SUPREME COURT OF THE UNITED STATES

No. 97–7541

AMANDA MITCHELL, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April 5, 1999]

JUSTICE KENNEDY delivered the opinion of the Court.

Two questions relating to a criminal defendant's Fifth Amendment privilege against self-incrimination are presented to us. The first is whether, in the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. We hold the plea is not a waiver of the privilege at sentencing. The second question is whether, in determining facts about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. We hold a sentencing court may not draw the adverse inference.

I

Petitioner Amanda Mitchell and 22 other defendants were indicted for offenses arising from a conspiracy to distribute cocaine in Allentown, Pennsylvania, from 1989 to 1994. According to the indictment, the leader of the conspiracy, Harry Riddick, obtained large quantities of cocaine and resold the drug through couriers and street sellers, including petitioner. Petitioner was charged with

one count of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U. S. C. §846, and with three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of §860(a). In 1995, without any plea agreement, petitioner pleaded guilty to all four counts. She reserved the right to contest the drug quantity attributable to her under the conspiracy count, and the District Court advised her the drug quantity would be determined at her sentencing hearing.

Before accepting the plea, the District Court made the inquiries required by Rule 11 of the Federal Rules of Criminal Procedure. Informing petitioner of the penalties for her offenses, the District Judge advised her, "the range of punishment here is very complex because we don't know how much cocaine the Government's going to be able to show you were involved in." App. 39. The judge told petitioner she faced a mandatory minimum of one year in prison under §860 for distributing cocaine near a school or playground. She also faced "serious punishment depending on the quantity involved" for the conspiracy, with a mandatory minimum of 10 years in prison under §841 if she could be held responsible for at least 5 kilograms but less than 15 kilograms of cocaine. *Id*., at 42. By pleading guilty, the District Court explained, petitioner would waive various rights, including "the right at trial to remain silent under the Fifth Amendment." *Id.*, at 45.

After the Government explained the factual basis for the charges, the judge, having put petitioner under oath, asked her, "Did you do that?" Petitioner answered, "Some of it." *Id.*, at 47. She indicated that, although present for one of the transactions charged as a substantive cocaine distribution count, she had not herself delivered the cocaine to the customer. The Government maintained she was liable nevertheless as an aider and abettor of the delivery by another courier. After discussion with her counsel, petitioner reaffirmed her intention to plead guilty

to all the charges. The District Court noted she might have a defense to one count on the theory that she was present but did not aid or abet the transaction. Petitioner again confirmed her intention to plead guilty, and the District Court accepted the plea.

In 1996, nine of petitioner's original 22 codefendants went to trial. Three other co-defendants had pleaded guilty and agreed to cooperate with the Government. They testified petitioner was a regular seller for ringleader Riddick. At petitioner's sentencing hearing, the three adopted their trial testimony, and one of them furnished additional information on the amount of cocaine petitioner sold. According to him, petitioner worked two to three times a week, selling 1½ to 2 ounces of cocaine a day, from April 1992 to August 1992. Then, from August 1992 to December 1993 she worked three to five times a week, and from January 1994 to March 1994 she was one of those in charge of cocaine distribution for Riddick. On cross-examination, the codefendant conceded he had not seen petitioner on a regular basis during the relevant period.

Both petitioner and the Government referred to trial testimony by one Alvitta Mack, who had made a series of drug buys under the supervision of law enforcement agents, including three purchases from petitioner totaling two ounces of cocaine in 1992. Petitioner put on no evidence at sentencing, nor did she testify to rebut the Government's evidence about drug quantity. Her counsel argued, however, that the three documented sales to Mack constituted the only evidence of sufficient reliability to be credited in determining the quantity of cocaine attributable to her for sentencing purposes.

After this testimony at the sentencing hearing the District Court ruled that, as a consequence of her guilty plea, petitioner had no right to remain silent with respect to the details of her crimes. The court found credible the testimony indicating petitioner had been a drug courier on a

regular basis. Sales of 1½ to 2 ounces twice a week for a year and a half put her over the 5-kilogram threshold, thus mandating a minimum sentence of 10 years. "One of the things" persuading the court to rely on the testimony of the codefendants was petitioner's "not testifying to the contrary." App. 95.

The District Judge told petitioner:

> "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. . . . I'm taking the position that you should come forward and explain your side of this issue.
>
> "Your counsel's taking the position that you have a Fifth Amendment right not to. . . . If he's– if it's determined by a higher Court that he's right in that regard, I would be willing to bring you back for resentencing. And if you– if– and then I might take a closer look at the [codefendants'] testimony.'" *Id.*, at 98–99.

The District Court sentenced petitioner to the statutory minimum of 10 years of imprisonment, 6 years of supervised release, and a special assessment of $200.

The Court of Appeals for the Third Circuit affirmed the sentence. 122 F. 3d 185 (1997). According to the Court of Appeals, "By voluntarily and knowingly pleading guilty to the offense Mitchell waived her Fifth Amendment privilege." *Id.*, at 189. The court acknowledged other Circuits have held a witness can "claim the Fifth Amendment privilege if his or her testimony might be used to enhance his or her sentence," *id.*, at 190 (citing *United States* v. *Garcia*, 78 F. 3d 1457, 1463, and n. 8 (CA10), cert. denied, 517 U. S. 1239 (1996)), but it said this rule "does not withstand analysis," 122 F. 3d, at 191. The court thought it would be illogical to "fragment the sentencing process," retaining the privilege against self-incrimination as to one or more components of the crime while waiving it as to

others. *Ibid.* Petitioner's reservation of the right to contest the amount of drugs attributable to her did not change the court's analysis. In the Court of Appeals' view:

> "Mitchell opened herself up to the full range of possible sentences when she was told during her plea colloquy that the penalty for conspiring to distribute cocaine had a maximum of life imprisonment. While her reservation may have put the government to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her." *Ibid.*

The court acknowledged a defendant may plead guilty and retain the privilege with respect to other crimes, but it observed: "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing, nor could she be retried by the state for the same offense." *Ibid.* (citing 18 Pa. Cons. Stat. §111 (1998), a statute that bars, with certain exceptions, a state prosecution following a federal conviction based on the same conduct).

Judge Michel concurred, reasoning that any error by the District Court in drawing an adverse factual inference from petitioner's silence was harmless because "the evidence amply supported [the judge's] finding on quantity" even without consideration of petitioner's failure to testify. 122 F. 3d 185, at 192.

Other Circuits to have confronted the issue have held that a defendant retains the privilege at sentencing. See, *e.g.*, *United States* v. *Kuku*, 129 F. 3d 1435, 1437–1438 (CA11 1997); *United States* v. *Garcia*, 78 F. 3d 1457, 1463 (CA10 1996); *United States* v. *De La Cruz*, 996 F. 2d 1307, 1312–1313 (CA1 1993); *United States* v. *Hernandez*, 962 F. 2d 1152, 1161 (CA5 1992); *Bank One of Cleveland, N. A.* v. *Abbe*, 916 F. 2d 1067, 1075–1076 (CA6 1990); *United States* v. *Lugg*, 892 F. 2d 101, 102–103 (CADC 1989);

United States v. *Paris*, 827 F. 2d 395, 398–399 (CA9 1987). We granted certiorari to resolve the apparent circuit conflict created by the Court of Appeals' decision, 524 U. S. __ (1998), and we now reverse.

II

The Government maintains that petitioner's guilty plea was a waiver of the privilege against compelled self-incrimination with respect to all the crimes comprehended in the plea. We hold otherwise and rule that petitioner retained the privilege at her sentencing hearing.

A

It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. See *Rogers* v. *United States*, 340 U. S. 367, 373 (1951). The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross-examination," *Brown* v. *United States*, 356 U. S. 148, 154–155 (1958). "The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry," *id.*, at 155. Nice questions will arise, of course, about the extent of the initial testimony and whether the ensuing questions are comprehended within its scope, but for now it suffices to note the general rule.

The justifications for the rule of waiver in the testimonial context are evident: A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry. As noted in *Rogers*, a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony," 340 U. S., at 371. It would, as we said in *Brown*, "make of the Fifth

Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell," 356 U. S., at 156. The illogic of allowing a witness to offer only self-selected testimony should be obvious even to the witness, so there is no unfairness in allowing cross-examination when testimony is given without invoking the privilege.

We may assume for purposes of this opinion, then, that if petitioner had pleaded not guilty and, having taken the stand at a trial, testified she did "some of it," she could have been cross-examined on the frequency of her drug deliveries and the quantity of cocaine involved. The concerns which justify the cross-examination when the defendant testifies are absent at a plea colloquy, however. The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea. The Government would turn this constitutional shield into a prosecutorial sword by having the defendant relinquish all rights against compelled self-incrimination upon entry of a guilty plea, including the right to remain silent at sentencing.

There is no convincing reason why the narrow inquiry at the plea colloquy should entail such an extensive waiver of the privilege. Unlike the defendant taking the stand, who "cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute," *id.*, at 155–156, the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense. Rather, the defendant takes those matters out of dispute, often by making a joint statement with the prosecution or confirming the prosecution's version of the facts. Under these circumstances, there is little danger that the court will be misled by selective disclosure. In this respect a guilty plea is more like an offer to stipulate than a decision to take the stand. Here, petitioner's statement that she had done "some of" the proffered conduct did not pose a threat to

the integrity of factfinding proceedings, for the purpose of the District Court's inquiry was simply to ensure that petitioner understood the charges and that there was a factual basis for the Government's case.

Nor does Federal Rule of Criminal Procedure 11, which governs pleas, contemplate the broad waiver the Government envisions. Rule 11 directs the district court, before accepting a guilty plea, to ascertain the defendant understands he or she is giving up "the right to be tried by a jury and at that trial . . . the right against compelled self-incrimination." Rule 11(c)(3). The transcript of the plea colloquy in this case discloses that the District Court took care to comply with this and the other provisions of Rule 11. The District Court correctly instructed petitioner: "You have the right at trial to remain silent under the Fifth Amendment, or at your option, you can take the stand and tell the jury your side of this controversy. . . . If you plead guilty, all of those trial rights are gone." App. 45.

Neither the Rule itself nor the District Court's explication of it indicates that the defendant consents to take the stand in the sentencing phase or to suffer adverse consequences from declining to do so. Both the Rule and the District Court's admonition were to the effect that by entry of the plea petitioner would surrender the right "at trial" to invoke the privilege. As there was to be no trial, the warning would not have brought home to petitioner that she was also waiving the right to self-incrimination at sentencing. The purpose of Rule 11 is to inform the defendant of what she loses by forgoing the trial, not to elicit a waiver of the privilege for proceedings still to follow. A waiver of a right to trial with its attendant privileges is not a waiver of the privileges which exist beyond the confines of the trial.

Of course, a court may discharge its duty of ensuring a factual basis for a plea by "question[ing] the defendant

under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded." Rule 11(c)(5). We do not question the authority of a district court to make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis. A defendant who withholds information by invoking the privilege against self-incrimination at a plea colloquy runs the risk the district court will find the factual basis inadequate. At least once the plea has been accepted, statements or admissions made during the preceding plea colloquy are later admissible against the defendant, as is the plea itself. A statement admissible against a defendant, however, is not necessarily a waiver of the privilege against self-incrimination. Rule 11 does not prevent the defendant from relying upon the privilege at sentencing.

Treating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants. At oral argument, we asked counsel for the United States whether, on the facts of this case, if the Government had no reliable evidence of the amount of drugs involved, the prosecutor "could say, well, we can't prove it, but we'd like to put her on the stand and cross-examine her and see if we can't get her to admit it." Tr. of Oral Arg. 45. Counsel answered: "[T]he waiver analysis that we have put forward suggests that at least as to the facts surrounding the conspiracy to which she admitted, the Government could do that." *Ibid.* Over 90% of federal criminal defendants whose cases are not dismissed enter pleas of guilty or *nolo contendere.* U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1996, p. 448 (24th ed. 1997). Were we to accept the Government's position, prosecutors could indict without specifying the quantity of drugs involved, obtain a guilty plea, and then put the defendant on the stand at

sentencing to fill in the drug quantity. The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power. *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961) ("[O]urs is an accusatorial and not an inquisitorial system").

We reject the position that either petitioner's guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing.

B

The centerpiece of the Third Circuit's opinion is the idea that the entry of the guilty plea completes the incrimination of the defendant, thus extinguishing the privilege. Where a sentence has yet to be imposed, however, this Court has already rejected the proposition that "incrimination is complete once guilt has been adjudicated," *Estelle* v. *Smith*, 451 U. S. 454, 462 (1981), and we reject it again today.

The Court of Appeals cited Wigmore on Evidence for the proposition that upon conviction "criminality ceases; and with criminality the privilege." 122 F. 3d, at 191 (citing 8 J. Wigmore, Evidence §2279, p. 481 (J. McNaughton rev. 1961)). The passage relied upon does not support the Third Circuit's narrow view of the privilege. The full passage is as follows: "Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege." *Ibid.* It could be argued that liability for punishment continues until sentence has been imposed, and so does the privilege. Even if the Court of Appeals' interpretation of the treatise were correct, however, and it means the privilege ceases upon conviction but before sentencing, we would respond that the suggested rule is

simply wrong. A later supplement to the treatise, indeed, states the proper rule that, "[a]lthough the witness has pleaded guilty to a crime charged but has not been sentenced, his constitutional privilege remains unimpaired." J. Wigmore, Evidence §2279, p. 991, n. 1 (A. Best ed. Supp. 1998).

It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude that principle applies to cases in which the sentence has been fixed and the judgment of conviction has become final. See, *e.g., Reina* v. *United States,* 364 U. S. 507, 513 (1960). If no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared.

Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court stated in *Estelle:* "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U. S., at 463. *Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Id.,* at 462 (emphasis in original) (quoting *Culombe* v. *Connecticut,* 367 U. S. 568, 581–582 (1961)). The Government itself makes the implicit concession that the acceptance of a guilty plea does not eliminate the possibility of further incrimination. In its brief to the Court, the Government acknowledges that a defendant who awaits sentencing after having pleaded guilty may assert the privilege against self-incrimination if called as a witness

in the trial of a codefendant, in part because of the danger of responding "to questions that might have an adverse impact on his sentence or on his prosecution for other crimes." Brief for United States 31.

The Fifth Amendment by its terms prevents a person from being "compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the law and to common sense. As to the law, under the Federal Rules of Criminal Procedure, a court must impose sentence before a judgment of conviction can issue. See Rule 32(d)(1) ("A judgment of conviction must set forth the plea . . . and the sentence"); cf. *Mempa* v. *Rhay*, 389 U. S. 128, 134 (1967). As to common sense, it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important. Our rule is applicable whether or not the sentencing hearing is deemed a proceeding separate from the Rule 11 hearing, an issue we need not resolve.

III

The Government suggests in a footnote that even if petitioner retained an unwaived privilege against self-incrimination in the sentencing phase of her case, the District Court was entitled, based on her silence, to draw an adverse inference with regard to the amount of drugs attributable to her. Brief for United States 31–32, n. 18. The normal rule in a criminal case is that no negative infer-

ence from the defendant's failure to testify is permitted. *Griffin* v. *California*, 380 U. S. 609, 614 (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.

This Court has recognized "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter* v. *Palmigiano*, 425 U. S. 308, 318 (1976), at least where refusal to waive the privilege does not lead "automatically and without more to [the] imposition of sanctions," *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 808, n. 5 (1977). In ordinary civil cases, the party confronted with the invocation of the privilege by the opposing side has no capacity to avoid it, say, by offering immunity from prosecution. The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed. Another reason for treating civil and criminal cases differently is that "the stakes are higher" in criminal cases, where liberty or even life may be at stake, and where the Government's "sole interest is to convict." *Baxter*, 425 U. S., at 318–319.

Baxter itself involved state prison disciplinary proceedings which, as the Court noted, "are not criminal proceedings" and "involve the correctional process and important state interests other than conviction for crime." *Id.*, at 316, 319. Cf. *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272 (1998) (adverse inference permissible from silence in clemency proceeding, a nonjudicial post-conviction process which is not part of the criminal case). Unlike a prison disciplinary proceeding, a sentencing hearing is part of the criminal case– the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we must accord the privilege

the same protection in the sentencing phase of "any criminal case" as that which is due in the trial phase of the same case, see *Griffin*, *supra*.

The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing. Without question, the stakes are high: Here, the inference drawn by the District Court from petitioner's silence may have resulted in decades of added imprisonment. The Government often has a motive to demand a severe sentence, so the central purpose of the privilege– to protect a defendant from being the unwilling instrument of his or her own condemnation– remains of vital importance.

Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle* v. *Smith*, in which the Court could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U. S., at 462–463. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. See *supra*, at 11. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann* v. *United States*, 350 U. S. 422, 426 (1956). Later, it quoted with apparent approval Wigmore's observation

that "[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime," *Lakeside* v. *Oregon*, 435 U. S. 333, 340, n. 10 (1978) (quoting 8 Wigmore, Evidence §2272, p. 426 (J. McNaughton rev. 1961)). It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence. Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition. This process began even before *Griffin*. When *Griffin* was being considered by this Court, some 44 States did not allow a prosecutor to invite the jury to make an adverse inference from the defendant's refusal to testify at trial. See *Griffin*, *supra*, at 611, n. 3. The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it.

By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination. The judgment of the Court of Appeals is

reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.