

**No. 21-125**

IN THE

***SUPREME COURT OF THE UNITED STATES***

OCTOBER TERM 2021

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AUSTIN CODA,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT  
**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF EAST VIRGINIA**

PETITIONER BRIEF

## **QUESTIONS PRESENTED**

1. Whether a ten-year pre-indictment delay that caused the accused actual prejudice violates the Fifth Amendment to the United States Constitution when the delay was a result of negligence on the part of the Government.
2. Whether a defendant's silence while in custody, but before the commencement of custodial interrogation and receipt of *Miranda* warnings can be used as substantive evidence of guilt when upon arrest, he remained silent in response to solely being advised of the charges him.

**TABLE OF CONTENTS**

**QUESTION PRESENTED**.....i

**TABLE OF AUTHORITIES**.....ii

**STATEMENT OF THE CASE**.....1

**SUMMARY OF THE ARGUMENT**.....3

**ARGUMENT**.....7

    I.    **THE TEN-YEAR PRE-INDICTMENT DELAY THAT MR. CODA SUFFERED VIOLATED HIS FIFTH AMENDMENT DUE PROCESS RIGHTS BECAUSE HE EXPERIENCED ACTUAL PREJUDICE FROM TO THE GOVERNMENT’S NEGLIGENCE**.....7

        A. The Petitioner can Prevail on a Claim of Pre-Indictment Delay without Establishing Bad Faith on the Governments Behalf.....9

        B. This Court Should Adopt a Balancing Test to Ensure Optimal Protection of an Accused’s Constitutional Rights that are negatively Impacted by a Pre-indictment Delay.....11

    II.   **MR. CODA’S CONVICTION MUST BE REVERSED BECAUSE THE USE OF HIS POST-ARREST PRE-MIRANDA SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT AT TRIAL VIOLATED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION**..... 15

        A. Mr. Coda’s remained silent in reliance on the inherit privilege against self-incrimination guaranteed by the Fifth Amendment, thus it cannot be used as substantive evidence of guilt.....17

        B. The District Court erred by allowing the prosecution to comment on Mr. Coda’s post-arrest pre-*Miranda* silence at trial because the silence was not probative, and the error was harmful.....21

            i. The silence is not probative and cannot take the form of any admissible evidence.....21

            ii. The District Court erred in admitting the silence as evidence and the error was harmful, thus reversible.....26

**CONCLUSION**.....29

**TABLE OF AUTHORITIES**

| <b><u>CASES</u></b>  | Page(s) |
|--|---------|
| <i>Betterman v. Montana</i> ,<br>136 S. Ct. 1609 (2016) .....                            | 11      |
| <i>BMW of North America, Inc. v. Gore</i> ,<br>517 U.S. 559 (1996) .....                 | 14      |
| <i>Berghuis v. Thompkins</i> ,<br>560 U.S. 370 (2010).....                               | 20      |
| <i>California v. Beheler</i> ,<br>463 U.S. 1121 (1983) .....                             | 18      |
| <i>Doyle v. Ohio</i> ,<br>426 U.S. 610 (1976) .....                                      | 17      |
| <i>Fletcher v. Weir</i> ,<br>455 U.S. 603 (1982).....                                    | 24      |
| <i>Howell v. Barker</i> ,<br>904 F.3d 889 (4th Cir. 1990) .....                          | 14      |
| <i>Jones v. Angelone</i> ,<br>94 F.3d 900 (4th Cir. 1996) .....                          | 13      |
| <i>Mathews v. Eldridge</i> ,<br>424 U.S. 319 (1976) .....                                | 14      |
| <i>Michigan v. Tucker</i> ,<br>417 U.S. 433 (1974) .....                                 | 19      |
| <i>Minnesota v. Murphy</i> ,<br>465 U.S. 420 (1984).....                                 | 18      |
| <i>Moran v. Burbine</i> ,<br>475 U.S. 412 (1986).....                                    | 20      |
| <i>United States v. Hale</i> ,<br>422 U.S. 171 (1975) .....                              | 20      |
| <i>Naposki v. Adams</i> ,<br>2017 U.S. Dist. LEXIS 32537 (C.D. Cal., Mar. 7, 2017) ..... | 12      |
| <i>United States. v. Rhett</i> ,<br>346 Fed.Appx. 816 (9th Cir. 2009).....               | 25      |

|  |                  |
|--|------------------|
| <i>Salinas v. Texas</i>                              |                  |
| 570 U.S. 178 (2013) .....                            | 18               |
| <i>State v. Stokes,</i>                              |                  |
| 350 Or. 44, 248 P.3d 953 (2011) .....                | 14               |
| <i>United States v. Anagnostou,</i>                  |                  |
| 974 F.3d 939 (7th Cir. 1992) .....                   | 14               |
| <i>United States v. Ball,</i>                        |                  |
| 711 F. App'x 838 (9th Cir. 2017) .....               | 13               |
| <i>United States. v. Hampton,</i>                    |                  |
| 843 F. Supp. 2d 571 (E.D.Pa. February 8, 2021) ..... | 24               |
| <i>United States v. Hoosier,</i>                     |                  |
| 542 F.2d 687 (6 <sup>th</sup> Cir. 1976).....        | 23               |
| <i>United States v. Ibarra,</i>                      |                  |
| 493 F.3d 526 (5th Cir. 2007) .....                   | 17               |
| <i>United States v. Leshuk,</i>                      |                  |
| 65 F.3d 1105 (4th Cir. 1995) .....                   | 18               |
| <i>United States v. Lively,</i>                      |                  |
| 852 F.3D 549 (6th Cir. 2017) .....                   | 12               |
| <i>United States v. Lovasco,</i>                     |                  |
| 431 U.S. 783 (1977) .....                            | 7, 10, 11, 13    |
| <i>United States v. Marion,</i>                      |                  |
| 404 U.S. 307 (1971) .....                            | 7, 9, 10, 11, 13 |
| <i>United States v. Mays,</i>                        |                  |
| 549 F.2d 670 (9th Cir. 1977) .....                   | 8, 9, 12, 13     |
| <i>United States v. Moran,</i>                       |                  |
| 759 F.2d 777 (9th Cir. 1985) .....                   | 13, 14           |
| <i>United States v. Newman,</i>                      |                  |
| 493 F.2d 1155 (9th Cir. 1991) .....                  | 26, 27, 28       |
| <i>United States v. Sebetich,</i>                    |                  |
| 776 F.2d 412 (3d Cir. 1985) .....                    | 10               |
| <i>United States v. Shields,</i>                     |                  |
| 571 F.2d. 1115 (9th Cir. 1978) .....                 | 24               |
| <i>United States v. Torres,</i>                      |                  |
| 114 F.3d 520 (5th Cir. 1997) .....                   | 26               |

|  |            |
|--|------------|
| <i>United States v. Uribe-Rios</i> ,<br>558 F.3d 347 (4th Cir. 2009) .....       | 8, 13      |
| <i>United States v. Vitale</i> ,<br>459 F.3d. 190 (2d Cir. 2006) .....           | 26         |
| <i>United States. v. Velarde-Gomez</i> ,<br>269 F.3d. 1023 (9th Cir. 2001) ..... | 25, 26, 27 |
| <i>United States v. Whitehead</i> ,<br>200 F.3d 634 (9th Cir. 2000) .....        | 27         |

**STATUTES**

|                        |    |
|------------------------|----|
| 18 U.S.C. § 3295 ..... | 10 |
| 18 U.S.C.§ 844 .....   | 23 |

**FEDERAL RULES**

|                         |        |
|-------------------------|--------|
| Fed. R. Evid. 401 ..... | 23     |
| Fed R. Evid. 403 .....  | 16, 24 |
| Fed. R. Evid. 801 ..... | 24     |

**OTHER AUTHORITIES**

|   |        |
|---|--------|
| Danielle M. Rang, <i>Student Article: The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials</i> ,<br>66 S.D. L. Rev. 143, 165-66 (2021) .....                   | 12, 13 |
| Ian C Kerr, <i>Beyond Salinas v. Texas: Why an Express Invocation Requirement Should Not Apply to Post-Arrest Silence</i> , 115 CLMLR<br>489, 492 (2016) .....                            | 18     |
| Phyllis Goldfarb, <i>Article: When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions.</i> ,<br>31 Wm. & Mary L. Rev. 607, 623 (1990) .....                 | 9      |
| Marty Skrapka, <i>Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt</i> ,<br>59 OKLA. L. REV. 357, 360 (2006) ..... | 16     |
| Nolan S. Clark, <i>A Circuit Split on the Proper Standard of Pre-Indictment Delays with Governmental Negligence</i> ,<br>50 Cumb. L. Rev. 529, 531 (2020) .....                           | 11     |

## STATEMENT OF THE CASE

### **I. Facts**

Petitioner Austin Coda (“Mr. Coda”) was a hardworking business owner in the small town of Plainview, East Virginia who provided hardware essentials to the citizens of both North Carolina and East Virginia. R. at 1. Mr. Coda first opened his hardware store in January 2002 and quickly gained a large consumer base from both states, as it was the only store of its kind in the area. R. at 1. His store remained profitable for many years. R. at 1.

On December 22, 2010, a tragic explosion occurred at Mr. Coda’s hardware store, forever altering the trajectory of his life and business. R. at 2. By the time firefighters, the entire store was destroyed, leaving Mr. Coda with nothing. Due to the nature of the incident, local fire investigators and agents from the Federal Bureau of Alcohol, Tobacco, and Firearms (“AFT”) opened an investigation to determine the cause of the explosion. R. at 2. Evidence suggested that the cold weather caused faulty gas line to leak and ultimately destroy the store. R. at 2.

The Federal Bureau of Investigation (“FBI”) received a tip shortly after the accident from Sam Johnson (“Mr. Johnson”), Mr. Coda’s neighbor and previous friend who claimed to have details about the explosion. R. at 2. Mr. Johnson explained that he was aware of the hardware store’s insurance policy and the financial struggles Mr. Coda faced due to the recession and the opening of a competing hardware store nearby. R. at 1-2. Subsequently, the FBI shared this information with the United States Attorney’s Office (“The Government”).

The Government then marked Mr. Coda’s case as “low-priority.” At the time, the Government experienced high turnover rates and as a result, Mr. Coda’s case was passed from one Assistant U.S. Attorney to another, causing no progression or increase in priority to the case for almost a decade. R. at 2. The Assistant U.S. Attorney’s chose to prosecute drug trafficking crimes instead of pursuing Mr. Coda’s case. The government explained further that they chose not to prosecute Mr. Coda at the time because prosecution of an unrelated state charge. R. at 2.

In April 2019, nearly ten years after the explosion, the Assistant U.S. Attorney then assigned to Mr. Coda's case noticed that the statute of limitations was about to run. R. at 2. Only then was Mr. Coda apprehended and taken into custody on April 23, 2019. R. at 7. Upon Arrest, FBI Special Agent Park informed Mr. Coda of the charges against him, and Mr. Coda remained silent. R. at 7. The FBI proceeded to read Mr. Coda his *Miranda* rights at the detention center and were ready to begin interrogating him. R. at 7. The Government is now attempting to use Mr. Coda's pre-Miranda silence as substantive evidence of guilt. R. at 7.

Mr. Coda has since lost every alibi defense he had due to the Government's ten-year delay in prosecution. At his evidentiary hearing, Mr. Coda testified that he planned to raise an alibi defense at trial, asserting that he was in New York visiting his family the night of the explosion. R. at 3. Mr. Coda was certain of his whereabouts because the night of the explosion, December 22, 2010, was his birthday. R. at 3. Mr. Coda stressed that every year up until 2015, he would take a Greyhound Bus to visit his family in New York; however, he would not be able to corroborate his defense due to The Government's delay in prosecuting his case. R. at 3. Since the incident, four out of the five family members Mr. Coda visited have passed away. R. at 3. Two family members perished in a car accident in 2018, and two family members died of chronic diseases in 2015 and 2018. R. at 3. Mr. Coda's last surviving family member has been diagnosed with dementia and can no longer remember whether Mr. Coda visited the family in New York on the day of the explosion. R. at 3. Additionally, Mr. Coda cannot produce any of his Greyhound bus records, as Greyhound only stores their records for three years, and his last trip was over three years ago, in 2015. R. at 3. Due to The Governments delay in prosecuting Mr. Coda, he has been left with absolutely no possible way to corroborate his alibi. R. at 3.

I. **Procedural History**

Following his arrest, Mr. Coda filed a Motion to Dismiss his indictment for the pre-indictment delay with The United States District Court for the District Court of East Virginia ("District Court"). R. at 1. Mr. Coda further moved to suppress the evidence of his silence in



response to the charges, arguing that admission of his silence is in clear violation of the Fifth Amendment. R. at 7-8. The District Court incorrectly denied Mr. Coda's pre-trial motions to dismiss based on preindictment delay and to suppress evidence of his post-arrest, but pre-*Miranda* silence. R. at 11.

Mr. Coda appealed the District Court decision to the United States Court of Appeals for the Thirteenth Circuit ("Court of Appeals"), seeking to have his conviction overturned and charges dismissed. R. at 11. Mr. Coda contended that the government's almost ten-year delay caused substantial prejudice and violated the Due Process Clause, despite an absence of evidence of bad faith on the part of the government. R. at 12. The Court of Appeals affirmed the District Court's analysis in full. R. at 12. On July 9, 2021, the Supreme Court of the United States ("Supreme Court") granted Mr. Coda's Petition for Writ of Certiorari. R. at 16.

### **SUMMARY OF THE ARGUMENT**

The Appellate Court incorrectly held that Mr. Coda's motion to dismiss the pre-indictment delay must be denied. Respondent was clearly negligent in pursuing Mr. Coda's case. It is not necessary for the Government to have acted in bad faith; they blame the ten-year delay on high turnovers in the office, causing it to pass between multiple district attorneys, and state that Mr. Coda's case was of "low priority." If the statute of limitations was not about to expire, it is unclear how long the Government would have continued to allow Mr. Coda's case to sit there idly, with every passing year further jeopardizing his Due Process rights. Respondent's negligent conduct caused Mr. Coda to suffer egregious prejudice; he lost every key witness and record that was necessary for his successful defense.

The Appellate Court's decision erroneously relies on case law from circuit courts that misread this Court's leading precedent on pre-indictment delay. The lower courts were merely

given authority by this Court to use their own discretion when assessing what circumstances would allow a pre-indictment delay to be dismissed, which has led to a circuit split. Some circuits interpret the leading precedent to require a defendant to meet both prongs of an exceptionally strict test, that they must show the delay caused actual prejudice and the delay was done in bad faith by the Government to gain a tactical advantage. Not only does this rule make it nearly impossible for an accused to succeed in a dismissal, but this interpretation is plainly incorrect. The leading precedents specify that a bright-line rule *cannot* be created. Instead, each delay must be evaluated on a case-by-case basis, looking at the prejudice suffered by the accused as well as the governments' reason for the delay. For this reason, the Appellate Court must reverse its decision because it relies on non-binding authority, which misinterprets the chief precedents from this Court.

This Court should adopt the balancing test approach that other circuit courts have implemented. A balancing test allows more deference when evaluating the delay; a defendant can prevail if the delay caused them actual and substantial prejudice even if they cannot prove that the Government had acted in bad faith. Other reasons, such as negligence on the part of the Government, can constitute a dismissal of the indictment. Due Process is an integral right promised in the United States Constitution to individuals. Pre-indictment delay issues can be the result of complicated situations and require an intricate analysis rather than a narrow two-prong approach to ensure those freedoms outlined in the constitution are justly upheld.

Petitioner Mr. Coda's Fifth Amendment privilege against self-incrimination was violated when the District Court allowed the prosecution to comment on his post-arrest, pre-*Miranda* silence. In the Government's opening and closing statements at trial, when upon arrest he remained silent in response to simply being advised of the charges against him.

Although it is well-settled that *Miranda* warnings are required when a suspect is both in-custody and subject to custodial interrogation, upon a formal arrest, a suspect may exercise his Fifth Amendment right to remain silent solely by remaining silent. The inherent right to remain silent is derived from the Fifth Amendment's Self-Incrimination clause and should be distinguished from an invocation of that right pursuant to *Miranda* warnings. It is essential to recognize that a formal arrest is a significant restraint on a suspect's freedom. As such, a suspect's arrest means that he is detained and not free to leave, thus "in-custody." As a result of this restraint of freedom upon arrest, any subsequent silence is ambiguous and of little probative value.

Specifically, there is a relevant distinction between an arresting officer's observations as to a suspect's physical response or communicative gestures and a suspect's utter silence upon arrest. Such observations of a suspect's physical response or communicative gestures may provide law enforcement officers with a basis to make reasonable inferences of guilt, whereas absolute silence cannot serve as a basis for a similar inference. To allow an arresting officer to interpret the silence as he or she deems fit undoubtedly adversely affects the accused by allowing the manufacturing of silence to fit a narrative that will be consistent to result in a conviction.

It is impossible to interpret a suspect's silence upon arrest as several explanations may exist for the silence that are completely independent of guilt. To infer such silence as evidence of guilt and fail to take into account that other reasons may exist for that silence is an error in logic. For instance, feelings of fear, intimidation, shock, and humiliation may reasonably set in when an individual is confronted by law enforcement with accusatory statements such that standing mute is a natural reaction. Consequently, to immediately associate such silence with guilt when a suspect is arrested runs afoul to the accused's privileges that are secured by the Fifth Amendment. It follows that it is problematic to allow the prosecution to present this silence as the first and last statement a

prosecutor makes at trial, the resulting damage to the accused is irreparable. Surely, it must be considered that Mr. Coda was in a complete state of shock when arrested nearly ten (10) years later after the fire.

Mr. Coda's conviction must be reversed because the District Court erred in admitting the silence as substantive evidence of guilt and the error was harmful because it adversely and irrevocably affected his rights. First, because the silence is ambiguous it was not relevant or probative of anything, especially the prosecution's burden to prove the elements of the crime beyond a reasonable doubt. Namely, the silence was not probative of his intent to cause the explosion nor that he was in possession of any explosives. Next, even if the silence is relevant, exclusion was warranted because the probative value is substantially outweighed by unfair prejudice.

Mr. Coda's privilege against self-incrimination was violated when the prosecution commented on his silence such that it allowed the jury to make the misguided inferential leaps suggested by the prosecution. As a result, the conviction was not based on establishing the elements of the crime but the prosecution's suggestion that the silence unequivocally infers guilt. Last, the District Court made no attempts to mitigate the damage the silence caused during the trial by way of a limiting or curative instruction. Indeed, the silence could have been admitted as proper impeachment evidence if Mr. Coda took the stand; however, he declined to testify at trial.

Not only did the District Court err in admitting the silence but the admission of the silence was harmful. It is undisputed that if a court's legal error is deemed harmful, the conviction should be reversed. Here, the error was harmful because the only evidence the jury was able to consider was purely circumstantial. The only fact of consequence that could be established to demonstrate criminal liability is that the building that Mr. Coda operated his building out of, engaged in interstate

commerce. In order to establish criminal liability, all of the elements of the crime must be demonstrated beyond a reasonable doubt. Moreover, it is necessary to also consider that due to the Respondent' delay, the evidence Mr. Coda had to corroborate his defense dwindled due to the passage of time and of no fault of his own.

## ARGUMENT

### **I. THE TEN-YEAR PRE-INDICTMENT DELAY THAT MR. CODA SUFFERED VIOLATED HIS FIFTH AMENDMENT DUE PROCESS RIGHTS BECAUSE HE EXPERIENCED ACTUAL PREJUDICE FROM TO THE GOVERNMENT'S NEGLIGENCE**

An unjustified and lengthy pre-indictment delay caused by the Government's negligence violated Mr. Coda's Fifth Amendment Due Process rights. After nearly ten years, Mr. Coda lost every key witness and piece of evidence that was crucial for his defense. Contrary to the circuits that misinterpret this Court's leading precedent, it is *not* necessary for the defendant to show both that (1) the delay caused actual prejudice, and (2) that the delay was intentional on the part of the Government to gain a tactical advantage. Rather, it is imperative for this Court to overrule the narrow two-prong test, as the second prong is nearly impossible for any defendant to prove and leads only to a cruel confiscation of their constitutional rights. Instead adopting a clear balancing test is the best approach to ensure that an individual's Constitutional Due Process rights are protected, rather than in jeopardy, when confronted with a pre-indictment delay.

The two leading pre-indictment delay cases that this Court relies on both provide the elements of the constricting two-prong test in their decisions, however, the cases further specify that a bright-line narrow rule *cannot* be created, and rulings must be made on a case-by-case basis. *United States v. Marion*, 404 U.S. 307, 325 (1971), *United States v. Lovasco*, 431 U.S. 783, 790 (1977). While many circuits erroneously adopt the two elements as a narrow two-prong test without

considering the surrounding reasoning in the Court's decisions, other circuits correctly understand that the two elements were not intended to be used as strict rule and implemented a fair and efficient balancing test. *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977), *United States v. Uribe-Rios*, 588 F.3d 347 (4th Cir. 2009). This test weighs the reason for the delay with the resulting prejudice to the defendant. It does not require a showing of bad faith on the part of the Government for a defendant's success, but instead allows other reasons, such as negligence, to be enough to dismiss charges if the delay in fact caused actual and substantial prejudice to the defendant. *Id.* These drastically different interpretations are a direct result of the absence of a clear guideline. This issue of pre-indictment delay requires proper and specific articulation because constitutional rights are at risk.

Here, while it is conceded that Mr. Coda suffered actual and substantive prejudice due to the Government's delay, the Government erroneously argues that the delay did not violate Mr. Coda's Fifth Amendment rights since there is no evidence of bad faith on their part. Allowing almost ten years to pass before bringing the indictment, solely because Mr. Coda's case was a "low priority," and blaming high turnovers in the office as the cause for the case being passed between multiple Assistant U.S. Attorneys is an act of carelessness and neglect. Mr. Coda's incapability to prove "bad faith" on the part of the Government does not hinder his argument that the delay violated his Fifth Amendment rights because the Government's negligence still resulted in substantial prejudice to Mr. Coda's defense. Although the indictment was brought within the crime's statute of limitations, that alone is only one procedural safeguard, and Due Process still succeeds as protection when a delay causes significant harm.

Respectfully, the Appellate Court's decision should be reversed, allowing Mr. Coda's charges to be dismissed.

**A. The Petitioner can Prevail on a Claim of Pre-Indictment Delay without Establishing Bad Faith on the Government’s Behalf.**

At the expense of justice, many circuit courts misconstrue this Court’s leading precedents on pre-indictment delay because there is confusion as to whether the two elements presented in the decisions must be applied conjunctively in a narrow two-prong test, or disjunctively, allowing them to be weighed and considered independently. These two elements are (1) that the accused suffer actual or substantial prejudice and (2) that the Government had delayed in bad faith. *United States v. Mays*, 549 F.2d 670, 675 (9th Cir. 1977). The first prong of this test is not in contention.

This Court in *United States v. Marion*, 404 U.S. 307 (1971) stated “...the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay *in this case* caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” *Id.* at 324. The precise language of “in this case” is evidence that it was not describing a standard bright-line rule to be used for a Due Process violation analysis; the language was merely describing “one egregious situation that such a standard would likely proscribe.” Phyllis Goldfarb, *Article: When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions.*, 31 Wm. & Mary L. Rev. 607, 623 (1990). *Marion* continued to express “[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a *delicate judgment based on the circumstances of each case.*” *Id.* at 325. It is evident that the *Marion* decision did not intend for a strict two-prong test to be adopted when assessing a pre-indictment delay issue. Justice Brennan, concurring, concluded “[C]learly, a deliberate attempt by the Government to use delay to harm the accused ... is unjustifiable. The same may be true of any governmental delay that is unnecessary, whether intentional or *negligent* in origin. A negligent

failure by the Government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure.” *Id.* at 334.

In *United States v. Lovasco*, 431 U.S. 783, 790 (1977), this Court affirmed that “the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused,” and must not violate any “fundamental conceptions of justice... which define the community’s sense of fair play and decency.” *Lovasco* conceded that since *Marion*, the Court still has not and will not “determine the abstract circumstances in which pre-accusation delay would require dismissing prosecutions,” and allowed the lower courts to use their own discretion on these matters. *Id.* at 796.

Here, the lower court erroneously relied on a Third Circuit case, *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985), to dispel Mr. Coda’s argument that his charges should be dismissed. R. at 4. This reliance is an error as *Sebetich* interprets both *Marion* and *Lovasco* to require the strict two-prong test in pre-indictment delay suits. The lower court also only acknowledged two distinct reasons for a delay: (1) to gain a tactical advantage, or (2) for a good-faith investigative delay. R. at 4. This Court in *Lovasco* merely mentioned those two possible reasons for a delay, recognizing one as not a violation of Due Process — the investigative delay that was examined in *Lovasco*, and one that is a violation— to gain a tactical advantage in bad faith, as was examined in *Marion*. The lower court also ignored that *Lovasco* and *Marion* concede there could be other reasons for delay, but this Court was not ruling on the various possibilities at the time the decisions was made. *Lovasco* at 796.

Further, a Due Process violation may still exist even if the indictment was brought within the statute of limitations. The lower court also uses the statute of limitations as part of its reasoning for not dismissing the charges, insisting that since Mr. Coda’s indictment was brought within the ten-year statute of limitations permitted under 18 U.S.C. § 3295. R. at 5. The lower court argues it



is not a violation of Due Process as the statute “exists as a procedural safeguard against unfair delay.” R. at 5. Although a statute of limitations does exist for that reason, this Court recognized that a statute of limitations is not the only safeguard to protect an accused’s rights, and the Due Process Clause also acts as protection from an oppressive delay. *Lovasco* at 789, quoting *Marion*, 404 U.S. at 324. In a recent decision from this Court in *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016), it was again emphasized that a statute of limitations is the primary protection against delay, but Due Process “may be violated by prosecutorial delay that is tactical *or* reckless.”

Therefore, in this case the mere fact that the statute of limitations was not violated is only one piece of the puzzle when analyzing a Due Process violation. Mr. Coda’s charges were brought within the statute of limitations, but he had suffered actual and substantial prejudice due to Government’s negligence.

Negligence, without acting in bad faith, serves as sufficient grounds as a violation to Due Process rights. Therefore, this Court must reverse the lower court’s decision, as it directly goes against the rulings of both *Marion* and *Lovasco*.

**B. This Court Should Adopt a Balancing Test to Ensure Optimal Protection of an Accused’s Constitutional Rights that are negatively Impacted by a Pre-indictment Delay**

With this Court failing to lay out a specific test for these claims, along with the freedom granted to the lower courts by *Lovasco*, the circuits are split as to what the proper standard is to apply. Nolan S. Clark, *COMMENT: A Circuit Split on the Proper Standard of Pre-Indictment Delays with Governmental Negligence*, 50 *Cumb. L. Rev.* 529, 531 (2020). It is necessary for this Court to establish a concrete method, along with defined reasons when delay on the part of the Government is permissible when analyzing a Due Process claim caused by pre-indictment delay.

A dissent from Justice White in 1988 illustrated the significant disagreements in the lower courts, concluding “[T]he continuing conflict amongst the Circuits on this important question of constitutional law requires resolution by this Court.” *Hoo v. United States*, 484 U.S. 1035, 1036 (1988) (White, J., dissenting). In a California District Court case, although the petitioner argued that government negligence would be sufficient to satisfy a violation of Due Process from pre-indictment delay, the court could not rule in their favor because there was “no clearly established federal law particularly as to whether the test can be satisfied when a habeas petitioner is alleging only government negligence.” *Naposki v. Adams*, 2017 U.S. Dist. LEXIS 32537 (C.D. Cal., Mar. 7, 2017). This Court should adopt a rule that defines the various circumstances, such as negligent conduct, which would require a dismissal if it resulted in a prejudicial delay. The requisite solution would be to adopt the balancing test used by numerous lower courts.

Further, the narrow two-prong test has resulted in countless accused individual’s Due Process rights to be violated. While both prongs required are difficult to prove, the second prong which requires proof of bad faith on the part of the Government is especially difficult, and almost impossible to demonstrate. Danielle M. Rang, *Student Article: The Waiting Game: How Preindictment Delay Threatens Due Process and Fair Trials*, 66 S.D. L. Rev. 143, 165-66 (2021); see *United States v. Mays*, 549 F.2D 670, 677 (9th Cir. 1977) (holding that requiring the defendant to prove, in addition to actual prejudice, a specific bad intent on the part of the Government places an extremely difficult burden on a defendant; one which he may not be able to meet without considerable time and expense); see *United States v. Lively*, 852 F.3D 549, 566 (6th Cir. 2017) (admitting that it is an “uphill battle” for defendant to satisfy both prongs of the test).

Consequently, if a delay was found not be made in “bad faith,” the strict two-prong approach allows the Government to withhold any justification for a lengthy delay, permitting it to be the

result of negligence or indifference. Rang, *supra* at 166. This approach results in zero repercussions to the party responsible and allows the accused to unfairly suffer from no fault of their own. *Id.* In a dissenting opinion from the Tenth Circuit, Judge McKay stated his disagreement of requiring both prejudice and intent on the Government to gain a tactical advantage, stating “I am uncomfortable with our continued adherence to an excessively narrow interpretation of the *Marion* standard for due process violations in cases involving pre-indictment delay. Not only does our interpretation of the standard run counter to the Supreme Court's recent discussion of pre-indictment delay problems in *Lovasco*, but it seems to be removed from the underpinnings of *Marion* itself.” *United States v. Radmall*, 591 F.2d 548, 552 (10th Cir. 1978) (McKay, J., dissenting). The balancing test that the lower courts follow allows the circumstances to be weighed evenly in fairness as addressed by this Court in both *Marion* and *Lovasco*.

The circuits which have adopted the balancing test reason that once actual prejudice is shown (a daunting task in itself), the length *and* the reason of the pre-indictment delay must be weighed to determine if Due Process has been violated. See *United States v. Ball*, 711 F. App'x 838, 842 (9th Cir. 2017), *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985); *United States v. Mays*, 549 F.2d 670, 676-78 (9th Cir. 1977); *United States v. Uribe-Rios*, 558 F.3d 347 (4th Cir. 2009); *Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996).

Delays caused by negligent conduct on the part of the Government, without any evidence of bad faith, shall be considered in the balancing test because “the ultimate responsibility for such circumstances must rest with the government rather than the defendant.” *Moran* at 781; see *Mays* at 678 (holding that there must be some culpability on the Government's part either in the form of intentional misconduct *or* negligence). Negligence is constituted when a case is left untouched and abandoned without any further efforts to investigate. See *Mays* at 679 (holding that the Government

was negligent when the delay was “unusual and unnecessary,” where there was a three-year period absent any effort to prosecute the case); see *Howell v. Barker*, 904 F.3d 889, 895 (4th Cir. 1990) (holding that negligence in prosecuting a defendant without a valid or justifiable investigative reason fails the balancing test when that pre-indictment delay caused prejudice to the defendant); see *United States v. Anagnostou*, 974 F.3d 939, 943 (7<sup>th</sup> Cir. 1992) (holding that a five-year pre-indictment delay caused by the Government’s excessive workload and staff turnover does not suggest bad faith, but is hardly a compelling justification for a delay). These courts acknowledge that if the delay was caused by negligence on the part of the Government, the prejudice suffered by the defendant would need to weigh heavier than in cases where the Government intentionally delayed for a tactical advantage. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985).

This Court should adopt a multi-factor balancing test, as it uses for many other constitutional Due Process issues instead of bright-line rules. *State v. Stokes*, 350 Or. 44, 59, 248 P.3d 953, 962 (2011). These include balancing tests for analyzing whether a punitive damages award violates due process, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), and to determine whether a property or liberty violation violates Due Process, see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Stokes* at 59. The lower court erroneously argues that a balancing test should not be used for pre-indictment delay issues because the prejudice suffered by the defendant and the reasons for the delay are “distinct considerations” and there are no clear standards to apply. R. at 5. A pre-indictment violation should not be treated any differently than other Due Process violations; they deserve the same deference of weighing the harm with the benefit to protect an accused’s constitutional rights.

Mr. Coda and many other defendants in his position are in desperate need for this Court to establish the balancing test approach when faced with pre-indictment delay. The narrow two-prong

test that the Appellate court used is erroneous as it failed to protect Mr. Coda's Constitutional Due Process rights. Mr. Coda suffered actual prejudice due to the Government's negligent delay indicting him; it is not required under any precedent from this Court that he needed to show evidence that the Government had delayed in bad faith.

The Government is likely to argue that the majority of circuits rule in their favor, but for the reasons stated above, those circuits have misinterpreted those cases from this Court. Due Process rights are complex and deserve more protection than a narrow bright-line rule. It requires an approach that allows courts to distinguish the unique facts of each case, because every citizen who is accused of a crime deserves their constitutional rights to be protected zealously. Whether a delay was caused by a prolonged investigation, a tactic used by the Government for their benefit, or plain negligence, the result is the same: the defendant is confronted with constitutionally protected rights to be violated. If the court does not adopt a balancing test to look at every element and reason for delay individually, they are knowingly allowing constitutional violations to continue in the lower courts. Therefore, Mr. Coda's Fifth Amendment Due Process rights were violated by the Government's negligence in pursuing his case for nearly ten years.

**II. MR. CODA'S CONVICTION MUST BE REVERSED BECAUSE THE USE OF HIS POST-ARREST PRE-MIRANDA SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT AT TRIAL VIOLATED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION**

A suspect's silence upon arrest must be protected by the inherit privilege against self-incrimination guaranteed by the Fifth Amendment because to allow silence, under the circumstances of arrest, to function as a statement, circumvents the privilege. Moreover, an accused's silence post-arrest but prior to receipt of *Miranda* warnings and custodial interrogation warrants protection because of the deprivation of freedom. Here, Mr. Coda's silence occurred while

he was hand-cuffed, at the direction of the police, when the arresting agents advised him of the criminal charges brought against him. R. at 7.

Mr. Coda remained silent by relying on his Fifth Amendment privilege against self-incrimination because he was unable to invoke his right to remain silent pursuant to *Miranda* warnings. Because *Miranda* warnings are not required until a suspect is both in custody and subjected to interrogation, the gap between arrest and interrogation becomes an unprotected moment where silence may be admissible evidence against the accused. Consequentially, this pre-interrogation trigger runs afoul to the inherit right to remain silent under the Fifth Amendment because post-arrest yet pre-interrogation, the accused remains in the custody and at the control of law enforcement. Considering the circumstances that surround an arrest, allowing the silence to function as the equivalent of a statement deprives the accused of the privilege against self-incrimination under the Fifth Amendment. As such, Mr. Coda was vulnerable with no recourse during the time that elapsed between his arrest and the commencement of interrogation.

“The use of silence at trial must comport with both evidentiary and constitutional law.” Marty Skrapka, Note, *Silence Should Be Golden: A Case Against the Use of a Defendant's Post-Arrest, Pre-Miranda Silence as Evidence of Guilt*, 59 OKLA. L. REV. 357, 360 (2006). The prosecution must demonstrate that the silence is relevant, not unfairly prejudicial, and not barred as hearsay. As such, under Fed. R. Evid. 403, the trial court has the discretion to exclude even relevant evidence “if its probative value is substantially outweighed by the danger of...unfair prejudice.” Fed. R. Evid. 403. Mr. Coda’s post-arrest silence is not relevant, cannot take the form of any admissible evidence, and its probative value is substantially outweighed by unfair prejudice.

There are no reasonable inferences that an arresting law enforcement officer can make from an arrestee’s silence. Indeed, allowing such inferences to be made by law enforcement contravenes

the interests of justice and adversely and unalterably affects the rights of the accused. To warrant reversal of a conviction, this Court must find that the District Court abused its discretion in admitting the evidence and that the District Court's error was harmful. *United States v. Ibarra*, 493 F.3d 526, 532 (5<sup>th</sup> Cir. 2007) (citing *United States v. Gutierrez-Farias*, 294 F.3d 657, 662 (5<sup>th</sup> Cir. 2002); *United States v. Williams*, 957 F.2d 1238, 1242 (5<sup>th</sup> Cir.1992)). "Under the harmless error standard, reversal is required if there is a 'reasonable possibility that the improperly admitted evidence contributed to the conviction.'" *Ibarra*, 493 at 532. Here, the prosecution's comment on Mr. Coda's post-arrest, pre-*Miranda* silence in its opening and closing arguments reasonably and substantially contributed to his conviction as Respondent's remaining evidence was purely circumstantial.

Therefore, this Court should reverse Mr. Coda's conviction and dismiss the charges against him because the District Court abused its discretion by allowing the prosecution to comment on Mr. Coda's post-arrest silence, thus compelling him to testify as a witness against himself in violation of the Fifth Amendment and such error was harmful.

**A. Mr. Coda's remained silent in reliance on the inherit privilege against self-incrimination guaranteed by the Fifth Amendment, thus it cannot be used as substantive evidence of guilt**

When a criminal defendant declines to testify in a criminal proceeding, the Fifth Amendment "forbids...comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 609-615 (1965); *United States v. Patane*, 549 U.S.630, 637 (2007). "[T]he warnings mandated by [*Miranda* are] a "prophylactic means of safeguarding Fifth Amendment rights." *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). While the *Miranda* warnings do not confer an express right, the warnings operate as procedural safeguard and carry an "implicit assurance" that silence will not adversely affect the accused. *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37 (1984). Because *Miranda* warnings are not required until a suspect is both in-custody and subjected to interrogation,

the post-arrest setting is a period of time where essentially, anything the suspect says or doesn't say can be used against him. Ian C. Kerr, Note, *Beyond Salinas v. Texas: Why an Express Invocation Requirement Should Not Apply to Post-Arrest Silence*, 115 CLMLR 489, 492 (2016).

Allowing silence to function as statement and as an inference of guilt is specifically problematic in the post-arrest setting because of the circumstances of arrest. It is evident that upon a suspect's formal arrest, the suspect is in custody and deprived of freedom in a significant way such that the suspect's movement is at the direction of law enforcement. *See e.g. Miranda*, 384 at 444 (holding that custody may be demonstrated when a suspect is deprived of his freedom of action in any significant way.) *Compare California v. Beheler*, 463 U.S. 1121, 1125 (1983) (holding that custody can be demonstrated by a suspect's formal arrest or when the suspect objectively believes that the detainment is a formal arrest), *With Minnesota v. Murphy*, 465 U.S. 420, 421 (1984) (noting that the defendant was not "in-custody" because he was not formally arrested nor had a significant restraint on his freedom of movement). Notwithstanding a formal arrest, simply placing a suspect in handcuffs is a relevant factor that may rise to the level of a significant deprivation of freedom. *United States v. Leshuk*, 65 F.3d 1105, 1109, 1110 (4th Cir. 1995). *cf. U.S. v. Griffin*, 922 F.2d 1343, 1350 (8th Cir. 1990) (stating that when a suspect is informed by law enforcement that he is not under arrest, there can be no finding of custody). It is undisputed that Mr. Coda was deprived of his freedom in a significant way when he was handcuffed and placed under arrest. R. at 7.

As a result, Mr. Coda was detained and not free to leave while confronted with accusations. These facts, *inter alia*, in the case at bar, are clearly distinguishable from the facts in *Salina v. Texas*. In *Salinas v. Texas*, the defendant was suspected of murder, he voluntarily agreed to turn over his gun for ballistics testing and voluntarily agreed to accompany the police officers to the station for an interview. 570 U.S. 178 (2013). Moreover, while at the police station, the defendant voluntarily



answered questions about the murder but fell silent when asked if the ballistics testing of the gun he surrendered would match the shell casings at the scene of the murder. *Id.*

In *Salinas*, this Court in affirming the defendant's conviction, emphasized the distinction between the pre-custodial setting and the post-custodial setting noting that because the defendant voluntarily agreed to the interview, was not under arrest, and was free to leave, his statements fell outside the scope of *Miranda*, 384 at 186. The post-arrest setting, and post-interrogation setting share the most essential factor in common, detainment. Conversely, the pre-arrest setting, and post-arrest setting do not share the very opposite in common, freedom of movement. It follows, that the circumstances of detainment warrant that Mr. Coda's silence should have been protected under the Fifth Amendment.

The absence of *Miranda* warnings in a post-arrest setting plays a significant role as to whether a suspect can voluntarily invoke his right to remain silent. Namely, a suspect who voluntarily gives a verbal statement pre-interrogation after receipt of *Miranda* warnings is deemed to have waived the right to remain silent yet a suspect who remains silent post-arrest, pre-interrogation, and pre-*Miranda* is not treated as having invoked that right. *See Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974) (noting that a suspect may be exercising his right to remain silent by remaining silent only when proper *Miranda* warnings are given). Silence upon arrest cannot be definitively interpreted as guilt without the proper procedural safeguards in place. While the underlying policies and goals under *Miranda* are to protect the accused from coercive police tactics that are used to obtain compelled and incriminating statements, the post-arrest setting is not safe from the threat of those same tactics simply because no interrogation actually takes place at that moment. Kerr, *Supra* at 506.

Here, while there was no express coercion, the absence of the procedural safeguard of the right to remain silent secured by *Miranda* prevents the accused from exercising his Fifth Amendment right voluntarily. Instead, implicit coercion is invited and can take place by delaying *Miranda* warnings and interrogation to manufacture silence such that despite guilt, the silence functions as a statement. Because Mr. Coda, after arrest was in the sole custody of law enforcement until reaching the detention center, for a certain period of time, the agents had a window of opportunity to engage in coercive police tactics while also implicitly engaging in coercive police tactics by allowing Mr. Coda's silence to further accrue as evidence against him. To resolve this, as a matter of policy, silence should be protected upon arrest.

Because the post-arrest setting is trapped between two extremes, the deprivation of freedom and the pre-interrogation trigger, a suspect is deprived of the opportunity to voluntarily invoke his Fifth Amendment right under *Miranda*. See *Salinas*, 570 at 186-191 (noting that when considering the admissibility of silence, it is essential to determine whether the defendant was deprived of the right to voluntarily invoke the right to remain silent). If Mr. Coda were mirandized upon arrest, his silence could not have been used against him. Although on its face, these warnings do not guarantee that silence “[c]arries no penalty,” the “[a]ssurance is implicit” when a suspect is properly mirandized. *United States v. Hale*, 422 U.S. 171, 177 (1975). In *Berghuis v. Thompkins*, this Court held that the defendant waived his right to remain silent under *Miranda* by voluntarily responding in the affirmative to the police officer's incriminating question. 560 U.S. 370, 387 (2010).

*Berghuis* and *Salinas*, are distinguishable for similar reasons, in both cases, the defendant volunteered statements. Thus, by remaining silent he implicitly relied on his Fifth Amendment privilege because he did not waive it by voluntarily offering statements. See *Moran v. Burbine*, 475 U.S. 412, 421 (1986)(noting that the relinquishment of the right to remain silent must be a

“[p]roduct of a free and deliberate choice rather than intimidation, coercion or deception” and the relinquishment must be made with a [f]ull awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it”).

Here, Mr. Coda remained absolutely silent. In *Berghuis*, the central issue was whether he properly invoked or waived his right to remain silent after receiving his *Miranda* warning. *Id.* at 389. Unlike the defendant in *Berghuis*, Mr. Coda was neither read his *Miranda* rights nor subjected to custodial interrogation. Moreover, in *Berghuis*, the prosecution did not seek to admit the defendant’s silence, rather his statement, “yes” in response to the police officer’s question regarding the murder stating, “did you pray to God to forgive [you] for shooting that boy down?” *Id.* The privilege against self-incrimination cannot be asserted where a suspect, who received and understood the *Miranda* warnings, offers statements voluntarily. *Id.*

Therefore, considering the effect and circumstances of arrest and the absence of *Miranda* warnings, Mr. Coda remained silent in reliance of his privilege against self-incrimination guaranteed by the Fifth Amendment as he did not volunteer statements and was in-custody.

**B. The District Court erred by allowing the prosecution to comment on Mr. Coda’s post-arrest pre-*Miranda* silence at trial because the silence was not probative, and the error was harmful**

**i. The silence is not probative and cannot take the form of any admissible evidence**

While Respondent contends that Mr. Coda’s silence is probative evidence of guilt, the silence is not probative to satisfy the prosecution’s only burden in a criminal trial, proving guilt beyond a reasonable doubt. Considering the ambiguity that surrounds silence as a statement, it cannot be deemed probative. In *Hale*, the Supreme Court affirmed the reversal of the defendant’s robbery conviction on the grounds that the trial court erred by allowing his silence to be used against him

for any purpose because such silence is so ambiguous that it lacks probative value. *Id.* at 176. In that case, the court considered the following facts: (1) the defendant's continued assertions of innocence throughout his proceedings; (2) the defendant being solely in the presence of police; and (3) that the defendant was targeted by an eyewitness. *Id.*

Analogous to *Hale*, Mr. Coda indeed asserted his innocence at the inception of the criminal proceedings when he raised his alibi defense at his evidentiary hearing. R. at 3. However, prior to the commencement of trial, Mr. Coda did not have an obligation to assert an alibi defense nor reason to believe that if he did the circumstances would have changed. To that end, the Respondent would have been inclined to use or illicit any statements made upon arrest in the same manner it used Mr. Coda's silence. Additionally, Mr. Coda was silent upon arrest where for an undetermined period of time, he was in the sole custody and presence of the police on April 23, 2019. R. at 7. Similarly, Mr. Coda, like the defendant in *Hale*, was the target of a tip by a witness who alleged personal knowledge of Mr. Coda's guilt. R. at 2. Because silence upon arrest is inherently ambiguous it cannot be unequivocally held against the accused. *Hale*, 422 at 177. It is impossible to interpret silence. Thus, it is not inconceivable to fathom that several explanations may exist as to why a suspect may remain silent upon arrest or when faced with accusations by law enforcement. To wit, regardless of guilt, a suspect may find the circumstances of arrest so intimidating, inducing a state of shock or fear such that standing mute is a natural reaction. *Id.*

The silence is simply too ambiguous to consider probative when various scenarios may explain that the silence manifested for a reason completely independent of an accused's guilt or even unintentional silence. Skrapka, *Supra* at 362 (2006). Specifically, it is alleged that Mr. Coda intentionally caused the explosion on January 22, 2010; however, he was arrested on April 19, 2019, nearly ten (10) years later. R. at 2,7. When considering the certainty with which the arresting agents

immediately and unreasonably associated Mr. Coda's silence with guilt, it is unreasonable not to consider that Mr. Coda may have been in a state of shock when arrested almost ten (10) years later. Notwithstanding, a thorough investigation as to the cause of the explosion by the ATF, intentional wrongdoing was not initially suspected. R. at 2. Rather than the explosion was caused by cold weather and a faulty pipeline. R. at 2. As such, the surrounding facts corroborate a stronger inference that Mr. Coda's arrest was utterly shocking rather than he remained silent because he was guilty.

Considering mere silence upon arrest, the Respondent incorrectly asserts the silence is probative because Mr. Coda failed to assert an alibi or provide an exculpatory story; however, he had no obligation to do so because there are no reasonable inferences that can be made from the silence. *cf. United States v. Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976) (affirming the Defendant's conviction and finding that the defendant's failure to deny a statement made in his presence combined with corroborating witness testimony, created a sequence of events that supporting that it was "[p]robable human behavior" to deny the statement if it were untrue).

Mere silence upon arrest should not be deemed relevant because it is not an affirmative statement and does not translate to anything of consequence to a criminal prosecution. "Relevant evidence is that which has any tendency to make any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Here, the admission of Mr. Coda's silence was not relevant evidence and should have been excluded because it did not serve to satisfy any of the elements under 18 U.S.C. § 844(i). Specifically, the silence did not make it more or less probable that he intended to cause the explosion nor that he was in possession of any explosives. In this case, although the prosecution could have used Mr. Coda's post-arrest, pre-*Miranda* silence against him in the form of impeachment evidence

if he took the stand, that limited exception did not apply because he declined to testify. *See Fletcher v. Weir*, 455 U.S. 603, 607-607 (1982) (holding defendant's post-arrest, pre-*Miranda* silence was admissible against the defendant as impeachment evidence when he voluntarily took the stand).

Although the prosecution was able to overcome the relevancy hurdle, the silence should have been excluded because it was unfairly prejudicial against Mr. Coda. Under Fed. R. Evid. 403, a trial court has the discretion to “[e]xclude relevant evidence if its probative value is substantially outweighed by the dangers of one or more of the following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” The silence was prejudicial because the prosecutor commented on it during its opening and closing statements to the jury. As a result, there is a high probability that the jury weighed heavily on the silence in its deliberations by relying on it as an inference of guilt, leading the jury to make misguided inferential leaps not based on fact or corroborating evidence. *See United States v. Shields*, 571 F.2d. 1115, 1119 (9th Cir. 1978) (holding that the trial court did not err in declining to exercise its discretion to exclude a witness' testimony, which merely suggested appellant's silence at an IRS conference under Fed. R. Evid. 403).

While silence is admissible as a non-hearsay adoptive statement under Fed. R. Evid. 801(d)(2)(B), it should not be admissible as substantive evidence of guilt in a post-arrest, pre-*Miranda* setting because of “[t]he danger of unfair prejudice by misleading the jury, substantially outweigh the probative value of the alleged adoptive statement.” Skrapka, *Supra, Id.* at 388. The party offering the adoptive statement must establish, “whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced to the statement.” *United States v. Hampton*, 843 F. Supp. 2d 571, 579

(E.D.Pa. February 8, 2021). Surely, it would prove extremely difficult if not impossible for Respondent to prove that Mr. Coda, under the circumstances of his arrest, agreed and understood that his silence could be used adversely against him.

Similarly, the silence cannot take the form of evidence as admissible demeanor evidence pursuant to the police officer's observations. The Respondent incorrectly argues that the arresting agents simply observed Mr. Coda's silence and thus such common-sense observations are admissible. R. at 9. However, Mr. Coda did not exhibit expressive conduct to the extent that the agent was denied the ability to use his common sense and experience to make any reasonable inferences of guilt. Also, Mr. Coda's failure to respond or react by remaining silent fails as admissible demeanor evidence. *See Velarde-Gomez*, 269 at 1028 (holding that the police officer's testimony regarding the defendant's lack of physical or emotional reaction regarding a large amount of marijuana found in his gas tank was not admissible demeanor evidence because it was synonymous with silence.)

To that end, silence must be distinguished from expressive gestures or physical responses that can reasonably be associated with guilt, lying, or nervousness. By way of example, in *Salinas*, the defendant did not simply remain silent, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.* at 182. In that case, the officer's testimony regarding the defendant's expressive behavior was dependent on his observations and such behavior can reasonably correlate to an inference of guilt. *Id. See United States. v. Rhett*, 346 Fed.Appx. 816, 817 (9th Cir. 2009)(holding that "the district court did not abuse its discretion when it admitted evidence that [the defendant] defecated in his pants at the point when border patrol officers were discovering illegally imported marijuana in the trailer he was

pulling.) Here, because Mr. Coda’s silence cannot be interpreted as demeanor evidence because he did not exhibit similar expressive behavior or gestures that may reasonably infer guilt.

**ii. The District Court erred in admitting the silence as evidence and the error was harmful, thus reversible**

Here, the District Court abused its discretion by allowing the Prosecution to comment on Mr. Coda’s silence to the jury. A District Court’s evidentiary rulings in a criminal case are initially reviewed for abuse of discretion and if the reviewing court finds that an abuse of discretion occurred, it applies the harmless error doctrine. *United States v. Torres*, 114 F.3d 520, 526 (5th Cir. 1997). Once the reviewing court determines that an error resulted from the trial court’s abuse of discretion, it must apply the harmless error doctrine to determine if the error affected a substantial right of the defendant, such that a reversal of the ruling is warranted. *Id.* The Government bears the burden of proving that a constitutional error was harmless beyond a reasonable doubt. *Velarde-Gomez*, 269 F.3d at 1035. (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In reviewing an evidentiary challenge, the court will view the evidence in the light most favorable to the Government. *United States v. Vitale*, 459 F.3d. 190, 191 (2d Cir. 2006).

“[T]he jury is likely to assign much more weight to the defendant’s previous silence than is warranted.” *Hale*, 422 U.S. at 180. A trial court may mitigate the harmful error by providing the jury with curative or limiting instructions; however, the record is void of any indication that the District Court made any attempts to mitigate the prejudice caused to Mr. Coda. *See United States v. Newman*, 493 F.2d 1155, 1156 (9th Cir. 1991) (recognizing the District Court’s curative instruction to the jury to not consider “for any purposes whatsoever” the Agent’s testimony on direct examination referencing the defendant’s silence). Here, the district court clearly abused its discretion in allowing the prosecution to comment on Mr. Coda’s post arrest, pre-*Miranda* silence



in its opening and closing arguments as such silence was unfairly prejudicial infringing on his Fifth Amendment privilege against self-incrimination. *See United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000) (holding that the District Court erred by allowing the prosecution to comment on the defendant's post-arrest, pre-*Miranda* silence because it infringed on his privilege against self-incrimination).

In *Newman*, the court properly reversed defendant's conviction and remanded the case to the District Court holding that the prosecution violated defendant's constitutional rights by eliciting testimony about his post-arrest silence constituting a harmful error. *Id.* In that case, the Defendant appealed his criminal conviction for allegedly setting fire to lands in the Coronado National Forest in southern Arizona. *Id.* at 1155. On appeal, Defendant argued that the Agent's testimony regarding his post-arrest silence was substantially prejudicial. *Id.* On two occasions during the agent's testimony, the judge had to give the jury instructions regarding the improper testimony on defendant's post-arrest silence, one curative and one limiting. *Id.* at 1156-57. Here, as in *Newman*, the prosecutor commented on the silence twice, directly to the jury in his opening and closing arguments. However, here no such mitigating instruction was given to lessen the harm.

The prosecution's comment on Mr. Coda's silence was harmful under the harmless error standard and reversal of his conviction is warranted. Under the harmless error standard, this Court must determine whether "absent the prosecutor's allusion to [Mr. Coda's silence], it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *Velarde-Gomez*, 269 F.3d at 1034. (citing *United States v. Hastings*, 461 U.S. 499, 510-11 (1983)). In this case, it cannot be said that absent the prosecution's comment on Mr. Coda's silence in its case-in-chief and closing arguments at trial, the Respondent's remaining circumstantial evidence would have convinced the jury of his guilt beyond a reasonable doubt.

There are three factors (“*Newman* factors”) to consider in the context of silence: “[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.” *Id.* at 1158. Relying on these factors, the district court concluded that the Agent’s testimony regarding Defendant’s post-arrest silence was not harmless error beyond a reasonable doubt for the following reasons: (1) the prosecution elicited several “[e]xtensive and prejudicial” statements from the Agent regarding the silence; (2) despite the trial judge’s jury instructions, [t]he effect of those statements, intended or otherwise, was to suggest to the jury that Newman must have been guilty because an innocent person would not have remained silent,” and (3) the weakness of the Government’s evidence, such that the remaining evidence of Newman’s guilt was all circumstantial. *Id.* Specifically, with regards to the strength of the Government’s evidence, the court recognized that there was no evidence that anyone actually saw Newman start the fire. *Id.*

This court should apply the *Newman* factors here because the factors are practical in determining whether an error was harmless. Applying the *Newman* factors here, first, the prosecution prejudicially commented on Mr. Coda’s silence twice, in its opening and closing arguments to the jury. Second, it is undisputed that the silence was admitted solely as evidence of guilt. Thus, it follows that the jury strongly considered the silence during its deliberations. Despite, the fact that the building that exploded was where Mr. Coda’s business - that engaged in interstate commerce – operated out of, and the tip of an uncorroborated witness, Sam Johnson, the Respondent’s evidence was woefully weak. Additionally, due to the Respondent’s delay in indicting Mr. Coda, he was not able to present the requisite evidence to corroborate his defense. Namely, he was out of state at the time of the incident, four (4) out of five (5) of his corroborating

witnesses are deceased and one (1) lacks capacity as she cannot recount the events due to dementia, and the corroborating greyhound bus records reflecting his travel were destroyed. R. at 3.

Therefore, Mr. Coda's conviction must be reversed because the District Court's erred by allowing the prosecution to comment on his post-arrest, pre-*Miranda* silence and such error was harmful.

### **CONCLUSION**

For the foregoing reasons, Mr. Coda respectfully requests that this Court reverse the Appellate Court's decision, dismissing Appellant's charges, and reversing his conviction.

Date: September 13, 2021

By: /s/ \_\_\_\_\_

Team 9

Counsel for Petitioner