No. 97-7541

In the Supreme Court of the United States

OCTOBER TERM, 1997

AMANDA MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant's plea of guilty to an offense waives any Fifth Amendment privilege to remain silent at sentencing about the details of that offense.

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OPINION BELOW

The opinion of the court of appeals (J.A. 112-128) is reported at 122 F.3d 185.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1997. A petition for rehearing was denied on October 17, 1997. J.A. 129. The petition for a writ of certiorari was filed on January 13, 1998, and was granted on June 15, 1998. J.A. 130. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment provides, in relevant part: "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." Relevant

portions of Rule 11 of the Federal Rules of Criminal Procedure are set forth in an appendix to this brief.

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a), and one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. She was sentenced to ten years' imprisonment, to be followed by six years' supervised release. The court of appeals affirmed. J.A. 112-128.

1. Petitioner and 22 other defendants were indicted for their roles in a cocaine distribution conspiracy that operated between 1989 and 1994 in Allentown, Pennsylvania. Petitioner was charged in Count 2 of the superseding indictment with conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and in Counts 11, 21, and 28 with separate instances of distributing cocaine within 1,000 feet of a school or playground, in violation of 21 U.S.C. 860(a). J.A. 3-11, 15, 20, 23.

a. Petitioner pleaded guilty, without a plea agreement, to all four counts with which she was charged. She reserved, however, the opportunity to contest at sentencing the quantity of cocaine attributable to her on the conspiracy count. J.A. 37-39, 51. The court advised petitioner that the quantity determination would be made following a sentencing hearing (J.A. 39), and that her guilty plea exposed her "to serious punishment depending on the quantity involved" (J.A. 42). The court and the government informed petitioner of the penalties for her offenses (J.A. 39-43, 51), including the ten-year mandatory minimum sentence under

21 U.S.C. 841 for distribution of at least five kilograms, but less than 15 kilograms, of cocaine (J.A. 39, 42).

In the colloquy required by Rule 11 of the Federal Rules of Criminal Procedure, the court also explained to petitioner that she would waive various rights by pleading guilty. J.A. 43-45. In discussing the rights at issue, the court stated that "[y]ou 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." J.A. 45. After the court had placed petitioner under oath (J.A. 36), the government, at the court's request, provided the factual basis for the cocaine conspiracy and distribution offenses. The government described the evidence showing that petitioner was part of an organization that distributed cocaine on a daily and weekly basis in the Allentown, Pennsylvania, area and that she had aided and abetted or personally conducted the distributions in the substantive counts in which she was charged. J.A. 46-47. The court then asked petitioner whether she had engaged in the conduct that the government had described. J.A. 47. Petitioner acknowledged that she had done "[s]ome of it," but expressed reservations about one of the substantive cocaine distribution counts. *Ibid.* After discussion about the conduct that was charged against petitioner in that count, petitioner affirmed her desire to plead guilty to it. J.A. 47-50.[1]

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[1] The count at issue (Count 11) charged petitioner and three others with distributing cocaine, and aiding and abetting the distribution of cocaine, on April 9, 1992. J.A. 15. Petitioner initially indicated that she did not recall that she was present at that transaction or that four people were present. J.A. 48. Her counsel then explained that petitioner had earlier acknowledged to him that she was present during the delivery of cocaine on that date, but that she disputed the government's theory that she was

At the conclusion of the plea proceeding, the court asked "[h]ow say you to Count 2, charging you with conspiracy to distribute cocaine; Count 11 and 21, charging you with distribution and/or aiding and abetting the distribution of cocaine within 1,000 feet of a school; and Count 28, charging you with distribution or aiding and abetting distribution within 1,000 feet of a playground, guilty or not guilty?" J.A. 51. Petitioner stated "[g]uilty." *Ibid.*

b. Nine of petitioner's co-defendants went to trial. Much of the trial testimony centered on the activities of Harry Riddick, the leader of the cocaine distribution ring. Three of the original co-defendants, who had pleaded guilty and agreed to cooperate with the government, testified that petitioner was one of Riddick's regular sellers. Shannon Riley testified that she had often seen petitioner at Phill's Bar and Grill, the headquarters of the cocaine distribution ring, going into the bathrooms to sell cocaine. Paul Belfield testified that, when he was selling cocaine for Riddick in 1991 and 1992, petitioner delivered the cocaine to him. He testified that petitioner used pagers and two-way radios provided by Riddick for her cocaine deliveries. Richard Thompson testified that from April 1992 through December 1993, petitioner sold one-and-a-half ounces of cocaine to customers two or three times a week. J.A. 115-116.

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there to be introduced to the customer so that she could sell cocaine to her in the future, since petitioner already knew the customer. J.A. 48-49. The court noted that, based on those facts, petitioner might have a defense to the charge that she aided and abetted the drug distribution on that date, but advised petitioner that it was her choice whether to present that defense at trial or to relinquish it and plead guilty. J.A. 49-50. Petitioner reaffirmed her intention to plead guilty. J.A. 50.

2. At petitioner's sentencing hearing, Riley, Belfield, and Thompson adopted their trial testimony. In addition, Thompson testified that, between April 1992 and August 1992, petitioner had worked two or three times a week, selling one-and-a-half to two ounces of cocaine each time; between August 1992 and December 1993, petitioner had worked three to five times a week; and from January through March 1994, petitioner was one of those in charge of cocaine distribution for Riddick. Petitioner's counsel cross-examined those witnesses. The parties also referred to trial evidence indicating that, in 1992, Alvita Mack had received three deliveries of cocaine, totaling two ounces, from petitioner. After Riley, Belfield, and Thompson had testified, the district court advised petitioner's counsel that petitioner "may testify if she wishes, but she may remain silent." J.A. 53-82, 88-90, 116-117.

Petitioner did not offer any evidence at the sentencing hearing. Nor did she testify under oath to rebut the government's evidence about drug quantity. Rather, petitioner, through counsel, argued that the evidence of her three sales to Mack was the only evidence sufficiently reliable to be credited in determining the quantity of cocaine attributable to her for sentencing purposes. J.A. 98.

The district court rejected petitioner's arguments. The court found that the testimony identifying petitioner as a drug courier on a regular basis during an extended period was "substantially accurate" (J.A. 117) and that her sales of one-and-a-half to two ounces of cocaine twice a week for a year and a half put her "well over five kilograms" (J.A. 93). See also J.A. 98-99. The court stated that "[o]ne of the things" that persuaded it to rely on the testimony of Riley, Belfield, and Thompson was petitioner's "not testifying to the contrary."

J.A. 95, 118; see also J.A. 98 (advising petitioner that "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"). The court reasoned that it could consider petitioner's silence against her without violating the Fifth Amendment, because "once a criminal defendant in a felony charge pleads guilty, then that defendant * * * no longer has a Fifth Amendment right to remain silent." J.A. 95, 118.[2]

The district court found that petitioner had participated in the distribution of almost 13 kilograms of cocaine during the conspiracy. J.A. 99, 119. In explaining its ruling to petitioner, the court stated that "it's pretty clear you were a courier for two to three years, and that by delivering small quantities, it adds up to more than five kilograms." J.A. 98. The court noted that "without anything from you and with my understanding of this Riddick cocaine organization, I think you were involved in more than five kilograms of cocaine." J.A. 99. In light of its drug quantity finding, the court imposed a sentence of ten years' imprisonment —the minimum term applicable when the quantity of cocaine involved is five kilograms or more. *Ibid.*; see 21 U.S.C. 841(b)(1)(A)(ii).

3. The court of appeals affirmed. The court rejected petitioner's claim that the district court had erred in drawing an adverse inference from her failure to testify at the sentencing hearing. J.A. 119-125. The court

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[2] The district court then permitted petitioner to make an unsworn statement. Petitioner acknowledged that "for a long time I used drugs" and that "I did a lot of things I—to get drugs." She added: "I got too involved with doing drugs. And as much drugs as I did, I couldn't have did all the other things. That's all I have to say." J.A. 98, 118.

observed that, "if a defendant's testimony cannot incriminate her, she cannot claim a Fifth Amendment privilege." J.A. 119 (citing *Ullmann* v. *United States*, 350 U.S. 422, 431 (1956)). The court noted that a defendant who has pleaded guilty to an offense "waives his privilege as to the acts constituting it." J.A. 120. The effectiveness of such a waiver, the court observed, depends on the defendant's receiving advice from the trial court about the rights relinquished by such a plea. But here, the court noted, petitioner did not dispute that she had entered a knowing and voluntary plea after having been advised of the consequences of her guilty plea, including her "forfeiture of * * * the right to remain silent under the Fifth Amendment." *Ibid.*

The court of appeals acknowledged that, in general, a defendant's plea of guilty to one offense does not waive the Fifth Amendment privilege with respect to other offenses. J.A. 121-122. The court stated, however, that the Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" does not extend to testimony that would only "have an impact on the appropriate sentence for the crime of conviction." J.A. 124. The court noted that petitioner "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, see 18 Pa. C.S.A. § 111." J.A. 125; see also *ibid.* (observing that petitioner "does not claim that she exposed herself to future federal or state prosecution").[3] The court further concluded that the amount of cocaine involved in petitioner's con-

[3] The Pennsylvania statute cited by the court of appeals bars, with certain exceptions not applicable here, a state prosecution following a federal conviction based on the same conduct.

spiracy offense, while affecting the severity of her sentence, "is not an issue of independent criminality to which the Fifth Amendment applies." J.A. 124. Nor did petitioner's reservation of the issue of drug quantity at the time of her plea change the analysis. The court explained that, "[w]hile [petitioner's] 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." J.A. 124-125.

The court of appeals rejected petitioner's claim that the evidence was insufficient to support the district court's finding that she had distributed nearly 13 kilograms of cocaine in the conspiracy. The court observed that the district court had found credible the testimony of four witnesses that petitioner sold cocaine on a regular basis, including Thompson's testimony that petitioner sold one-and-a-half to two ounces of cocaine on two to five days per week between April 1992 and March 1994. In addition, the court noted that the district court could infer that those amounts were reliable from petitioner's refusal to offer any evidence to the contrary. J.A. 125-126.

Judge Michel, in a concurring opinion, agreed with the majority that "ordinarily a guilty plea waives the privilege as to all facts concerning the transactions alleged in an indictment." He questioned, however, whether that rule applied in this case given petitioner's reservation of the quantity issue at the time of her guilty plea. J.A. 127. But Judge Michel deemed it unnecessary to resolve that issue. He concluded that any error in that regard was harmless because "the evidence amply supported [the district court's] finding on quantity," even without consideration of petitioner's silence. *Ibid*.

Petitioner filed a petition for rehearing with suggestion for rehearing en banc, which asserted, for the first time, that her testimony about the cocaine distribution conspiracy could implicate her in other crimes. Petition for Rehearing at 11-13. The court of appeals denied the petition, with four judges dissenting. J.A. 129.

SUMMARY OF ARGUMENT

A defendant who pleads guilty to a crime waives any Fifth Amendment privilege that he would otherwise possess at sentencing to remain silent about the details of that crime. That principle reflects the well-settled rule that "disclosure of a fact waives the privilege as to details." *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). Under that rule, a witness who testifies to committing a crime "is not permitted to stop, but must go on and make a full disclosure." *Id.* at 373 (quoting *Brown* v. *Walker*, 161 U.S. 591, 597 (1896)). That rule guards against the "distortion of the facts" that would occur if such a witness were permitted "to select any stopping place in the testimony." *Id.* at 371.

A plea of guilty constitutes "a confession" by the defendant, under oath and in open court, "which admits that [he] did various acts" constituting the crime. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). Indeed, "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Having admitted to each and every element of the crime by entering a guilty plea, the defendant has no Fifth Amendment privilege at sentencing to refuse to disclose the details of the crime, including those details that could enhance his sentence or that could incidentally implicate him in additional crimes.

The understanding that a defendant who pleads guilty no longer has any Fifth Amendment privilege to refuse to testify about his offense in his own criminal case is reflected in Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(f) directs a district court not to enter judgment on any guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." Rule 11(d) requires a district court to "determin[e] that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Rule 11(c)(5) contemplates that the court may satisfy those requirements 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." There are many circumstances in which a district court may need to question a defendant extensively about the details of his crime in order to ascertain that his guilty plea has a factual basis and is being given voluntarily.

In light of those requirements placed on the district court to ensure that a guilty plea is factually grounded and voluntary, it is indispensable to the proper functioning of the Rule 11 colloquy that a defendant relinquish any Fifth Amendment right he might otherwise have to remain silent about the details of the crime. And having relinquished any Fifth Amendment privilege on those details in entering his plea of guilty, a defendant cannot claim protection for a decision to remain silent about his crime at sentencing. Any other rule would give defendants a strong incentive at the guilty plea stage to conceal or minimize their actual conduct, and would thereby intrude on the court's ability to evaluate and accept guilty pleas.

A defendant's waiver of the Fifth Amendment privilege by virtue of a guilty plea is not unlimited. A

guilty plea, like a defendant's testimony at trial admitting or denying the crime, waives the privilege only as to matters "reasonably related" to the crime. *McGautha* v. *California*, 402 U.S. 183, 215 (1971). As the courts of appeals have also recognized, a waiver of the privilege applies only in the particular case in which the waiver occurs. It does not apply in separate proceedings, such as a prosecution of the defendant's confederates or a subsequent prosecution of the defendant himself. But it does apply in the defendant's own sentencing proceeding, which forms an integral part of the criminal case in which the defendant has entered his plea.

Petitioner pleaded guilty, *inter alia*, to conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. She thereby waived her Fifth Amendment privilege to refuse to testify at sentencing about the details of that offense—in particular, the quantity of cocaine that she distributed as a participant in the conspiracy. Petitioner's waiver of the privilege was not limited by her reservation of the opportunity to contest the government's evidence on drug quantity. She did not purport to reserve any privilege to remain silent with impunity on the drug quantity issue. Nor could she have done so. The scope of a Fifth Amendment waiver through a guilty plea is a legal prerequisite to, and consequence of, the plea and is not subject to unilateral restriction by the defendant.

ARGUMENT

A DEFENDANT WHO PLEADS GUILTY TO AN OFFENSE MAY NOT CLAIM THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION TO PREVENT A COURT FROM DRAWING AN ADVERSE INFERENCE FROM HIS DECISION NOT TO TESTIFY AT SENTENCING ABOUT THE DETAILS OF THAT OFFENSE

A plea of guilty constitutes "a confession" by the defendant, under oath and in open court, "which admits that [he] did various acts" constituting the crime. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). A plea of guilty waives the protection of the Fifth Amendment privilege against compelled self-incrimination on that offense. That waiver extends not only to the general outlines of the conduct constituting the crime, but also to its factual details. Petitioner's plea of guilty to a drug conspiracy offense thus constituted a waiver of her Fifth Amendment privilege with respect to the specific actions she took during and in furtherance of that conspiracy, even though those details were highly relevant in determining the length of her sentence. The district court was therefore permitted to draw an adverse inference from her refusal, at sentencing, to offer her version of her conduct in connection with the crime to which she had pleaded guilty.

A. By Pleading Guilty To An Offense, A Defendant Waives His Fifth Amendment Privilege To Remain Silent About The Details Of That Offense

The Fifth Amendment states that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." This case involves a defendant who entered a valid plea of guilty to the offenses on which

she was sentenced. That plea required and produced a waiver in her criminal case of her Fifth Amendment privilege to remain silent with respect to the charged offenses. By relinquishing her right to remain silent and instead admitting in open court her commission of the charged offenses, petitioner waived the right to remain silent about the details of those offenses, either at the plea hearing itself or at the ensuing sentencing proceedings.[4]

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[4] Petitioner argues at length that the Fifth Amendment applies at sentencing. Br. 11-22. In *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court held that the Fifth Amendment privilege applies in a capital sentencing proceeding. The Court has never addressed whether the holding of *Estelle* v. *Smith* extends to non-capital sentencing proceedings, and the question is complex. The Fifth Amendment privilege applies in "any criminal case," and a sentencing hearing itself, whether capital or non-capital, is a critical stage of a criminal case. *Mempa* v. *Rhay*, 389 U.S. 128 (1967). But in many respects, the Constitution's procedural requirements for criminal trials do not extend to sentencing. See *Libretti* v. *United States*, 516 U.S. 29, 49 (1995) (jury trial not required); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986) (proof beyond a reasonable doubt not required). The Court has also noted that sentencing judges have traditionally considered all reliable sources of information, without limitation by formal rules of evidence. *Williams* v. *New York*, 337 U.S. 241, 246-247 (1949); see 18 U.S.C. 3661. And, while the Court in *Estelle* v. *Smith* broadly described the purpose of the Fifth Amendment as protecting against compelled testimony "to convict *and punish*," 451 U.S. at 462, it also emphasized the particular nature and gravity of a capital sentencing proceeding, *id.* at 463, a type of sentencing proceeding that this Court has often surrounded with unique procedural protections. See, *e.g.*, *Monge* v. *California*, 118 S. Ct. 2246, 2253 (1998) (confining double jeopardy ruling in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), to "the unique circumstances of capital sentencing"). Because this case involves a guilty plea and waiver principles, however, the Court need not resolve the general question whether the Fifth Amendment applies in non-capital sentencing proceedings.

1. "A defendant who enters [a guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination." *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). A waiver of the Fifth Amendment privilege is inherent in any guilty plea. As this Court has recognized, it is "[c]entral to the plea and the foundation for entering judgment against the defendant" that "the defendant[] admi[t] in open court that he committed the acts charged in the indictment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969) ("A plea of guilty is * * * a confession which admits that the accused did various acts."). In entering a guilty plea, the defendant must necessarily "stand[] as a witness against himself," *Brady*, 397 U.S. at 743, and relinquish his Fifth Amendment privilege to "refus[e] to provide information on the count to which he had admitted his guilt," *United States* v. *Trujillo*, 906 F.2d 1456, 1461 (10th Cir.), cert. denied, 498 U.S. 962 (1990). See *United States* v. *Rodriguez*, 706 F.2d 31, 36 (2d Cir. 1983) (a guilty plea waives the Fifth Amendment privilege "with respect to the crime to which the guilty plea pertains") (quoting *United States* v. *Yurasovich*, 580 F.2d 1212, 1218 (3d Cir. 1978)); cf. *Namet* v. *United States*, 373 U.S. 179, 188 (1963) (observing that the prosecutor had "reason[ed] with some justification that [the witnesses'] plea of guilty to the gambling charge would erase any testimonial privilege as to that conduct").[5]

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[5] See also *Brown* v. *Butler*, 811 F.2d 938, 940 (5th Cir. 1987) (defendant, "[b]y pleading guilty, * * * waived the privilege against compulsory self-incrimination" with respect to presentence interview that formed the basis for the sentence); *United States* v. *Fortin*, 685 F.2d 1297, 1298 (11th Cir. 1982) ("a plea of guilty waives the right against self-incrimination * * * as to matters

By pleading guilty to an offense, a defendant waives his Fifth Amendment privilege not only as to his commission of the offense, but also as to all details of the offense, including those details that could affect the severity of his sentence. The principle that disclosure of a fact waives the privilege with respect to the details is well established in Fifth Amendment law. In *Rogers* v. *United States*, 340 U.S. 367 (1951), a grand jury witness incriminated herself by admitting to membership in the Communist Party, but then sought to invoke the Fifth Amendment privilege to avoid disclosing the location of Communist Party membership lists and dues records. This Court rejected that effort. The Court explained that, "if the witness himself elects to waive his privilege * * * and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." 340 U.S. at 373 (quoting *Brown* v. *Walker*, 161 U.S. 591, 597 (1896)); see also *id.* at 373-374 ("[W]here a witness has voluntarily answered as to materially criminating facts, it is held with uniformity that he cannot stop short and refuse further explanation, but must disclose fully what he has attempted to relate.") (quoting *Foster* v. *People*, 18 Mich. 266, 276 (1869)). The Court explained that a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." *Id.* at 371. *Rogers* thus stands for the general principle that "[d]isclosure of a fact waives the privilege as to details." *Id.* at 373; see also, *e.g.*, *United*

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which might incriminate the defendant of the particular crime to which the plea is made"); *United States* v. *Moore*, 682 F.2d 853, 856 (9th Cir. 1982) ("[a] voluntary guilty plea * * * is a waiver of the fifth amendment privilege * * * in regard to the crime that is admitted").

States v. *St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (L. Hand, J.) ("at least after a witness has confessed all the elements of the crime, he may not withhold the details"), cert. dismissed, 319 U.S. 41 (1943).[6]

Similarly, in *Brown* v. *United States*, 356 U.S. 148 (1958), the Court recognized that a witness cannot, after electing to give some testimony about a potentially incriminating matter, invoke the Fifth Amendment to avoid giving further testimony about that same matter. In that case, the defendant voluntarily took the witness stand in her denaturalization case and testified on direct examination that she had never belonged to any organization advocating the overthrow of the government. On cross-examination, when asked whether she had ever been a member of the Communist Party, she invoked the Fifth Amendment privilege. The Court held that the defendant, as a voluntary witness, "could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." *Id.* at 156. Many other authorities support

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[6] The rule articulated in *Brown* v. *Walker*, and subsequently in *Rogers*, has been traced to two English cases from the early 19th Century involving the common-law privilege against compelled self-incrimination: *Dixon* v. *Vale*, 171 E.R. 1195 (1824) ("[I]f a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object, that any further question has a tendency to criminate him"), and *East* v. *Chapman*, 172 E.R. 259, 261 (1827) ("[H]aving given evidence, you must answer the question. You might have objected to give evidence at first, but having gone through a long history of what passed, and was not taken down, you must still go on, otherwise the jury will know only half of the matter."). The current English rule, however, is to the contrary. See *St. Pierre*, 132 F.2d at 838-839.

that proposition. See *Ohio Adult Parole Authority* v. *Woodard*, 118 S. Ct. 1244, 1252-1253 (1998) ("Long ago we held that a defendant who took the stand in his own defense could not claim the privilege against self-incrimination when the prosecution sought to cross-examine him.") (citing *Brown* v. *Walker* and *Brown* v. *United States*); *McGautha* v. *California*, 402 U.S. 183, 215 (1971) ("It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination."); 8 J. Wigmore, *Wigmore on Evidence* § 2276, at 459 (McNaughton rev. ed. 1961) (a criminal defendant's "voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between all"); *Johnson* v. *United States*, 318 U.S. 189, 195-196 (1943) (quoting Wigmore).[7]

The underlying concern in cases such as *Rogers* and *Brown* is that, if a witness could selectively invoke the Fifth Amendment privilege, it would distort the truth-seeking process by permitting the witness to present a one-sided account to the trier of fact. As the Court observed in *Brown*, to provide a witness with "an immunity from cross-examination on the matters he has himself put in dispute * * * would make of the Fifth Amendment * * * a positive invitation to mutilate the

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[7] See also *Raffel* v. *United States*, 271 U.S. 494, 497 (1926) ("When [a defendant] takes the stand in his own behalf, * * * [h]is waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing."); *Fitzpatrick* v. *United States*, 178 U.S. 304, 315 (1900) ("Where an accused party waives his constitutional privilege of silence * * * he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.").

truth a party offers to tell." 356 U.S. at 156; see also *St. Pierre*, 132 F.2d at 839-840 (noting "the obvious injustice of allowing a witness, who need not have spoken at all, to decide how far he will disclose what he has chosen to tell in part"). Once a defendant has elected to testify, therefore, "[h]is privilege against self-incrimination does not shield him from proper questioning." *United States* v. *Havens*, 446 U.S. 620, 627 (1980).

A defendant who enters a guilty plea, under oath and in open court, has, like the witness in *Rogers*, "'elect[ed] to waive his privilege * * * and disclose[] his criminal connections.'" 340 U.S. at 373. And, like the witness in *Brown*, the defendant has voluntarily come before the court to swear to a version of the events at issue, presumably after calculating that his interests would better be served by doing so than by continuing to exercise his right to remain silent. Such an individual may therefore be required to "go on and make a full disclosure," *ibid*, about all of the details of that offense, whether or not they would affect the severity of his sentence. Any contrary rule would, as further explained below, impede the trial court's ability to assess whether a defendant's guilty plea is factually based and voluntarily given and whether a defendant's sentence is appropriately tailored to his criminal conduct. It could thereby present the same dangers of "distortion" of the truth that concerned the Court in *Rogers* and *Brown*.

2. Because a defendant's waiver of the Fifth Amendment privilege extends to all details of the crime to which he has pleaded guilty, the waiver includes any such details that also may incidentally relate to crimes to which he has not pleaded guilty. The defendant does retain the privilege with respect to incriminating matters not "reasonably related," *McGautha*, 402 U.S. at 215, to the crime that was the subject of the guilty

plea. The details of the offense, however, are necessarily and inherently related to the plea.[8]

The nature of that waiver is one of the costs of a defendant's choice to enter a guilty plea. This Court's cases "do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U.S. 87, 96 (1993); *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980) (defendant's decision not to testify "because of the risk of cross-examination" is a "choice of litigation tactics"); *United States* v. *Frazier*, 971 F.2d 1076, 1080 (4th Cir. 1992) ("The Fifth Amendment does not insulate a defendant from all 'difficult choices' that are presented during the course of criminal proceedings, or even from all choices that burden the exercise or encourage waiver of the Fifth Amendment's right against self-incrimination.") (citing *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973) and *Corbitt* v. *New Jersey*, 439 U.S. 212, 218 (1978)), cert. denied, 506 U.S. 1071 (1993). A defendant, in consultation with counsel, is capable of evaluating the risk that testimony at sentencing about the details of the crime to which he would plead guilty might reveal his involvement in other crimes. If the defendant calculates that the risk is too great, he may choose not to plead guilty, and instead to proceed to trial. Cf. *Brown*, 356 U.S. at 155-156 ("[A] witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of

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[8] As discussed in Part C, *infra*, the waiver applies only in the particular case in which it occurs. Thus, it would not apply in a subsequent prosecution of the defendant (or others) for other crimes. It does, however, carry through to the sentencing for the offense to which the defendant has pleaded guilty.

putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute.").

The Sentencing Commission has taken a similar approach with respect to downward adjustments in a defendant's sentence for acceptance of responsibility. A defendant must "truthfully admit[] the conduct comprising the offense[s] of conviction" in order to obtain any such adjustment, but he may remain silent about "relevant conduct beyond the offense of conviction." See Sentencing Guidelines § 3E1.1 cmt. (n.1(a)). In applying Guidelines § 3E1.1, the Seventh Circuit has held that a defendant must provide a "complete and credible explanation of the conduct involved in the offense of conviction," even if that explanation might also incidentally implicate him in other, uncharged offenses. *United States* v. *Hammick*, 36 F.3d 594, 599 (1994); see *id.* at 600 (defendant could remain silent as to those matters that "bore no obvious relation to the offense of conviction"); *id.* at 602 (Bauer, J., dissenting in part) (noting that details that defendant was required to reveal might implicate her in other crimes); see also *United States* v. *Reyes*, 9 F.3d 275, 279 (2d Cir. 1993) (under Guidelines § 3E1.1, "a sentencing court may not compel testimony in respect of any offense *other* than the offense that is the subject of the plea," but "as to the offense that *is* the subject of the plea, the district court may require a candid and full unraveling").

Even if a defendant who pleaded guilty could assert the Fifth Amendment privilege at sentencing for information that, while relevant to the offense on which the

plea was entered, also revealed additional crimes for which there was a real and substantial fear of prosecution, it would not assist petitioner. Petitioner did not make any such claim to the district court or to the court of appeals panel. Indeed, the panel expressly noted its understanding that "[petitioner] does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." J.A. 125. This Court has recognized that "[t]he Fifth Amendment privilege against compelled self-incrimination is not self-executing," *Roberts* v. *United States*, 445 U.S. 552, 559 (1980), but requires an assertion by the party claiming it. Even where the privilege is claimed, the specific basis for the claim must be asserted; "[t]he validity of [the witness's] justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made." *United States* v. *Murdock*, 284 U.S. 141, 148 (1931), overruled on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).[9]

[9] It is therefore not enough that petitioner asserted the privilege at sentencing based on a different theory, *i.e.*, that her testimony could affect the severity of her sentence. This Court observed in *Roberts* that, if a defendant "believed that his failure to cooperate was privileged" and thus should not have been considered against him at sentencing, "he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." 445 U.S. at 560. Petitioner likewise should have afforded the sentencing court an opportunity to determine the legitimacy of her claim that her testimony about the quantity of cocaine that she distributed was privileged on the theory that it would implicate her in other crimes.

B. The Process For Taking A Guilty Plea Under Rule 11 Of The Federal Rules Of Criminal Procedure Confirms That The Defendant's Plea Waives The Privilege For The Details Of His Offense

Rule 11 of the Federal Rules of Criminal Procedure prescribes the inquiry that the federal district courts must conduct before accepting guilty pleas. The Rule contemplates that a defendant who pleads guilty to an offense waives the Fifth Amendment privilege with respect to all facts and circumstances of the offense.

Rule 11(f) provides that "the court should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." The court is not required to make any particular type of inquiry in order to determine whether the plea has a factual basis. Rule 11(c)(5) recognizes, however, that a court may discharge its duty of determining that a guilty plea has a factual basis by "question[ing] the defendant under oath * * * about the offense to which the defendant has pleaded." See also Advisory Committee Notes (1974 Amendment) ("An inquiry [regarding the factual basis for the plea] might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case."); *United States* v. *Tunning*, 69 F.3d 107, 112 (6th Cir. 1995) ("The ideal means to establish the factual basis for a guilty plea is for the district court to ask the defendant to state, in the defendant's own words, what the defendant did that he believes constitutes the crime to which he is pleading guilty.").

A district court is afforded wide discretion under Rule 11 to question a defendant about the crime to which he is pleading guilty. Rule 11(f) expressly

authorizes the court to conduct an inquiry as broad and intensive as necessary to "satisfy it" that such a basis exists. As the Fifth Circuit has explained, "no mechanical rule can be stated, and the more complex or doubtful the situation as to [the factual basis] requirement, the more searching will be the inquiry dictated by a sound judgment and discretion." *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). In principle, any evidence that would be relevant at trial to prove the offense would also be relevant during the Rule 11 factual-basis inquiry.

A court may often wish to question a defendant closely about the factual basis for a plea of guilty. Such a need may exist to ensure that the defendant understands possible defenses, to remove confusion about his understanding of the charged offenses, or to determine whether in fact the defendant wishes to plead guilty at all. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989). In this case, for example, the government provided the initial factual basis, and the court then asked petitioner: "Did you do that?" J.A. 47. Petitioner equivocated by saying "[s]ome of it." *Ibid.* In that situation, the court is required to go into the details of the conduct to which the defendant is prepared to admit. A similar situation arises if the court has reason to believe that the defendant might be entering a false guilty plea because of force or threats, in order to protect another person, or because of a mental defect.[10] In such a case, the

[10] See *Godwin* v. *United States*, 687 F.2d 585, 590 n.4 (2d Cir. 1982) ("[T]he risk that a [voluntary] plea might nonetheless be inaccurate remains a matter of concern. . . . A clearly rational defendant may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person.") (quoting ABA Standards Relating to Pleas of Guilty 31 (Approved Draft 1968)).

court should conduct "a most searching inquiry," *Dayton*, 604 F.2d at 938, by questioning the defendant extensively about the facts and circumstances of the crime. Indeed, the possibility of force, threats, or mental defects implicates the very voluntariness of the plea, calling into play Rule 11(d), which *requires* the court to address the defendant personally to determine "that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." See *McCarthy*, 394 U.S. at 465-466.

A court might also wish to conduct a particularly searching factual-basis inquiry of the defendant, asking for details of the crime, where the court suspects that the defendant might have a valid defense to the charge, such as entrapment or self-defense. See *United States* v. *Frye*, 738 F.2d 196, 199 (7th Cir. 1984) ("before pleading guilty a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis of such defenses"); *Sober* v. *Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981) (same). Here, for example, after the court heard the factual basis for one count in which petitioner was charged with aiding and abetting a substantive drug distribution, the court raised the possibility that petitioner might have a defense that she "didn't take a step to further the transaction." J.A. 49. The court thus advised petitioner that she did not have "to plead to something you didn't do." *Ibid.*. Thus, as one commentator has stated, in order to "be certain that in accepting a guilty plea, it is not punishing the defendant for a crime he did not commit," the court "must engage in as extensive a colloquy as is required to verify that the plea is voluntary and proper." M. Rhodes, *Orfield's Criminal Procedure Under the Federal Rules* § 11.29, at 104 (2d ed. 1985).

Given the court's latitude to conduct an intense inquiry of the defendant under Rule 11(f), defendants may often be called upon, in response to questioning by the court about their offense conduct, to reveal or admit to facts that also could affect their sentence or implicate them in related crimes. The factual basis inquiry may, for example, involve discussion about the defendant's precise role in the crime, the defendant's motive, the identity of the victim, where the crime was committed, and the amount of money or contraband involved. See *United States* v. *Montoya*, 891 F.2d 1273, 1291 (7th Cir. 1989) (defendant's "description of his role and activities in the operation provided a sufficient factual basis for his plea of guilty to the conspiracy charge"); *United States* v. *Wetterlin*, 583 F.2d 346, 353 (7th Cir. 1978) (vacating guilty plea because defendant never admitted to facts establishing his role in the charged conspiracy), cert. denied, 439 U.S. 1127 (1979). Such details may also have a bearing on the penalty that may be imposed for the crime under the Criminal Code[11] and the Sentencing Guidelines.[12] In addition, such details may re-

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[11] A variety of statutes provide for enhanced sentences based on the way in which the crime is carried out. See, *e.g.*, 21 U.S.C. 841(b) (penalty for drug distribution offense depends on quantity of drugs involved); *Barker* v. *United States*, 7 F.3d 629, 634 (7th Cir. 1993) (recognizing drug quantity to be sentencing factor rather than element of offense under 21 U.S.C. 841), cert. denied, 510 U.S. 1099 (1994); *United States* v. *Cross*, 916 F.2d 622, 623 (11th Cir. 1990) (same), cert. denied, 499 U.S. 929 (1991); see also 18 U.S.C. 111(b) (penalty for assault on federal officer is enhanced if deadly weapon is used); *United States* v. *Young*, 936 F.2d 1050, 1053-1055 (9th Cir. 1991) (recognizing use of deadly weapon to be sentencing factor rather than element of offense under 18 U.S.C. 111).

[12] The Guidelines provide for systematic consideration of the character of the offense and the defendant's role in it. See, *e.g.*,

late to elements that are common both to the crime to which the defendant is pleading guilty and to a related crime with which the defendant has not been charged.[13] Conspiracy offenses, such as the drug conspiracy charged in this case, provide a good example of that rule: in order to determine the existence, nature, and scope of the conspiratorial agreement to which the defendant is admitting, the court would often have to inquire into specific acts that give shape and content to the agreement, even though each act may be itself a separate crime.

It would therefore be impracticable for a court to conduct a Rule 11(f) inquiry of the defendant without asking questions that touch on factors that could adversely affect his sentence or implicate him in related

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Sentencing Guidelines § 2B4.1(a)(b)(1) (penalty for bribery enhanced if bribe exceeded $2,000); *id.* § 2D1.1(b)(3) (penalty for drug distribution offenses enhanced if offense occurred in prison); *id.* § 2E2.1(b)(1)(B) (penalty for extortionate extension of credit enhanced if dangerous weapon was used); *id.* § 2K1.3(b)(1) (penalty for unlawful possession of explosives depends on quantity of explosives involved); *id.* § 3A1.1(a) (penalty depends on whether defendant was motivated by victim's race, sex, or sexual orientation in committing offense); *id.* § 3B1.2(a) (penalty is enhanced if defendant was an organizer, leader, manager, or supervisor of the criminal activity).

[13] It is not unusual for a single act to constitute an element of multiple crimes. A drug offense, for example, may be an element of an offense under 18 U.S.C. 924(c), which prohibits using or carrying a firearm during and in relation to a drug trafficking offense. A drug offense may also be an element of a continuing criminal enterprise offense under 21 U.S.C. 848. A mail or wire fraud offense may be an element of a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which requires, *inter alia*, the commission of at least two predicate acts of racketeering, including mail or wire fraud, see 18 U.S.C. 1961(1).

crimes. If a defendant had a Fifth Amendment privilege to refuse to answer such questions, the ability of the court, absent a specific waiver, to question him about the factual basis for his plea would be, at the very least, significantly impaired. Essentially, courts would be restricted to obtaining from defendants a bare-bones admission to the elements of the offense, devoid of relevant detail concerning motive, role in the offense, manner of commission, and surrounding circumstances. That would constitute a significant departure from current practice in which defendants are usually required to respond to government proffers that go well beyond the mere elements of the offense and that summarize in detail the evidence supporting the charge. See, *e.g.*, *United States* v. *Wilson*, 81 F.3d 1300, 1308 (4th Cir. 1996) ("lengthy and detailed" proffer); *Montoya*, 891 F.2d at 1290 (setting forth detailed proffer); *United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985) ("lengthy factual proffer"); J.A. 46-47 (factual basis for petitioner's cocaine conspiracy offense).

If the court can require the defendant who pleads guilty to reveal the details of the crime without violating any Fifth Amendment privilege—as a reasonable application of Rule 11 requires—it would make little sense to permit the defendant to rely on the Fifth Amendment at sentencing to withhold the same details. To the extent that the plea itself waives the privilege, there is no sound reason to conclude that the privilege revives later in the same proceeding. Indeed, any such rule would give the defendant a strong incentive during the guilty plea colloquy to provide the court with an incomplete, self-serving account of his offense, in the hope that by doing so he might avoid a harsher sentence or avoid disclosure of factually related crimes. There is no warrant for injecting such gamesmanship

into the Rule 11 process, thereby "degrad[ing] the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *United States* v. *Hyde,* 117 S. Ct. 1630, 1634 (1997).

C. A Plea Of Guilty Waives The Fifth Amendment Privilege In The Defendant's Own Criminal Case, Not In Other Cases

A court may receive a defendant's guilty plea to an offense and impose sentence on the defendant for that offense at a single hearing.[14] Far more commonly today in the federal system, the court receives the guilty plea at one hearing and imposes sentence at a subsequent hearing. See Fed. R. Crim. P. 32. In either event, the defendant's waiver of his Fifth Amendment privilege in entering his guilty plea continues to apply at sentencing, because both aspects of the case are part of a single proceeding for Fifth Amendment purposes.

It is settled that a waiver of the Fifth Amendment privilege "is limited to the particular proceeding in which the waiver occurs." *United States* v. *Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980); see *United States* v. *Fortin*, 685 F.2d 1297, 1299 (11th Cir. 1982) (characterizing this rule as "hornbook law"); *United States* v. *Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976) (Clark, J.) (same). The "single proceeding" rule serves to protect a witness against changed circumstances —such as a change in the law or in the focus of inquiry—"creating new grounds for apprehension" that the witness may not have anticipated at the time of the first proceeding. *United States* v.

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[14] See, *e.g.*, *United States* v. *Kassar*, 47 F.3d 562, 564 (2d Cir. 1995); *United States* v. *Eiselt*, 988 F.2d 677, 678 (7th Cir. 1993); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1488 (9th Cir.), cert. denied, 473 U.S. 913 (1985).

Miranti, 253 F.2d 135, 140 (2d Cir. 1959); accord *In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *In re Neff*, 206 F.2d 149, 152-153 (3d Cir. 1953).

A defendant's guilty plea hearing and sentencing are constituent parts of a "single proceeding" for purposes of this rule. Both are conducted in the same criminal case, before the same court, and by the same prosecuting authority. The plea and sentence focus on the same defendant and the same criminal charges. Because sentencing follows virtually automatically from the guilty plea, the two steps are integral to the entry of the judgment. Indeed, under the Federal Rules of Criminal Procedure, the court must impose sentence before a guilty plea can result in a judgment of conviction. See Fed. R. Crim. P. 32(d)(1); *Parr* v. *United States*, 351 U.S. 513, 518 (1956) ("Final judgment in a criminal case means sentence. The sentence is the judgment.") (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937)).

In cases that have held the "single proceeding" rule not to be satisfied, the proceedings were significantly more independent than the guilty plea hearing and sentencing in this case. Those cases involved a grand jury investigation and a trial based on an indictment issued by the grand jury (*Licavoli*, 604 F.2d at 623; *United States* v. *James*, 609 F.2d 36, 45 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); *Neff*, 206 F.2d at 152);[15] a trial and a retrial after an appeal (*United States* v. *Gary*, 74 F.3d 304, 312 (1st Cir.), cert. denied, 518 U.S. 1026 (1996); *United States* v. *Wilcox*, 450 F.2d

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[15] But see *Ellis* v. *United States*, 416 F.2d 791, 800 (D.C. Cir. 1969) (individual who testifies before grand jury without invoking Fifth Amendment privilege waives privilege if called as witness at trial based on indictment returned by grand jury).

1131, 1141-1142 (5th Cir. 1971), cert. denied, 405 U.S. 917 (1972)); the witness's trial and a co-defendant's trial (*Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973)); and the witness's guilty plea hearing and a co-defendant's trial (*Fortin*, 685 F.2d at 1298-1299; *United States* v. *Johnson*, 488 F.2d 1206, 1210 (1st Cir. 1973)).[16]

Several courts have held that a defendant who has pleaded guilty and is awaiting sentencing may invoke the Fifth Amendment privilege to refuse to testify at the trial of a co-defendant. See, *e.g.*, *United States* v. *Kuku*, 129 F.3d 1435, 1437 (11th Cir. 1997), cert. denied, 118 S. Ct. 2071 (1998); *United States* v. *De La Cruz*, 996 F.2d 1307, 1313 (1st Cir.), cert. denied, 510 U.S. 936 (1993); *United States* v. *Bahadar*, 954 F.2d 821, 824 (2d Cir.), cert. denied, 506 U.S. 850 (1992); *United States* v. *Lugg*, 892 F.2d 101, 103 (D.C. Cir. 1989); *United States* v. *Valencia*, 656 F.2d 412, 416 (9th Cir.), cert. denied, 454 U.S. 877 (1981).[17] The results in those cases are consistent with the rule that we propose here that a guilty plea waives the Fifth Amendment privilege for the entirety of the defendant's *own* case. It is one thing

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[16] See also *United States* v. *Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.) (affidavit supporting one co-defendant's severance motion, severed trial of other co-defendant), cert. denied, 439 U.S. 1005 (1978); *Cain*, 544 F.2d at 1117 (deposition in one case; trial in different case); *Marcello* v. *United States*, 196 F.2d 437, 444-445 (5th Cir. 1952) (grand jury investigation; investigation into unrelated crime by same grand jury one year later).

[17] The defendant cannot, however, assert the Fifth Amendment privilege with respect to a crime for which a final conviction, which is not under appeal, has been entered, because there is no longer any danger of further incrimination on that offense. *See Reina* v. *United States*, 364 U.S. 507, 513 (1960); *Taylor* v. *Best*, 746 F.2d 220, 222 (4th Cir. 1984), cert. denied, 474 U.S. 982 (1985).

to hold that a defendant who has pleaded guilty has no privilege to remain silent at his own sentencing with respect to details about the crime that is the subject of the plea. It is quite another to require him to respond in a separate proceeding, involving different parties with different interests, to questions that might have an adverse impact on his sentence or on his prosecution for other crimes. The distinction between the defendant's own sentencing and his co-defendant's trial is a logical application of the rule that a waiver of the privilege is limited to the proceeding in which it occurs.

D. Petitioner's Plea Of Guilty To Conspiracy To Distribute Cocaine Waived Her Fifth Amendment Privilege To Remain Silent At Sentencing About The Amount of Cocaine That She Distributed Pursuant To The Conspiracy

Petitioner, by pleading guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. 846, waived her Fifth Amendment privilege to remain silent about the details of that offense. Those details include the quantity of cocaine that petitioner agreed to, and did, distribute as a participant in the conspiracy described in the superseding indictment. Because petitioner elected to remain silent at sentencing about those details even while contesting the quantities of cocaine that were attributed to her by the witnesses presented by the government, the district court did not err in drawing the inference that any truthful testimony she might give would have been adverse to her position.[18]

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[18] Indeed, the court may have had authority to draw such an inference even apart from petitioner's waiver of the privilege through her guilty plea. No federal statute or rule prohibited the court from doing so, as amicus National Association of Criminal Defense Lawyers, et al., concedes (Br. 12 n.11). Cf. 18 U.S.C. 3481 ("*In trial* of all persons charged with the commission of offenses

Petitioner, to the extent that she addresses the question whether a guilty plea to an offense constitutes a waiver of the Fifth Amendment privilege at sentencing as to all details of the offense, argues only that "factually there was no such blanket waiver in this case." Pet. Br. 29. Petitioner apparently believes that no such waiver can be valid unless the trial court not only advises the defendant generally that by pleading guilty he will lose "the right at trial to remain silent under the Fifth Amendment," as the court did here (J.A. 45), but also advises the defendant specifically that he will lose the right to remain silent at sentencing

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against the United States * * *, the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him.") (emphasis added). This Court has ruled that the Fifth Amendment protects a defendant from having his silence considered against him at the guilt phase of his criminal trial, *Griffin* v. *California*, 380 U.S. 609 (1965), but has not addressed whether *Griffin* also applies at the sentencing phase. In other contexts outside the guilt phase of a criminal trial, the Court has ruled that, even where the Fifth Amendment privilege prevents compelling an individual to testify against himself, it does not unduly burden the privilege to permit the fact-finder to draw an adverse inference from the individual's decision to remain silent in the face of probative evidence. See *Woodard*, 118 S. Ct. at 1252 (clemency hearing); *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-318 (1976) (state prison disciplinary hearing). In the present context, guilt has already been established and the court is faced with the task of determining an appropriate sentence for an individual who has committed a crime. Where the defendant disputes the extent of his culpability, as shown by probative evidence offered by the government, a court should be permitted (although not required) to infer, for whatever evidentiary weight is justified, that the defendant's silence at sentencing about facts within his personal knowledge supports the inference that the truth would not be favorable.

about the offense to which he pleads guilty. See Pet. Br. 32.

This Court has recognized, however, that "an individual may lose the benefit of the [Fifth Amendment] privilege without making a knowing and intelligent waiver," at least outside a custodial setting. *Minnesota* v. *Murphy*, 465 U.S. 420, 428 (1984) (quoting *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976)); see 1 J. Strong, *McCormick on Evidence* 494 (4th ed. 1992) (noting that "[m]ost courts hold that a trial judge has no duty to admonish a represented defendant who seeks to testify that he has a right not to do so"). In *Rogers* and *Brown*, for example, the witnesses were held to have waived the Fifth Amendment privilege by testifying about their alleged offenses, although nothing in those opinions suggests that the witnesses were instructed in advance that such testimony would constitute a waiver. See *Rogers*, 340 U.S. at 377-378 (Black, J., dissenting) (noting that the Court had not required that privilege "be knowingly waived").[19] Petitioner's valid guilty plea had a comparable effect, even though the court did not advert to inferences it might draw from her silence at sentencing. As this Court has noted, "[a]part from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo." *Libretti* v. *United States*, 516 U.S.

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[19] The only decision of this Court that petitioner cites in support of her position is *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). See Pet. Br. 28, 29, 32. As this Court explained in *Garner*, however, cases such as *Rogers* "do not apply a 'waiver' standard, as that term was used in *Johnson* v. *Zerbst*." 424 U.S. at 654 n.9.

29, 50-51 (1995). Petitioner makes no claim that her Rule 11 colloquy was insufficient or that her plea was not knowing, voluntary, and intelligent. J.A. 120.

Finally, petitioner's waiver of her Fifth Amendment privilege through her guilty plea was not negated, as the concurring judge below suggested (J.A. 127-128), by her reservation of the opportunity to contest at sentencing the government's position that she participated in the distribution of more than five kilograms of cocaine. A defendant who wishes to confess to the crime and permit the court to enter judgment on the plea cannot control the scope of his waiver any more than a witness who elects to testify can dictate the scope of his cross-examination. See *Rogers*, 340 U.S. at 373 (a witness who "discloses his criminal connections * * * is not permitted to stop, but must go on and make a full disclosure"). In any event, nothing in petitioner's reservation, during her Rule 11 hearing, of her right to contest drug quantity purported to reserve any right to remain silent on the issue with impunity. See, *e.g.*, J.A. 38-39 (district court observes in colloquy with petitioner's counsel that "I understand you're going to contest her involvement in more than five kilograms * * * [a]nd that's going to be determined at sentencing"); see also J.A. 42. At most, as the court of appeals explained, petitioner's "reservation may have put the government to its proof as to the amount of drugs." J.A. 124-125. It did not prevent petitioner's refusal to testify on the issue from being held against her. *Ibid*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Rule 11 of the Federal Rules of Criminal Procedure states:

Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

* * * * *

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the

proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

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(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.