nary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.

I respectfully dissent.

526 U.S. 314, 143 L.Ed.2d 424

314 **Amanda MITCHELL, petitioner,**

v.

UNITED STATES.

No. 97–7541.

Argued Dec. 9, 1998.

Decided April 5, 1999.

Defendant was convicted in the United States District Court for the Eastern District of Pennsylvania, of conspiracy to distribute cocaine, and she appealed. The United States Court of Appeals for the Third Circuit, 122 F.3d 185, affirmed, and defendant petitioned for certiorari. The Supreme Court, Justice Kennedy, held that: (1) neither defendant's guilty plea nor her statements at plea colloquy functioned as a waiver of her right to remain silent at sentencing, and (2) sentencing court could not draw adverse inference from defendant's silence in determining facts relating to circumstances and details of the crime.

Reversed and remanded.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined.

Justice Thomas filed dissenting opinion.

1. Witnesses ⚿305(1)

A witness, in a single proceeding, may not testify voluntarily about a subject and then invoke privilege against self-incrimination when questioned about the details; privilege is waived for the matters to which the witness testifies, and the scope of the waiver is determined by the scope of relevant cross-examination. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⚿273.4(1), 393(1)

Neither defendant's guilty plea nor her statements at plea colloquy functioned as a waiver of her right to remain silent at sentencing. U.S.C.A. Const.Amend. 5; Fed. Rules Cr.Proc.Rule 11, 18 U.S.C.A.

3. Criminal Law ⚿393(1)

Where a sentence has yet to be imposed, entry of guilty plea does not complete the incrimination of defendant, so as to extinguish the privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

4. Witnesses ⚿297(1)

Where there can be no further incrimination, there is no basis for the assertion of the privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⚿317

No negative inference from the defendant's failure to testify is permitted. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⚿393(1), 1310

Sentencing court could not draw adverse inference from defendant's silence in determining facts relating to circumstances and

does not, however, persuade me that the *Di Re* case would have been decided differently if Di Re had been a woman and the gas coupons had been found in her purse. Significantly, in commenting on the *Carroll* case immediately preceding the paragraphs that I have quoted in the text, the *Di Re* Court stated: "But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver." *United States v. Di Re,* 332 U.S., at 586–587, 68 S.Ct. 222.

details of the crime. U.S.C.A. Const.Amend. 5.

Syllabus *

Petitioner pleaded guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine, but reserved the right to contest at sentencing the drug quantity attributable under the conspiracy count. Before accepting her plea, the District Court made the inquiries required by Federal Rule of Criminal Procedure 11; told petitioner that she faced a mandatory minimum of 1 year in prison for distributing cocaine, but a 10–year minimum for conspiracy if the Government could show the required five kilograms; and explained that by pleading guilty she would be waiving, *inter alia*, her right "at trial to remain silent." Indicating that she had done "some of" the proffered conduct, petitioner confirmed her guilty plea. At her sentencing hearing, three codefendants testified that she had sold 1½ to 2 ounces of cocaine twice a week for 1½ years, and another person testified that petitioner had sold her two ounces of cocaine. Petitioner put on no evidence and argued that the only reliable evidence showed that she had sold only two ounces of cocaine. The District Court ruled that as a consequence of petitioner's guilty plea, she had no right to remain silent about her crime's details; found that the codefendants' testimony put her over the 5–kilogram threshold, thus mandating the 10–year minimum; and noted that her failure to testify was a factor in persuading the court to rely on the codefendants' testimony. The Third Circuit affirmed.

Held:

1. In the federal criminal system, a guilty plea does not waive the self-incrimination privilege at sentencing. Pp. 1311–1314.

(a) The well-established rule that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details is justified by the fact that a witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the statements' trustworthiness and diminishing the factual inquiry's integrity. The privilege is waived for matters to which the witness testifies, and the waiver's scope is determined by the scope of relevant cross-examination. *Brown v. United States*, 356 U.S. 148, 154, 78 S.Ct. 622, 2 L.Ed.2d 589. The concerns justifying cross-examination at trial are absent at a plea colloquy, which protects 315 the defendant from an unintelligent or involuntary plea. There is no convincing reason why the narrow inquiry at this stage should entail an extensive waiver of the privilege. A defendant who takes the stand cannot reasonably claim immunity on the matter he has himself put in dispute, but the defendant who pleads guilty takes matters out of dispute, leaving little danger that the court will be misled by selective disclosure. Here, petitioner's "some of" statement did not pose a threat to the factfinding proceeding's integrity, for the purpose of the District Court's inquiry was simply to ensure that she understood the charges and there was a factual basis for the Government's case. Nor does Rule 11 contemplate a broad waiver. Its purpose is to inform the defendant of what she loses by forgoing a trial, not to elicit a waiver of privileges that exist beyond the trial's confines. Treating a guilty plea as a waiver of the privilege would be a grave encroachment on defendants' rights. It would allow prosecutors to indict without specifying a drug quantity, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the quantity. To enlist a defendant as an instrument of his or her own condemnation would undermine the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power. *Rogers v. Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 5 L.Ed.2d 760. Pp. 1311–1313.

(b) Where a sentence has yet to be imposed, this Court has already rejected the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

proposition that incrimination is complete once guilt has been adjudicated. See *Estelle v. Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359. That proposition applies only to cases in which the sentence has been fixed and the judgment of conviction has become final. See, *e.g., Reina v. United States*, 364 U.S. 507, 513, 81 S.Ct. 260, 5 L.Ed.2d 249. Before sentencing a defendant may have a legitimate fear of adverse consequences from further testimony, and any effort to compel that testimony at sentencing "clearly would contravene the Fifth Amendment," *Estelle, supra*, at 463, 101 S.Ct. 1866. *Estelle* was a capital case, but there is no reason not to apply its principle to noncapital sentencing hearings. The Fifth Amendment prevents a person from being compelled in any criminal case to be a witness against himself. To maintain that sentencing proceedings are not part of "any criminal case" is contrary to the Federal Rules of Criminal Procedure and to common sense. Pp. 1313–1314.

2. A sentencing court may not draw an adverse inference from a defendant's silence in determining facts relating to the circumstances and details of the crime. The normal rule in a criminal case permits no negative inference from a defendant's failure to testify. See *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106. A sentencing hearing is part of the criminal case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing. This holding |316is a product not only of *Griffin* but also of *Estelle's* conclusion that there is no basis for distinguishing between a criminal case's guilt and sentencing phases so far as the protection of the Fifth Amendment privilege is concerned. There is little doubt that the rule against adverse inferences has become an essential feature of the Nation's legal tradition, teaching that the Government must prove its allegations while respecting the defendant's individual rights. The Court expresses no opinion on the questions whether silence bears upon the determination of lack of remorse, or upon acceptance of responsibility for the offense for purposes of a downward adjustment under the United States Sentencing Guidelines. Pp. 1314–1316.

122 F.3d 185, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and O'CONNOR and THOMAS, JJ., joined, *post*, p. 1316. THOMAS, J., filed a dissenting opinion, *post*, p. 1321.

Steven A. Morley, Philadelphia, PA, for petitioner.

Michael R. Dreeben, Washington, DC, for respondent.

For U.S. Supreme Court briefs, see:

1998 WL 545400 (Pet.Brief)

1998 WL 664227 (Resp.Brief)

1998 WL 761902 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

Two questions relating to a criminal defendant's Fifth Amendment privilege against self-incrimination are presented to us. The first is whether, in the federal criminal system, a guilty plea waives the privilege in the sentencing phase of the case, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. We hold the plea is not a waiver of the privilege at sentencing. The second question is whether, in determining facts |317about the crime which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. We hold a sentencing court may not draw the adverse inference.

I

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

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

Before accepting the plea, the District Court made the inquiries required by Rule 11 of the Federal Rules of Criminal Procedure. Informing petitioner of the penalties for her offenses, the District Judge advised her, "the range of punishment here is very complex because we don't know how much cocaine the Government's going to be able to show you were involved in." App. 39. The judge told petitioner she faced a mandatory minimum of one year in prison under § 860 for distributing cocaine near a school or playground. She also faced "serious punishment depending on the quantity involved" for the conspiracy, with a mandatory minimum of 10 years in prison under § 841 if she could be held responsible for at least 5 kilograms but less than 15 kilograms of cocaine. *Id.,* at 42. By pleading guilty, the District Court explained, [318] petitioner would waive various rights, including "the right at trial to remain silent under the Fifth Amendment." *Id.,* at 45.

After the Government explained the factual basis for the charges, the judge, having put petitioner under oath, asked her, "Did you do that?" Petitioner answered, "Some of it." *Id.,* at 47. She indicated that, although present for one of the transactions charged as a substantive cocaine distribution count, she had not herself delivered the cocaine to the customer. The Government maintained she was liable nevertheless as an aider and abettor of the delivery by another courier. After discussion with her counsel, petitioner reaffirmed her intention to plead guilty to all the charges. The District Court noted she might have a defense to one count on the theory that she was present but did not aid or abet the transaction. Petitioner again confirmed her intention to plead guilty, and the District Court accepted the plea.

In 1996, 9 of petitioner's original 22 codefendants went to trial. Three other codefendants had pleaded guilty and agreed to cooperate with the Government. They testified petitioner was a regular seller for ringleader Riddick. At petitioner's sentencing hearing, the three adopted their trial testimony, and one of them furnished additional information on the amount of cocaine petitioner sold. According to him, petitioner worked two to three times a week, selling 1½ to 2 ounces of cocaine a day, from April 1992 to August 1992. Then, from August 1992 to December 1993 she worked three to five times a week, and from January 1994 to March 1994 she was one of those in charge of cocaine distribution for Riddick. On cross-examination, the codefendant conceded he had not seen petitioner on a regular basis during the relevant period.

Both petitioner and the Government referred to trial testimony by one Alvitta Mack, who had made a series of drug buys under the supervision of law enforcement agents, including three purchases from petitioner totaling two ounces [319] of cocaine in 1992. Petitioner put on no evidence at sentencing, nor did she testify to rebut the Government's evidence about drug quantity. Her counsel argued, however, that the three documented sales to Mack constituted the only evidence of sufficient reliability to be credited in determining the quantity of cocaine attributable to her for sentencing purposes.

After this testimony at the sentencing hearing the District Court ruled that, as a consequence of her guilty plea, petitioner had no right to remain silent with respect to the details of her crimes. The court found credible the testimony indicating petitioner had been a drug courier on a regular basis. Sales of 1½ to 2 ounces twice a week for a year and a half put her over the 5–kilogram threshold, thus mandating a minimum sentence of 10 years. "One of the things" persuading the court to rely on the testimony of the codefendants was petitioner's "not testifying to the contrary." *Id.,* at 95.

The District Judge told petitioner:

" 'I held it against you that you didn't come forward today and tell me that you really only did this a couple of times.... I'm taking the position that you should come forward and explain your side of this issue.

" 'Your counsel's taking the position that you have a Fifth Amendment right not to.... If he's—if it's determined by a higher Court that he's right in that regard, I would be willing to bring you back for resentencing. And if you—if—and then I might take a closer look at the [codefendants'] testimony.' " *Id.,* at 98–99.

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

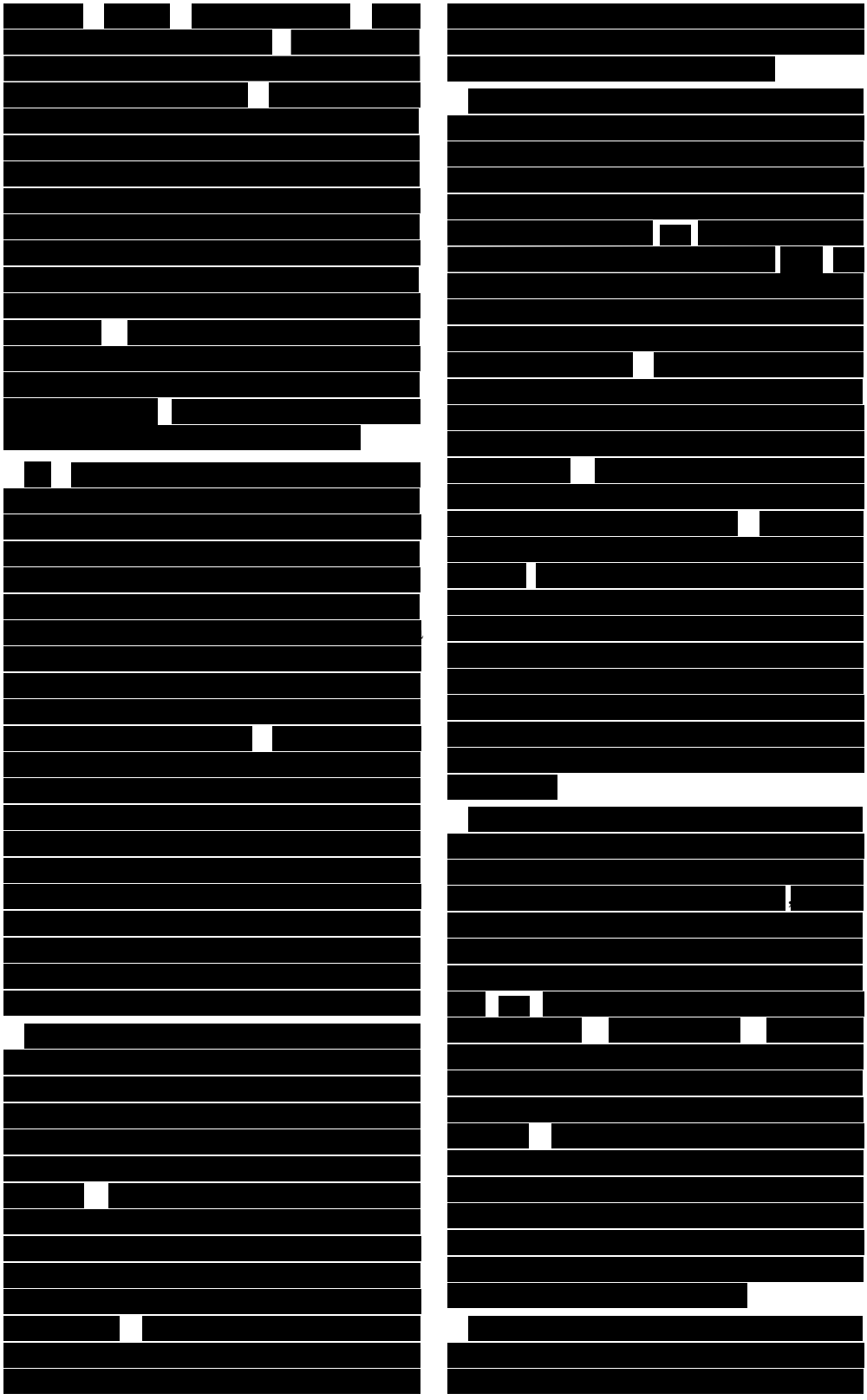
The Court of Appeals for the Third Circuit affirmed the sentence. 122 F.3d 185 (1997). According to the Court of Appeals: "By voluntarily and knowingly pleading guilty to 320 the offense Mitchell waived her Fifth Amendment privilege." *Id.,* at 189. The court acknowledged other Circuits have held a witness can "claim the Fifth Amendment privilege if his or her testimony might be used to enhance his or her sentence," *id.,* at 190 (citing *United States v. Garcia,* 78 F.3d 1457, 1463, and n. 8 (C.A.10), cert. denied, 517 U.S. 1239, 116 S.Ct. 1888, 135 L.Ed.2d 182 (1996)), but it said this rule "does not withstand analysis," 122 F.3d, at 191. The court thought it would be illogical to "fragment the sentencing process," retaining the privilege against self-incrimination as to one or more components of the crime while waiving it as to others. *Ibid.* Petitioner's reservation of the right to contest the amount of drugs attributable to her did not change the court's analysis. In the Court of Appeals' view:

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

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

Judge Michel concurred, reasoning that any error by the District Court in drawing an adverse factual inference from petitioner's silence was harmless because "the evidence amply supported [the judge's] finding on quantity" even without 321 consideration of petitioner's failure to testify. 122 F.3d, at 192.

Other Circuits to have confronted the issue have held that a defendant retains the privilege at sentencing. See, *e.g., United States v. Kuku,* 129 F.3d 1435, 1437–1438 (C.A.11 1997); *United States v. Garcia,* 78 F.3d 1457, 1463 (C.A.10 1996); *United States v. De La Cruz,* 996 F.2d 1307, 1312–1313 (C.A.1 1993); *United States v. Hernandez,* 962 F.2d 1152, 1161 (C.A.5 1992); *Bank One of Cleveland, N.A. v. Abbe,* 916 F.2d 1067, 1075–1076 (C.A.6 1990); *United States v. Lugg,* 892 F.2d 101, 102–103 (C.A.D.C.1989); *United States v. Paris,* 827 F.2d 395, 398–399 (C.A.9 1987). We granted certiorari to resolve the apparent Circuit conflict created by the Court of Appeals' decision, 524 U.S. 925, 118 S.Ct. 2318, 141 L.Ed.2d 693 (1998), and we now reverse.



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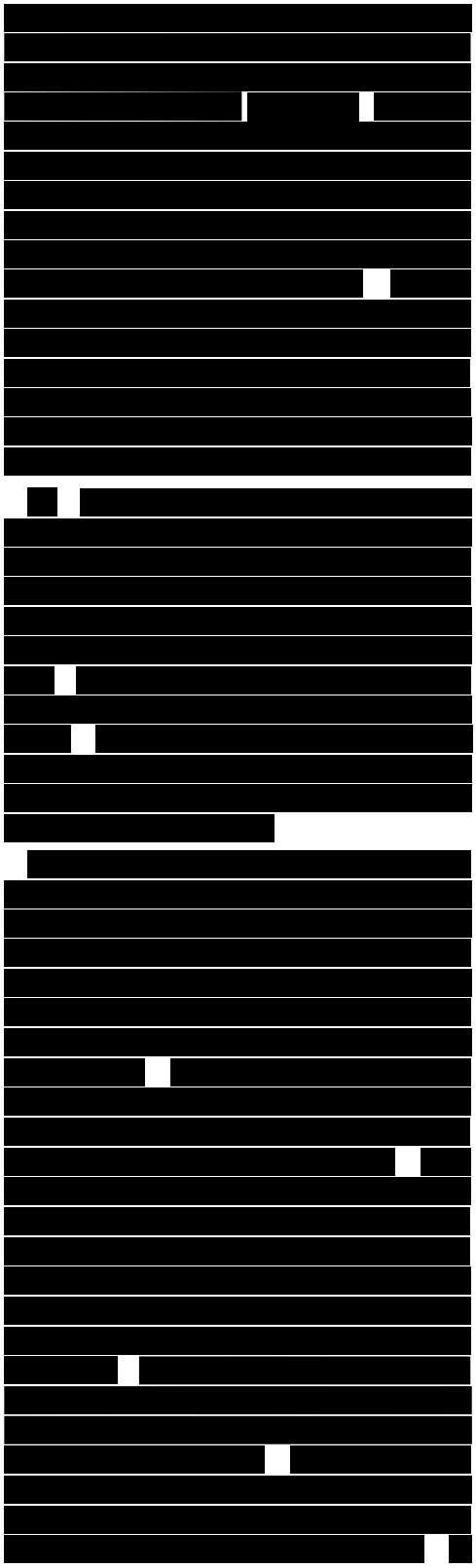

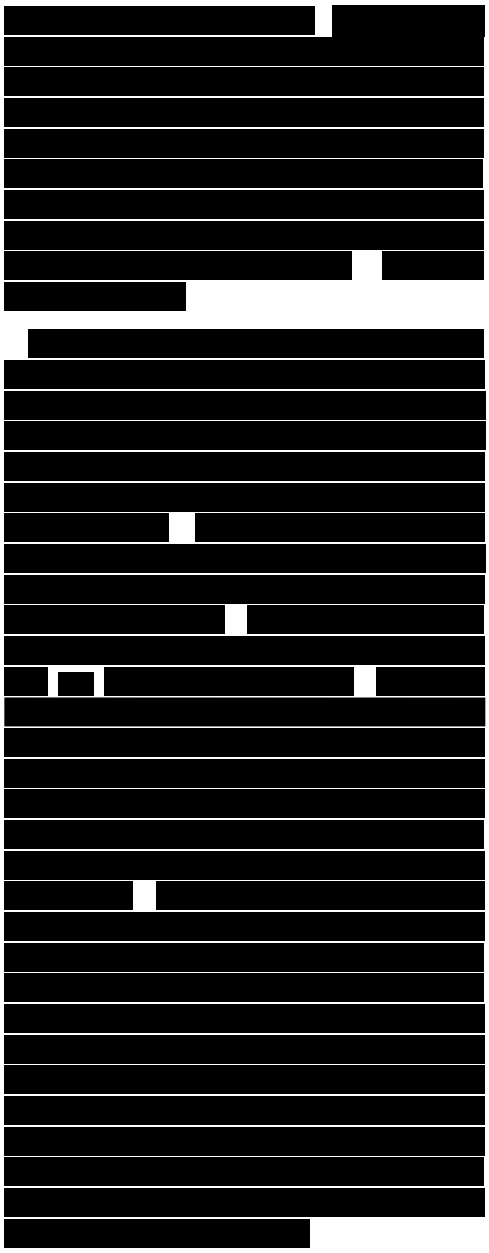

III

[5, 6] The Government suggests in a footnote that even if petitioner retained an unwaived privilege against self-incrimination in the sentencing phase of her case, the District Court was entitled, based on her silence, to draw an adverse inference with regard to the amount of drugs attributable to her. Brief for United States 31–32, n. 18. The

328 normal rule in a criminal case is that no

negative inference from the defendant's failure to testify is permitted. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.

This Court has recognized "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), at least where refusal to waive the privilege does not lead "automatically and without more to [the] imposition of sanctions," *Lefkowitz v. Cunningham*, 431 U.S. 801, 808, n. 5, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977). In ordinary civil cases, the party confronted with the invocation of the privilege by the opposing side has no capacity to avoid it, say, by offering immunity from prosecution. The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed. Another reason for treating civil and criminal cases differently is that "the stakes are higher" in criminal cases, where liberty or even life may be at stake, and where the government's "sole interest is to convict." *Baxter*, 425 U.S., at 318–319, 96 S.Ct. 1551.

Baxter itself involved state prison disciplinary proceedings which, as the Court noted, "are not criminal proceedings" and "involve the correctional process and important state interests other than conviction for crime." *Id.*, at 316, 319, 96 S.Ct. 1551. Cf. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998) (adverse inference permissible from silence in clemency proceeding, a nonjudicial postconviction process which is not part of the criminal case). Unlike a prison disciplinary proceeding, a sentencing hearing is part of the criminal case—the explicit concern of the self-incrimination privilege. In accordance with the text of the Fifth Amendment, we [329] must accord the privilege the same protection in the sentencing phase of "any criminal case" as that which is due in the trial phase of the same case, see *Griffin*, *supra*.

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

Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle v. Smith*, in which the Court could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S., at 462–463, 101 S.Ct. 1866. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. See *supra*, at 1314. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann v. United States*, 350 U.S. 422, 426, 76 S.Ct. 497, 100 L.Ed. 511 (1956). Later, it quoted with apparent approval Wigmore's observation that " '[t]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession [330] of crime,' " *Lakeside v. Oregon*, 435 U.S. 333, 340, n. 10, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) (quoting

8 Wigmore, Evidence § 2272, at 426). It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence. Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition. This process began even before *Griffin*. When *Griffin* was being considered by this Court, some 44 States did not allow a prosecutor to invite the jury to make an adverse inference from the defendant's refusal to testify at trial. See *Griffin*, *supra*, at 611, n. 3, 85 S.Ct. 1229. The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it.

By holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[redacted]

[redacted], ch. 10 (1555).

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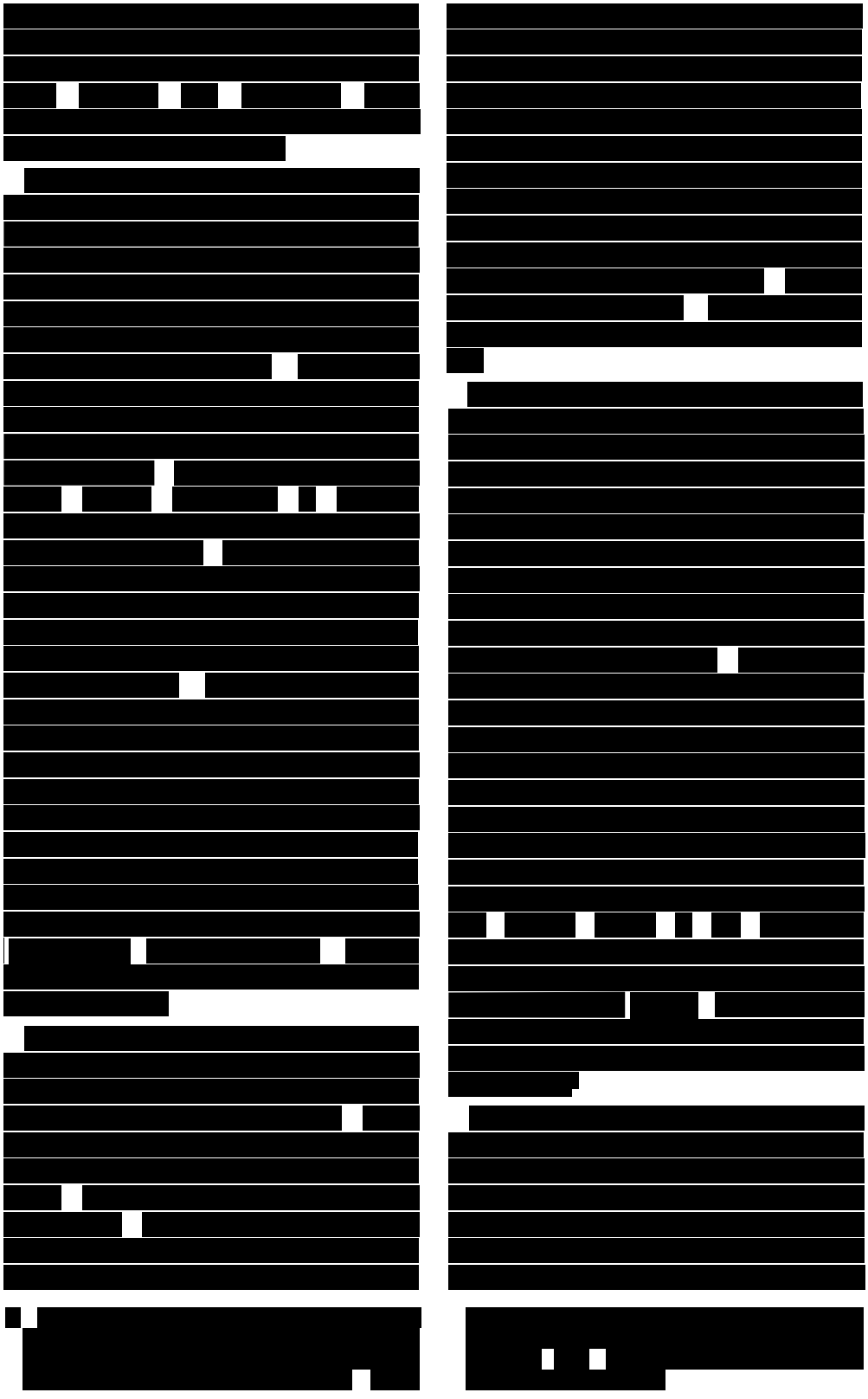

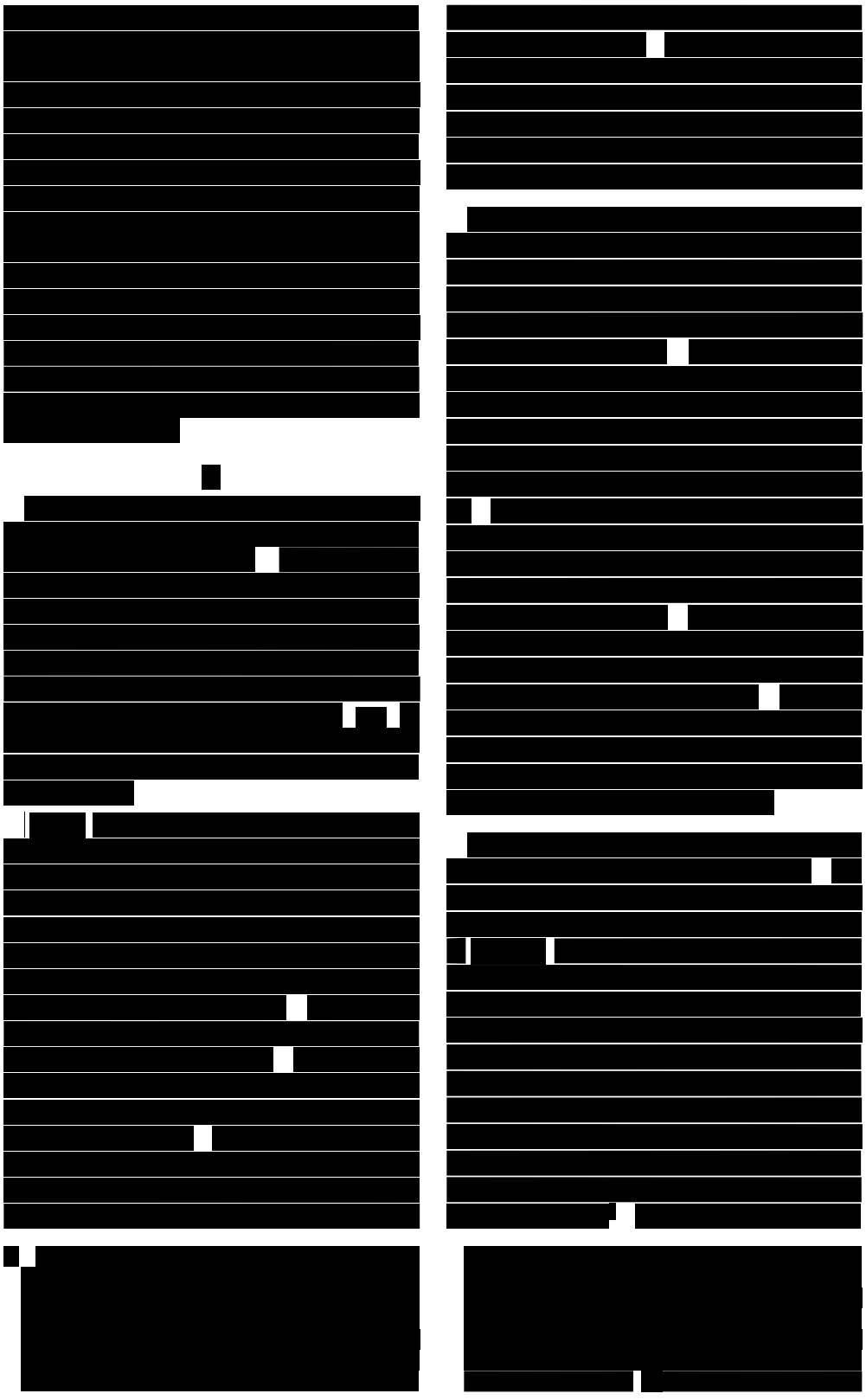

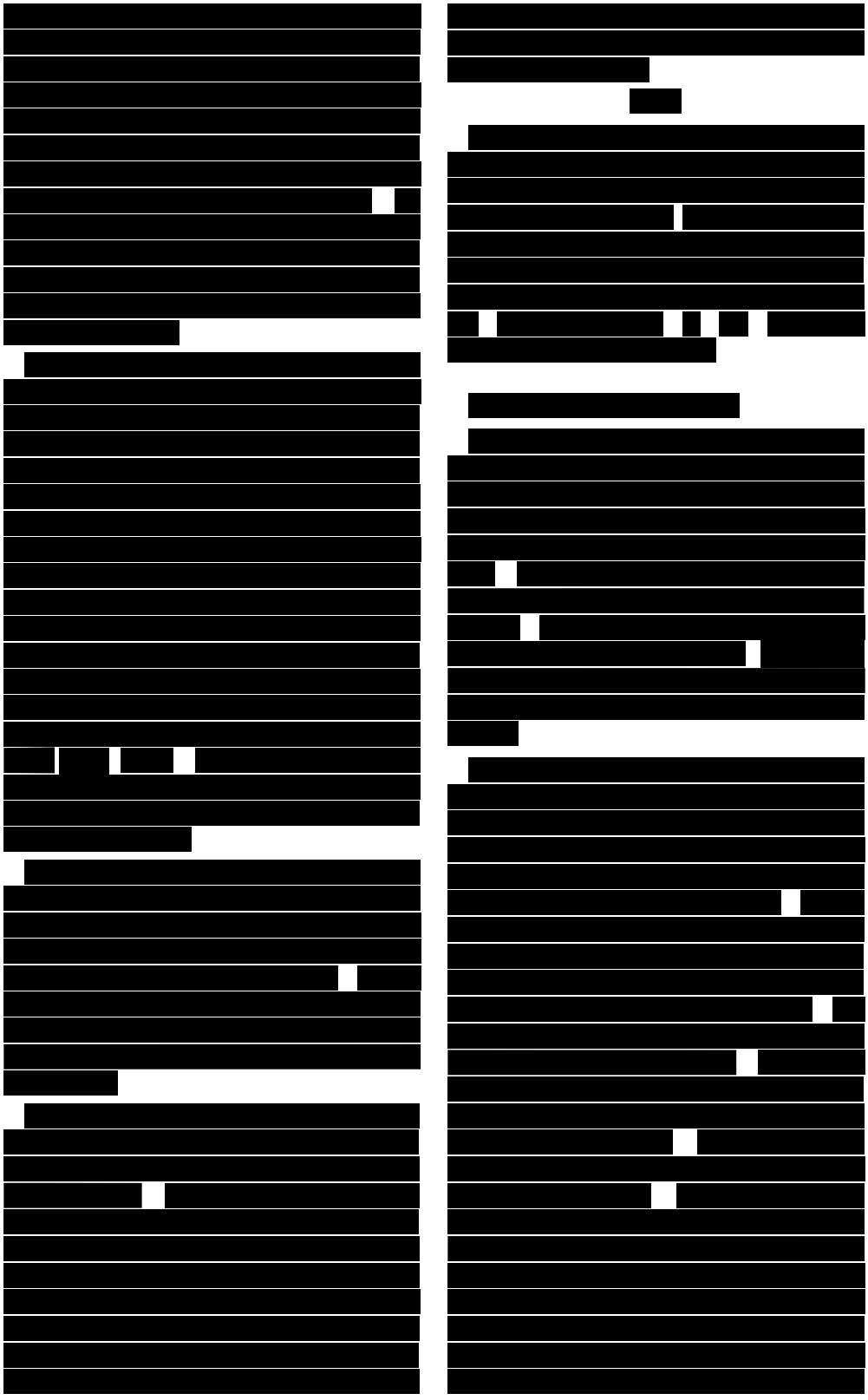

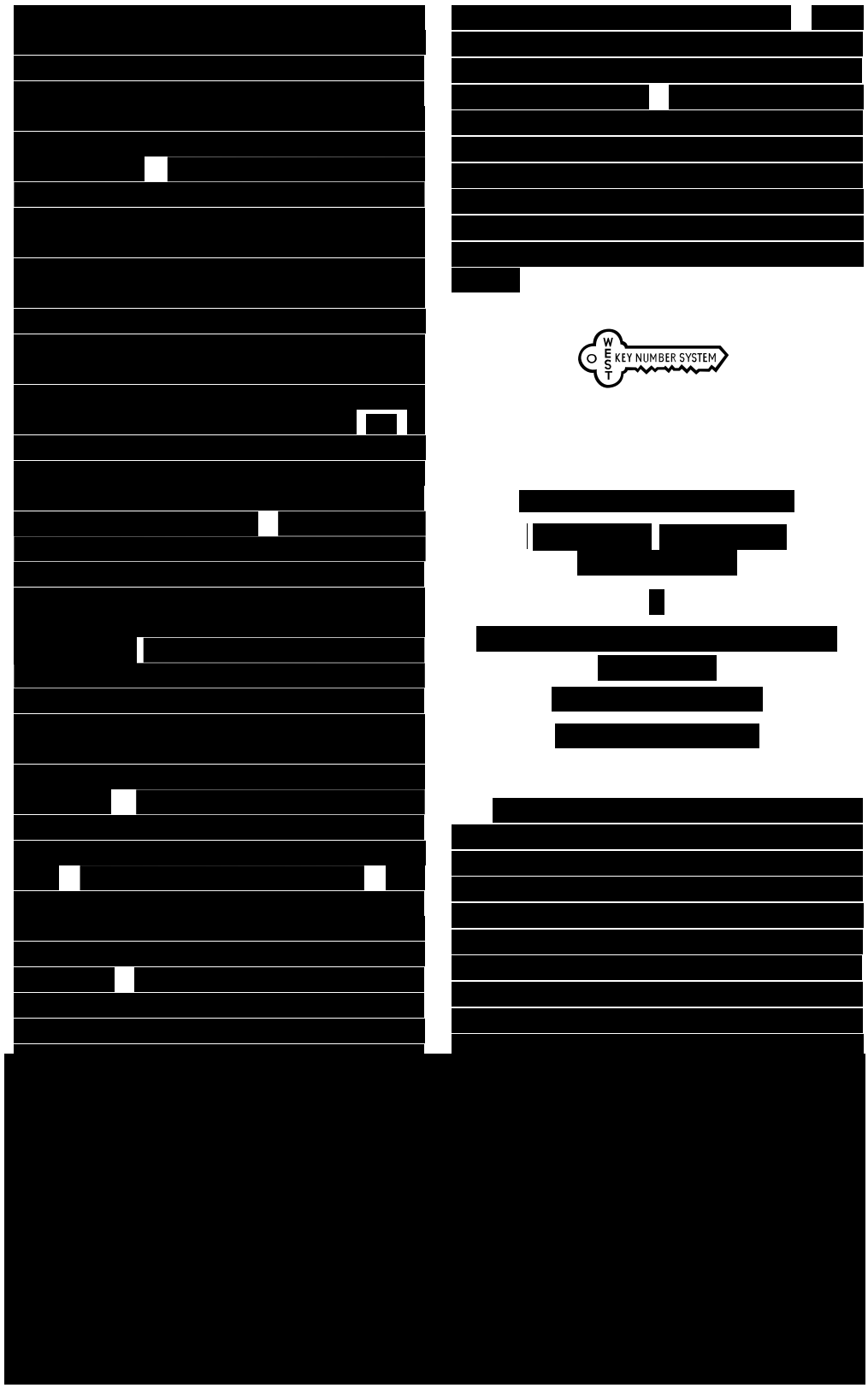
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