

**FIFTH AMENDMENT—RIGHT AGAINST SELF-INCRIMINATION—THE PRIVILEGE AGAINST SELF-INCRIMINATION MAY BE ASSERTED DURING SENTENCING FOLLOWING A PLEA OF GUILTY, AND THE TRIAL COURT MAY NOT DRAW AN ADVERSE INFERENCE FROM ITS ASSERTION WHEN DETERMINING RELEVANT FACTS ABOUT THE CRIME—*Mitchell v. United States*, 119 S. Ct. 1307 (1999).**

The United States Supreme Court unanimously held that following a guilty plea, a criminal defendant retains the Fifth Amendment privilege against self-incrimination. *See Mitchell v. United States*, 119 S. Ct. 1307, 1309 (1999). Additionally, in a 5-4 split, the majority held that when determining facts at sentencing, a court may not draw an adverse inference from the defendant's silence. *See id.* The Court reasoned that the *de minimis* questioning during a plea colloquy is not sufficient to constitute a broad waiver of the privilege. *See id.* at 1312. Moreover, the Court asserted the utility of the rule against drawing adverse inferences from a criminal defendant's silence—directing that the proper inquiry in a criminal case is whether the government, not the defendant, has carried its burden. *See id.* at 1314. Therefore, the Court reasoned that allowing an adverse inference to be drawn against the defendant placed an impermissible burden on the assertion of the defendant's constitutional privilege. *See id.* at 1316. The Court expressly declined to address whether an adverse inference from a defendant's silence may contribute to a downward departure under Section 3E1.1 of the United States Sentencing Guidelines for acceptance of responsibility. *See id.* The Court's failure to address this issue, as well as what role a defendant's silence may play with regard to other departure guidelines, will lead to confusion and uncertainty both in the federal system as well as in the state system.

The petitioner, Amanda Mitchell ("Mitchell"), pled guilty to a number of drug related crimes, including one count of "conspiracy to distribute five or more kilograms of cocaine." *Id.* at 1310. Mitchell did not enter into a plea agreement, but reserved the right to contest the amount of drugs attributable to her in connection with the conspiracy count. *See id.* During the plea colloquy, Mitchell was advised that if the government could establish that she was responsible for at least 5 kilograms of cocaine, she was facing a mandatory minimum sentence of 10 years on the conspiracy count. *See id.* The district court further advised Mitchell of the rights she was giving up by pleading guilty, including "the right at trial to remain silent under the Fifth Amendment." *Id.*

The testimony of one of Mitchell's co-defendants implicated her in a series of sales over the course of three years, totaling over 5 kilograms of cocaine. *See id.* On cross-examination, the reliability of this testimony was questioned by the co-defendant's admission that during the relevant time period he had not seen Mitchell on a regular basis. *See id.* There was also trial testimony of-

ferred that implicated Mitchell in three sales to a police informant, totaling two ounces of cocaine. *See id.* Mitchell offered no evidence or testimony in rebuttal. *See id.*

The district court held that due to the fact that Mitchell pled guilty, she had no right to remain silent at her sentencing. *See id.* Thus, using Mitchell's silence against her, the district court relied on the testimony proffered by her co-defendants and found that more than 5 kilograms of cocaine were attributable to her. *See id.* at 1310-11. Mitchell was sentenced to the statutory minimum of 10 years. *See id.* at 1311.

Mitchell's sentence was affirmed by the United States Court of Appeals for the Third Circuit. *See id.* (citing *United States v. Mitchell*, 122 F.3d 185 (3d Cir. 1997)). The court of appeals indicated that Mitchell had waived the privilege against self-incrimination when she knowingly and voluntarily pled guilty. *See id.* The court declined to follow other circuits that had fragmented the privilege during sentencing, allowing it to be asserted with regard to testimony that might lead to an enhanced sentence. *See id.* Upholding application of the privilege only as far as a defendant may be implicated in another crime, the court held that it was proper for the trial court to draw an adverse inference from Mitchell's decision to remain silent. *See id.*

The United States Supreme Court granted *certiorari* to resolve the conflict between the decision of the Third Circuit and other circuits that have upheld the privilege during sentencing. *See id.* (citing *Mitchell v. United States*, 524 U.S. \_\_\_, 118 S. Ct. 2318 (1998)). The Court reversed the judgment of the court of appeals, and remanded the case to the district court for further proceedings. *See id.* at 1316.

Justice Kennedy, joined by Justices Souter, Stevens, Ginsburg and Breyer, delivered the opinion for the majority. *See id.* at 1309. The Justice began by recounting the well-known principle that once a defendant chooses to testify, she cannot thereafter assert the privilege against self-incrimination. *See id.* at 1311-12 (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951)). To hold otherwise, the Court asserted, would invite mutilation of the truth by allowing a witness to pick and choose what information to provide. *See id.* at 1312. The Court observed that these concerns, which justify cross-examination of a testifying defendant at trial, are not present during a plea colloquy. *See id.* According to Justice Kennedy, the plea colloquy is a constitutional safeguard against involuntary or unintelligent pleas, and should not become a sword causing the defendant to relinquish all rights. *See id.* While a defendant puts matters into dispute at trial, the Court asserted, during a plea colloquy, a defendant takes matters out of dispute. *See id.* Thus, the justice analogized a guilty plea to an offer to stipulate and averred that statements made in support of a guilty plea did not threaten the integrity of the system meant to ascertain facts. *See id.*

The Court further addressed Federal Rule of Criminal Procedure 11 which

governs guilty pleas. *See id.* Finding no indication that a defendant consents to take the stand by virtue of his decision to plead guilty, Justice Kennedy propounded that nothing in the Rule allows an adverse inference to be drawn from a defendant's decision to remain silent at sentencing. *See id.* at 1312-13. The Court further clarified that the purpose of Rule 11 is to advise a defendant of the rights she loses by foregoing trial. *See id.* at 1313. Hence, a decision to waive the right to trial, the Justice concluded, does not result in the waiver of those privileges that exceed the confines of trial. *See id.*

Maintaining the district court's discretion to assure that a plea of guilty is in fact voluntary, Justice Kennedy noted that assertion of the privilege during the colloquy might cause a court to find the factual basis lacking and reject the plea. *See id.* Notwithstanding, the Court suggested that to hold otherwise would result in an inquisition-like proceeding where the government could indict, obtain a guilty plea, and then force a defendant to take the stand to establish the drug quantity. *See id.*

Justice Kennedy continued by addressing the argument of the court of appeals, that once a defendant pleads guilty, his incrimination is complete and the privilege ceases. *See id.* In rejecting this argument, the Court adopted the view that where a sentence has not yet been imposed, there is a legitimate fear that adverse consequences may ensue from further testimony. *See id.* (citing *Estelle v. Smith*, 451 U.S. 454, 463 (1981)). The Fifth Amendment, opined the Court, protects an individual from being compelled to be a witness against himself in "any criminal case . . ." *Id.* at 1314 (quoting U.S. CONST. amend. V). Pointing to common sense as well as Federal Rule of Criminal Procedure 32(d)(1), which requires imposition of a sentence prior to issuance of a judgment of conviction, the Court indicated that sentencing proceedings are a part of the criminal case. *See id.*

The Justice next considered whether an adverse inference could be drawn from a defendant's decision to assert the privilege during sentencing. *See id.* The Court reiterated the general rule that no adverse inferences may be drawn from a criminal defendant's decision not to testify at trial. *See id.* at 1315 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)). Acknowledging that adverse inferences are permitted in civil litigation and certain correctional processes, Justice Kennedy refused to yield from the general principle for the sentencing phase. *See id.* The Court distinguished these other proceedings as not being part of the criminal case. *See id.* Observing that the Fifth Amendment mandates application of the privilege in both the criminal trial and the sentencing phase, the justice held that the privilege must also be given the same protection in both proceedings. *See id.*

Finally, the Court asserted the importance of having such a rule to overcome the natural inference that whoever asserts the privilege is guilty. *See id.* The justice characterized the widely-accepted "no adverse inference" principle as "an essential feature of our legal tradition." *Id.* at 1316. Furthermore, the

justice added, the government bears the burden of proving relevant facts at sentencing and it cannot enlist the testimony of the defendant to meet this burden in contradiction of the privilege. *See id.* The Court concluded that the district court imposed an impermissible burden upon Mitchell when it held her silence against her. *See id.* However, the majority declined to express any view as to the impact assertion of the privilege may have on a court's decision to adjust downward for acceptance of responsibility. *See id.* (citing U.S.S.G. §3E1.1 (1998)). Furthermore, the Court failed to provide guidance as to the role a defendant's silence may play with regard to other departure issues, leaving the courts without guidance.

Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas. *See id.* (Scalia, J., dissenting). The dissenters agreed that the Fifth Amendment privilege against self-incrimination should be maintained during the sentencing phase. *See id.* The dissent believed, however, that the sentencing judge should be permitted to draw an adverse inference from the assertion of the privilege. *See id.*

Justice Scalia first asserted that the threat of an adverse inference does not compel testimony. *See id.* The dissenters criticized the Court's prior holding in *Griffin v. California*, which held it a penalty to draw an adverse inference from a defendant's decision to remain silent during trial. *See id.* (citing *Griffin*, 380 U.S. at 614). That decision, Justice Scalia opined, was illogical and contrary to the normal inference to be drawn from an individual's silence. *See id.* at 1317 (Scalia, J., dissenting). Expanding on this criticism, the dissent reviewed the history of the privilege. *See id.*

According to Justice Scalia, *nemo tenetur seipsum prodere* was a long-standing common law principle that was eventually ratified into the Fifth Amendment as a fundamental right. *See id.* at 1318 (Scalia, J., dissenting). The dissent asserted that this principle prohibited only testimony forced by physical torture or compulsory oath and did not prohibit unsworn testimony. *See id.* at 1317 (Scalia, J., dissenting). In fact, the dissent stated, during the 17th and 18th centuries, prisoners were required to speak for themselves during both trial and pretrial proceedings or have an adverse inference drawn against them. *See id.* Although at the time, the justice noted, a defendant was precluded from offering formal testimony on his own behalf. *See id.* The dissent opined that the question addressed in *Griffin* arose when many states began to adopt statutes allowing defendants to testify under oath on their own behalf. *See id.* at 1318 (Scalia, J., dissenting).

The dissent characterized the rule announced in *Griffin* as "a breathtaking act of sorcery . . . ." *Id.* Notwithstanding this characterization, the dissent was not prepared to overrule *Griffin*. *See id.* at 1319 (Scalia, J., dissenting). Justice Scalia opined that although wrongly decided, the *Griffin* rule was widely accepted, and as such, should be maintained. *See id.* The dissent was not prepared, however, to extend *Griffin*'s holding to the sentencing phase.

*See id.*

The dissent further supported its argument by indicating that case law has continually distinguished between rights accorded a defendant during the trial and rights accorded during the sentencing phase. *See id.* at 1319 (Scalia, J., dissenting). Justice Scalia then offered, as an example, the rights provided by the Sixth Amendment that apply “[i]n all criminal prosecutions.” *Id.* (quoting U.S. CONST. amend. VI). Those rights, including the right to a trial by jury, the right to confront witnesses, and the requirement that the prosecution meet the burden of proving facts beyond a reasonable doubt, are not, according to Justice Scalia, applicable in the sentencing phase. *See id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986); *Spaziano v. Florida*, 468 U.S. 447, 462-63 (1984); *Williams v. New York*, 337 U.S. 241, 252 (1949)). Hence, the dissent disagreed with the majority’s interpretation of *Estelle*, that the Fifth Amendment’s scope is precisely the same in both the sentencing and trial phases. *See id.* (citing *Estelle*, 451 U.S. at 462).

Justice Scalia reasoned that adverse inferences drawn from a defendant’s silence are allowed in a number of other areas, such as in the denial of clemency and violations of prison rules. *See id.* (citations omitted). Elaborating further, the dissent refuted the notion that the sentencing phase is a part of the criminal case. *See id.* at 1319-20 (Scalia, J., dissenting).

Finally, the dissent addressed the inconsistency between the majority’s opinion and the normal sentencing practice, which grants the court great discretion to consider evidence of all types and sources in calculating a defendant’s sentence. *See id.* at 1320 (Scalia, J., dissenting). Criticizing the implications that the majority’s decision will have in practice, the dissent condemned their failure to address whether assertion of the privilege may be considered in determining acceptance of responsibility. *See id.* at 1320-21 (Scalia, J., dissenting). The dissent further suggested that a decision either way would lead to an inadequate result. *See id.* The dissent concluded that Mitchell retained the right to assert the Fifth Amendment privilege at sentencing, but that a court should be able to consider a defendant’s silence in determining an appropriate sentence. *See id.* at 1321 (Scalia, J., dissenting).

Justice Thomas wrote a short separate dissent. *See id.* at 1321 (Thomas, J., dissenting). Agreeing that the Court’s prior holding in *Griffin* was unfounded and illogical, the justice asserted his willingness to reconsider *Griffin* and its progeny in an appropriate case. *See id.* at 1321-22 (Thomas, J., dissenting).

## ANALYSIS

The *Mitchell* Court correctly held that the Fifth Amendment right against self-incrimination extends to all phases of sentencing. However, the Court limited its decision regarding the no adverse inference rule to factual determinations. The Court’s failure to address whether an adverse inference may be

drawn for the purpose of other sentencing determinations, such as departures, leaves both the federal and state systems without guidance. This issue is especially relevant in state systems such as New Jersey, where great emphasis is placed on the weighing of aggravating and mitigating factors when determining the severity of a sentence. *See* N.J. STAT. ANN. § 2C:44-1 (West 1999) (listing the aggravating and mitigating factors considered by a court).

In New Jersey, for example, if a defendant pleads guilty to a second-degree crime, the court shall fix a sentence between 5 and 10 years. *See* N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1999). If the aggravating and mitigating factors are equal, then the defendant will receive a sentence of 7 years. *See* N.J. STAT. ANN. § 2C:44-1(f)(1)(c) (West 1999). However, if the court finds that either the aggravating or mitigating factors outweigh the other by a preponderance of the evidence, it may sentence the defendant to as little as 5 years, or as many as 10. *See* N.J. STAT. ANN. § 2C:44-1(f) (West 1999). Additionally, for crimes of the first or second degree, if the court is clearly convinced that the mitigating factors outweigh the aggravating factors, the defendant may be sentenced as if he was convicted of a crime one degree lower. *See* N.J. STAT. ANN. § 2C:44-1(f)(2) (West 1999). It is not only the fact that a mitigating or aggravating factor exists, but also the weight given that factor that determines the severity of a sentence. If a court is permitted to draw an adverse inference from a defendant's silence during the weighing of these aggravating and mitigating factors, a defendant is likely to receive a harsher sentence.

The *Mitchell* Court's lack of guidance is also a concern in the federal system, although the comments to the federal sentencing guidelines touch upon the issue. For instance, when deciding if a defendant will receive a downward adjustment under guideline 3E1.1, for acceptance of responsibility, the application notes provide a list of very specific considerations that if satisfied, will result in a downward adjustment. *See* U.S.S.G. § 3E1.1. Application note 1(a) specifically allows a defendant to remain silent with regard to relevant conduct and still receive a downward adjustment. *See id.* Furthermore, the acts that make a defendant eligible for an acceptance of responsibility adjustment often occur prior to the sentencing hearing, based on his timely decision to plead guilty, or his cooperation with the police. Notwithstanding this minimal guidance, the courts will remain uncertain as to whether a defendant's silence may be considered in determining other departure issues.

Despite the Court's failure to discuss these other important sentencing issues, its decision to extend the Fifth Amendment privilege against self-incrimination to sentencing was appropriate. As the Court pointed out, without the privilege, if the government failed to gather sufficient evidence against a defendant, it could easily place that defendant on the stand and elicit such testimony. *See Mitchell*, 119 S. Ct. at 1313. Thus, the defendant's compelled testimony would work to prove the government's case. *See id.* Such a result is clearly prohibited by the Fifth Amendment.

Moreover, compelled testimony may also increase a sentence. For example, if the defendant testifies and the court later makes findings contrary to that testimony, the court may increase the defendant's sentence under the obstruction of justice guideline. *See* U.S.S.G. § 3C1.1; *see also United States v. Dunnigan*, 507 U.S. 87 (1993). Additionally, all of a defendant's relevant conduct contributes to the severity of his sentence. *See* U.S.S.G. § 1B1.3. If she is compelled to testify, additional relevant conduct may become apparent and result in an increased sentence. Therefore, the Court's decision protects the defendant from an inquisition-like system, and from being compelled to give testimony that may increase her sentence.

*Laura M. LoGiudice*