Civil No. 21-125

IN THE
SUPREME COURT of the UNITED STATES

AUSTIN CODA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

BRIEF FOR RESPONDENT

Attorneys for Respondent
Team 26

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QUESTIONS PRESENTED

I. Does preindictment delay violate the Fifth Amendment to the United States Constitution where there is no evidence that the government deliberately delayed indictment to gain a tactical advantage?

II. Does admission of an accused's post-arrest but pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The petitioner on this appeal is Austin Coda. R. at 1. Petitioner owned and operated a hardware store in Plainview, East Virginia. *Id.* The small, rural town is located on the border between East Virginia and North Carolina. *Id.* Residents from both East Virginia and North Carolina do significant business with Petitioner and the store. *Id.*

Mr. Coda opened the store in 2002. *Id.* The store benefited from being the sole hardware store in Plainview and enjoyed a large customer base. *Id.* Following years of profitability, the business suffered due to the 2008 recession. *Id.* In 2009, Petitioner's business was further burdened when a chain hardware store opened in Plainview. *Id.* Thereafter, the business's profitability deteriorated to the extent that Petitioner struggled to keep the store open. *Id.*

An explosion took place at Petitioner's store on December 22, 2010. *Id.* at 2. Firefighters were unable to control the fire and the building was completely destroyed. *Id.* Local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms opened an investigation into the explosion. *Id.* Initially, investigators believed cold weather caused an old, faulty gas line to leak. *Id.*

Shortly thereafter, federal agents received a tip from Petitioner's close friend and neighbor, Sam Johnson, regarding the store explosion. *Id.* Mr. Johnson called attention to Petitioner's financial hardships and an insurance policy, which covered the hardware store in the event of a total loss. *Id.* Mr. Johnson also told investigators that Petitioner seemed "very anxious and paranoid" the week of the explosion. *Id.* After receiving this information, investigators believed Petitioner may have intentionally destroyed the store. *Id.* The investigators relayed their suspicion to the United States Attorney's Office. *Id.*

Criminal Proceedings

The U.S. Attorney's Office took the case but labeled it "low-priority," because Petitioner was already being prosecuted for unrelated state charges. *Id.* The U.S. Attorney's Office thought it would be inconvenient to transport Petitioner back and forth from the proceedings. *Id.* Petitioner's state charges eventually concluded. *Id.* However, at that time, the U.S. Attorney's Office was being pressured politically to prioritize drug-related offenses, which resulted in high prosecutor turnover. *Id.* In light of the turnover, the case was transferred from one prosecutor to another. *Id.* Amid these challenges, the case did not substantially progress for several years. *Id.*

Ultimately, the prosecutor handling the case believed Petitioner destroyed his hardware store to claim money from his insurance policy. *Id.* at 3. On April 23, 2019, the FBI apprehended Petitioner and placed him in custody. *Id.* at 2-3. Upon arrest, the agent immediately informed Petitioner of the charges against him. *Id.* at 7. Petitioner remained silent from the time of arrest until arriving at the detention center. *Id.* Upon arrival at the detention center, Petitioner was warned of his *Miranda* rights. *Id.*

In May of 2019, Petitioner was indicted "under 18 U.S.C. § 844(i), which prohibits maliciously using an explosive to destroy property that affects interstate commerce." *Id.* at 3. Petitioner was indicted within the applicable statute of limitations. *Id.*

Procedural History

Before the District Court, Petitioner moved to dismiss the charges arguing that the preindictment delay violated his Fifth Amendment Rights under the Due Process Clause. *Id.* at 3.

At an evidentiary hearing on September 15, 2019, Petitioner argued that the time period between the explosion and the indictment diminished the strength of his alibi. *Id.* The alleged alibi detailed he was traveling on a Greyhound bus to visit family members in New York on the

date of the explosion. *Id.* Petitioner claims this bus trip is an annual tradition that takes place on his birthday. *Id.* Allegedly, evidence of this bus ride is no longer available, because Greyhound disposes its records after three years. *Id.* According to Petitioner, his last trip was in 2015 so there are no bus records supporting his birthday tradition. *Id.*

Petitioner also argued his alibi is weakened, because the five family members he visited in 2010 are unable to corroborate his alibi. *Id.* Specifically, four family members died and one developed dementia. *Id.*

Petitioner also moved to suppress his post-arrest but pre-*Miranda* silence arguing the use of his silence would violate his rights under the Fifth Amendment. *Id.* at 7.

Both of Petitioner's pre-trial motions were denied by the District Court. *Id.* at 6. Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit. *Id.* at 11-12. The Court of Appeals adopted the District Court's analysis of the case and affirmed the denial of both motions. *Id.* at 12. On request of Petitioner, the Supreme Court granted a writ of certiorari, certifying two issues for appeal. *Id.* at 16.

SUMMARY OF THE ARGUMENT

Regarding the preindictment delay issue, this Court should affirm the decision of the United States Thirteenth Circuit Court of Appeals, because Petitioner failed to demonstrate that the government intentionally delayed his indictment to gain a tactical advantage.

Petitioner was indicted within the applicable statute of limitations. The statute of limitations is set by the legislature, which is best able to balance competing interests through research and public interest.

Prejudice is inherent in any delay, regardless the duration. When prejudice is inherent in every case, bad faith must be the distinguishing characteristic for what warrants dismissal.

Prosecutorial delay can occur in the most fair, ethical prosecutions. Good-faith delay should not preclude a defendant from being held accountable for the wrong committed. Adopting the two-prong test both promotes ethical prosecution and punishes prosecutors that deliberately delay to obtain a tactical advantage.

Prosecuting offices are challenged with limited resources. Without a bad faith requirement, lengthy hearings would be required in most cases to determine whether prosecutors proceeded diligently, which would further strain resources. Petitioner's case exemplifies the challenges facing prosecutorial offices, as during the investigation, the department was instructed to prioritize drug trafficking cases and attorney turnover was high.

Petitioner's due process rights were not violated, because the government did not deliberately delay the indictment to gain a tactical advantage over the Petitioner.

Regarding the right against self-incrimination issue, this Court should affirm the decision of the United States Thirteenth Circuit Court of Appeals, because Petitioner failed to invoke the right against self-incrimination in accordance with the general rule that a witness must claim the privilege.

As a natural extension of the Court's holdings in *Salinas v. Texas* and *Fletcher v. Weir,* this Court should find that Petitioner was not subjected to sufficient compulsion to warrant an exception to the general rule.

Furthermore, none of the established exceptions to the general rule apply in this case. The adverse-inference exception is not applicable to Petitioner because he was not compelled to testify. Because Petitioner was not subjected to an interrogation, the level of compulsion does not rise to the level that warrants the *Miranda* safeguards. In addition, Petitioner was not subjected to the degree of compulsion as those that have been threatened with loss of government benefits.

Finally, an exception is not warranted because Petitioner would not suffer a penalty or criminal sanctions for claiming his right to remain silent.

This Court should not establish a new exception to the general rule because granting an exception would substantially undermine two important government objectives. First, the general rule provides the government with notice that a witness is claiming Fifth Amendment protections. Notice is important in this context, because it cannot be known why Petitioner remained silent after his arrest. Second, the government has an interest in offering all relevant and probative evidence to aid a fact-finder in arriving at a truthful determination of guilt or innocence. Petitioner's silence could aid the jury in determining whether he is guilty of intentionally destroying the store beyond a reasonable doubt.

Concerns that the government may exploit the general rule to prejudice a witness are exaggerated in this case. A witness is free to invoke their right against self-incrimination at any point after arrest which mitigates risk of the government abusing the general rule. In addition, granting an exception for post-arrest silence will only shift any incentive to manufacture incriminating silence to before an arrest.

In applying the general rule, the record is bare of a single fact that indicates Petitioner claimed the privilege against self-incrimination. The failure to invoke the privilege is fatal to Petitioner's claim that his right against self-incrimination was violated.

ARGUMENT

I. Absent evidence of bad faith, preindictment delay does not violate the Fifth Amendment.

The Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Court has observed "that the due process clause affords protection 'only' for violations of those 'fundamental conceptions of

justice[.]'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney v. Holohan,* 294 U.S. 103, 112 (1935)). "[T]he Due Process Clause of the Fifth Amendment protects defendants against *oppressive* pre-indictment delay within the applicable limitations period." *United States v. Marion*, 404 U.S. 307, 324 (1971) (emphasis added).

In the context of preindictment delay, it is settled "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." *Lovasco*, 431 U.S. at 790 (emphasis added). The Court has specified that dismissal of an indictment brought within the statute of limitations is warranted "if the defendant can prove that the [g]overnment'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) (citing *Lovasco*, 431 U.S. at 789–90) (emphasis added).

Jurisdictions are split as to the interpretation of *Marion*, *Lovasco*, and *Gouveia*. *Hoo v. United States*, 484 U.S. 1035, 1036 (1988), *cert. denied*, (White, J., dissenting). The split centers on whether the government must act in bad faith before an indictment offends the Fifth Amendment. *Id.*

One interpretation requires the defendant to satisfy a two-prong test, proving the government's delay not only caused actual prejudice but also was a deliberate act. *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985) (citing *Gouveia* 467 U.S. at 192).

The other interpretation acknowledges the language of *Gouveia*, but reasons that "[t]he Court…was merely restating in *dicta* the established outer contour of unconstitutional preindictment delay." *Howell v. Barker*, 904 F.2d 889, 894 (4th Cir. 1990). These courts apply a balancing test where once actual prejudice is established, the prejudice suffered by the defendant

is balanced with the reasons for the government delay. *Jones v. Angelone*, 994 F.3d 900, 904 (4th Cir. 1996) (citing *Howell,* 904 F.2d at 895). The principal consideration when performing the balancing test is whether the delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Howell*, 904 F.2d at 896 (quoting *U.S. v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 404 (4th Cir. 1985)).

Nine circuit courts of appeals, twenty-eight state courts, and the District of Columbia have adopted the two-prong test.[1] In contrast, two circuit courts of appeals and twelve state courts use the balancing test.[2]

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[1] *U.S. v. Stokes*, 124 F.3d 39, 47 (1st Cir. 1997); *U.S. v. Snyder*, 668 F.2d 686, 689 (2d Cir. 1982); *U.S. v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985); *U.S. v. Crouch*, 84 F.3d 1497, 1508 (5th Cir. 1996); *U.S. v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *U.S. v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994); *U.S. v. Madden*, 682 F.3d 920, 929 (10th Cir. 2012); *U.S. v. Benson*, 846 F.2d 1338, 1341 (11th Cir. 1988); *U.S. v. Pollack*, 534 F.2d 964, 969 (D.C. Cir. 1976); *State v. Lacy*, 929 P.2d 1288, 1294 (Ariz. 1996); *Bliss v. State* 668 S.W.2d 936, 939 (Ark. 1984); *People v. McClure*, 756 P.2d 1008, 1011 (Colo. 1988); *State v. Roger B.*, 999 A.2d 752, 757 (Conn. 2010); *United States v. Day*, 697 A.2d 31, 34 (D.C. 1997); *State v. Hight*, 274 S.E.2d 638, 639-40 (Ga. 1980); *State v. Murphy*, 584 P.2d 1236, 1239 (Idaho1978); *Ackerman v. State*, 51 N.E.3d 171, 189-90 (Ind. 2016); *State v. Smith*, 957 N.W.2d 669, 677 (Iowa 2021); *State v. Houck*, 727 P.2d 460, 466 (Kansas 1986); *Kirk v. Commonwealth*, 6 S.W.3d 823, 826 (Ky. 1999); *Clark v. State*, 774 A.2d 1136, 1155 (Md. 2001); *Commonwealth v. Dame*, 45 N.E.3d 69, 76 (Mass. 2016); *State v. F. C. R.*, 276 N.W.2d 636, 639 (Minn. 1979); *Caston v. State*, 823 So. 2d 473, 504 (Miss. 2002); *State v. Griffin*, 848 S.W.2d 464, 467 (Mo. 1993); *State v. Oldson*, 884 N.W.2d 10, 62 (Neb. 2016); *Jones v. State*, 607 P.2d 116, 117 (Nev. 1980); *State v. Aguirre*, 670 A.2d 583, 586 (N.J. Super. Ct. App. Div. 1996); *Gonzales v. State*, 805 P.2d 630, 632 (N.M. 1991); *State v. Goldman*, 317 S.E.2d 361, 365 (N.C. 1984); *Commonwealth v. Scher*, 803 A.2d 1204, 1229-30 (Pa. 2002); *State v. Vanasse*, 593 A.2d 58, 64 (R.I. 1991); *Moore v. State*, 943 S.W.2d 127, 128 (Tex. Ct. App. 1997); *State v. Hales*, 152 P.3d 321, 333 (Utah 2007); *State v. King*, 165 A.3d 107, 188-19 (Vt. 2016); *Sandoval v. Commonwealth*, 768 S.E.2d 709, 715 (Va. 2015); *State v. Rivest*, 316 N.W.2d 395, 401-02 (Wis. 1982); *Hogan v. State*, 908 P.2d 925, 931 (Wyo. 1995).

[2] *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *U.S. v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992); *Evans v. State*, 808 So. 2d 92, 100-01 (Fla. 2001); *State v. Higa*, 74 P.3d 6, 9-10 (Haw. 2003); *People v. Lawson*, 367 N.E.2d 1244, 1248 (Ill. 1977); *State v. Schrader*, 518 So. 2d 1024, 1028 (La. 1988); *State v. Rippy*, 626 A.2d 334, 338 (Me. 1993); *State v. Wright*, 17 P.3d 982, 986-87 (Mont. 2000); *State v. Philibotte*, 459 A.2d 275, 277 (N.H. 1983); *State v. Hunter*, 92 N.E.3d 137, 142 (Ohio 2017); *State v. Stokes*, 248 P.3d 953, 961 (Or. 2011); *State v. Brazell*, 480 S.E.2d 64, 68-69 (S.C. 1997); *State v. Oppelt*, 257 P.3d 653, 656-57 (Wash. 2011); *State v. Cook*, 723 S.E.2d 388, 392 (W. Va. 2010).

A. This Court should adopt the two-prong test, because it properly balances due process principles with the government's interest in arriving at truthful determinations of guilt or innocence.

This Court should adopt the two-prong test for the following reasons: (1) the statute of limitations mitigates delay-related concerns, (2) actual prejudice is inherent in the criminal justice process, (3) the two-prong test properly punishes any bad-faith actions of the government, and (4) the two-prong test is more workable given the scarcity of prosecutorial resources.

1. The statute of limitations mitigates delay-related concerns.

The corresponding statute of limitations for the charged offense is 10 years. U.S.C. § 3295. The statute of limitations is a defendant's "primary guarantee against bringing overly stale criminal charges." *Marion,* 404 U.S. at 322. "[S]uch statutes represent legislative assessments of relative interests of the State and [a] defendant in administering and receiving justice[.]" *Id.*

The statute of limitations is set by the legislature, which is able to determine the proper statutory period through research and public interest. *Id.* Accordingly, "[w]hen the statute of limitations is constitutional, the Constitution places a very heavy burden on a defendant to show that pre-indictment delay has offended due process." *Stoner v. Graddick*, 751 F.2d 1535, 1541 (11th Cir. 1985). This Court should respect the statute of limitations set by Congress. The statutory periods should only be set aside in instances of bad faith.

Petitioner was indicted within the applicable statutory period. Congress has determined that indicting a suspect for this crime within ten years is fair and proper. This Court should respect Congress's guidance regarding the length of time that may pass before indictment for this crime.

2. Actual prejudice is inherent in the criminal justice process.

Prejudice is inherent in any delay, regardless the duration. *Marion*, 404 U.S. at 321-22. The Court in *Marion* recognized that prejudice is likely to happen with any amount of time that passes. Delay-related prejudice could have existed in the Petitioner's case the day immediately after the explosion. The government cannot be expected to query a defendant to glean what evidence they intend to rely on for their defense and customize the prosecution to accommodate the defendant's case. The criminal justice process cannot be customized on a case-by-case basis and tailored to each individual defendant who brings a grievance. The balancing test's focus on prejudice punishes the government for not individualizing indictment timing.

Petitioner may have experienced some prejudice towards his defense from the time that passed between the crime being committed and the crime being charged. However, courts have found that absence of records, memory loss, and death of witnesses have each separately failed to be established as sufficient reason to find prejudice. *United States v. Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983); *United States v. Wright*, 343 F.3d 849, 860 (6th Cir. 2003); *United States v. Corona-Verbera*, 509 F.3d 1105, 1113 (9th Cir. 2007). While Petitioner's case may have been impacted, the fact still stands that the statutory period had not expired and there was no deliberate act on the part of the government to prejudice Petitioner.

Delay can be equally prejudicial to the defendant or government's case, depending on the circumstances. *Marion*, 404 U.S. at 321–22. Put another way, the government is equally likely to lose key evidence due to delay. Accordingly, the government has an incentive to expeditiously try the case in order to preserve the evidence. Because either party can be prejudiced by delay, the existence of delay should distinguish when delay is appropriate or not.

The matter at hand is illustrative of this argument. The government had an equal likelihood of losing key witnesses or records. In actuality, the government may have lost critical evidence from the very sources to which Petitioner complains. Perhaps, the deceased relatives would have testified that Petitioner was not with them on the date of the explosion. Perhaps, Greyhound records would have revealed Petitioner was not traveling as he claims. This further illustrates the unpredictable nature of which party delay will impact. Prejudice is not indicative of proper or improper prosecution. Rather, prejudice is inherent, and inconsistent. Overemphasizing prejudice, as the balancing test does, departs from the very purposes of due process and the criminal justice process. *See United States v. Crouch*, 84 F.3d 1497, 1512-13 (5th Cir. 1996) (explaining the protections of due process have historically been applied when the government takes deliberate action).

When prejudice is inherent in every case there must be a distinguishing characteristic and established principle for what warrants dismissal. The distinguishing characteristic must be improper government motive. The balancing test ignores that prejudice is inherent and improperly places interests on each side of the scale that are "wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most." *Id.* at 1512. This balancing test "compare[s] the incomparable." *Id.* Further, there are no established standards or historic precedents for weighing and analyzing the evidence. *Id.*

3. The Two-prong Test Properly Punishes Any Bad-faith Actions of the Government.

Prosecutorial delay can occur in the most fair, ethical prosecutions. *See Lovasco*, 431 U.S. at 795. This highlights the significant difference between intentional delay and good-faith delay. *Marion*, 404 U.S. at 307. Good-faith delay, such as investigative delay, is entirely appropriate of a prosecutor's office and is not grounds for dismissal of the complaint. *Lovasco*,

431 U.S. at 795. Surely, "a prosecutor abides by [standards of fair play and decency] if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able to promptly establish guilt beyond a reasonable doubt." *Id.*

Even if a prosecutor does make a mistake, it should not preclude a defendant from being held accountable for the wrong committed. Acknowledging that prosecutorial mistakes can happen, courts have held that negligence on the part of the government does not equate to bad faith. *Parker v. Burt*, 595 Fed. App'x 595, 601 (6th Cir. 2015); *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994); *United States v. Long*, 697 F. Supp. 651, 657, n. 3 (S.D.N.Y. 1988). Good-faith errors may lead to inferences of negligence or recklessness, but "these mental states are *insufficient to show improper intent*." *Parker*, 595 Fed. App'x at 601 (emphasis added). This Court needs to reinforce the notion that good-faith mistakes are not parallel to intentional, bad-faith actions. Furthermore, good-faith mistakes should not contravene the government's interest in prosecuting crime.

Adopting the two-prong test promotes ethical prosecution and punishes prosecutors that deliberately delay to obtain a tactical advantage. Petitioner's case was initially marked as low priority because he was simultaneously being prosecuted for an unrelated state charge. The U.S. Attorney's office, in good faith, believed it would be inefficient to have Petitioner transferred back-and-forth from both proceedings.

During this time, the U.S. Attorney's Office was subjected to political pressure to prioritize prosecuting drug-related charges. As a result of the pressure and priority change, Petitioner's case naturally remained low priority. As acknowledged by the *Sebetich* court, dismissal of the charge is not warranted when a case "just sort of [falls] between the chairs." *Sebetich*, 776 F.2d at 429.

There was no intentional plan to impair Petitioner's defenses in the case at bar. The Court has described dismissal of an indictment as an *extreme* remedy. *Gouveia*, 467 U.S. at 180 (emphasis added). Dismissal, as an extreme remedy, should only be granted when the government deliberately acts to prejudice a defendant. If this Court were to adopt the balancing test requested by Petitioner, the Court would categorize honest, good-faith mistakes and oversights in prosecution alongside delay designed to destroy the accused's defense. Such a categorization overbroadly groups entirely different prosecutorial conduct and would frustrate the prosecution of crime.

4. The two-prong test is more workable given the scarcity of prosecutorial of resources.

Prosecuting offices are often stretched-thin and lack adequate resources. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U.L. Rev. 261 (2011). "Prosecutors…have caseloads far in excess of the recommended guidelines that scholars often cite to criticize the caseloads of public defenders. Quite simply, many prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage." *Id.*

Without a bad faith requirement, "the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise.'" *Crouch*, 84 F.3d at 1506 (citing *Marion*, 404 U.S. at 321, n. 13). This would further strain a prosecutorial office's resources. Prosecutors manage their caseloads in accordance with applicable statute of limitations. *Marion* at 324. Any further strain that would accompany the balancing test would only lead to more allegations of negligent prosecutorial delay.

When prosecutors handle large caseloads, the reality is that mistakes will be made. Gershowitz, *supra* at 264. Delay and any related prejudice resulting from heavy caseloads cannot

rise to the level of violating fundamental concepts of fair play and decency. Adopting the balancing test creates a dangerous cycle, because it would place additional strain on prosecutorial resources which would ultimately increase the likelihood that fewer criminals are held accountable.

During the time Petitioner's case was in the office, the department was instructed to prioritize drug trafficking cases. The turnover rate for attorneys in the office was high during this time. The high turnover rate, combined with the drug-case priority and the high caseload the attorneys in the office were dealing with would only increase the chances Petitioner's case face some neglect.

The current case highlights the challenges facing prosecutorial offices. Political pressure, turnover, and good-faith mistakes are unavoidable. These challenges cannot be ignored in due process jurisprudence, because these prosecutors are tasked with pursuing the very enforcement of our criminal codes. Adopting the balancing test would ignore the reality of these challenges.

B. Under the two-prong test, Petitioner's Fifth Amendment rights were not violated.

Having established that the two-prong test should apply to Petitioner's claim, Petitioner's due process rights were not violated. The government does not contest that Petitioner suffered prejudice resulting from the amount of time that passed between the explosion and the indictment. Rather, there was no intentional delay under the second prong.

Petitioner cannot satisfy the second prong of the test, because the government did not deliberately delay the indictment. The time that passed between the explosion and the indictment was due to the time required by the investigation and several uncontrollable forces. The uncontrollable forces included Petitioner being simultaneously prosecuted for non-related state crimes, a prioritization of drug-related offenses, and high turnover rates within the prosecutor's

office. In addition, it cannot be lost on the Court that the prosecutor's office needed time to perform the core investigation. Meanwhile, the attorney assigned to the case was aware of the statute of limitations and properly pursued indictment before the Congressionally-imposed deadline. Nothing on the record indicates that there was any deliberate act on the government's part to harm Petitioner's defense. The absence of bad faith is fatal to Petitioner's due process claim.

II. The admission of Petitioner's silence as substantive evidence of guilt did not violate his Fifth Amendment right against self-incrimination.

The right against self-incrimination, embodied within the Fifth Amendment, guarantees "[n]o person shall be *compelled* in any criminal case to be a witness against himself." U.S. Const. amend. V (emphasis added). Accordingly, the right to remain silent is available to witnesses that wish not to offer self-incriminating testimony. *Malloy v. Hogan*, 378 U.S. 1, 8, (1964).

Irrespective of the right to remain silent's availability, the Court has established the general rule that a witness must claim the privilege against self-incrimination before enjoying its protections. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (citing *United States v. Monia*, 317 U.S. 424, 427 (1943)). There are two categories of exceptions to the "general rule" that a witness must claim their Fifth Amendment privileges. *Salinas v. Texas*, 570 U.S. 178, 181 (2013). First, the Court has established a no adverse-inference rule that prohibits the government from commenting on a criminal defendant's decision not to take the stand at trial. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). Second, exceptions have been applied in a factually-varied line of cases where "government coercion makes [the witness's] forfeiture of the privilege involuntary." *Salinas*, 570 U.S. at 184.

The Court has not expressly determined whether the general rule, or an exception, should apply to post-arrest, pre-interrogation silence. The Fourth, Eighth, and Eleventh Circuits have held that post-arrest, pre-interrogation silence does not qualify as a claim of Fifth Amendment protections. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Frazier*, 394 F.3d 612, 619 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). In contrast, the Seventh and Ninth Circuits have held that post-arrest, pre-interrogation silence aligns with one of the exceptions and constitutes a lawful invocation of Fifth Amendment protections. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1033 (9th Cir. 2001); *United States v. Hernandez*, 948 F.2d 316, 322 (7th Cir. 1991). This Court should resolve this circuit split by adopting the preferrable position of the Fourth, Eighth, and Eleventh circuits and hold that Petitioner's constitutional rights were not violated.

A. The general rule should apply to witnesses similarly situated as Petitioner.

It would be prudent for this Court to extend the general rule to witnesses similarly situated as Petitioner, because (1) Petitioner was not subjected to the degree of compulsion that warrants an exception to the general rule, (2) the general rule supports important government objectives, and (3) any concerns that the government may exploit the general rule to prejudice a witness cannot be alleviated by granting an exception in this case.

1. Petitioner was not subjected to the degree of compulsion that warrants an exception to the general rule.

The Fifth Amendment "speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him." *Murphy*, 465 U.S. at 427 (quoting *Monia*, 317 U.S. at 427). As will be discussed below, when the Court has granted an exception to the general rule, it explicitly or implicitly considers the degree of compulsion that a witness faces.

As a natural extension of the Court's holdings in *Salinas v. Texas* and *Fletcher v. Weir,* this Court should find that Petitioner was not subjected to sufficient compulsion to warrant an exception to the general rule.

The *Salinas* Court applied the general rule and held that the right against self-incrimination was not violated when the government offered a witness's silence as substantive evidence of guilt. *Salinas*, 570 U.S. at 191. In *Salinas*, the witness was not in custody, but a police officer interrogated the witness in an interview room at a police station. *Id.* at 193 (Breyer, J., dissenting). During the interrogation, the detective asked an incriminating question. *Id.* at 182. In response, the witness sat in silence for a few moments and did not answer the question. *Id.* At trial, the Government offered the witness's silence as substantive evidence of guilt which the Court held did not violate his right against self-incrimination because his testimony was voluntarily given. *Id.* at 182, 191.

The witness in *Salinas* endured greater compulsion to testify than Petitioner. The *Salinas* witness was asked an incriminating question by a police officer in an interview room at a police station. In contrast, Petitioner was not compelled to testify, because he was not questioned in any way and the government was not soliciting any response. *See Frazier*, 408 F.3d at 1111. Since the witness in *Salinas* was required to invoke his rights in accordance with the general rule, Petitioner should be required to do the same due to the relative lack of compulsion endured by Petitioner.

In *Fletcher v. Weir*, the Court applied the general rule and held it did not offend the right against self-incrimination when the use of post-arrest, pre-interrogation silence was used to impeach the witness's testimony at trial. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Critically, the *Fletcher* Court rejected the notion that "an arrest, by itself, is governmental action which

implicitly induces a defendant to remain silent." *Id.* at 606. The Court was confronted with offering silence specifically in the impeachment context and properly confined its ruling to the issue presented. *See Id.* at 607.

The substantive use of the evidence in this case provides the Court an opportunity to apply the reasoning of the *Fletcher* decision by extending the general rule to post-arrest, pre-interrogation silence whether offered for impeachment or substantive purposes.

Turning to the established exceptions to the general rule, each exception is inapplicable to the case at bar and contemplates situations that generate stronger compelling forces than Petitioner experienced. The first exception was announced in *Griffin* and conferred the right to remain silent on defendants that do not take the stand. *Griffin*, 380 U.S. at 615. The second exception contemplates situations where government compulsion denies a witness their "free choice to admit, to deny, or to refuse to answer.'" *Salinas*, 570 U.S. at 185 (*quoting Garner v. U.S.*, 424 U.S. 648, 657 (1976). This second exception can be subcategorized as custodial interrogations, threats to withdrawal government benefits, and situations where expressly invoking their rights may be incriminating. The no adverse-inference exception and each of the second exception's subcategories will be discussed in turn.

No Adverse-Inference Rule

The *Griffin* Court held "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws." *Griffin*, 380 U.S. at 614 (internal citations omitted) (internal quotations omitted). In *Griffin*, the defendant decided not to take the stand at trial. *Id.* at 609. In light of the defendant's refusal to testify, the prosecutor told the jury that defendant opted not to "take the stand and deny or explain" the alleged facts. *Id.* at 610–11 (1965). The prosecutor ended the argument by stating, "[the victim] is dead, she can't tell

you her side of the story. The defendant won't." *Id. Griffin* created an exception to the general rule, because the witness did not have to invoke his rights to preclude the prosecutor from commenting on his refusal to testify. *See Id.* at 615.

Absent the *Griffin* holding, a witness may be compelled to take the stand. Interestingly, the *Griffin* Court did not explicitly discuss compulsion, but it did describe commenting on the defendant's refusal to testify as a "penalty." *Id.* at 614. The Court explained that the penalty "cuts down on the privilege [against self-incrimination] by making its assertion costly." *Id.* The prosecutor in *Griffin* called the jury to infer that the defendant would take the stand and explain his innocence if he was truly innocent. If the penalty contemplated in *Griffin* was lawful, a witness may be better served by taking the stand than suffering the penalty. This forbidden penalty is a form of government compulsion that may rob a witness of the voluntary decision of whether to assert their constitutional privilege.

The adverse-inference exception is not applicable to Petitioner, because he was not compelled to testify. Critically, the petitioner would suffer no penalty by claiming his right to remain silent. The lack of relative compulsion here is evident when Petitioner's freedom to invoke his privilege is compared with a defendant who suffers a penalty for refusing to take the stand. The exception is inapplicable in this case, because the government did not use a penalty to compel Petitioner to forfeit the privilege.

Further distinguishing *Griffin* from the matter at hand, it is not apparent whether Petitioner refused to testify. This distinction is critical because the *Griffin* Court held that comment on the "*refusal* to testify" offends the Fifth Amendment. *Id.* The defendant in *Griffin* refused to testify because a defendant's refusal to be cross-examined at their own trial is an unambiguous exercise of their rights. Because refusal to take the stand is a clear invocation of

the right to remain silent, the general rule serves a diminished purpose in the *Griffin* context. While granting an exception in the *Griffin* context is more palatable due to the general rule's diminished importance, the same cannot be said of granting an exception to Petitioner. As supported by *Salinas*, applying the general rule is necessary in the case at bar, because the purpose of Petitioner's silence could not be known by the government. *See Salinas,* 570 U.S. at 189. Truly, Petitioner may have been silent for any number of reasons unrelated to his constitutional rights. The general rule is necessary to put the government on notice that a post-arrest, pre-interrogation witness is claiming the right to remain silent.

Some Courts have mistakenly expanded the no adverse-inference exception in holding that post-arrest, pre-interrogation silence alone invokes the right to remain silent. For example, the Ninth Circuit relied on language from *Griffin* that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice." *Velarde-Gomez*, 269 F.3d at 1029. Similarly, the lower court's dissenting opinion in this case claimed that the penalty contemplated by the *Griffin* Court "applies with equal force" to Petitioner's claim. R. at 14-15.

These opinions fail to acknowledge the two critical distinctions pointed out above. First, Petitioner did not refuse to testify. Second, Petitioner would not have suffered penalty for claiming his right to remain silent. These distinctions should control because they are rooted in the very purpose of the right against self-incrimination: the government cannot compel a witness to testify against themself. U.S. Const. amend. V.

Custodial Interrogations

The landmark *Miranda v. Arizona* decision created an exception to the general rule that requires the government to warn witnesses of certain Fifth Amendment rights before a custodial *interrogation*. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). The Court has

consistently explained, "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980); *see also Murphy*, 465 U.S. at 430.

Here, Petitioner was not subjected to an interrogation, so the level of compulsion does not rise to the level that warrants the *Miranda* safeguards as established in *Rhode Island v. Innis*. *See Innis*, 446 U.S. at 300. When no response from a witness has been elicited, it is incognizable that government compulsion precipitated an involuntary response from the witness. *See Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring) ("[T]he 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."). Put another way, if an arrestee has not been interrogated, their behavior is inherently voluntary. *See Frazier*, 408 F.3d at 1111.

Offering a comparable position to Ninth Circuit jurisprudence, the court's dissenting opinion in this case misstated *Miranda* principles when it claimed, "the right to remain silent should not be defined by the arbitrary line of when police explicitly give *Miranda* warnings." R. at 14; *see also Velarde-Gomez*, 269 F.3d at 1028-29. First, this argument ignores the fact that the right to remain silent is not defined by the issuance of *Miranda* warnings. Rather, a witness is free to claim protection prior to issuance of the warnings. *Salinas*, 570 U.S. at 181. Second, this argument ignores that the timing of *Miranda* warnings is not arbitrary, because the warnings must be issued before a custodial interrogation commences. *Miranda*, 384 U.S. at 479. Certainly, in the absence of *Miranda* warnings, any testimony offered by a witness in a custodial interrogation is protected by the right against self-incrimination. *Id.* Third, the dissent disregards

that the Court has firmly established *Miranda* warnings as a special safeguard specifically triggered by the coercive nature of custodial interrogations. *Innis*, 446 U.S. at 300; *see also Murphy*, 465 U.S. at 430.

Withdrawal of Government Benefits

A witness need not invoke their right against self-incrimination to enjoy its protections when faced with a choice between loosing government benefits or claiming the privilege. *Garrity v. State of N.J.*, 385 U.S. 493, 497–98, 500 (1967). This principle was exemplified in *Garrity v. State of N.J.* where police officers were told they would lose their government jobs if they refused to answer self-incriminating questions. *Id.* at 495. The Court held that this "practice, like interrogation practices we reviewed in *Miranda v. State of Arizona* . . . is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'" *Id.* at 497–98 (*quoting Miranda*, 384 U.S. at 464-65). *See also Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) ("[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment[.]").

In the case at bar, the Petitioner was not subjected to the degree of compulsion as those that have been threatened with loss of government benefits. In stark contrast, Petitioner would not have lost any benefit from claiming his rights. Petitioner had nothing to lose if he claimed his rights, so an exception aligned with the reasoning in *Garrity* and *Lefkowitz* decisions is not warranted.

Self-Invocation Incriminates

A witness does not need to invoke their right against self-incrimination if the very act of invoking the right is likely to expose them to a "real and appreciable risk of self-incrimination."

Leary v. United States, 395 U.S. 6, 16 (1969) (internal quotations omitted). The Court has applied this exception when statutes require reporting information to the government that may implicate a witness of a crime. *Leary*, 395 U.S. at 16 (The Marihuana Tax Act required individuals to report their status as a marihuana transferee when possession of marihuana was illegal in all fifty states); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77 (1965) (Pursuant to a regulatory order, individuals were required to report their membership with the Communist Party which was likely to criminally implicate them under the Subversive Activities Control Act). The *Leary* Court summarized that a witness cannot be "criminally liable for one's previous failure to obey a statute which required an incriminatory act." *Leary*, 395 U.S. at 28.

These types of statutory schemes promulgate substantial compelling forces that rob a witness of their free will to testify. A witness should not be forced to choose whether to comply with the statute and disclose their illegal activity or potentially face criminal liability. *Id.* These statutory schemes warrant an exception to the general rule because it cannot be illegal for someone to exercise their constitutional right to remain silent.

Here, an exception is not warranted because Petitioner would not suffer a penalty or criminal sanctions for claiming his right to remain silent. The compulsion a witness experiences when deciding whether to disclose incriminating activity in accordance with the law far exceeds any compulsion experienced by Petitioner. Furthermore, Petitioner would suffer no penalty for claiming his right to remain silent and therefore this exception does not apply in this case.

2. The general rule supports important government objectives.

Given that no established exception applies in this case, no exception to the general rule should be granted because it would undermine the important government objectives of receiving notice of invocation and arriving at a truthful determination of guilt or innocence.

First, "[o]nly the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled." *Garner*, 424 U.S. at 655–57. Therefore, unless the witness claims the privilege, the "government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating." *Id.*

It cannot be known why Petitioner remained silent after his arrest. While some argue that silence of an arrested witness can be assumed to be an invocation of the right to remain silent, such a proposition does not reconcile with the Court's conclusion that arrest is not "by itself . . . governmental action which implicitly induces a defendant to remain silent." *Fletcher*, 455 U.S. at 606. As the Court has recognized, a witness may be silent "because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else." *Salinas v. Texas*, 570 U.S. 178, 189 (2013). Here, it is possible that Petitioner remained silent because he did not have an alibi. Therefore, the general rule is necessary because it puts the government on notice that an arrested witness is invoking the right to remain silent.

Second, "[t]he privilege against self-incrimination 'is an exception to the general principle that the Government has the right to everyone's testimony'" for the enforcement of our criminal codes. *Salinas*, 570 U.S. at 183 (quoting *Garner*, 424 U.S. at 658, n. 11). "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system . . . depend[s] on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974). The Federal Rules of Evidence provide a sufficient safeguard for ensuring that the probative value of the silence exceeds any prejudice to a defendant on a case by

case basis. *See* Fed. R. Evid. 403. Here, the Petitioner's silence can aid the jury in determining whether he is guilty of intentionally destroying the store beyond a reasonable doubt.

3. Any concerns that the government may exploit the general rule to prejudice a witness cannot be alleviated by granting an exception in this case.

Proponents of applying an exception to the general rule for post-arrest, pre-interrogation silence err in reasoning that the government will manufacture incriminating silence by delaying interrogation. R. at 14.

The first issue with this argument is that a witness is free to invoke their right against self-incrimination at any point after arrest. If an arrested witness invokes their right to remain silent, the government will not be able to offer any post-invocation silence of the witness which mitigates risk of inappropriate government tactics. *Salinas*, 570 U.S. at 191.

In addition, granting an exception for post-arrest silence will only shift any incentive to manufacture incriminating silence to before an arrest. If this Court decides that an arrest triggers the right to remain silent, nothing prevents the government from delaying an arrest to manufacture silence. Under *Salinas*, the government could lawfully delay arrest and offer the pre-arrest silence as substantive evidence of guilt. *Salinas*, 570 U.S. at 191. Using this case as an illustration, the government could have delayed arresting Petitioner for a period of time and offered the pre-arrest silence as substantive evidence of guilt. An attempt to avoid this concern is futile: if the Court overruled *Salinas* by providing an exception to silence occurring at some point just prior to arrest, it would only shift the incentive to manufacture silence to an earlier point in the government's investigation. *See Salinas*, 570 U.S. at 190 ("Notably, petitioner's approach would produce its own line-drawing problems, as this case vividly illustrates.").

Simply put, regardless of the point in time in which silence is automatically protected, the government would be able to manufacture silence before that point in time.

B. Petitioner's silence can be offered as substantive evidence of guilt, because he failed to invoke the right against self-incrimination.

Having established that the general rule should apply in this case, Petitioner failed to invoke the right against self-incrimination. "Although 'no ritualistic formula is necessary in order to invoke the privilege,' a witness does not do so by simply standing mute." *Salinas*, 570 U.S. at 181 (quoting *Quinn v. United States*, 349 U.S. 155, 164 (1955)).

The record is bare of a single fact that indicates Petitioner claimed the privilege against self-incrimination. The fact that Petitioner remained silent after his arrest cannot suffice as an invocation of his rights.

The failure to invoke the right against self-incrimination is fatal to Petitioner's claim that his right against self-incrimination was violated.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court affirm the Thirteenth Circuit Court of Appeals.

Respectfully submitted,
Team 26
Counsel for Respondent