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 THE RESPONDENT

TEAM 5
Counsel for Respondent
September 13, 2021

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QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fifth Amendment, does prejudice to the accused resulting from pre-indictment delay require dismissal of the accused's case when the delay arises upon no bad faith of the government and dismissal would subject the defendant to more harm than good by forcing the government's hand to bring charges pre-maturely?

2. Under the Fifth Amendment to the United States Constitution, is a defendant's post-arrest, but pre-*Miranda* silence admissible as substantive evidence of guilt when the defendant's silence was not elicited through interrogation and the defendant never expressly invoked the privilege against self-incrimination?

STATEMENT OF THE CASE

A. Statement of the Facts

Austin Coda (hereinafter "Coda") was the owner of a hardware store in East Virginia that served residents of both East Virginia and North Carolina. R. at 1. On December 22, 2010, the store mysteriously exploded and burned to the ground. R. at 2. Initially, investigators believed the explosion resulted from a gas line; however, some time after the explosion, one of Coda's close friends, Sam Johnson, disclosed to the FBI that Coda had seemed "'very anxious and paranoid'" the week of the explosion. *Id.* Johnson revealed that Coda had been losing money because the store, that was once prosperous, had, by 2010, been struggling to turn a decent profit. *Id*. Furthermore, Johnson divulged that Coda had an insurance policy on the store. *Id*. Upon receiving this information, the FBI informed the U.S. Attorney's Office that Coda might have intentionally caused the explosion. *Id*.

Because Coda was at this same time facing unrelated state charges, the federal prosecutor's office decided to wait to bring charges against him. *Id*. This decision was made due to the difficulty of transporting a defendant between state and federal custody. *Id*. It was some time before an indictment was formerly brought as the U.S. Attorney's Office needed to prioritize drug trafficking cases and Coda's case was considered to be low priority. *Id*. Eventually, before the statute of limitations ran out, an attorney assigned to the case brought formal charges against Coda. *Id*. Upon his arrest, Coda was "informed of the charges against him" by FBI Special Agent Park. R. at 7. Coda, though, said nothing in response. *Id.*

Coda was indicted for "maliciously using an explosive to destroy property that affects interstate commerce" under 18 U.S.C. § 844(i). R. at 3. Coda moved to dismiss the indictment on due process grounds, asserting that the delay between the alleged offense and his indictment had

substantially prejudiced his ability to bring a valid alibi defense. R. at 3. Additionally, Coda moved to suppress evidence of his post-custody, pre-*Miranda* silence as a violation of his Fifth Amendment right against self-incrimination. R. at 7.

B. Procedural History

The United States District Court for the District of East Virginia denied both Coda's motion to dismiss and his motion to suppress. R. at 1, 7. The district court adopted the two-prong test that requires defendants to show both actual, substantial prejudice and governmental bad faith in order to obtain a dismissal on due process grounds for pre-indictment delay. R. at 4. The district court also held that pre-*Miranda* silence is admissible as substantive evidence of guilt. R. at 8.

Eventually, Coda was convicted of maliciously destroying property with an explosive. R. at 11. Following his conviction, Coda appealed the district court's denial of his pre-trial motions. *Id*. The Court of Appeals for the Thirteenth Circuit affirmed Coda's conviction, holding that the district court had correctly analyzed both issues before it. R. at 12. Chief Judge Martz dissented. *Id*. In response, Coda is appealing his conviction to this Court. R. at 16.

SUMMARY OF THE ARGUMENT

Pre-indictment delay resulting in prejudice to the accused does not violate the accused's right to due process unless the government has acted in bad faith. This Court's precedent on pre-indictment delay lays out a two-prong test for assessing potential due process violations. The defendant must prove actual, substantial prejudice arising from the delay while also proving that the delay was manipulated by the government in bad faith to achieve an unfair advantage over the accused. Recognizing that an accused's defense could be harmed from a delay, the legislature purposefully crafted the federal statutes of limitations to protect defendants from being held to answer for their mistakes indefinitely. Adopting a two-prong test over a balancing

approach allows these predetermined assessments of the legislature to provide protection for the defendant without placing undue burdens on the government. Thus, this Court should adopt the two-prong test requiring a showing of government bad faith in order for the defendant to obtain a dismissal on due process grounds. Therefore, because the government here did not act in bad faith, Coda's case was properly tried.

The prosecution may use a defendant's post-custody, pre-Miranda silence as substantive evidence of the defendant's guilt. The Fifth Amendment generally does not bar the prosecution from using a defendant's silence. The amendment prohibits only compelled testimony, and pre-*Miranda* silence is generally not compelled. Here, Coda's silence was properly admitted because it was voluntary, not compelled. Furthermore, those wishing to invoke the privilege against self-incrimination must do so expressly and unambiguously, which Coda failed to do. Finally, declining to expand the Fifth Amendment privilege against self-incrimination beyond this Court's recent precedents will not deprive defendants of fair trials because numerous other constitutional provisions work in harmony with the Fifth Amendment to protect trial rights. Thus, this Court should hold that evidence of Coda's silence was properly admitted.

ARGUMENT

A. Pre-indictment delay resulting in prejudice to the accused does not violate the accused's right to due process unless the government has acted in bad faith.

The idea that someone who has been accused of a crime is deemed innocent until proven guilty has been a long-standing notion of justice and fairness.[1] Basing the American criminal justice system on this foundational tenet, the framers of the United States Constitution explicitly

[1] "Better that ten guilty persons escape than that one innocent suffer." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765).

declared that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Due process encompasses both substantive and procedural concerns; the procedural is the means of enforcing an individual's substantive rights. *See* Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155 (2017). It is this procedural component that criminal defendants most often use to assert violations of due process, and it is this component that causes pre-indictment delay to become a matter of discussion.

1. The language of this Court's precedent addressing pre-indictment delay points only to a two-prong approach for assessing potential due process violations.

This Court first examined pre-indictment delay in *United States v. Marion*, where two defendants who were charged with nineteen counts of engaging in fraudulent business practices were not indicted until three years after investigation had commenced. *United States v. Marion*, 404 U.S. 307, 308–09 (1971). This Court began by noting that issues of pre-indictment delay do not implicate the Sixth Amendment speedy trial provisions, as "these guarantees are applicable only after a person has been accused of a crime." *Id.* at 307. Instead, these issues are analyzed under the Fifth Amendment, "where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor." *Id.*

This Court declined to say what circumstances surrounding pre-indictment delay would require the dismissal of a case, but it did hold that there was no violation of due process in that case because "[n]o actual prejudice to the conduct of the defense [wa]s alleged or proved, and there [wa]s no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.* While not explicitly laying out a standard for future cases, many courts began to use this language as the establishment of a two-prong test. To obtain a

dismissal on due process grounds, the defendant must prove (1) that the pre-indictment delay resulted in actual, substantial prejudice to his defense and (2) that the government operated in bad faith by creating the delay to gain an advantage over him.

The majority of the U.S. Courts of Appeals follow this strict two-prong test to rule on due process claims involving pre-indictment delay.[2] However, the Fourth and Ninth circuits have utilized a balancing test approach, while the Seventh Circuit seems to incorporate elements of both tests. *See Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Moran*, 759 F.2d 777, 781-82 (9th Cir. 1985); *United States v. Hagler*, 700 F.3d 1091, 1099 (7th Cir. 2012).

These outlier circuits primarily base their approaches on language found in *United States v. Lovasco*, a case arising in this Court six years after *Marion*. *See United States v. Lovasco*, 431 U.S. 783 (1977). In *Lovasco*, a defendant charged with illegal firearms dealing and eight counts of stealing firearms from the United States mail was not indicted until eighteen months after the alleged crimes because of the Postal Inspector's investigation into the matter. *Id*. at 784. The defendant demanded a dismissal of his case, claiming that two material witnesses had passed away during the delay and that their absence was prejudicial to his defense. *Id*. at 786-87. This Court disagreed with the defendant's characterization of his case, instructing that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id*. at 790. It is this language that the outlier circuits have latched on to, believing that this calls for weighing the prejudice to the accused against the government's reasons for the delay.

[2] *See United States v. Crooks*, 766 F.2d 7, 11 (1st Cir. 1985); *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987); *United States v. Ismaili*, 828 F.2d 153, 167 (3d Cir. 1987); *United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996); *United States v.* Thomas, 404 F. App'x. 958, 961 (6th Cir. 2010); *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006); *United States* ***v.*** *Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994).

However, when this language is read in the context of this Court's full opinion and the surrounding language, it is easy to see that this was not the birth of a balancing test; rather, it is an express rejection of the claim that prejudice alone is enough for a dismissal. *Lovasco,* 431 U.S. at 789. This Court explained that "proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid." *Id*. Referencing *Marion,* this Court distinguished delay arising out of investigative purposes from delay undertaken to gain an unfair advantage over the defendant, holding that "prosecut[ing] a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id*. at 796. In accordance with this reasoning, this Court reversed the dismissal of the defendant's case. *Id*.

These clarifications by this Court were almost enough to settle the standard for good; however, this Court's brief proffer at the end of its opinion that it "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions" opened the door for further confusion. *Id*. It wasn't until seven years later in *United States v. Gouveia* that this Court expressly approved the two-prong test when it declared that "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *United States v. Gouveia*, 467 U.S. 180, 192 (1984). This Court has not revisited this issue since, and in the few cases mentioning these decisions for other purposes, it has only acknowledged the two-prong approach. *See Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Thus, a textual analysis of this Court's jurisprudence for pre-indictment delay points only to the bright-line, two-prong approach. But even if it were still in question today, this Court should adopt

the two-prong approach because of the protections it provides to the defendant as well as to members of society.

2. The legislature carefully crafted the federal statutes of limitations to protect defendants from unjust pre-indictment delay.

This Court has recognized that statutes of limitations are the "primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966). Statutes of limitations for federal crimes date all the way back to the First Congress with the enactment of the Crimes Act of 1790. Crimes Act of 1790, 1st Cong. Ch. 9, § 32 (1790). The First Congress is considered by many to be "the most important Congress in U.S. history" as "[t]o this new legislature fell the responsibility of passing all the legislation needed to implement the new system [of government]." *The First Federal Congress*, https://www.archives.gov/exhibits/treasures_of_congress/text/page2_text.html (last visited Sep. 13, 2021). This Congress set up the judiciary and adopted the Bill of Rights, establishing extensive protections for criminal defendants for generations to come. *Id*. The framers of the Constitution and the members of the First Congress were well aware that a defendant awaiting trial sits in a vulnerable position. As time passes, memories fade, witnesses become unavailable, and evidence that was once readily accessible disappears. Ergo, "the Constitution contains three interrelated rights that are designed to ensure that prisoners cannot be detained in an American version of the Tower of London: the rights to habeas corpus (Article I, Section 9, Clause 2), to non-excessive bail (Amendment VIII), and to a speedy trial (Amendment VI)." *The Heritage Guide to the Constitution: Speedy Trial Clause*, THE HERITAGE FOUNDATION, https://www.heritage.org/constitution/#!/amendments/6/essays/152/speedy-trial-clause (last visited Sep. 13, 2021).

However, while these protections vigorously guard the rights of those who have been charged, they do not capture situations where one currently stands unaccused until some unknown day in the future. Thus, before the Bill of Rights was even ratified, Congress established the first protections for the unaccused by restraining the ability of the government to indefinitely prosecute federal crimes through the institution of statutes of limitations. Crimes Act of 1790, 1st Cong. Ch. 9, § 32 (1790). The first limitations stated:

> No person or persons shall be prosecuted, tried or punished for treason or other capital offence . . . unless the indictment for the same shall be found by a grand jury within three years next after . . . committed; nor shall any person be prosecuted, tried or punished for any offence, not capital, . . . unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence.

Id. It is noteworthy that these safeguards were put in place at the very birth of the judiciary because this highlights the legislature's thoughtfulness in securing the rights of the unaccused before they were ever asserted by a defendant in a federal criminal proceeding.

Today, the general statute of limitations for federal crimes is housed in 18 U.S.C. § 3282 and is nearly identical to the limitation first enacted in 1790. The general limitation has been extended, however, to five years, with deliberate exceptions for various offenses such as crimes against children, trafficking, arson, terrorism, and capital offenses. The variation within the exceptions demonstrates clear congressional reflection on the seriousness of each crime, the elements needed to prove each offense, and the scope of likely investigation that proving each offense would require. Necessarily, some offenses call for significant consequences, such as when someone's life or safety has been compromised. For the most part, society approves the degree to which these crimes are punished. Accordingly, Congress allotted a longer time frame for the government to be able to protect the safety of the general public by holding these types of perpetrators accountable for their crimes.

For example, "[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer." 18 U.S.C. § 3283. The fact that the government is able to pursue these cases so freely features Congress's efforts to protect children from horrific suffering. To have no time limit for such heinous crimes is reasonable because these types of crimes often are not revealed until quite some time after the offense. Some children may not reveal abuse because they are scared and some may not even realize that what is being done to them is inappropriate and illegal until they are older. To place a time limit on such offenses would put children at risk of being harmed by those who are regular offenders, which is often the case for these types of crimes.

These interests are not taken lightly. Legislative history confirms that the actions of Congress regarding criminal reform elicit considerable thought, evoke vigorous debate, and demand extensive time spent weighing the effects of certain crimes on society against the rights of defendants to fair proceedings. Thus, the legislature has already engaged in a balancing test, has made its determination of fairness as a collective body, and has set forth a clear-cut standard to be applied going forward. Such pre-determinations are essential to the orderly administration of justice. Commenting on the massive responsibility of setting up a new government, James Madison stated that "[s]carcely a day passe[d] without some striking evidence of the delays and perplexities springing merely from the want of precedents." National Archives, *From James Madison to Edmund Randolph, 31 May 1789*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-12-02-0122. Indeed, clear procedural standards relieve courts from grappling over confusing issues or engaging in

unnecessary balancing tests, which, in turn, decreases delays for all parties involved. As a result, such bright-line rules help ensure that the valuable rights of each defendant remain protected.

Ultimately, statutes of limitations are "legislative assessments of relative interests of the [government] and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.'" *Pub. Schs. v. Walker*, 76 U.S. 282, 288 (1870). "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion*, 404 U.S. at 322. Because of the steadfast protection that the statutes of limitations provide against unfair prosecution, this Court has recognized that overall, "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789.

Of great concern is the potential for courts to use the due process clause as a way to circumvent the intent of the legislature. Weighing a defendant's prejudice against the reasons for any governmental delay for each particular case requires a judge to step out of his role as adjudicator and into the role of a legislator. As the Fifth Circuit has noted,

> [A balancing] approach—so long as it actually tries to "balance" or "weigh" instead of merely find a due process violation on the basis of the extent of the prejudice alone—inevitably involves [the courts] in grading or evaluating the merit of resource allocation and management decisions that are properly the province of the executive and/or legislative branches.

United States v. Crouch, 84 F.3d 1497, 1514 (5th Cir. 1996). This Court has emphasized that "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *Lovasco*, 431 U.S. at 790 (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952). Thus, to compel courts to stay within their intended function, this Court must reject the

balancing test used by the outlier circuits for evaluating potential due process violations in cases of pre-indictment delay.

Here, Coda was indicted under 18 U.S.C. § 844(i) for "maliciously using an explosive to destroy property that affects interstate commerce." R. at 3. Because this is an arson-type of offense, the government was subject to a ticking clock of ten years after the crime within which to bring any charges. *See* U.S.C. § 3295. As the legislature intended, this ticking clock provided Coda with the assurance that his crime would not forever be held against him. But like the legislature also intended, this running clock did not give Coda an automatic get-out-of-jail-free card. Because the government properly brought the charge within the predetermined time limit, Coda was not deprived of protection from burdensome delay, and the prosecution was properly allowed to go forward with its case.

3. Adopting a two-prong test over a balancing approach allows justice to be carried out without placing undue burdens on the government or the defense.

This Court must also reject a balancing test because of its impediment to the administration of justice. Proponents of the balancing test claim that the two-prong test requiring the defendant to show governmental bad faith in delaying the bringing of an indictment imposes a heavy burden on the defense. But what these proponents fail to realize is that it is the *balancing* test that harms the defendant, while at the same time placing an impossible burden on the government.

a) The balancing approach improperly compels the government to indict before it is ready.

It is well established that "[t]he public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it." *Dickey v. Florida*, 398 U.S. 30, 42 (1970). Because prosecutors carry the extraordinary responsibility of being the voice of the people in a court of law, "[t]he decision to file criminal charges, with the

awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." *Lovasco*, 431 U.S. at 794–95. Necessarily, the government is allotted discretion in bringing charges against potential defendants. Notably, this Court has expressly refused to command that the government bring charges as soon as probable cause has been established or proof beyond a reasonable doubt compiled. *Id*. at 792. The balancing approach seeks to destroy this discretion by forcing the government to indict before it is ready to move forward with prosecution. Knowing that a court will scrutinize the length of delay and compare it to any prejudice experienced, the government becomes obligated to judge with accuracy whether delay for legitimate concerns is worth more weight on a scale than unknown potential claims of prejudice that an accused could allege. These types of assessments would prove futile, as it would be impossible for a prosecutor's office to keep tabs on an alleged criminal's every movement, every potential defense witness, and every piece of evidence that the defense could possibly bring. This would be impossible to keep track of for a single defendant, let alone for the thousands of potential criminals located in or subjected to prosecution in a particular jurisdiction. Knowing that a court would be weighing these considerations after the fact puts prosecutors in the untenable position of having to weigh the circumstances themselves, knowing that the court may disagree and dismiss the charges. Naturally, "[t]he determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions." *Id*. at 792–93. Thus, "[t]o avoid the risk that a subsequent indictment would be dismissed for preindictment delay, the prosecutor might feel constrained to file premature charges, with all the disadvantages that would entail." *Id*.

There are numerous "reasons for delay [that] may be partly or completely beyond the control of the prosecuting authorities. Offenses may not be immediately reported; investigation may not immediately identify the offender; an identified offender may not be immediately apprehendable. . . . [Moreover,] an indictment may be delayed for weeks or even months until the impaneling of the next grand jury." Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 527 (1975). Where there arises more than "one possible charge against a suspect, some of them may be held back pending the disposition of others, in order to avoid the burden upon the prosecutor's office of handling charges that may turn out to be unnecessary to obtain the degree of punishment that the prosecutor seeks." *Id.* Additionally, "concerns against 'blowing' an ongoing investigation may cause delay in the filing of charges against one suspect during the time necessary to investigate his suspected accomplices without forewarning them." *Id.*

These unavoidable delays are also present in law enforcement as "proof of the offense may depend upon the testimony of an undercover informer who maintains his 'cover' for a period of time before surfacing to file charges against one or more persons with whom he has dealt while disguised." *Id.* To force such an informer to uncover himself because of early indictment requirements could have potentially fatal consequences to an informer while "giving extraordinary advantages to organized crime as well as others who use a farflung complicated network to perform their illegal activities." *Marion*, 404 U.S. at 335.This Court's appreciation for these legitimate concerns is precisely why prosecutors are afforded discretion as to when charges should be brought and why this Court should expressly repel the balancing approach that covertly demands what has already been rejected.

b) The two-prong test best protects the accused's right to a fair trial.

The burden of requiring early indictment that a balancing approach compels not only hampers prosecutorial discretion, but it also frustrates the interests of the accused. As formerly discussed, "insisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early and possibly unwarranted prosecutions." *Lovasco*, 431 U.S. at 792–93. The defendant in such a case has a high price to pay. Each formal accusation may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320. For these reasons, "[r]ather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *United States v. Burks*, 316 F. Supp. 3d 1036, 1042 (M.D. Tenn. 2018).

It may be argued that requiring the defense to prove governmental bad faith in delaying prosecution puts a heavy burden on the defendant as prosecutorial misconduct remains unchecked. What is often forgotten, however, is that there are already checks on the prosecution to curb destructive behavior. These safeguards include this Court's precedents which specifically require the prosecution to turn over any evidence that would tend to negate the defendant's guilt as well as any information that could help the defense attack the credibility of government witnesses. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972). Failure to do so, even by accident arising from slight negligence, is a due process violation that will not only result in an overturned conviction, but it can also subject the prosecutor to severe discipline, including ethics violations, disbarment, or jail

time. *Former Williamson County DA, Ken Anderson Goes to Jail for Witholding Evidence*, FREEDOM AUSTIN, https://freedomaustin.com/former-williamson-county-da-ken-anderson-goes-to-jail-for-witholding-evidence/ (last visited Sep. 13, 2021). Thus, since prosecutors are held accountable for their actions, the burden on the accused to prove intentional government misconduct does not exceed the burden to all that a balancing test creates.

Ultimately, the essence of due process is to protect the fairness of the adversarial process. To deny the government the opportunity to protect its interests and the interests of its citizens based on potentially unsubstantiated claims of the defendant is no more fair than denying the defendant himself a fair trial. Thus, this Court must reject the balancing approach and expressly adopt the two-prong test for cases involving pre-indictment delay.

Here, while actual substantial prejudice has arguably been proven, bad faith intent on the part of the government has not been shown. R. at 6. The delay in this case initially arose from the government's consideration of Coda's prosecution in another jurisdiction, and the delay was continued by the government's need to efficiently prosecute drug-trafficking offenses. R. at 2. While it is unfortunate that Coda was prejudiced by the delay, none of the deeds of the government point to a tactical manipulation of the circumstances to harm the accused. Therefore, it is only fair that Coda was tried and held accountable for his crime. Accordingly, the defendant's motion to dismiss was properly denied.

B. The prosecution may use a defendant's post-custody, pre-Miranda silence as substantive evidence of the defendant's guilt.

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. A person who is silent after being arrested but prior to being interrogated has not been compelled to speak or to be silent. Furthermore, absent special circumstances not present here, a person does not

invoke the Fifth Amendment merely by being silent. Therefore, the prosecution did not violate Coda's Fifth Amendment rights by using his silence as substantive evidence of his guilt.

1. The Fifth Amendment generally does not bar the prosecution from using a defendant's silence against him.

The Fifth Amendment does not per se prohibit the use of silence against a defendant. In *Salinas v. Texas*, five justices of this Court agreed that, in the absence of an express invocation of the privilege against self-incrimination, a defendant's pre-custodial silence in response to police interrogation was admissible as substantive evidence of his guilt. *Salinas v. Texas*, 570 U.S. 178, 182, 191 (2013) (plurality opinion); *id.* at 192 (Thomas. J., concurring). This Court has also held that a defendant's post arrest, pre-*Miranda* silence can be used to impeach him. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Furthermore, the plain language of the Fifth Amendment, while guaranteeing a defendant's right to remain silent at trial, says nothing explicit about the prosecution's use of the defendant's pre-trial silence. *See Fletcher*, 455 U.S. at 605 ("the *Miranda* warnings contain no express assurance that silence will carry no penalty"). Thus, if evidence of post-custody silence is prohibited, it must be prohibited *not* because it is silence, but because it constitutes compelled testimony under the Fifth Amendment, or because the defendant invoked the Fifth Amendment, or because the defendant's silence falls under one of the specific exceptions this Court has outlined for the use of silence. As discussed below, Coda's silence was neither compelled, nor an invocation of the privilege against self-incrimination, nor a type of silence protected by one of the exceptions this Court has recognized. Consequently, Coda's silence was properly admitted against him.

There are two exceptions to the general rule that silence is admissible. First, this Court has extended special protection to defendants who choose to remain silent at trial and sentencing. *Griffin v. California*, 380 U.S. 609, 615 (1965) (prosecutors may not comment on a defendant's

silence at trial); *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (courts cannot draw adverse inferences from a defendant's silence at sentencing). Since Coda's silence did not occur at trial, this exception is inapplicable here.

The second exception is that the prosecution cannot use the silence of a defendant who was warned of his right to remain silent before he was silent. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). In *Doyle*, this Court held that post-*Miranda* silence is inadmissible, explicitly basing its decision on due process, not the privilege against self-incrimination. *Id*. at 611; 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, 22 (2005). This Court stated:

> [W]hile 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 the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 618. Romantz noted that by "bas[ing] its holding on the flexible requirements of due process and not the absolute proscription of the Fifth Amendment, the Doyle Court seemed purposefully to leave the door open for some use of silence not contemplated by its opinion." Romantz, *supra*, at 23. If the privilege against self-incrimination enumerated in the Fifth Amendment prohibited the use of pre-trial silence, then the *Doyle* Court could have noted that instead of looking to due process for the answer.

Here, unlike the defendant in *Doyle*, Coda had not received *Miranda* warnings when he was silent. Regardless of whether Coda erroneously believed he had an unqualified right to silence that could not be used against him, he could not have been relying on any assurance *given to him*. There was nothing fundamentally unfair about using Coda's silence against him, and to do so did not violate due process. The Constitution does not require courts to give effect to popular

misunderstandings of the law. As the Court in *Doyle* insinuated, the privilege against self-incrimination does not prohibit the prosecution from using a defendant's silence against him. Thus, none of the exceptions this Court has applied to bar silence from the courtroom apply here.

2. Coda's silence was properly admitted because it was not compelled within the meaning of the Fifth Amendment.

The Fifth Amendment's privilege against self-incrimination provides two protections for defendants. First, it provides that "a criminal defendant has an 'absolute right not to testify.'" *Salinas*, 570 U.S. at 184 (plurality opinion) (quoting *Turner v. United States*, 396 U.S. 398, 433 (1970) (Black, J., dissenting)). Second, it provides that a defendant's confession must be voluntary in order to be used against the defendant at trial. *Bram v. United States*, 168 U.S. 532, 548 (1897). The use of silence violates neither of these protections. Thus, the prosecution may offer evidence of a defendant's pre-*Miranda* silence without violating the Fifth Amendment.

a) The admission of silence does not compel a defendant to be a witness against himself.

Silence itself is not testimony. A person whose silence has been admitted against him as substantive evidence of guilt has not been compelled to be a witness against himself. *See Salinas*, 570 U.S. at 192 (Thomas, J., concurring) ("A defendant is not 'compelled . . . to be a witness against himself' simply because a jury has been told that it may draw an adverse inference from his silence."). The very fact of his silence is evidence that he was *not* compelled to confess. As noted above, when this Court determined that post-*Miranda* silence is inadmissible, it did so on due process grounds, not self-incrimination grounds, thus suggesting that admitting evidence of silence would not violate the privilege against self-incrimination. Romantz, *supra*, at 22; *see Doyle*, 426 U.S. at 611. Furthermore, when this Court held that the Fifth Amendment prohibits prosecutors from commenting on a defendant's silence at trial, it did so *not* because prosecutors are thereby compelling the defendant to be a witness against himself, but because commenting on

trial silence "is a penalty imposed by courts for exercising a constitutional privilege" and "cuts down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614. The language of the privilege against self-incrimination, though, does not appear to cover the admission of silence.

b) Coda's silence was properly admitted because it was voluntary and not the product of official compulsion.

Even assuming that silence is testimony within the Fifth Amendment's protection, it is admissible unless compelled. *See Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004); Romantz, *supra*, at 48. The plain language of the Fifth Amendment applies to bar only *compelled* testimony. Of course, the amendment does not bar all testimony that the defendant would wish to bar at the time of trial; it bars only the testimony that was compelled at the time it was made. If the amendment barred the former, prosecutors could never use any defendant's statement, regardless of whom the defendant was speaking to when he made the statement. This Court has held that "[t]o qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel*, 542 U.S. at 189. 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 official compulsion to speak." *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring) (footnote omitted). He added that "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." *Id.* at 243–44 (footnote omitted). Thus, absent official compulsion, the privilege does not apply.

The privilege against self-incrimination does not prohibit the admission of voluntary statements. *See Bram*, 168 U.S. at 576. Over one hundred years ago, this Court recognized that the Fifth Amendment was created to permanently enshrine in the Constitution the English and

American common-law rule that no confession could be admitted in evidence against an accused unless it was voluntarily made. *Id.* at 542, 545, 548, 557. In *Bram*, this Court reversed the conviction of an American defendant who, while in the custody of Canadian authorities, had made incriminating statements in response to questions posed by a policeman during and after a strip-search. *Id.* at 561–62, 569. This Court said that "the general rule that the confession must be free and voluntary, that is, not produced by inducements engendering either hope or fear, is settled . . . ." *Id.* at 557–58. Statements resulting from custodial interrogations were not per se inadmissible, but the fact that custodial interrogation occurred could be considered in determining the voluntariness of the statements. *Id.* at 578–79.

A statement is voluntary unless made in response to official coercion. *Colorado v. Connelly*, 479 U.S. 157, 170–71 (1986). In *Connelly*, this Court held that a defendant who was suffering from a mental illness had voluntarily confessed and waived his *Miranda* rights, notwithstanding the fact that he believed God was telling him to confess. *Id.* at 161, 167, 170–71. This Court considered the defendant's confession under the voluntariness standard of the Due Process Clause and considered the defendant's waiver under the Fifth Amendment. *Id.* at 167, 170. This Court held that, because there had been no governmental coercion, the defendant acted voluntarily in both confessing and waiving his rights. *Id.* at 167, 170–71. This Court pointed out that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion. Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Id.* at 170 (citations omitted) (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

Furthermore, compulsion—or governmental coercion—does not exist unless there is both custody and interrogation. As Romantz has said:

> Because Miranda's presumption of compulsion is intrinsically tied to interrogation, logic dictates that without interrogation there can be no compulsion-and without compulsion, the constitutional prohibition against compelled self-incrimination does not apply. Silence, then, observed after an arrest but before the Miranda warning[,] is not compelled unless it is in response to a question, and therefore its use is determined, not under the Fifth Amendment's privilege against self incrimination, but under the routine rules of evidence that ask whether the probative significance of that silence is greater than its prejudice to the defendant.

Romantz, *supra*, at 49. This Court has clearly held that custody alone does not equate to compulsion. For example, when a defendant in custody confesses to an undercover agent, he has not been compelled to incriminate himself. *Illinois v. Perkins*, 496 U.S. 292, 294 (1990). A defendant who is arrested and makes incriminating responses to "routine booking question[s]" can expect that his responses will be used against him. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990). And when a defendant makes incriminating statements in response to the non-interrogatory statements of police, the defendant's statements are admissible against him. *Rhode Island v. Innis*, 446 U.S. 291 (1980). This Court has even differentiated between pre-*Miranda* and post-*Miranda* silence for purposes of impeachment, holding that the *Miranda* warnings, not the arrest, are what induce a defendant to remain silent. *Fletcher*, 455 U.S. at 606–07.

In sum, the Fifth Amendment prevents a defendant from being *compelled* to testify against himself, whether on the stand or, as this Court has long recognized, by having his prior, involuntary confession introduced against him. But when a defendant's confession is voluntary, the confession is admissible because he is not being *compelled* to testify. In the same way, when a defendant's *silence* is voluntary, he is not being compelled to testify against himself. The Fifth Amendment thus allows prosecutors to use a defendant's speech and *silence* when they are not compelled.

Here, Coda's silence was not compelled. Special Agent Park merely "informed [Coda] of the charges against him." R. at 7. She did not question or threaten Coda, nor did she promise him anything in return for a statement. Unlike the defendant in *Bram*, Coda was not being subjected to

the indignity of a search, nor was he being interrogated. There is no reason to think that his silence was the result of either hope or fear induced by Park's statement. The choice of whether to speak or to remain silent was his alone. He chose to be silent, and it was a voluntary choice.

Furthermore, like the defendant's statements in *Connelly*, Coda's incriminating response was not the product of governmental coercion. It is good practice, not coercion, for government agents to truthfully tell arrestees why they have been arrested; to do so benefits those in custody by allowing them to make more informed decisions about their Fifth and Sixth Amendment rights. Like the officers in *Connelly*, here Park did not induce Coda to incriminate himself. Thus, if Coda had made a statement, instead of remaining silent, that statement would have been admissible. The same logic applies to Coda's silence. Because the government did not coerce Coda into giving a statement or remaining silent, his silence was not compelled and thus was properly admitted.

c) Circuit courts have allowed post-custody, pre-Miranda silence to be admitted as substantive evidence of guilt.

U.S. Courts of Appeals for the Fourth, Eighth, and Eleventh circuits have all held that pre-*Miranda* silence is admissible as substantive evidence of guilt. *United States v. Cornwell*, 418 Fed. Appx. 224, 227 (4th Cir. 2011); *United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005); *United States v. Cabezas-Montano*, 949 F.3d 567, 595 (11th Cir. 2020); *see also United States v. Garcia-Gil*, 133 Fed. Appx. 102, 107–08 (5th Cir. 2005) (no plain error where the prosecution introduced post-arrest, pre-*Miranda* silence as substantive evidence). In *Frazier*, the defendant had been arrested after police discovered a controlled substance in the U-Haul he was driving. *Frazier*, 408 F.3d at 1106–07. At trial, over the defendant's objection, the prosecution asked a police officer whether the defendant had said anything upon being arrested. *Id.* at 1109. The Eighth Circuit held that the court had not committed plain error in admitting the testimony, noting that there had been no Fifth Amendment violation at all because the defendant "was under no government-imposed

compulsion to speak." *Id.* at 1111. The court said that "an arrest by itself is not governmental action that implicitly induces a defendant to remain silent." *Id.*

Here, like the defendant in *Frazier*, Coda had not received *Miranda* warnings when he was silent. Like in *Frazier*, here the prosecution sought to introduce the defendant's reaction to the suspicion that had fallen on him. Whereas in *Frazier* the arrest itself served as the only governmental action that could possibly be considered a compulsion to speak or an inducement to remain silent, here it was Special Agent Park's statement of the charges, which was basically part of the arrest procedure. In neither case was there any actual governmental compulsion to speak or inducement to remain silent. Thus, like in *Frazier*, here admission of the defendant's silence did not violate the Fifth Amendment.

In contrast, other circuits have held that post-arrest, pre-*Miranda* silence is inadmissible. *See, e.g.*, *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000). The Ninth Circuit said that by commenting on such silence, the prosecution "plainly infringed upon [the defendant's] privilege against self-incrimination." *Id.* at 639. But the court "failed to explain how an arrest on its own compels suspects to remain silent." Romantz, *supra*, at 44. Indeed, based on this Court's clear precedent holding that an arrest does not alone constitute compulsion to make an incriminating statement, it is unclear how an arrest could be considered compulsion to remain silent.

3. Because Coda did not expressly and unambiguously invoke the privilege against self-incrimination, he cannot now benefit from its protection.

Even though Coda was under no compulsion to remain silent, his silence might still have been inadmissible if his silence itself had been an invocation of the privilege against self-incrimination. But it was not. Assuming, *arguendo*, that the privilege against self-incrimination could apply to keep prosecutors from using a defendant's silence in a post-custody, pre-*Miranda*,

non-compulsive context, it still would not apply here. Coda did not expressly and unambiguously invoke the privilege, so he cannot benefit from its protection.

It is well established that a person must invoke the privilege against self-incrimination expressly and unambiguously in order to benefit from the privilege. *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010); *Salinas*, 570 U.S. at 181, 184–85 (plurality opinion). In *Berghuis*, the defendant had been Mirandized prior to a three-hour interrogation. *Id.* at 374–75. He had initially remained silent, with the exception of "a few limited verbal responses," but he finally incriminated himself. *Id.* at 374–76. The defendant argued that he had invoked the right to remain silent through his silence, but this Court disagreed. *Id.* at 380–82. This Court stated:

> If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

Id. at 382 (citation omitted) (quoting *Davis v. United States*, 512 U.S. 452, 461 (1994)). This Court held that the defendant could have invoked the privilege by either saying "that he wanted to remain silent or that he did not want to talk with the police." *Id.* Since the defendant had not done so, he had "not invoke[d] his right to remain silent." *Id.*

Furthermore, a criminal defendant must "expressly invoke the privilege against self-incrimination" in order to benefit from the privilege unless the defendant is at trial or is being subjected to "governmental coercion." *Salinas*, 570 U.S. at 181, 184–85 (plurality opinion). In *Salinas*, the defendant, who was not in custody but was at a police station, had voluntarily answered questions about a homicide but had remained silent when asked whether the shells recovered would match his shotgun. *Id.* at 182. "Instead, [he] '[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.'" *Id.* (quoting

J.A. at 18, *Salinas*, 570 U.S. 178 (No. 12-246)). At trial, the prosecution introduced evidence of the defendant's silence and incriminating behavior in its case-in-chief. *Id.* This Court upheld the defendant's conviction against a Fifth Amendment challenge. *Id.* at 181–82. Writing for the plurality, Justice Alito said that it was unnecessary to determine "whether the prosecution [could] use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief" because the defendant had never asserted the privilege. *Id.* at 183. He said that "a witness who '"desires the protection of the privilege . . . must claim it"' at the time he relies on it." *Id.* at 183 (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). He stated:

> [T]he Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself"; it does not establish an unqualified "right to remain silent." 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. at 189. Requiring defendants to contemporaneously invoke the privilege "ensures that the government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, or cure any potential self-incrimination through a grant of immunity." *Id.* at 183.

Justice Alito noted that there are two exceptions to the rule that a person cannot invoke the privilege through silence. First, a defendant need not expressly assert the privilege at trial, because "a criminal defendant has an 'absolute right not to testify.'" *Id.* at 184 (quoting *Turner v. United States*, 396 U.S. 398, 433 (1970) (Black, J., dissenting)). Second, a person's "failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Id.* When the government interrogates a defendant in custody or threatens to deprive someone of government benefits, the coercive element present can excuse a defendant from

expressly invoking the privilege. *Id.* at 184–85. Likewise, "where assertion of the privilege would itself tend to incriminate," such as when the government requires those engaged in illegal activities to fill out certain forms admitting as much, silence can be sufficient to claim the privilege. *Id.* at 185. Thus, unless the circumstances of an interrogation involve coercion, a person must expressly invoke the privilege to remain silent to rely on it. Silence is not an express invocation.

Here, like the defendants in *Berghuis* and *Salinas*, Coda did not expressly or unambiguously claim the privilege against self-incrimination. Instead, like both of those defendants, Coda was merely silent. Furthermore, none of the exceptions apply to excuse Coda from expressly invoking his privilege. He was not at trial, he was not experiencing governmental coercion, and claiming the privilege would not have been an admission of guilt. In fact, the defendant in *Salinas*, who was under suspicion of murder and was being interrogated at a police station, was probably in a more coercive environment than Coda, who had been arrested but was not under interrogation *at all*. Like the defendant in *Berghuis*, Coda was in custody when he was silent, but this fact is not sufficient to make his silence an express, unambiguous invocation of the Fifth Amendment. If police had been interrogating Coda, then Coda would have been able to argue that his silence was inadmissible because it was obtained in violation of *Miranda*, but here there was no interrogation. Thus, even if the privilege against self-incrimination applies post-custody but pre-*Miranda*, Coda cannot benefit from the privilege because he never invoked it.

4. Declining to expand the Fifth Amendment beyond this Court's recent precedents will not deprive defendants of constitutional protections ensuring fair trials.

This Court's decision to interpret the Fifth Amendment in accordance with its recent precedents and the original intent of the amendment will not deprive defendants of fair trials. The Fifth Amendment is not the last bulwark between a defendant and an unfair conviction and need

not be expansively twisted to provide greater protections than the founders intended. The privilege against self-incrimination may not cover every situation in which a defendant chooses not to speak, but numerous other constitutional and procedural protections work in harmony with the Fifth Amendment to provide every defendant with what is at the heart of several of our most treasured constitutional provisions—the right to a fair trial. The Federal Rules of Evidence, this Court's jurisprudence surrounding *Miranda* warnings, and the Sixth Amendment's guarantees of assistance of counsel and an impartial jury all combine to protect defendants from being unfairly convicted based on silence.

a) Police cannot manufacture silence by delaying Miranda warnings because even statements that are not questions can constitute an interrogation if they are designed to elicit an incriminating response.

In her dissent below, Chief Judge Martz suggested that allowing the prosecution to use a defendant's pre-*Miranda* silence in its case-in-chief would incentivize law enforcement to delay interrogating a suspect in order to elicit incriminating silence. R. at 14. But this Court's holding in *Rhode Island v. Innis*, 446 U.S. 291 (1980), already prohibits such abuse. In *Innis*, a murder suspect had been Mirandized and had invoked his right to an attorney prior to being placed in a patrol car with three officers. *Id.* at 293–94. En route to the police station, the officers began expressing concern among themselves that disabled children in the area might find the murder weapon and injure themselves. *Id.* at 294–95. In response, the suspect offered to lead them to the murder weapon. *Id.* at 295. This Court held that the suspect's statement and the weapon were admissible and were not obtained in violation of the suspect's right to counsel because the officers did not interrogate the suspect. *Id.* at 203, 295–96, 302, 304. This Court said that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should

know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). In determining there was no interrogation, the dispositive fact was *not* the absence of express questioning. *Id.* at 302. The Court focused instead on the officers' reasonable ignorance that their conversation was "likely to elicit an incriminating response." *Id.* at 302–03.

Here, of course, Coda has not argued that Special Agent Park interrogated him. Park merely "informed [Coda] of the charges against him," R. at 7, a type of statement "normally attendant to arrest." *Innis*, 446 U.S. at 301. But had Park taken further action to try to elicit incriminating silence, Coda would have been able to argue that his silence was obtained in violation of *Miranda*, and then it really would have been inadmissible. Under *Miranda*, Police cannot say or do anything—beyond what is normally attendant to arrest—that is likely to elicit an incriminating response, including incriminating *silence*. If this Court holds that pre-*Miranda* silence is admissible, that holding will leave *Innis* intact and do little to incentivize police to "manufacture silence" because police will still have to carefully avoid crossing the line into interrogation.

b) The evidence rules, the right to counsel, and the right to a jury provide a barrier to convictions unfairly based on silence.

If this Court holds today that pre-*Miranda* silence is admissible as substantive evidence of guilt, that holding will mean only that silence does not violate the Fifth Amendment. It will not sentence defendants to convictions unfairly based on silence, because two other important protections still stand between the defendant and a conviction. First, although the prosecution does not violate the Fifth Amendment by offering a defendant's pre-*Miranda* silence in its case-in-chief, courts will continue to exercise their discretion to disallow evidence of pre-*Miranda* silence if its prejudicial effect outweighs its probative value. Romantz, *supra*, at 54; Fed. R. Evid. 403; *see* 1 *Courtroom Criminal Evidence* § 1106 (Matthew Bender Co. 2020) (one rationale behind courts refusing to admit silence is "the belief that an arrestee's safest course is silence is now so

widespread that the arrestee's silence is too ambiguous to support an inference of assent.") Thus, defendants are free to object to evidence of silence on evidentiary grounds, and when a court determines that a particular defendant's silence really was "too ambiguous to support an inference of assent," the court can rule that the prejudicial effect of the silence outweighs its probative value. Furthermore, defendants are represented by counsel who, through cross-examination, closing argument, and other evidence, can show that silence is hardly an unusual response for someone bewildered by an unexpected arrest who has not yet had the opportunity to talk to an attorney.

Second, even if evidence of silence is admitted, a jury still stands between the defendant and conviction. The public may perceive the Fifth Amendment as covering far more speech and silence than it actually covers, particularly because of the prevalence of *Miranda* warnings in television and movies. *See* George Fisher, *Federal Rules of Evidence 2018–2019 Statutory and Case Supplement* 515–16 (2018); *see* 1 *Courtroom Criminal Evidence* § 1106 (Matthew Bender Co. 2020). As Justice Alito aptly noted, "popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be 'compelled in any criminal case to be a witness against himself"; it does not establish an unqualified 'right to remain silent.'" *Salinas*, 570 U.S. at 189 (plurality opinion). These misconceptions, created and reinforced on screen, cannot change the meaning of the Fifth Amendment, but they do affect the weight a jury is likely to give silence. If the public believes that the Fifth Amendment provides an unqualified right to silence, then juries may understand a defendant's silence as a sensible decision instead of an admission of guilt. The more popular culture uses phrases such as "don't say anything without a lawyer present" and "you have the right to remain silent," the more likely that the public will view silence charitably from the jury box. Public misconceptions may harshen the reality of what the Fifth Amendment actually means, but they simultaneously soften the blow to misinformed defendants.

Thus, there is no per se rule that silence is inadmissible. Coda's silence was not compelled, and he never invoked the privilege against self-incrimination. Furthermore, this Court's Fifth Amendment jurisprudence, as well as other constitutional provisions, already provide defendants with adequate protection in the pre-*Miranda* context without expanding the Fifth Amendment beyond its original meaning. Therefore, this Court should hold that the Fifth Amendment does not prohibit prosecutors from using defendants' pre-*Miranda* silence as substantive evidence of guilt.

CONCLUSION

This Court should adopt the two-prong test for due process claims involving pre-indictment delay because its precedents only align with this approach. Adopting the two-prong test allows the predetermined assessments of Congress enumerated in the federal statutes of limitations to provide protection for the defendant without placing undue burdens on the government. Thus, this Court should require a showing of governmental bad faith. Furthermore, the Fifth Amendment does not forbid prosecutors from using a defendant's post-custody, pre-*Miranda* silence as substantive evidence of the defendant's guilt. The Fifth Amendment applies to prohibit only compelled testimony, not silence in response to a mere statement of charges.

Here, the pre-indictment delay was not caused by any bad faith on the part of the government. Additionally, Coda was not compelled to speak or be silent, and he did not claim the privilege against self-incrimination. For these reasons, Respondent, the United States of America, prays that this Court affirm the conviction below, denying Petitioner's motions to dismiss on both grounds.

Respectfully submitted,

TEAM 5
Counsel for Respondent