Mercer Law Review

Volume 49 | Number 3 Article 14

5-1998

United States v. Mitchell: The Fifth Amendment at Sentencing

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United States v. Mitchell: The Fifth Amendment at Sentencing

Whether the Fifth Amendment privilege against self-incrimination may be claimed by a criminal defendant after conviction is an open question. In *United States v. Mitchell*,[1] the Third Circuit aligned itself with the minority of circuits by holding that defendants retain no Fifth Amendment right against self-incrimination with respect to the facts or circumstances of a crime once convicted, even though their testimony may work to increase their level of punishment.[2]

I. BACKGROUND

In *Mitchell*, defendant was indicted on four counts for her involvement in a four-year cocaine conspiracy extending from 1989 to 1994. Count one charged Mitchell with conspiring to distribute five or more kilograms of cocaine, which carries a minimum mandatory ten year sentence. Mitchell entered an open plea of guilty to all counts, but specifically reserved her right to contest the amount of cocaine she had distributed. The trial court explained to Mitchell that by entering a plea of guilty she was waiving her Fifth Amendment right not to testify.[3]

The case against nine of Mitchell's co-defendants went to trial a few months later. During the trial, some of Mitchell's co-defendants, who pled guilty and agreed to cooperate with the Government, testified about the extent of Mitchell's involvement in the conspiracy. Richard Thompson, a co-defendant, testified that Mitchell sold one and a half ounces of cocaine two to three times a week between April 1992 and December 1993. Later, at Mitchell's sentencing hearing, Thompson adopted his trial testimony and elaborated on the specific amount of cocaine Mitchell had sold. Thompson testified that Mitchell had received one and a half ounces of cocaine two to three times a week beginning in April 1992; that she received the same amount three to five times a week between August 1992 and December 1993; and that Mitchell was

1. 122 F.3d 185 (3d Cir. 1997).
2. *Id.* at 191.
3. *Id.* at 186-87.

in charge of distribution from January 1994 through March 1994. On cross examination, Thompson conceded that he had not consistently seen Mitchell during these times.[4]

Another witness for the Government, Alvita Mack, testified that he had bought a total of two ounces of cocaine from Mitchell on three occasions under the supervision of the DEA. This testimony was also adopted by both parties during the sentencing hearing. Mitchell contended at the sentencing hearing that this was the only quantity of cocaine established by reliable testimony and thus the only amount for which she should be held responsible. Mitchell did not testify at the sentencing hearing nor did she offer any evidence to contravene that of the Government.[5]

The district judge then indicated that he believed Mitchell retained no Fifth Amendment right to remain silent at the sentencing hearing with respect to the crimes to which Mitchell had pled guilty. On this premise, the district court judge told Mitchell, "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 [and] I'm taking the position that you should come forward and explain your side of this issue."[6] The trial judge then concluded that Mitchell had sold a total of thirteen kilograms of cocaine from 1992-1994. Mitchell was sentenced to ten years imprisonment, six years of supervised release, and a special assessment of two hundred dollars.[7]

Mitchell appealed the conviction, arguing that the district court had violated her Fifth Amendment right not to testify at the sentencing hearing.[8] The Court of Appeals for the Third Circuit affirmed the decision of the district court and held that when a criminal defendant has pled guilty to or has been convicted of a crime, that defendant retains no Fifth Amendment right against self-incrimination with respect to the facts or circumstances of that crime even though the testimony may affect the level of punishment.[9]

II. LEGAL HISTORY

The Fifth Amendment provides in part that "no person shall . . . be compelled in any criminal case to be a witness against himself."[10] This

4. *Id.*
5. *Id.* at 187-88.
6. *Id.* at 188.
7. *Id.*
8. *Id.*
9. *Id.* at 191-92.
10. U.S. CONST. amend. V.

right extends to defendants in all proceedings where their statements may be used to incriminate them.[11] However, the right is not absolute and ceases to apply once the sanctions that justify the invocation of the privilege are removed.[12] "The interdiction of the [Fifth] Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge."[13] Thus, the Fifth Amendment's sole concern is preventing witnesses from being forced to give testimony that may lead to the infliction of criminal penalties.[14]

In the past, the Court's holdings sufficed to offer protection to criminal defendants who had pled guilty to or been convicted of a crime. However, with mandatory minimum sentences and the institution of the Federal Sentencing Guidelines ("the Guidelines"),[15] which mandate certain sentence increases or reductions, the contours of the Fifth Amendment protection have become somewhat obscured. The Guidelines condition the sentence not merely upon the core facts that constitute the crime but on "specific offense characteristics."[16] For example, in drug related offenses the base offense (the acts constituting the crime) may be conspiring to distribute cocaine. The specific offense characteristics would be the amount of cocaine for which the defendant is responsible.[17] These specific offense characteristics are aggravating factors.[18] If indeed the concern of the Fifth Amendment is with the "penalties affixed to the criminal acts,"[19] then this concern may be frustrated when defendants' testimony works to enlarge their sentences, sometimes nearly twofold.

Defendants have often been asked to testify at their own sentencing hearings regarding a crime to which they have either already pled guilty or for which conviction is had, and frequently defendants assert their Fifth Amendment privilege. The circuit courts stand uniformly on the proposition that if a defendant remains subject to the possibility of prosecution, the defendant may not be compelled to testify and can properly assert his Fifth Amendment privilege.[20] However, the circuits are split when the issue of further prosecution is removed and the

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11. *In re* Gault, 387 U.S. 1, 49 (1967).
12. Ullmann v. United States, 350 U.S. 422, 431 (1956).
13. *Id.*
14. *Id.* at 438-39 (quoting Boyd v. United States, 116 U.S. 616, 634 (1886)).
15. *See generally* U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.].
16. *Id.* at § 181.3.
17. *Id.*
18. *Id.*
19. *Ullmann*, 350 U.S. at 438-39.
20. *See Mitchell*, 122 F.3d at 190.

defendant is asked to talk only about the crime for which the defendant has already been convicted.[21]

The Supreme Court has not squarely addressed the issue raised in *Mitchell*, namely whether defendants retain their Fifth Amendment privilege against self-incrimination for crimes when they no longer face the possibility of conviction, nor risk additional prosecutions, but when such testimony may lengthen the sentence. The circuit courts have found language in several of the Supreme Court cases upon which they have based their decisions when resolving this issue. Two approaches have emerged in the circuits and, not surprisingly, the two are directly opposed.[22] The approach followed by the Second and Third Circuits is that when defendants plead guilty to a crime, they admit commission of that crime and waive their privilege as to the acts comprising the crime.[23] In support of this approach, these circuits point to instances where the Supreme Court has written "if the criminality has already been taken away, the [A]mendment ceases to apply."[24]

Although the Third Circuit labeled the issue in *Mitchell* as one of first impression, the court had already touched upon the issue earlier in *United States v. Frierson*.[25] The *Frierson* decision accurately reflects the position of the circuits that follow the "waiver-by-plea" doctrine.[26] The court in *Frierson* said, "the . . . privilege is not implicated when a defendant is asked to talk about the crime to which he has pled guilty and about his or her attitude concerning that crime. Nor is [it] implicated if the sentence imposed is more harsh because of the defendant's [testimony]."[27]

The circuits taking the other approach do so with little discussion, holding that "the convicted but unsentenced defendant retains a legitimate protectable Fifth Amendment interest as to matters that could

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21. *See* United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983) (holding that the Fifth Amendment ceases to apply upon conviction). For cases to the contrary, holding that the convicted defendant retains the Fifth Amendment right against self-incrimination, see United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997); United States v. Garcia, 78 F.3d 1457 (10th Cir. 1996); United States v. Lugg, 892 F.2d 101 (D.C. Cir. 1989).

22. *See supra* note 21 and cases cited therein.

23. United States v. Frierson, 945 F.2d 650, 656 (3d Cir. 1991). While a decision on this issue was not necessary in *Frierson*, the court accurately recited the state of the law in the circuits following this rationale.

24. Hale v. Henkel, 201 U.S. 43, 67 (1906).

25. 945 F.2d 650 (3d Cir. 1991).

26. *Id.* at 657. The waiver-by-plea doctrine is the name given to the situation where a defendant has pled guilty and the Fifth Amendment is held waived with respect to the acts constituting that crime.

27. *Id.* at 657 n.2.

affect his sentence."[28] A typical example of this approach is found in the Tenth Circuit's decision in *United States v. Garcia*.[29] Defendant in *Garcia* had entered into a plea agreement whereby one count for conspiracy to distribute cocaine was dropped in exchange for defendant's guilty plea to one count of distribution. However, the agreement expressly left sentencing to the discretion of the trial judge and the mandates of the Guidelines. The judge at the sentencing hearing in *Garcia* indicated that defendant had waived his Fifth Amendment right by entering a guilty plea. The trial judge then considered defendant's silence and refusal to take the witness stand to refute evidence pertaining to the amount attributable to defendant in fixing the amount of cocaine chargeable to defendant.[30] On appeal, the Tenth Circuit held that the trial judge had erred with respect to the Fifth Amendment rights of defendant at the sentencing phase of the trial.[31] The court wrote, "[t]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites."[32] The court noted that defendant faced "exposure" because his testimony admitting to distribution of a certain amount of cocaine could have enhanced the sentence he faced.[33] Thus, in those circuits that follow the *Garcia* approach, "[t]here is no question but that the Fifth Amendment does offer protection in the sentencing process . . . and the defendant does not lose [that privilege] by reason of his conviction of a crime."[34]

III. THIRD CIRCUIT'S RATIONALE

In *Mitchell*, the court explained that the Fifth Amendment extends to defendants the right not to provide evidence by their own testimony that may be used against them in a criminal prosecution or that may be used to instigate a criminal prosecution against them.[35] The court wrote that the exercise of this right may not be used in any way to penalize a defendant,[36] and neither may comment be made on the defendant's invocation of the privilege;[37] but when a defendant has been convicted,

28. United States v. De La Cruz, 996 F.2d 1307, 1312 (1st Cir. 1993) (citations omitted).
29. 78 F.3d 1457, 1463 (10th Cir. 1996).
30. *Id.* at 1460-63.
31. *Id.* at 1463.
32. *Id.* (citing *In re* Gault, 387 U.S. 1, 49 (1967)).
33. *Id.* at 1463 n.8.
34. *Id.* at 1463 (citations omitted).
35. 122 F.3d at 189 (citing Hoffman v. United States, 341 U.S. 479, 486 (1951)).
36. *Id.* (citing Minnesota v. Murphy, 465 U.S. 420, 434 (1984)).
37. *Id.* (citing Wilson v. United States, 149 U.S. 60, 62 (1893)).

"the privilege is lost because 'he can no longer be incriminated by his testimony [concerning that] crime.'"[38] Relying on the earlier decision in *Frierson*, the court noted that upon a defendant's plea of guilty to a crime, the defendant waives the privilege regarding the acts constituting that crime.[39]

The court responded to cases cited by Mitchell on appeal and distinguished those from Mitchell's case.[40] The court rejected two cases cited by Mitchell and stated the issue in those cases was the district courts' attempt to compel the defendants to testify to acts beyond those of the actual crime for which they had been convicted.[41] The court distinguished these by finding that invocation of the Fifth Amendment privilege in those cases was to avoid inculpation in crimes additional to those for which the defendants were being sentenced and for which guilt had not been established.[42] In other words, criminal defendants retain their Fifth Amendment rights with respect to acts beyond those which pertain to the crime of conviction. Thus, the court wrote "a defendant's plea of guilty to one offense does not 'by its own force . . . waive [the Fifth Amendment] privilege with respect to other alleged transgressions.'"[43] The court distinguished the third case, *Frierson*, and explained that the case held that when a defendant fails to claim his Fifth Amendment privilege but refuses to testify, that refusal may be held against the defendant in denying the defendant a sentence reduction.[44] After summarizing and dismissing the cases cited by Mitchell, the court stated that the cases were simply examples of the general principle that defendants retain their Fifth Amendment right regarding offenses for which they have not yet been convicted.[45]

Therefore, noting that the issue presented was one of first impression, the court demonstrated the novelty of Mitchell's claim.[46] The court distinguished this case from those cases when a criminal defendant was asked to testify but was able to rightfully invoke his Fifth Amendment privilege and avoid testifying to acts that would have placed the

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38. *Id.* (quoting Reina v. United States, 364 U.S. 507, 513 (1960)).

39. *Id.* (quoting *Frierson*, 945 F.2d at 656).

40. *Id.* (citing *Fierson*, 945 F.2d 650; United States v. Huebel, 864 F.2d 1104 (3d Cir. 1989); and United States v. Garcia, 544 F.2d 681 (3d Cir. 1976)).

41. *Id.* (citing *Huebel*, 864 F.2d 1104 and *Garcia*, 544 F.2d 681).

42. *Id.*

43. *Id.* at 190 (quoting United States v. Yurasovich, 580 F.2d 1212, 1218 (3d Cir. 1978)).

44. *Id.* at 190-91. The court in reaching its conclusion relied heavily on dicta in *Fierson*. This is discussed *infra* in the text of this Note.

45. *Id.* at 190.

46. *Id.*

defendant at risk of prosecution for additional crimes.[47] The court pointed to the oft repeated language in those cases that "Fifth Amendment self-incrimination rights continue in force until sentencing."[48] However, the court indicated that this was not the rule of law.[49] The court explained that this language had emerged from cases where non-pleading defendants had sought to compel testimony from a defendant who had already pled guilty to a crime but had not yet been sentenced.[50] Because defendants awaiting sentencing could by testimony implicate themselves in further crimes, the language in those cases was not intended as a rule, but rather went to the procedural status of the case.[51] The court indicated that the language, which seemingly supported Mitchell, was mere dicta and that it did not extend the Fifth Amendment privilege to sentencing proceedings.[52]

Nevertheless, the court acknowledged that some of the circuits had adopted the rule that defendants may invoke the Fifth Amendment privilege when their testimony may enhance the sentence.[53] The court rejected the rationale employed in those cases and cited a footnote in *Frierson*: "the Fifth Amendment . . . is not implicated when a defendant is asked to talk about the crime to which he has pled guilty [even though] the sentence imposed is more harsh because of the defendant's response to that interrogation."[54]

The court iterated that it was unable to find either within the Amendment itself or in the Supreme Court cases "any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction."[55] The court then cited a 1961 hornbook[56] and found that to extend the privilege to acts constituting the crime of conviction "would contravene the established principle that upon conviction, 'criminality ceases; and with criminality the privilege.'"[57] The court declared that although there may be "many components to be considered when

47. *Id.*
48. *Id.* (quoting Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1076 (6th Cir. 1990)).
49. *Id.* at 191.
50. *Id.*
51. *Id.*
52. *Id.* at 190.
53. *Id.* (citing *Garcia*, 78 F.3d at 1463).
54. *Id.* (quoting *Frierson*, 945 F.2d at 656 n.2).
55. 122 F.3d at 191.
56. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 2279 (John T. McNaughton ed., 1961).
57. 122 F.3d at 191.

computing the sentence in the new era of Sentencing Guidelines . . . one cannot logically fragment the sentencing process for this purpose and retain the privilege against self-incrimination."[58] Mitchell argued further that while she had pled guilty to the conspiracy to distribute cocaine, she had not pled to any specific amount of cocaine, and therefore had not admitted to the crime for which she was being sentenced (which was distributing five or more kilos of cocaine.)[59] The court rejected this argument stating that "Mitchell opened herself up to the full range of possible sentences for distributing cocaine when she was told . . . that the penalty for conspiring to distribute cocaine had a maximum [sentence] of life imprisonment."[60]

Because the testimony that the court sought from Mitchell was not testimony that would have opened Mitchell up to further criminal prosecution for additional crimes and because Mitchell did not run the risk of being retried for the same offense, the court found that Mitchell's refusal to testify was properly held against her.[61] The court reasoned that the amount of cocaine that Mitchell was responsible for was "not an issue of independent criminality" and therefore, Mitchell had lost her Fifth Amendment privilege with regard to the crime of conviction.[62] Moreover, while Mitchell may have "put the [G]overnment to its proof as to the amount of drugs, her declination to testify on that issue could properly be held against her."[63] Thus, although Mitchell faced the possibility of a harsher sentence, the Fifth Amendment privilege was no longer available to her.[64]

Judge Michel concurred only in the judgment and indicated that the case should have been disposed of under the Harmless Error rule because there was sufficient evidence in the record from which the trial judge could have determined Mitchell's sentence.[65] Judge Michel expressed his concern as to the majority's "categorical rationale that a guilty plea entirely waives a defendant's Fifth Amendment privilege—even as to facts that are not elements of the offense charged and as to which a defendant expressly 'reserved' in offering a plea."[66] He was not prepared to rule that a guilty plea to the crime of conviction waived the Fifth Amendment privilege "in the face of such an express

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 192 (Michel, J., concurring).
66. *Id.*

reservation as to a non-element [of the crime of conviction], especially where, as here, the defendant's silence" worked to double the sentence.[67] The concurrence closed by noting that the majority had created "an apparent split among [the] [c]ircuits," and that a ruling on an issue of this importance should have been reserved for a case when deciding it was unavoidable.[68]

IV. IMPLICATIONS

The Third Circuit's decision aligns itself with a minority of the circuit courts on this issue by holding that the convicted defendant does not retain a Fifth Amendment right with respect to the crime of conviction. Stated another way, upon conviction the sentencing court may properly compel the defendant to testify to acts which relate to the crime of conviction provided that the testimony will not subject her to further criminal prosecution.[69] Consider below some arguments which militate against the approach adopted in *Mitchell*.

The problem that the holding in *Mitchell* presents is really a function of the Guidelines, which prescribe sentence lengths for particular crimes. Because these guidelines "step-up" or enhance a defendant's sentence for aggravating factors, a defendant such as Mitchell is faced with a difficult choice. Although there may be advantages to pleading guilty, such as avoiding the cost of a trial the defendant may be certain to lose, the defendant must proceed to sentencing faced with a "cruel trilemma."[70] This "cruel trilemma" is that the defendant may either remain silent and be held in contempt, testify untruthfully risking perjury, or testify truthfully giving testimony that the defendant knows will subject him to a more severe penalty.[71] An oft made argument in support of the Fifth Amendment's protection is that it contravenes the moral nature of man to incriminate himself.[72] This argument is usually offered for the privilege in the first instance (prior to conviction), but it would seem that the argument applies with even greater force to a defendant who has been convicted and awaits his sentence, who if then compelled to testify becomes the "deluded instrument of his own execution."[73]

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67. *Id.*

68. *Id.* "Given the unsettled state of the law among the [c]ircuits on this important Fifth Amendment issue, I would defer a decision on it to a case in which deciding it is unavoidable . . . ." *Id.*

69. *Id.* at 191.

70. Carter v. Kentucky, 450 U.S. 288, 299 (1981).

71. *Id.*

72. Couch v. United States, 409 U.S. 322, 328 (1973).

73. Estelle v. Smith, 451 U.S. 454, 462 (1981) (citations omitted).

Further, the Supreme Court has written "it [is] better for an occasional crime to go unpunished than the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused."[74] Likewise, although the privilege may occasionally "save a guilty man from his just deserts" it tempers their "tendency in human nature to abuse power" and the prosecution is forced to play by the rules.[75] It seems that removing the privilege from the defendant at sentencing makes great the potential for abuse by prosecutors and judges with little benefit to the administration of justice. The burden of proving by a preponderance of the evidence the quantity of cocaine attributable to a defendant remains on the Government at the sentencing phase.[76] By removing the defendant's Fifth Amendment privilege, the prosecution is not "put to its proof" as the majority in *Mitchell* wrote,[77] but rather is relieved of its proof as the defendant may now be compelled to divulge all facts concerning the crime of conviction.

Moreover, if "the sole concern is . . . with [the] *penalties* affixed to the criminal acts,"[78] it is as much the punishment that is attached to the conviction, as the conviction itself, that the Fifth Amendment seeks to provide defendants.[79] Thus, while the label of conviction may carry with it a moral stigma, the prospective penalty of imprisonment redoubles the imposition of the label, and to the stigma adds a loss of freedom. The Fifth Amendment privilege would be rarely invoked if no sanction accompanied conviction.

Finally, it seems that the decision in *Mitchell* provides the opportunity for the prosecution and the sentencing court to avoid its statutorily imposed task in determining the sentence of a convicted defendant. If a defendant upon conviction refuses to testify to his involvement in whatever crime he is convicted of, the sentencing court may then hold the defendant in contempt of court and thereby imprison the defendant for contempt. This then subjects the defendant to a further penalty irrespective of the crime for which she is convicted.

In sum, the unsettled state of the Fifth Amendment privilege at sentencing presents some serious questions in light of the Guidelines. In the Third Circuit a criminal defendant will now be compelled to testify concerning all acts and relevant conduct surrounding the crime

74. *Ullmann*, 350 U.S. at 427.
75. *Id.* at 428.
76. *Id.*
77. 122 F.3d at 191.
78. *Ullmann*, 350 U.S. at 438-39 (quoting *Boyd*, 116 U.S. at 634) (emphasis added).
79. *Id.*

for which he is convicted or has pled guilty even when such testimony may negatively affect his sentence. In other circuits such as the Tenth, a defendant will retain his Fifth Amendment rights through sentencing. It appears the circuits will remain definitely split on the issue until the issue is ultimately decided by the Supreme Court.

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