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Docket No. 21 - 125

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IN THE

**Supreme Court of the United States**

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AUSTIN CODA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**BRIEF FOR THE PETITIONER**

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*Team 22  
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## QUESTIONS PRESENTED

- I. Must a defendant show prosecutors delayed an indictment in bad faith to prove a violation of the Fifth Amendment to the United States Constitution when actual prejudice is clearly present?
- II. Does admission of a defendant's post-arrest but pre-*Miranda* silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?

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## OPINIONS BELOW

The District Court's Opinion appears in the record at pages 1-10. The opinion of the United States Court of Appeals for the Thirteenth Circuit appears in the record at pages 11-15.

## CONSTITUTIONAL PROVISIONS

The text of the following constitutional provision is provided below:

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

## STATEMENT OF THE CASE

### I. Factual History

Austin Coda opened a family hardware store in Plainview, East Virginia in January of 2002. R. at 1. Plainview was a small, rural town on the border between Virginia and North Carolina. *Id.* The business was profitable for its first few years but was impacted heavily by the recession of 2008. *Id.* To make matters worse, in a story all too familiar to small town “mom and pop” stores, a large chain store opened in Plainview in 2009 and took much of Coda's remaining business away. *Id.* By 2010, Coda's business barely generated enough revenue to stay open. *Id.* The low profit margins left Coda unable to maintain proper upkeep of the building. *Id.*

On December 22, 2010, an explosion occurred at Coda's hardware store. R. at 2. The resulting fire destroyed the entire store. *Id.* Local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) opened an investigation into the cause of the

explosion. *Id.* Evidence suggested that cold weather caused an old, faulty gas line to leak and destroy the run-down building. *Id.* Coda was put under suspicion, however, after one of his neighbors, Sam Johnson, contacted the Federal Bureau of Investigation (FBI) and told them that Coda's personal finances were in decline. *Id.* Johnson claimed Coda maintained an insurance policy which covered the hardware store in case of a total loss. *Id.* Johnson also claimed Coda seemed "anxious and paranoid" the week of the explosion. *Id.* Based on Johnson's unsubstantiated accusation, the FBI decided to pursue Coda as a suspect in the explosion and informed the United States Attorney's Office. *Id.*

The U.S. Attorney's Office marked Coda's case as "low-priority." *Id.* Coda was being prosecuted for unrelated state charges and the U.S. Attorney's Office believed that it would be inconvenient to transport him back and forth during that time. *Id.* Once Coda's state proceedings were finished, under political pressure to prioritize drug trafficking cases, the U.S. Attorney's office intentionally chose not to pursue Coda's case. *Id.* Coda's case was passed from one Assistant U.S. Attorney to another, designated "low priority," with zero progress made. *Id.* No investigation was undertaken until nearly a decade later, in April of 2019, when the Assistant U.S. Attorney then assigned to Coda's case realized that the statute of limitations was about to run. R. at 2-3.

The FBI apprehended Coda and took him into custody on April 23, 2019. R. at 3. FBI Special Agent Park informed Coda of the charges against him when he was apprehended and he remained silent, believing anything he said could be used against him in a court of law. R. at 7. The FBI read Coda his *Miranda* rights only after they reached the detention center and were ready to interrogate him. *Id.*

The government's indictment alleged that Coda destroyed his store to claim insurance proceeds. *Id.* The indictment, which took place in May 2019, was barely within the statute of



limitations provided by 18 U.S.C. § 3295. *Id.*

At an evidentiary hearing, Coda testified that he was in New York, hundreds of miles away, the night the explosion occurred, visiting family. *Id.* The night of the explosion was Coda's birthday. *Id.* Every year until 2015, he took a Greyhound bus to visit his family in New York on his birthday, but because of the government's delay in prosecuting his case, four out of the five family members Coda visited in 2010 had died by 2019. *Id.* Two died from chronic disease in 2015 and 2017 respectively, and two died in a car accident in 2018. *Id.* The fifth family member was diagnosed with dementia in the intervening years. *Id.* Coda was also unable to produce his Greyhound bus records because they are stored online for only three years, and so records corroborating his alibi were also unavailable at trial. *Id.*

## **II. Procedural History**

Coda was arrested in on April 23, 2019, and indicted under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce. R. at 2-3. Following his indictment, Coda brought motions to dismiss the indictment for preindictment delay and to suppress his post-arrest but pre-*Miranda* silence. R. at 1, 7. After an evidentiary hearing, the motions were denied on all grounds. *Id.* Coda was tried, convicted, and sentenced to ten years imprisonment. R. at 11. Coda's counsel filed an appeal to the United States Court of Appeals for the Thirteenth Circuit. *Id.* The Thirteenth Circuit affirmed the District Court's ruling on both issues. R. at 11-12. Coda then petitioned for a writ of certiorari which was granted on July 9, 2021. R. at 16.

## **SUMMARY OF THE ARGUMENT**

The United States Government would have this Court believe that waiting nine years to indict a man, during which time all his alibi witnesses died or were afflicted with dementia, does not offend the sense of fair play and decency at the heart of our justice system. The government's argument

that such a delay does not violate due process fails on several fronts. First, the government contends that prosecutors must have acted in “bad faith” in delaying their indictment in order for Austing Coda to prevail despite the fact that the words “bad faith” appear nowhere in this Court’s jurisprudence on the matter. The Fourth and Ninth circuits correctly weigh the prejudice to a defendant against the reasoning for prosecutorial delay, reasoning that a lack of bad faith merely means that the prejudice against a defendant must reach a higher bar. Under such a standard, the extreme prejudice to Coda greatly outweighs the reasons for prosecutorial delay, here. Second, the government seeks to have this Court adopt the rigid, bright-line methodology of courts like the Third and Fifth circuits, in which a Fifth Amendment due process claim fails immediately if “bad faith” is not present. Even under such a standard, this Court should find Coda’s due process rights were violated because intentionally stalling an investigation due to political pressure is not a good faith reason for delay. Beyond the immediate case, such a rigid standard is unworkable, and unfair. A due process right entirely contingent upon proving the state of mind of a prosecutor, and reliant upon her candor in admitting bad faith or incompetence, is little better than no right at all. The core concern of due process is that a defendant receives a fair trial, something the government overlooks in pressing a standard that courts have admitted is practically impossible to meet. For these reasons, an approach that balances the prejudice to a defendant against legitimate reasons for prosecutorial delay is the fairest, and the one this Court should adopt.

Furthermore, Coda’s rights were violated a second time when his pre-custodial silence was used against him at trial in violation of the Fifth Amendment. The Fifth Amendment applied in Coda’s case because custody marks the beginning of criminal proceedings and is inherently coercive. A reasonable person could not believe that FBI agents taking a person, forcing them into a government vehicle, and telling them that they have been accused of a crime does not constitute an inherently coercive circumstance. The government’s machinations coupled with the Thirteenth

Circuit's error in denying Coda's motion to suppress his custodial silence violated his Fifth Amendment privilege against self-incrimination and resulted in prejudice against him at trial. The district court, and the Thirteenth Circuit's affirmation of the lower court, trampled the vibrancy of Fifth Amendment privilege against self-incrimination. Since our founding, the United States' criminal justice system has incorporated a presumption of innocence for the accused, and the right to remain silent in the face of government interrogation. In this case, the petitioner Austin Coda, a former small-business owner whose hardware store tragically burned down more than a decade ago, attempted to find shelter in the Fifth Amendment. Upon his arrest by the FBI, a shocked Mr. Coda immediately recognized the gravity of the situation and chose to exercise his right to remain silent, but the prosecutor later penalized him for exercising his Fifth Amendment privilege through silence. The prosecutor could not use Mr. Coda's words against him because he had remained silent, so at trial the prosecutor argued that Mr. Coda's silence served as substantive evidence of his guilt. This case represents the Framers' worst nightmare -- precisely the type of situation they intended the Fifth Amendment to prevent. Nevertheless, this Court can mitigate the damage done by the courts below by reversing Coda's conviction, vacating his conviction, and setting a new rule that assures Fifth Amendment protection of a defendant's post-arrest silence.

## **ARGUMENT**

### **I. AUSTIN CODA'S FIFTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE GOVERNMENT NEEDLESSLY DELAYED INDICTING HIM.**

The Fifth Amendment to the United States Constitution provides that "no person shall... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This Court first suggested that preindictment delay that affects a defendant's ability to have a fair trial may violate a defendant's right to due process under the Fifth Amendment in 1971. See *United*

*States v. Marion*, 404 U.S. 307, 324–25 (1971). Six years later this court expanded its analysis of the issue when it reasoned that *Marion* “makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977). This Court conceded it could not determine, in the abstract, “the circumstances in which preaccusation delay would require dismissing prosecutions” and “therefore left to the lower courts the task of applying the settled principles of due process to the particular circumstances of individual cases.” *Id.* at 796-97.

The question here is whether Austin Coda’s due process rights were violated when prosecutors waited nearly a decade to indict him, purposefully refusing to advance his case or investigate the accusation made against him until all his alibi witnesses were dead or incapacitated, and all evidence of his bus trip out of state on the day of the crime had been lost to time. The answer is yes, Coda’s rights were violated. This Court lamented in *Lovasco* that “more than five years” after *Marion* it still could not determine the exact circumstances that would require dismissing a prosecution for violating due process. *Id.* Those circumstances are before this Court today, and it can right that wrong by vacating the verdict against Austin Coda and returning him his freedom.

### **1. There was clear and actual prejudice to Coda.**

Coda suffered actual prejudice due to the government’s nearly ten-year delay in charging him because four of his alibi witnesses died, another was incapacitated, and greyhound bus records that would have shown he was hundreds of miles away the night of the explosion at his store were destroyed. “Proof of actual prejudice makes a due process claim concrete and ripe for adjudication.” *United States v. Lovasco*, 431 U.S. 783, 789-90. However, proof of actual prejudice is “a necessary but not sufficient element of a due process claim,” and merely the first step in such a due process

analysis. *Id.* Some circuits view the establishment of actual prejudice in a case as a threshold requirement before the case can even be considered in full. *See Jones v. Angelone*, 94 F.3d 900, 904 (4th Cir. 1996). The burden rests on the defendant to show actual prejudice exists. *Id.* A mere delay in indictment alone is not enough to prove actual prejudice. *Id.* at 907; E.g., *Wilson v. McCaughtry*, 994 F.2d 1228, 1234 (7th Cir. 1993) (Holding that delay alone does not violate the constitutional right to due process). To sustain his burden of proof, the defendant must "demonstrate how [the loss of evidence] is prejudicial" to him, and that it is not merely speculative but rather substantial. *See United States v. Birney*, 686 F.2d 102, 105-06 (2d Cir. 1982).

Here, the Thirteenth Circuit correctly found that Coda suffered actual prejudice because the loss of his alibi witnesses and Greyhound records had a significant effect on the outcome of his case. Where the Thirteenth Circuit erred, however, was in its analysis regarding the prosecution's reason for delay.

## **2. Coda's due process rights were violated under the constitutionally appropriate balancing tests employed by the Fourth and Ninth Circuits.**

Circuits have split on how to analyze prosecutorial delay, with some, like the Thirteenth Circuit adopting rigid, nearly bright-line rules requiring bad faith on behalf of the government, however the Fourth and Ninth Circuits correctly apply a balancing test to weigh the prejudice against the defendant against the reasoning for the prosecutorial delay. Under a balancing test, if a defendant can establish actual prejudice, as in this case, then the Court must weigh the defendant's prejudice against the government's justification for delay. *See Jones*, 94 F.3d at 904. The due process inquiry "must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790. Intent or reckless behavior by the government is not "an essential ingredient" to finding a due process violation. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). If "mere negligent conduct by the prosecutors is asserted," then a defendant must simply

show that the delay and/or prejudice suffered was greater than that in cases where recklessness or intentional governmental conduct was alleged. *Id.*

In *Jones*, a defendant accused of murder fled the state of Virginia and was not indicted until eleven years after his alleged crime because the State of New York refused to extradite him. *Jones*, 94 F.3d at 901. The defendant in *Jones* claimed that due to the delay, he could not locate a witness he needed for his defense. *Id.* at 908. The Court in *Jones* found that the reason for the delay in prosecution was valid because New York repeatedly refused to extradite the suspect despite repeated attempts by Virginia prosecutors. *Id.* at 907. The Court in *Jones* said that mere length of delay alone could not support a due process claim. *Id.* In contrast, another Fourth Circuit Court found a defendant's due process rights had been violated in a case involving a man who had been indicted by the state of North Carolina on robbery charges after a two-year delay when he could not locate an alibi witness. See *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). The Court in *Howell* said actual prejudice was not only present, but "assumed" because the defendant had made extensive efforts to locate his missing witness and identified exactly what the witness would have testified to in his defense. *Id.* at 892. The Court in *Howell* found that this prejudice, coupled with the State of North Carolina's admission that the preindictment delay was done for "mere convenience" and with no actual investigative purpose, weighed in favor of finding a due process violation. *Id.* at 892. The Court in *Howell* further reasoned that because the defendant's case was not particularly complicated and no investigation was ongoing, there was "no valid justification...for the preindictment delay that prejudiced the defendant." *Id.*

The Ninth Circuit explained the rationale for using a balancing test in *Moran*. The Court in *Moran* explained that the Courts in *Marion* and *Lovasco* merely acknowledged "that intentional or reckless conduct would or might be considered violations of the due process clause if actual prejudice had been shown" in those cases. The *Marion* Court specifically stated that "the sound

administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case.” *Marion*, 404 U.S. at 324-25. Justice Brennan even more clearly articulated the point in his concurring opinion when he stated that “a negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure.” *Marion*, 404 U.S. at 334 (Brennan, J., concurring). The *Lovasco* court implicitly did not set out intent or recklessness as required standards of fault when it acknowledged that it could not determine the exact circumstances that would require dismissing a prosecution for violating due process. *Lovasco*, 431 U.S. at 796-97. Thus, as the Court in *Moran* found, any governmental assertion here that *Lovasco* overrules the possibility that due process might be violated upon a negligent delay by the government is not supported by either *Lovasco* or *Marion*. See *Moran*, 759 F.2d at 781. The *Moran* Court reasoned further that if “mere negligent conduct by the prosecutors is asserted, then obviously the delay and/or prejudice suffered by the defendant will have to be greater than that in cases where recklessness or intentional governmental conduct is alleged.” *Id.*

Read together, the reasoning of the Fourth and Ninth Circuits says that in a case where prosecutors negligently delay filing charges and cause substantial actual prejudice to a defendant, as happened here, a defendant’s right to due process has been violated. Like the prosecutors in *Howell* who delayed filing charges for “mere convenience,” and unlike the prosecutors in *Jones* who repeatedly tried to have their murder suspect extradited to Virginia, the prosecutors here had no compelling reason to delay filing charges against Coda. The prosecutors in Coda’s case initially delayed filing charges because it would be “inconvenient” to them, then intentionally chose to prioritize other cases due to political pressure, and finally lost track of his case as it was passed from Assistant U.S. Attorney to Assistant U.S. Attorney like an unwanted holiday fruitcake. R. at 2-3. Like the prosecutors in *Howell*, the prosecutors in Coda’s case offered no investigative

purpose for their delay and did not advance his case or begin investigation until nine years after his alleged crime. *Id.* While the Court in *Jones* acknowledged that mere length of delay alone could not support a due process claim, extreme length of delay coupled with a lack of compelling reason for that delay weighs in favor of finding Coda's rights were violated here. The conduct of the prosecutors in Coda's case clearly rose to the level of negligence – losing track of cases for several years is not proper prosecutorial conduct – and this court should vindicate Coda by vacating his conviction.

**3. Even under the incorrectly applied bright line test employed by the Thirteenth Circuit, Coda's due process rights were violated.**

Coda's due process rights were violated because the actions of the prosecutors in his case were intentional, for an improper purpose, and violated society's sense of fair play and decency. The Thirteenth Circuit has misguidedly developed a rigid, bright line rule that makes it impossible for a defendant to prove a due process violation without showing that prosecutors acted with "bad faith" in delaying indictment. *R.* at 4. The Third and Fifth Circuits have developed similarly rigid rules governing Fifth Amendment due process claims. *See United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985); *United States v. Crouch*, 84 F.3d 1497, 1510 (5th Cir. 1996). These Circuits have acted under the erroneous notion that *Marion* and *Lovasco* require a showing of bad faith. Their jurisprudence stems mainly from a single line of dicta in *United States v. Gouveia*, which says "the Fifth Amendment requires the dismissal of an indictment... 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." 467 U.S. 180, 192 (1984). As the Court in *Howell* observed, the Court in *Gouveia* "was merely restating, in dicta, the established outer contour of unconstitutional preindictment delay," and not creating some extreme bright line rule. *Howell*, 904 F.2d at 894. This Court has frequently eschewed the use of bright



line rules in the context of individual rights, particularly concerning due process, and stressed repeatedly that such situations cannot be analyzed mechanically, rigidly, or divorced of context. See *Florida v. Harris*, 568 U.S. 237, 244 (2013); *Kelo v. City of New London*, 545 U.S. 469, 483 (2005); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Indeed, it seems unlikely that if the Court in *Marion* viewed a lack of bad faith as fatal to a Fifth Amendment due process claim, it would have commented, after finding such a lack of bad faith, that “events of the trial may demonstrate actual prejudice, but at the present time appellees’ due process claims are speculative and premature.” *Marion*, 404 U.S. at 325-26. Justice Brennan’s concurrence in *Marion* also suggested that the Court was not seeking to establish a bright line rule when he wrote “the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided – whether it was unnecessary.” *Id.* at 334 (Brennan, J., concurring).

Nevertheless, even under the misguided bright line tests employed by the Thirteenth and other Circuits, Coda’s due process rights were violated. The Third Circuit laid out its test in *Sebetich*, where it considered the cases of three robbery defendants who allegedly committed crimes in 1979 and were not charged until 1984, just a few days before the statute of limitations expired. 776 F.2d 412, 429 (3d Cir. 1985). The Court in *Sebetich* found that no due process violation had occurred because the robbers had not demonstrated prosecutorial “bad faith.” *Id.* at 430. The Court said that to prove bad faith, the robbers would have needed to provide “evidence tending to suggest that the delay was a deliberate tactical maneuver by the government.” *Id.* The Court in *Sebetich* said the delay in the robbers’ cases was not “intentional,” but rather the “result of a mix-up” and therefore did not satisfy the standard required. *Id.* The Court in *Sebetich* summed up by saying that “appellants must show intentional delay and actual prejudice” and that because

the robbers failed to show “intentional delay,” the court did not need to reach the issue of actual prejudice. *Id.*

The Fifth Circuit employed a similar, though slightly different standard in *Crouch*. 84 F.3d at 1505. In *Crouch*, two defendants suffered an eight-year pre-indictment delay in a savings and loan fraud case, but the Court found no due process violation because the delay in the case was not “intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose.” *Id.* at 1514. The Court in *Crouch* reasoned that the delay was not intentional because bank fraud investigations were “overwhelming the Federal criminal justice system” due to their complexity and need for specialized prosecutors. *Id.* at 1513-14. The Court said that delay due to such causes was “fundamentally unlike intentional delay to gain tactical advantage or for other improper purpose,” and that it was hesitant to wade into the debate over how congress funds government departments. *Id.* at 1514. The Court claimed that evaluating the merit of resource allocation and management decisions was properly the province of the executive and legislative branches, and not the judiciary. *Id.* The Court also noted that historically, the “guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property” and not to unintentional acts. *Id.* at 1512-13. Therefore, the Court in *Crouch* refused to find that the government delay was in “bad faith.” *Id.* at 1514.

Applying the rules of *Sebetich* and *Crouch*, this court should find Coda’s due process rights were violated. Unlike the prosecutors in *Sebetich*, who delayed filing charges due to a mistake, or the prosecutors in *Crouch*, who delayed filing charges due to a lack of qualified attorneys to prosecute a complex matter, the prosecutors in Coda’s case initially intentionally delayed filing charges against him because they did not want to be inconvenienced, and later because they felt

politically pressured to prioritize other cases. Coda's case is not analogous to *Crouch*, where prosecutors faced a complex case which required a specialist to try it; Coda's crime was simple arson and neither complex in nature nor overwhelming to try in court. The delay of the prosecutors in Coda's case was intentional, and not merely negligent because the delay was a product of improper motivations. Failing to prosecute a case due to political pressures, as admittedly occurred in Coda's case, is the sort of "improper purpose" the Court in *Crouch* warned against. Therefore, this court should find Coda did not receive due process.

#### **4. Bad faith is a nebulous standard that leads to fundamentally unfair rulings.**

Several circuits have opined that employing a balancing test for Fifth Amendment due process cases is unworkable, but the truly unworkable test is the one which relies upon an undefined standard of bad faith. As a foundational matter, the phrase "bad faith" appears nowhere in *Marion*, *Lovasco* or *Gouveia*. While the Court in *Lovasco* said that prosecutors acted in good faith when they delayed indicting the respondent because they were attempting to locate a potential accomplice in his crimes, the court was ultimately concerned with whether trying the respondent after the delay was "fundamentally unfair." See *Lovasco*, 431 U.S. at 796. The fundamental right of a defendant implied through Fifth Amendment Due process is his right "to a fair trial," not his right to be free of prosecutorial bad faith. See *Marion*, 404 U.S. at 324.

The Courts which require "bad faith" have failed to define what it even means. The Fifth Circuit in *Crouch*, disparaging the use of a balancing test, said there is "no scale or conversion table to tell us whether eighty percent of minimally adequate prosecutorial and investigative staffing is outweighed by a low-medium amount of actual prejudice." *Crouch*, 84 F.3d at 1512. The Court said that such a test would necessarily lead to judges weighing by their own "personal and private notions of fairness." *Id.* at 1512. The same Court which decried such a nebulous

standard went on to implement a two-prong test requiring “bad faith,” and commented “we need not now attempt to catalogue all possible “other” impermissible, bad faith purposes of intentional delay... we leave that to further case-by-case development.” *Id.* at 1514. The decision of the Court in *Crouch* essentially defined bad faith as an attempt to gain a tactical advantage and “other” things, a standard as prone to personal and private notions of fairness as the very balancing test it rejected.

Moreover, the Court in *Crouch* was misguided in its reasoning because *Marion* and *Lovasco* both suggest courts must balance competing interests. The court in *Marion* explicitly stated that statutes of limitation “represent legislative assessments of relative interests of the State and the defendant,” implying that those interests can indeed be balanced. See *Marion*, 404 U.S. at 322. The Court in *Lovasco* could not have been clearer that the due process inquiry must consider both “the reasons for the delay as well as the prejudice to the accused.” *Lovasco*, 431 U.S. at 790. Far too often, courts applying rigid, two-prong “bad faith” tests find that if there was no bad faith, the claim simply fails, regardless of the degree of prejudice. R. at 6. These courts have created a “standard [that] is nearly insurmountable.” *United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018). Here, Coda came before such a Court and received no relief despite the Court’s finding that the actual prejudice to his case was clear and unambiguous. If the U.S. Attorney’s office, here, had tried Coda’s case promptly, he would have been able to produce five witnesses who could have attested to the fact that he was hundreds of miles away when his alleged crime was committed, and yet he was still denied relief. A court which dismisses a claim automatically when bad faith is not present cannot be said to truly consider the prejudice to a defendant, because no matter its severity, such a court will never grant relief. Under such an exacting standard, prosecutors can hang a sword of Damocles over the head of a defendant until the very edge of the statutory abyss because of laziness, incompetence, or mere convenience, so long

as they do not intentionally try to gain a “tactical advantage.” Few Americans would find that such actions comport with any sense of fair play and decency. As Benjamin Franklin famously wrote, “that it is better one hundred guilty persons should escape than that one innocent person should suffer is a maxim that has been long and generally approved.” Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in *The Oxford Dictionary of American Quotations*, 371, (Hugh Rawson and Margaret Miner eds., 2008).

This Court should find that “bad faith” is not a necessary element to a Fifth Amendment due process violation and vacate Austin Coda’s conviction due to the extreme prejudice he suffered due to the unjustified delay in his prosecution.

## **II. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION SHIELDS CODA’S CUSTODIAL SILENCE.**

At its core, the Fifth Amendment features a privilege against self-incrimination which forbids the government from compelling a person involved in criminal proceedings to testify against himself. U.S. Const. amend. V. The question presented involves several interrelated principles undergirding Fifth Amendment privilege against self-incrimination to include the following: transformation of silence into a statement; connection between custody and coercion; the government’s burden to demonstrate the suspect waived the privilege; and the constraints on the government’s particular use of silence at trial. Mr. Coda’s custodial silence falls within a precarious legal gap because he exercised one aspect of his Fifth Amendment privilege against self-incrimination, the right to remain silent, *after* FBI Special Agent Park announced the charges and arrested him, but *before* the FBI explicitly issued a Miranda warning. R. at 7.

Despite the Thirteenth Circuit’s erroneous holding on this issue, careful analysis of relevant decisions issued by this Court and Courts of Appeals reveals the Fifth Amendment protects Coda’s custodial silence for the following reasons. First, Fifth Amendment protection is not contingent on

timing of Miranda warnings, and factors in the particular circumstances. Second, the inherently coercive nature of custody brings the custodial silence within Fifth Amendment protection. Third, the government failed to show Coda waived his Fifth Amendment privilege, and public policy weighs toward ensuring the Fifth Amendment protects a defendant's custodial silence. Finally, the lower court's error in admitting Coda's post-arrest silence, which the government used as substantive evidence of his guilt at trial, was not harmless error and, as a result, prejudiced his case.

**1. The Fifth Amendment applies because custody marks the beginning of criminal proceedings and is inherently coercive.**

The Supreme Court announced landmark decisions related to the Fifth Amendment in the mid-1960's in *Miranda v. Arizona* and *Griffin v. California* that resulted in more robust protection of defendants. 384 U.S. 436, 443 (1966); 380 U.S. 609, 612 (1965). In *Miranda*, the Court explicated the contours of the Fifth Amendment privilege against self-incrimination, and its historic role in the Constitution's formation. *Miranda*, 384 U.S. at 436. Notably, the principles backdropping the Fifth Amendment originated from "a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons" in England. *Id.* at 442. The Court's decision in *Miranda* predicated the government's use of the defendant's statements later in the criminal proceedings upon the government issuing specific warnings before beginning interrogation. *Id.* The *Miranda* warnings distilled Fifth Amendment procedural safeguards into understandable phrases to ensure defendants understood they possessed a right to remain silent in the face of questions and obtain the assistance of counsel. *Id.* at 444. The Court in *Miranda* implemented a Fifth Amendment standard that found compulsion when the accused was "involuntarily impelled to make a statement when but for the improper influences he would have remained silent." *Id.* at 461–62 (quoting *Bram v. United States*, 168 U.S. 532, 549). There, the

Court implied that silence functions as a zone of safety for the accused who seeks the shelter of Fifth Amendment. *Id.*

In addition, the Supreme Court's decision in *Griffin* struck down a state law that allowed a prosecutor to comment on a defendant's exercise of his Fifth Amendment privilege by refusing to testify at trial. 380 U.S. at 612. This law perpetuated the inquisitorial system of criminal justice the Fifth Amendment intended to abolish. *Id.* at 614. The Court found this type of prosecutorial comment violated the Fifth Amendment because it effectively penalized defendants for invoking their constitutional privilege, and "cut down on the privilege by making its assertion costly." *Id.* Importantly, the Court's rationale recognized a foundational premise of the United States criminal justice system: a presumption of innocence applies to the accused, regardless of her choice to testify. *Id.* After all, the Court acknowledged various reasons for an innocent defendant's refusal to testify at trial; whether due to "excessive timidity, [or] nervousness when facing others and attempting to explain transactions of a suspicious character," some cannot "safely venture on the witness stand." *Id.* at 613 (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893) (Which held "comment, especially hostile comment, upon [a defendant's] failure [to testify] must necessarily be excluded from the jury"). Notwithstanding the reason for refusal, however, the Fifth Amendment affords the accused a privilege against self-incrimination and a presumption of innocence not contingent on asserting Fifth Amendment privilege.

According to the Fifth Amendment text, the privilege applies to the spectrum of "criminal proceedings," although an obvious application of the privilege occurs when a defendant chooses not to testify at trial. U.S. Const. amend. V. The Court in *Miranda* stated unequivocally that the privilege applies more broadly: "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which

their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.” *Miranda*, 384 U.S. at 467. Notably, the Court stated the Fifth Amendment “protects the individual from being compelled to incriminate himself in any manner,” and predicated admissibility of any statement made by a defendant on whether the government issued the required warnings or could demonstrate the defendant knowingly and voluntarily waived her privilege. *Id.*

Our present case revolves around the issue of when the Fifth Amendment applies to a defendant; the government’s case presents the faulty, and dangerous, notion that the Fifth Amendment does not apply until law enforcement decides to issue the Miranda warnings, or a shocked defendant has the presence of mind to explicitly invoke the right before hearing the required warnings. Applying the Miranda rationale to our present case, the government characterized Coda’s silence in response to his arrest as evidence of his guilt at trial; in doing so, the prosecution treated Coda’s omission as a statement he made announcing his guilt. This characterization by the prosecution located Coda’s silence within the realm of Fifth Amendment protection where admissibility depends on the government either fulfilling its responsibility to issue a Miranda warning or demonstrating Coda made a knowing and voluntary waiver of his privilege. However, the government failed to warn Mr. Coda until he arrived at the interrogation facility, or to demonstrate his waiver. R. at 8, 9.

As further support for the proposition that Fifth Amendment protects post-arrest silence, the First, Second, Ninth, and District of Columbia Circuits have deemed post-arrest silence inadmissible at trial. In particular, the DC Circuit in *United States v. Moore* reiterated that the arbitrary timing of a *Miranda* warning should not be dispositive with regard to the application of Fifth Amendment; rather, the DC Circuit ruled “custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*.” *United States v. Moore*, 104 F.3d 377,



385 (D.C. Cir. 1997). In addition, the Ninth Circuit in *United States v. Hernandez* found post-arrest silence inadmissible, and the Second Circuit in *United States v. Okatan* held that the “right to remain silent exists independently of the fact of arrest.” *United States v. Hernandez*, 476 F.3d 791, 796 (9th Cir. 2007); *United States v. Okatan*, 728 F.3d 111, 118 (2d Cir. 2013).

## **2. Fifth Amendment protection of custodial silence prevents perverse government incentive to delay *Miranda* warnings and circumvent privilege.**

The Supreme Court’s decisions in *Salinas v. Texas* and *Doyle v. Ohio* are instructive regarding the Fifth Amendment’s protection of Coda’s custodial silence. *Doyle v. Ohio*, 426 U.S. 610 (1980); *Salinas v. Texas*, 570 U.S. 178 (2013) (plurality opinion). Although Thirteenth Circuit Judges McManus and McGee affirmed the District Court’s analysis and ruling, Chief Judge Martz’s dissenting opinion described how the district court erred in denying Coda’s motions to dismiss the case and suppress the government’s use of his custodial silence as evidence of his guilt R. at 12-15. Chief Judge Martz’s dissent was correct to criticize the majority’s jurisprudence because it misapplied *Salinas* to the present case. In *Salinas*, the Court held no Fifth Amendment violation when the government used a suspect’s non-custodial silence at trial because the suspect did not invoke the privilege, voluntarily answered questions, but fell silent when asked whether “ballistics testing would match his shotgun to shell casings found at the scene of the crime.” *Salinas*, 570 U.S. at 183-84. The suspect’s silence accompanied telling body language: 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.* at 182 (2013).

In *Salinas*, the Court explained Fifth Amendment privilege functions as “an exception to the general principle that the Government has the right to everyone’s testimony” and that a “witness who desires the protection of the privilege ... must claim it at the time he relies on it.” *Id.* at 183 (quoting *Garner v. United States*, 424 U.S. 648, 658, n. 11, (1976), and *Minnesota v. Murphy*, 465

U.S. 420, 427 (1984) (internal quotations omitted)). However, the Court noted two scenarios in which silence, without an explicit invocation of the privilege, would not waive a suspect's Fifth Amendment privilege. For the first exception, the Court hearkened back to its decision in *Griffin*, where the Court ruled a criminal defendant need not invoke the privilege by taking the stand at his own trial because such a defendant possesses an "absolute right not to testify." *Salinas*, 570 U.S. at 184. For the second exception to a defendant's lack of invocation, the Court cited the *Miranda* decision which acknowledged the "inherently compelling pressures" of an unwarned custodial interrogation and permitted an exception where "governmental coercion makes [the defendant's] forfeiture of the privilege involuntary." *Miranda*, 384 U.S. at 467-68. Ultimately, the Court ruled that the defendant in *Salinas*, under his particular circumstances of voluntarily answering the government's questions in a non-custodial environment, did not suffer a coercive deprivation that removed his ability to invoke the privilege. *Salinas*, 570 U.S. at 186.

Applying the *Salinas* rules to the present case illustrates significant variance between the circumstances facing the defendant in *Salinas* and the petitioner, Mr. Coda. The defendant in *Salinas* agreed to accompany officers to the station for an interview, voluntarily answered questions, had the freedom to leave the interview at any time, but then stood mute when challenged about a critical piece of evidence that would implicate his guilt. Coda, however, refused to speak at all after he was arrested, affirming his intention of invoking his Fifth Amendment privilege. On April 23, 2019, more than nine years after he lost his small business in a tragic fire, Coda had no advance warning that FBI Special Agent Park would arrest him on charges of maliciously using an explosive to destroy property that affects interstate commerce under 18 U.S.C. § 844(i). Special Agent Park immediately took Coda into custody and transported him to the FBI facility where he was eventually given Miranda warnings. Coda was likely shocked by an unexpected arrest,

followed by an FBI Agent forcing him into an unfamiliar vehicle to transport to a government facility for interrogation. Upon arrest, Coda could not leave, and therefore, the government exerted pressure, effectively held him captive, and later misconstrued his silence as evidence of guilt. In this case, the government's actions to manufacture Coda's silence by delaying the *Miranda* warning, arresting him, and isolating him created the type of coercive environment this Court deemed unlawful in *Miranda*.

Furthermore, Although the defendant in *Salinas* remained silent in a non-coercive, pre-custodial setting, Coda's silence persisted during custody. These stark distinctions -- Coda's custodial silence and unwillingness to answer any questions -- highlight the error of the lower courts' reliance on *Salinas* and demonstrate the inapplicability of this rule to the present case.

In another case, this Court found a Fourteenth Amendment Due Process violation, and reversed the convictions of two defendants when a prosecutor drew attention to their post-arrest silence during cross-examination at trial to impeach their novel exculpatory story. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). The Court in *Doyle* described post-arrest silence as "insolubly ambiguous" because it is usually preceded by the State's required *Miranda* warning, implying an assurance that the government will not wield post-arrest silence as a weapon against a defendant later at trial. *Id.* at 617-18 (1976). Hence, the Court declared as "fundamentally unfair" the practice of allowing a prosecutor to use the arrest person's silence at trial, even if for impeachment purposes. *Id.* Critically, the Court pointed out the inconsistency of informing a suspect of Fifth Amendment protections, and then allowing a prosecutor to use their invocation of the Fifth Amendment against them at a criminal proceeding. *Id.*

Applying the reasoning in *Doyle* to the present case, this court should find Coda's Fifth Amendment rights were violated. In both cases the prosecution used the defendants' silence against them, but in *Doyle* the prosecutor used it solely to impeach, unlike what occurred in the present case. Here, the prosecutor went a step further by using Coda's silence as substantive evidence of his guilt. Both the *Doyle* defendants and Coda exercised their Fifth Amendment privilege post-arrest; however, the *Doyle* defendants were given *Miranda* warnings, answered some questions during interrogation, and took the stand at trial. In both cases, the prosecutor situated the defendants in an impossible position. Whether Coda remained silent or made statements protesting the arrest and charges, what he said, and ironically, his choice not to speak, would be held against him. Either way, the government effectively trapped Coda by arresting him with no warning, delaying the *Miranda* warning, and later exploiting his interim silence to bolster their weak case. Importantly, Chief Judge Martz's dissent noted the prosecution relied almost entirely on circumstantial evidence, the testimony of a neighbor who had suspicions about Coda and used Coda's silence as substantive evidence of his guilt likely severely damaged his case. R. at 15, footnote 4.

From a policy perspective, adopting a rule that would limit the Fifth Amendment to protecting statements, or silence as in this case, only post-*Miranda* warning would create perverse incentives for law enforcement to manufacture an intervening period to use later at trial. *Miranda* intended to instantiate the Fifth Amendment protections into understandable warnings defendants could understand to function as notice of the risks posed by proceeding, and especially without counsel.

From a policy perspective, adopting a rule that limits Fifth Amendment protection to statements, or silence as in this case, that occur post-*Miranda* warning would create perverse

incentives for law enforcement to manufacture an intervening period to use later at trial. The *Miranda* warning serves an instrumental function to concisely communicate Fifth Amendment protections to defendants in an accessible way. Arbitrary lines of demarcation for the Fifth Amendment's application to a defendant's silence mistakes *Miranda* as an end in itself, rather than merely a vehicle by which the objective of warning defendants is accomplished. Cogent rules for protecting silence, however, consider the facts at issue as they relate to various Fifth Amendment principles. For example, in the case at hand, Coda did not receive *Miranda* warnings until he arrived at the FBI facility, but he opted to assert his privilege at the time of his arrest by the FBI Special Agent by acting in accordance with it ("remaining silent") rather than counterintuitively breaking the silence to invoke the right verbally.

**3. The government's use of Coda's post-arrest silence as substantive evidence of guilty at trial caused actual prejudice.**

The Thirteenth Circuit erred in denying the suppression motion because admitting his post-arrest silence caused prejudice to Coda's case. As Chief Judge Martz indicated in his dissent, the government's case consisted of evidence that was "circumstantial insufficient to prove guilt beyond a reasonable doubt." R. at 14, 15, note 4. Accordingly, the government's use of his post-arrest silence as substantive evidence of Coda's guilt contributed significantly to the jury's decision against him. In addition, the government has not argued harmless error below, which precludes them from doing so here. Per the standard set forth in *United States v. Ibarra* because the trial court's error in admitting Coda's evidence of silence had a reasonable possibility of affecting the trial's outcome, the error is deemed prejudicial, not harmless. 493 F.3d 526, 532 (5th Cir. 2007).

## CONCLUSION

For the foregoing reasons, Petitioner, Mr. Austin Coda, respectfully requests that this Court reverse the Thirteenth Circuit Court of Appeals and vacate Mr. Coda's conviction.

*Respectfully submitted,*

Team 22  
Counsel for Petitioner