

No. 21-125

IN THE
SUPREME COURT OF THE UNITED STATES

AUSTIN CODA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR THE RESPONDENT

Team 8

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QUESTIONS PRESENTED

- I. Under the Fifth Amendment, does preindictment delay violate the Due Process Clause when the delay may have caused actual prejudice to the accused's ability to defend himself, but was merely the unintentional result of good-faith administrative decisions and the indictment was carried out well within the statute of limitations?

- II. Under the Fifth Amendment, does admitting a criminal defendant's post-arrest but pre-Miranda silence as substantive evidence of their guilt, after only being made aware of the charges against them, violate their constitutional right against self-incrimination?

STATEMENT OF THE CASE

On December 22, 2010, the Petitioner's hardware store was destroyed in a blaze after an explosion. R. at 2. Despite that, the store struggled with low profit for years, as a result of the recession in 2008, and the nearby opening of a large chain store in 2009. R. at 1-2. Petitioner still maintained an insurance policy which covered the hardware store in case of total loss. *Id.*

Shortly after the explosion, the FBI received a tip from Petitioner's neighbor and close friend, Sam Johnson. R. at 2. Mr. Johnson advised the FBI that Petitioner's business and personal finances were in decline and that when they spoke the week of the incident, Petitioner seemed "very anxious and paranoid." *Id.* Based on the information Mr. Johnson provided, investigators believed that Petitioner had purposely caused the explosion and informed the United States Attorney's Office. *Id.*

The U.S. Attorney's Office marked Petitioner's case "low-priority" primarily due to the Petitioner's involvement in litigation for unrelated state charges at the time. *Id.* Moreover, transporting Petitioner back and forth to litigate both cases simultaneously would be too inconvenient. *Id.* Once Petitioner's state proceedings ended, the U.S. Attorney's Office prioritized prosecuting drug trafficking and other related offenses. R. at 4. In addition, political pressure at the time caused high employee turnover, and as such, Petitioner's case remained "low priority" due to understaffing. *Id.*

In April 2019, a new Assistant United States Attorney was assigned to Petitioner's case and moved to progress the case. R. at 2. Petitioner was apprehended and taken into custody on April 23, 2019. R. at 7. Then, Petitioner was indicted on one count of destroying property that affects interstate commerce using an explosive, under 18 U.S.C. § 844(i). R. at 3.

During an evidentiary hearing held on September 15, 2019, Petitioner claimed that the alibi defense he intended to raise at trial was now impossible to corroborate due to preindictment delay. *Id.* As such, Petitioner contended that moving forward with the trial would violate his Fifth Amendment

right to a fair trial. *Id.* Subsequently, Petitioner filed a motion to dismiss the indictment. R. at 1. The United States District Court for the District of East Virginia properly denied the motion. *Id.* The District Court appropriately held that for a preindictment delay to violate the Due Process Clause and require a dismissal of charges, the defendant must show both that there was actual prejudice, and that the government acted in bad faith. R. at 4. Petitioner was unable to prove the government purposely delayed his prosecution to gain an unfair advantage. R. at 6.

Thereafter, Petitioner filed a second motion, attempting to suppress his post-arrest, pre-Miranda silence, from being used against him as substantive evidence of guilt. R. at 7. The District Court again properly denied the motion. *Id.* The District Court held that because Petitioner's silence coincided with his arrest, his pre-custodial silence is admissible. R. at 8. In addition, the District Court suggested that a reasonable person with an alibi defense would have informed the agents of his alibi. R. at 9. Petitioner also failed to invoke the privilege against self-incrimination, holding that an arrestee can simply assert his Fifth Amendment right to remain silent at any time. Further, the court reasoned that if law enforcement is not required to issue a Miranda warning, and the arrestee does not assert his rights, then the use of the arrestee's silence does not contravene Miranda. R. at 10.

Consequently, Petitioner was tried and convicted for maliciously destroying property with an explosive and was sentenced to ten years in prison. R. at 11. Petitioner appealed the denial of both District Court motions, seeking to have his conviction overturned and charges dismissed. *Id.* The United States Court of Appeals for the Thirteenth Circuit properly affirmed both decisions of the District Court. R. at 12. This Court should affirm the decision of the Court of Appeals with respect to both issues.

SUMMARY OF THE ARGUMENT

This Court should affirm the decisions of the United States Court of Appeals for the Thirteenth Circuit on both of Petitioner's pretrial motions to dismiss based on preindictment delay and to suppress evidence of his post-arrest, pre-*Miranda* silence, as neither claim was a violation of Petitioner's constitutional rights.

The lower court properly dismissed Petitioner's motion to dismiss the indictment due to preindictment delay. This Court has recognized that the statute of limitations is the primary safeguard against bringing overly stale criminal charges. The Petitioner was properly indicted nearly two years prior to the end of the statute of limitations in this case. Further, this Court's holding in *United States v. Lovasco*, 431 U.S. 783, 796 (1977), established that the passage of time alone, absent an unlawful reasoning for delay, does not constitute a violation of due process. Therefore, considering the obvious lack of bad faith, as the lower courts have already determined, and because the indictment fell well within the statute of limitations, the U.S. Attorney's office should be given deference in their decision on the proper timing to seek the indictment against Petitioner.

Additionally, when actual prejudice to an accused is proven, the circuit courts are divided in the proper test to determine whether a preindictment delay is a violation of an accused's due process rights. In this case, regardless of which test is applied, the U.S. Attorney's Office properly indicted Petitioner. This Court should adopt the majority two-prong test, which first examines whether there was actual prejudice to the accused, and second examines whether the government purposely delayed indictment to gain an improper advantage over the accused. In this case, the U.S. Attorney's office delay was neither the result of a purposeful decision nor done in bad faith, therefore the Petitioner was properly indicted. The minority approach, however, also examines

actual prejudice to the accused, and if such prejudice is found, the Court then weighs the level of prejudice against the government's reasoning for the delay. Even if the Court applies the minority test in this case, the preindictment delay was not a conscious choice by the U.S. Attorney's Office. The delay was the result of political and administrative decisions that were outside of the control of the U.S. Attorney who ultimately sought the indictment. Because the indictment was well within the statute of limitations, and the delay was not the result of any bad faith or conscious decision on the part of the U.S. Attorney's office, the Petitioner was properly indicted and there was no constitutional violation.

Additionally, the lower court properly exercised its discretion by admitting the Petitioner's post-arrest, pre-*Miranda* silence as substantive evidence. Under an abuse of discretion standard, a substantial right of the party must be affected to warrant reversal. *Kotteakos v. U.S.*, 328 U.S. 750, 765 (1946). As the Petitioner's substantial right is not affected, this must be deemed a harmless error such that it does not warrant reversal on this issue.

Furthermore, the government did not violate the Petitioner's Fifth Amendment right against self-incrimination when the Petitioner failed to unequivocally invoke his right. Under this Court's holdings in both *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010), and *Salinas v. Texas*, 570 U.S. 178, 187 (2013), one must unambiguously invoke their Fifth Amendment right. It is insufficient to simply stay silent. *See Salinas*, 570 U.S. at 187. Here, the Petitioner never unambiguously or unequivocally invoked his Fifth Amendment right against self-incrimination. The government may also comment on the Petitioner's post-arrest, pre-*Miranda* silence. Most circuit courts and the California Supreme Court have allowed the use of that silence in the government's case-in-chief. Here, the government properly commented on the defendant's silence

in its case-in-chief and during the closing argument. Thus, his silence was not protected under the Fifth Amendment and was subject to comment by the government during its case-in-chief.

Finally, the government did not coerce the Petitioner into forfeiting his right to remain silent. This Court recognizes three scenarios of government coercion: when the government forces the individual to choose between self-incrimination and some important public benefit, when a regulatory regime makes the act of invoking the privilege—thereby identifying oneself to the government—inherently incriminating, and when the defendant is subject to custodial interrogation. *See Garrity v. New Jersey*, 385 U.S. 493, 496–98, (1967); *Leary v. United States*, 395 U.S. 6, 28–29 (1969); *Pennsylvania v. Muniz*, 496 U.S. 582, 599 (1990). Here, the Petitioner was not subjected to any of these scenarios while he was being read the charges against him. Thus, the Petitioner was not coerced.

ARGUMENT

I. THE U.S. ATTORNEY’S OFFICE PROPERLY INDICTED PETITIONER BECAUSE THE INDICTMENT WAS BROUGHT WELL WITHIN THE STATUTE OF LIMITATIONS AND THE DELAY WAS NOT THE RESULT OF BAD FAITH ON THE PART OF THE GOVERNMENT.

This Court has established that statutes of limitation already exist as a “primary guarantee against bringing overly stale criminal charges.” *Marion v. United States*, 404 U.S. 307, 322 (1971) (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)). In addition, this Court has recognized that preindictment delay may result in a violation of an accused’s due process rights and, as such, it is necessary to examine potential due process violations as an added layer of constitutional protection. *Id.* Therefore, any inquiry of a potential due process violation only exists to determine the limit beyond where there would exist an “irrebuttable presumption” that a defendant’s right to a fair trial would be prejudiced. *Id.* Thus, the Due Process Clause “has a limited role to play in protecting against oppressive delay.” *United States v. Lovasco*, 431 U.S. 783, 789 (1977).

This Court has already determined that the passage of time alone, absent some impermissible reasoning for delay, does not constitute a violation of due process. *Id.* Furthermore, actual prejudice to an accused’s defense is a “necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *Id.* at 790. Thus, this Court, in *Marion* and *Lovasco*, has established a two-part inquiry for determining due process claims resulting from preindictment delay. The lower courts differ in how they interpret and apply this two-part analysis.

The circuit courts are unevenly divided regarding the appropriate test for due process claims resulting from preindictment delay. Nine circuits have adopted a straightforward two-prong approach in which the accused must show: (1) that the preindictment delay caused actual prejudice

to his defense; and (2) that the delay was the result of an intentional attempt to secure an improper tactical advantage over the accused. *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996). Only two circuits apply a balancing approach with respect to examining preindictment delay. This balancing approach considers the two parts of the analysis as put forth in *Marion* and *Lovasco*, but puts the burden on the accused only to prove actual prejudice to his defense, and then shifts the burden to the court to weigh the accused's prejudice against the government's reasoning for the delay. *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990).

It is established law that all due process claims require a showing of actual prejudice, not merely presumptive prejudice. *Marion*, 404 U.S. at 326 (“No actual prejudice...is alleged or proved...Appellees rely solely on the real possibility of prejudice...however these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial...”). Few circuit courts require that the actual prejudice be substantial. *United States v. Willis*, 583 F.2d 203, 207 (5th Cir. 1968) (“The accused must show that: (1) substantial prejudice resulted from the delay...”).

Once actual prejudice has been proven, the question of whether the government could have moved forward with an indictment sooner than they did essentially becomes irrelevant so long as the indictment lies within the statute of limitations, because mere passage of time is not sufficient in and of itself to violate due process. *Lovasco*, 431 U.S. at 789. Instead, together with actual prejudice to the accused, it must be shown that the government deliberately postponed action that could have been taken, for some reason outside of lawful good intentions. *Id.* The Fifth Circuit recognized that “grounding a due process violation on the basis of good faith but inadequate, ineffective, or insufficient governmental personnel or management leading to preindictment delay runs counter to...constitutional principles.” *Crouch*, 84 F.2d at 1512. The Due Process Clause is

“not implicated by the lack of due care of an official causing unintended injury to life, liberty or property.” *Id.* at 1513 (quoting *Davidson v. Cannon*, 474 U.S. 344, 347 (1986)).

In this case, the U.S. Attorney’s Office had no subversive reasoning for delaying Petitioner’s indictment. The indictment failed to advance merely due to circumstance and administrative decisions within the U.S. Attorney’s office. Part of the delay was the result of the Petitioner’s own unrelated litigation for state charges that hindered the indictment at the outset. The fact that the U.S. Attorney’s Office could have, but did not, indict the Petitioner immediately after his state litigation concluded does not mean the delay rises to a level of oppressive delay, despite that the Petitioner has suffered some prejudice to his defense as a result. Because the indictment was brought nearly two years ahead of the statute of limitations, the prejudice Petitioner presumably suffered, without some deliberate bad-faith reasoning for delay on the part of the U.S. Attorney’s Office, does not rise to constitute a due process violation. Thus, Petitioner’s Constitutional rights have remained intact.

A. This Court Should Adopt the Majority Two-Prong Test to Determine Whether Preindictment Delay Violates an Accused’s Due Process Rights Based on Actual Prejudice to a Defendant and Bad Faith on the Part of The Government.

The First, Second, Third, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits apply the straightforward two-prong test to determine whether preindictment delay violates an accused’s due process right to a fair trial. Eli DuBosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by The United States Supreme Court*, 40 Fla. St. L. Rev. 659 (Spring 2013). In 1996, the Fifth Circuit was one of the first to determine that where an indictment was not barred by the statute of limitations. To bring a successful claim of preindictment delay, a defendant was required to prove actual, substantial prejudice and “that the prosecution purposely delayed the indictment to gain tactical advantage or for other bad faith purpose.” *Crouch*, 84 F.3d at 1500. The Fifth Circuit court

held that the balancing test, which weighs the level of prejudice to the accused against the government's reasons for preindictment delay, first utilized in *United States v. Townley*, (665 F.2d 579 (5th Cir. 1982)), is insufficient as a means to examine due process claims because the “test purports to weigh or balance the extent or degree of the actual prejudice against the extent to which the government's ‘good faith reasons’ for the delay deviate from what the court believes to be appropriate.” *Id.* at 1512. This test considered two aspects that are “wholly different from each other and have no possible common denominator that would allow determination of which ‘weighs’ the most.” *Id.* Therefore, the Fifth Circuit rejected the *Townley* test in favor of the more straightforward two-prong approach. This test was subsequently adopted by most Circuit Courts, with one prong examining actual prejudice to an accused and once actual prejudice has been established, then triggering the second prong that involves examining intentional bad faith on the part of the government. For the same reason, this Court should adopt the two-prong approach for all due process claims resulting from preindictment delay.

This Court has held that the government's reasoning for preindictment delay is a necessary factor to consider when examining due process claims. *Lovasco*, 431 U.S. at 790. It has also determined that the Due Process Clause “does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment.” *Id.* It was recognized that some base level confidence needs to be put into the law enforcement system and that it is not the responsibility of the Court to “impose on law enforcement officials our ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” *Id.* (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)). Considering this determination, it would be logical to deduce that the government is presumptively justified for

preindictment delays, unless the delays rise to a level that could be considered unlawful, deliberate, and in bad faith.

In this case, the U.S. Attorney's Office did not intentionally delay the indictment for any specific reason except by virtue of circumstance. Initially, it was the Petitioner's own involvement in litigation for unrelated state charges that delayed the indictment. After that initial delay, the U.S. Attorney's Office was faced with other circumstances that inadvertently resulted in a continued delay of Petitioner's case. High employee turnover and political pressure to focus on certain types of cases resulted in Petitioner's case remaining low priority. It is specifically for these types of reasons that the statute of limitations was put into place. This Court determined in *Marion* that applicable statutes of limitation are "the primary guarantee against bringing overly stale criminal charges. . . they are made for . . . the protection of those who may (during the limitation) . . . have lost their means of defence [sic]." *Marion*, 404 U.S. at 322, (quoting *Public Schools v. Walker*, 76 U.S. 282, 288 (1869)). Therefore, because there was an obvious lack of bad faith, and because the U.S. Attorney's office acted well within the statute of limitations for this type of crime, Petitioner's due process right to a fair trial were not violated.

B. Even Applying the Minority Balancing Test, The U.S. Attorney's Office Still Properly Indicted Petitioner Because the Delay was Justifiable and Well Within the Statute of Limitations.

In contrast to the majority of circuit courts, the Fourth and Ninth Circuits apply a balancing test, similar to the *Townley* test, to determine whether preindictment delay is a due process violation. Eli DuBosar, *Pre-Accusation Delay: An Issue Ripe for Adjudication by The United States Supreme Court*, 40 Fla. St. L. Rev. 659 (Spring 2013). This balancing test, like the majority two-prong approach, also has a two-point analysis. With this approach, the Court first examines evidence of actual prejudice to the accused, and in the occurrence of actual prejudice, the Court

then examines the government's good-faith or bad-faith reasoning for any prosecutorial delay. *Howell*, 904 F.2d at 895.

In the balancing approach, the Fourth Circuit has stated the basic issue then becomes “whether the Government’s action in prosecuting after substantial delay violates ‘fundamental conceptions of justice’ or ‘the community’s sense of fair play and decency.’” *U.S. v. Uribe-Rios*, 558 F.3d 347, 358 (4th Cir. 2009) (quoting *Lovasco*, 431 U.S. at 790). Similarly, the Ninth Circuit applies two-point balancing test wherein “the length of the delay is weighed against the reasons for the delay,” and the delay must be proven to “offend those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’” *U.S. v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) (quoting *Lovasco*, 431 U.S. at 790). At its core, the two-point balancing approach is very similar to the majority two-prong test because the standard that would constitute the government’s delay to be unjustified is high, going beyond just prejudice to the accused and requiring some offense to the “fundamental conceptions of justice.” *Id.*

What distinguishes the Fourth and Ninth Circuits’ differing approaches to preindictment delay is the way the courts handle a showing of intentional bad faith, or lack thereof, on the part of the government. However, while rejecting the bad faith prong, the Fourth and Ninth circuits approach the balancing test in a similar manner. The Fourth Circuit court in *Howell v. Barker*, 904 F.2d 889, 893 (4th Cir. 1990), held that the defendant’s due process rights had been infringed due to a “the delay both in serving the arrest warrant and indicting Petitioner was the result of a *conscious decision* by . . . authorities.” It can be inferred that the conscious decision to delay indictment in that case lacked good-faith reasoning. That can be directly contrasted to the present case, where the delay was not the result of conscious decisions, but a mere byproduct of circumstance and administrative choices. If fundamental injustice is the standard to be met in the

balancing approach to preindictment delay, then intentional bad faith must be present to weigh heavily against an accused's purported prejudice.

This Court has not elaborated on whether recklessness or negligence resulting in a lengthy preindictment delay would constitute a due process violation. However, the Court asserted that “[in] due process claims based on pre-accusation delay [it] should be considered . . . that very short delays can cause prejudice to a defendant’s case, but that dismissal is not warranted by “every delay-caused detriment.”” *Marion*, 404 U.S. at 324-25. So long as the indictment is within the statute of limitations, it is not the length of the delay that is at issue, but rather the reasoning for the delay, as even short delays may cause just as much prejudice to an accused as long delays. It is this very reasoning that makes the Fourth and Ninth Circuit’s balancing approach less reliable than the majority’s straightforward two-prong approach. The balancing approach involves a more fluid analysis to arrive at the same result because even under that approach, some form of intentional choice causing the delay must be shown. In that instance, a delay for any legitimate reason would not automatically be a violation of an accused’s constitutional rights.

In this case, the U.S. Attorney’s office action was well within the statute of limitations when they indicted the Petitioner and it cannot be said that the delay on the part of the U.S. Attorney’s Office was intentional in any manner, and any purported negligence in delaying accusation of Petitioner is negligible at best. Therefore, when balanced against the Petitioner’s alleged actual prejudice, the unintentional delay on the part of the U.S. Attorney’s office is justified because there is no intentional reason for the delay except for the bureaucratic circumstances and commonplace political matters that affect government and law enforcement agencies that neither rise to a level of negligence, nor to intentional disregard for the rights of an individual being

accused. It would be improper for this Court to dismiss the Petitioner's claim, merely due to unplanned and unforeseen circumstances on the part of the U.S. Attorney's Office.

II. THE GOVERNMENT'S USE OF PETITIONER'S POST-ARREST, PRE-MIRANDA SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT AND FAILURE TO ASSERT AN ALIBI IS CONSISTENT WITH THE FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION.

An individual's right against self-incrimination must be unequivocally invoked. The Fifth Amendment's self-incrimination clause states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. For an individual to invoke that privilege, they must "do so unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *Salinas v. Texas*, 570 U.S. 178, 187 (2013) (holding that an arrestee does not expressly invoke their privilege against self-incrimination by simply staying silent). This rule avoids difficulties of proof and "provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Berghuis*, 560 U.S. at 381-82.

Accordingly, the Fifth Amendment privilege does not outright bar the government from using an individual's pretrial silence. For example, the government may use a defendant's pre-arrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege. *Salinas*, 570 U.S. at 181. Alternatively, the government may use a defendant's post-arrest silence as impeachment evidence, provided the defendant has not yet been informed of his *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

Miranda warnings are only required when an individual is subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or

otherwise deprived of his freedom of action in any significant way.” *Id.* Likewise, *Miranda* only applies when the individual is “in custody,” *See Roberts v. United States*, 445 U.S. 552, 560 (1980) (“[T]he exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.”), and when the individual is subject to interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (“It is clear . . . that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.”); *See also Miranda*, 384 U.S. at 478 (“The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.”).

Applying these principles in *Salinas*, the Supreme Court held that pre-custodial silence is admissible as substantive evidence. *Salinas*, 570 U.S. at 190. However, this Court held that post-*Miranda* silence is inadmissible as substantive evidence of guilt. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

A. The Lower Court Properly Exercised Its Discretion by Allowing Admission of the Petitioner’s Post-Arrest, Pre-Miranda Silence.

When evidentiary rulings are raised on appeal, an abuse of discretion standard shall apply where a party claims the lower court abused its discretion in exercising its decision. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (citing *Old Chief v. U.S.*, 519 U.S. 172, 174 n. 1 (1997)). Upon applying the abuse of discretion standard, the lower court’s ruling should only be reversed if the lower court’s erroneous decision affected a substantial right of the party. *See id.*; *Kotteakos v. U.S.*,

328 U.S. 750, 765 (1946). If an error does not affect a party's substantial right, the error is deemed to be harmless such that reversal is unwarranted.¹ *Id.*

Relevant evidence is admissible unless it is barred by a specific rule, statute, or constitutional provision. Fed. Rule of Evid. 402. When considering relevance, the evidence at issue must have any tendency to make a fact of consequence more or less probable. Fed. Rule of Evid. 401.

Moreover, when applying the abuse of discretion standard to a lower court ruling regarding a criminal defendant's post-arrest pre-*Miranda* silence, the Eleventh Circuit held that it would not reverse the lower court's decision when the government introduced such evidence in a limited capacity. *United States v. Alexander*, 713 Fed. Appx. 919, 926 (11th Cir. 2017) (finding that the government briefly commented on the criminal defendant's post-arrest, pre-*Miranda* silence). It went on to say "[t]hat is true even if Alexander [the defendant] is correct that the evidence was admitted as substantive evidence of his guilt rather than as impeachment evidence." *Id.* Similarly, this Court held in *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993), that post-arrest, pre-*Miranda* silence is probative.

In applying this Court's prior statement in *Salinas*, while the Petitioner's post-arrest, pre-*Miranda* silence may be unfavorable to the Petitioner, this type of evidence is permissible in criminal trials. Furthermore, the Petitioner's post-arrest pre-*Miranda* silence is not dispositive of

¹ See *Kotteakos v. U.S.*, 328 U.S. 750, 765 (1946).

But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id.

his guilt. As such, it is relevant evidence such that it tends to make a fact of consequence, Petitioner's guilt, more probable. Fed. Rule of Evid. 401. Conversely, Petitioner chose to remain silent after he was arrested and waited to raise an alibi until a pre-trial hearing. This silence and failure to assert his alibi continues to be probative of Petitioner's silence by making his guilt more or less probable. Although the Court can exclude relevant evidence, here any unfair prejudice does not *substantially* outweigh the probative value of the Petitioner's silence. Considering this Court's holding in *Brecht*, evidence of Petitioner's silence is probative. As such, this Court must include this evidence.

While relevance is necessary, an evidentiary ruling reviewed under an abuse of discretion standard only requires reversal when the criminal defendant's substantial right was affected. Here, even if permitting evidence of Petitioner's post-arrest, pre-*Miranda* silence was an error, it does not rise to a level beyond a harmless error warranting a mistrial or any remedial action.

Additionally, under appellate review using the abuse of discretion standard, if this Court were to find that the government wrongly commented on Petitioner's silence, that comment is only a harmless error. As such, it is not a reversible issue because it did not affect Petitioner's substantial right.

B. The Government May Comment on Petitioner's Silence Because He Never Unequivocally Invoked His Fifth Amendment Right Against Self-Incrimination Prior To That Silence.

An individual who wishes to invoke his right against self-incrimination during both custodial and non-custodial interrogation must "do so unambiguously." *Berghuis*, 560 U.S. at 381; *Salinas*, 570 U.S. at 187. While this court in *Berghuis* applied the rule within the context of a custodial interrogation, this court in *Salinas* applied the rule outside the context of custodial interrogation. In its decision to allow the use of non-custodial silence as substantive evidence, the

Court explained that the privilege against self-incrimination “is an exception to the general principle that the Government has the right to everyone's testimony.” *Id.* at 183 (quoting *Garner v. United States*, 424 U.S. 648, 658, n. 11 (1976)). The Court stated that the privilege must be claimed at the time the individual relied on it. *Salinas*, 570 U.S. at 187. The Court in *Salinas* and *Berghuis* focused on the same two concerns in establishing these rules: avoiding difficulties of proof and providing guidance to officers. *Id.*; *Berghuis*, 560 U.S. at 381-82.

1. The Individual Must Unambiguously Invoke His Right to Remain Silent.

An arrestee does not expressly invoke their privilege against self-incrimination by simply staying silent. *Salinas*, 570 U.S. at 187 (finding that silence during a non-custodial police interview did not rise to the level of asserting a defendant's Fifth Amendment right against self-incrimination). The Court reasoned that although there is no exact formula to invoking one's Fifth Amendment privilege, “a witness does not do so by simply standing mute.” *Id.* at 181. Moreover, there is dire need for a criminal defendant to expressly invoke their privilege because it ensures “that the Government obtains all the information to which it is entitled.” *Id.* at 184 (quoting *Garner v. United States*, 424 U.S. 648, 658, n. 11 (1976)).

Furthermore, the silence must be linked to the right against self-incrimination. Beyond the evidentiary conclusion the Supreme Court drew in *Salinas*, it found that an individual's constitutional right to remain silent depends on the reason for doing so: only not to incriminate themselves. *Salinas*, 570 U.S. at 189. Therefore, if the defendant's silence is unrelated to incriminating themselves, Fifth Amendment protections would be inapplicable. *Id.*

The Fourth Circuit court held that an arrestee who remains silent and has not received a *Miranda* warning can have their silence used as evidence against them when that silence is observed. *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985). In this case, the court

applied both the *Doyle* and *Fletcher* rules such that it found that the lower court properly admitted a government agent's testimony regarding criminal defendants' post-arrest, pre-*Miranda* silence. *Id.*

Here, the Petitioner never expressly invoked his Fifth Amendment privilege against self-incrimination. His silence cannot be treated as invoking his Fifth Amendment privilege. *Salinas*, 570 U.S. at 187. Additionally, his silence does not provide a clear picture of whether the government obtained all information it was entitled to. Therefore, the privilege was not invoked at the time of his silence.

Moreover, the purpose for Petitioner's silence is unclear. In this situation, it is crucial to know what the Petitioner's reasons were for staying silent. The defendant cannot assert a blank assumption that the government violated his right when the government has no knowledge of the petitioner's intent. Here, the facts are ambiguous as to whether Petitioner's silence was intended to serve as invoking any privilege against self-incrimination, or whether it served another purpose not covered by any constitutional protections. Thus, given the significant ambiguity, Petitioner's silence cannot be viewed as an express invocation of his Fifth Amendment right where no actual reason for his silence can be discerned. *See id.* at 188.

Lastly, the Petitioner's silence was observed by FBI Special Agent Park as she informed Petitioner of the charges against him. Hence, when applying the precedent set by the Supreme Court in *Doyle* and *Fletcher*, the use of this silence as substantive evidence is admissible.

2. The Government Properly Commented on Petitioner's Silence.

Most circuit courts, and a state supreme court, have held that the government may comment on a defendant's post-arrest, pre-*Miranda* silence.

The Seventh Circuit court was one of the first courts to consistently allow a prosecutor to comment on a defendant's post-arrest, pre-*Miranda* silence. *See, e.g., U.S. ex rel. Smith v. Rowe*, 746 F.2d 386, 388 (7th Cir. 1984); *Feela v. Israel*, 727 F.2d 151, 157 (7th Cir. 1984); *United States ex rel. Saulsbury v. Greer*, 702 F.2d 651, 655 (7th Cir. 1983). In *Rowe*, the Petitioner and another witness failed to assert his alibi following his arrest but prior to his trial. *Id.* at 387. The prosecutor commented on that post-arrest, pre-*Miranda* silence in their closing arguments. *Id.* The court held that the prosecutor's use of that "post-arrest silence did not violate petitioner's right to fundamental fairness guaranteed by the Due Process Clause." *Id.* The court reasoned that, even though the Petitioner received the "sort of affirmative assurances embodied in the *Miranda* warnings" from his attorney, that was not "the kinds 'affirmative assurances' to which the *Fletcher* Court was referring." *Id. See Fletcher*, 455 U.S. at 607 ("In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to the post-arrest silence when a defendant chooses to take the stand.").

The Eleventh Circuit court held that the government may comment on a criminal defendant's silence after their arrest but before the reading of the defendant's *Miranda* rights. *United States v. Rivera*, 944 F.2d 1563, 1567 (11th Cir. 1991). In *Rivera*, the court found that any comment made by the government was held to be a harmless error, such that it was an insufficient basis for reversal on that issue. It upheld this decision in subsequent cases. *United States v. Wilchcombe*, 838 F.3d 1179, 1190 (11th Cir. 2016) (holding the government may use a defendant's post-arrest, pre-*Miranda* silence as substantive evidence that may prove the defendant's guilt and any error related to the use of such silence as evidence was a harmless error); *United States v. Cabezas-Montano*, 949 F.3d 567, 595 (11th Cir. 2020) (finding the lower court did not abuse its

discretion by permitting the use of post-arrest, pre-*Miranda* silence as evidence that tends to prove the criminal defendant's guilt).²

Furthermore, the Eighth Circuit court held that the use of a criminal defendant's post-arrest, pre-*Miranda* silence during the government's case-in-chief is constitutional. *United States v. Frazier*, 408 F.3d 1102, 1109 (8th Cir. 2005) (holding the use of defendant's post-arrest, pre-*Miranda* silence was permissible under the Fifth Amendment after he was arrested pursuant to a traffic stop for possession of a controlled substance); *United States v. Osuna-Zepeda*, 416 F.3d 838, 844 (8th Cir. 2005) (holding the use of defendant's post-arrest, pre-*Miranda* silence did not violate the defendant's Fifth Amendment right when he was arrested for methamphetamine conspiracy). The *Frazier* court found that Defendant Frazier was under no obligation to speak at the time of his silence and the government did not induce him to speak. *Frazier*, 408 F.3d at 1111. This court found the facts of *Osuna-Zepeda* analogous to those in *Frazier* such that neither defendant had their Fifth Amendment right against self-incrimination violated. *Osuna-Zepeda*, 416 F.3d at 844.

This principle was followed in the Sixth Circuit. Following *Salinas*, the Sixth Circuit held the government may comment on a defendant's silence if it "did not occur in response to interrogation." *Abby v. Howe*, 742 F.3d 221, 224 (6th Cir. 2014) ("[A] defendant's constitutional right to remain silent is not violated by a prosecutor's comment on his silence before custodial interrogation and before *Miranda* warnings have been given.").

² The following circuits disagree, and do not permit government comment on post-arrest, pre-*Miranda* silence: *See United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007) (holding that it was only proper for the jury to consider the criminal defendant's pre-arrest, pre-*Miranda* silence as substantive evidence of his guilt); *See Jaradat v. Williams*, 591 F.3d 863, 868 (6th Cir. 2010) (upholding *Doyle* such that it is impermissible for the government to comment on a criminal defendant's post-arrest silence as substantive evidence); *See U.S. v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *See U.S. v. Moore*, 104 F.3d 377, 385-390 (D.C. Cir. 1997).

Moreover, the Supreme Court established that the government may cross-examine a criminal defendant about their post-arrest, pre-*Miranda* silence. *Fletcher*, 455 U.S. at 607. This Court narrowed the *Doyle* rule by permitting testimony which observed the criminal defendant's silence before receiving any *Miranda* warning.

Finally, the California Supreme Court has directly addressed the issue of using post-arrest, pre-*Miranda* silence as substantive evidence. Contrary to the Ninth Circuit court, the state supreme court held that post-arrest, pre-*Miranda* silence can be used as substantive evidence of guilt against a criminal defendant. *People v. Tom*, 331 P.3d 303, 316 (Cal. 2014) (“Where a defendant could have invoked his privilege against self-incrimination at any point—but failed to do so—the prosecution's use in its case-in-chief of the defendant's post-arrest, pre-*Miranda* silence in the absence of interrogation cannot be deemed a ‘penalty . . . for exercising a constitutional privilege.’”). The court reasoned that the use of this silence in the absence of custodial interrogation would not “subject him to the ‘cruel trilemma’ of incriminating himself, lying, or demonstrating his guilt by silence.” *Id.*

In applying the Seventh and Eleventh Circuit's consistent holdings, as well as the Fourth, Sixth, Seventh, Eighth, and California holdings, the government must be able to comment on Petitioner's post-arrest, pre-*Miranda* silence and use that silence as substantive evidence of his guilt. Here, the government commented on Petitioner's silence and failure to assert an alibi during its case-in-chief and in the closing argument. This case is analogous to *Rowe* because both cases involved a failure to assert an alibi following their arrest but prior to receiving *Miranda* warnings. Thus, this court should follow the ruling set forth in most circuits, and allow the government comment on Petitioner's silence within its appropriate, albeit limited, capacity.

C. The Petitioner Voluntarily Remained Silent as the Government Did Not Coerce the Petitioner to Forfeit His Fifth Amendment Right against Self Incrimination.

The government's statement of the charges against the Petitioner to him were not recited to intimidate him into forfeiting his privilege. Likewise, an arrest cannot be viewed as government action that induces an arrestee to remain silent. *Fletcher*, 455 U.S. at 606.

A witness' failure to invoke the privilege "must be excused where governmental coercion makes his forfeiture of the privilege involuntary." *Salinas*, 570 U.S. at 178. This exception applies in three scenarios: (1) when the government forces the individual to choose between self-incrimination and some important public benefit, *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 496–98, (1967) (public employment); *Lefkowitz v. Cunningham*, 431 U.S. 801, 804–806 (1977) (public office); *Lefkowitz v. Turley*, 414 U.S. 70, 84–85 (1973) (public contracts); (2) when a regulatory regime makes the act of invoking the privilege—thereby identifying oneself to the government—inherently incriminating, *Leary v. United States*, 395 U.S. 6, 28–29 (1969); and (3) in the "inherently coercive environment created by ... custodial interrogation." *Pennsylvania v. Muniz*, 496 U.S. 582, 599 (1990); *see also Salinas*, 570 U.S. at 184–85 ("Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege 'unless [he] fails to claim [it] after being suitably warned.'").

The three exceptions described above do not apply to the instant case. Here, Petitioner's arrest and reading of his charges in and of itself is insufficient to establish government inducement or coercion to remain silent. *See Fletcher*, 455 U.S. at 606. Therefore, the Petitioner was not coerced into forfeiting his right to remain silent.

CONCLUSION

For the foregoing reasons, the decisions of the United States Court of Appeals for the Thirteenth Circuit should be affirmed.

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Respectfully submitted,

Team 8

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