1975)	13, 14
<i>United States v. Moore</i> , 104 F.3d 377 (D.C. Cir. 1997).....	17, 21
<i>United States v. Pardue</i> , 134 F.3d 1317 (7th Cir. 1998).....	9, 10
<i>United States v. Rivera</i> , 944 F.2d. 1563(11th Cir. 1991).....	17
<i>United States v. Sherlock</i> , 962 F.2d. 1349 (9th Cir. 1989).....	6, 12
<i>United States v. Salinas</i> 480 F.3d 750 (5th Cir. 2007)	22, 23
<i>United States v. Sowa</i> , 34 F.3d 447 (7th Cir. 1994)	8, 13, 15
<i>United States v. Whitehead</i> 200 F.3d. 634 (9th Cir. 2000)	17
<i>Other Authorities</i>	
Nolan S. Clark, <i>A Circuit Split on the Proper Standard for Pre-Indictment Delays with Governmental Negligence</i> , 50 Cumb. L. Rev. 529, 534 (2020).....	7

David S. Romantz,
*"You Have the Right to Remain Silent": A Case for the Use of Silence As Substantive
Proof of the Criminal Defendant's Guilt*, 38 Ind. L. Rev. 1, 54 (2005)..... 21

QUESTIONS PRESENTED

- I. Under the Fifth Amendment, does pre-indictment delay violate a defendant's due process rights when there is no evidence of bad faith on part of the Government?
- II. Under the Fifth Amendment, can the Government use evidence of a defendant's post arrest but pre-*Miranda* silence to prove its case-in-chief when the defendant failed to unambiguously assert his right against self-incrimination?

STATEMENT OF THE CASE

I. Statement of the Facts

Petitioner Austin Coda (“Coda”) owned a struggling hardware store in Plainview, East Virginia that served residents of both East Virginia and North Carolina. R. at 1. After the 2008 recession and the opening of a large chain store in Plainview in 2009, Coda began losing customers. R. at 1. By 2010, Coda’s store barely generated enough revenue to remain open, and Coda could not maintain proper upkeep of the building due to low profit margins. R. at 1.

On December 22, 2010, an explosion occurred at Coda’s hardware store. R. at 2. Fire destroyed the entire building. R. at 2. Agents of the local Federal Bureau of Alcohol, Tobacco, and Firearms investigated the scene R. at 2. They initially hypothesized that the cold weather caused an old gas line to leak, and that the gas leak caused the explosion. R. at 2. Shortly thereafter, Coda’s neighbor and close friend, Sam Johnson (“Johnson”) gave a tip to the Federal Bureau of Investigation (“FBI”). R. at 2. Johnson informed the FBI that Coda’s business and finances were in decline, but that Coda had maintained a total loss insurance policy for the hardware store. R. at 2. Johnson also commented that Coda appeared “very anxious and paranoid” the week of the explosion. R. at 2. With this information, the FBI suspected that Coda was responsible for the explosion and informed the United States Attorney’s Office (the “Government”). R. at 2.

The Government opened a case against Coda and marked it as “low priority.” R. at 2. The Government provided multiple justifications to support this designation. R. at 2. As Coda was concurrently being prosecuted for unrelated state charges, the Government determined it would be inconvenient to transport him back and forth between proceedings. R. at 2. Once Coda’s state proceedings finished, mounting political pressure caused high attorney turnover within the

Government. R. at 2. Consequentially, Coda’s case passed from one U.S. Attorney to another. R. at 2. Coda’s case did not increase in priority during that time. R. at 2.

On April 19, 2019—within the statute of limitations period provided by 18 U.S.C. § 3295—the Government arrested, brought into custody, and indicted Coda under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. R. at 2–3. FBI Special Agent Park arrested Coda and immediately listed the charges brought against him. R. at 7. Coda remained silent upon arrest. R. at 7. The FBI subsequently read Coda his *Miranda* rights after they reached the detention center before beginning any interrogation. R. at 7.

The Government alleged that Coda destroyed his store to claim insurance proceeds. R. at 3. At an evidentiary hearing, Coda offered an alibi that he was in New York the night of the explosion. R. at 3. Coda claimed to have taken a Greyhound bus to visit family, but no family members could corroborate the testimony because they were either deceased or suffering dementia. R. at 3. Moreover, Greyhound could not produce records to corroborate his ticket purchase because it only kept online ticket records for three years. R. at 3. As such, no records corroborating his defense are available. R. at 3.

II. Procedural History

Coda filed a Motion to Dismiss with the District Court of East Virginia claiming the Government’s pre-indictment delay caused substantial prejudice in violation of the Due Process Clause of the Fifth Amendment, notwithstanding an absence of evidence of bad faith on the part of the prosecution. R. at 11. The district court adopted the two-prong test requiring both actual prejudice and intentional delay to establish unconstitutional pre-indictment delay—the majority approach—over Coda’s minority approach of a balancing test and denied Coda’s Motion to

Dismiss. R. at 4–6. Coda separately filed a Motion to Suppress his post-arrest but pre-*Miranda* silence as evidence of substantive guilt in violation of his Fifth Amendment rights. R. at 7. The district court also denied this motion. R. at 10. Coda appealed the denial of his Motion to Dismiss and Motion to Suppress to the Thirteenth Circuit. R. at 11. The Thirteenth Circuit affirmed the district court’s decision. R. at 12. This Court granted Coda’s petition for certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

First, absent evidence of bad faith on the part of the Government, a defendant’s due process rights under the Fifth Amendment have not been violated by pre-indictment. The Due Process Clause of the Fifth Amendment requires dismissal of an indictment if a defendant can show that (1) the pre-indictment delay causes substantial prejudice to the defendant’s right to a fair trial and (2) that the delay was intentionally caused by the government to gain an advantage over the accused. An overwhelming majority of federal appellate courts have adopted a two-prong, bright-line test for deciding cases of pre-indictment delay, which requires that the defendant show evidence of both actual prejudice and bad faith in order to prevail. In contrast, a minority of courts employ a balancing test to consider whether the substantial prejudice experienced by the defendant outweighs the Government’s justifications for the delay. In order to further interests of due process under the Fifth Amendment, this Court should align with the majority and adopt the two-prong, bad faith intentional delay standard to account for the level of prosecutorial discretion necessary to perform thorough investigation prior to indictment, promote respect for the separation of powers between the judiciary and legislature, and ensure judicial consistency in pre-indictment delay cases. As the Government’s indictment of Coda fell squarely within the provided statute of limitations, his claim for a violation of due process for pre-

indictment delay necessarily fails, and this Court should affirm the decision of the Appellate Court.

Second, permitting the Government to use post-arrest but pre-*Miranda* silence as evidence of substantive guilt does not violate the Fifth Amendment. While recognizing the constitutional right against self-incrimination, this Court has increasingly permitted silence to be used as evidence in criminal proceedings. Evidence of a defendant's silence post-arrest, but pre-*Miranda* should be admissible because the defendant has not experienced any coercive government action inducing his silence, this Court's long-standing precedent requires the defendant to expressly invoke the protections of the Fifth Amendment, and the Government has made no implicit assurance not to use the defendant's silence. Therefore, under this Court's holding in *Salinas v. Texas*, evidence of Coda's silence *coinciding* with his arrest should be admissible as substantive evidence of guilt.

ARGUMENT

I. Due Process is Not Violated by Pre-Indictment Delay Absent Bad Faith on the Part of the Government.

Due process is not violated when pre-indictment delay occurs absent bad faith on the part of the Government. The Fifth Amendment Due Process Clause provides “No person shall . . . be deprived of life, liberty, or property, without due process of law.” Const. Amend. V. Due process safeguards “the liberty of the citizen against deprivation through the action of the state, [and] embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). This Court first recognized that pre-indictment delay could violate a defendant's due process rights in *United States v. Marion*, 404 U.S. 307, 325 (1971). Though the *Marion* Court rejected the notion that pre-indictment delay violated the defendants' Sixth Amendment right to a speedy trial, the Court instead held that “the

Due Process Clause of the Fifth Amendment require[s] dismissal of [an] indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Marion*, 404 U.S. at 324. Despite stating this broad standard, the Court declined to “determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.” *Id.*

Later, in *United States v. Lovasco*, this Court reaffirmed “that the Due Process Clause has a limited role to play in protecting against oppressive delay.” 431 U.S. 783, 789 (1977). The *Lovasco* Court affirmed that the due process inquiry for pre-indictment delay must consider the reasons for the delay and nature of the prejudice to the accused. *Id.* at 795. Under *Lovasco*, a pre-indictment delay causing actual prejudice did not violate the defendant’s due process rights. *Id.* at 785–96.

Read together, *Marion* and *Lovasco* lay the foundation for the differing approaches employed by the federal appellate courts regarding the standard for dismissal for pre-indictment delay. An overwhelming majority of courts have interpreted *Marion* and *Lovasco* as creating a two-prong, bright-line test requiring dismissal of a case for pre-indictment delay when the defendant shows (1) “substantial prejudice” and (2) “that the delay was an intentional device by the Government to gain a tactical advantage.” *United States v. Brown*, 667 F.2d 566, 568 (6th Cir. 1982); *see also United States v. Crouch*, 84 F.3d 1487, 1511–12 (5th Cir. 1996) (listing circuits which have adopted the two-prong approach). In contrast, a minority of federal appellate courts have interpreted *Marion* and *Lovasco* to instead require courts to employ a balancing test comparing the actual prejudice against the Government’s reasons for delay. *See, e.g., Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990) (determining whether the court “must balance the

defendant's prejudice against the Government's justification for delay”); *United States v. Sherlock*, 962 F.2d. 1349, 1353–54 (9th Cir. 1989) (same).

This Court should align with the majority of federal appellate courts and adopt the two-prong test, which requires defendants meet a bad faith intentional delay standard to gain a tactical advantage before dismissing a pre-indictment delay as a violation of due process. Historically, due process protections have only “been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis added). Moreover, this Court has stressed the importance of good faith versus bad faith intent where the Government is responsible for the loss of evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (discussing cases where the Supreme Court applied a bad faith standard to due process claims). This Court’s adoption of the two-prong, bad faith intentional delay standard will further due process interests by accounting for the level of prosecutorial discretion necessary to perform thorough investigation prior to indictment, promoting respect for the separation of powers between the judiciary and legislature, and ensuring judicial consistency in pre-indictment delay cases.

A. The bad faith intentional delay standard protects due process rights by preventing unnecessary and rushed indictments.

While the interests of justice and due process mandate prompt prosecutorial attention, requiring defendants to meet the bad faith intentional delay standard protects due process rights by preventing unnecessary and rushed indictments. This Court has long held that arrest is a “public act that may seriously interfere with the defendant's liberty.” *Marion*, 404 U.S. at 320. It would be unprofessional for a prosecutor to recommend an indictment on less than probable cause. *Lovasco*, 431 U.S. at 792. It should be equally apparent that prosecutors should not be required to file charges as soon as probable cause exists but before they are satisfied they will be

able to establish a suspect's guilt beyond a reasonable doubt. *Id.* In such a case, neither the Government's nor the defendant's "interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so." *Id.*; *see also United States v. Ewell*, 383 U.S. 116, 120 (1966) (reasoning that rushing prosecutors to indict once probable cause is established "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself"). For this reason, many courts give prosecutors deference in determining when to indict a person. *See Nolan S. Clark, A Circuit Split on the Proper Standard for Pre-Indictment Delays with Governmental Negligence*, 50 *Cumb. L. Rev.* 529, 534 (2020) (explaining the importance of prosecutorial discretion in pursuing indictments).

In *Lovasco*, this Court stated that prosecutors do not deviate from "fundamental conceptions of justice" when they defer indictments until both probable cause and a sense of a suspect's culpability beyond reasonable doubt have been established. *Lovasco*, 431 at 790–91. Rather, the Court reasoned that placing increased pressure on the Government to pursue indictments would increase unwarranted charges, add to the time during which defendant's stood accused but untried, pressure prosecutors into resolving doubtful cases in favor of prosecution, and "preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases." *Id.* at 791–94. Ultimately, providing prosecutors with the leeway to fully investigate a potential indictment before acting furthers interest of due process throughout the course of investigation, despite the fact that some prejudice may occur due to the lapse of time between establishing probable cause and a suspect's indictment. *Id.* at 793.

Here, the lapse of time between Coda's arrest and indictment allowed the Government to uphold his due process rights against an unnecessary and rushed indictment by allowing prosecutors to fully investigate his case before acting. Importantly, the Government provided

multiple justifications for placing Coda on “low priority” status after initially opening a case against him. R. at 2. First, the Government delayed indictment due to concurrent prosecution of Coda for unrelated state charges and the inconveniences of transporting him between proceedings. This justification underscores the *Lovasco* Court’s concern for adding to the time during which defendant’s stood accused but untried. *Lovasco*, 431 at 795–96; *see also United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994) (determining delaying indictment until the end of the state’s prosecution was a “valid exercise of prosecutorial discretion.”). Secondly, once Coda’s state proceedings finished, the Government experienced mounting political pressure to pursue drug trafficking, which in turn led to high attorney turnover. R. at 2. This, too, highlights the *Lovasco* Court’s desire to preclude the Government from pursuing indictment before the case had been given full consideration. *Lovasco*, 431 at 794–95. The Government should not be penalized for deferring until they had established—within the statute of limitations—probable cause and sense of his culpability beyond reasonable doubt.

Moreover, it cannot be said that the Government had a bad faith intent to delay indictment when the political pressure to pursue drug trafficking cases contributed significantly to the lapse in time between the opening of Coda’s case and his indictment. R. at 2. The purpose of the bad faith standard is to prevent the Government from resolving doubtful cases in favor of prosecution, not to restrict the level of prosecutorial discretion necessary to perform thorough investigation prior to indictment. Therefore, the intentional delay standard ensures that prosecutors not only fully investigate, but also fully assess the benefits of indictment, before indicting.

B. The two-prong pre-indictment delay standard promotes separation of powers by respecting the legislature’s authority to establish statutes of limitations.

The bad faith standard for pre-indictment delay promotes separation of powers by respecting the legislature’s authority to establish a statute of limitations. Accordingly, the Government should not be punished for adhering to the legislature’s proscribed statute of limitations when choosing to indict. Statutes of limitations “represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice.” *Marion*, 404 U.S. at 322; *see also Lovasco*, 431 U.S. at 783, 789 (stating that statutes of limitations “provide predictable, legislatively enacted limits on prosecutorial delay”). While statutes of limitations offer one protection against prosecutorial delay, this Court has also held that the Fifth Amendment itself requires the dismissal of an indictment within the statute of limitations if there “was a deliberate device to gain advantage” over a defendant that caused him actual prejudice in presenting his defense. *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *see also Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996) (holding that “as long as the indictment is brought within the statute of limitations, we will not presume that the defendant has been prejudiced by delay between commission of the offense and arrest or indictment.”).

In *United States v. Pardue*, the Seventh Circuit emphasized that “[a] defendant's primary protection against overly stale criminal charges is the applicable statute of limitations, which is the legislative limit on prosecutorial delay,” while the Fifth Amendment plays a limited role in protecting defendants against *egregious* delay. 134 F.3d 1316, 1319 (7th Cir. 1998) (citing *Marion*, 404 US 307 (1971)). In *Pardue*, the defendant alleged pre-indictment delay in violation of his Fifth Amendment rights because the alleged crimes took place in 1986 but the indictment occurred ten years later in 1996. *Id.* at 1317–18. To determine whether a due process violation occurred, the court required the defendant to show “that the [Government] delayed [indictment]

to gain a tactical advantage or slowed the process down for some other impermissible reason.” *Id.* at 1319. However, given that the defendant failed to provide any concrete basis for his assertion that the Government delayed indictment to achieve a tactical advantage, his claim for a due process violation failed. *Id.* at 1320. Therefore, a blanket assertion of bad faith, absent any evidence to prove a tactical gain in violation of due process, cannot overcome the deference owed to legislatively enacted limits on prosecutorial delay.

Here, the Government indicted Coda under 18 U.S.C. § 3295 for malicious use of an explosive to destroy property which affects interstate commerce. R. at 4. Congress set the applicable statute of limitations for this criminal offense at ten years. R. 6. Though Coda’s indictment occurred near the end of the statute of limitations window, it is undisputed that his indictment nevertheless occurred within the ten-year time frame established by Congress, and the Government did not act in bad faith in delaying indictment. To weigh the timing of Coda’s indictment, absent any evidence that the Government intentionally delayed indictment to gain an advantage, would amount to questioning Congress’ legislative authority to determine the necessary statute of limitations period. Therefore, this Court should reject Coda’s use of the balancing test in order to protect the fundamental principles of the separation of powers, which admonishes one branch’s overreach upon another.

C. Adoption of the bright line test for pre-indictment delay promotes consistency within the judiciary.

Adoption of the two-prong intentional delay standard protects due process by providing judges with a clear test that creates consistent jurisprudence. As noted in *Lovasco*, the “Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with the prosecutor’s judgement as to when to seek an indictment.” 431 U.S. at 790.

Moreover, when defining due process, “judges are not free . . . to impose on law enforcement officials [their] ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” *Id.* at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). Adoption of the two-prong intentional delay test avoids the risk of infusing such subjective notions of fairness into due process analysis, which the *Lovasco* Court wanted to avoid. *Id.* at 790.

In *United States v. Crouch*, the Fifth Circuit formally rejected its prior balancing approach to determine whether pre-indictment delay violated due process. 84 F.3d at 1512. Instead, it required the defendants prove that the delay was intentionally caused by the prosecution to gain a tactical advantage over the defendant. *Id.* The court explained:

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. However, what this test seeks to do is compare the incomparable. The items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no common denominator that would allow determination of which “weighs” the most . . . There are no general standards or principles to aid us in making that determination and virtually no body of precedent or historic practice to look for guidance.

Id. Thus, determinations under the balancing test would necessarily lead judges to define due process by weighing “their own personal notions of fairness upon the prosecution” as admonished by this Court in *Lovasco*. *Id.*

Personal and private notions of fairness should not be controlling in cases of pre-indictment delay like Coda’s. One of the reasons underscoring the Government’s decision to mark Coda’s case as “low priority” was that political pressure caused the Government to prioritize prosecution of drug trafficking and other related offenses after Coda’s case was opened. R. 2. The Government’s pursuit of cases at its own discretion was critical to its prosecutorial efficiency and success at the time, especially with limited resources due to high

attorney turnover at the Government. Requiring Coda to demonstrate bad faith on behalf of the Government, rather than engaging in a balancing test, ensures that during investigation the Government can make decisions without fear that a judge would second guess when sufficient evidence to justify indictment had been established. Due process are benefits from consistent jurisprudence, and the path to consistent jurisprudence is through this Court's adoption of the two-prong approach to determining pre-indictment delay.

D. Even under the balancing approach, the Government's good faith reasons for pre-indictment delay prevail over Coda's lack of substantial prejudice.

Even if this Court adopted the balancing approach to determine violations of due process during pre-indictment delay, the Government would still prevail because Coda did not experience substantial prejudice and the Government has adequate good faith reasons for the delay. The minority of federal appellate courts utilizing the balancing test require a defendant to first show actual prejudice; then the court balances the defendant's prejudice against the Government's justification for the delay. *Howell*, 94 F.3d at 900; *see also Sherlock*, 962 F.2d at 1354-55 (same). In making this determination, the court must decide if the prejudice balanced against the reason for delay "offends those 'fundamental conceptions of justice which lie at the of our civil and political institutions.'" *Id.* at 1354-55 (quoting *Lovasco*, 431 U.S. at 790). Here, Coda's lack of substantial prejudice cannot overcome the adequate reasons justifying the Government's pre-indictment delay. Thus, even if this Court did adopt the minority's balancing approach, the Government will still prevail.

i. Coda failed to provide evidence of substantial prejudice.

Under the balancing test for pre-indictment delay, a defendant's due process rights have not been violated if the defendant fails to prove substantial prejudice. A critical difference exists between "actual" and "substantial" prejudice. *Lovasco*, 431 U.S. at 789–90. Actual prejudice alone may not be sufficient to justify a motion to dismiss for pre-indictment delay in every case. *Id.* Indeed, a defendant may experience actual prejudice from even "the shortest and most necessary delay, [yet] no one suggests that every delay-caused detriment to a defendant's case should abort a criminal." *Id.* However, substantial prejudice has occurred when a defendant has been "meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Angelone*, 94 F.3d at 907. Proving substantial prejudice requires the defendant show a reasonable likelihood that the proceeding would have been different if not for the delay. *Stoner v. Graddick*, 751 F.2d 1535, 1547 (11th Cir. 1985) (requiring a defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *Sowa*, 34 F.3d at 450 (stating that an allegation of substantial prejudice be "specific, concrete, and supported by evidence").

In order to establish that substantial prejudice due to witness unavailability, the defendant must "identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; . . . made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources." *Angelone*, 94 F.3d at 908. However, the loss of witnesses alone is insufficient to prove substantial prejudice. *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975). In *McGough*, the Fifth Circuit held that the death of the defendant's six potential witnesses during

the pre-indictment delay did not cause prejudice because the defendant only provided *speculative* claims that the testimony of these witnesses would meaningfully advance his case. 510 F.2d at 604. Mere speculation cannot be sufficient to prove substantial prejudice in regard to a violation of due process.

While there is no dispute as to whether Coda faced actual prejudice, this prejudice alone does not rise to the level of substantial prejudice required to overcome the Government's adequate reasons for delay. Coda identified five family members as witnesses, four of whom had died and one with dementia. R. at 3. Yet, similar to the defendant in *McGough*, Coda did not provide any specificity regarding the testimony these individuals would have provided beyond a bare bones allegation that they could corroborate the story that he was in New York at the time of the hardware store's explosion. R. at 4. There is little evidence to suggest that the outcome would have been different if his witnesses testified; even if they could vouch for his presence in New York the night of the explosion, such testimony does not mitigate the potential for Coda to be involved with the explosion in some other capacity. Nor could the testimony rebut Johnson's accusations that Coda had appeared "very anxious and paranoid" the week of the explosion or the fact that Coda's business was in known financial decline. R. at 2. Therefore, there is not a reasonable probability that Coda's witnesses, had they been alive and able to testify, would have provided testimony sufficient to reach a different result in this case. While Coda may have experienced actual prejudice due to the Government's pre-indictment delay, he has not experienced substantial prejudice sufficient to outweigh the Government's adequate reasons for delay under the balancing test.

ii. The Government’s justification for delay is substantial due to Coda’s state proceedings and the proper prioritization of Government resources

The Government’s adequate justifications for pre-indictment delay weigh against any prejudice experienced by the defendant under the balancing test. Legitimate justifications for pre-indictment delay must go beyond “mere convenience.” *Howell*, 904 F.2d at 895. However, courts have considered the importance of prosecutorial discretion and efficient allocation of resources as valid reasons for the Government to delay. *See United States v. Crooks*, 766 F.2d, 7, 11 (1st Cir. 1985) (determining an effort “to discover all those who participated in the conspiracy and to try them together” was a legitimate reason to delay indictment); *United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992) (determining a pre-indictment delay due to pursuit of a plea deal did not violate the defendant's due process rights.).

Here, the Government provided multiple legitimate justifications for Coda’s delayed indictment. First, the Government delayed indictment due to Coda’s concurrent prosecution for unrelated state charges and the inconveniences of transporting him back and forth between proceedings. R. at 2. In *United States v. Sowa*, the court held that delaying indictment until the end of state prosecution was a “valid exercise of prosecutorial discretion.” 34 F.3d at 451. This Court should recognize the same. Secondly, once Coda’s state proceedings finished, the Government experienced mounting political pressure to pursue drug trafficking and related offenses, which in turn led to high attorney turnover. R. at 2. That Coda’s case remained on low-priority was not due to “mere convenience,” but rather ensured that Coda’s case was not rushed before the Government could fully considering the desirability of prosecuting his case. *See Lovasco*, 431 U.S. at 794. Moreover, the Government's good faith decision to prioritize its resources in times of high turnover has been considered a valid reason to delay. *Engstrom*, 965 F.2d at 839 (recognizing an “active criminal docket in [the Government’s] office with a

consequent number of shifts of the [defendant's] case from one Assistant U.S. Attorney to another" was adequate justification for pre-indictment delay). These reasons provide ample evidence to support the Government's good faith reasons to delay Coda's indictment. Therefore, under the balancing test, Coda has not demonstrated the requisite level of prejudice to overcome the Government's legitimate justifications for delay.

Pre-indictment delay, when the Government did not act in bad faith, does not violate the Due Process Clause of the Fifth Amendment. This is because the intentional delay standard serves to protect the defendant from unjustifiably fast indictments, promotes the separation of powers, and judicial consistency. Moreover, the Government would prevail either under the two-prong test or the balancing test. Accordingly, this Court should affirm the holding of the Thirteenth Circuit and reject Coda's Motion to Dismiss for pre-indictment delay.

II. The Government's Use of Post-Arrest but Pre-Miranda Silence as Evidence of Substantive Guilt Does not Violate the Fifth Amendment

The Fifth Amendment Self-Incrimination Clause provides that "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This clause prohibits the Government from compelling a defendant to bear witness against himself at his own criminal trial. *Griffin v. California*, 380 U.S. 609, 614–15 (1965) (holding the Fifth Amendment prohibits the Government from commenting on the defendant's decision not to testify). In *Miranda v. Arizona*, the Court extended the Fifth Amendment's privilege against self-incrimination to include incriminating statements made in the course of a custodial interrogation during the investigation of a crime. 384 U.S. 436, 479 (1966). Thus, under the *Miranda* rule, the Government may only use a defendant's statements from custodial interrogation after he has been apprised of his *Miranda* rights and he has voluntarily, intelligently, and knowingly waived

his rights. *Miranda*, 384 U.S. at 444. Importantly, this Court has clarified that the *Miranda* warning “derives from the Fifth Amendment and adds nothing to it.” *Roberts v. United States*, 445 U.S. 552, 560 (1980).

Following *Miranda*, this Court addressed the admissibility of a defendant’s silence in multiple contexts. In *Doyle v. Ohio*, the Court held that the Government’s use of post-*Miranda* silence to impeach the credibility of the defendant was “fundamentally unfair and a deprivation of due process.” 426 U.S. 610, 618 (1976). In subsequent cases, however, the Court made clear that a defendant’s pre-*Miranda* silence received no such protection. *See Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (holding the use of pre-arrest silence to impeach the defendant’s credibility did not violate the Self-Incrimination Clause of the Fifth Amendment); *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding the use of post-arrest but pre-*Miranda* silence to impeach the defendant’s credibility did not violate the Fourteenth Amendment).

Whether a defendant’s post-arrest but pre-*Miranda* silence may be used as evidence of substantive guilt under the Fifth Amendment presents an issue of first impression for this Court. R. at 16. The federal appellate courts are split on the issue, with three circuits allowing the prosecution to draw adverse inferences of guilt from silence at trial. *Compare United States v. Frazier*, 408 F.3d 1102, 1109–11 (8th Cir. 2005) (allowing use of post-arrest but pre-*Miranda* silence as evidence of guilt); *United States v. Rivera*, 944 F.2d 1563, 1568–69 (11th Cir. 1991) (same); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (same); *with United States v. Whitehead*, 200 F.3d 634, 637–40 (9th Cir. 2000) (barring use of post-arrest but pre-*Miranda* silence as evidence of guilt); *United States v. Moore*, 104 F.3d 377, 384–90 (D.C. Cir. 1997) (same); *United States v. Hernandez*, 948 F.2d 316, 322-25 (7th Cir. 1991) (same). Permitting the Government to use post-arrest but pre-*Miranda* silence as evidence of substantive guilt does not

violate the Fifth Amendment because the defendant has not experienced any coercive governmental action inducing his silence, this Court’s long-standing precedent establishes that the protections of the Fifth Amendment must be expressly invoked, and the Government has made no implicit assurance not to use the defendant’s silence. Therefore, under this Court’s holding in *Salinas v. Texas*, evidence of Coda’s silence *coinciding* with his arrest should be admissible as substantive evidence of guilt.

A. The Government did not compel Coda to renounce his Fifth Amendment rights post-arrest but before receiving the *Miranda* warning.

A defendant’s Fifth Amendment right against self-incrimination is not violated when a defendant is under no compulsion to speak or remain silent. While this Court has long recognized that a defendant’s failure to invoke his privilege against self-incrimination must be excused when governmental coercion makes forfeiture involuntary, *Miranda*, 384 U.S. at 467–68, the “privilege against compulsory self-incrimination is simply irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak.” *Jenkins*, 447 U.S. at 241. Thus, the *Miranda* rights protect against any “inherently compelling pressures” at play in custodial interrogation “which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Miranda*, 384 U.S. at 467. However, this Court has emphasized that the *Miranda* safeguard “does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.” *Roberts*, 445 U.S. at 560. Additionally, this Court has held that arrest alone does not implicitly compel the defendant to remain silent. *See Fletcher*, 455 U.S. at 605–606 (rejecting the Sixth Circuit’s argument that an arrest “is governmental action which implicitly induces a defendant to remain silent.”).

In *United States v. Frazier*, the Eighth Circuit concluded that a defendant is under no compulsion to speak—or remain silent—post-arrest but pre-*Miranda* because “an arrest by itself is not governmental action that implicitly induces a defendant to remain silent.” *Id.* at 1111 (citing *Fletcher*, 455 U.S. at 607). In *Frazier*, the defendant was arrested by the police for possession of drugs and transported back to the State Patrol office where he was advised of his *Miranda* rights. 408 F.3d at 1107. The defendant remained silent during this time. *Id.* On appeal, the court addressed whether the Government’s submission of the defendant’s post-arrest but pre-*Miranda* silence as evidence of substantive guilt violated the Fifth Amendment by narrowing the issue to whether the defendant “was under any compulsion to speak at the time of his silence.” *Id.* at 1111. As the defendant faced no compulsion to speak or remain silent beyond his own arrest, he suffered “no government-imposed compulsion,” therefore, Fifth Amendment did not apply. *Id.* at 1111.

Like the defendant in *Frazier*, Coda, was not compelled into silence by government action after his arrest but before he received his *Miranda* warnings. FBI Special Agent Park arrested Coda and immediately listed the charges brought against him, and Coda chose to remain silent. R. at 7. The FBI subsequently read Coda his *Miranda* rights after they reached the detention center but before beginning any interrogation. R. at 7. Under these facts, there is no evidence to suggest that Coda was under any undue influence to speak or remain silent beyond the circumstances of his arrest. Moreover, as Coda had not yet been subjected to custodial interrogation, he cannot claim to have experienced the coercion the *Miranda* court feared. Given that this Court has emphasized that the *Miranda* safeguard against self-incrimination applies specifically to custodial interrogation, Coda’s Fifth Amendment right against self-incrimination had simply not been implicated.

B. A defendant must unambiguously assert his Fifth Amendment rights.

It is this Court’s long-standing precedent has established that the protections of the Fifth Amendment are not self-executing, but instead must be expressly invoked. *Roberts*, 445 U.S. at 559. This holds true even if the defendant answers an incriminating question, so long as the response took place outside of a custodial interrogation. *Minnesota v. Murphy*, 465 U.S. 420, 428 (1984). In *Davis v. United States*, this Court held that a defendant’s assertion to his right to counsel must be “unambiguous or unequivocal” in order to impose on police officers an “obligation to stop questioning.” 512 U.S. 452, 461–62 (1994). Later, in *Berghuis v. Thompkins*, this Court applied *Davis*’s clarity requirement to invocations of the right to remain silent. 560 U.S. 370, 380–82 (2010) (holding that if a defendant intends to protect his silence outside of custodial interrogation, he must unambiguously assert that right). This Court has repeatedly emphasized that if a defendant “desires the protection of the privilege, he must claim it.” *United States v. Monia*, 317 U.S. 424, 427 (1943).

In *Salinas v. Texas*, this Court took the unambiguous assertion requirement one step further and held that the Fifth Amendment’s Self-Incrimination Clause does not protect a defendant’s refusal to answer questions asked by law enforcement before he has been arrested or read his *Miranda* rights. 570 U.S. 178, 188 (2013). During a non-custodial interview, the defendant initially answered questions but fell silent when questioned about whether gun shells found at the scene of a murder would match those in his shotgun. *Id.* at 182. The government used the defendant’s silence as substantive evidence of guilt. *Id.* at 182–83. On appeal, the issue was whether prosecutorial comment on this silence—which occurred prior to both arrest and receipt of *Miranda* warnings—violated the defendant’s Fifth Amendment rights. *Id.* at 181–83. In a plurality decision, this Court sidestepped the constitutional question and instead decided the

appeal on invocation grounds. *Id.* at 183. By refusing to carve out an exception to the invocation requirement for a citizen who remains silent in the face of police suspicion, this Court reasoned that “the logic of *Berghuis* applies with equal force: 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.

Coda’s failure to avail himself of his constitutional rights is not the Government’s responsibility to hear when attempting to present its case-in-chief to the jury. Acknowledging that “an arrest by itself is not governmental action that implicitly induces a defendant to remain silent,” *see Fletcher*, 455 U.S. at 607, Coda faced no questioning from FBI Special Agent Park after being informed of the charges brought against him. R. at 7. Coda also chose to remain silent after his arrest, and in doing so took no action to put the Government on notice of his reliance on his Fifth Amendment rights. In the absence of any government compulsion to speak or remain silent, this Court has held that a defendant must unambiguously assert his right against self-incrimination. This Court should not carve another exception out of Fifth Amendment jurisprudence to allow police custody alone to “trigger” Fifth Amendment rights, *see, e.g Moore*, 104 F.3d at 384–90. Rather, a defendant must establish the required element of compulsion to activate Fifth Amendment considerations. Continuing to fracture the *Miranda* rule only serves to frustrate defendants and the Government alike. *See David S. Romantz, "You Have the Right to Remain Silent": A Case for the Use of Silence As Substantive Proof of the Criminal Defendant's Guilt*, 38 Ind. L. Rev. 1, 54 (2005) (concluding *Miranda* should not extend the right against self-incrimination to pre-*Miranda* silence given its probative value).

C. The Government made no implicit assurance that Coda’s silence would not be used against him.

Without providing any implicit assurance that a defendant’s silence will not be used against him, the Government’s use of post-arrest but pre-*Miranda* silence as evidence of substantive guilt does not offend the notions of fundamental fairness integral to a due process violation. Indeed, it is the *Miranda* warnings themselves that convey the implicit assurance that “silence will carry no penalty.” *Doyle*, 426 U.S. at 618. This Court has reasoned that “[a]llowing the use of the defendant's silence in the face of such assurances would be so ‘fundamentally unfair’ as to deprive the defendant of the right to due process.” *Id.* at 612. However, absent such affirmative assurances, a defendant cannot allege the Government made a promise it failed to keep. In *Salinas v. Texas*, this Court acknowledged that the “[p]etitioner [was] correct that due process prohibits prosecutors from pointing to the fact that a defendant was silent after he *Miranda* warnings, but that rule does not apply where a suspect has not received the warnings’ implicit promise that any silence will not be used against him.” 570 U.S. at 188 n.3.

In *United States v. Salinas*, the Fifth Circuit came to a similar conclusion when it determined that absent “the affirmative assurances embodied in the *Miranda* warnings,” the prosecution can use post-arrest but pre-*Miranda* silence as evidence of substantive guilt. 480 F.3d 750, 757 (5th Cir. 2007) (quoting *Fletcher*, 447 U.S. at 240). Following an arrest for failure to provide proof of insurance, police discovered a firearm in Salinas’ car. *Id.* at 753. He was subsequently charged and convicted of possession of a firearm by a convicted felon. *Id.* at 754–55. Salina appealed claiming the prosecution’s use of his post-arrest, pre-*Miranda* silence in its case-in-chief violated his due process rights. *Id.* at 755. The court determined that since the government relied on Salinas’ pre-*Miranda* silence, it did not violate the fundamental fairness of due process because the government had offered no affirmative assurances. *Id.* at 757.

Here, as in *United States v. Salinas*, there is no evidence to show that the Government made any implicit promises prior to providing Coda with his *Miranda* warnings. FBI Special Agent Park arrested Coda and immediately informed him of his charges. R. at 7. The FBI subsequently read Coda his *Miranda* rights after they reached the detention center but before beginning any interrogation. R. at 7. Under these facts, there is no hint of affirmative assurance by the Government that Coda's silence would or would not be used against him as substantive evidence of guilt. Absent the *Miranda* warnings of Coda had not received implicit assurance so fundamentally unfair to deprive him of his due process rights. Therefore, the Government's use of Coda's post-arrest but pre-*Miranda* silence did not violate the Fifth Amendment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit in this case.

Respectfully submitted,

Team 33
Counsel for Respondent
September 13, 2021

APPENDIX

Constitutional Provision Involved

In relevant part, the Fifth Amendment provides “[n]o person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.

In relevant part, the Sixth Amendment provides “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. Amend. VI.

In relevant part, the Fourteenth Amendment provides “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.