

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

COUNSEL FOR RESPONDENT

TEAM 27

DATED SEPTEMBER 13, 2021

QUESTIONS PRESENTED

- I. Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where there is no evidence of bad faith on the part of the government?
- II. Does admission of an accused's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt violate the Fifth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

On April 23, 2019, the Federal Bureau of Investigation's ("FBI") Special Agent Park arrested Austin Coda for maliciously using an explosive to destroy property that affects interstate commerce in violation of 18 U.S.C. § 844(i). R. at 3, 7. Austin Coda's hardware store, located on the border of Virginia and North Carolina in Plainview, Virginia, had been completely destroyed by an explosion on December 22, 2010. R. at 1-2. After the explosion the FBI acquired information that led the investigators to suspect that Coda had intentionally caused the explosion in an attempt to acquire the insurance reimbursement from the loss. R. at 2.

During the investigation the U.S. Attorney's Office became aware of unrelated state charges being pursued against Coda and permitted the state prosecution to take priority over the federal investigation. *Id.* The U.S. Attorney's Office was at the time experiencing high turnover and was primarily focused on drug trafficking and other related investigations. *Id.* The statute of limitations provided by 18 U.S.C. § 3295 requires that an indictment occur not later than ten years after the date on which the offense was committed. The explosion occurred exactly eight years, four months and one day before Coda was indicted for the offense. R. at 2. Coda was arrested one year, eight months and twenty-nine days before the statute of limitations were set to expire. *Id.* Immediately after Special Agent Park arrested Coda, she informed him that he was being charged for maliciously destroying property with an explosive. R. at 7. Coda did not respond to learning of the federal charges against him and remained silent throughout the trip to the detention center. *Id.* After their arrival at the detention center, Coda was read his *Miranda* rights and the FBI began the interrogation. *Id.*

Prior to trial, Coda moved to dismiss the charges against him. R. at 1, 7. Coda asserted that his Fifth Amendment Due Process rights were violated by the preindictment delay between

the explosion and his arrest because records corroborating his alibi defense were unavailable. R. at 4-5, 7-8. The United States District Court for the District of East Virginia denied the Motion to Dismiss on September 30, 2019. R. at 6.

At trial, Coda's silence in response to being informed of the federal charges against him was introduced to undermine his alibi defense. R. at 3. Coda moved to exclude the evidence of his silence arguing that it violated his Fifth Amendment privilege against self-incrimination. R. at 7. The United States District Court for the District of East Virginia denied Coda's Motion to Suppress, and he was subsequently convicted under 18 U.S.C. § 844(i) for maliciously destroying property with an explosive and was sentenced to ten years in prison. R. at 10-11. On appeal, the United States Court of Appeals for the Thirteenth Circuit affirmed in full the district court's denials of the Motion to Dismiss and the Motion to Suppress. R. at 12. On July 9, 2021, the United States Supreme Court granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of East Virginia and the United States Court of Appeals for the Thirteenth Circuit properly denied Petitioner's Motion to Dismiss the indictment for preindictment delay and Petitioner's Motion to Suppress post-arrest but pre-*Miranda* silence. First, Petitioner has the burden to meet a two-prong test of actual harm and bad faith, which he was unable to do. Petitioner cannot satisfy the second prong of governmental malintent since there is no evidence that the prosecutor's office intentionally delayed Petitioner's case to harass him or gain a tactical advantage. In fact, the government provided three neutral reasons to justify its delay, including convenience to the Petitioner, political pressure, and high

turnover. Thus, Petitioner cannot satisfy the two-pronged test required to prevail in a due process challenge to preindictment delay.

Second, Petitioner's silence was not in response to officer interrogation, as he had been asked no questions and had not yet been transported to the detention center. Outside of interrogative circumstances, Fifth Amendment privileges are not self-executing. As Petitioner did not at any point expressly invoke his Fifth Amendment privilege to the officers when he remained silent after learning of the charges against him, his silence was not protected. Thus, Petitioner cannot prevail in his Motion to Suppress under the Fifth Amendment.

ARGUMENT

When reviewing a motion to dismiss an indictment and motion to suppress, appellate courts exercise *de novo* review for legal conclusions and clear error review for factual findings. *See United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011). For a court to find a factual determination clearly erroneous, it must review the entire record and be left with "the definite and firm conviction that a mistake has been committed." *United State v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007). Where a court has denied the motion to dismiss, the evidence is considered in a light most favorable to the non-moving party. The present case must be viewed in a light most favorable to the Respondent.

I. The Court of Appeals for the Thirteenth Circuit correctly affirmed the District Court's denial of Petitioner's Motion to Dismiss the indictment based on preindictment delay because the delay was not a result of governmental malintent and fell within the applicable statute of limitations.

The Thirteenth Circuit properly affirmed the District Court's denial of Petitioner's Motion to Dismiss the indictment based on preindictment delay. First, Petitioner did not provide sufficient evidence to satisfy each element of preindictment delay. A defendant cannot prevail in

a due process challenge to preindictment delay unless he can show the prosecution acted in bad faith. Here, there is no evidence of such governmental malintent. In fact, the government provided several justifications for its delay, which included allowing Petitioner's unrelated state case to take precedence, political pressure on the government to take high priority cases such as drug trafficking, and high turnover. Nevertheless, the burden is on the Petitioner to show that the government intentionally acted in bad faith to cause substantial harm to the defendant, which Petitioner has not done.

Second, the prosecution brought charges before the statute of limitations ran. 18 U.S.C. § 3295 provides prosecutors ten years to bring charges against a criminal defendant. These limitations exist as a procedural safeguard against unfair delay, and it is for Congress and not the courts to determine the reasonability of that limit. Here, Congress felt it was appropriate to provide the government ten years to bring charges against a defendant, which the Assistant U.S. Attorney did. Therefore, the indictment was consistent with the Fifth Amendment.

a. The language of *Marion* and *Lovasco* requires Petitioner to meet a two-pronged test of actual harm and bad faith, which Petitioner has failed to satisfy because there is no evidence that the delay was a result of governmental malintent to gain a tactical advantage.

The government cannot be liable in a due process challenge to preindictment delay unless the defendant can show both (1) actual harm and (2) bad faith. *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *United States v. Marion*, 404 U.S. 307, 324-25 (1971); *United States v. Jackson*, 446 F.3d 847 (8th Cir. 2006); *United States v. Crouch*, 84 F.3d 1497, 1500 (5th Cir. 1996); *United States v. McCullough*, 427 F. Supp 246, 248 (E.D. Pa. 1977).

Prejudice to the defendant and prosecutorial intent to purposefully delay an indictment to gain a tactical advantage are independent factors that a defendant must satisfy in a due process challenge based on preindictment delay. *See Marion*, 404 U.S. at 324; *see also United*

States v. Crouch, 84 F.3d 1497, 1512 (5th Cir. 1996) (en banc) (stating that the balancing test “seeks ... to compare the incomparable” because there are no clear standards for a court to determine whether the government’s justification outweighs the defendant’s prejudice). In *Marion*, the defendant engaged in fraudulent business practices, and the government indicted him three years after his most recent crime. *Id.* at 309. The government indicated that this three-year delay was a result of understaffing and more important cases taking precedence. *Id.* at 328. The defendant thereafter moved to dismiss his indictment based on preindictment delay and argued that there is a likelihood of prejudice because “memories will dim, witnesses [will] become inaccessible, and evidence [will] be lost.” *Id.* at 326. The Court ultimately held that the government did not violate the Due Process Clause, because a due process challenge based on preindictment delay requires the defendant to show both “substantial prejudice to appellees’ right to a fair trial *and* that the delay was an intentional device to gain [a] tactical advantage over the accused.” *Id.* at 324 (emphasis added). While the Court did not clearly define the kind of prejudice or government culpability required to prevail, it suggested a two-pronged test that must be satisfied in a due process analysis. *Id.*

The plain language of *Lovasco* advanced the *Marion* Court’s two-prong proposition by adding substance to what constitutes bad faith and analyzed it as its own factor. *Lovasco*, 431 U.S. at 790. In *Lovasco*, the government suspected the defendant of possessing and selling stolen guns without a license between July 25 and August 31, 1973, but they did not indict the defendant until March 6, 1975. *Id.* at 784. Within that time, a material witness for the defendant died and the government made no effort to explain its delay, so the District Court and Eighth Circuit dismissed the indictment. *Id.* at 787. On appeal, the Supreme Court reversed the dismissal and held that “statutes of limitations ... provide the primary guarantee against bringing overly

stale criminal charges” and that due process has a “limited role to play in protecting against oppressive delay.” *Id.* at 788-89 (citing *Marion*, 404 U.S. at 326). Additionally, the Court in *Lovasco* opined that “*Marion* makes clear that proof of prejudice is generally necessary but not [a] 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.” *Id.* Thus, the language of *Marion* and *Lovasco* both require a defendant to independently satisfy each factor of preindictment delay.

Investigative delays do not violate the Due Process Clause even if it causes harm to the defendant. *Lovasco*, 431 U.S. at 790 (distinguishing between a delay that is made in bad faith and a violation of the Due Process Clause from a delay that is investigatory and not a violation of the Due Process Clause). The Court in *Lovasco* indicated that an “investigative delay” is unlike a delay undertaken by the government solely “to gain tactical advantage over the accused,” and absent that malintent, it is a mere investigative delay that does not violate due process. *Id.* at 795; *see also Marion*, 404 U.S. at 324. In its discussion, the Court made clear that prosecutors may continue investigations as they see fit because they are under no duty to file charges as soon as probable cause or even proof beyond a reasonable doubt exists, and that duty “would have deleterious effect[s] both upon the rights of the accused and upon the ability of society to protect itself” *Id.* (citing *United States v. Ewell*, 383 U.S. 116, 119-120 (1966)). Similarly, in *Crouch*, the Fifth Circuit held that investigative delays that result from insufficient manpower and the “low priority which [the] investigation was assigned” are “fundamentally unlike intentional delay[s] to gain [a] tactical advantage or for other improper purpose[s].” *Crouch*, 84 F.3d at 1514. In fact, the court in *Crouch* concluded that analyzing resource allocation and management decisions in a due process challenge raises problematic

separation-of-powers concerns. *Id.* At 1513-14. Thus, some evidence of bad faith or improper purpose must be present.

Where the statute of limitations has not run, a preindictment delay claim should show some bad faith or improper purpose on the part of the prosecution regardless of if the defendant can show actual prejudice. See *United States v. Eight Thousand Eight Hundred and Fifty Dollars* (\$8,850), 461 U.S. 555, 563 (1983) (“the interests of the suspect and society are better served if, absent bad faith or extreme prejudice to the defendant, the prosecutor is allowed sufficient time to weigh and sift evidence to ensure that an indictment is well founded.”); *United States v. Jackson*, 446 F.3d 847, 849 (8th Cir. 2006) (“... a defendant must overcome a high hurdle when contending that a pre-indictment delay that does not violate the statute of limitations is violative of the due process clause.”). Although the statute of limitations does not excuse a preindictment delay analysis, if it is still within the allocated time then the bar to prove the delay was unconstitutional is higher. *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991) (... preindictment delay ... offends due process if the defendant can carry the burden of showing (1) that the government delayed bringing the indictment in order to gain a tactical advantage; and (2) that the delay caused him actual and substantial prejudice”); *United States v. Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992) (“there must be both a showing of actual prejudice and evidence that the delay was purposeful in order to gain a tactical advantage ... a defendant must meet this two-pronged test”); *United States v. Hayes*, 40 F.3d 362, 365 (11th Cir. 1994) (“In this circuit, the defendant must show that he suffered substantial prejudice and that the delay was the product of deliberate action by the Government to gain a tactical advantage”).

In the present case Petitioner must meet a two-prong test, requiring actual harm and proof of bad faith based on the language in *Marion* and *Lovasco* as well as various policy

considerations. Petitioner argues that he was prejudiced by the delay because material witnesses died and Greyhound deleted their bus records after four years, leaving him unable to provide corroborating evidence in support of his alibi defense. R. at 3. While this may satisfy the first prong, Petitioner cannot prove that the government's preindictment delay was a result of prosecutorial malintent that sought to gain an unfair advantage or harass the Petitioner. *See United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018). As the Court made clear in *Marion* and furthered in *Lovasco*, 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. Thus, Petitioner must provide evidence that the government intentionally acted in bad faith, which he cannot do.

Turning to the bad faith element, the government provided several reasons to justify their investigative delays. First, the government decided to prioritize Petitioner's existing unrelated state case, and the office believed that it would be burdensome to the Petitioner to transport him back and forth during that time. R. at 2. Second, political pressure urged the office to take on higher priority cases such as drug trafficking. *Id.* Third, the office faced high turnover because of the political pressure. *Id.* While the evidence, at best, would indicate oversight and mere negligence, it is insufficient to satisfy the bad faith requirement of preindictment delay. Not only would judicial scrutiny of resource allocation and management decisions raise separation-of-powers concerns, but it is also unreasonable to expect prosecutors to bring charges the moment probable cause exists. *See Marion*, 404 U.S. at 324; *see also Crouch*, 84 F.3d at 1514.

Finally, Congress imposed a statute of limitations of ten years for non-capital arson or use of explosive offenses under 18 U.S.C. § 3295. Statutes of limitation exist as a procedural

safeguard against unfair delay. Although Petitioner's possible alibi defense was hindered because of the delay, it is for Congress, not the courts, to set this extended statutory period. Additionally, while statutes of limitations inherently carry risks that a defendant could be prejudiced before trial, the same applies to the government who could similarly lose corroborating evidence. It is for Congress and not this Court to set the appropriate boundaries on permissible prosecutorial delay, and because the government complied with the applicable statute of limitation and did not delay Petitioner's case to harass the Petitioner or gain a tactical advantage, it is not a delay in bad faith and satisfies the Fifth Amendment.

II. The Court of Appeals for the Thirteenth Circuit correctly affirmed the District Court's denial of Petitioner's Motion to Suppress the use of Petitioner's silence in response to hearing the criminal charges against him as not protected by the Fifth Amendment for Petitioner was not subject to interrogation and Petitioner failed to expressly invoke the privilege against self-incrimination.

The Fifth Amendment to the Constitution protects individuals from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This protection requires law enforcement officers to fulfill certain procedures before an individual is "subjected to custodial police interrogation." *Miranda v. Arizona*, 384 U.S. 436, 439 (1966). Failure to properly demonstrate "the use of procedural safeguards" results in the exclusion of any "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant." *Id.* at 444. Such protections are required due to the unduly coercive nature of law enforcement interrogations and therefore need not be expressly invoked by the accused during such circumstances to be effectuated. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). Outside of the coercive circumstances surrounding custodial interrogation, the Fifth Amendment privilege against self-incrimination is not self-effectuating to not shield information not properly protected by the Fifth Amendment. *See Salinas v. Texas*, 570 U.S. 178, 183-84 (2013).

The District Court properly denied Petitioner’s Motion to Suppress his silence in response to learning the charges against him from being used as evidence against him because Petitioner’s silence was not in response to officer interrogation, he had been asked no questions and had not yet been transported to the detention center. Outside of interrogative circumstances, Fifth Amendment privileges are not self-executing. As petitioner did not at any point expressly invoke his Fifth Amendment privilege to the officers when he remained silent after learning of the charges against him, his silence is not protected.

a. Petitioner’s silence was not in response to officer interrogation, he had been asked no questions and had not yet been transported to the detention center.

The Fifth Amendment protects individuals against self-incrimination when subject to police interrogation. *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Hale*, 422 U.S. 171 (1975); *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). In *Miranda v. Arizona*, procedural safeguards around interrogation were first articulated. 384 U.S. 436 (1966). The three cases consolidated in *Miranda* all involved “incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.” *Id.* at 445. The Court “spelled out” exactly the circumstances under which an individual’s privilege against self-incrimination must be protected by a prophylactic warning (known today as *Miranda* warnings). *Id.* at 444. “[T]he prosecution may not use statements, whether exculpatory or inculpatory, *stemming from custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean *questioning initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* (emphasis added).

The Supreme Court in several subsequent decisions has emphasized the interrogative circumstances required to trigger the procedural safeguard first articulated in *Miranda*. In the consolidated cases presented in *Doyle v. Ohio*, the petitioners' Fifth Amendment privileges were held to have been violated by the prosecution's cross-examination questioning on the petitioners' failure to tell the interrogating officers of their exculpatory story after *Miranda* warnings were given. 426 U.S. 610 (1976). Importantly, the prosecutor attempted to use the petitioners' post-arrest, post-*Miranda* silence as impeachment evidence. *Id.* at 616. The Court held the Fifth Amendment privilege implicitly protects silence in response to *Miranda* warnings. *Id.* at 618. ("the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit *to any person who receives the warnings*" (emphasis added)). The *Miranda* warnings trigger this implicit protection of petitioner's silence, precisely, as the Court articulates, "because of what the State is required to advise the person arrested." *Id.* at 617; *see also United States v. Hale*, 422 U.S. 171, 176 (1975) (emphasizing that a defendant has ordinarily been advised by government authorities of their right to remain silent before custodial interrogation commences). In order for a petitioner to reasonably rely on the implicit protections provided in *Miranda* warnings, the petitioner must have first been provided with those procedural safeguards.

The distinction between post-arrest, pre-*Miranda* silence and post-arrest, post-*Miranda* silence as it relates to the Fifth Amendment privilege against self-incrimination was further distinguished by the Supreme Court in *Fletcher v. Weir*, 455 U.S. 603 (1982). In *Weir*, the record did not indicate that respondent had received any *Miranda* warnings during the period in which he remained silent immediately after his arrest, emphasized by the majority as "[t]he significant difference" between this case and *Doyle*. *Id.* at 606-07. The Supreme Court

rejected the Sixth Circuit’s extension of protected, induced silence triggering immediately after the arrest without *Miranda* warnings and held that without the “affirmative assurances embodied in the *Miranda* warnings” it does not violate due process of law for the state to introduce post-arrest silence. *Id.*; see also *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (finding no “fundamental unfairness” in using petitioner’s failure to speak before he was taken into custody and given *Miranda* warnings.) Consequently, the fundamental unfairness present in *Doyle* is not present in *Weir*. The Court again articulated the specific protection of silence “induced” by the government by “implicitly assuring the defendant that his silence would not be used against him” through the giving of *Miranda* warnings. *Weir*, 445 U.S. at 606.

In this case, petitioner’s post-arrest silence was *not* induced by the government giving *Miranda* warnings. R. at 11. Petitioner had been arrested and informed of the charges against him but vitally, was not being interrogated during his transport to the detention center. *Id.* Generally, a suspect’s *Miranda* rights are triggered during custodial interrogation. *Miranda*, 384 U.S. at 444. Interrogation is “express questioning” by law enforcement, or “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Without the implicit safeguards having been articulated to him through *Miranda* warnings, as had been the case in *Doyle*, petitioner could not have relied on such safeguards when he chose to remain silent in response to learning of the federal charges against him. Petitioner’s circumstances are analogous to *Weir*, who failed to inform officers of his exculpatory explanation (that he acted in self-defense) and only presented that theory while taking the stand in his own defense. The petitioner here advanced a similar exculpatory theory (that he was not present in the state) during trial and similarly did not inform officers of this

exculpatory information after he had been arrested and informed of his charges. Petitioners pre-*Miranda* silence is no more protected than the respondent in *Weir*, who's own silence was deemed admissible for it had not been induced by the procedural safeguards articulated by law enforcement during *Miranda* warnings.

Petitioner attempts to distinguish his circumstance from *Weir*, in which the respondent chose to take the stand and his silence was offered as impeachment evidence; whereas petitioner's silence was used in the government's argument to provide important context as to his alleged alibi defense. *Weir*, 445 U.S. at 606. R. at 12. While petitioner's silence in this case was used as evidence to impeach his alleged defense during as opposed to impeachment evidence during cross-examination, the affirmative assurances embodied in the *Miranda* warnings were equally absent in this case and thus, petitioner's silence is no more protected from use in the case against him than *Weir*'s silence had been in his case. The method through which the petitioner's defense was asserted is not what the privilege of the Fifth Amendment hinges on. The Fifth Amendment privilege against self-incrimination is not inferred until after *Miranda* warnings have been given, and thus, no privilege extends to exclude petitioner's pre-*Miranda* silence from use as evidence against his asserted alibi defense.

b. Fifth Amendment privileges are not self-executing; petitioner failed to expressly invoke his Fifth Amendment privilege to the officers when he remained silent after learning of the charges against him.

Outside of interrogative circumstances, an individual must expressly invoke his Fifth Amendment privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984) (The Fifth Amendment speaks of compulsion. . . . If, therefore, [a defendant] desires the protection of the privilege, he must claim it, or he will not be considered to have been 'compelled' within the meaning of the Amendment." (internal citations omitted)). The

privilege must be expressly invoked to prevent the privilege from shielding information “not properly within its scope” that the defendant may “simply . . . prefer not to give.” *Salinas v. Texas*, 570 U.S. 178, 183-84 (2013) (internal citations omitted).

In *Salinas*, the petitioner failed to expressly invoke his Fifth Amendment privilege when he voluntarily subjected himself to questioning at the police station and answered several questions but remained silent in response to other questions. 570 U.S. 178, 181 (2013). The petitioner was not in custody and had not been arrested or informed of his *Miranda* rights and the government used his silence as substantive evidence of his guilt in its case in chief. *Id.* The petitioner sought to prohibit the use of his silence as evidence against him, requesting that the court carve out an exception to the express invocation requirement when an individual stands mute and declines to give an answer that officials suspect would be incriminating. *Id.* The Court rejected petitioner’s claim, holding that the petitioner had not been “deprived of the ability to voluntarily invoke the Fifth Amendment.” *Id.* at 186. The Court determined that “it would have been a simple matter for him to say that he was not answering the officer’s question on Fifth Amendment grounds” and that such an exception would needlessly burden the government’s interests in prosecuting criminal activity. *Id.* at 186. Ultimately, the court articulated unambiguously, “[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.” *Id.* at 188. *See also Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (finding that defendant failed to invoke the privilege while remaining silent in response to police questioning for two hours and forty-five minutes).

The Court’s established precedent that simply remaining silent does not invoke the Fifth Amendment privilege extends to the circumstances before the Court today. Comparable to the lack of coercion in *Salinas*, the petitioner’s situation was not under official compulsion that

would undermine his freedom to invoke the privilege. 570 U.S. 178, 185 (2013); R. at 12. The petitioner’s freedom of movement had been interrupted by his arrest; but the coercion implicit in police interrogation had critically, not begun. R. at 11-12. There had been no deprivation of his ability to invoke the privilege as there had been no interrogation at all at the time petitioner failed to assert his alleged alibi when told of the charges against him. Silence is too “insolubly ambiguous” to automatically invoke a privilege against self-incrimination alone; the petitioner must put officers on notice as to the privilege justifying the silence. *Doyle, v. Ohio*, 426 U.S. 610, 617 (1976). As the Court noted in *Salinas*, there are many reasons why someone would remain silent, most of which are not protected by the privilege against self-incrimination. 570 U.S. 178, 194-95 (2013) Just as it was the defendant’s burden to establish the privilege in *Salinas*, the burden was on petitioner to inform officers of his invocation of his Fifth Amendment privilege against self-incrimination to preclude its use as evidence of his guilt and Petitioner failed to do so.

CONCLUSION

For the reasons above, this Court should affirm the holdings of both the District Court and the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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