

Supreme Court Criminal Law Update

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The United States Supreme Court has issued numerous substantive opinions in the past year on topics ranging from withdrawal from a conspiracy to searches and seizures to what constitutes a Fifth Amendment violation. This article sheds light on some of these decisions, while Kearns Davis' federal criminal law update discussed at the October 21, 2013 CLE provided criminal law practitioners with a more in-depth look at recent decisions from both the United States Supreme Court and the Fourth Circuit Court of Appeals.

Burden of proof is on the defendant for withdrawal from a conspiracy. Before the Court's opinion in *Smith v. United States*, 133 S. Ct. 714 (2013), the circuits were divided as to whether withdrawing from a conspiracy before the statute of limitations period shifts the burden of proof to the government to prove beyond a reasonable doubt that the accused was a member of the conspiracy during the relevant period. *Id.* at 718. In *Smith*, the Supreme Court unanimously resolved this split, holding that establishing withdrawal from a conspiracy is an affirmative defense in which the burden of proof rests on the defendant, regardless of when the purported withdrawal took place. *Id.* at 720.

Petitioner *Smith* was convicted, *inter alia*, of various conspiracy charges. *Id.* at 717-18. Petitioner argued these conspiracy convictions were barred by the applicable 5-year statute of limitations, since Petitioner presented evidence that he withdrew from the conspiracies more than five years before he was charged, as he had spent the last six years of the charged conspiracies in prison for a felony conviction. *Id.* at 718. As a result, Petitioner contended that the burden of proof shifted to the Government to prove Petitioner's membership in the conspiracy persisted within the applicable five year window—which the Government did not do. *Id.* at 718-19.

In addressing Petitioner's argument, the Court first reaffirmed that the relevant date for statute of limitation purposes with conspiracy crimes is the date when the conspiracy concludes or the date when a defendant withdraws from the conspiracy. *Id.* at 718. The Court further emphasized that withdrawal is an affirmative defense that requires affirmative acts inconsistent with the goals of conspiracy that are communicated to the defendant's co-conspirators. *Id.*

Justice Ginsberg, who authored the opinion, noted that with affirmative defenses, the burden of proof lies usually with the defendant unless the affirmative defense negates an element of the crime. *Id.* at 719. However, as the affirmative defense of withdrawal does not negate an element of the conspiracy crimes charged and instead presupposes the defendant committed the offense (in order to be able to withdraw from it), the Supreme Court held that the burden of proof for

withdrawal likewise does not shift to the Government. *Id.* The Court further noted that with regard to withdrawal, Petitioner, as the one claiming he withdrew from the conspiracy, would be in the best position to provide proof of that withdrawal since the Petitioner would know what steps, if any, he took to dissociate from his co-conspirators. *Id.* at 720.

Moreover, since the commission of a conspiracy within the applicable statute of limitations period is also not an element of the conspiracy offense, the Court held that the burden is on the defendant to prove the statute of limitations has expired. *Id.* As a result, the Supreme Court affirmed Petitioner's convictions for conspiracy because he did not meet his burden of proof in presenting the affirmative defense of withdrawal or the expiration of the statute of limitations. *Id.* at 721.

Only occupants in the immediate vicinity of the area to be searched pursuant to a search warrant may be detained. In *Bailey v. United States*, 133 S. Ct. 1031 (2013), the defendant was detained by officers after leaving the premises in his car just before officers began executing a search warrant for the premises. *Id.* at 1336. Officers in an unmarked car followed defendant for .7 miles before detaining and bringing him back to the apartment being searched. *Id.* at 1045. By the time they returned, the search team had found a gun and drugs in plain view inside the apartment. *Id.* at 1036. Defendant was arrested, and his keys were seized incident to the arrest. *Id.* Officers later learned one of the keys opened the door of the apartment being searched. *Id.*

At trial, the defendant moved to suppress the apartment key and statements he made when detained by the officers .7 miles from where the search was occurring, contending the evidence was obtained from an unreasonable seizure in violation of the Fourth Amendment. *Id.* While the district court and the Second Circuit disagreed, the Supreme Court sided with the defendant. *Id.* at 1037, 1041.

Justice Kennedy, authoring the majority opinion, first noted the general rule that Fourth Amendment seizures are reasonable only if based on probable cause to believe an individual has committed a crime. *Id.* at 1037. The Court recognized the narrow exception laid out in *Michigan v. Summers*, 132 S. Ct. 2710 (2012), by which officers executing a search warrant may detain occupants of the premises being searched without the necessity of probable cause, due to law enforcement interests of officer safety, facilitating the completion of the search, and preventing flight. *Id.* at 1037-38. The Court reasoned that none of these rationales, however, apply with similar force to the scenario where the defendant is detained outside the "immediate vicinity" of the premises being searched. *Id.* at 1041. Justice Kennedy also noted the additional intrusiveness on the defendant's personal liberty of being detained while on the premises versus being detained after having left its immediate vicinity. *Id.* In the former scenario, the public stigma associated with the search itself would only be minimally added to and the defendant would avoid the inconvenience and indignity of being detained somewhere besides his home. *Id.* However,

detention after the defendant has left the premises will resemble a full-fledged arrest and therefore be more intrusive on the defendant's personal liberty. *Id.*

The Court finally emphasized the need for a spatial constraint to the Summers exception because the exception grants officers the substantial authority to detain individuals outside the traditional rules of the Fourth Amendment. *Id.* at 1042. Justice Kennedy wrote that limiting the Summers rule to the area where an occupant poses a "real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification." *Id.* Once the occupant is beyond the "immediate vicinity" of the premises being searched, officers may no longer detain the occupant pursuant to Summers and will have to have another lawful rationale for the stop (such as an arrest based on probable cause or a brief stop pursuant to *Terry v. Ohio*). *Id.* Otherwise, the occupant may not be detained.

Of note is that the Court did not define what "immediate vicinity" means because there was no doubt the defendant in this case was outside the immediate vicinity. *Id.* The Court did, however, indicate lower courts could consider a number of factors to determine if an individual was detained in the immediate vicinity of the searched premises, including but not limited to the lawful limits of the premises, whether occupant was in the line of sight of the premises, and the ease of reentry from the occupant's location. *Id.*

Justice Scalia wrote the concurrence and noted that the majority's balancing test was inconsistent with the bright line, categorical rule provided in Summers and would make it harder for officers to know whether a seizure was constitutionally permissible before carrying it out. *Id.* 1043-45. Justice Breyer authored the dissent and contended that the majority applied an arbitrary geographical rule instead of weighing out Fourth Amendment concerns. *Id.* at 1045-50.

Failure to use Sentencing Guidelines in effect at time of offense violates the *Ex Post Facto* Clause.

In *Peugh v. United States*, 133 S. Ct. 2072 (2013), Petitioner Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. *Id.* at 2075. At his sentencing hearing, Petitioner was sentenced under the 2009 Sentencing Guidelines in effect at that time instead of the 1998 Sentencing Guidelines that were in effect at the time of his offenses. *Id.* at 2078. Petitioner's sentencing range under the 1998 Guidelines would have been 30 to 37 months, while his range under the 2009 Guidelines increased significantly to 70 to 87 months. *Id.* at 2078-79. The district court rejected Petitioner's argument that sentencing him under the 2009 Guidelines was an *ex post facto* violation and sentenced Petitioner to 70 months in prison pursuant to the lower end of the 2009 Guidelines (which was still 33 months higher than the high end of the 1998 Guidelines range). *Id.* at 2079. The Seventh Circuit affirmed the district court on appeal. *Id.*

Because there existed a split amongst the Circuit Courts as to whether the *Ex Post Facto* Clause could be violated when a defendant is sentenced under Guidelines promulgated after he committed his crimes when such Guidelines provide a higher applicable sentencing range than the version in place at the time of the offense, the Supreme Court granted certiorari. *Id.* Writing for the majority, Justice Sotomayor provided that under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts must apply the Sentencing Guidelines “in effect on the date the defendant is sentenced.” *Id.* at 2081. However, the Sentencing Guidelines include the provision that “[i]f the Court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the [E]x [P]ost [F]acto [C]lause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.” *Id.* (alteration in original) (citing USSG §§ 1B1.11(a), (b)(1) (Nov. 2012)).

At issue here was the category of *ex post facto* laws that inflict a greater punishment than the law annexed to the crime when committed. *Id.* Because the 2009 Guidelines call for a greater punishment than the 1998 Guidelines, Petitioner argued the *Ex Post Facto* Clause was violated, while the Government contended that because the Guidelines were merely advisory, they are not “law” and there can thus be no *ex post facto* problem. *Id.* As each party could point to precedent in support of its position, the Court focused on the touchstone of the Court’s inquiry concerning *ex post facto* violations, which is whether a particular change in a law presents a “sufficient risk of increasing the measure of punishment attached to the covered crime.” *Id.* at 2082.

Relying on the prior Supreme Court holding in *Miller v. Florida*, 107 S. Ct. 2446 (198), the Court noted that “applying amended sentencing guidelines that increase a defendant’s recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.” *Id.* As the federal sentencing scheme aims to achieve uniformity amongst sentences, the Guidelines are to anchor sentencing decisions and remain a meaningful benchmark through the process of appellate review. *Id.* at 2083. District courts must begin their analysis for sentencing with the Guidelines and failure to calculate the correct Guidelines range constitutes procedural error. *Id.* at 2083. Thus, the Court held the Guidelines have the “intended effect of influencing the sentences imposed by judges.” *Id.* at 2084. Based on these findings, the Court held the *Ex Post Facto* Clause forbids the government from altering the substantive formula used to calculate the applicable sentencing range to enhance a defendant’s measure of punishment. *Id.* at 2088.

Accordingly, the Court held that the district court’s refusal to apply the previous guidelines in effect at the time of defendant’s offenses created a type of *ex post facto* law that changed the nature of the crime by inflicting a greater punishment than would be applied when the crime was committed. *Id.* Going forward, the Court held that district courts must begin their sentencing analysis with the guidelines in effect at the time the defendant committed his crimes. *Id.* at 2087.

However, the Guidelines in effect at the time of sentencing are not necessarily deemed pointless, as they may serve as a reason for deviating from the older Guidelines. *Id.*

Silence is not enough to invoke the privilege against self-incrimination. In a plurality decision concerning the Fifth Amendment right against self-incrimination, the Supreme Court held in *Salinas v. Texas*, 133 S. Ct. 2174 (2013) that one who desires the protection of the Fifth Amendment must expressly invoke it. In 1992, Petitioner agreed to accompany police to the station for questioning concerning a murder. *Id.* at 2178. Petitioner answered the officer's questions over an hour but fell silent when asked questions about whether his shotgun would match shells recovered at the murder scene. *Id.* Instead of responding, he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.* After the interview, he was released due to a lack of evidence to charge him with the murders. *Id.* By the time police found a witness who heard Petitioner confess to the crimes, Petitioner had absconded. *Id.* In 2007, he was found living under an assumed name. *Id.*

At his trial, Petitioner did not testify. However, over his objection, the prosecution used his silence in response to the officer's question regarding his shotgun during the 1992 interview as evidence of his guilt. *Id.* Petitioner was found guilty and sentenced to 20 years in prison. The Court of Appeals of Texas affirmed his convictions, rejecting Petitioner's argument that prosecutors' use of his silence to evidence his guilt violated the Fifth Amendment. *Id.* The Court reasoned that Petitioner's pre-arrest, pre-Miranda silence was not "compelled" within the meaning of the Fifth Amendment. *Id.* The Texas Court of Criminal Appeals affirmed on the same grounds. *Id.* at 2179.

Justice Alito authored the opinion, in which the Chief Justice and Justice Kennedy joined, beginning with the general principle that the Government has the right to everyone's testimony. *Id.* at 2179. The exception to that general rule is the Fifth Amendment, and the Court emphasized that it has long held this exception must be claimed by the one who desires its protection. *Id.* Although Justice Alito recognized that scenarios exist where one need not expressly invoke the Fifth Amendment to gain its protection, those exceptions are united by the common principle that a witness need not do so where "some form of official compulsion denies him a free choice to admit, deny, or refuse to answer." *Id.* at 2180. Petitioner, however, could not benefit from any of these exceptions because his interview with the police was voluntary. *Id.* Accordingly, Petitioner had to expressly invoke the privilege of the Fifth Amendment to prevent the prosecution from using his noncustodial silence as evidence of his guilt. *Id.* As he did not, the prosecution was free to use his silence against him. *Id.*

Justices Thomas and Scalia agreed with Justice Alito, but concurred to write that even had Petitioner expressly invoked his privilege, his silence could nevertheless be used as evidence of his guilt because the prosecutors' comments about his silence did not compel him to give self-

incriminating testimony. *Id.* at 2184. The remaining four justices dissented, emphasizing that using the Petitioner’s silence against him compels the Petitioner to take the stand to explain his silence, and the prosecution may then introduce a prior conviction for impeachment purposes that the law would otherwise make inadmissible. *Id.* at 2186. The dissent also commented on the impracticality of the Court’s holding and questioned how the common man would know to expressly assert legalese invoking the Fifth Amendment, instead advocating for an approach analyzing the individual’s silence and the surrounding circumstances to determine if the Fifth Amendment had been invoked. *Id.* at 2190-91.

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