

Case No. 21-125

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 2021**

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AUSTIN CODA,

*Petitioner-Appellant*

-v.-

UNITED STATES OF AMERICA,

*Respondent-Appellee*

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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 PETITIONER-APPELLANT  
AUSTIN CODA**

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Team 3  
Dated September 13, 2021

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## **QUESTION PRESENTED**

- I.** Under the Fifth Amendment, does preindictment delay that causes the accused actual and substantial prejudice due to loss of crucial exculpatory evidence and witnesses, violate the Due Process Clause when the delay was: (1) within the statute of limitations; (2) due to government recklessness; and (3) without evidence of intentional bad faith?
  
- II.** Under the Fifth Amendment, does admission of post-arrest but pre-*Miranda* and pre-interrogation silence as evidence of substantive guilt violate an accused's privilege against self-incrimination when: (1) an accused makes the decision to remain silent upon arrest; (2) he was under prosecution for federal charges by the U.S. Attorney's Office; (3) the government's preindictment delay prevented him from producing a viable alibi; and (4) the statute of limitations on his case was about to run?

## STATEMENT OF THE CASE

### **Preliminary Statement:**

Petitioner, Austin Coda (Coda), owned and operated a hardware store in Plainview, East Virginia that served local rural residents in East Virginia and neighboring North Carolina. R. at 1-2. Along with many others, Coda's business experienced financial decline during the economic recession of 2008, and he struggled to maintain proper upkeep of the building. R. at 2.

On December 22, 2010, an explosion at Coda's hardware store destroyed the entire premises. R. at 2. A preliminary investigation by the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) suggested that the cold weather had caused an old, faulty gas line to leak leading to the explosion that destroyed the deteriorated building. R. at 2.

Soon after the explosion, Sam Johnson, a neighbor and close friend of Coda, informed the Federal Bureau of Investigation (FBI) of Coda's declining personal and business finances and an insurance policy that would cover the hardware store in case of a total loss. R. at 2. Johnson also alerted them to Coda's "very anxious and paranoid" behavior the week of the accident. R. at 2. With this information and believing that Coda might be responsible for the explosion, the FBI informed the U.S. Attorney's Office. R. at 2. The U.S. Attorney's Office assigned a "low-priority" to Coda's case since Coda was being prosecuted for unrelated state charges and the government anticipated inconvenience in transporting Coda during this period. R. at 2.

In April 2019, approximately eight years and five months after the explosion, in fear of the soon expiring statute of limitations, the US Attorney's office apprehended Coda. R. at 2. It apprehended Coda and indicted him in May 2019 under 18 U.S.C. § 844(i), alleging malicious



use of an explosive to destroy property that affects interstate commerce and alleging that Coda destroyed his store to claim insurance proceeds. R. at 2,3.

#### **A. The U.S. Attorney's Office preindictment delay**

Coda states that, on December 22, 2010, the night of the explosion, he took a Greyhound bus to New York to celebrate his birthday with his family. R. at 3. He did this every year until 2015. R. at 3. Since the explosion, four of the five family members Coda visited annually had died, and the fifth suffered from dementia and was unable to recall Coda's visit on the day of the explosion. R. at 3. Furthermore, Greyhound Bus Lines only stores bus records online for three years, and Coda, therefore, would not be able to provide corroborating proof of his bus trip to visit his family. R. at 3.

The United States District Court for the District of East Virginia conceded that the Greyhound bus records would be favorable to Coda's defense and that, if Coda's family members were available to testify, they would have corroborated his testimony. R. at 6. The District Court does not dispute that the government's preindictment delay caused actual and substantial prejudice to an otherwise facially conclusive alibi defense. R. at 7, 13. As a result, Coda argued that the preindictment delay violated his Due Process rights since he was unable to present a fair trial due to the lack of corroborating witnesses and evidence. R. at 7, 13.

While the District Court conceded that Coda suffered actual and substantive prejudice due to the lack of evidence and witnesses caused by the Respondent's preindictment delay, it contended that, because the government did not act in bad faith with the purpose to delay prosecution and gain unfair advantage, the government's preindictment delay did not violate the Due Process Clause. R. at 7. The United States Court of Appeals for the Thirteenth Circuit adopted "the District Court's thorough analysis" and affirmed the decision. R. at 13.

**B. Admission of an accused's post-arrest but pre-*Miranda* and pre-interrogation silence as substantive evidence of guilt.**

On April 23, 2019, FBI Special Agent Park arrested Coda and informed him of the 18 U.S.C. § 844(i) charge being brought against him. R. at 3, 7. The government brought Coda into custody, where Coda invoked his right to remain silent rather than assert his alibi defense. R. at 7. Once they reached the detention center, the FBI read Coda his *Miranda* rights and then interrogated him. R. at 7. The U.S. Attorney's Office sought to use Coda's post-arrest but pre-*Miranda* silence as substantive evidence of guilt, arguing that any reasonable person would have disclosed their alibi defense to the arresting officers. R. at 7. Coda moved to suppress the evidence of his post-arrest but pre-*Miranda* silence in the United States District Court for the District of East Virginia, arguing that admission of this silence violated the Fifth Amendment privilege against self-incrimination. R. at 7-8.

The issue of whether Respondent may use an accused's post-arrest but pre-*Miranda* silence as evidence of substantive guilt is an issue of first impression for the Supreme Court. R. at 8. Coda argues that unless an arrestee voluntarily begins to answer questions, the government cannot use his post-arrest but pre-*Miranda* silence as evidence of substantive guilt. R. at 8. In contrast, Respondent argues that since Coda's silence coincided with the arrest, the government never interrogated him and thus there was no Fifth Amendment violation. R. at 8. Respondent contends that because Coda remained silent under arrest, he does not have a reasonable alibi and jurors should be able to consider this evidence. R. at 9. Additionally, Respondent contends that if Coda intended to exercise his Fifth Amendment right to remain silent, he should have unambiguously asserted it. R. at 9. Coda's position is that formal interrogation or being taken into custody need not commence for an individual to have the right to remain silent. R. at 9. If interrogation were a requirement to trigger the Fifth Amendment protection, law enforcement

would have an adverse incentive to delay interrogation in order to admit incriminating silence. R. at 9-10. Coda was subsequently tried and the District Court denied Coda's motion to suppress admission of his post-arrest but pre-*Miranda* silence as evidence. R. at 7. On appeal, the Court of Appeals for the Thirteenth Circuit affirmed the decision of the District Court for the District of East Virginia. R. at 7, 11. Coda's Petition for Writ of Certiorari was granted, and the case is now being decided by the United States Supreme Court.

### **SUMMARY OF THE ARGUMENT**

The federal government violated Coda's Due Process rights because the excessive and reckless delay in launching its indictment caused Coda actual and substantial prejudice and prevented him from defending himself in a fair trial. While Congress enacts the statute of limitations as the primary guarantee prohibiting the government from bringing overly stale charges against the accused, the statute of limitations does not fully define the rights of the accused to defend himself in a fair trial when the indictment has been excessively delayed. The Court confirmed that the statute of limitations cannot be the sole source of law that protects the accused from being indicted on stagnant charges, and this Court in *Marion* and *Lovasco* specifically instructed the trial courts to find those circumstances that require dismissal.

In order for courts to consider the reason for the delay, the accused must have suffered actual and substantial prejudice to a fair trial. This is a heavy burden for the accused to prove. Thus, many courts, this Court included, have not addressed the reason for indictment delay in more than vague or speculative terms. This Court in both *Marion* and *Lovasco* contemplated Due Process rights and the different reasons that courts should consider in weighing the rights of the defendant and the needs of society. *Marion* and *Lovasco* confirmed that some indictment delays, even lengthy ones, are required for good prosecutorial preparation, and these investigative delays

are categorically more acceptable than delays rooted in bad faith intention by the government. However, *Marion* and *Lovasco* did not establish a definitive black-letter rule that investigative delay and bad faith delay are the only conditions to consider in addition to the prejudice suffered. Many courts, however, have gleaned this hardline bad faith rule from this Court.

A flexible and nuanced case-by-case analysis, as *Lovasco* advocated, would affirm that Coda endured actual and substantial prejudice, and that the reckless and excessive preindictment delay of the government violated his Due Process right to a fair trial. Adhering to fundamental conceptions of justice, as well as community sense of fair play and decency, this Court should reverse the District Court's determination that the excessive preindictment delay was not an unconstitutional violation of Coda's Fifth Amendment Due Process right to a fair trial.

Admission of an accused's post-arrest but pre-*Miranda* silence violates the Fifth Amendment privilege against self-incrimination because every post-arrest silence is insolubly ambiguous and creates a prejudiced jury towards this silence. In its full effect, the Fifth Amendment forbids the prosecution from commenting on an accused's silence during arrest and inferring that this silence is substantive evidence of guilt. While Coda did explicitly state his right to remain silent, his decision to not speak while under arrest is all that is needed to invoke his Fifth Amendment privilege. Additionally, the U.S. Attorney's Office was prosecuting Coda under 18 U.S.C. §844(i) and it was reasonable for Coda to believe any statement upon arrest could incriminate him in a future criminal proceeding. Even if Coda provided his defense, there was no defense that would deter the officers from taking him into custody. Moreover, the Fifth Amendment provides individuals the freedom to remain silent until they can obtain council.

Additionally, there is a lack of evidence as to whether Coda caused the explosion, as he is unable to produce his Greyhound bus records that prove he was in New York, and there are no

family members who can testify to his visit. Greyhound bus records are only stored for three years and his family members have either passed away or been diagnosed with dementia. The prosecution's entire argument is based on this silence and Coda is unable to collaborate his alibi through no fault of his own. Therefore, admission of this post-arrest but pre-*Miranda* silence would prejudice the jury. Lastly, cases like Coda's where the statute of limitation is about to run provides an adverse incentive for law enforcement to delay interrogation to admit incriminating silence. Given the underwhelming evidence in this case, Coda's post-arrest but pre-*Miranda* silence would overly prejudice Coda's trial.

### **ARGUMENT**

#### I. THE UNITED STATES FEDERAL GOVERNMENT RECKLESSLY DELAYED CODA'S INDICTMENT AND DEPRIVED CODA OF HIS CONSTITUTIONALLY PROTECTED RIGHTS TO DUE PROCESS BECAUSE CODA ENDURED ACTUAL AND SUBSTANTIAL PREJUDICE BY LOSING CORROBORATING EVIDENCE AND WITNESSES DUE TO THE EXCESSIVE DELAY.

This Court should reverse the ruling of the Court of Appeals for the Thirteenth Circuit and reverse the charges against Coda, because the Respondent's excessive preindictment delay, notwithstanding the statute of limitations, violated Coda's Fifth Amendment right to Due Process in a fair trial. The Supreme Court has found that, when the accused suffers actual and substantial prejudice due to preindictment delay, trial courts should apply fundamental interpretations of justice, fair play and decency embodied in the concept of Due Process to the particular circumstances of individual cases. *United States v. Lovasco*, 431 U.S. 783, 797 (1977). This Court has distinguished acceptable delays caused by robust, extended prosecutorial investigation as different from bad faith delays intended "to gain tactical advantage over the accused." *Lovasco*, 431 U.S. at 795 (quoting *United States v. Marion*, 404 U.S. 307, 324 (1971)). This Court, however, has never held that bad faith is a requisite to constitutionally challenging the

reasons for a preindictment delay. This Court merely acknowledged that bad faith delay, as an “intentional device to gain tactical advantage over the accused,” would violate the Due Process Clause if the accused successfully proved debilitating prejudice. *Marion*, 404 U.S. at 324.

Here, Coda suffered prejudice because the Respondent neglected to pursue his indictment in a timely manner. Respondent indicted Coda more than eight years after the explosion occurred because Respondent categorized drug trafficking cases as more important throughout the duration of the entire eight years following the explosion. R. at 2-3. Respondent did not direct importance to Coda’s case until it realized the statute of limitations was expiring. R. at 3. Additionally, Respondent did not pursue new prosecutorial evidence since the beginning of the investigation. R. at 3. Coda suffered actual and substantial prejudice as corroborating witnesses died and corroborating evidence, such as the Greyhound bus online records, became unavailable. R. at 3. Like *Lovasco*, this Court should examine the reasons for the preindictment delay and find that the delay was excessive and reckless and violated Coda’s Due Process rights. Despite the protection to the accused that the statute of limitations provides, Coda lost his ability to present a corroborating alibi defense. R. at 3. Although the government did not delay the indictment in bad faith, the government did deprive Coda of his Due Process rights to a fair, decent, and just trial.

A. The statute of limitations may be an insufficient procedural safeguard against the hazards of mounting a defense due to a preindictment delay.

The Due Process Clause supplements the shortcomings of the statute of limitations in guaranteeing the procedural rights of the accused. In a criminal case, the purpose of a statute of limitations is to promote prompt prosecution of criminal charges, thereby sparing the accused “the burden of having to defend against stale charges after memories may have faded or evidence

is lost.”<sup>1</sup> A statute of limitations is designed to protect the accused from having to defend himself against charges “when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *United States v. Marion*, 404 U.S. 307, 323 (1971) (quoting *Toussie v. United States*, 397 U.S. 112, 114–15 (1970)). Legislators have enacted these statutes, after assessing the relative interests of the government and the accused, to protect those accused who, during excessively long limitation, may “have lost their means of defense.” *Marion*, 404 U.S. at 322 (quoting *Public Schools v. Walker*, 9 Wall. 282, 288, 19 L.Ed. 576 (1870)). This Court recognizes that the applicable statute of limitations “is usually considered the primary guarantee against bringing overly stale criminal charges.” *Marion*, 404 U.S. at 322 (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

However, the Due Process Clause is more than a peripheral consideration in preventing prejudice due to excessively long preindictment delays. *Marion*, in its comparable analysis of the Sixth Amendment right to a speedy trial, conceded that “the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment.” *Marion*, 404 U.S. at 324. Moreover, *Lovasco* confirmed that “the Due Process Clause has a limited role to play in protecting against oppressive delay.” *Lovasco*, 431 U.S. at 783. The government cannot exceed the statute of limitations in its effort to indict the accused. The government also may not violate the constitutional rights of the accused within this time period. This Court confirmed that the accessibility of the Due Process Clause “always protects defendants against fundamentally unfair treatment by the government in criminal proceedings.” *Doggett v. United States*, 505 U.S. 647, 666 (1992). Therefore, although limited, the Due Process Clause provides an accessible safety net when the rights of the defendant are not protected by the statute of limitations.

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<sup>1</sup> Charles Doyle, *Statute of Limitation in Federal Criminal Cases: A Sketch*, CONGRESSIONAL RESEARCH SERVICE REPORT (Nov. 14, 2017), <https://sgp.fas.org/crs/misc/RS21121.pdf>

Coda's right to a fair trial under the Due Process Clause was deprived. Moreover, the ten-year statute of limitations did not prevent Coda from suffering substantive and actual prejudice in his ability to prepare a compelling defense. R. at 5. In *Marion*, the defendant did not assert specific prejudice and "[n]o actual prejudice to the conduct of the defense [wa]s alleged or proved." *Marion*, 404 U.S. at 325. In *Lovasco*, although two witnesses had died and the defendant had lost testimony due to the delay, the defendant did not state how the witnesses would have aided the defense had they been willing to testify. *Lovasco*, 431 U.S. at 786.

Here, the District Court conceded that Coda irrefutably suffered actual and substantial prejudice from the government's delay, as well as missing witnesses and evidence that would have corroborated Coda's defense. Therefore, Coda no longer had a facially air-tight alibi defense. R. at 5. Nevertheless, the District Court asserted that "statute of limitations already exists as a procedural safeguard against unfair delay," and that "[i]t is for Congress—and not this Court—to set the appropriate boundaries on permissible prosecutorial delay." R. at 5. Congress, however, unlikely intended the statutes of limitations to preclude constitutional protections when the government's negligence prejudiced a defendant. Congress established the statute of limitations as the primary protection against unfair prosecution, but, as *Lovasco* agreed, the Due Process Clause provides a reinforcing layer of protection when government delay violates rights that the statute of limitations should have protected.

Petitioner does not recommend that this Court change the statute of limitations for 18 U.S.C. § 844(i), nor change the boundaries, nor "alter the line Congress has drawn," as the District Court suggests. R. at 5. Like in *Lovasco*, where the statute of limitations did not fully define the rights of the defendant, the statute of limitations did not protect Coda against an unfair trial, and, ultimately, reckless government indictment delay because of a "low priority"



categorization violated Coda's procedural right to Due Process. R. at 2. This Court should allow for Due Process Clause consideration because the statute of limitations failed to provide Coda protection against deprivation of his procedural rights to a fair trial.

B. The United States Supreme Court favors a nuanced, case-by-case evaluation of Due Process rights, which supports a flexible balancing test over a rigid two-prong test in cases of preindictment delay.

1. *Due Process protection requires a flexible, case-by-case approach that upholds fundamental conceptions of justice.*

Recognizing the crucial burden of proving the defendant's prejudice to a fair trial, in addition to the complexity of determining the government's purpose in delaying the indictment, this Court has advocated for a case-by-case analysis of the infringement of Due Process rights. *Lovasco*, 431 U.S. at 797. The Fifth Amendment Due Process clause declares that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Under the Due Process Clause, a defendant may invoke Due Process to challenge delay before (and after) an official accusation. A defendant must show that a preindictment delay caused actual and substantial prejudice to his right to a fair trial in order to establish a Due Process violation. *See, generally, Marion*, 404 U.S. at 320; *Dickey v. Fla.*, 398 U.S. 30, 40 (1970). Before contemplating government intention for the indictment delay, a defendant has the heavy burden of showing actual (as opposed to "speculative and premature") prejudice, and that any actual prejudice was substantial, such as the loss of a crucial witness or corroborating evidence. *See, eg. Marion*, 404 U.S. at 307. The defendant must show that his ability to defend himself against the indictment charges were "meaningfully impaired ... to such an extent that the disposition of the criminal proceeding was likely affected." *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996); *see, e.g., Marion*, 404 U.S. at 324 ("substantial prejudice"). Proof of prejudice

makes a Due Process claim “ripe for adjudication,” but does not automatically validate such a claim. *Lovasco*, 431 U.S at 789. Lower courts must also consider the reasons for the delay. *Id.*

The mere passage of time is insufficient to support a Due Process claim for preindictment delay even if the time lapse to some degree prejudices the defense. *Marion*, 404 U.S at 322. In *Lovasco*, this Court established that preindictment delay is unconstitutional when it violates traditional Due Process principles, which embody the “fundamental conceptions of justice which lie at the base of our civil and political institutions,” and “the community’s sense of fair play and decency.” *Lovasco*, 431 U.S at 790. When the government excessively delays indicting a defendant for years or decades, and witnesses and evidence become lost or forgotten, a defendant’s right to a fair trial may be unfairly compromised whether the prosecution acted with an improper motive in mind or not. *State v. Oppelt*, 172 Wash. 2d 285, 292 (2011).

Courts that advocate a nuanced balancing test question whether the government’s action violates fundamental conceptions of justice. *Id.* This “does not necessarily turn on the intent of the government actors.” *Id.* Logically extending the bad faith requirement would hold that “no matter how egregious the prejudice to the defendant, and no matter how long the preindictment delay,” no Due Process violation has occurred if a defendant cannot prove improper prosecutorial motive. *Howell*, 904 F.2d at 895. Such an outcome would defy the “fundamental conceptions of justice” as well as “the community’s sense of fair play and decency” fortified in Due Process principles. *Lovasco*, 431 U.S at 783. Courts that advocate for the two-prong test places a burden on the accused to show that the preindictment delay caused prejudice and that the government acted in bad faith. *See, eg., United States v. Rogers*, 118 F.3d 466, 477 (6th Cir. 1997). Applying such a stringent standard would force a result that was “unconstitutional, unwarranted, and unfair.” *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996).

In *Lovasco*, this Court held that an eighteen-month investigative delay—during which prosecutors sought more information—did not violate the accused’s Due Process rights. *Lovasco*, 431 U.S. 796. Nevertheless, *Lovasco* expressed the need for trial “to consider the constitutional significance of various reasons for delay.” *Lovasco*, 431 U.S. at 797 (1977). The *Marion* Court applied a comparable analysis to the Sixth Amendment right to a speedy trial and determined that “the right to a speedy trial is denied if there were years of unexplained and inexcusable preindictment delay.” *Marion*, 404 U.S. at 333. However, the *Marion* Court, found that there was no violation of Due Process rights because the defendants did not allege or prove actual prejudice, nor prove that the Government “intentionally delayed to gain some tactical advantage over appellees or to harass them.” *Marion*, 404 U.S. at 325. In a concurring opinion, Justice Douglas, rallies for “the wisdom of avoiding today's mechanical approach to the application of basic constitutional guarantees.” *Marion*, 404 U.S. at 333. Furthermore, Justice Brennan, in his concurrence, recognizes outer limits to a “reasonable” delay, notwithstanding a statute of limitations. *Marion*, 404 U.S. at 333. Even in the most serious cases (e.g., organized crime), “a three-year delay ... goes to the edge of a permissible delay.” *Marion*, 404 U.S. at 333.

This Court favors a more individualized approach that looks to “the particular circumstances of individual cases” rather than a bright line. *Lovasco*, 431 U.S. at 797. Due Process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, “Due Process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* This assertion is equally valid when furthering the protection that the Due Process Clause provides against arbitrary and prejudicial preindictment delay. See *Marion*, 404 U.S. at 307. (“[T]he sound administration of justice to the rights of the defendant to a fair trial will

necessarily involve a delicate judgment based on the circumstances of each case.”) The *Lovasco* Court left to the lower courts, “the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.” *Lovasco*, 431 U.S at 783.

Courts that favor a test that balances the prejudice against the reasons for delay recognize this Court’s adherence to flexibility, which courts advancing the two-prong test ignore. This Court in both *Lovasco* and *Marion* “made it clear that the administration of justice, vis-a-vis a defendant’s right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case.” *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). The court in *Howell* contended that this Court never established a black-letter test to determine unconstitutional preindictment delay, but instead recommended examining the facts of the delay in consideration of the fundamental conceptions of justice and sense of fair play and decency in *Lovasco*. *Id.* The flexibility afforded by the balancing approach is more “faithful to the Court’s Due Process jurisprudence,” which “favors multi-factor tests and balancing over bright-line rules.” *State v. Stokes*, 248 P.3d 953, 962 (Or. 2011). “The formalistic and rigid two-part test” that the majority of circuits use does not accurately reflect “the more nuanced approach” suggested by this Court. *State v. Oppelt*, 172 Wash. 2d 285, 292 (2011).

Here, Coda, was subject to the two-prong approach in the District Court, and he could only have found relief if he had been able to prove that the prosecutor maliciously and intentionally delayed proceedings to gain a tactical advantage over him at trial. R. at 6. While the government presented no justifiable reason for a lengthy and prejudicial delay other than extreme negligence and indifference, Coda, nevertheless, indisputably suffered from the government’s negligence because corroborating witnesses died or suffered from dementia, and online records of Coda’s bus transportation had long expired. R. at 3. Unlike *Marion*, where there was no

assertion of prejudice to the defense, and unlike *Lovasco*, where the investigative delay precluded the contemplation of Due Process violation, Coda undisputedly suffered prejudice due to reckless delay that went far beyond “the edge of a permissible delay.” *Marion*, 404 U.S. at 335. The two-prong standard, requiring government bad faith, therefore, protected the Respondent with an unjust, unassailable defense that is wholly immune from any assertions of prosecutorial recklessness.

2. *A defendant need not show the Government acted in bad faith to show a Due Process violation*

*Marion* and *Lovasco* emphasized the importance of considering the reasons the government delayed prosecuting the defendant, but they did not establish a black-letter rule that a defendant must show bad faith intention for a Due Process challenge to a preindictment delay. In *Marion*, the Government conceded that the Due Process Clause would require a court to dismiss an indictment “if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Marion*, 404 U.S. at 324 (emphasis added). Likewise, in *Lovasco*, the Court noted this concession and distinguished the eighteen months of “investigative delays” of the subject case as “fundamentally unlike” a delay undertaken by the Government “solely ‘to gain tactical advantage over the accused.’” *Lovasco* 431 U.S. at 783 (quoting *Marion*, 404 U.S. at 324). Incorporating the same concession, this Court in *United States v. Gouveia* noted that the Due Process Clause compels 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.” *United States v. Gouveia*, 467 U.S. 180, 192 (1984).

When the *Marion* Court acknowledged that a bad faith tactic to prejudice the defendant at trial would suffice, it did not purport to hold that only such a motive could violate the

defendant's right to a fair trial. *Marion*, 404 U.S. at 324. Rather, the Court "provided an illustration of one egregious situation that such a standard would likely proscribe ... establishing the due process ceiling to the problem." *Clark v. State*, 364 Md. 611, 632 (2001) (quoting Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L.REV. 622-23 (1990)). *Marion* presented bad faith delay that was as "an intentional device to gain tactical advantage over the accused" as one vivid and extreme example of unfair delay in seeking an indictment. *Marion*, 404 U.S. at 307. The *Marion* Court did not state that the Due Process Clause would require dismissal of the indictment *only if* the delay was resulting from a bad faith intention. It also did not state that a preindictment delay would never be considered a violation of Due Process rights *unless* it was rooted in malevolent government intention. This Court asserted that improper motive was sufficient to show a Due Process violation when there was actual and substantive prejudice, but it did not claim that improper motive is always necessary. *Lovasco* did not implicitly mandate a strict requirement to prove improper motives, but rather adhered to a balancing framework.

Furthermore, a note in *Lovasco* suggests a willingness to expand on the dicta in *Marion*, stating that a violation of Due Process might result from demonstration of "prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Lovasco*, 431 U.S. at 796. The concession in *Marion* that this Court "could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions" remained true in *Lovasco* as this Court left it for future lower courts to apply "settled principles of due process ... to the particular circumstances of individual cases." *Lovasco*, 431 U.S. at 796. The Court in *Lovasco*, in dismissing Due Process violation in the subject case, left open the

contemplation of balancing a spectrum of prosecutorial intention balanced against the extent of prejudice suffered by the defendant.

Similarly, noting the Government's concession that the Due Process Clause would require dismissal of the indictment if the delay was an intentional device to gain tactical advantage over the accused, this Court also made the point of noting that it "need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution." *Marion*, 404 U.S. at 324. This Court later instructed lower courts to "to consider the constitutional significance of various reasons for delay" given "the particular circumstances of individual cases." *Lovasco*, 431 U.S. at 797.

Nevertheless, lower courts invoke their subjective interpretation of this Court's opinions. Two-prong courts that rely on the bad faith motive requirement reference language in this Court's opinions to argue that only a bad faith motive would be sufficient to show a Due Process violation. To determine unconstitutional pre-indictment delay, the court in *United States v. Burks* demands "the second part of the test," which necessitates "that the delay was an intentional device by the government to gain a tactical advantage." *United States v. Burks*, 316 F. Supp. 3d 1036, 1040 (M.D. Tenn. 2018) (citing *United States v. Rogers*, 118 F.3d 466, 476 (6th Cir. 1997)). The court in *United States v. Sebetich* cautioned against using the Due Process Clause to affirm the "the extreme sanction" of dismissing an indictment, insisting that "the defendants must prove 'that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him.'" *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985) (quoting *United States v. Gouveia*, 467 U.S. 180, 192 (1984)). This Court in *Gouveia*, however, like *Marion* and *Lovasco*, did not stipulate that a defendant "must" delay in indictment rooted in pernicious intent. They merely indicate, by extreme example, that a defendant may proceed with

a Due Process claim if they can prove that the Government’s delay was deliberate. *Marion*, 404 U.S. at 324, 92; *Lovasco*, 431 U.S. at 795. This Court provided bad faith delay as the opposite example situation when preindictment delay is impermissible. *Id.* Permissible investigative delay and unjustifiable bad faith delay are two ends of a spectrum on which a defendant may prove that the government acted negligently or recklessly in delaying the indictment. Lower courts adhering to the two-prong stringency subjectively extend their interpretations of this Court’s opinions to advance a black-letter rule that this Court never established.

Here, the District Court adopted a rigid, inflexible test to evaluate whether the conditions around the preindictment delay violate Coda’s Due Process rights. R. at 4. The District Court held that, regardless of the severity of the actual and substantial prejudice to Coda and the length of the preindictment delay, the Respondent did not violate Coda’s Due Process rights to a fair trial if Coda could not prove the government’s improper subjective motive for the delay. R. at 4. The District Court concluded that the government’s almost ten-year delay in indicting Coda—where the government had neither sought nor found new evidence over the last nine of those ten years—was consistent with Due Process, even though key witnesses had died, and potentially exculpatory critical evidence had become unavailable. R. at 4. Despite the extraordinary delay and extreme prejudice to Coda, the District Court found no Due Process violation solely because Coda had not been able to prove that government had purposefully “acted in bad faith . . . with the purpose to delay prosecution to gain an unfair advantage,” which R. at 6. (citing *United States v. Burks*, 316 F. Supp. 3d 1036, 1043 (M.D. Tenn. 2018)).

The stringent standard that a defendant “must meet both parts of the test to warrant dismissal of the indictment,” is divorced from the demands of Due Process, and, critically, it is out of step with the case-by-case balancing approach that this Court has adopted in related



contexts to assess whether other delays in the criminal process violate the Constitution. *Burks*, 316 F. Supp. 3d at 1040. This Court should apply a balancing test since the reasons for the government delay and the prejudice suffered by Respondent can usefully be weighed against each other. A balancing test is procedurally just and proper because prejudice to Coda's fair trial and the Respondent's reasons for the excessive delay are comparable—not distinct—considerations, as the court in *Crouch* contended. *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996). Courts using a balancing test correctly recognize that, when a defendant has shown that the prosecution's excessive delay in pursuing charges has caused actual prejudice to his ability to defend himself, he has been denied Due Process of law unless the prosecution's reasons for delay are sufficient to justify that prejudice. *See, e.g. Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996); *Howell v. Barker*, 904 F.2d 889, (4th Cir. 1990); *State v. Lee*, 653 S.E.2d 259 (S.C. 2007); *People v. Boysen*, 165 Cal. App. 4th 761 (2007).

Courts employing a balancing test weigh “the significance of the particular prejudice” proven by the defendant and “any demonstrable reasons for the delay,” and they do so on “a case-by-case basis.” *Overton v. State*, 976 So. 2d 536, 560 (Fla. 2007). These balancing courts consider not only whether there has been some actual and subjective prejudice to the defendant, they also weigh the degree of prejudice in accessing a fair trial as the government delay becomes more excessive. The court in *Crouch*, however, espouses the bad faith prong by narrowly interpreting the *Gouveia* Court's requiring the dismissal of an indictment “if the defendant can prove” the intentional bad faith Government delay in bringing the indictment. *Crouch*, 84 F.3d at 1510 (citing *Gouveia*, 467 U.S. at 192)). Moreover, *Crouch* considers the prejudice to the defendant and the reasons for the prosecution's delay as two individually siloed, inquiries that seeks “to compare the incomparable.” *Crouch*, 84 F.3d at 1512. *Crouch* asserts that the items on

each side of the scale “are wholly different from each other,” with “no possible common denominator that would allow determination of which ‘weighs’ the most.” *Id.*

Although lower courts are keen to run with the subjective interpretation of this restricted language, neither *Gouveia*, not *Marion*, nor *Lovasco* assert that the bad faith example is more than a loathsome example of unjust government indictment delay that would sufficiently invoke the Due Process Clause. *Crouch* seems to dismiss the value of the preindictment delay balancing test, and creditability of balancing tests in general. Assessing “the appropriate due process balance” which weighs seemingly incomparable assets, is a well-accepted and established tenet of this Court. *Mathews*, 424 U.S. 319, 347 (1976).

Here, the delay of the Respondent to move forward with Coda’s indictment until months before the end of the ten-year statute of limitations violated the defendant’s Due Process rights, even if it was not an intentional effort to gain tactical advantage. The facts of this case distinguish it from *Marion* and *Lovesco* in that Coda endured undisputable prejudice due to reckless delay that strayed far from prosecutorial integrity. Furthermore, an eight-year delay due to the low prioritization of Coda’s case distinguishes it from a three-year delay due to ongoing investigation. This court should adhere to the case-by-case analysis that balances the reasons for delay against prejudice suffered. The Respondent’s negligent excessive delay should be weighed against the flagrant prejudice that Coda suffered in being able to defend himself at a fair trial because of the delay.

C. Historic discrepancy over preindictment delay has led to confusion and inconsistent legal procedure that should be resolved by this Court

Lower courts have adopted two competing approaches for addressing how the Due Process Clause applies to excessive preindictment delay. This Court has not had “a sustained opportunity to consider the constitutional significance of various reasons for delay,” since

defendants are often unable to establish the requisite actual and substantive prejudice requirements. *Lovasco*, 431 U.S. at 796–97. Lower courts championing either the balancing test or the two-prong side have acknowledged the conflict over these standards, as has a member of this Court. *Hoo v. United States*, 484 U.S. 1035, 1035-36 (1988). Justice White, writing in dissent, recognized that the federal circuits were entrenched in “continuing conflict” over “the correct test” to determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment. *Id.* Justice White identified the “significant disagreement in the lower courts over the proper test” and that the Circuit courts that have “acknowledged conflicts between decisions from their own Circuits on this issue.” *Id.*

If Coda had been indicted in the Fourth or the Ninth circuit, eight years after the government first relegated his alleged crime as a “low priority,” multiple factors would be balanced out to determine whether Coda had endured violations of his Due Process Rights. The actual and substantial prejudice that the lack of witnesses and corroborating evidence caused him in defending himself would be weighed against the reasons for the government’s excessive delay in indicting him. Coda suffered egregious prejudice to his defense, and he was unable to fairly establish a compelling defense because of the excessive delay of Respondent in indicting Coda.

**II. THE SUPREME COURT SHOULD FIND THAT THE U.S. ATTORNEY’S OFFICE’S ADMISSION OF CODA’S POST-ARREST BUT PRE-MIRANDA AND PRE-INTERROGATION SILENCE AS EVIDENCE OF SUBSTANTIVE GUILT VIOLATES THE FIFTH AMENDMENT’S PRIVILEGE AGAINST SELF-INCRIMINATION.**

The Supreme Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and affirm Coda’s Motion to Suppress his post-arrest but pre-*Miranda* silence as evidence of substantive guilt because it violates the Fifth Amendment privilege against self-incrimination. In *Salinas*, the Supreme Court held that use of noncustodial silence did not

violate the Fifth Amendment and in *Doyle* that silence after receiving *Miranda* warnings was admissible as evidence of substantive guilt. *Salinas v. Texas*, 570 U.S. 178, 186 (2013) *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). The Fifth Amendment “in its direct application to the Federal Government and in its bearing on the States...forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” *Griffin v. California*, 380 U.S. 609, 615 (1965). Every post-arrest silence “is insolubly ambiguous because of what the State is required to advise the person arrested” under the *Miranda* decision. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). To demonstrate “prejudice” under the cause and prejudice standard, a defendant must “shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice,” but that these errors created an actual and substantial disadvantage. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1050 (7th Cir. 2001).

Here, Coda’s post-arrest but pre-*Miranda* silence reflects his decision to remain silent under the Fifth Amendment and prevent eliciting any incriminating statements that may be used in a criminal proceeding. R. at 7. Additionally, the statute of limitations on Coda’s case was about to run and the admission of his post-arrest but pre-*Miranda* silence would create adverse incentives for law enforcement to delay interrogation to manufacture incriminating silence. R. at 2-3. Finally, Respondent’s preindictment delay precluded Coda from producing a viable alibi and a jury would be prejudice towards favoring his post-arrest but pre-*Miranda* silence as evidence of guilt. R. at 3. For these reasons, the Supreme Court should find that admission of Coda’s post-arrest but pre-*Miranda* and pre-interrogation silence as evidence of guilt violates the Fifth Amendment and should reverse the decision of the Thirteenth Circuit.

- A. Coda’s post-arrest but pre-*Miranda* silence is “insolubly ambiguous” and represents his decision to remain silent under the Fifth Amendment rather than elicit incriminating statements that may be used in a criminal proceeding.

1. *Coda's decision to remain silent while being taken into custody by the government must be treated as an exercise of his Fifth Amendment right.*

Formal interrogation or arrest need not commence for Coda to exercise his Fifth Amendment right to remain silent while being taken into custody by the government. When making the decision to remain silent while being taken into custody, a defendant need “not use the words ‘Fifth Amendment’ or ‘privilege against self-incrimination.’” *United States v. Okatan*, 728 F.3d 111, 119 (2nd Cir. 2013). Silence in the face of arrest “without reference to *Miranda* warnings could not be used as substantive evidence of guilt” because that would “act as an impermissible penalty on the exercise of the...right to remain silent.” *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000). However, “regardless whether the *Miranda* warnings [are] actually given, comment on the defendant’s exercise of his right to remain silent [is] unconstitutional.” *United States v. Bushyhead*, 270 F.3d 905, 912 (9th Cir. 2001). While the presence of *Miranda* warnings might provide an additional reason for disallowing use of a defendant’s silence as evidence of guilt, they are not a necessary condition to such a prohibition. *United States ex. rel. Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987).

Courts have held that defendants have a right to remain silent upon arrest and the prosecution’s comment on this silence during trial is a Fifth Amendment violation. In *Okatan*, the defendant exercised his Fifth Amendment right to remain silent when he refused to answer any questions without a lawyer present. *Okatan*, 728 F.3d 111, 116 (2nd Cir. 2013). The court found where “an individual is interrogated by an officer... his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt.” *Id.* at 120. Likewise, in *Whitehead*, “it was undisputed that after the defendant was taken into custody for the purposes of *Miranda*, but before he was read the *Miranda* warnings, the defendant exercised his right to remain silent.” *Whitehead*, 200

F.3d 634, 637 (9th Cir. 2000). The court concluded that the district court’s decision to allow the government to comment on this silence in its closing argument plainly infringed upon the defendant’s privilege against self-incrimination. Similarly, in *Lane*, “the prosecution’s use of defendant’s refusal to talk to police” as evidence of substantive guilt was unconstitutional. *Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987). Unlike where impeachment by silence is permissible, “the government may not argue that a defendant’s silence is inconsistent with a claim of innocence” because “there is a constitutional right to say nothing at all about the allegations.” *Id.* Moreover, the defendant in *Bushyhead*’s “statement was an invocation of his right to silence and was therefore protected by the Fifth Amendment privilege against self-incrimination.” *Bushyhead*, 270 F.3d 905, 913 (9th Cir. 2001). The District Court erred when it allowed the prosecutor to comment on what Bushyhead said when he invoked his right to silence under *Miranda*. *Id.*

Here, Coda’s decision to remain silent while under arrest should be seen as an exercise of his Fifth Amendment privilege against self-incrimination and not evidence of substantive guilt. R. at 7. As in *Whitehead* and *Lane*, formal interrogation need not commence for an accused to exercise his constitutional right to remain silent. Like the 9th Circuit in *Whitehead*, the Supreme Court should find that the Thirteenth Circuit erred when it allowed the U.S. Attorney’s Office to comment on Coda’s silence while making their case against him. R. at 10. Applying the reasoning of *Lane*, Coda’s decision to not speak to the police who arrested him, was an exercise of a constitutional freedom rather than an inconsistency with innocence. R. at 7. Although Coda did not explicitly state a right to remain silent and not incriminate oneself like the defendant in *Bushyhead* and *Okatan*, no words or expression are needed to exercise this right. It is insignificant that the silence was prior to Coda’s *Miranda* warnings because the Fifth Amendment privilege against self-incrimination exists before one is arrested or adversarial

proceedings commence. Thus, this Court should hold that Coda's decision to remain silent during arrest and while taken into custody reflected his Fifth Amendment right and admission of post-arrest but pre-*Miranda* silence would violate Coda's constitutional protections under the Fifth Amendment.

2. *Coda was under prosecution for federal charges and his decision to remain silent prevented him from making an incriminating statement and provided the opportunity to obtain counsel.*

Further, Coda was under prosecution for federal charges and his decision to remain silent allowed him to obtain counsel before eliciting any incriminating statements. For the Fifth Amendment privilege against self-incrimination to be in full effect, "individuals must not be forced to choose between making potentially incriminating statements and being penalized for refusing to make them." *Okatan*, 728 F.3d 111, 116 (2nd Cir. 2013). The Supreme Court's purpose in requiring authorities to advise a defendant of his right to silence and council in *Miranda* "was to assure that those rights were properly safeguarded before any *statements* he made could be used against him, not his silence." *United States v. Moore*, 104 F.3d 377, 386 (D.C. Cir. 2013) At the time of arrest and during custodial interrogation, an arrestee may "maintain silence out of fear or unwillingness to incriminate another" and are "advised by government authorities moments earlier that he has a right to remain silent." *United States v. Hale*, 422 U.S. 171, 177 (1975). Moreover, a defendant is advised that anything he does or says can and will be used against him in court. *Id.*

In *Okatan*, the defendant's request for an attorney was made during an interrogation by a border patrol agent and there was legitimate "reason to fear that any such answer 'might be used to incriminate him in future criminal proceedings.'" *Okatan*, 728 F.3d 111, 118 (2nd Cir. 2013). The Second Circuit held that "any answer Okatan gave 'might [have been] used to incriminate

him in future criminal proceedings,” and “a simple failure to answer might also have been used to incriminate him.” *Id.* at 119. Similarly, in *Moore*, the District of Columbia Circuit found that the “prosecutor violated Fifth Amendment right of defendant not to incriminate himself by commenting that defendant’s silence as hood of vehicle was lifted by police” and contraband revealed indicated that he knew objects were there. *Moore*, 104 F.3d 377, 386 (D.C. Cir. 2013).

Furthermore, the defendant in *Hale* “had substantial indication that nothing he said would influence the police decision to retain him in custody” and “at the time of his arrest petitioner knew that the case against him was built on seemingly strong evidence.” *Hale*, 422 U.S. 171, 179 (1975). *Hale* was a “potential defendant” whose prior contacts with the police and his participation in a narcotics rehabilitation program further diminished the likelihood of his release. *Id.* The Supreme Court rejected the government’s argument “that respondent’s silence at the time of his arrest was probative of the falsity of his explanation later proffered at trial because the incentive of immediate release and the opportunity for independent corroboration would have prompted an innocent suspect to explain away the incriminating circumstances.” *Id.* Lastly, in *Coppola v. Powell*, the Fifth Circuit rejected a lower court’s ruling that “any refusal to speak, no matter how couched, in the face of police interrogation, raises an inference that the person being questioned probably had something to hide.” *Coppola v. Powell*, 878 F.2d 1562, 1566 (1st Cir. 1989). The court reasoned that since the defendant “was telling the state police two things: that he was not going to confess; and that he knew he had a right not to incriminate himself” it was a valid exercise of his Fifth Amendment privilege. *Id.* at 1567

Similar to the defendants in *Okatan* and *Hale*, it was reasonable for Coda to believe that a statement upon arrest could incriminate him since the U.S. Attorney’s Office was prosecuting him for federal offenses. R. at 2. While Coda did not request an attorney like the defendant in



*Okatan*, the Fifth Amendment provides individuals the freedom to remain silent until they can obtain counsel. Like in *Hale*, Coda was a “potential defendant” having been indicted under 18 U.S.C. §844(i) and under prosecution for unrelated state charges. R. at 2-3. Respondents may argue that any reasonable person would have informed the arresting agents of their alibi defense. R. at 7. However, Coda was aware he was under prosecution for federal charges and nothing he would have said would deter officers from taking him into custody. R. at 7. Applying the reasoning from *Powell*, Coda’s refusal to speak in front of the police is a valid exercise of one’s Fifth Amendment privilege against not self-incrimination. R. at 7. Therefore, the Supreme Court should find given Coda’s federal charges, his decision to remain silent protected him from making any incriminating statements and provided the opportunity to obtain counsel. Thus, admission of Coda’s post-arrest but pre-*Miranda* silence would violate Coda’s Fifth Amendment privilege against self-incrimination.

B. The government’s preindictment delay precludes Coda from producing his greyhound bus records or family testimony and a jury would be prejudiced towards favoring this silence as evidence of guilt.

Lastly, the government’s preindictment delay prevented Coda from providing his alibi and a jury would be prejudiced towards favoring his post-arrest but pre-*Miranda* silence as substantive evidence of guilt. When determining whether a prosecutor’s reference to a defendant’s post-arrest but pre-*Miranda* silence was prejudicial, the “court will consider...whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant’s guilt.” *Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000). Silence at the time of arrest is “generally not very probative of a defendant’s creditability, but it also has a significant potential for prejudice” because “the danger is that a jury is likely to assign much more weight to the defendant’s previous silence than is warranted.” *Hale*, 422 U.S. 171,

180 (1975). Also, “permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.” *Id.* The Supreme Court has explained that to establish the “cause and prejudice standard,” a defendant must demonstrate “not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage,” infecting his entire trial with errors of constitutional dimensions. *Ouska*, 246 F.3d 1036, 1050 (7th Cir. 2001).

In *Whitehead*, the court held that “an inference of guilt from silence was stressed to the jury in violation of Whitehead’s constitutional rights” and “this factor weighs in favor of finding prejudice.” *Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000). Although the inspector’s comments on the witness stand regarding Whitehead’s post-arrest, pre-*Miranda* silence were scant, the District Court erred “when it allowed the government to comment on this silence in closing argument” because “it plainly infringed upon Whitehead’s privilege against self-incrimination.” *Id.* Similarly, in *Hale*, the Supreme Court ruled that “the respondent’s silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact.” *Hale*, 422 U.S. 171, 180 (1975). Further, in *Lopez*, the court found that “the prosecutor impermissibly commented on Lopez’s right to remain silent” but “the error was harmless beyond a reasonable doubt because of the limited reference to Lopez’s post-*Miranda* silence and the overwhelming evidence of Lopez’s guilt.” *United States v. Lopez*, 500 F.3d 840, 848-849 (9th Cir. 2007). Conversely, in *Ouska*, the defendant claimed, “that the use of her post-arrest silence was not only constitutional error, but that the error significantly prejudiced her case and therefore cannot be considered harmless.” *Ouska*, 246 F.3d 1036, 1044 (7th Cir. 2001). However, the 7th Circuit held that the defendant did

“not demonstrate prejudice from any improper use of her post-arrest silence in light of the very substantial other evidence of her guilt” and therefore found no Fifth Amendment violation. *Id.* at 1050.

Similar to *Whitehead*, *Hale* and *Lopez*, it would be a prejudicial error for the Supreme Court to admit Coda’s post-arrest but pre-*Miranda* silence as evidence of substantive guilt and his motion to suppress should be affirmed. Even if mention of this silence were brief like in *Whitehead*, Coda is unable to produce his alibi and a jury would be prejudiced towards weighing this silence in their decision. Due to the delay in the U.S. Attorney’s Office prosecuting his case, Coda was unable to produce his Greyhound bus records that indicate he was in New York in 2010 and there is no family member who can testify to his visit. R. at 3. Greyhound bus records are only stored for three years and his family members have either passed away or been diagnosed with dementia. R. at 3. Unlike in *Lopez* and *Ouska*, there is no other incriminating evidence in this case and a jury would be forced to heavily weigh Coda’s post arrest but pre-*Miranda* silence. Due to the lack of evidence as to whether Coda caused the explosion to his hardware store, the prosecution’s entire case would be based upon this silence and a prejudicial jury would be inevitable. Even if Coda took the stand to explain how his alibi cannot be corroborated, a jury would still have a strong negative inference towards his silence because it would be the only evidence the prosecution put forth. On appeal, the Supreme Court should find the preindictment delay precluded Coda from providing his alibi and a jury would be prejudicial towards favoring his post-arrest but pre-*Miranda* silence as evidence of guilt.

- C. The statute of limitations on Coda’s case was about to run and admission of post-arrest but pre-*Miranda* and pre-interrogation silence would create an incentive for law enforcement to delay interrogation to produce incriminating silence.

Furthermore, the statute of limitations on Coda's case was about to run and admission of his post-arrest but pre-*Miranda* silence incentivizes law enforcement to delay interrogation to manufacture incriminating silence. Whether interrogation has commenced or not, "neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody." *Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). Irrespective if an individual offers an unsolicited statement to police before questioning, "the defendant who stands silent must be treated as having asserted" the protected right to remain silent. *Id.* If courts were to permit the use of silence in the face of questioning about incriminating evidence, it would allow the government to manufacture additional incriminating evidence for later use at trial. *United States v. Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001).

In *Moore*, the District of Columbia Circuit held "that custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*." *Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997). Any other holding "would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant." *Id.* Moreover, in *Velarde-Gomez*, the Ninth Circuit held that admission of defendant's post-arrest but pre-*Miranda* silence violated the Fifth Amendment because regardless of Velarde's response, the government would be able to use his silence as additional evidence of guilt to be argued to the jury. *Velarde-Gomez*, 269 F.3d 1023, 1032 (9th Cir. 2001). If he remained silent during the questioning, "the government could use, as it did, his silence as powerful and persuasive evidence that Velarde was the consummate drug carrier." *Id.* If "Velarde denied the existence of the drugs, a response wholly consistent with innocence," the

government would be able to impeach him with the physical or other evidence tending to discredit him. *Id.*

Here, like in *Moore*, Coda's right to remain silent began when he was taken into custody and not when formal interrogation commenced. R. at 7. The U.S. Attorney's Office realized that the statute of limitations was about to run on Coda's case and had insufficient evidence to produce substantive evidence of guilt. R. at 2. By delaying interrogation, Coda's post-arrest but pre-*Miranda* silence would create an argument that the prosecution could bring to the jury. R. at 14. Allowing this would open the floodgates for police to delay interrogation for the purposes of manufacturing incriminating silence and would clearly violate the Fifth Amendment of the Constitution.<sup>2</sup> Similar to *Velarde-Gomez*, if Coda's post-arrest but pre-*Miranda* silence were admissible in a court of law, the U.S. Attorney's Office would have incriminating evidence to argue to the jury either way. On review, the Supreme Court should find that the statute of limitations on Coda's case was about to run and the admission of his post-arrest, but pre-*Miranda* silence would create adverse incentives for law enforcement to delay interrogation to manufacture incriminating silence.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this court reverse the Thirteenth Circuit's decision to deny both motions.

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<sup>2</sup> Portman, Janet. "Using the Defendant's Post-Custody but Pre-Miranda Silence Against Him." *Nolo*, [nolo.com/legal-encyclopedia/using-the-defendant-s-post-custody-pre-miranda-silence-against-him.html](http://nolo.com/legal-encyclopedia/using-the-defendant-s-post-custody-pre-miranda-silence-against-him.html)

Respectfully submitted this 13th day of September 2021.

/s/ Team 3  
Team #3  
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