No. _____

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# IN THE
# SUPREME COURT OF THE UNITED STATES

_____

ATTICUS SLITER-MATIAS,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

_____

**On Petition for Allowance of Appeal To The United States Court of Appeals for the Third Circuit**

_____

**PETITION FOR A WRIT OF CERTIORARI**

_____

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## QUESTIONS PRESENTED

Whether the Third Circuit Court of Appeals erred in affirming the District Court's judgment of conviction and sentence by failing to find that the district court committed plain error when it permitted the government to present evidence of appellant invoking his fifth amendment right against self-incrimination?

## PARTIES TO THE PROCEEDING

The Petitioner is Atticus Sliter-Matias, an individual. The Respondent is the United States of America. There is no party with an interest to disclose pursuant to Rule 29(6).

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## PETITION FOR A WRIT OF CERTIORARI

Mr. Atticus Sliter-Matias respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit entered a Non-Precedential Opinion on December 2, 2020, which is unreported. The opinion and order of the District Court in this matter is also unreported.

## JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The time for filing a Petition for Writ of Certiorari began to run on December 28, 2020, when the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing and Rehearing *En Banc*. Due to the COVID pandemic, the extension to file a Petition for Writ of Certiorari expires after May 27, 2021.

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF FACTS

### A. Nature of the Case

This is an appeal of a judgment of conviction and sentence of Mr. Sliter-Matias entered in this action on April 15, 2019, by the U.S. District Court for the Western District of Pennsylvania, Criminal No. 17-cr-32-1. Mr. Sliter-Matias alleges error in the trial court's allowance of evidence of Mr. Sliter-Matias' invocation of his Fifth Amendment right against self-incrimination.

### B. Proceedings Below

On February 7, 2017, the United States charged Mr. Sliter-Matias with two counts of mail fraud in violation of 18 U.S.C. § 1341. (A. 0016-0026). The jury trial in this matter against Mr. Sliter-Matias commenced on May 23, 2018. Some of the evidence that the government presented at trial focused on the search of Mr. Sliter-Matias' residence on July 5, 2016. As part of that presentation, the United States introduced evidence of Mr. Sliter-Matias' invocation of his Fifth Amendment rights at the time of the search of his home.

The government presented this evidence through the testimony of one of the investigating agents, U.S. Postal Inspector Lindsay Weckerly, as follows:

> Q. Postal Inspector Weckerly, during the search of the residence, did the defendant agree to be interviewed?
>
> A. **Initially, he did not**, but later during our search, he initiated contact with law enforcement and agreed to be interviewed.
>
> Q. When you say, "he initiated contact," he asked to talk to you guys?
>
> A. Correct.
>
> Q. Who interviewed him?

A. Myself and Postal Inspector Mike Adams.

Q. And was he provided his what we call Miranda warnings?

A. He was. **In both instances both when he declined to speak with us** and later when he said that he did want to speak with us, he was provided his rights both times, you know, the right to remain silent, the right to an attorney, that he could stop the interview at any point. The first time, he did not waive those rights and the second time he did waive those rights and agreed to talk to us.

(A. 0594-0595). (Emphasis added).

On May 30, 2018, at the close of the government's evidence, Mr. Sliter-Matias made an oral motion for judgment of acquittal pursuant to Fed. R.Crim.P. 29, asserting that, even viewing the government's evidence in a light most favorable to the government, a reasonable jury could not reach a verdict of guilty as to any of the charges against Mr. Sliter-Matias. (A. 0638-0639). The trial court denied that motion. (A. 0639). Mr. Sliter-Matias then presented evidence in his defense. (A. 0639-0715). After presenting the aforementioned evidence, Mr. Sliter-Matias rested his defense. (A. 0715). At the close of all evidence, Mr. Sliter-Matias renewed his motion for Judgment of Acquittal, which was denied by the trial court. (A. 0715).

On May 31, 2018, the jury returned and announced its verdict of guilty against Mr. Sliter-Matias, as to both counts in the indictment. (A. 0762-0763). The jury was discharged by the court on that date. (A. 0763). On June 14, 2018, Mr. Sliter-Matias filed a motion for a new trial or to set aside jury verdict. (A. 0033-0037). On June 18, 2018, the trial court issued an order denying Mr. Sliter-Matias' motion for a new trial. (A. 0015).

On April 15, 2019, after a hearing on sentencing, the trial court entered an order of judgment, conviction and sentence. (A. 0002-0010). The court sentenced Mr. Sliter-Matias as follows:

a. imprisonment for a term of 46 months;

b. supervised release for 3 years at Counts I and II with such terms to run concurrently;

c. special assessment of $200.00;

d. restitution in the amount of $379,591.95.

(A. 0002-0010).

On July 10, 2019, Mr. Sliter-Matias filed an appeal of the District Court judgment to the Third Circuit Court of Appeals. On December 2, 2020, the Third Circuit Court of Appeals, without argument, issued a judgment affirming the District Court order entered on April 15, 2019. (a. 0781-0790). On December 14, 2020, Mr. Sliter-Matias filed a Petition for Hearing and Rehearing *En Banc* to the Third Circuit Court of Appeals. On December 28, 2020, the Third Circuit Court of Appeals denied Mr. Sliter-Matias' Petition for Hearing and Rehearing *En Banc.* Mr. Sliter-Matias is eligible to be released from prison on January 6, 2022. (a. 0793-0794).

### C. Statement of Related Cases and Proceedings

There are no known separate cases and proceedings related to the matter appellant has brought before this Court.

## REASONS FOR GRANTING THE PETITION

*THE THIRD CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S JUDGMENT OF CONVICTION AND SENTENCE BY FAILING TO FIND THAT THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT PERMITTED THE GOVERNMENT TO PRESENT EVIDENCE OF APPELLANT INVOKING HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.*

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." The privilege "permits a person to refuse to answer questions, in formal or informal proceedings, where the answers might be used to incriminate him in future criminal proceedings." U.S. v. Ramos, 685 F.3d 120, 126 (2d Cir. 2012) see also Miranda v. Arizona, 384 U.S. 436 (1966).

It also allows a person to express his desire to remain silent, or to remain silent until he has the assistance of an attorney. Wainwright v. Greenfield, 474 U.S. 284, 295 n. 13 (1986) ("With

respect to post-Miranda warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.").

As described above, at trial, the United States introduced evidence of Mr. Sliter-Matias' invocation of his Fifth Amendment rights at the time of the search of his home. The testimony regarding the Miranda warnings forms utilized by investigator Weckerly demonstrated that Mr. Sliter-Matias was informed of his Fifth Amendment Rights; was assured that the exercise of that right could not be held against him; and that he thereafter exercised his right to remain silent. (A. 0595-0597).

It is axiomatic that Mr. Sliter-Matias held the privilege to remain silent, particularly after being informed of his rights by Postal Inspector Weckerly. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman v. U.S., 341 U.S. 479, 486–87 (1951). Based on the circumstances of the questioning, Defendant had good cause for concern that his answers might be "injurious" and be used to incriminate him in future criminal proceedings.

As stated in U.S. v. Edwards, 792 F.3d 355, 357-58 (3d Cir. 2015), "Miranda warnings carry the Government's 'implicit assurance' that an arrestee's invocation of the Fifth Amendment right to remain silent will not later be used against him." Gov't of the V.I. v. Martinez, 620 F.3d 321, 335 (3d Cir. 2010) (quoting Gov't of the V.I. v. Davis, 561 F.3d 159, 163-64 (3d Cir. 2009)). Further, following the inferences from Edwards, the Government's 'implicit assurance' not to use an arrestee's invocation of the Fifth Amendment has the effect of "prohibit[ing] a prosecutor from impeaching a defendant with his or her post-Miranda silence." U.S. v. Lopez, 818 F.3d 125, 126 (3d. Cir. 2015). The Court in Lopez stated that this improper impeachment by the prosecution

"burden[s] the defendant's right to remain silent with a costly, unconstitutional penalty." Id. Therefore, it is a violation of the Fifth Amendment and due process "for a prosecutor to cause the jury to draw an impermissible inference of guilt from a defendant's post-arrest silence" after a defendant is Mirandized. Id. (quoting Hassine v. Zimmerman, 160 F.3d 941, 947 (3d Cir. 1998)); see also U.S. v. Shannon, 766 F.3d 346, 354 (3d Cir. 2014) ("[T]he rights secured by Doyle v. Ohio, 426 U.S. 610 (1976), apply in equal effect 'to federal prosecutions under the Fifth Amendment.'" (quoting U.S. v. Agee, 597 F.2d 350, 354 n. 11 (3d Cir. 1979))).

Courts will overturn a defendant's convictions when the government violates a defendant's Fifth Amendment rights. In U.S. v. Waller, 654 F.3d 430, 437 (3d. Cir. 2011), the Court vacated the defendant's conviction in part because the government violated the defendant's Fifth Amendment rights. At the end of trial, the district court allowed the jury instructions to "infer that [the defendant] had the requisite intent to deliver the heroin from the fact that he exercised his right to remain silent after receiving his Miranda warnings. This is precisely what the Fifth Amendment, as explicated in Doyle, forbids." Id. Further, the court noted "'[b]ecause a defendant's post-Miranda warning silence could be nothing more than an invocation of his right to silence, it would be fundamentally unfair to permit a breach of that assurance by allowing' his failure to give an exculpatory account to the police after receiving the warnings to be invoked later as inculpatory evidence against him." Id. quoting Hassine v Zimmerman, 160 F.3d 941, 947 (3d Cir. 1998).

Other U.S. Courts of Appeals have held that such statements elicited during the United States' case is improper. See U.S. v. Okatan, 728 F.3d 111, 117, 122 (2d Cir. 2013) citing Combs v. Coyle, 205 F.3d 269, 286 (6th Cir. 2000) (where defendant "clearly invoked the privilege against self-incrimination ... the prosecutor's comment on [his] prearrest silence in its case in chief ... violated [the] Fifth Amendment"); U.S. v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991) ("[O]nce a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to

any Fifth Amendment rights which defendant exercised."); Coppola v. Powell, 878 F.2d 1562, 1567-68 (1st Cir. 1989) (where defendant's "statement invoked his privilege against self-incrimination," his "constitutional rights were violated by the use of his statement in the prosecutor's case in chief").

The danger of presenting evidence of a defendant's invocation of his Fifth Amendment right to remain silent is particularly consequential when the issue at hand turns on credibility and the government's attempt to impeach the defendant. The Third Circuit further addressed the issue of improper impeachment in Lopez, where it cautioned that "a prosecutor could diminish a defendant's credibility by suggesting that a defendant's silence raises suspicion. . ." Lopez 818 F.3d at 126. In Lopez, the defendant's credibility was at stake. Consequently, the Third Circuit noted, "[t]he jurors were faced with the decision of whether to believe the officer's testimony . . . or to believe Lopez's testimony that the police framed him. In light of this conflicting testimony and the paucity of other evidence, Lopez's credibility was crucial to his defense." Id.

The danger of presenting evidence of a defendant's invocation of his Fifth Amendment right to remain silent was on full display in this case. The trial record is replete with government challenges to Mr. Sliter-Matias' credibility. This came in both the substance and tone of the government's cross-examination of Mr. Sliter-Matias:

> Q. You have a hard time understanding when you are making a lie and when you are not?
>
> A. No. I didn't say that.
>
> Q. But you don't think the business of creating fake accounts under fake names meant to go by eBay's policy is not a lie?
>
> A. I have never seen anybody prosecuted for eBay stealth activity ever.
>
> Q. I'm not asking if anyone was prosecuted. I'm asking if it's a lie.

A. What exactly constitutes a lie?

Q. I don't know, sir. You are on the stand under oath. Do you have a problem with the concept of a lie?

A. No.

(A. 0691).

The concern with the use of the evidence regarding an accused's invocation of his Fifth Amendment rights is further exacerbated when counsel takes steps to assert the defendant is apt to change his position or testimony regarding the facts at issue. See Lopez, 818 F.3d at 130 (where the court stated that the government's use of the defendant's silence against him in cross examination "was intended to raise the impermissible inference that the defendant fabricated his story sometime before trial and that the defendant's testimony was therefore not credible.") During its cross-examination of Mr. Sliter-Matias, on multiple occasions the government undermined Mr. Sliter-Matias' credibility regarding the interview by Inspector Weckerly: "Sir, your story today is completely different than the story you told Inspector Weckerly, wasn't it?" (A. 0700). Even though that was a reference to an alleged change in the version of events from the time of the interview to trial, the argumentative question could also have been used by the jury to speculate regarding the reason for Mr. Sliter-Matias' original decision to remain silent.

Here, the jury was given evidence from which they could infer that Mr. Sliter-Matias delayed his interview so that he could fabricate a story. The fact of invoking Fifth Amendment rights, however, should never be a consideration for the jury. In this case, the government's presentation of that evidence caused that to be a material part of the evidence that the jury considered.

The fact that Mr. Sliter-Matias' trial counsel did not object should not serve as a reason to allow this violation of his constitutional rights to stand. As stated in U.S. v. Calabretta, 831 F.3d 128, 131-32 (3d Cir. 2016), when the party seeking review has failed to preserve the issue in the

trial court, the Court of Appeals reviews for plain error. The rule governing plain error provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed.R.Crim.P. 52(b).

To establish plain error, an appellant "must show that (1) the District Court erred; (2) the error was clear or obvious, rather than subject to reasonable dispute; and (3) the error affected the appellant's substantial rights, which in the ordinary course means that there is a reasonable probability that the error affected the outcome of the proceedings." Calabretta, 831 F.3d at 132 (citing U.S. v. Marcus, 560 U.S. 258, 262 (2010); U.S. v. Tai, 750 F.3d 309, 313-14 (3d Cir. 2014)). If all three elements are established, then the Court may exercise its discretion to award relief. See U.S. v. Olano, 507 U.S. 725, 736 (1993).

There is no more fundamental substantial right than an individual's right to be free from government compulsion to give evidence against himself. The sensitivity of this issue, combined with the undeniably adverse inference that a finder of fact would make against the defendant in such circumstances, makes protection against disclosure of the invocation of the right to remain silent critical in every trial. In Lopez, the court determined that the government's violation of the defendant's rights "satisfie[d] plain error review." 818 F.3d at 131. It went on to state that "[b]ecause Lopez's defense depended entirely on his credibility as compared to the officer's credibility, we find that the Government's impermissible impeachment of Lopez's testimony diminished his credibility in a manner that created a reasonable probability that this error affected the outcome of his trial." Id. The court ultimately concluded that the taint of injustice from the government's violation was enough to "undermine the fairness, integrity, and reputation of judicial proceeding." Id.

We are now faced with the same adverse inference in the present case. The determination of credibility was certainly critical in the trial of this matter, and the manner that it played out

adversely impacted Mr. Sliter-Matias' rights. As a result, it is more than reasonable to believe that this evidence affected the outcome of the proceedings to Mr. Sliter-Matias' detriment. On this basis, the judgment of conviction and sentence should be reversed, and Mr. Sliter-Matias should be granted a new trial.

The Third Circuit Court of Appeals' decision regarding this issue mentions the Fifth Amendment only once, and that is only for the purpose of stating the issue raised by Mr. Sliter-Matias. The Panel's decision also does not cite or otherwise address any precedential or persuasive judicial decisions in its analysis of this fundamental issue. Accordingly, it is not believed that the gravity of the evidence and its impact on the result of the trial was fully apprehended and analyzed by the Panel.

In this case, given that the government's theme was largely based on the assertion that Mr. Sliter-Matias was a liar and a fraud, testimony about his invocation of his right to remain silent, and later waiver was very damaging. See Lopez (where the Government "violated Doyle by impeaching Lopez's trial testimony with his post-Miranda silence and by inviting the jury to infer that Lopez's testimony was a fabrication of this silence.") Here, the government's entire case rested upon the theme that Sliter-Matias was (1) untrustworthy; and (2) attempting to use various schemes and stories to get an acquittal. For example, the government's cross-examination of Sliter-Matias emphasized changes in his "story," and suggested that he may have invoked the Fifth Amendment to delay his interview to give himself an opportunity to fabricate an explanation. (A. 0702.) As argued previously, the delivery by the government of the "hint that [Mr. Sliter-Matias'] silence [was] inconsistent with later statements produc[ed] the inference forbidden by Doyle and imperil[ed] the verdict." See Splunge v. Parke, 160 F.3d 369, 373 (7th Cir. 1998). As further discussed by the Seventh Circuit Court of Appeals in Splunge:

> Prosecutors who invite the jury's attention to a defendant's silence walk a narrow path from which it is easy to fall. Any hint that the silence is inconsistent with later

> statements produces the inference forbidden by Doyle and imperils the verdict. Unless the defendant tries to persuade the jury that any statement he made was involuntary, why take the risk?

Splunge, 160 F.3d at 373.

The testimony at issue here was far more than just a passing reference to Sliter-Matias' invocation of his Miranda rights of the type that courts have found do not violate the Fifth Amendment under Doyle. Indeed, the testimony here went far beyond the "isolated reference" or a "mere mention" that might be otherwise found to be acceptable. Here, the Postal Inspector—led by the prosecutor's direct and express inquiry into the topic—testified multiple times that Mr. Sliter-Matias exercised his right to remain silent. First, the prosecutor asked Postal Inspector Weckerly whether Mr. Sliter-Matias agreed to be interviewed, to which Postal Inspector Weckerly answered "Initially, he did not … ." (A. 0595-0597.) Then, the prosecutor asked Postal Inspector Weckerly whether she provided Mr. Sliter-Matias Miranda warnings. (A. 0595-0597.) In response, Postal Inspector Weckerly made two additional statements about Mr. Sliter-Matias' exercise of his Miranda rights. (Id.) First, she stated that Mr. Sliter-Matias was given his Miranda rights "when he declined to speak with us … ." (Id.) Later in that same response, Postal Inspector Weckerly again noted that Mr. Sliter-Matias initially "did not waive those rights." (Id.) (emphasis added).

Moreover, this testimony served no purpose other than to penalize Mr. Sliter-Matias. In fact, Splunge identifies only *one* reason to introduce testimony about a defendant's silence: when "the defendant tries to persuade the jury that any statement he made was involuntary … ." Splunge, 160 F.3d at 373. Yet the government did not (and cannot) argue that the testimony here was introduced for that purpose. Mr. Sliter-Matias never argued at trial that his statements to Postal Inspector Weckerly were involuntary and he never made that argument in a pre-trial suppression motion.

In summary, there was no appropriate bases for the presentation of evidence that Mr. Sliter-Matias invoked his right to remain silent. The admission of this evidence affected his substantial rights. Under the circumstances outlined above, there is a reasonable probability that the error affected the outcome of the proceedings, including the jury's deliberations and verdict. Accordingly, the Panel erred in denying Mr. Sliter-Matias' appeal and request for a new trial.

## CONCLUSION

For the reasons stated above, it is respectfully requested that this Petition for Writ of Certiorari be granted so that this honorable Court may fully review Mr. Sliter-Matias' assertion of error, and reverse the District Court's judgment of conviction and sentence.

Respectfully submitted:

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