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 THE PETITIONER

Team 35
Counsel for the Petitioner

September 13, 2021

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QUESTIONS PRESENTED

The district court denied Petitioner's motions to suppress due to the lack of bad faith evidence on the part of the government and because the use of post-arrest but pre-*Miranda* silence as substantive evidence of guilt does not violate the Fifth Amendment. The Court of Appeals for the Thirteenth Circuit affirmed the judgement. Appellant submits the following questions for this Court's review:

First Issue Presented:

Does preindictment delay that causes the accused actual prejudice violate the Fifth Amendment to the United States Constitution where there is no evidence of bad faith on the part of the government?

Second Issue Presented:

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

STATEMENT OF THE CASE

Statement of the Record:

In April 2019, Petitioner Austin Coda was taken into custody and indicted for malicious use of an explosive to destroy property that affects interstate commerce, as codified in 18 U.S.C. § 844(i). R. at 3. The complaint alleges Coda intentionally destroyed his store to collect insurance proceeds. *Id.*

Coda subsequently filed a motion to dismiss the indictment for preindictment delay, arguing that the lengthy period between the explosion at issue and issuance of the indictment fatally undermined his alibi defense. *Id.* Coda also filed a motion to suppress his post-arrest but pre-*Miranda* silence because its use at trial would violate his Fifth Amendment right against self-incrimination. *Id.* at 7.

The trial court denied both motions. *Id.* at 6, 10. As to the first motion, the court held that the lack of evidence of bad faith on the part of the government rendered dismissal of the charges beyond Coda's reach. *Id.* at 6. The court denied the second motion because Coda failed to assert his right to remain silent regardless of *Miranda* issuance and Coda's silence formed a relevant part of the arresting officers' common sense perceptions of the case. *Id.* at 9, 10. The Court of Appeals for the Thirteenth Circuit summarily affirmed. *Id.* at 12.

This Court granted Certiorari on July 9, 2021. *Id.* at 16.

Statement of the Facts:

Austin Coda owned a hardware store in rural Plainview, East Virginia beginning in January 2002. *Id.* at 1. The store, the only one in the area, was very profitable for many years. *Id.* However, the Coda's fortunes took a turn for the worse in the aftermath of the 2008 recession. *Id.* His business began losing customers and was fatally injured when a large chain store opened

in Plainview in 2009. *Id*. By the end of 2010, the store was struggling to remain afloat, with many repairs left unattended. *Id*.

On December 22, 2010, an explosion leveled Coda's store. *Id*. at 2. Local investigators and ATF agents investigated the incident and found evidence suggesting an old, faulty gas line was to blame. *Id*. Later, a friend of Coda's came forward and told agents that Coda was experiencing severe financial difficulties, seemed anxious and paranoid recently, and maintained an insurance policy on the store in case of total loss. *Id*. This new information in hand, authorities began to suspect Coda had a hand in the episode. *Id* .

The case was initially rated "low-priority" by the local U.S. Attorney's office, and the file was passed around for several years. *Id*. Finally, Coda was indicted in April 2019. *Id*. at 3. Upon his arrest, Coda was informed of the charged by Agent Park of the FBI. *Id*. at 7. However, Coda did not respond to Park's reading, choosing instead to stand mute. *Id*.

Later, Coda moved to dismiss the indictment for prejudicial delay in violation of the Fifth Amendment, and to suppress his silence as evidence of guilt. *Id*. at 3, 7. In support of his motion, Coda testified that the explosion happened on his birthday, while he was in New York, having travelled there by bus to attend an annual birthday celebration. *Id*. Unfortunately, four of the five witnesses to his presence have since passed away, and the fifth suffers from dementia and is thus unable to testify. *Id*. Further eviscerating Coda's defense, the bus records corroborating the trip were destroyed due to normal record retention practices three years after the incident. *Id*.

SUMMARY OF THE ARGUMENT

The Fifth Amendment reads,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

As to the first issue, the right to a fair trial is at the core of the Due Process Clause. A defendant's ability to defend against criminal charges is foundational to the right to a fair trial. It is well established that the statute of limitations is the publics primary protection against the threat of stale criminal charges. However, due process also plays a role in preindictment settings. Extended preindictment delay attributed to non-investigative reasons has a fatal effect on a defendant's ability to mount a defense and their due process rights.

The majority of circuits have fundamentally misunderstood key pronouncements from this Court on the issue of preindictment delay's effect on defendant's due process rights. The common thread of this Court's precedents dealing with due process challenges to preindictment delay is each situation requires a case-by-case analysis to determine whether the delay warrants dismissal. The Court has never endorsed a requirement that a defendant show bad faith, nor would such a requirement sufficiently further the purpose of the due process clause.

This Court has recognized the insufficiency of a one-size fits all test in due process challenges to preindictment delay. Unfortunately, most circuits have misunderstood the pronouncements of this Court and placed a nearly unbearable burden on defendants to prove bad

faith by the government. A requirement of bad faith threatens the core purpose of the due process clause. Thus, bad faith by the government should be properly recognized as one end of the balancing test endorsed by this Court in the seminal cases on the issue.

As to the second issue, the rights enshrined by this Court are prophylactic in nature, not donative. For that reason, the rights of defendants are vested the moment they are taken into custody, not when police deign to give defendants their *Miranda* warning. In no other sphere of constitutional liberty do authorities directly determine by choice when and where a citizen becomes entitled to certain rights.

Allowing silence to used as substantive evidence of guilt, it burdens defendants' Fifth Amendment right against self-incrimination because defendant are then subjected to unreasonable pressure to provide evidence against themselves, and in many cases may not be afforded a choice at all. Defendants may choose to speak and risk incriminating themselves, or remain silent and certainly provide evidence harmful to their case. Police would also be incentivized to create or manufacture evidence by tactically delaying the issuance of a *Miranda* warning to insert incriminating silence into a case. Requiring citizens to act proactively to defeat the use of incriminating silence undermines the prophylactic nature of *Miranda* that this Court has recognized.

Regardless, however, of the burdens the use of such silence places on Fifth Amendment rights, such silence is at risk of being grossly overplayed in the minds of jurors. As this Court has recognized, silence is usually of limited probative value due to its uncertain nature and opaque meaning. Silence cannot always be taken to mean or convey something.

ARGUMENT

I. This Court Should Hold That Preindictment Delay Which Causes Actual Prejudice Violates The Fifth Amendment, Even When There Is No Evidence Of Governmental Bad Faith.

Relevant statute of limitations is the public's "primary guarantee against [. . .] overly stale criminal charges." *United States v. Marion,* 404 U.S. 307, 322 (1971). However, the Due Process Clause of the Fifth Amendment protects the right of a criminal defendant to receive a fair trial. R. at 12. Consequently, the "Due Process Clause has a limited role to play in protecting against oppressive delay" before indicting a criminal Defendant. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). Challenges to preindictment delay have been brought unsuccessfully under the Sixth Amendment's Speedy Trial Clause. The Sixth Amendment challenges have been unsuccessful because, "only 'a formal indictment or information or [. . .] actual restraints imposed by arrest'" trigger the protection. *Id.* at 789. In deciding a Due Process challenge to a preindictment delay, courts are to determine if the delay offends the "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *Id.* at 790.

The Court established in *Lovasco*, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* A defendant must show the preindictment delay caused substantial prejudice to his right to a fair trial. *Marion*, 404 U.S. at 323. Mr. Coda has proven the preindictment delay in this case did actually and substantially prejudice his defense. R. at 6. Mr. Coda's right to a fair trial was substantially prejudiced by the delay because it destroyed his "facially air-tight alibi defense." R. at 12. However, "prejudice is generally a necessary but not sufficient element of a due process claim." *Lovasco,* 431 U.S. at 790. The Court in *Marion* also recognized the "sound administration of justice [. . .] will necessarily involve a delicate judgment based on the circumstances of each case. 404 U.S. at

325. Following this guidance a minority of circuits adopted a balancing test that weighs the Governments reason for the delay against the defendant's prejudice. *Jones v. Angelone,* 94 F.3d 900, 904 (4th Cir. 1996). Under the balancing test, the inquiry effectively becomes whether prosecution following the delay violates "fundamental conceptions of justice" at the core of our society's institutions. *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005). The majority of Circuits have keyed in on the statement of the Court in *Lovasco* that "investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage." 431 U.S. at 795. Consequently, the majority of Circuits adopted a two-prong test in which the defendant must show: (1) substantial prejudice from the delay; and (2) the delay was intentional by the government to gain a tactical advantage. *United States v. Crouch,* 84 F.3d 1497, 1508 (5th Cir. 1996).

The preindictment delay of nearly a decade in this case does violate the "fundamental conceptions of justice" at the heart of the American justice system and foreclosed any opportunity for Mr. Coda to receive a fair trial. *Id*. Further, the balancing test, embraced by the only the Ninth Circuit to date, is the correct inquiry to undertake in assessing a defendant's due process claim regarding preindictment delay. The two-prong test followed by the District Court is a grave misunderstanding of the Court's guidance in the seminal decisions of *Marion* and *Lovasco*. Gross negligence of the type exhibited in this case must be stamped out of the justice system at every instance. The balancing test is better suited for handling cases similar to Mr. Coda's where the preindictment delay was the fault of gross negligence by the Government. Additionally, the delay in this case cannot be categorized as investigative delay, nor has the government provided any reasonable explanation to try and categorize the delay as investigative. However, even if the two-prong test is the correct formulation of the test, gross negligence of this

type raises to the level required to show a violation of society's most foundational concepts of justice. Especially when the grossly negligent delay causes the defendant substantial and actual prejudice as severe as the prejudice Mr. Coda experienced in this case.

A. The Balancing Test Endorsed In Chief Judge Martz's Dissent Is The Correct Test In Due Process Preindictment Delay Cases.

The seminal cases regarding preindictment delay, *United States v. Marion,* 404 U.S. 307 (1971), and *United States v. Lovasco,* 431 U.S. 783 (1977) establish a balancing framework to determine due process claims related to preindictment delay. The Court concedes in both cases it cannot "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Lovasco*, 431 U.S. at 796. This concession in both cases and the direction to consider the reason "as well as" the prejudice show the intent to establish a balancing framework. The preindictment delay in this case cannot be characterized as investigative delay. Not only does investigative delay indicate a level of action not present in Mr. Coda's case, but the government has not offered a reasonable explanation for the delay to indicate it was caused by anything more than gross negligence. Further, if gross negligence of this severity is permitted under the investigative delay exception, this Court risks entitling prosecutor's to a margin of laziness in prosecuting "low-priority" cases.

The due process inquiry of a preindictment delay situation, "must consider the reasons for the delay as well as the prejudice to the accused." *Id*. at 790. Additionally, the statute of limitations "does not fully define the [defendant's] rights" prior to formal indictment of criminal charges. *Marion,* 404 U.S. at 324. Preindictment delay that is undertaken by the government for investigative purposes does not deprive a defendant of due process. *Lovasco,* 431 U.S. at 794–95. Investigative delay is permitted because it is "fundamentally unlike delay [. . .] solely to gain tactical advantage." *Id.* However, the Due Process Clause would require the indictment be

dismissed if the delay caused "substantial prejudice to appellee's rights to a fair trial and [. . .] was an intentional device to gain tactical advantage" over the defendant. *Marion,* 404 U.S. at 324. Finally, the Court has conceded it cannot "determine in the abstract the circumstances in which preaccusation delay" requires dismissal of the indictment. *Lovasco,* 431 U.S. at 796. Also confirming the lower courts are tasked with "applying settled principles of due process [. . .] to the particular circumstances of individual cases." *Id.* at 796–97.

As one of the two seminal cases, *Lovasco,* provides the best endorsement of the balancing test by the Court on due process claims challenging preindictment delay. Lovasco was indicted for possessing stolen firearms following an 18-month delay between commission of the offense and indictment. *Id.* at 784. Lovasco moved to dismiss the indictment because of the delay. *Id.* Lovasco claimed to have lost the testimony of two material witnesses in order to show prejudice caused by the delay. *Id.* The government explained the delay was due to continuing the investigation in hopes of gaining more information about Lovasco's son, who was suspected of the actual theft of the weapons. *Id.* at 785–86. The Government further explained that investigation did not continue on a full-time basis, but there was communication between prosecutors and investigators throughout the delay. *Id.* at 787. The Court held that prosecution following investigative preindictment delay "does not deprive [the defendant] of due process, even if his defense might have been somewhat prejudiced." *Id.* at 796. The Court reasoned investigative delay is a different kind of delay than a delay that is intentional only to get a tactical advantage over the defendant. *Id.* at 795. Additionally, the Court noted that "*Marion* makes clear" prejudice is a "necessary but not self-sufficient element" to satisfy due process in the case of preindictment delay. *Id.* at 790. The Court continued that the inquiry must "consider the reasons for the delay *as well as* the prejudice." *Id.* (emphasis added).

Marion provides the Court's cornerstone of the balancing test to determine preindictment delay due process implications. *Marion* involved defendants suspected of business fraud indicted after three years passed between the criminal acts. *See generally* 404 U.S. 307. Marion challenged the indictment under the Sixth Amendment's Speedy Trial provision. *Id.* at 309. The Government asked the delay to be excused due to understaffing and the higher priority given to other types of cases in the prosecutor's office. *Id.* at 327–28 (Douglas J., concurring). The Court denied Marion's claims because the defendant's relied only on the "possibility of prejudice" and not actual prejudice. *Id.* at 325–326. The Court ultimately held that the Sixth Amendment has no place in preindictment delay situations. *Id.* at 321–322. The Court also held statutes of limitations are not the full extent of protection available to a defendant prior to indictment. *Id.* at 323. The Court reasoned that it could not determine "when and in what circumstances actual prejudice" requires dismissal in preindictment situations. *Id.* at 325. The Court could only reason dismissal would be required under Due Process where the "preindictment delay in this case caused substantial prejudice [. . .] and the delay was an intentional device." *Id.* at 324.

Turning to the case at hand, the Court should formally and definitively adopt the balancing test endorsed by the Court in the seminal decisions on the issue. The most reasonable interpretation of the statements in *Marion* and *Lovasco* is a Court-endorsed balancing test inquiry in a preindictment delay due process challenge. This Court took time to clarify that the due process inquiry "will necessarily involve a delicate judgment based on the circumstances of each case." *Id*. at 325. Most notably, when the Court did address the reasons for the delay in *Lovasco*, they remained silent on whether bad faith was required. The Court chose, instead, to announce the inquiry "must consider the reasons *as well as* the prejudice." *Lovasco*, 431 U.S. at 790 (emphasis added). In the Order from the District Court, Judge Maddrey failed consider the

reasons for the delay in any meaningful way. The analysis into the reason for the delay terminated after determining bad faith was required and not present. R. at 6. The Court in *Lovasco*, undertook an extensive analysis to determine the sense behind various rules to prohibit investigative delay, and delay in that case was indeed investigative. 431 U.S. at 796. Unlike *Lovasco*, the government in Mr. Coda's case has not provided any explanation for the delay to support a finding that it was investigative. Judge Maddrey agreed the delay was negligent and not investigative. R. at 6. Mr. Coda's case is distinguishable from *Lovasco* in that Judge Maddrey failed to consider the reasons for the delay in the inquiry, and acknowledged the delay was not investigative. *Id.* The cause of Judge Maddrey's error however is that the wrong test was applied. Relying on misinterpretation of Marion and Lovasco, Judge Maddrey understood the cases to require bad faith. However, the more reasonable understanding is to see the cases as two different ends of the same spectrum. Understanding investigative delay as a permissible end of the spectrum, and bad faith as an impermissible end, the Judge would have seen negligence in the proper light. Certainly, the "delay and/or prejudice suffered [. . .] will have to be greater than in cases where recklessness or intentional governmental conduct is alleged." *United States v. Moran*, 759 F.2d 777, 783 (9th Cir. 1985). The acknowledgement that the prejudice will have to be greater than in bad faith cases indicates a reasoned and thoughtful balancing analysis.

The balancing test endorsed in *Lovasco* and *Marion* is better suited for situations like Mr. Coda's where the preindictment delay is caused by government negligence. Judge Maddrey disagreed with the assertion that *Marion* and *Lovasco* were "never intended to permit gross governmental negligence". R. at 4. However, negligent parties that cause harm are held accountable every day under the law. Additionally, a prosecutor's office, particularly the U.S. Attorney's Office, is an environment where even one instance of negligent conduct causing harm

cannot be tolerated due to its impact on the justice system. The purpose of due process protection is to protect against actions that violate the "fundamental conceptions of justice which [. . .] define the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790. If a defendant's right to a fair trial is destroyed by a governmental act, in this case preindictment delay, that act must be held to account for the due process violation regardless of the level of culpability attached to the actor. Regardless of the act being caused by negligence, recklessness, or intentionality, a due process violation is a due process violation. In *Marion*, the Court did not believe the defendants had sufficiently shown prejudice required to sustain a due process claim. 404 U.S. at 325–26. Unlike *Marion*, the District Court in this case specifically found Mr. Coda sufficiently proved prejudice to his defense. R. at 6. The Court in *Marion* did recognize intentional bad faith delay was an extreme situation in which would require dismissal of charges. *Marion*, 404 U.S. at 323–24. Additionally, the Court's note that a delicate circumstance-based judgment is required for the administration of justice in due process claims would support the conclusion that a circumstance of negligence would be weighed against the prejudice to the defendant. Id. at 325–26. The harm caused by the prejudice in this case is equally harmful to Mr. Coda's defense and right to a fair trial regardless of it being caused by government bad faith or negligence. Because the result of the delay is the same regardless of the level of intent, and the balancing test is the only framework to adequately weigh the effect of the harm, the balancing test is the correct inquiry to be undertaken in this case.

In conclusion, the seminal cases regarding the limits of a defendant's due process rights with respect to preindictment delay endorse a balancing test. Because the District Court failed to apply the proper test, the wrong inquiry was undertaken and failed to preserve Mr. Coda's due process rights.

B. If The Balancing Test Is Rejected, The Two-Prong Test Should Not Require Proof Of Bad Faith To Sustain a Due Process Claim.

The majority of circuits reject the balancing test and impose a two-prong test requiring the defendant to prove; (1) actual and substantial prejudice and; (2) the delay was intentional to gain an unfair tactical advantage. One of the key reasons for the requirement of bad faith is that the statute of limitations is the primary tool to protect the defendant against a stale prosecution. Additionally, circuits have taken the absence of any reference to balancing or weighing, in the seminal cases, to indicate that the Court was instituting a bad faith requirement and rejecting the balancing test. However, the protections offered by the statute of limitations only extends so far. Some crimes have no statute of limitations at all, and some have exceedingly long limits that offer no practical protection to a defendant's defense. Further, the absence of any direct mention of balancing or weighing is not dispositive because neither case mentions a bad faith requirement either.

In a majority of circuit courts, a defendant must show; (1) substantial and actual prejudice and; (2) the prosecution was delayed intentionally to gain a tactical advantage against the defendant. *Crouch*, 84 F.3d at 1511. To satisfy the second prong of this test a defendant must show bad faith by the government. *Id.* at 1514. Further, the burden is on the defendant to prove the bad faith. *United Staes v. Gulley*, 526 F.3d 809, 820 (5th Cir. 2008). The reason for the bad faith requirement has been justified as protecting against judges weighing due process by "their own 'personal and private notions' of fairness." *Crouch*, 84 F.3d at 1513.

Many cases challenging preindictment delay under due process fail because the defendant's prejudice claims are considered speculative by failing to state more than possibilities of prejudice. The Defendant's burden to show prejudice is "heavy and rarely met." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005). Additionally, defendants are not familiar

with the inner workings of prosecutor's offices. *Jones v. Angelone* provides a clear example of a Court weighing the two tests at issue here, and show the path taken to reach the misunderstanding of the circuits endorsing the two-prong test. 94 F.3d 900 (4th Cir. 1996). The case involved a defendant in a homicide case who fled to New York and was subsequently arrested there on an unrelated charge. *Id*. at 901. The Defendant, Jones, was indicted 11 years after the homicide following a lengthy extradition battle. *Id.* at 903. The battle resulting in the delay included violations of prison rules by the defendant in order to delay extradition, the hesitation to extradite by New York over death penalty fears, and oversight by the Virginia authorities. *Id.* at 902. The Court endorsed the Governments argument that the two-prong test requiring bad faith was the correct standard, but applied the balancing test because only an en banc panel could overrule a panel precedent. *Id.* at 905. Under the balancing test the court held Jones had not proved a due process violation. *Id.* Key to the court's reasoning was that significant portions of the delay were in fact caused by Jones' own actions to resist extradition. *Id.* at 10. The court also reasoned in on the fact that whether or not the state could do more to take Jones into custody is not the inquiry. *Id.* Additionally, the court noted that the bad-faith test might be the proper standard based on then-Justice Renquist's apparent endorsement of the test in *United States v. Gouveia*, 467 U.S. 180, 192–93 (1984).

Turning to Mr. Coda's case, Coda did not contribute to the delay in anyway. The court in *Jones* is correct in its assertion that the inquiry is not limited to whether the government could have done more to apprehend Mr. Coda. However, the due process inquiry does involve a determination of whether the government violated the notions of justice at the center of American jurisprudence. While Jones' right to a fair trial was not prejudiced by the delay because of his own actions contributing to the delay, that is not the case for Mr. Coda. Critical to

the outcome of *Jones* was the use of the balancing test instead of the two-prong bad faith requirement. Even though the outcome would have been the same in *Jones* under the bad faith requirement, the reasoning under the balancing test is stronger. The court mistakenly understood the pronouncement in *Gouveia* as an authoritative statement of the rule, instead of a musing in dicta while rejecting a Sixth Amendment Right to Counsel claim. For example, in *United States v. Valenzuela-Bernal*, the court recognized a materiality aspect of the actual prejudice requirement and quoted conflicting statements from *Marion* and *Lovasco* that seem to endorse both the bad faith requirement and the balancing test. 458 U.S. 858, 868–69 (1982). Neither of the statements from *Valenzuela-Bernal* or *Gouveia* are authoritative statements of the proper test. They can only be seen as restatements of where the inquiry stood to that time, and where it remains today.

Lastly, policy favors adopting the balancing test endorsed by the *Marion* and *Lovasco* Court's. Courts repeatedly begin the preindictment delay due process inquiry on the premise that statute of limitations is the primary protection available to a defendant against facing stale criminal charges. However, statutes of limitations do not offer enough protection to permit the only other avenue of protection to be foreclosed so easily by a requirement of bad faith. For example, a defendant in a homicide case subject to preindictment delay has no statute of limitations to rely on for protection. If the prosecutor is negligent in bringing the charges, regardless of how long the delay is, the defendant will be stuck with the near impossible task of proving prejudice and bad faith to vindicate the prejudice inherent in the delay. Perhaps this scenario is one justified by the severity of the crime charged, but property destruction does not rise to the same level of severity. Additionally, the requirement of bad faith is a virtually impossible standard to meet for a defendant. The burden of proving actual prejudice is already

an extremely heavy burden. Mr. Coda has satisfied this heavy burden in this case. To require Mr. Coda additionally prove the intent of the prosecution without having a meaningful opportunity to investigate the prosecution creates a test only met when whistle blowers step forward or the misconduct is too egregious to be ignored. Establishing a framework that puts negligent actors in prosecutors' offices at risk provides an even stronger incentive for the government to eliminate bad faith actions from their office.

To conclude, if the two-prong framework is the correct formulation it should not require a bad faith showing. The text of the primary cases supports a balancing test. Additionally, Marion and Lovasco are silent on the requirement of bad faith, and sound policy favors holding the government accountable for negligent conduct that destroys a defendants defense and right to a fair trial.

II. ALLOWING THE USE OF POST-ARREST BUT PRE-*MIRANDA* SILENCE FOR SUBSTANTIVE PROOF OF GUILT VIOLATES THE FIFTH AMENDMENT BECAUSE THE RIGHT TO REMAIN SILENT IS VESTED REGARDLESS OF *MIRANDA* ISSUANCE, THE USE OF SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT CREATES AN IMPLICIT BURDEN TO SPEAK, AND POLICE WOULD BE INCENTIVIZED TO ABUSE AN INTERROGATION TRIGGER SCHEME.

The motion to suppress was improperly denied because the government's use of post-arrest but pre-*Miranda* silence violates the Fifth Amendment. Deference to the Fifth Amendment right to remain silent of defendants is commanded by this Court's precedents and the potential for abuse. In *Miranda*, this Court announced a new regime intended to respect the rights of criminal defendants upon arrest. *See generally Miranda v. Arizona*, 384 U.S. 436 (1966). Arresting authorities were thenceforth required to inform defendants of (1) their right to remain silent, (2) anything defendants say is usable at trial, (3) defendants have a Fifth Amendment right to counsel during interrogations, and (4) a lawyer is available to defendants regardless of their

ability to pay. *See generally id*. The warning need not use any specific words, nor do the rights need to be conveyed in a specific order. *See generally California v. Prysock*, 453 U.S. 355 (1981). To be valid, the warning simply needs to adequately and fully convey the rights so that a defendant is fully appraised. *See generally id*. Courts have allowed notice of the rights to be conveyed orally or in writing. *See generally U.S. v. Labrada-Bustamante*, 428 F.3d 1252 (9th Cir. 2005).

There exists a circuit split regarding whether prosecutors may use post-arrest but pre-*Miranda* silence as substantive evidence of guilt. Some circuits have allowed the use of such silence, while others have not. *See, e.g., U.S. v. Velarde-Gomez*, 269 F.3d 1023, 1026 (9th Cir. 2001) (disallowing the use of such silence and substantive evidence of guilt); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989) (holding that the right to remain silent extends to post-arrest but pre-*Miranda* situations); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (allowing the use of such silence as substantive evidence of guilt). This is an issue of first impression with this Court.

The rights enshrined by *Miranda* vest automatically upon arrest, not at the leisure of police. No other right found in the Constitution vests at the pleasure of arresting authorities. Furthermore, by allowing use of the type of silence at issue here, this Court would incentivize defendants to either speak and risk incriminating themselves, or be silent and certainly incriminate themselves. To allow the use of such silence despite that fact would allow police to manufacture evidence against defendants, also an unprecedented allowance. The government would then be permitted to present evidence, potentially of its own craftsmanship, that is of dubious value in the historical view of this Court. Such evidence cannot be allowed in the face of

this actual and potential parade of horribles. To give full effect to the Fifth Amendment, silence cannot be used as evidence against Coda and other similarly situated defendants.

Post-arrest but pre-*Miranda* silence should be disallowed because (1) the rights mentioned by *Miranda* are vested immediately on arrest, not at the leisure of police, (2) defendants would be forced to provide a link in the chain of evidence against themselves, (3) police would be apt to abuse a system where they could manufacture evidence, and (4) even if such silence is allowed, it is of little probative value anyway.

A. The Fifth Amendment, which is conferred by the Constitution, is burdened when silence can be used as substantive evidence of guilt.

This Court has long respected the Fifth Amendment. However, to give full effect to its protections, post-arrest but pre-*Miranda* silence must be excluded from evidentiary use as substantive evidence of guilt. The use of such silence impermissibly burdens the Fifth Amendment by placing the power to bestow a constitutional right in the hands of police and forcing defendants to bear witness against themselves no matter what they do.

The genesis of constitutional rights is not and should not become the choice of police. Instead, actional triggers are the genesis of rights. The arrest of a defendant, for example. Additionally, placing a defendants in an impossible position by allowing the use of silence is not tenable. This Court has concluded that defendants cannot be required to provide a link in the chain against themselves. *Hoffman v. U.S.*, 341 U.S. 479, 480 (1951). But by allowing such silence, this Court is requiring defendants to do just that.

i. The Fifth Amendment right against self-incrimination is automatically vested at arrest, not conferred by police at the issuance of *Miranda* warnings.

The protections of the Fifth Amendment are and remain vested in the accused from the moment they are taken into custody. Those protections, enshrined in the text of the Constitution,

are not subject to the whims of police nor do police control their conferral. The right against self-incrimination–and the right to be free of repercussions for asserting that right–is not subject to the whims and schedules police interrogators.

This Court has repeatedly held that the pronouncements enshrined in the now-famous *Miranda* warning are prophylactic. *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974). The warning is meant to safeguard and prevent abuse of rights already held by defendants. *Tucker*, 417 U.S. at 439. *Miranda* does not create new rights nor confer those rights onto defendants at some defined point in their custodial experience. *See generally Miranda*, 384 U.S. 436.

The Ninth Circuit persuasively read *Miranda*, *Doyle*, and other precedents of this Court to create a regime that adequately prevents encumbrance on defendants' self-incrimination rights. In *U.S. v. Velarde-Gomez*, the court considered the prosecution of Ramon Velarde-Gomez, who was stopped at the U.S.-Mexico border with a gas tank full of marijuana. 269 F.3d at 1026. Velarde-Gomez aroused suspicions of border agents upon arriving at the border, driving a car that was not registered to him. *Id*. Agents, not believing Velarde-Gomez's story about buying the car a short time prior, moved him to an interview room and searched the car, where they found sixty-three pounds of marijuana. *Id*. Their newfound discovery in hand, agents proceeded to speak with Velarde-Gomez, who was informed of the discovery. *Id*. Velarde-Gomez, who was not under arrest and had not yet been charged, "did not speak or physically respond." *Id*. Later, Velarde-Gomez waived his *Miranda* rights and answered questions. *Id*.

Before trial, Velarde-Gomez moved to suppress evidence of his silence and demeanor when confronted with the agents' discovery. *Id*. The court, after initially granting his motion, allowed the testimony at trial. *Id*. The appeals court, after relaying the dictates of the Fifth

Amendment, reiterated this Court's view of the prophylactic nature of *Miranda*. *Id*. at 1028–29. The court then drew an important inference: while the dictates of *Miranda* serve a critical preventative function in protecting rights, those dictates *are not the genesis of those rights*. *Id*. at 1029. (emphasis added). Essentially, in the compelling words of the Ninth Circuit, the Constitution and this Court's precedents, when read together, conclusively express that while *Miranda* protects the rights of defendants, the rights themselves flow from the Constitution. Therefore, upon a defendant's arrest, he enjoys the right to "remain silent in the face of government questioning, regardless of whether the Miranda warnings are given." *Id*. By so holding, the Ninth Circuit recognized that the Fifth Amendment right against self-incrimination vested upon arrest, not interrogation.

The government argues, and courts below held, that the right to remain silent–and be free from any consequences for asserting that right–attaches only once police give a *Miranda* warning. That formulation suggests that the rights of defendants flow from *Miranda* and its words rather than from the Constitution and attach at the whim of the police. As the Ninth Circuit has shown, that is not the case. This Court has acknowledged the prophylactic, rather than donative, nature of *Miranda* and its progeny. It stands to reason then, the rights discussed therein attach regardless of the expression of the *Miranda* warning. In no other sphere do detaining authorities decide when rights attach, and this situation should be no different.

In support of its argument, the government cites, and the lower courts adopted, this Court's holding in *Salinas v. Texas* as the controlling legal rule. R. at 8, 12. *Salinas*, in which this Court allowed the use of pre-arrest silence as evidence of guilt, involved a suspect that *voluntarily* submitted to police *questioning* before arrest. 570 U.S. 178, 181 (2013) (emphasis added). Salinas spoke to police for nearly an hour, freely answering questions the entire time,

before police asked an incriminating one. *Id*. In response, Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id*. at 182. Salinas and the questioning officers sat in silence for a few moments before the officers asked a different question, and Salinas resumed answering questions. *Id*. Authorities sought to use this silence, which this Court allowed. *See generally id*.

The factual scenario in *Salinas* is plainly distinguishable from Coda's. Salinas was interacting voluntarily with police, while Coda was not. Salinas was engaging in a lengthy conversation with police, while Coda was not. Salinas chose not to answer one question out of a series, while Coda answered no questions. Beyond the obvious custodial difference, Salinas was answering actual questions, as opposed to Coda who declined to respond to a simple relay of information. No questions were asked of Coda. The fact that questions were asked in Salinas' case while none were posed in Coda's is ample evidence that *Salinas* does not apply. Further rendering *Salinas* outside usefulness for the government is the voluntary nature of Salinas' activities. He chose to meet and talk with police, while Coda was in custody. *Salinas* is quite different from the situation faced by Coda, and thus does not and should not apply.

ii. When silence is used as substantive evidence of guilt, it burdens defendants' Fifth Amendment right against self-incrimination by forcing them to provide a link in the chain of evidence against themselves.

This Court has repeatedly paid reverence to the Fifth Amendment, and the next logical step is the protection of post-arrest but pre-*Miranda* silence. However, should this Court decline to protect such silence, it would place defendants in the precise position the Fifth Amendment was contemplated to avoid: bearing witness against themselves.

Beginning with *Miranda*, this Court has protected silence. *Miranda*, a consolidated set of cases addressing the situations faced by four defendants in the custody of three states and the

government, addressed "the interrogation atmosphere and the evils it can bring." *Miranda*, 384 U.S. at 456. This Court held that police must inform defendants, prophylactically, of their rights in custodial settings. *See generally id*. In further respect of the Fifth Amendment, and perhaps in anticipation of future interpretation issues, this Court clarified one critical point: "[t]he prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Id*. at n.37.

This Court's deference to the facially broad language of the Fifth Amendment extended back even further than *Miranda*. In *Hoffman v. U.S.*, this Court considered the case of a man who declined to answer grand jury questions, claiming the answers would be incriminating. 341 U.S. at 480. Justice Clark, writing for a unanimous Court, held that the protections of the Fifth Amendment extend not just to answers that would themselves support conviction, but answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id*. at 486 (citing *Blau v. United States*, 340 U.S. 159 (1950)).

That decision was favorably updated by this Court in 2000, when it considered the prosecution of a man implicated by the investigators of the Whitewater Investigation. *U.S. v. Hubbell*, 530 U.S. 27, 30 (2000). Prosecutors initially cut a deal with Hubbell, before issuing a broad subpoena to ensure compliance with its terms. *Id*. at 31. After initially declining, Hubbell complied with the subpoena. *Id*. The documents produced responsive to that subpoena formed the basis for Hubbell's second prosecution. *Id*. This Court vacated the second indictment, quoting *Hoffman*. *See generally id*. The dragnet style of the government's subpoena, Justice Stevens wrote, did bear fruit, but not the ones the government predicted, and it formed the basis of an indictment the government apparently did not expect against Hubbell. *Id*. at 42. The rest of the factual circumstances did not matter, the only operative issue was that Hubbell had been

forced to provide a link in the chain against himself. *See generally id*. That was impermissible and burdened his Fifth Amendment right.

Coda faces a similar situation. Upon a formal reading of the charges, Coda chose to remain silent, and thus forged a link in the chain against him. If he spoke, he risked incriminating himself further and thus forging a different link in the chain. The quintessential Catch-22 position. By allowing the use of post-arrest but pre-*Miranda* silence, this Court would be endorsing a regime where defendants would be providing evidence against themselves no matter what they do. This Court has disfavored defendants being forced to provide any evidence against themselves in the past, and it should continue to do so here.

The use of silence as an initial matter, however, seems to violate *Miranda*. Chief Justice Burger noted that prosecutors may not use the fact that a defendant choose to stand mute against him. Coda chose to stand mute in the most literal sense. Faced with accusations, he remained silent. Using silence against Coda, or any similarly situated defendants, violates the Fifth Amendment by burdening their right to silence and forcing them to provide a link in the chain or evidence against themselves, in direct contravention to the compounding precedents of this Court.

B. If this Court adopts an interrogation trigger to the right to remain silent, police would be apt to abuse that power, thereby creating evidence that is itself of dubious value.

By allowing post-arrest but pre-*Miranda* silence, this Court would be creating an interrogation regime whereby police or other custodial authorities could manufacture evidence against defendants. While the debate on the extent to which that abuse will occur is largely academic, the fact that it will occur should be cause for alarm. It is antithetical to our system of

justice that police could simply create evidence against a defendant. Police and investigators are charged with discovery of evidence, not creating it.

Even if this Court is not receptive to those concerns, it has previously held that such evidence is of little value. *U.S. v. Hale*, 422 U.S. 171, 176 (1975). The reasoning behind that premise is simple: there are too many moving factors and unknowns form the basis for a defendant's silence that the precise reasoning behind it cannot possibly be inferred. Furthermore, in certain situations, like Coda's, the use of silence as an adoptive admission suggests there is something to adopt. However, the simple relay of information rather than questioning, as here, creates a genuine question of whether there is anything to adopt in the first instance.

i. An interrogation trigger would allow police to intentionally delay interrogations to manufacture incriminating evidence.

Should this Court recognize an interrogation trigger to *Miranda* and the protections of the Fifth Amendment, whereby police control when and where the right to remain silent attaches, police would be incentivized to manufacture silence. By so doing, they would be able to strengthen their own case by simply doing nothing. Courts and evidence theorists have recognized this issue and the abuse it could create. Marty Skrapka, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 Okla. L. Rev. 357, 363 (2006) (citing FED. R. EVID. 801 advisory committee's note; 3 GRAHAM, § 801.21 at 158; 2 MCCORMICK ET AL., § 262 at 168). Police should not be allowed to manufacture guilt.

The D.C. Circuit in *U.S. v. Moore*, when considering a gun crimes prosecution, noted that precise potential. 104 F.3d 377, 385 (D.C. Cir. 1997). An interrogation trigger, that court noted, "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*. That danger was also

cited by the dissent in the Thirteenth Circuit decision below in this case. The D.C. Circuit likened *Miranda* to an estoppel that protects silence, and outright rejected the contention of the government in that case, the same contention made here, "that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of his rights." *Id*. at 386. To recognize that boiled down government argument, the court concluded, would turn "a whole realm of constitutional protection on its head." *Id*.

It is anathema to our system of justice that police could simply manufacture evidence against a defendant. But if this Court recognizes the government's position here, it would be endorsing just that, and it would be a catastrophe. In every criminal case, evidence tainted by police misconduct is excluded. Police cannot, when they hold a grudge against a particular citizen, bring a vial of that person's blood to the scene of an unsolved crime and simply manufacture guilt. Allowing post-arrest but pre-*Miranda* silence is the functional equivalent. The outcome of this case turns, in part, on this Court's comfort level with empowering the police to create, out of thin air, incriminating evidence. While such police abuse would not be a certainty, simply that it could happen should be cause for a concern.

The government argued in favor of, and the lower courts adopted, the idea that since police are not required to offer *Miranda* warning immediately upon arrest, if a defendant wishes to protect their rights and avoid police-manufactured silence, they can simply assert the right unambiguously immediately as required by this Court. R. at 9; *Berghuis v. Thompkins*, 560 U.S. 370, 380–82 (2010). This argument, however, presupposes that all defendants everywhere are already apprised of their rights to a degree sufficient to knowingly assert them upon arrest. While it is true that *Miranda* warnings have reached immortal status in the national consciousness as a result of extensive use in film and television, expecting laypeople to be aware of and possess an

understanding of the intricacies of this Court's precedents on *Miranda* and when and how to invoke its protections is a bridge too far. This Court has already recognized the prophylactic nature and role of *Miranda*. Should the expectation suddenly become that defendants should already know of their rights, that nature and role would be critically undermined. That prophylactic nature is specifically intended to protect those ignorant of their rights, to suddenly expect the opposite would be tantamount to this Court requiring the public at large to take a course in Constitutional Criminal Procedure before venturing out into the world.

ii. This Court has previously adopted the view that silence on the part of the accused is of little probative value.

Admission of silence as substantive proof at trial must comport with both evidentiary and constitutional law. Generally, the basis for the use of silence as evidence is adoptive admission, meaning the trial court considers a defendant's silence in the face of questioning to be tantamount to acceptance of the question's premise. Skrapka, *supra* at 362.

Silence as an adoptive admission, however, is fraught with problems, three in particular. First, as Justice Marshall noted in *U.S. v. Hale*, silence is often so "ambiguous that it is of little probative force." 422 U.S. at 176. Second, Justice Marshall cited noted evidence theorist John Henry Wigmore to say that while "[s]ilence gains more probative weight where it persists in the face of accusation," "[f]ailure to contest an assertion...is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question." *Id*. Finally, and further clouding the reliability of silence, is the inclination of innocent as well as guilty defendants, "perhaps particularly the innocent," to stand mute in the face of the situation's intimidation. *Id*. at 177. Those three tenants cast critical doubt on the reliability of silence when used against defendants.

Those three bases for exclusion of silence as evidence are in stark relief in the instant case. Consider the questioning that forms the basis for the initial motions in this case. Coda was informed of the charges against him and in response, Coda said nothing. The government's assertion that his silence is probative of something begs the question: just how should Coda have responded to avoid the imputation of guilt? Should he have thanked the officer for the information? Grunted in acknowledgement? The assertion that Coda's silence in the face of a simple pro forma relay of information is quite possibly the best exemplar of the situations Justice Marshall was referring to when he said silence is probative of little. Furthermore, the use of silence in situations such as Coda's, where silence is treated as an adopted admission, begs another question: adoption of what? Coda's silence after the charges are formally read can scarcely be considered an adoptive admission of the charges. There is simply no reasonable argument that Coda's silence means anything. If the government believes Coda's silence is evidence of guilt, it could just as easily mean Coda was ignoring the officer and praying for a quick end to his ordeal. That ambiguity critically undermines the use of post-arrest, pre-*Miranda* silence in all situations, but particularly Coda's.

It would seem that the government expects that Coda should have immediately and vociferously protested his innocence upon the formal reading of the charges by the officer, but in the situation faced by Coda, it would not have been natural. If Coda had been screaming his innocence from the proverbial rooftops from the moment of arrest, instead of facing the issue he faces now, he would be contending with Shakespeare's quandary of over-protestation in the minds of officers and jurors. William Shakespeare, *Hamlet*, ln. 219, Act III, Scene II (Mowat ed. 2003) ("The lady doth protest too much, methinks."). It would also have been natural for Coda to stand moot in the face of formal accusation of officers given the intimidation of the setting.

Despite the fact that nearly everyone has seen someone arrested and interrogated on television, being in that position personally is quite different. Coda, and other criminal defendants, can hardly be faulted for being stunned into silence by the situation they face, regardless of their guilt. However, particularly the innocent such as Coda, would feel such an inclination.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand the District Court's denial of the motions to suppress and find that preindictment delay that causes actual prejudice without bad faith violates the Fifth Amendment, and the use of post-arrest but pre-*Miranda* silence as substantive evidence of guilt also violates the Fifth Amendment.

Respectfully submitted this thirteenth day of September, 2021.

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