
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 THE PETITIONER

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September 13, 2021

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QUESTIONS PRESENTED

1. Does preindictment delay caused by governmental negligence violate the Fifth Amendment to the United States Constitution when there is evidence that the preindictment delay actually and substantially prejudiced the accused's defense?
2. Does the government's use of a suspect's post-arrest, pre-*Miranda*, and pre-interrogation silence to establish guilt violate the Fifth Amendment to the United States Constitution when the government's use of that silence would be fundamentally unfair and penalize a suspect for exercising his privilege against self-incrimination?

STATEMENT OF THE CASE

A. Statement of the Facts

In January 2002, the petitioner, Austin Coda (“Mr. Coda”) opened a hardware store in Plainview, East Virginia. R. at 1. When Mr. Coda first opened his store, it was the only hardware store in the area; therefore, the business was very profitable for many years. R. at 1. However, after the recession, Mr. Coda’s profit margins were so low that it left him unable to maintain proper upkeep of the building. R. at 1. Even worse, on December 22, 2010, an unfortunate explosion occurred at the hardware store, which caused the store to catch on fire. R. at 2. By the time firefighters successfully extinguished the fire, Mr. Coda’s entire store was destroyed. R. at 1, 3.

Following the fire at Mr. Coda’s store, local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (“ATF”) opened an investigation into the cause of the explosion. R. at 2. The investigation uncovered evidence which suggested that cold weather caused an old and faulty gas line—presumably one in which Mr. Coda was unaware of or was unable to repair due to insolvency—to leak and destroy Mr. Coda’s store. R. at 2. Despite this evidence, the Federal Bureau of Investigation (“FBI”) believed, based on an informant’s testimony, that Mr. Coda might be responsible for the explosion. R. at 2. As a result, the FBI referred the case to the applicable United States Attorney’s Office. R. at 2.

After the United States Attorney’s Office (the “Office”) received Mr. Coda’s case, the Office marked the case as “low-priority,” as a result of political pressure which caused the Office to prioritize prosecuting drug trafficking and other related offenses. R. at 2. Thereafter, Mr. Coda’s case was passed from one U.S. Attorney to another due to high turnover in the Office. R. at 2. As a result, Mr. Coda’s case never increased in priority, nor did Mr. Coda’s case progress, until April 23, 2019, when Mr. Coda was arrested and brought into custody by the FBI. R. at 2, 7. Immediately

after Mr. Coda's arrest, he was informed of the charges against him. R. at 7. During the time in which he was informed of the charges against him, Mr. Coda remained silent. R. at 7. Finally, after Mr. Coda arrived at the detention center, Mr. Coda was read his *Miranda* warnings. R. at 7.

Thereafter, Mr. Coda was indicted under 18 U.S.C. § 844(i). R. at 3. Although the incident occurred in December 2010, the government delayed Mr. Coda's indictment until May 2019—nearly ten years later and barely within the statute of limitations provided by 18 U.S.C. § 3295. R. at 2, 3. At a later evidentiary hearing, Mr. Coda testified that he intended to raise an alibi defense at trial, proving that he was in New York on December 22, 2010—the night of the explosion. R. at 3. Mr. Coda further testified that December 22, 2010, was the night of his birthday and that every year for his birthday, he took a Greyhound bus to visit his family in New York. R. at 3. Unfortunately, because of the government's delay in prosecuting his case, Mr. Coda informed the court that he would be unable to produce such critical testimony to corroborate his defense. R. at 3. In fact, since the incident, four out of the five family members Mr. Coda visited in 2010 had died (two from chronic disease and two died in a car accident) R. at 3. The fifth family member was diagnosed with dementia and could not remember whether Mr. Coda visited New York on the day of the explosion. R. at 3. Finally, Mr. Coda could not produce his Greyhound bus records because the company stores ticket's online for only three years. R. at 3.

At Mr. Coda's subsequent trial, the government entered into evidence, during its case-in-chief, the fact that Mr. Coda remained silent following arrest under a theory that Mr. Coda's silence was indicative of guilt. R. at 9. In addition, the government commented on Mr. Coda's silence during closing argument. R. at 9. Following a jury trial, Mr. Coda was convicted under 18 U.S.C. § 844(i) for maliciously destroying property with an explosive and was sentenced to ten years in prison. R. at 11.

B. Procedural History

After Mr. Coda's indictment in May 2019, Mr. Coda filed a Motion to Dismiss the indictment arguing that the preindictment delay violated the Fifth Amendment Due Process Clause. R. at 3. On September 30, 2019, the United States District Court for the Eastern District of Virginia denied Mr. Coda's motion. R. at 3, 6. The court credited Mr. Coda's testimony concerning his alibi defenses and found that the government's preindictment delay caused actual and substantial prejudice to his defense. R. at 5–6. Nevertheless, the court held that Mr. Coda's due process challenge failed because Mr. Coda could not prove the government acted in bad faith or intentionally delayed indictment to gain a tactical advantage. R. at 4, 6.

In addition, Mr. Coda filed a Motion to Suppress his post-arrest but pre-*Miranda* silence arguing that the admission of this evidence would violate the Fifth Amendment. R. at 7. On December 19, 2019, the United States District Court for the Eastern District of Virginia denied Mr. Coda's motion. R. at 7, 10. The court held that Mr. Coda failed to invoke his right to remain silent and that under the circumstances the police were not required to issue *Miranda* warnings; therefore, the use of Mr. Coda's silence did not contravene the Fifth Amendment. R. at 3–10. On August 28, 2020, the United States Court of Appeals for the Thirteenth Circuit summarily affirmed and adopted the District Court's judgment and analysis regarding Mr. Coda's Motion to Dismiss and Mr. Coda's Motion to Suppress.

SUMMARY OF THE ARGUMENT

Preindictment Delay, which causes the accused actual prejudice, may deprive a defendant of their Fifth Amendment right to due process even when there is no evidence of prosecutorial bad faith. Evidence of prosecutorial bad faith is not required to prove that the government's preindictment delay violated Mr. Coda's Fifth Amendment right to due process.

This Court should follow the reasoning of lower courts that apply a balancing test to determine whether the preindictment delay, under the circumstances, violated fundamental conceptions of justice and the community's sense of fair play and decency. Using a balancing test not only correctly interprets this Court's precedent but it correctly balances equities by placing the focus of a due process challenge to preindictment delay on fundamental fairness rather than the government's intent in delaying indictment. The use of a balancing test also mirrors similar due process inquiries, thus bringing consistency to the law. Therefore, because the actual and substantial prejudice to Mr. Coda's defense outweighs the government's reason for the delay of Mr. Coda's indictment, the preindictment delay violated the Due Process Clause of the Fifth Amendment.

The Fifth Amendment to the United States Constitution prohibits the government from using Mr. Coda's post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt. First, the government's use of Mr. Coda's post-arrest silence, as substantive evidence of guilt, deprived Mr. Coda of the fundamental fairness guaranteed by the due process of law, even though the silence occurred pre-*Miranda* and pre-interrogation. The United States District Court of the Eastern District of Virginia erroneously focused on the absence of *Miranda* warnings, which are a prophylactic means of securing Mr. Coda's Fifth Amendment rights, because such warnings have become embedded in routine police practice to the point where the warnings have become part of our national culture. Second, the government's use of Mr. Coda's post-arrest silence as substantive evidence of guilt, deprived Mr. Coda of his ability to freely exercise his Fifth Amendment Privilege against Self-Incrimination, even though the silence occurred pre-*Miranda* and pre-interrogation. The United States District Court of the Eastern

District of Virginia erroneously focused on the fact that Mr. Coda did not expressly invoke the privilege as, under the circumstances, Mr. Coda was not required to do so.

ARGUMENT

I. Preindictment delay, which causes the accused actual prejudice, may deprive a defendant of their Fifth Amendment right to Due Process even when there is no evidence of prosecutorial bad faith.

Under certain circumstances, preindictment delay, which causes the accused actual prejudice, may deprive the accused of their Fifth Amendment right to Due Process, even if there is no evidence of prosecutorial bad faith. This Court's holdings in *United States v. Marion*, 404 U.S. 307 (1971), and in *United States v. Lovasco*, 431 U.S. 783 (1977), led to a circuit split over the proper test for evaluating whether preindictment delay has deprived the accused of their Fifth Amendment Right to Due Process. Lower federal courts typically use a two-prong test in evaluating Due Process challenges to preindictment delay. Many lower federal courts agree that the first prong in evaluating a Due Process challenge to preindictment delay is to determine if the accused suffered actual prejudice as a result of the delay. *See Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990); *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996). However, lower federal courts have reached conflicting conclusions regarding the proper standard used under the second prong of a Due Process challenge to preindictment delay. Contrary to the conclusion of some lower federal courts, this Court's holdings in *Marion* and *Lovasco* do not require the second prong be a determination of whether the preindictment delay was caused by prosecutorial bad faith.

Instead, because requiring bad faith is an inflexible rule that would frustrate rather than promote justice, this Court should employ a balancing test as the second prong in a due process challenge to preindictment delay in order to determine whether preindictment delay violates 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. *Lovasco*, 431 U.S. at 790. To hold otherwise and to favor a rigid requirement of prosecutorial bad faith over a balancing test would be inconsistent with the fundamental goals of due process jurisprudence, creating inconsistency in the law. Furthermore, to require the accused to establish evidence of prosecutorial bad faith would leave defendants like Mr. Coda, who suffer actual and substantial prejudice due to governmental negligence, with no proper recourse.

A. Evidence of prosecutorial bad faith is not required to prove that the government's preindictment delay violated Mr. Coda's Fifth Amendment right to due process.

A proper reading of *Marion* and *Lovasco* leads to the conclusion that evidence of prosecutorial bad faith is not required to prove that the government's preindictment delay violated Mr. Coda's Fifth Amendment right to due process. While this Court in *Marion* did begin to consider whether the dismissal of a federal indictment was required because of a three-year preindictment delay, it never declared when and in what circumstances actual prejudice resulting from preindictment delay requires dismissal. *Marion*, 404 U.S. at 324 ("... we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution."). In fact, this Court did not attempt to establish a test for when preindictment delay, which causes the accused actual prejudice, requires dismissal because, unlike Mr. Coda, the defendant in *Marion* failed to demonstrate any actual prejudice. *Id.* at 325.

Nevertheless, this Court in *Marion* did recognize one example of circumstances that could give rise to a dismissal:

[T]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

Marion, 404 U.S. at 324. While this Court recognized this example of unconstitutional preindictment delay, this Court did not state that a finding of preindictment delay used as an “intentional device to gain tactical advantage over the rights of the accused” was required to dismiss an indictment for unconstitutional delay. *See United States v. Ball*, 711 F. App’x 838 (9th Cir. 2017); *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977). Instead, it merely gave an example of flagrant due process abuse. In addition, the *Marion* Court indicated that it would be “unwise” to forecast its decision in other cases raising the issue of preindictment delay. *Marion*, 404 U.S. at 325. Instead of declaring a minimum standard, this Court left the determination to be made by the lower courts using “delicate judgment based on the circumstances of each case.” *Id.* Thus, this Court in *Marion* did not establish a test to determine when preindictment delay constitutes a violation of the right to due process. Rather, it simply illustrated the extreme case of prosecutorial abuse, allowing the lower courts to apply a balancing test to resolve different factual scenarios.

After *Marion*, this Court in *United States v. Lovasco* reexamined the intersection of preindictment delay and due process. However, *Lovasco* only addressed the narrow issue of whether *investigative* prosecutorial delay deprives the accused of their Fifth Amendment right to due process. *Lovasco*, 431 U.S. at 790. Rather than establishing a general test for determining when preindictment delay is unconstitutional, this Court looked to whether the preindictment delay, under the circumstances in *Lovasco*, violated “‘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.*; *See Howell*, 904 F.2d at 895 (explaining that *Lovasco* did not establish a “black-letter test” for preindictment delay). While this Court did ultimately determine that the investigative prosecutorial delay in *Lovasco* did not violate basic principles of due process, similar to this Court’s decision in *Marion*, this Court in *Lovasco* did not forecast its decision onto other

cases involving other types of prosecutorial preindictment delay, such as recklessness or negligence. In fact, this Court in *Lovasco* explicitly stated that it did not consider circumstances in which preindictment delay would require a dismissal other than the circumstances that were before the Court and noted that “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.” *Lovasco*, 431 U.S. at 796. Thus, the only reason for delay addressed in *Lovasco* was investigative delay.

If neither *Marion* nor *Lovasco* individually establish a requirement of bad faith, they cannot be read together as establishing such a requirement. The two cases merely define the two ends of the spectrum, establishing that investigative delay may not violate due process and that intentional delay to gain tactical advantage is not necessary to violate due process but is sufficient. In both cases, the example does not constitute the rule. Reading *Marion* and *Lovasco* together, this Court left it to the lower courts to determine what circumstances of prejudice and delay violate fundamental conceptions of justice and the community’s sense of fair play and decency. As a result, *Marion* and *Lovasco* stand only for the proposition that, if the government delays indictment to achieve tactical gain, it is *sufficient* to find a due process violation but not necessary. Therefore, because *Marion* and *Lovasco* do not require a finding of prosecutorial bad faith, negligent prosecutorial conduct that leads to preindictment delay, which causes the accused actual prejudice, may violate the accused’s Fifth Amendment right to due process under certain circumstances.

In addition to *Marion* and *Lovasco*, some lower federal courts have cited to this Court’s comments in *United States v. Gouveia*, 467 U.S. 180 (1984), as support for the use of a test requiring evidence of prosecutorial bad faith to evaluate claims of unconstitutional preindictment delay. See *Crouch*, 84 F.3d at 1510; *United States v. Sebetich*, 776 F.2d 412, 430 (3rd Cir. 1985).

However, *Gouveia* raises a Sixth Amendment right to counsel issue. *Gouveia*'s discussion of *Marion*, *Lovasco*, and preindictment delay is merely dicta, and that dictum simply contains restatements of comments made in *Marion* and *Lovasco*. *Gouveia*, 467 U.S. at 192. *Gouveia* does not require evidence of prosecutorial bad faith but merely restates the ends of the unconstitutional preindictment delay spectrum previously established in *Marion* and *Lovasco*.

B. This Court should follow the reasoning of lower courts that apply a balancing test to determine whether the preindictment delay, under the circumstances, violated fundamental conceptions of justice and the community's sense of fair play and decency.

While statutes of limitation provide a guarantee against the bringing of stale charges, statutes of limitation do not define the full scope of a defendant's rights to have charges promptly brought, for the Due Process Clause has its own role to play in protecting against oppressive delay. *See United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985); *Lovasco*, 431 U.S. at 789; *Marion*, 404 U.S. at 324. The role that due process plays in protecting against oppressive delay is protecting against delay that violates fundamental conceptions of justice and the community's sense of fair play and decency. To bring effect to the phrase, lower courts employ a balancing test to evaluate due process challenges to preindictment delay by balancing the prejudice to the defendant against the reason for delay and the length of the delay. *See United States v. Walker*, 601 F.2d 1051 (9th Cir. 1979). Not only does this balancing test correctly interpret *Marion* and *Lovasco* but it correctly balances equities by placing the focus of a due process challenge to preindictment delay on fundamental fairness rather than the government's intent in delaying indictment. In addition, this balancing test mirrors similar due process inquiries, thus bringing consistency to due process law.

1. *Using a balancing test not only correctly interprets Marion and Lovasco but it correctly balances equities by placing the focus of a due process challenge to preindictment delay on fundamental fairness rather than the government's intent in delaying indictment.*

As noted above, *Marion* and *Lovasco* left room for lower courts to determine what reasons for preindictment delay, when combined with prejudice to the accused's defense, violate fundamental conceptions of justice and the community's sense of fair play and decency, therefore violating due process. *Lovasco*, 431 U.S. at 796; *Marion*, 404 U.S. at 325. Lower courts have since found that *Marion* and *Lovasco* support the use of a balancing test to determine whether the government's preindictment delay offends fundamental conceptions of justice and the community's sense of fair play and decency. Specifically, the balancing test weighs the prejudice suffered by the accused against the government's reason for the preindictment delay, as well as the length of such delay. *Walker*, 601 F.2d at 1055-57; *Mays*, 549 F.2d at 677-78.

Such a balancing test is the best way to balance equities under due process. Indeed, the essential focus in cases involving a due process challenge to preindictment delay should be whether the government's preindictment delay has made it impossible for an accused to receive a fair trial rather than the intent of the government in delaying indictment. Therefore, the absence of prosecutorial bad faith should not be an absolute bar to a successful due process challenge to preindictment delay. Accordingly, the lower courts have found that, under certain circumstances, preindictment delay due to negligent governmental conduct may violate fundamental conceptions of justice and the community's sense of fair play and decency, thus violating the Due Process Clause of the Fifth Amendment. *Moran*, 759 F.2d at 783.

Consistent with such Fifth Amendment jurisprudence, the Ninth Circuit has used a balancing test to determine whether preindictment delay offends fundamental conceptions of justice and the community's sense of fair play and decency and is, therefore, impermissible

preindictment delay. *Walker*, 601 F.2d at 1051. The court reasoned that certain language in *Lovasco*, specifically that “the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused,” suggests the use of a balancing test to evaluate claims of unconstitutional preindictment delay. *Walker*, 601 F.2d at 1055 (quoting *Lovasco*, 431 U.S. at 789). To determine whether preindictment delay violates fundamental conceptions of justice, the court in *United States v. Walker* balanced the prejudice to the defendants against the reason for delay and the length of the delay. Ultimately, the court in *Walker* concluded that the defendants’ due process rights were not violated because the defendants proffered a minimal showing of prejudice, which did not outweigh the government’s reason of investigative delay. However, what is important is that instead of rigidly requiring the defendant to prove prosecutorial bad faith, the Ninth Circuit correctly favored a balancing test, which is not only consistent with *Marion* and *Lovasco* but consistent with due process goals of upholding fundamental fairness.

2. *Using a balancing test not only correctly interprets Marion and Lovasco but it mirrors similar due process inquiries, thus bringing consistency to the law.*

The use of a balancing test to determine whether preindictment delay violates fundamental conceptions of justice and the community’s sense of fair play and decency is not only supported by *Marion* and *Lovasco*, as pointed out in *Walker*, but also by courts’ application of basic due process principles to similar legal issues. For instance, when evaluating a claim of unconstitutional presentencing delay, the Sixth Circuit applied a balancing test weighing the reason for the delay against the prejudice suffered by the defendant as a result of the delay. *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006). The Sixth Circuit’s use of a balancing test in cases raising the issue of unconstitutional presentencing delay is based primarily on *Lovasco* and its progeny. *Id.* Furthermore, in *United States v. Ray*, 578 F.3d 184 (2d Cir. 2009), a Second Circuit case addressing unconstitutional presentencing delay, the court noted that “a defendant must show both

prejudice and an unjustified reason for the delay in order to prove a due process violation.” Courts apply a balancing test in cases addressing unconstitutional presentencing delay because, like in cases addressing unconstitutional preindictment delay, the essence of the due process inquiry is whether the accused received a fair trial, not whether the government *intended* to prevent a fair trial from occurring. Consequently, when determining whether the right to due process under the Fifth Amendment has been violated, courts typically use a balancing test. Fifth Amendment due process considerations regarding preindictment delay should not require the use of a standard that deviates from other basic due process inquiries. Thus, whether preindictment delay violates fundamental conceptions of justice and the community’s sense of fair play and decency should be determined using a balancing test.

A balancing test that weighs the prejudice suffered by the accused against the government’s reason for the preindictment delay and the length of such delay addresses the essential issue in cases raising unconstitutional preindictment delay far better than a requirement of evidence of prosecutorial bad faith, which is why courts use a balancing test to evaluate other due process violations, such as unconstitutional presentencing delay. Because a balancing test best achieves the purpose of the Fifth Amendment, lower courts have applied a balancing test in cases involving negligent preindictment delay. *Moran*, 759 F.2d at 783; *Mays*, 549 F.2d at 677. Those courts have found when applying a balancing test that, under certain circumstances, preindictment delay due to negligent governmental conduct may violate fundamental conceptions of justice and the community’s sense of fair play and decency, thus violating the due process clause of the Fifth Amendment. *Howell*, 904 F.2d. at 895. To remain consistent with the jurisprudence of this Court and other courts when applying fundamental Fifth Amendment principles, this Court should apply a balancing test when evaluating claims of unconstitutional preindictment delay.

C. The actual and substantial prejudice to Mr. Coda's defense outweighs the government's reason for the delay of Mr. Coda's indictment and, therefore, the preindictment delay violated the Due Process Clause of the Fifth Amendment.

If actual prejudice is established, then preindictment delay is unconstitutional when it violates fundamental conceptions of justice or the community's sense of fair play and decency. *Howell*, 904 F.2d. at 895; *Lovasco*, 431 U.S. at 790. In determining whether preindictment delay violates fundamental conceptions of justice or the community's sense of fair play and decency, the prejudice to the defendant must be balanced against the reason for delay and the length of the delay. *Mays*, 549 F.2d at 677-78. If negligent conduct by the government is asserted and the defendant suffers sufficient prejudice, then the government's negligent preindictment delay violates the Fifth Amendment right to due process. *Moran*, 759 F.2d at 782.

In *Howell*, the government did not arrest or indict the defendant until over twenty-seven months after the issuance of his arrest warrant. As a result of the delay, the defendant was unable to locate an alibi witness to testify at his trial. *Howell*, 904 F.2d at 891. The government did not assert that the delay was due to preindictment investigation. In addition, the government conceded that the twenty-seven-month delay caused the defendant actual prejudice. *Id.*

Applying a balancing test, the court found that the defendant's Fifth Amendment right to due process was violated because the government's reason for delay did not outweigh the prejudice caused to the defendant's defense. *Id.* The court reasoned that the government lacked a valid justification for the preindictment delay. According to the court, the government's reason for the delay was "mere convenience," therefore there was no valid justification to outweigh the prejudice caused to the defense of the accused. *Id.*

In *Mays*, the government allowed over four years to pass before indicting the defendants. *Mays*, 549 F.2d at 678. The defendants claimed that during those four years, three witnesses died,

and the memories of the live witnesses were dimmed, causing prejudice to their defenses. According to the court, because the government delayed for their own convenience, the delay constituted negligent conduct, rather than intentional conduct. *Mays*, 549 F.2d at 679. When applying the balancing test, the court noted “the greater the length of the delay and the more substantial the actual prejudice to the defendant becomes, the greater the reasonableness and the necessity for the delay will have to be to balance out the prejudice.” *Id.* at 678. The court held that the government’s misconduct did not rise to an unconstitutional level because, although the government conduct was “clearly negligent,” the defendants’ claim of prejudice was “mere speculation” because the defense did not reveal what the content of the decedent witnesses’ testimony would have been or its potential benefit to the defendants. *Id.* at 680. Thus, the court found that, because the defendants did not prove actual prejudice to their defense, the government’s negligence was not unconstitutional. *Id.*

After *Mays*, the Ninth Circuit again addressed the issue of unconstitutional preindictment delay in *United States v. Moran*. In *Moran*, the defendant was indicted once two years after the alleged criminal act occurred and then reindicted five years after the alleged criminal act occurred. *Moran*, 759 F.2d at 780. The defendant claimed that the loss of witness testimony and the dimming of live witnesses’ memories caused prejudice to his defense, but the government asserted that the delay between the indictments was due to investigation. *Id.* at 782-83. The court reasoned because the *Mays* standard is fully consistent with *Lovasco*, and intent or reckless behavior by the government is not essential to the existence of a preindictment delay due process claim, the government’s negligent conduct may form a basis for unconstitutional preindictment delay under some circumstances, but, under the circumstances in *Moran*, the court ultimately held that the

preindictment delay did not violate the due process rights of the defendant because the delay was due to investigation, rather than negligence, recklessness, or bad faith. *Id.* at 783.

Here, the actual prejudice suffered by Mr. Coda outweighs the government's reason for the delay of his indictment, thus violating fundamental conceptions of justice and the community's sense of fair play and decency. Unlike in *Mays* and *Moran*, the government's conduct here violated Mr. Coda's Fifth Amendment right to due process of law because Mr. Coda suffered actual prejudice and demonstrated that prejudice by explaining what the testimony would have been of the witnesses lost due to preindictment delay, unlike the defendants in *Mays* and *Moran* who merely speculated about the potential content of lost testimony. In fact, like the government in *Howell*, the government here does not dispute that the nearly ten-year delay caused Mr. Coda to suffer actual and substantial prejudice to his defense. R. at 6. In addition, similar to the government in *Mays* and unlike the government in *Moran*, the government here did not delay indictment for investigative reasons. Instead, the government simply neglected to investigate, delaying Mr. Coda's indictment for nearly ten years. R. at 3. Like in *Howell*, the government delayed Mr. Coda's indictment for nearly ten years without justification, as the government simply considered Mr. Coda's case a "low priority." R. at 2. The government here caused actual and substantial prejudice to Mr. Coda's defense for the sake of mere convenience.

The actual and substantial prejudice suffered by Mr. Coda outweighs the government's reason for the delay of his indictment, thus violating fundamental conceptions of justice and the community's sense of fair play and decency. Therefore, Mr. Coda's Fifth Amendment right to due process was violated. To hold that the government's negligence is not outweighed by the actual and substantial prejudice caused to the defense of Mr. Coda would be inconsistent with the

fundamental goals of due process and frustrate the fairness of the judicial process, thus undermining the very right that the Fifth Amendment exists to protect.

II. The Fifth Amendment to the United States Constitution prohibits the government from using Mr. Coda's post-arrest silence, which occurred pre-*Miranda* and pre-interrogation, as substantive evidence of guilt.

The government's use of Mr. Coda's post-arrest, pre-*Miranda*, and pre-interrogation silence, as substantive evidence of guilt, violated the Fifth Amendment to the United States Constitution for two reasons. First, the government's use of Mr. Coda's silence deprived Mr. Coda of his Fifth Amendment right to Due Process. Second, the government's use of Mr. Coda's silence deprived Mr. Coda of the ability to exercise his Fifth Amendment Privilege against Self-Incrimination without incurring a penalty. As a result, the United States Court of Appeals for the Thirteenth Circuit erred in allowing the government to use Mr. Coda's silence as substantive evidence of guilt. Further, because of the lack of evidence tending to prove Mr. Coda's guilt, it is not clear beyond a reasonable doubt that the jury would have returned a verdict of guilty absent the government's unconstitutional use of Mr. Coda's silence. Therefore, the government cannot prove that the district court's error in permitting government's use of Mr. Coda's silence was harmless. *See United States v. Hasting*, 461 U.S. 499, 510–11 (1983).

A. The Government's substantive use of Mr. Coda's post-arrest, pre-*Miranda*, and pre-interrogation silence deprived Mr. Coda of the fundamental fairness guaranteed by the due process of law.

The Fifth Amendment provides, in pertinent part, that “[n]o person shall . . . be deprived of life, liberty or property without due process of law.” U.S. Const. amend. V. In determining whether the use of silence at a criminal trial has deprived an individual of due process of law, this Court considers whether the ideals of fundamental fairness and common decency have been offended by the use of such evidence. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Wainwright v.*

Greenfield, 474 U.S. 284, 290–92, 295 (1986). Here, the District Court erred in allowing the government to use Mr. Coda’s post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt, because it deprived Mr. Coda of the fundamental fairness guaranteed by the due process of law and, therefore, violated the Fifth Amendment. To hold otherwise would overextend this Court’s precedent allowing the use of post-arrest and pre-*Miranda* silence for the limited purpose of impeachment. *See United States v. Moore*, 104 F.3d 377, 386 (D.C. Cir. 1997). In addition, to hold otherwise would incentivize officers to delay recitation of the arrestee’s *Miranda* rights, thus undercutting this Court’s fundamental goals of preventing coercion and ensuring that suspects are advised of their rights in a timely fashion. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

I. Allowing the government to use Mr. Coda’s post-arrest, pre-Miranda, and pre-interrogation silence for substantive evidence of guilt would overextend this Court’s precedent allowing the use of post-arrest and pre-Miranda silence for the limited purpose of impeachment.

This Court’s precedent has established that the fundamental fairness guaranteed by due process of law prohibits the government from using a suspect’s post-arrest and post-*Miranda* silence against him at trial—even to impeach his testimony if he testifies—because it would be fundamentally unfair to implicitly assure a suspect that his silence will not be used against him and then use his silence against him. *Doyle*, 426 U.S. 618–19; *Greenfield*, 474 U.S. at 290.¹ On the other hand, this Court has held that post-arrest, pre-*Miranda* silence is admissible for the purpose of impeachment—thus making the distinction in terms of admissibility for impeachment

¹ Opposing counsel may claim that *Berghuis v. Thompkins*, 560 U.S. 370 (2010) stands for the proposition that post-arrest, pre-*Miranda* silence may be used substantively; however, in *Berghuis*, this Court held that an individual’s post-*Miranda* voluntary speech was admissible. This Court said nothing at all about commenting on the individual’s preceding silence and the government did not seek to do so. *See Hurd v. Terhune*, 619 F.3d 1080, 1088 (9th Cir. 2010)).

hinge on the issuance of *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 606–07 (1982). However, the issuance of *Miranda* warnings cannot be used as a litmus test for substantive admissibility of silence for several reasons.

First, the reasoning of allowing pre-*Miranda* silence to be used in impeachment cases, such as *Fletcher*, is confined to the admissibility of silence for the limited use of impeachment. *See Moore*, 104 F.3d at 386. In *Fletcher*, the defendant voluntarily took the stand to testify, which allowed the government to use his pre-trial silence for impeachment. *Fletcher*, 455 U.S. at 387. However, this Court determined that the presence of *Miranda* warnings before the defendant’s silence estopped the government from using that silence against him—even to impeach. *Id.* It is evidence; therefore, that the presence or absence of *Miranda* warnings was important only to determine whether the government was estopped from using a testifying defendant’s pre-trial silence for impeachment. As a result, this Court’s holding in *Fletcher* is simply inapplicable to the government’s substantive use of an arrestee’s post-arrest, pre-*Miranda* silence, or the government’s substantive use of a non-testifying defendant’s pre-*Miranda* silence. *Moore*, 104 F.3d at 386 (“It is plain that the significance of the *Miranda* warnings in establishing the ability of the prosecution to use the defendant’s silence is limited to impeachment.”)

To extend this Court’s holding in *Fletcher* so that it covers scenarios involving the substantive use of a non-testifying defendant’s silence would overextend *Fletcher*’s focus on the presence or absence of *Miranda* warnings beyond its rational limits of estopping the government from impeaching a testifying defendant. Therefore, this Court should not focus on the absence of *Miranda* warnings in order to allow the government to use post-arrest, pre-*Miranda* silence substantively. Rather, the fundamental fairness guaranteed by due process, which prohibits the use of post-*Miranda* silence, due to the implicit assurance that silence won’t carry a penalty, should

similarly prohibit the government from using a non-testifying defendant's post-arrest silence—even when an officer fails to timely advise a suspect of their *Miranda* warnings. Indeed, today this is not a remarkable conclusion due to *Miranda*'s implicit assurance that silence won't be used against a suspect becoming embedded in routine police practice to the point where the warning has become part of our national culture. *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

Here, studies show that a criminal defendant who has been arrested but has not yet been read his *Miranda* warnings is most likely aware of *Miranda*'s implicit assurance that silence will carry no penalty either because of prior dealings with the police or because of a familiarity with those warnings that are a part of our nation's collective conscience.² Consequently, there is support for the argument that this Court offered the implicit “assurance that silence will carry no penalty” to all Americans in 1966, when *Miranda* was decided. *Dickerson*, 530 U.S. at 443; *Brogan v. United States*, 522 U.S. 398, 405 (1998) (this Court found it “implausible” that “in the modern age of frequently dramatized ‘*Miranda*’ warnings,” that “a person under investigation may be unaware of his right to remain silent”); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (“virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: ‘No person . . . shall be compelled in any criminal case to be a witness against himself’”). Because of *Miranda*'s success in invading our Nation's collective conscience, it is legal fiction to hinge a defendant's due process rights on an officer's failure to read *Miranda* warnings by allowing the use of a defendant's pre-*Miranda* custodial silence, yet prohibiting the use of defendant's post-

² See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134 (1980) (Empirical evidence supporting the notion that large percentages of American juveniles and adults are well aware of their rights embodied in the *Miranda* warnings by focusing on both juveniles' and adults' capacity to understand and waive *Miranda* rights); See Ian C. Kerr, *Beyond Salinas v. Texas: Why an Express Invocation Requirement Should Not Apply to Postarrest Silence*, 116 Colum. L. Rev. 489 (2016)

Miranda custodial silence. Therefore, the relevance of the issuance of *Miranda* warnings to support the admission to silence should remain limited to its proper role of determining whether the government is estopped from using a testifying defendant's silence to impeach. To hold otherwise would overextend *Fletcher* by placing unnecessary emphasis on the recitation of *Miranda*—a prophylactic means of protecting Fifth Amendment rights—rather than the genesis of those rights. *Doyle*, 426 U.S. at 617; *United States v. Velarde-Gomez*, 269 F.3d 1023, 1029 (9th Cir. 2001).

Finally, the government does not lose by prohibiting the use of a non-testifying defendant's pre-*Miranda* custodial silence. In fact, voluntary custodial statements made pre-*Miranda*, and even post-*Miranda*, will still be allowed to be used as substantive evidence of the accused's guilt. See *Berghuis v. Thompkins*, 560 U.S. 370 (2010). In addition, society does not lose by prohibiting the use of a non-testifying defendant's pre-*Miranda* custodial silence. Rather, society is simply avoiding an unfair trial for the accused because *Miranda*'s implicit assurance that silence will carry no penalty is embedded in our Nation's collective conscience, and it is fundamentally unfair to assure a defendant that his silence will not be used against him and thereafter use his silence against him. *Dickerson*, 530 U.S. at 443; *Brogan*, 522 U.S. at 405; *Tucker*, 417 U.S. at 439. Indeed, society wins not only when the guilty are convicted but when criminal trials are fair, and our system of administration of justice suffers when any accused is treated unfairly. *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

2. *Allowing the government to use Mr. Coda's post-arrest, pre-Miranda, and pre-interrogation silence as substantive evidence of guilt would impermissibly incentivize officers to delay Miranda warnings.*

The fundamental fairness guaranteed by due process of law prohibits the government from using Mr. Coda's post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence

of guilt. To hold otherwise would incentivize officers to manufacture delay in recitation of an arrestee's *Miranda* rights, thus undercutting this Court's fundamental goals of preventing coercion and ensuring that suspects are advised of their rights in a timely fashion. *See Moore*, 104 F.3d at 385; *Miranda*, 384 U.S. 436.

In *Moore*, the government commented on the petitioner's post-arrest, pre-*Miranda*, and pre-interrogation silence during its case-in-chief and closing argument. *Moore*, 104 F.3d at 377. The court held that, with or without *Miranda* warnings, the government was prohibited from using the petitioner's custodial silence to establish his guilt. *Id.* at 389. The court reasoned that any other holding was a "misinterpretation of *Doyle*," as "it is plain that the significance of the *Miranda* warnings in establishing the ability of the prosecution to use the defendant's silence is limited to impeachment." *Id.* at 386. The court further reasoned that, after the petitioner was placed in custody, the petitioner's silence was protected, and that protection was not dependent on the presence of interrogation nor the simple recitation of *Miranda* warnings. *See id.* at 383–85. Any other holding, the court reasoned, 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.* at 385.

Here, Mr. Coda's silence should be protected simply because Mr. Coda was placed in custody, and not dependent on the presence of interrogation, or an officer's simple recitation of *Miranda* warnings. Similar to the court's reasoning in *Moore*, to hold otherwise would incentivize an enterprising officer to expand the time window during which silence is admissible by delaying custodial interrogation and thus delaying the need to administer *Miranda* warnings. In addition, to hold otherwise might incentivize enterprising officers to delay recitation of the arrestee's *Miranda* rights until long after his or her arrest, thus increasing the chance that the defendant would have

some sort of admissible incriminating silent reaction. Either result would substantially undercut the fundamental goals of *Miranda*—preventing coercion and ensuring that suspects are advised of their rights in a timely fashion. See *Miranda*, 384 U.S. 436. Similarly, such a result would seem to contravene this Court’s instruction’s to officers that “the warnings mandated by *Miranda* . . . require that a person taken into custody be advised *immediately* that he has the right to remain silent” *Doyle*, 426 U.S. at 618 (emphasis added).

B. The Government’s substantive use of Mr. Coda’s post-arrest pre-*Miranda*, and pre-interrogation silence deprived Mr. Coda of his ability to freely exercise his Fifth Amendment Privilege against Self-Incrimination.

The privilege against self-incrimination derives from the Fifth Amendment, which 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. While this Court has held that the privilege against self-incrimination is *generally* not self-executing, this Court has never held that the privilege must *always* be expressly invoked for an individual to enjoy the privilege. See *Salinas v. Texas*, 570 U.S. 178, 181, 184–86 (2013). Rather, this Court looks to the circumstances of a case to determine whether an individual who desires the protection of the privilege must expressly invoke it. *Id.* Here, under the circumstances, Mr. Coda was under no obligation to expressly invoke the privilege against self-incrimination. As a result, Mr. Coda sufficiently exercised his privilege against self-incrimination by simply refraining from speaking to the arresting officer. Therefore, the government’s use of Mr. Coda’s silence, which was an exercise of his privilege against self-incrimination, deprived Mr. Coda of his ability to exercise his constitutional privilege without incurring a penalty.

I. Mr. Coda was under no obligation to expressly invoke the privilege against self-incrimination following his custodial arrest in order to enjoy the privilege.

It is true that the privilege against self-incrimination is *generally* not self-executing. *Salinas*, 570 U.S. at 181. However, this Court looks to the circumstances of a case to determine whether an individual who desires the protection of the privilege against self-incrimination must expressly invoke the privilege—or whether the privilege is, under the circumstances, self-executing. *See id.* at 184–86; *Id.* at 196 (Ginsburg, J., dissenting). Indeed, the statement that the privilege is *generally* not self-executing implies that there are circumstances in which the privilege may be self-executing. In fact, the same plurality of this Court, which held that an individual in pre-custody and pre-*Miranda* interrogation, must expressly invoke the privilege against self-incrimination, also recognized that “a suspect who is subjected to the ‘inherently compelling pressures’ of an unwarned custodial interrogation need not invoke the privilege.” *Id.* Therefore, the circumstances surrounding a defendant’s silence may determine whether a suspect must expressly invoke the privilege against self-incrimination in order to enjoy the privilege. Here, under the circumstances surrounding Mr. Coda’s silence, Mr. Coda was under no obligation to expressly invoke the privilege against self-incrimination in order to enjoy the protection of the privilege for two reasons.

First, *Salinas* cannot be read as requiring individuals in circumstances marked by post-arrest, pre-*Miranda*, and pre-interrogation, to invoke the privilege against self-incrimination in order to enjoy the privilege. In fact, the narrow issue in *Salinas* was whether the Fifth Amendment privilege against self-incrimination prohibits the government from using a defendant's *pre-custodial* silence as evidence of his guilt. Therefore, outside of dicta, this Court’s decision in *Salinas* does not speak to whether the privilege against self-incrimination must be invoked in *post-*

arrest circumstances. Therefore, *Salinas* simply has no import on a case, such as this, involving post-arrest silence. See *United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016) (where a suspect is in custody, *Salinas* does not provide support for the government's comments on the suspect's silence); *Coleman v. State*, 434 Md. 320, 334 (2013) (noting that *Salinas* did not apply because *Coleman* involved post-arrest, post-Miranda silence).

Second, the concerns that justified an express invocation rule in circumstances of pre-arrest, pre-Miranda police questioning in *Salinas*, do not justify the application of the same rule in circumstances of post-arrest, pre-Miranda, pre-interrogation. The cases in which this Court has insisted that a suspect expressly invoke the privilege against self-incrimination in order to rely on the privilege, indicate that this Court is concerned with: (1) circumstances surrounding the silence did not give rise to an inference that the defendant intended, by his silence, to exercise his Fifth Amendment rights; and (2) circumstances in which the questioner greeted by the silence had a special need to know whether the defendant sought to rely on the protections of the Fifth Amendment. See *Salinas*, 570 U.S. at 197 (Ginsburg, J., dissenting).

Here, post-arrest, pre-Miranda, and pre-interrogation silence is marked by two distinct characteristics that render the above concerns and application of the express invocation requirement inapplicable. First, and simply, the absence of police questioning distinguished the need for an interrogator to know whether a suspect is invoking the right to remain silent. Second, the fact of arrest leads to circumstances surrounding the silence that gives rise to a reasonable inference that the accused has intended, by his silence, to exercise his Fifth Amendment rights. *Id.*; *People v. Tom*, 331 P.3d 303, 330 (Cal. 2014) (Liu, J., dissenting). Indeed, when official suspicions have ripened into probable cause for arrest, a suspect's silence correspondingly becomes more suggestive of fear of self-incrimination. Given these circumstances, Mr. Coda's

silence was “sufficient to put the [government] on notice of an apparent claim of the privilege.” *Quinn v. United States*, 349 U.S. 155, 164 (1955). Just as the *Salinas* plurality’s invocation rule is premised on the relatively uncertain reasons for silence in the noncustodial context, a rule that recognized an arrestee does not need to invoke the privilege to protect silence post-arrest and pre-*Miranda* is premised on the relatively predictable reason for silence in the custodial context. These different rules are intended to govern two broad categories of cases—custodial and noncustodial—in light of a general feature that differentiates them, i.e., the accusatory nature of an arrest.

2. *Because Mr. Coda was under no obligation to expressly invoke the privilege against self-incrimination, Mr. Coda properly exercised his privilege against self-incrimination by refraining from speaking to the arresting officer.*

As noted above, this Court has recognized exceptions to the requirement to invoke the right to remain silent. Indeed, a criminal defendant need not take the stand and assert the privilege at his trial. *Griffin v. California*, 380 U.S. 609, 613–15 (1965). Similarly, an individual does not need to invoke the privilege against self-incrimination where the individual is subject to custodial interrogation. *Miranda*, 384 U.S. at 467–68, n. 37. Further, a criminal defendant who need not invoke the privilege at his trial, or under unwarned custodial interrogation, may remain lawfully silent to invoke the privilege, and that silence is protected. *See Griffin*, 380 U.S. 609; *Miranda*, 384 U.S. at 468, n. 37.

It is evident; therefore, that in situations where an individual need not invoke his right to remain silent, that individual may remain lawfully silent, and that silence may not be used against him, as remaining lawfully silent was a sufficient exercise of that individual’s privilege against self-incrimination. *See Salinas*, 570 U.S. at 196 (Ginsburg, J., dissenting). Here, because under the circumstances Mr. Coda was not required to invoke the privilege against self-incrimination for his silence to be protected; therefore, Mr. Coda exercised his privilege against self-incrimination by

simply refraining from speaking to the arresting officer. As explained below, Mr. Coda’s exercise of his Fifth Amendment right may not be used against him at trial.

3. *The government is prohibited from commenting on Mr. Coda’s exercise of his Fifth Amendment privilege against self-incrimination because doing so would impermissibly penalize Mr. Coda for exercising his constitutional privilege.*

It is a violation of the Fifth Amendment privilege against self-incrimination to allow the government to comment, at a defendant’s trial, on the fact that the defendant exercised his privilege against self-incrimination because doing so would impose an impermissible penalty upon a defendant for exercising a constitutional privilege and undermine the privilege by making its exercise costly. *Griffin*, 380 U.S. at 614.³ Similarly, the Fifth Amendment prohibits instructions by the court that a defendant’s exercise of his privilege against self-incrimination is evidence of guilt because doing so would impose an impermissible penalty upon a defendant for exercising a constitutional privilege, which is a remnant of the “inquisitorial system of criminal justice” outlawed by the Fifth Amendment. *Id.*; *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

In *Griffin*, the petitioner declined to take the witness stand at trial. *Griffin*, 380 U.S. at 609. Thereafter, the trial court instructed the jury on the issue of guilt and stated that “if [the petitioner] does not testify,” the jury may draw adverse inferences by assuming that the failure to testify indicates that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. *Id.* at 611. In addition, the government commented on the petitioner’s failure to testify indicating that he was conscious of his own guilt. Based on these facts, this Court held that a trial court’s instruction to the jury and the government’s comment’s regarding

³ This Court has recognized that the rule in *Griffin*—that the Fifth Amendment privilege against self-incrimination “prohibit[s] an inference of guilt from a defendant’s rightful silence”—has found “general and wide acceptance in the legal culture” and “has become an essential feature of our legal tradition.” *Mitchell v. U.S.*, 526 U.S. 314, 330 (1999).

inferences of guilt drawn from a defendant's failure to testify violated the Self-Incrimination Clause of the Fifth Amendment because such comments are a penalty imposed on lawful silence and is a remnant of the "inquisitorial system of criminal justice" outlawed by the Fifth Amendment privilege against self-incrimination. This Court reasoned that the Fifth Amendment provides a safe haven for those who prefer to not be a witness at trial and that the spirit of the Self-Incrimination Clause declares that the failure of a defendant to testify shall not create any presumption or penalty against him. *Griffin*, 380 U.S. at 614–15.

Here, this Court's reasoning in *Griffin* requires finding that the Fifth Amendment prohibits establishing guilt from the fact that an individual exercised his privilege by refraining from speaking to an arresting officer pre-*Miranda* and pre-interrogation. If establishing guilt by commenting on a defendant's exercise of his fifth amendment privilege against self-incrimination by refusing to testify at trial, is outlawed by the Fifth Amendment privilege against self-incrimination, then establishing guilt by commenting from the fact that a defendant exercised his privilege by refraining from speaking to the arresting officer pre-*Miranda* and pre-interrogation is similarly outlawed by the Fifth Amendment privilege against self-incrimination.

Indeed, there is no principled distinction between the two scenarios that would permit a rule that allows the government to proffer evidence of the fact that a defendant exercised his privilege by refraining from speaking to the arresting officer in circumstances marked by post-arrest, pre-*Miranda*, and pre-interrogation yet prohibits the government from commenting on inferences of guilt drawn from a defendant's failure to testify at trial. In either scenario, it must be considered a violation of the Privilege against self-incrimination to permit the government to use an individual's exercise of the privilege as a weapon to convict because "when the privilege [against self-incrimination] is exercised, the privilege is fulfilled only when the person is

guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty’ for doing so. *Malloy*, 378 U.S. at 8.

C. The District Court’s error in allowing the government to use Mr. Coda’s post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt was not harmless.

Under the harmless error standard, this Court must determine whether it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty absent the government’s comment on Mr. Coda’s silence, and the subsequent admission into evidence of Mr. Coda’s exercise of his Fifth Amendment privilege against self-incrimination by refraining from speaking to the arresting officer in circumstances marked by post-arrest, pre-*Miranda*, and pre-interrogation. *Velarde-Gomez*, 269 F.3d at 1035; *United States v. Hasting*, 461 U.S. 499, 510–11 (1983). In the context of comments on silence, courts focus on three factors: “(1) the extent of comments made by the witness, (2) whether an inference of guilt from silence was stressed to the jury, and (3) the extent of other evidence suggesting defendant’s guilt.” *Velarde-Gomez*, 269 F.3d at 1034 (citing *United States v. Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991)).

As an initial matter, the government has not claimed that such use in the circumstances of this case might have been harmless error. However, upon consideration of these factors, it is evident that the government cannot meet its burden in proving that the District Court’s error in allowing the government to use Mr. Coda’s silence as substantive evidence was constitutionally harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Velarde-Gomez*, 269 F.3d at 1035 (the burden of proving a constitutional error harmless beyond a reasonable doubt rests upon the government). First, the government, through government witnesses, put on evidence about Mr. Coda’s silence during its case-in-chief. Second, the government thereafter stressed the fact that Mr. Coda’s silence was indicative of his guilt during closing argument in an attempt to persuade

the jury. Third, there was a clear lack of direct evidence proving Mr. Coda's guilt. Instead, the government's only evidence was circumstantial evidence that tended to prove that Mr. Coda's business profits and personal finances were in decline, that Mr. Coda maintained an insurance policy, and that before the accident, Mr. Coda seemed anxious and paranoid. It is evidence, therefore, that the government relied heavily upon evidence of Mr. Coda's silence to gain conviction. Given that each of the *Newman* factors weighs against a finding of harmless error, the government cannot prove that the admission of Mr. Coda's post-arrest, pre-*Miranda* silence was harmless error.

CONCLUSION

Preindictment delay, which causes the accused actual prejudice, may deprive a defendant of their Fifth Amendment right to due process even when there is no evidence of prosecutorial bad faith. Because evidence of prosecutorial bad faith is not required to prove that the government's preindictment delay violated Mr. Coda's Fifth Amendment right to due process, this Court should follow the reasoning of lower courts that apply a balancing test to determine whether the preindictment delay, under the circumstances, violated fundamental conceptions of justice and the community's sense of fair play and decency. Because the actual and substantial prejudice to Mr. Coda's defense outweighs the government's reason for delay of Mr. Coda's indictment, the preindictment delay violated the Due Process Clause of the Fifth Amendment.

The governments use of Mr. Coda's post-arrest, pre-*Miranda*, and pre-interrogation silence as substantive evidence of guilt violated the Fifth Amendment to the United States Constitution. First, the government's use of Mr. Coda's post-arrest silence deprived Mr. Coda of the fundamental fairness guaranteed by the due process of law, despite the fact that the silence occurred pre-*Miranda* and pre-interrogation. Second, the government's use of Mr. Coda's post-

arrest silence deprived Mr. Coda of his ability to freely exercise his Fifth Amendment Privilege against Self-Incrimination, despite the fact that the silence occurred pre-*Miranda* and pre-interrogation.

Respectfully submitted,

TEAM 4
Counsel for the Petitioner