No. ____

IN THE

Supreme Court of the United States

MARK MARINO ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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AUGUST 1, 2024

QUESTIONS PRESENTED

I. Whether a defendant's Fifth Amendment privilege against self-incrimination was violated where a sentencing court draws an adverse inference regarding future dangerousness from a defendant's decision to remain silent at his sentencing hearing?

II. Whether the petitioner's Fourth Amendment right to be free from unreasonable searches and seizures was violated where the search warrant's affidavit was based on the petitioner's mere propinquity to another that was independently suspected of online criminal activity?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Mark Marino, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

United States v. Marino, 3:20-cr-00094-TJC-LLL (November 7, 2022).

United States Court of Appeals (11th Cir.)

United States v. Marino, 2024 WL 1430697 (11th Cir. April 3, 2024).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Mark Marino, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The U.S. District Court for the Middle District of Florida, Jacksonville Division, adjudicated Mr. Marino guilty of one count of attempted sex trafficking of a child who had not attained the age of 14 years, in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(a); three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, in violation of 18 U.S.C. §§ 2251(a) and (e); two counts of receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1); and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). (Appendix A). Mr. Marino appealed his judgment and sentence to the Eleventh Circuit Court of Appeals, and it affirmed the district court in its opinion which was reported at *United States v. Marino*, 2024 WL 1430697 (11th Cir. April 3, 2024). (Appendix B).

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was issued on April 3, 2024. (Appendix A). This Court later extended the time within which Mr. Marino may petition for a writ of certiorari until August 1, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. V:

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

STATEMENT OF THE CASE

While investigating the finances of an individual who advertised child pornography for sale, officers found that the individual had two Bitcoin addresses, one associated with the child pornography business and one that was not. *Marino v. United States,* 2024 WL 1430697, at *1 (11th Cir. April 3, 2024). The officers investigated both addresses and saw that Mr. Marino had used Bitcoin to send money to the account that was not associated with child pornography. *Id.* They did not find any evidence that child pornography was sought by Mr. Marino or sent to him. *See Id.* That single transaction formed the basis of an affidavit for a search warrant that was executed at Mr. Marino's residence.

Mr. Marino was charged by indictment in the United States District Court for the Middle District of Florida with one count of attempted sex trafficking of a child who had not attained the age of 14 years, in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(a); three counts of enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, in violation of 18 U.S.C. §§ 2251(a) and (e); two counts of receipt of child pornography, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1); and one count of possession of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). (Appendix A).

Mr. Marino filed a motion to suppress the physical evidence obtained during the execution of a search warrant at his residence, including evidence obtained from forensic examination of the items seized, as well as his statements to law enforcement as a result of the illegal search. *Marino*, 2024 WL 1430697 at * 1. He

later amended the motion to suppress to include all evidence obtained as a result of a second search warrant as it was fruit of the poisonous tree. After conducting an evidentiary hearing, the district court denied the motion. *Id.* at *5.

Mr. Marino waived his right to a jury trial and proceeded to a stipulated bench trial, at which he was found guilty as charged; but preserved his right to have the court's order denying his motion to suppress reviewed on direct criminal appeal.

At sentencing, Mr. Marino chose not to address the district court. *Id.* at *6. The district court complained that Mr. Marino's silence deprived the district court of any insight as to his current state of mind, and future dangerousness. *Id.* The district court varied downward and sentenced Mr. Marino to 660 months' imprisonment to be followed by a life term of supervised release. *Id.*

Mr. Marino appealed his judgment and sentence to the United States Court of Appeals for the Eleventh Circuit. (Appendix B). He argued that the district court erred in denying the motion to suppress. *Marino*, 2024 WL 1430697 at * 1. Specifically, Mr. Marino argued that the affidavit in support of the search warrant was facially insufficient to establish probable cause. *Id.* The affidavit was based on a single Bitcoin transaction that Mr. Marino had with a known criminal, but the evidence did not reflect that the transaction was criminal in nature. *Id.* Additionally, Mr. Marino argued that the affidavit contained material misrepresentations and omissions; that the information in the affidavit was stale, and that the good faith and inevitable discovery exceptions were inapplicable. *Id.*

Finally, Mr. Marino argued that the district court judge held his silence against him at sentencing. *Id.* at *6-7. The Eleventh Circuit affirmed Mr. Marino's conviction holding that the district court was correct in finding there was probable cause, that the challenged statements did not negate probable cause, that the information was not stale, and that the officers acted in good faith. *Id.* at *1-5. The Eleventh Circuit also held that the sentencing court did not draw an adverse inference against Mr. Marino and this Court had expressly left open the issue of whether "a sentencing court may properly draw an adverse inference from a defendant's silence in considering lack of remorse or acceptance of responsibility (i.e. sentencing considerations similar to the future dangerousness factor relevant here)." *Id.* at *7.

REASONS FOR GRANTING THE PETITION

I. Whether a defendant's Fifth Amendment privilege against self-incrimination is violated where a sentencing court draws an adverse inference regarding future dangerousness from a defendant's decision to remain silent at his sentencing hearing?

This Court has long held the Fifth Amendment's privilege against self-incrimination does not permit a negative inference from a defendant's decision not to testify. *See Griffin v. California,* 380 U.S. 609 (1965). In *Mitchell v. United States*, 526 U.S. 314 (1999), this Court held the privilege applied to sentencing proceedings, stating that a court may not draw an adverse inference from a defendant's silence in determining facts relating to circumstances and details of the crime. However, in *Mitchell,* this Court also stated that it declined to address whether a sentencing court could consider a defendant's silence in determining "lack of remorse" or "acceptance of responsibility," because that was a separate question which was not before *Mitchell Co*urt. *Id.* at 330. Since this Court's decision in *Mitchell,* the lower courts have struggled to determine the scope of the Fifth Amendment privilege against self-incrimination in sentencing proceedings. Several have mistakenly construed this Court's decision not to address the question as actually creating an exception to Fifth Amendment. The Eleventh Circuit has now expanded the 'exception' to allow adverse inferences regarding future dangerousness. Whether any negative inference from a defendant's silence at sentencing is permissible is an important question of federal law that has not been, but should be, settled by this

Court, especially since the Eleventh Circuit has decided this question in a way that that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c).

This Court should grant certiorari and address this matter for two reasons. First, this Court has previously held that the Fifth Amendment applies equally to trial and sentencing proceedings. *See Griffin v. California,* 380 U.S. 609, 614 (1965); *Estelle v. Smith,* 451 U.S. 454 (1981). But the Circuit Courts of Appeal have misconstrued dicta in *Mitchell,* concluding that this Court created an exception that allows a sentencing court to consider a defendant's silence when determining lack of remorse or acceptance of responsibility. Second, the Eleventh Circuit has expanded on this erroneous interpretation of *Mitchell* to now include determinations of "future dangerousness." *Marino,* 2024 WL 143069 at *7. The Eleventh Circuit now allows sentencing courts to rely on negative inferences from a defendant's silence when considering the factors of 18 U.S.C. § 3553(a). *Id.* This Court should quickly address this matter, before the circuit court's imagined *Mitchell* exception vitiates all defendant's Fifth Amendment rights at sentencing.

A. The Circuit Courts are not following this Court's precedent that the Fifth Amendment privilege against self-incrimination applies to sentencing hearings.

The Fifth Amendment of the United States Constitution protects the rights of a criminal defendant to remain silent at his trial. U.S. CONST. amend. V. Furthermore, this Court held in *Griffin*, the Fifth Amendment's privilege against self-incrimination does not permit any negative inference from a defendant's decision not to testify at trial.

In *Griffin v. California*, this Court firmly established that a defendant's silence could not be used to determine his guilt, going so far as to analogize allowing comments on a defendant's failure to testify as stepping back into the "inquisitorial system of criminal justice." *Griffin*, 380 U.S. 609, 614 (1965) (quoting *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964)). The *Griffin* Court noted that to allow a defendant's silence to be used against him was to impose a penalty on that defendant for asserting a fundamental right that the defendant is unconditionally entitled to, noting that imposing such a penalty "cuts down on the privilege by making its assertion costly." *Id*.

This Court later recognized that the right also applied to sentencing proceedings. In *Carter v. Kentucky*, 450 U.S. 288 (1981), and *Estelle,* this Court clearly established that a criminal defendant is "entitled to a requested no-adverse-inference instruction in the penalty phase of a capital trial." *White v. Woodall,* 572 U.S. 415, 428 (U.S. 2014). In *Carter*, this Court held a trial judge "has the constitutional obligation, upon proper request," to give a requested no-adverse-inference instruction in order "to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." 450 U.S. at 305. The concern was that without the no-adverse-inference instruction, a jury may "draw from the defendant's silence broad inferences of guilt," which would thwart the "full and free exercise of the [Fifth Amendment] privilege." *Id*. at 301, 305.

In *Estelle*, this Court held that "so far as the protection of the Fifth Amendment privilege is concerned," it could "discern no basis to distinguish

between the guilt and penalty phases" of a defendant's "capital murder trial." 451 U.S. at 462–463. *Estelle* was a habeas case where the State introduced the defendant's compelled statements to a psychiatrist at the penalty phase, in an attempt to show the defendant's future dangerousness. *Id.* at 456. The State argued that the defendant "was not entitled to the protection of the Fifth Amendment because [his statements were] used only to determine punishment after conviction, not to establish guilt." *Id.* at 462. This Court rejected that argument holding that the Fifth Amendment applies equally to the penalty phase and the guilt phase of a capital trial. *Id*. at 462–463.

In *Mitchell v. United States*, 526 U.S. 314 (1999), a noncapital case, this Court again affirmed that the Fifth Amendment privilege against self-incrimination applied to sentencing proceedings holding that a sentencing court may not draw adverse inference from a defendant's silence in determining facts relating to circumstances and details of the crime. In *Mitchell,* the defendant pled guilty to drug offenses and reserved the right to contest the drug amount. *Id.* at 317. At sentencing, the defendant chose not to testify, but the sentencing court held that, as a consequence of her guilty plea, she did not have the right to remain silent. *Id.* at 319. This Court held that defendants retain the privilege against self-incrimination throughout their entire criminal case, including sentencing proceedings. *Id.* at 325-6.

In *Mitchell*, this Court stated that it was not addressing the question of whether a sentencing court could consider a defendant's silence in determining

whether there is a lack of remorse or acceptance of responsibility "for purposes of the downward adjustment provided in § 3E1.1." *Mitchell,* 526 at 330. This Court concluded by stating that it was a separate question that "is not before us, and we express no view on it." *Id.* Despite this Court's clear statement, the circuit courts have read this passage to intentionally create an exception to the Fifth Amendment. Thus, appellate courts have held, based on a misunderstanding of dicta in *Mitchell*, that it is permissible for a sentencing court to consider a defendant's silence in determining a defendant's lack of remorse or acceptance of responsibility.

The Circuit Courts of Appeal have reached different conclusions as to how to apply the Fifth Amendment to sentencing proceedings. In *United States v. Caro*, 597 F.3d 608, 629–630 (4th Cir. 2010), the Fourth Circuit noted that *Mitchell* "reserved the question of whether silence bears upon lack of remorse," but reasoned that "*Estelle* and *Mitchell* together suggest that the Fifth Amendment may well prohibit considering a defendant's silence regarding the nonstatutory aggravating factor of lack of remorse." In contrast, in *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008), the Seventh Circuit held that while the right to remain silent persists at sentencing, "silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse," which "is properly considered at sentencing."

B. The Eleventh Circuit permits sentencing courts to consider a defendant's sentence when considering future dangerousness, in violation of the Fifth Amendment.

The Eleventh Circuit has recognized that the question left open in *Mitchell* is still open. *Marino,* 2024 WL 143069 at *7. However, it held in the instant case that

the defendant cannot show that the sentencing court drew an adverse inference, because he cannot show that he was punished for his silence. *Id.* In imposing Mr. Marino's sentence of 55 years (a downward variance), the sentencing court repeatedly complained about his silence saying that it "didn't have any insight at all. . .as to [Mr. Marino's] state of mind or why [it] would be comforted that he would not in the future engage in this same type of predatory conduct." At the close of the sentencing hearing defense counsel objected to the sentencing court giving weight to the fact that Mr. Marino declined to give a statement. The Court stated that it did not give Mr. Marino a higher sentence because he did not to speak, but asserted that he was entitled to take his silence into consideration when considering his future dangerousness. In other words, the sentencing court did draw an adverse inference, in that it took his silence into consideration, but there is no remedy for that in the Eleventh Circuit as this issue remains unresolved.

Mr. Marino's case is an appropriate vehicle for review of this issue because, the issue is properly preserved and argued below. Thus, this Court should accept jurisdiction of the instant case and provide much needed guidance to the Circuit Court on the privilege against self-incrimination at sentencing.

II. Whether the petitioner's Fourth Amendment right to be free from unreasonable searches and seizures was violated where the search warrant's affidavit was based on the petitioner's mere propinquity to another that was independently suspected of online criminal activity?

This Court should accept this case in order to address the issue of what constitutes "mere propinquity" in online transactions.

While independently investigating an advertisement by a purveyor of child pornography, law enforcement agents found that the individual in question had two Bitcoin addresses – one used in his child pornography business and one that was not. *See Marino,* 2024 WL 1430697 at *1-3. The agents found that Mr. Marino had sent $56.38 to the latter Bitcoin address. *Id.* There was no evidence that the separate account was ever used for child pornography sales. There was no evidence that any child pornography was sought by Mr. Marino or received by him. The affidavit contained only this transaction, an agent's account of receiving child pornography after making payments to the Bitcoins address associated with the business, and the agent's opinion that collectors of child pornography tend to hoard the images for a long time. *Id.* In other words, the affidavit did not contain any evidence that Mr. Marino had committed a crime. There was merely an inference that any interaction with a criminal must be criminal in nature. This guilt by association was upheld by the Eleventh Circuit when it affirmed the district court's denial of Mr. Marino's motion to suppress.

This Court has long held that mere proximity to suspected criminal activity does not, without more, provide probable cause to search an individual. In 1948, in *United States v. Di Re*, 332 U.S. 581, 583–587 (1948), this Court held that a passenger in a suspect's car did not forfeit his rights merely by his presence in vehicle. The Court held that it was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id*. at 586. *See also Sibron v. New York*, 392 U.S. 40, 62–63

(1968). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra v. Illinois*, 100 S.Ct. 338, 342 (1979). Just as proximity cannot provide probable cause to search an individual, "proximity" online, without additional inculpatory evidence, should not be found to establish probable cause for a search warrant.

The Circuit Courts of Appeal have struggled to uniformly apply this Court's holdings on the Fourth Amendment in light of today's increasingly online world. For example, in *United States v. White*, 80 M.J. 322 (CAAF 2020), the court faced a very similar factual situation as the one in *Marino*, but reached the opposite result. Mr. White was also found to have had a single monetary transaction with an online purveyor of child pornography. *Id.* at 325. But unlike Mr. Marino, Mr. White also had sent 189 electronic transfers to unknown persons in a city in the Philippines known to harbor those who engage in child sex trafficking. *Id.* Regardless, the court in *White* properly applied this Court's holding in *Ybarra* and held that Mr. White's mere propinquity to a criminal was not sufficient to give rise to probable cause.

If the Courts of Appeal should adopt the Eleventh Circuit's view on this issue, then many innocent people may find themselves subject to search warrant based on innocuous online transactions. To find that a single interaction can provide probable cause is akin to finding a defendant guilty by association. Not every financial

transaction a criminal does is criminal. If having a financial transaction with a criminal was sufficient to find probable cause, then warrants could be issued whenever someone accidentally came across a criminal in their life. Few people, if any, have the means to run criminal background checks on every merchant, uber driver, or pizza delivery man in their life.

Mr. Marino's case is an appropriate vehicle for review of this issue because, as this issue was fully examined by both the district and the appellate court. Thus, this Court should accept jurisdiction of the instant case and provide much needed guidance to the Circuit Courts on what constitution probable cause and what constitutes mere propinquity in online transactions.

CONCLUSION

For the above reasons, Mr. Marino respectfully requests that this Court grant his petition.

Respectfully submitted,

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