**CASE NO. 21-125**

---

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

---

AUSTIN CODA,
*PETITIONER*,

v.

UNITED STATES OF AMERICA,
*RESPONDENT*.

---

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

---

## BRIEF FOR PETITIONER

---

Team 34
Attorneys for Petitioner

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**



**TREATISES**



**CONSTITUTIONAL PROVISIONS**

## QUESTIONS PRESENTED

1. Whether a defendant who faces extreme prejudice because of the government's negligent failure to issue a timely indictment is entitled to a dismissal of the unduly delayed indictment under the Due Process Clause of the Fifth Amendment?

2. Under the Fifth Amendment to the United States Constitution, does the government violate a defendant's constitutional right to remain silent when the government uses the defendant's post-arrest but pre-*Miranda* silence as substantive evidence of his guilt?

## STATEMENT OF THE CASE

Nine years after an act of alleged wrongdoing, government actors pried Mr. Austin Coda from his life. R. at 2-3. The United States seeks to use the mere passage of time and Mr. Coda's common-sense choice to remain silent after arrested against him. R. at 3, 7. The Constitution allows neither. Mr. Coda faced an issue that is sadly well-known to small business owners: customer attrition due to the invasion of chain stores in small communities. R. at 1. Almost nine years after opening his hardware store, Mr. Coda's business was destroyed by an explosion due to a gas leak after his low profits forced him to neglect necessary maintenance. R. at 1-2. However, Mr. Coda's neighbor told the Federal Bureau of Investigation (FBI) that he suspected Mr. Coda intentionally destroyed his business to collect on his insurance. R. at 2.

The U.S. Attorney's Office did not think the case was worth pursuing. *Id.* Initially the attorney assigned to Mr. Coda's case neglected to bring charges against him because Mr. Coda was involved in criminal proceedings on the state level. *Id.* However, once these wrapped up, a combination of political pressures and high turnover in the office resulted in the stagnation of Mr. Coda's December 2010 case until April 2019. *Id.* Only when the government realized it would lose the chance to prosecute Mr. Coda did it find his case worth pursuing. R. at 2-3.

The FBI arrested Mr. Coda on April 23, 2019, R. at 7, and indicted him shortly thereafter in May. R. at 3. Mr. Coda's defense to the charges leveled against him is an alibi of which no proof remains. *Id.* When the gas leak caused the explosion at Mr. Coda's business, he was in New York, not East Virginia. *Id.* Ironically, the date of explosion was Mr. Coda's birthday. *Id.* Every year on his birthday, Mr. Coda traveled via Greyhound bus to New York City to visit his family. *Id.* But because of the amount of time that passed between his journey and his indictment, all sources of proof of Mr. Coda's alibi are gone. *Id.* Likely due to these unfortunate circumstances surrounding

Mr. Coda's defense, he made the good sense choice to remain silent after he was arrested even though the arresting agent had not yet read his *Miranda* rights. R. at 7. Rather than face interrogation without counsel about an alibi for which proof no longer exists, Mr. Coda chose silence. *Id.* The government wished to prey upon Mr. Coda's choice to remain silent, planning to use that choice as substantive evidence of guilt at trial. *Id.*

Mr. Coda moved on Fifth Amendment grounds to suppress the government's use of his post-arrest, pre-*Miranda* silence as evidence of substantive guilt. *Id.* The district court, noting that the issue was one of first impression in the Thirteenth Circuit, denied the motion based on the rationale that "[b]linding the jury to the agents' common-sense observations during the arrest is an obstacle to the pursuit of justice, not a violation of a defendant's Fifth Amendment rights." R. at 10. Also on Fifth Amendment grounds, Mr. Coda moved to dismiss the indictment because of prejudicial pre-indictment delay. R. at 1. The district court incorrectly sided with the majority of circuits and State Supreme Courts, deciding that a defendant must show bad faith on the part of the government, and denied Mr. Coda's motion. R. at 6. Following the disposition of these motions, Mr. Coda was convicted of the charges against him. R. at 11. Mr. Coda timely appealed to the United States Court of Appeals for the Thirteenth Circuit, arguing that both motions were erroneously decided. R. at 11-12. A divided panel of the Thirteenth Circuit affirmed the district court as to both motions. R. at 12, 15. Following Mr. Coda's petition, this Court granted Certiorari to address the issues raised in both motions. R. at 16.

## SUMMARY OF THE ARGUMENT

### I.

Requiring a defendant to prove bad faith on the part of the government to secure a dismissal for pre-indictment delay under the Due Process Clause creates an unconstitutional burden. A bad

faith threshold test harms innocent defendants more than guilty defendants. This result does not pass muster under our collective values of fundamental fairness and justice. To prevail on a motion to dismiss for pre-indictment delay, a defendant need only prove some culpability on the part of the government. This is consistent with the limited rulings of this Court in its seminal cases on the issue. In those cases, prosecutorial prudence was a given. This Court left unexplored the potential constitutional consequences of several other reasons for pre-indictment delay.

In this Court's newer Fifth Amendment cases, a defendant who has only suffered speculative prejudice will not be able to secure a dismissal of an indictment when there is no evidence of bad faith on the part of the government. However, the question before us today assumes that the defendant has been prejudiced. Therefore, under controlling principles of due process, bad faith on the part of the government is not required to secure a dismissal of an indictment based on pre-indictment delay when the defendant has been sufficiently prejudiced.

**II.**

Allowing the government to use Coda's post-arrest but pre-*Miranda* silence as substantive evidence of guilt is a violation of his Fifth Amendment rights. The Fifth Amendment is the vehicle that affords individuals a fundamental right to remain silent. Using this right against an individual not only oversteps the Fifth Amendment, but it also lessens the importance of it. In addition, this Court addressed the issue of whether pre-custody, pre-*Miranda* silence is admissible as substantive evidence of guilt in *Salinas*. However, *Salinas* is not controlling because it does not address the issue presented before us today. Furthermore, Coda was subjected to the functional equivalent of an interrogation when Agent Park read the charges against him, expecting a response from him in return. Lastly, because the Fifth Amendment is the source that guarantees an individual the right

to remain silent, the government should not be permitted to use Coda's silence against him because the Fifth Amendment does not support this.

## ARGUMENT

### I. Due process does not force innocent people to bear the brunt of governmental laziness.

The government enjoys the exclusive right to the legitimate taking of a person's freedom and autonomy. The proper and fair administration of the criminal law is tremendously important to so many interests—society's, the government's, law abiding citizens', and the criminal's. It offends intuitive notions of fairness and justice when the criminal process is miscarried. The Constitution appreciates this basic truth, providing robust protections to those who may be or accused of committing a crime. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The essence of due process requires "that state action . . . be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions[.]" *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926). In turn, this Court has held that when the government delays the indictment of an individual and the delay prejudices the ability of the newly minted defendant to assert their defense, the Due Process Clause of the Fifth Amendment requires dismissal of the indictment under certain circumstances. *United States v. Marion*, 404 U.S. 307, 324 (1971). This Court has left the task of deciding "when and in what circumstances actual prejudice resulting from pre-accusation delays requires dismissal" to the lower courts. *Id.*

But the guidance this Court has issued is undeniable: only some sort of culpability on the part of the government is the threshold a defendant must cross to secure dismissal. *See United States v. Lovasco*, 431 U.S. 783, 795-97 (1977); *see also United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977). As an extreme, foul play by the government would suffice. *See Marion*, 404 U.S.

at 324. ("the Due Process Clause . . . would require dismissal of the indictment if it were shown . . . that the delay was an intentional device to gain tactical advantage over the accused"). Conversely, a delay resulting from the investigative process would not. *Lovasco*, 431 U.S. at 795-96. Such a delay might be necessary to a responsible prosecution, providing benefits for both the government and the potential defendant; "investigative delay is not so one-sided." *Id.* at 795. We are presented with a spectrum: on one end lay those intentional actions by the government so offensive to notions of liberty and justice "defining 'the community's sense of fair place and decency'" that they obviously require dismissal of the indictment under the Due Process Clause. *Id.* at 790 (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)); *Marion*, 404 U.S. at 324. On the other, we find those actions which are biproducts of a prudent prosecution that obviously do not. *Lovasco*, 431 U.S. at 795.

What lies in the middle are the government's reckless and negligent acts resulting in pre-indictment delay. *Lovasco* indicates that the former is also violative of the Due Process Clause. *Id.* at n.17 (noting that the government conceded that "reckless disregard of circumstances, known to the prosecution, suggesting an appreciable risk that delay would impair the ability to mount an effective defense" would violate the Due Process Clause) (quoting Pet'r's Br. 32-33 n.25). But because "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused," *id.* at 790, only "some culpability on the government's part," not an act of bad faith, must precede a due process violation based on pre-indictment delay. *Mays*, 549 F.2d at 678; *see also Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). This Court has twice left the task of deciding "the constitutional significance of various reasons for delay" to the lower courts to address on a case-by-case basis. *Lovasco*, 431 U.S. at 796-97. *Marion* and *Lovasco* adopted principles of due process, not bright-line rules. *Id.* at 797. The lower courts are left with those

principles, which they must apply "to the particular circumstances of individual cases." *Id.* at 796-97. Such applications require a nuanced approach and "necessarily involve a delicate judgement based on the circumstances of each case." *Marion*, 404 U.S. at 325.

This mandate has not been followed by the majority of the circuits, who have left room for neither nuance nor delicacy. Some have decided that the judgement of individual courts simply cannot be trusted when it comes to due process; that a case-by-case analysis would require courts to not only insert their own subjective beliefs of fairness, but to "compare the incomparable." *United States v. Crouch*, 84 F.3d 1497, 1512 (5th Cir. 1996). Others misread *Marion*'s example of intentional mischief on the part of the government as a necessary condition to prove a due process violation. *See, e.g.*, *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987); *United States v. Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978); *United States v. Marler*, 756 F.2d 206, 213 (1st Cir. 1985).

For three reasons, the Fourth and Ninth Circuits are the only circuits to have adopted an approach founded upon this Court's guidance. *See Mays*, 549 F.2d at 678; *Howell*, 904 F.2d at 895. First, overarching considerations of due process require that the Constitution not give greater protections to guilty defendants than innocent defendants. Second, in *Marion* and *Lovasco*, this Court refused to rule on any set of facts other than those presented before it. In the process, it set up a permissive inquiry rather than the restrictive that has been adopted by the majority of circuits. Its decision not to speculate was grounded in the fact that other reasons for pre-indictment delay might or might not violate due process if the defendant is prejudiced. *Marion*, 404 U.S. at 325; *Lovasco*, 431 U.S. at 796, 797 n.19. Finally, deciding whether the government's delay of the indictment violated "fundamental conceptions of justice" at the heart of due process "necessarily

involve[s] a delicate judgment based on the circumstances of each case" that must consider the prejudice suffered by the defendant. *Marion*, 404 U.S. at 325.

A. Fundamental fairness gives defendants a fair shot, not an automatic dismissal.

The minority's approach creates results consistent with "fundamental conceptions of justice" and "the community's sense of fair play and decency" for two inextricable reasons. *Lovasco*, 431 U.S. at 790 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin*, 342 U.S. at 173). First, these notions are offended when procedural hurdles are enacted that necessarily cause undue hardship to innocent defendants that culpable defendants will be less likely to encounter. Second, the minority's approach discourages lazy behavior on the part of the government in accordance with the assumptions about prosecutorial prudence that supported this Court's holding in *Lovasco*. 431 U.S. at 790-94.

Innocence is mundane and unremarkable. It is hitting the snooze button, driving to work, and listening to the radio. It is the daily rituals that are undocumented and forgotten on a continuous basis. Guilt, on the other hand, is memorable. It persists in the mind. It, by definition, is hard to forget. And somebody who has committed a crime has good reason to remember exactly what happened and to create an alternate version of events that can mask it should inquisitive minds ever come around. It is in these truths that the bad faith threshold violates fundamental fairness: pre-indictment delay prejudices the innocent more than the guilty. As time wears on, the innocent and unknowing future defendant will not take steps to preserve evidence of their daily activities. Record-keepers will eventually lose data as a matter of course or on accident, and witnesses will move away or pass on. The guilty suspect, however, will be patiently waiting for authorities to come knocking—armed with an alibi or other defense. When an innocent person loses their freedom because of *any* governmental misstep, it gives rise to society's guttural and deep-seated

reaction of confusion and disgust. This is a natural reaction to a violation of our shared values of fundamental fairness.

When there is not a prudent investigation, innocent parties are jeopardized. If an innocent person's culpability has been incorrectly ascertained by the government or charges are instituted against an innocent person as a precautionary measure to prevent the statute of limitations from lapsing, the amount of time that has passed has an inverse relationship with the ability of the innocent person to assert an effective defense. And this is the crux of the rationale underlying *Marion* and *Lovasco*. These cases assume that the investigation has been thorough and that any charges brought will be the product of that investigation. Just as time needs to be taken to ensure than a person is not indicted until probable cause is present, time needs to be taken to weed out innocent suspects. When prosecutorial negligence creeps in, these two goals are less likely to be accomplished. The minority's rule, which requires a dismissal of a negligently delayed indictment under some circumstances, *Mays*, 549 F.2d at 678, acts as a deterrent to this behavior. On the contrary, the majority's rule fails to understand that imprudence and bad faith are not the same thing. In doing so, it reaches a step further than what this Court has held by precluding a dismissal even if a defendant has been immensely prejudiced by a pre-indictment delay resulting from negligence, ignorance, or imprudence. This result cannot stand, and this Court should clarify its prior rulings in *Marion* and *Lovasco* by explicitly adopting the approach that is in place in the Fourth and Ninth Circuits.

Adopting the majority's rule would create a safe haven for lazy and reckless prosecutors to test the bounds of negligence and ignorance. The consequences are twofold. First, there will be less incentive for prosecutors to proactively conduct investigations. This hurts the interests of society in the prompt apprehension of criminals and the integrity of the criminal justice system in

its ability to prove the guilt of a suspect beyond a reasonable doubt. Second, the interests of innocent parties will be harmed more than those of guilty parties—an absurdity that must be avoided at all costs. In any case, the majority's rule disregards this Court's mandate 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. Under that regime, the prejudice to the accused is not considered at all. The integrity of the Constitution is protected by the minority's approach, under which there still "must be some culpability on the government's part either in the form of intentional misconduct or negligence." *Mays*, 549 F.2d at 678.

'Some culpability' is most consistent with this Court's precedent. It certainly does not make securing a dismissal an easy task for a criminal defendant, nor should it—it simply makes it attainable within the bounds of due process. Creating an open season for dismissals of prosecutions based on mere allegations of negligence and prejudice would erode confidence in the criminal justice system. But a defendant still must prove actual prejudice, a rare feat. *See Lovasco*, 431 U.S. at 796-97 ("in the intervening [five] years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay"). All the minority approach allows is a fair chance. This is what due process provides all of us: a baseline amount of decency, fairness, liberty, and justice. *E.g.*, *Hebert*, 272 U.S. at 316; *Rochin*, 342 U.S. at 173.

B. The majority's rule adopted a restrictive approach that this Court expressly disavowed.

This Court is reluctant to engage in speculation. This truism displayed itself in *Marion* and *Lovasco*. In the course of human behavior, there are limitless reasons why the government might choose or neglect to timely indict a criminal defendant. *Marion* and *Lovasco* address two of those reasons while explicitly limiting their holdings to the facts of the records before them. 404 U.S. at

325 ("It would be unwise at this juncture to attempt to forecast our decision in [other cases]"); 431 U.S. at 797 ("We simply hold that in this case the lower courts erred in dismissing the indictment"). That courts have interpreted these narrow holdings as adopting a bright-line, threshold-based test for due process violations is incredulous. *See Crouch*, 84 F.3d at 1524 (Politz, C.J., dissenting). Of course, the same reading applies on the opposite end of the spectrum; not every delay that causes prejudice requires automatic dismissal, "[s]uch a bright line test would lead to absurd results[.]" *State v. Oppelt*, 257 P.3d 653, 658 (Wash. 2011); *cf. Marion*, 404 U.S. at 324-25 ("no one suggests that every delay . . . should abort a criminal prosecution"). Absurdity is avoided by employing nuance and "delicate judgement." *Id.* at 325. The reasoning the circuits adopting the bad faith threshold test use to justify circumventing this idea is unpersuasive and incorrect.

As a preliminary matter it bears iterating that several of the circuits' early post-*Marion* cases latched onto the 'tactical advantage' language that this Court noted "*would* require dismissal of the indictment," *Id.* at 324 (emphasis added), and decided it was the only way for a defendant to secure a dismissal. *See, e.g.*, *Marler*, 756 F.2d at 213; *Gravitt v. United States*, 523 F.2d 1211, 1215 (5th Cir. 1975); *United States v. Dennis*, 625 F.2d 782, 794 (8th Cir. 1980). Those cases fail to understand that this Court announced no such rule. It only approved a concession by the government that, under the Due Process Clause, such conduct *would* provide the basis for dismissal of a delayed indictment. *Marion*, 404 U.S. at 324.

Other decisions provided a more complete, but still incorrect, reading of *Marion* and *Lovasco*. The Fifth Circuit addressed the issue *en banc* in *Crouch*, where it abrogated its decision in *United States v. Townley*, 665 F.2d 579, 581-82 (5th Cir. 1982) (employing a balancing test between the prejudice to the defendant and the reasons for the delay), which the *en banc* court felt conflicted with its other decisions. *See Crouch*, 84 F.3d at 1508 (collecting cases). The court's

decision partially rests upon the notion that "[t]he only due process violation specifically recognized [by this Court] is where the delay not only 'caused substantial prejudice' but also 'was an intentional device to gain tactical advantage.'" *Id.* at 1510 (quoting *Marion*, 404 U.S. at 324). But this is false. This Court approved "reckless disregard of circumstances" on the part of the government as a basis for a due process violation in *Lovasco*. 431 U.S. at 795 n.17. Further, it explained that there is not a larger body of precedent examining the potential reasons for delay that could give rise to a due process violation because few defendants are able to show that they are prejudiced by delay in the first instance, *id.* at 796-97, as opposed to *Marion* setting forth the only options available.

Indeed, this Court listed some other non-investigative reasons for delay whose "constitutional significance" had yet to be explored. *Id.* at 797 n.19. Among these are "prosecutorial decisions such as the assignment of manpower and priorities among investigations," as was the case here. *Id.*; R. at 2. Even without these *Lovasco* footnotes, the language in *Marion*—though only explicitly endorsing intentional misconduct as a basis for dismissal by adopting the government's concession—includes the word 'however' immediately following that adoption. *Marion*, 404 U.S. at 324. This implies that some exceptions must exist to any previously announced 'rule.' *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (2012). And of course, in refusing to determine which circumstances do and do not require dismissal, this Court implicitly stated that it was *not* adopting a threshold standard. *Marion*, 404 U.S. at 324. Thus, *Crouch*'s assertion that the only due process violation adopted by this Court is one of intentional misconduct is facially incorrect and, otherwise, would not be the best reading of the case.

C. This Court's post-*Lovasco* cases have not altered the permissive nature of the due process landscape.

For similar reasons, this Court's dicta in *Gouveia* did not change the analysis set forth in *Marion* and *Lovasco*. It is quoted only selectively by the Fifth Circuit in *Crouch*. *See Crouch*, 84 F.3d at 1510 (quoting *United States v. Gouveia*, 467 U.S. 180, 192 (1984)). *Gouveia* dealt with Sixth Amendment counsel issues and addressed the Fifth Amendment only in passing at the end of the opinion, stating: "the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate" decision on the Government's part. *Gouveia*, 467 U.S. at 192. There is no falsehood there, the Court merely repeated the limited principles of due process it had already adopted. *See also id.* n.7 (reiterating that there's no constitutional obligation for prosecutors to indict as soon as probable cause appears). This is not an imposition of an increased burden on defendants under the Fifth Amendment, it is a casual mentioning of one additional way criminal defendants are protected by the Constitution. Certainly, it does not purport to change any principles of due process adopted and shaped in *Marion* or *Lovasco*. The Fifth Circuit's omission of the footnote indicates how far it stretched to reach its erroneous conclusion.

The Fifth Circuit's application of *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), is likewise incorrect. *Youngblood* only reaffirmed the approach taken by *Marion* and *Lovasco*. There, this Court took care to include the fact that the defendants in those two cases failed to show actual prejudice as a result of the government's delay. *Id.* True, it may be important "for constitutional purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government." *Id.* But in each case this Court discussed, there was no evidence of prejudice to the defendant's ability to assert a plausible defense. *See id.* (citing *Marion*, 404 U.S. at 325; *Lovasco*, 431 U.S. at 790; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872

(1982)). In this sense, the Fifth Circuit and the majority of its sisters conflate the issue by losing sight of the fact that whether the defendant has suffered prejudice is material to the inquiry: "the Due Process Clause requires [a showing of bad faith] when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it *could have* been subjected to tests, the results of which *might have* exonerated the defendant." *Youngblood*, 488 U.S. at 57 (emphasis added).

When there can be only speculation as to what the missing evidence would have shown, due process requires a showing bad faith. But here, the prejudice is a given—we are not dealing with possibilities, but actualities. In the erroneous rule adopted by the majority of the circuits, we are asked to distort this principle of due process beyond what this Court has previously held. In that proposed rule, it won't matter if prejudice obviously has been clearly established by the defendant. This would erode the constitutional protections given to defendants who have suffered real, not possible, injuries as a result of governmental missteps. The Fifth Circuit, attempting to export the rule of *Youngblood* to this length, noted that *Marion* and *Lovasco* were cited by this Court "in support of its holding" in that case. *Crouch*, 84 F.3d at 1513 n.17. But in failing to make the distinction between the speculative or nonexistent prejudice the defendants suffered in those cases and actual prejudice that defendants might suffer in future cases, the court preemptively foreclosed dismissal as a remedy to the latter category of defendants even though this Court made it clear that its rulings were limited. Because of this failure, the Fifth Circuit adopted a rule that is far too broad and inconsistent with due process.

Finally, the Fifth Circuit's other reasoning in support of its holding is similarly flawed. It made much ado of this Court's determination in *Lovasco* that the district and appellate courts erred, rather than "remanding in light of the principles," in dismissing the indictment despite the lower

courts' finding that the investigative delay was "unjustified, unnecessary, and unreasonable." *Id.* (quoting *Lovasco*, 431 U.S. at 787). But this undercuts the Fifth Circuit's conclusion. Indeed, this Court contrasted investigative delay with those delays in bad faith: "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused[.]'" *Lovasco*, 431 U.S. at 795 (quoting *Marion*, 404 U.S. at 324). In doing so, it simply defined the other end of the spectrum, where a court that dismisses an indictment based on a good-faith, prudent delay should expect reversal despite its factual findings. This Court did not say that 'investigative delay *is not* a delay made to score a tactical advantage; thus, the indictment cannot be dismissed.' It intentionally engaged in a process of comparison, wherein it used the phrase "fundamentally unlike," suggesting that the two are, indeed, opposites. *Id.*

However, just because there may be two opposite governmental behaviors does not amount to an invitation to engage in absolutism. This, however, is what many courts have done. Time and again, the majority of circuits have failed to engage in a delicate, case-by-case analysis, refusing to see anything but the two furthermost ends of the spectrum that this Court has defined. The best example of this behavior is *United States v. Brown*, 959 F.2d 63, 66 (6th Cir. 1992), where the court displayed a faulty understanding of prosecutorial behavior. There, the court assumed that prosecutors could only be doing one of two things in the process of delaying an indictment: investigating or seeking a tactical advantage. *Id.* ("particularly where the delay is investigative rather than intended to gain a tactical advantage over the accused, preindictment delay does not offend the Fifth Amendment"). But of course, we do not behave in absolutes. There may well be an infinite amount of space between the two ends of the spectrum where any level of innocence, negligence, recklessness, or sinister intentions are present.

*Brown*'s selective reliance on *Eight Thousand Eight Hundred and Fifty Dollars* exposes some of the largest flaws in the majority's approach. It used the following: "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 weight and sift evidence to ensure that an indictment is well founded." *Brown*, 959 F.2d at 66 (quoting *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 563 (1983)). There are two facets here that undercut the Sixth Circuit's application of this language. First, in the hypothetical situation addressed by this Court in *$8,850*, the prosecutor is, in fact, using the time that comprises the delay to conduct a prudent investigation. Second, more importantly, this Court explicitly recognized that the degree to which the defendant is prejudiced by the delay is material in the due process inquiry by intentionally including "extreme prejudice" as an exception to the fulfillment of due process. *$8,850*, 461 U.S. at 563. Thus, it is impossible for there to be a threshold test, wherein bad faith is the post that must be passed, if extreme prejudice will create a due process violation on its own even if no bad faith behavior on the part of the government is discovered. The disjunctive listing of "bad faith or extreme prejudice" cannot be overlooked. *Id.* This alone answers the question before us: when there is extreme prejudice, bad faith on the part of the government is not required.

## II. Admission of Mr. Coda's post-arrest but pre-*Miranda* silence as substantive evidence of his guilt violates the Fifth Amendment because the government is attempting to incriminate him with his silence when the Fifth Amendment guarantees him the right against self-incrimination.

The government's attempt to use Mr. Coda's post-arrest but pre-*Miranda* silence as substantive evidence of his guilt directly contradicts what the Fifth Amendment prohibits. The Fifth Amendment provides in relevant part that "[n]o person… shall be compelled in any criminal case to be a witness against himself…" U.S. Const. amend. V. Admission of Mr. Coda's silence as substantive evidence of his guilt violates his fundamental right to remain silent and not

incriminate himself, which is guaranteed by the Fifth Amendment of the United States Constitution.

This fundamental right to remain silent points to the constitutional foundation that balances and maintains citizens' dignity and integrity in respect to the government. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). Accordingly, "[t]hose who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty." *Id.* at 459. As follows, the government's use of Mr. Coda's silence as substantive evidence of guilt not only attacks his individual liberty, but also undermines the constitutional foundation the Fifth Amendment was built upon.

This Court has held that "the Fifth Amendment… 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). To hold any differently infringes on the right the Fifth Amendment affords individuals and instead suggests that the Fifth Amendment does not truly protect individuals. Moreover, this Court has long recognized that "there can be no doubt that the Fifth Amendment privilege… serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467; *see also United States v. Hernandez*, 476 F.3d 791, 796-97 (9th Cir. 2007) (concluding that "a reasonable person in [petitioner's] position would not have felt free to… leave").

A. The lower courts disregarded the facts and issue in the present case when relying upon *Salinas* as the controlling jurisprudence.

The lower courts erred in concluding that *Salinas* should control. *Salinas* only addresses whether pre-custody, pre-*Miranda* silence is admissible as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. 178 (2013). This is not the issue before us today. Consequently, the lack of

uniformity amongst the circuit courts on this issue implores this Court to set a precedent regarding this gray area of law. While this Court established that pre-custodial silence is admissible as substantive evidence of guilt, *Id.* at 186-91, this Court has yet to squarely address whether an accused's post-arrest silence is admissible as substantive evidence of guilt.

As follows, this Court should follow the Ninth, Tenth, and D.C. Circuits holding that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. Specifically, this Court should apply the legal standard set in *United States v. Whitehead* because it addresses the issue before us today. *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000).

In *Whitehead*, the appellant attempted to enter the United States and was stopped by border agents. *Id.* at 636. When government officials asked him questions at both primary and secondary inspections, he responded. *Id.* At secondary inspection, a narcotics-detector dog alerted officials to the rear of appellant's vehicle. *Id.* Consequently, officials placed the appellant in custody and brought him to a secondary office. *Id.* Upon being placed in custody, an inspector searched the appellant but did not find anything. *Id.* at 637. While this was happening, the appellant remained silent. *Id.* Following this, the inspector searched the appellant's vehicle and found several packages of marijuana. *Id.* The inspector returned to the secondary office, instructed the appellant to remove his shoes and belt, and placed him in a holding cell. *Id.* The appellant continued to remain silent throughout this process. *Id.*

At trial, a jury found appellant guilty of importation of marijuana and possession of marijuana with intent to distribute. *Id.* In closing argument, the prosecutor argued that the appellant "remained silent because he knew he was guilty." *Id.* at 638. On plain error review, the Court of Appeals held that the inference of guilt from appellant's silence undoubtedly violated his

constitutional rights, which weighed in his favor of finding prejudice, even though it found the error to be harmless under the facts established at trial. *Id.*

In the present case, Mr. Coda meets all four conditions under the plain-error standard. Analogous to the court's conclusion in *Whitehead*, if the government used Mr. Coda's silence as substantive evidence of guilt at trial, this would constitute an "error" that is "plain." However, unlike the appellant in *Whitehead*, the error would affect Mr. Coda's substantial rights by disregarding his right to remain silent and his privilege against self-incrimination.

Moreover, this error not only affects Mr. Coda's right against self-incrimination, but it would also negatively impact the fairness, integrity and outcome of legal proceedings as a whole. The government bears the burden of proving beyond a reasonable doubt that Mr. Coda is guilty. Allowing the government to use his silence as substantive evidence of guilt is a back-door attempt by the government to incriminate Mr. Coda. Our government is based on fairness, and this would be an enormous overstep by the government affecting Coda's right to a fair and balanced trial.

In *Salinas*, a murder investigation led police to the petitioner. *Salinas*, 570 U.S. at 181. Subsequently, he willingly agreed to accompany police to the station for questioning. *Id.* at 182. While at the police station, petitioner voluntarily answered the officer's questions. *Id.* However, when asked whether his shotgun would match the bullets recovered from the murder scene, the petitioner fell silent. *Id.* Following the petitioner's momentary silence, the officer continued asking questions, which the petitioner answered. *Id.*

Here, the petitioner in *Salinas* is clearly distinguishable from Mr. Coda. The petitioner in *Salinas* voluntarily agreed to accompany police to the station to answer questions in a non-custodial interview. While the petitioner in *Salinas* had the luxury of leaving his non-custodial

interview at any point, this was not the case for Mr. Coda. Mr. Coda was formally arrested and brought into custody by Special Agent Park, R. at 7, and consequently, he was not free to leave.

More importantly, Mr. Coda did not voluntarily answer any questions. As previously mentioned, the petitioner in *Salinas* volunteered statements, which is not barred by the Fifth Amendment. Significantly, there were no inherent pressures in the way that the questioning took place in *Salinas*. However, Mr. Coda was subjected to the inherent pressures associated with being placed under arrest by an FBI Special Agent. Therefore, *Salinas* is not controlling because the facts as well as the issue are not analogous to the instant case.

B. Agent Park informing Mr. Coda of the charges against him was the functional equivalent of an interrogation.

This Court has held that "[t]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Under *Miranda*, not only does the term "interrogation" refer to express questioning, but it also includes "any words or actions [from] the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 292. Mr. Coda was interrogated within the meaning of *Miranda* because (1) he was subjected to the functional equivalent of questioning, and (2) Agent Park should have known that she was eliciting an incriminating response from him.

In *Innis*, after receiving a picture identifying the respondent, an officer spotted the respondent and subsequently arrested him and advised him of his *Miranda* rights. *Id.* at 294. While the respondent was in the police vehicle, one of the officers started talking about how there were "a lot of handicapped children running around in [the] area." *Id.* at 291. Respondent interrupted the officers' conversation stating that he knew the location of the shotgun. *Id.* at 295. The respondent then led the police to a field where he pointed to the shotgun's location. *Id.*

This Court addressed whether the respondent was "interrogated" by police officers, and concluded that the respondent was not "interrogated" within the meaning of *Miranda*. *Id.* at 302. This Court reasoned that the conversation between respondent and the officers was "nothing more than a dialogue between the two officers to which no response from the respondent was invited." *Id.* This Court further determined that "the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him." *Id.*

In this case, the government states that they did not interrogate Mr. Coda. R. at 8. However, it is obvious that Agent Park's recitation of Mr. Coda's charges at the time of his arrest was an attempt to elicit an incriminating response from him. Unlike the officers in *Innis*, Agent Park was inviting Mr. Coda to respond to her and provide his alibi. The officers in *Innis* were having a casual conversation with each other when the respondent decided to participate in the conversation even after he was advised of his *Miranda* rights. Whereas, Agent Park's words were entirely directed towards Mr. Coda.

Furthermore, Agent Park should have known that both her words coupled with her actions were reasonably likely to elicit an incriminating response from Mr. Coda. Agent Park arresting Mr. Coda while simultaneously informing him of the charges against him, R. at 7, was essentially provoking Mr. Coda to make an incriminating response. Instead, Mr. Coda chose to exercise his right to remain silent, by doing just that, and he should not be penalized for that.

C. Mr. Coda has the right to remain silent irrespective of the fact that he was not yet advised of his *Miranda* rights because the Fifth Amendment is the source that guarantees Mr. Coda's right to remain silent, not the *Miranda* warnings.

The right to remain silent does not derive from the *Miranda* warnings. Instead, "the right to remain silent derives from the Constitution and… regardless of whether the [*Miranda*] warnings

are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001). While *Miranda* warnings support the Fifth Amendment, they are not the source of an individual's right to remain silent. *See id.* The court in *Velarde-Gomez* recognized that "once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning…" *Id.* at 1028-29.

In *Velarde-Gomez*, the appellant attempted to enter the United States when he was stopped at a primary inspection site by Customs. *Id.* at 1026. An agent approached the appellant's vehicle and sent him to a secondary inspection site. *Id.* Customs officials inspected the appellant's vehicle further and found marijuana in the gas tank. *Id.* Upon finding this, Customs agents escorted the appellant to an interview room where they informed him that they found marijuana in his gas tank. *Id.* In response to this, the appellant remained silent and did not physically react. *Id.*

A couple hours later, the agents read the appellant his *Miranda* rights, and he waived those rights. *Id.* Before trial, the appellant filed a motion to exclude evidence of his silence and demeanor. *Id.* The district court granted the motion, but subsequently allowed the government to introduce the evidence of his demeanor. *Id.* at 1027. The Court of Appeals held that the district court erred by permitting the government to comment on the appellant's post-arrest, pre-*Miranda* silence. *Id.* at 1033. The court reasoned that "[w]hether the government argues that a defendant remained silent or describes the defendant's state of silence, the practical effect is the same—the defendant's right to remain silent is used against him at trial." *Id.* at 1032.

Likewise, the court in *Okatan* stated that "[i]n order for the privilege to be given full effect, individuals must not be forced to choose between making potentially incriminating statements and being penalized for refusing to make them." *United States v. Okatan*, 728 F.3d 111, 116 (2d Cir.

2013). In *Okatan*, the appellant attempted to enter the United States with a German citizen in the passenger seat. *Id.* at 113. Customs and Border Protection ("CBP") told the appellant he was allowed to enter the country, but his passenger was denied entry. *Id.* The following day, the appellant attempted to enter the United States again, but this time he was alone. *Id.* Consequently, the appellant's license plate number alerted the officers to his previous attempt to enter the country. *Id.* An officer inspected his car, and found luggage belonging to the appellant's passenger. *Id.* The appellant agreed to leave the luggage with border patrol and entered the country. *Id.* at 114.

Later, an agent followed the appellant's car and pulled him over. *Id.* The agent approached his car and asked him if he was a United States citizen. *Id.* The agent then asked him what he was doing there and warned him that "lying to a federal officer is a criminal act." *Id.* In response, the appellant requested a lawyer, and the agent arrested him. *Id.* Before trial, the appellant moved to suppress statements he made to the officer at the rest area. *Id.* The district court granted the motion in respect to the statements he made to the agent after he requested a lawyer. *Id.* at 115.

The Court of Appeals stated that "[t]he Fifth Amendment guaranteed [the appellant] a right to react to the question without incriminating himself, and he successfully invoked that right." *Id.* at 119. In conclusion, the court held that when "an individual is interrogated by an officer, even prior to arrest, 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.

In the instant case, the government placed Mr. Coda in custody and therefore, he had the right to remain silent. Similar to the appellant in *Velarde-Gomez*, the government wants to use Mr. Coda's non-reaction and subsequent silence in response to the charges stated against him as its case-in-chief. This would burden Mr. Coda's right against self-incrimination by commenting on his silence and using it against him to show that he is guilty because he remained silent.

Consequently, this forces Mr. Coda to defend himself and explain why his silence does not equate to his guilt.

As follows, allowing this circumvents the constitutional protection the Fifth Amendment affords Mr. Coda. In essence, the government is attempting to penalize Mr. Coda for refusing to make a statement or provide his alibi at the moment Agent Park placed him under arrest, and the Fifth Amendment does not support this. The Fifth Amendment protects individuals against this type of self-incriminating evidence, and the government should not be able to use it against Mr. Coda.

As a policy concern, allowing prosecutors to begin using an accused's silence as substantive evidence of guilt places an undue burden on the accused by forcing him to either make a statement that can be used against him or have his silence used against him. In either case, it is a lose-lose situation for the accused. It is a self-serving process that benefits the government while disregarding any and all rights of the accused. Every American is entitled to a fair and balanced trial. Allowing an accused's silence to be used as substantive evidence of guilt destroys the fairness and balance of legal proceedings by creating an unfair prejudice against the accused.

## CONCLUSION

This case raises constitutional questions of the most important nature that will impact the ability of all Americans to face the criminal justice process with dignity and fairness. Petitioner requests that this Court answer the questions presented in the affirmative.

Respectfully submitted, this 20th day of September 2021,

*/s/ Team 34*
Team 34
Attorneys for Petitioner

## CERTIFICATION

Team 34 certifies that the team and coach of Team 34 have read and understand the rules of the Competition, this brief has been prepared in accordance with the rules of the Competition, and the brief represents the work product solely of Team 34's members.

*/s/ Team 34*
Team 34