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THE EXISTING CONFLICT BETWEEN THE DEFENDANT'S RIGHT OF CONFRONTATION AND THE WITNESS' RIGHT TO AVOID SELF-INCRIMINATION: A CONSTITUTIONAL DILEMMA

In a criminal trial, the confrontation clause of the sixth amendment to the United States Constitution guarantees a defendant's right to confront the witnesses against him. The United States Supreme Court has held this right to be fundamental to due process of law and a fair trial. A defendant exercises the right of confrontation through cross-examination of opposing witnesses. The fifth amendment, however, provides the witness with a privilege to decline to testify in order to avoid self-incrimination. Occasionally, the government seeks to call a witness knowing that the witness will provide no testimony and will invoke the privilege against self-incrimination. The trial court then must decide whether to allow the government to call such a witness before the jury.

A problem of constitutional dimension arises when the witness asserts his fifth amendment privilege in the presence of the jury, because the defendant is then unable to confront, through cross-examination, the inferences arising from the claim of the privilege. The jury is left with the witness' "ambiguous replies" to the government's questions and the powerful but improper inference as to what the witness' answer might have been in the absence of

1. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..." U.S. CONST. amend. VI.
4. The fifth amendment provides: "No person shall be...compelled in any criminal case to be a witness against himself...without due process of law..." U.S. CONST. amend. V.
5. See infra text accompanying notes 61-105, 136-77.
The Supreme Court has had two opportunities to address the issues arising out of such forced invocations of the fifth amendment privilege in the presence of the jury. In *Namet v. United States*, the Court recognized two rationales for holding that the practice of calling a witness to invoke the fifth amendment privilege in the presence of the jury constitutes reversible error. The Court recognized first that the practice may require reversal in the case of "prosecutorial misconduct"—where the government makes a "conscious and flagrant" attempt to build its case from the improper inferences arising from the claim of privilege. The Court stated that reversal may also be required if the witness' refusal to answer questions enhances the government's case in a manner not subject to cross-examination, thus unfairly prejudicing the defendant. Later, in *Douglas v. Alabama*, the Court addressed the constitutional dimension of the problem and held that when the "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant," calling the witness violated the sixth amendment right of confrontation.

Within this broad framework of evidentiary and constitutional guidelines, the federal courts of appeals have struggled with the question of when, if ever, the government may be allowed to call a witness when it knows that the witness will invoke the fifth amendment privilege. It is not surprising that in applying the *Namet* and *Douglas* standards, the courts have reached widely varying conclusions on this issue.

This Comment will identify the standards the federal courts of appeals have developed to evaluate the appropriateness of allowing the government to call a witness it knows will invoke the privilege against self-incrimination. Next, the Comment will analyze this practice in light of prevailing evidentiary and constitutional principles. The Comment will conclude that the principles involved require that when a witness is called to testify and the government expects that the witness may invoke his fifth amendment privilege, the court should examine the witness outside the presence of the jury to determine which, if any, questions the witness will answer. If the court de-

10. *Id.* at 186.
11. *Id.* at 187. The Court distinguished the occasional inference arising from the assertion of the fifth amendment privilege, a "minor lapse," from the use of assertion of the privilege as an important element of the government's case. *Id.*
13. *Id.* at 420 (quoting *Namet*, 373 U.S. at 187).
terminates that the witness will do nothing more than claim the privilege, the court should dismiss the witness and disallow any questioning before the jury.

I. CURRENT STATUS OF THE CONTROVERSY IN THE COURTS

A. The Supreme Court

In Namet v. United States, the Court affirmed the defendant’s conviction despite his two codefendants’ repeated invocations of the fifth amendment privilege in the presence of the jury. The United States Attorney charged the petitioner and his codefendants with violating the federal wagering tax law, and the defendants pleaded not guilty. On the day of the trial, the codefendants changed their pleas to guilty. The prosecutor, in his opening statement, remarked that the codefendants, who were husband and wife, would testify against the defendant. At that time, the defendant’s counsel approached the bench to object to the calling of the codefendants as witnesses. The trial court, however, stated that it was uncertain whether the codefendants could properly assert their claim of privilege after entering a plea of guilty.

The court allowed the government to call the first codefendant as a witness. She testified to basic background information, such as her name and address, and admitted her acquaintance with the defendant. However, she refused to answer whether she or her husband were involved in “some type of business relationship” with the defendant. The trial court ruled that the witness’ guilty plea deprived her of the right to refuse to testify about the

15. Id. at 189-91.
16. Id. at 180. For purposes of this Comment, a codefendant is a person who the government has charged together with the defendant, but who is not currently on trial either because the codefendant has pleaded guilty, the court has severed the trial, or the court has tried the codefendant.
17. Id. The government subpoenaed the witnesses to testify at Namet’s trial because they had previously provided information to the government regarding their relationship with Namet. Id.
18. Id. at 180-81.
19. Id. The defendant’s attorney argued that the witnesses’ guilty pleas did not waive their constitutional right to avoid self-incrimination, because their testimony could still lead to indictment on additional federal charges. Id. at 181. The same attorney represented both the defendant and the witnesses. Id. at 180.
20. Id. at 181. The court did not accept the defense’s argument and instead determined that it would rule on the appropriateness of the claims of privilege if and when the witnesses asserted the privilege during their testimony. Id.
21. Id.
22. Id.
gambling activity in question. The prosecutor also called the second codefendant to the stand. The codefendant testified voluntarily on some matters and on others only upon direction of the court. On four questions the court upheld his refusal to answer. The defendant’s counsel did not object to the second codefendant’s testimony. The jury never learned that the two codefendants had been arrested and charged with the defendant. Furthermore, the court instructed the jury not to draw inferences from the witnesses’ refusal to testify on certain matters. The jury convicted the defendant of violating the federal wagering tax laws.

Before the Supreme Court, the petitioner argued that the trial court committed reversible error when it allowed the prosecutor to question the two codefendants knowing that they would claim the fifth amendment privilege. The Court, however, disagreed. First, the Court found no evidence of “prosecutorial misconduct,” which occurs when the government makes a “conscious and flagrant” attempt to “build its case out of inferences arising from the use of the testimonial privilege.” Instead, the Court found first that the prosecutor acted properly in this case and stated that the prosecutor did not have to accept “at face value” the claim that the witnesses would invoke their fifth amendment privileges. Second, the Court did not find that inferences arising from the witness’ claim of the fifth amendment privilege added “critical weight . . . in a form not subject to cross-examination,” which the

23. Id. at 182. However, the court recognized that the witness still risked possible prosecution on other related charges, and therefore could only provide limited testimony. Id.
24. Id. at 184.
25. Id.
26. Id. The witness refused to answer the following questions: “Can you tell us what those dealings [the witness’ dealings with the [defendant]] were?”; “And were you paid a commission on all the bets you took in your variety store?”; “Who did you accept the bets for that you took in your variety store?”; and “Did you ever take bets for the defendant David Namet?” Id. n.3.
27. Id. at 184.
28. Id.
29. Id. at 185. The court instructed the jury not to draw inferences from the witness’ refusal to testify concerning certain matters unless “it would be a logical inference that would appeal to [the jurors] as having a direct bearing upon the defendant’s guilt.” Id.
30. Id. at 180.
31. Id. at 185. The Supreme Court did not find any constitutional issues raised in the petitioner’s argument; instead, the Court focused only on the evidentiary question. Id.
32. Id. at 188.
33. Id. at 186.
34. Id. at 187-88.
35. Id. at 188. Moreover, the Court found independent and proper reasons to call these witnesses. Id.
Court recognized could have unfairly prejudiced the defendant.\textsuperscript{36} The Court reasoned that the witnesses' claims of privilege were not the only source of a possible inference that the witnesses were involved with the defendant in criminal activity.\textsuperscript{37} On the contrary, the witnesses' nonprivileged testimony already had established that fact.\textsuperscript{38}

In \textit{Douglas v. Alabama},\textsuperscript{39} the Court reviewed a witness' invocation of the fifth amendment privilege in light of the defendant's sixth amendment confrontation clause protection.\textsuperscript{40} In \textit{Douglas}, the state tried the petitioner and an alleged accomplice on charges of assault with intent to murder.\textsuperscript{41} The jury convicted the accomplice of these charges and the accomplice planned to appeal. The accomplice's attorney advised his client to claim the fifth amendment privilege when called to testify at the petitioner's trial.\textsuperscript{42} The accomplice's attorney clearly informed the trial court that the accomplice intended to decline to testify.\textsuperscript{43} However, the trial court ruled that the convicted accomplice could not rely on his fifth amendment privilege because of his prior conviction.\textsuperscript{44} This ruling forced the accomplice to take the stand. For the most part, the prosecutor simply read from a document, identified as the accomplice's confession, and asked the accomplice if the statement was his.\textsuperscript{45} One of the passages in the statement identified the defendant as the person who fired the shotgun and wounded the victim.\textsuperscript{46} The accomplice invoked the fifth amendment privilege each time the prosecutor asked a question, a total of twenty-one times in all.\textsuperscript{47} The prosecutor then called three police officers to the stand to identify the document as the confession the accomplice signed.\textsuperscript{48}

The jury convicted the defendant of assault with intent to murder.\textsuperscript{49} On appeal, the defendant argued that the "questioning" of the accomplice

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} at 187.
\item \textsuperscript{37} \textit{Id.} at 189. The Court stated that the lengthy testimony that witnesses provided outweighed the limited assertions of the fifth amendment privilege. \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} 380 U.S. 415 (1965).
\item \textsuperscript{40} \textit{Id.} at 416-18.
\item \textsuperscript{41} \textit{Id.} at 416.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} When the witness still refused to answer the prosecutor's questions, the court declared the witness to be a "hostile witness" for the government and allowed the prosecutor to "cross-examine" the witness on the witness' prior statement. \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.} at 417. The statement also provided the details of the circumstances leading to the alleged crime. \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 416-17 & n.2.
\item \textsuperscript{48} \textit{Id.} at 417.
\item \textsuperscript{49} \textit{Id.} at 416-17.
\end{itemize}
through the reading of his confession violated the defendant's sixth amendment right of confrontation. The Supreme Court agreed, finding that the defendant's inability to cross-examine the witness about the statements made in the confession denied the defendant his right of confrontation. The Court reasoned that the statement provided a "crucial link" in the government's case, as evidence that the defendant fired the gun and that he had the intent to kill. In fact, the statement provided the only direct evidence that the defendant fired the shotgun. The Court also found the reading of the confession and the witness' refusal to respond may, to the jury, have been the equivalent of an admission that the witness made the statement and that it was true. But because of the witness' claim of privilege, cross-examination was impossible. Thus, because the alleged confession was a fundamental part of the government's case, the Court concluded that these "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant."

B. The Courts of Appeals

Namet and Douglas provide a foundation for considering the problem of witnesses' invocations of the fifth amendment privilege against self-incrimination and their effect on defendants. Those cases, however, deal with extreme factual situations that make it difficult to discern a general principle. In Namet, the witnesses provided relevant testimony that outweighed their occasional claims of privilege. The Court noted the defense counsel's partial lack of objection and the fact that the defense did not raise the confrontation clause issue. In Douglas, by contrast, the witness provided no

50. Id. at 417-18. In Pointer v. Texas, 380 U.S. 400, 403 (1965), the Supreme Court held that the sixth amendment confrontation clause applies to the states. The Alabama Court of Appeals, however, affirmed the defendant's conviction because his attorney "stopped objecting," which the court found to constitute a waiver. Douglas, 380 U.S. at 418.
52. Id. at 419.
53. Id. The statement indicated that Douglas was riding in the backseat of an automobile with a loaded automatic shotgun and that Douglas rolled down a window and fired the gun at a passing truck. When asked if he had made such a statement, the witness asserted his fifth amendment privilege. Id. at 417-18 n.3.
54. Id. at 419.
55. Id. at 419-20. Because the prosecutor who read the statement was not a witness, the prosecutor obviously could not be cross-examined in any way. The actual witness also could not be cross-examined because he did not testify or admit to the statements the prosecutor read. Id.
56. Id. at 420 (citing Namet v. United States, 373 U.S. 179, 187 (1963)).
57. See supra text accompanying notes 36-38.
testimony of any relevance, and the prosecution's reading of the witness' prior statement increased the prejudice arising from the defendant's inability to cross-examine.\(^5\) Thus, in considering these issues, the courts of appeals have been left with fairly broad discretion and have responded by developing a variety of analytical approaches to address the problem.

### I. The Balancing Approach

The United States Court of Appeals for the Sixth Circuit has explicitly developed a balancing approach that it uses to weigh the probative value of the witness' testimony and the government's need for that evidence against the prejudicial effect of the claims of privilege on the defendant.\(^6\) This approach tracks the test used in rule 403 of the Federal Rules of Evidence, which balances the probative value of certain evidence against the danger of unfair prejudice arising from the evidence.\(^6\)

For example, in *United States v. Compton*,\(^6\) the Sixth Circuit held that the government may call a witness who the government knows will invoke the fifth amendment privilege if the government has an "honest belief" that the witness has relevant information and that such information is admissible.\(^6\) The court cautioned, however, that it would find unfair prejudice if the government called the witness merely to induce the witness' claim of privilege in response to irrelevant or inadmissible questions.\(^6\)

Consistent with the approach of balancing the interests of the parties, the Sixth Circuit has stated that a trial court may permit the government to call a witness who will assert the fifth amendment privilege if the government's case would be "seriously prejudiced" by the absence of the witness.\(^6\) Such prejudice could arise if the jury were to question the absence of the witness and infer that because the government did not call him, his testimony would have been unfavorable to the government.\(^6\) Even in a case of potential prejudice to the government, however, the trial judge, according to the Sixth Circuit, should "closely scrutinize" the government's request.\(^6\) In addition, the Sixth Circuit will examine the scope of the government's questioning on

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59. See supra notes 45-56 and accompanying text.
60. See infra text accompanying notes 62-77.
61. Fed. R. Evid. 403, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time," provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."
63. Id. at 5.
64. Id.
66. Id.
the grounds that extensive questioning, in the face of repeated invocations of the privilege, is "obviously unfair." 68

United States v. Vandetti 69 also illustrates this approach of balancing probative value and prejudicial effect. In Vandetti, the grand jury indicted the defendant, along with six codefendants, on charges of conducting an illegal gambling business. 70 At the defendant's trial, the prosecutor called the codefendants as witnesses. 71 Although it was clear that they would all invoke their fifth amendment privileges, the trial court permitted the prosecution to call the witnesses for the purpose of providing their names and addresses and thereafter invoking the privilege in response to brief questioning. 72

The Sixth Circuit reversed in part and remanded, 73 instructing the trial court to analyze the use of the witnesses under the Federal Rules of Evidence. 74 The court noted that relevant evidence is only presumptively admissible, 75 and stated that if such evidence gives rise to unfair prejudice, the trial court should consider whether other means are available to bring forth the same information with less prejudice. 76 Finally, the court recognized that the probative value of the "testimony"—the assertion of the fifth amendment privilege—is typically outweighed by the impossibility of cross-examination. 77

2. The Witness' Relationship to the Defendant

In both Namet and Douglas, the witnesses who claimed the fifth amendment privilege were codefendants of the person on trial. 78 In Vandetti, the witnesses also were codefendants who the government tried separately. 79 In

68. Id.
69. 623 F.2d 1144 (6th Cir. 1980).
70. Id. at 1145.
71. Id. at 1146.
72. Id. The trial judge concluded that because the codefendants were eyewitnesses, their absence at trial could prejudice the government's case. The codefendants refused to testify, because of the possibility of future criminal charges and because they had appealed their convictions at that time. Id.
73. Id. at 1150.
74. Id. at 1149.
75. Id. The trial court may exclude relevant evidence if the potential for the evidence to generate unfair prejudice or confusion of the issues substantially outweighs its probative value. Id. (citing Fed. R. Evid. 403).
76. Id. "'Unfair prejudice' within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Id. (citing Fed. R. Evid. 403 advisory committee's note).
77. Id. at 1148 (citing Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), cert. denied, 401 U.S. 995 (1971)).
78. See supra note 16 and supra text accompanying notes 28, 41-48.
79. See 623 F.2d at 1145-46.
some circumstances, the United States Court of Appeals for the Fifth Circuit has held that the permissibility of calling a witness to the stand to invoke the privilege turns on the relationship of the proposed witness to the defendant. One of the first cases in which the court made this distinction was San Fratello v. United States. In San Fratello, the government sought to call the defendant’s wife as a witness, although the witness had informed the court that she had claimed her fifth amendment privilege in a previous trial and would continue to do so. The court nevertheless allowed the prosecution to call the wife as a witness, and she immediately asserted her privilege. In reversing the defendant’s conviction, the Fifth Circuit ruled that because of the husband/wife relationship between the defendant and the witness, the trial court should not have allowed the prosecution to call the witness without affirmatively demonstrating that “no injury” to the defendant would result from such a tactic. In reaching this conclusion, the court drew a distinction between an “ordinary witness,” who may be connected to the defendant through the facts of the case or through a prior relationship, and a witness with a close relationship to the defendant, such as a spouse or a codefendant, whose refusal to testify will likely impute guilt to the defendant.

Later, in United States v. Ritz, the Fifth Circuit followed this reasoning and reversed the conviction of four family members after the prosecution required the husband of one defendant and the father of two others to invoke the fifth amendment privilege in the presence of the jury. In Ritz, however, the relationship of the witnesses to the defendant, although important, was only one of several factors leading the court to conclude that the inferences arising from the claim of privilege added “critical weight” to the government’s case.

Although San Fratello placed the defendant’s spouse and the codefendants on equal footing as “nonordinary” witnesses, courts have generally followed a “relationship” standard as the test for determining whether or not the prosecutor should be allowed to call the witness only where familial relationships are involved. In practice, the prosecution often calls codefendants to

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80. 340 F.2d 560 (5th Cir. 1965).
81. Id. at 562.
82. Id. at 563.
83. Id. at 567.
84. Id. at 565.
85. 548 F.2d 510 (5th Cir. 1977).
86. Id. at 521.
87. Id. at 519-21.
88. See, e.g., United States v. Demchak, 545 F.2d 1029, 1031 (5th Cir. 1977) (defendant’s father); San Fratello, 340 F.2d at 562 (defendant’s wife). But see United States v. Jenkins, 442
the stand, either because of the belief that the codefendants might testify to relevant information or because of a concern that the jury will draw an inference against the prosecution from the fact that they are "missing."\textsuperscript{89}

3. The Number of Questions Asked

The number of questions the prosecutor asks after the invocation of the fifth amendment privilege often is considered an important factor in analyzing the prejudice to the defendant. In \textit{Namet}, the trial court sustained the witnesses' refusal to answer four times;\textsuperscript{90} in \textit{Douglas}, the prosecutor forced the witness to assert the privilege twenty-one times.\textsuperscript{91}

In \textit{Sanders v. United States},\textsuperscript{92} the United States Court of Appeals for the Ninth Circuit reviewed a situation in which the government continued to question a witness who asserted the fifth amendment privilege to fifty-five questions, only ten of which implicated the defendant.\textsuperscript{93} A second witness also claimed the privilege in response to the government's questions.\textsuperscript{94} In reversing the defendant's conviction, the court concluded that the number of questions asked clearly demonstrated that the improper inferences, which the defendant was unable to test through cross-examination, added "critical weight" to the government's case.\textsuperscript{95} Similarly, in \textit{United States v. Coppola},\textsuperscript{96} the United States Court of Appeals for the Tenth Circuit found prejudice to the defendant where the witness claimed the privilege eighteen times.\textsuperscript{97} The court stated that the practice clearly was prejudicial because the number and variety of questions demonstrated the government's effort to derive evidentiary value from the witness' claim of privilege.\textsuperscript{98}

In \textit{Robbins v. Small},\textsuperscript{99} the United States Court of Appeals for the First Circuit reversed the defendant's conviction after a witness claimed the privilege to fourteen questions.\textsuperscript{100} The court stated that once it becomes appa-
ent that the witness will continue to assert the privilege, basic fairness requires that all questioning immediately stop. Moreover, the court concluded that the questions asked by the prosecutor concerned a statement that was not offered in evidence and therefore not subject to cross-examination. Therefore, inferences arising from the witness’ claim of the fifth amendment privilege “added critical weight to the prosecution’s case in a form not subject to cross-examination.” In contrast, the Ninth Circuit concluded in *Skinner v. Cardwell* that no prejudice to the defendant existed where a witness claimed the privilege in response to four questions and the trial judge immediately discontinued questioning.

4. The Use of Jury Instructions

In *Namet*, the Court did not decide whether the petitioner was entitled to instructions explaining to the jury the witnesses’ assertion of the privilege because the defense made no request for such instructions. The Court noted that the instruction that the trial court gave was not “plain error.” Accordingly, the issue of the jury instruction did not warrant reversal under rule 52 of the Federal Rules of Criminal Procedure. In *Douglas*, the Court did not discuss the use of a jury instruction. In the courts of appeals, however, the availability and use of appropriate jury instructions has become a crucial factor in the review of forced invocations of the fifth amendment privilege in the presence of the jury.

At least one circuit has suggested that the government should request an appropriate instruction instead of calling a witness to the stand to invoke the fifth amendment privilege in the jury’s presence. In *Bowles v. United States*, the United States Court of Appeals for the District of Columbia Circuit stated that the jury is not entitled to rely on any inferences that it may draw from a witness’ decision to invoke the fifth amendment privi-

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101. Id. at 795. The court noted that in this case the prosecutor continued to question the witness although the prosecutor “knew or certainly should have known that the witness would” continue to invoke the fifth amendment privilege. Id.

102. Id.

103. Id.

104. 564 F.2d 1381 (9th Cir. 1977), cert. denied, 435 U.S. 1009 (1978).

105. Id. at 1389-90.


107. Id. at 190-91.

108. Id. FED. R. CRIM. P. 52 provides: “Any error, defect, irregularity, or variance which does not affect substantive rights shall be disregarded.” Id.


Therefore, the court held that no valid purpose exists in informing the jury of a witness' decision to invoke the privilege. The government, however, frequently has argued that it must call the witness in the jury's presence, lest the jury infer from the witness' absence that the witness' testimony would not be favorable to the government. Thus, in Bowles, the court stated that if the government is concerned that the jury will draw an improper inference from the witness' absence, the court should provide an appropriate instruction to negate that inference.

The courts have also addressed the issue of whether an appropriate jury instruction can "cure" the prejudice that occurs once a witness has invoked the privilege in the presence of the jury. In United States v. King, the United States Court of Appeals for the Eighth Circuit ruled that cautionary instructions to the jury are insufficient when viewed in terms of the prejudice to the defendant. Similarly, in Robbins v. Small, the First Circuit concluded that jury instructions were insufficient protection against the prejudice arising from forced invocations of the privilege against self-incrimination in the jury's presence.

Rather than giving a specific jury instruction, a trial judge sometimes will comment that a witness is unable to testify on constitutional grounds. The United States Court of Appeals for the Third Circuit held that this practice constituted a denial of due process where the only effect of the instruction was to remind the jury of the fifth amendment privilege. By contrast, where the trial judge simply informed the jury that the witness would discontinue testifying after the witness claimed the privilege, and the judge later instructed the jury to disregard the testimony, the reviewing court found no prejudice. The Fifth Circuit held that the consideration of the

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111. Id. at 541. Otherwise, the jury may draw improper inferences from the privilege, which will have a "disproportionate impact" on their deliberations. Id.
112. Id. at 542.
113. See Comment, supra note 7, at 155 n.10.
114. 439 F.2d at 542.
115. 461 F.2d 53 (8th Cir. 1972).
116. Id. at 57 n.4. The court did not consider cautionary instructions to the jury to be "sufficient protection to overcome the prejudicial harm created by the government . . . in the first place." Id.
117. 371 F.2d 793 (1st Cir.), cert. denied, 386 U.S. 1033 (1967).
118. Id. at 796 ("We would be closing our eyes to reality were we to find that the court's charge cured the prejudice that resulted . . . .").
120. Id. at 541 (impropriety of calling witness and judge's reference to witness "reinforced" or "sanctioned" the prejudicial effect).
121. United States v. Lyons, 703 F.2d 815, 818 (5th Cir. 1983).
122. Id. at 819 (quoting United States v. Irwin, 661 F.2d 1063, 1071 (5th Cir. 1981), cert. denied, 456 U.S. 907 (1982)) (citing the Fifth Circuit's general rule that "[a]n instruction to
merits and effects of the claim of privilege was within the trial court's discretion.\textsuperscript{123}

Jury instructions may also have substantial impact on the analysis under the "critical weight" standard. For example, in \textit{United States v. Lizza Industries},\textsuperscript{124} where the court carefully instructed the jury not to consider the claim of privilege of a witness against the defendant, the United States Court of Appeals for the Second Circuit concluded that the trial court did not commit reversible error.\textsuperscript{125} Courts often reason that the instruction not to draw inferences against the defendant from the witness' assertion of the privilege must be sufficient to protect the defendant's rights because the government is entitled to call a witness when the witness possesses relevant information.\textsuperscript{126} Similarly, an appropriate jury instruction also may contribute to a finding of harmless error.\textsuperscript{127} For example, in \textit{United States v. Kaminski},\textsuperscript{128} the Eighth Circuit found the prosecution's questions improper, but concluded that the error was not sufficiently prejudicial to warrant reversal in light of the jury instruction.\textsuperscript{129}

5. \textit{The Prosecutor's Conduct}

\textit{Namet} and \textit{Douglas} established that prosecutorial conduct—the government's "use" of the improper inferences arising from the claims of privilege—is an important factor in determining the harm to the defendant.\textsuperscript{130}
Namet recognized "prosecutorial misconduct" as a "conscious and flagrant" attempt to build the government's case out of improper inferences. In Douglas, the prosecutor's reading of the alleged confession of the witness constituted a substantial error requiring reversal. This conduct led the Court to conclude that the inferences derived from the invocation of the privilege added "critical weight" to the government's case.

Prior to the Namet and Douglas decisions, the Second Circuit recognized in United States v. Maloney that when a witness claims the fifth amendment privilege, a natural inference arises as to what the answer would have been. In Maloney, the prosecutor called and questioned a witness although he knew that the witness would claim the privilege. The prosecutor also referred to the witness' claim of privilege in his closing argument. The court concluded that permitting this practice was reversible error.

By contrast, in Gladden v. Frazier the Ninth Circuit's focus on prosecutorial conduct led it to conclude that the trial court committed no reversible error. In Gladden, the prosecutor's opening statement, identified a codefendant as a testifying witness. The defense immediately moved for a mistrial, which the trial court denied. The prosecutor called the codefendant to the stand, where the codefendant invoked his fifth amendment privilege. The defense renewed its motion for a mistrial, which the trial court again denied. On appeal, the Ninth Circuit stated
that the controlling factors in its determination were the good faith of the prosecutor in making the opening statement and the likelihood of prejudice to the defendant resulting from the statement.\textsuperscript{145} In considering the facts of the case, the court found no prosecutorial misconduct.\textsuperscript{146} The Sixth Circuit followed a similar analysis in \textit{United States v. Compton,}\textsuperscript{147} in which the court upheld the use of a forced claim of privilege before the jury in circumstances where the government had an honest belief that the witness had relevant information concerning the case.\textsuperscript{148}

Good faith was also crucial in \textit{United States v. Quinn.}\textsuperscript{149} In \textit{Quinn,} the witness informed the prosecutor that if called to testify, he would invoke his fifth amendment privilege unless the government provided him with immunity.\textsuperscript{150} Nevertheless, the government called the witness to testify and the witness invoked the privilege as promised.\textsuperscript{151} The Eighth Circuit examined the prosecutor's motives and the likelihood of prejudice to the defendant.\textsuperscript{152} Despite the court's conclusion that the witness should have asserted the privilege outside the presence of the jury, the court found neither prosecutorial misconduct nor prejudice sufficient to warrant reversal.\textsuperscript{153}

In other cases, courts have looked to the prosecutor's conduct as a contributing factor when determining whether improper inferences added "critical weight" to the government's case. In \textit{Cota v. Eyman,}\textsuperscript{154} the trial court allowed the prosecutor to call an accomplice to the witness stand knowing that the witness would claim the fifth amendment privilege.\textsuperscript{155} The witness claimed the privilege and the prosecutor reminded the jury of that claim in

\textsuperscript{145} Id. In affirming the defendant's conviction, the Supreme Court did not find the prosecutor's good faith controlling, but agreed with the Ninth Circuit's factual determination of the case, finding neither prosecutorial misconduct nor violation of the right of confrontation. \textit{Frazier v. Cupp,} 394 U.S. 731, 736 (1969).

\textsuperscript{146} \textit{Gladden,} 388 F.2d at 780-81.

\textsuperscript{147} 365 F.2d 1 (6th Cir.), cert. denied, 385 U.S. 956 (1966).

\textsuperscript{148} Id. at 5.


\textsuperscript{150} \textit{Quinn,} 543 F.2d at 649.

\textsuperscript{151} Id. at 650 & n.6. The court found that the prosecutor intended to grant immunity and that the witness' full testimony was crucial to the government's case. Id. at 650 n.6. It also concluded that because the courts must decide each case on its own facts, the trial judge had broad discretion in determining whether to allow a witness to assert the fifth amendment in the jury's presence. Id. at 650.

\textsuperscript{152} Id. at 650-52.

\textsuperscript{153} 453 F.2d 691 (9th Cir. 1971), cert. denied, 406 U.S. 949 (1972).

\textsuperscript{154} Id. at 693. The witness informed the court outside the jury's presence that he would invoke the fifth amendment privilege if called to testify. Nevertheless, the court allowed the prosecutor to call this witness. Id.
the prosecutor’s closing argument. Although the Ninth Circuit found the practice “troubling,” it found no “flagrant impropriety” as had existed in Douglas. Therefore, the court concluded that the practice did not add “critical weight” to the government’s case.

A court may find sufficient prejudice to warrant reversal where the prosecution insists on using the witness’ assertion of the fifth amendment privilege in a manner that adds “critical weight” to the prosecution’s case. In Fletcher v. United States, the witness informed the prosecutor and the court that the witness would refuse to testify and would claim the fifth amendment privilege if called. The government argued that the witness could not validly claim the privilege, and the court allowed the prosecutor to question the witness. The District of Columbia Circuit found prejudice to the defendant in the prosecutor’s questioning because each question asked concerned an alleged offense that provided principal support for the government’s case. The court stated that the claim of privilege in response to these questions was a “major feature of the proceeding.”

In Robbins v. Small, the prosecutor legitimately believed that a witness would testify. The witness, however, claimed the fifth amendment privilege fourteen times when questioned. The First Circuit concluded that once it becomes apparent that a witness will broadly claim the privilege, the prosecutor must discontinue the questioning. In Robbins, the court determined that the prosecutor’s questions focused the jury’s attention on a statement not offered in evidence. As a result, the defendant was unable to cross-examine the witness because the witness did not admit that the state-

156. Id.
157. Id. at 694.
158. Id. at 695.
159. 332 F.2d 724 (D.C. Cir. 1964).
160. Id. at 725.
161. Id. at 726. The prosecutor argued that the witness could not assert the privilege because a jury had convicted the witness of the crime in question. Id. at 725.
162. Id. at 727.
163. Id. at 726. Thus, the court distinguished this practice from the occasional invocations of the fifth amendment privilege in Namet v. United States, 373 U.S. 179, 187 (1963).
164. Fletcher, 332 F.2d at 726.
165. 371 F.2d 793 (1st Cir.), cert. denied, 386 U.S. 1033 (1967).
166. Id. at 795. The witness signed a statement implicating the defendant in the crime. Id.
167. Id. at 794.
168. Id. at 795. Although the witness’ statement led the prosecutor to believe that the witness would supply evidence against the defendant, the court found that the prosecutor tried to present this evidence to the jury through inferences arising from assertion of the fifth amendment privilege. Id.
169. Id.
ment was his. The court found that the prosecutor's conduct added "critical weight to the prosecution's case." In United States v. Coppola, the witness notified the prosecutor that, despite the witness' prior cooperation with the Federal Bureau of Investigation, the witness would refuse to testify. At trial, the prosecutor forced the witness to invoke the fifth amendment privilege in the jury's presence eighteen times before the judge ruled that further questioning would be improper. Nevertheless, even after the judge made his ruling, the prosecutor asked two additional questions. The prosecutor also used the claims of privilege in his closing argument. The Tenth Circuit considered this conduct sufficiently prejudicial to warrant reversal.

II. PROBLEMS WITH THE CURRENT JUDICIAL RESPONSE

The Supreme Court established broad guidelines for responding to forced invocations of the fifth amendment privilege in the presence of the jury. The courts of appeals, however, continue to struggle with the application of these guidelines in particular cases, leading to inconsistent and often unsatisfying results. Lacking a clear standard, the courts of appeals have adopted various overlapping approaches that attempt to reconcile the tension between the rights of the witness, the rights of the defendant, and the legitimate interests of the government. The outcome of a particular decision often depends on the particular factors upon which the courts focus and, in a broader sense, whether the courts analyze the problem as an evidentiary or a consti-

170. Id.
171. Id. (citing Douglas v. Alabama, 380 U.S. 415 (1965)).
172. 479 F.2d 1153 (10th Cir. 1973).
173. Id. at 1159.
174. Id.
175. Id.
176. Id. at 1160. The court concluded that neither the prosecutor nor the defense counsel should comment in his closing arguments about a witness' assertion of the fifth amendment privilege. Id. at 1161.
177. Id. The court found this conduct invalid and prejudicial because the number and variety of questions showed that the government was trying to gain evidentiary value from the claim of privilege. Id. at 1160.
178. See supra text accompanying notes 60-177 (discussing the courts of appeals' responses to the controversy). The Supreme Court recently declined to review the standards the courts of appeals have used to determine the appropriateness of the government calling a witness for the sole purpose of invoking the fifth amendment privilege in the presence of the jury. Lindsey v. United States, No. 86-5379 (6th Cir. Apr. 17, 1987), cert. denied, 108 S. Ct. 310 (1987). Justices White and Brennan, dissenting from the denial of certiorari, argued that the split in the circuits regarding the treatment of this issue warranted review by the Court. Lindsey v. United States, 108 S. Ct. 310, 311 (1987) (White, J., dissenting from denial of certiorari), denying cert. to. No. 86-5379 (6th Cir. Apr. 17, 1987).
Each court must decide, in a fact-specific context, the question of whether the forced invocation of the fifth amendment privilege before the jury requires reversal. However, there are several recurring principles that the courts may properly use to develop some general rules in this area.

A. Evidentiary Considerations

The Federal Rules of Evidence provide basic guidance on the admissibility of a witness' assertion of the fifth amendment at trial. Rule 403 requires the court to balance the probative value of any testimony against its prejudicial effect on the defendant. This approach to the witness' assertion of the fifth amendment privilege, which the Sixth Circuit follows explicitly, grants broad discretion to the trial judge.

Forcing a witness simply to assert his fifth amendment privilege in the jury's presence can never give rise to testimony of legitimate probative value. The only value of such a procedure, in the absence of any actual testimony, is to strengthen the prosecution's case in the eyes of the jury through the inference of guilt that arises from the invocation of the privilege. The prejudice arising from these inferences is heightened if the prosecutor, intentionally or otherwise, attempts to establish some link between the witness' refusal to testify and the defendant's guilt. This practice can only invite the jury to draw improper conclusions from the inferences.

Prejudice to the defendant always arises from inferences drawn from the invocation of the fifth amendment privilege because the defendant is unable to cross-examine the witness about the witness' "ambiguous replies." Rather than recognizing that the situation always invites prejudice and lacks legitimate probative value, however, courts often admit that the prejudice exists and simply focus on whether the prejudice is sufficient to require reversal. Thus, rather than questioning the practice directly, the courts
look to the jury instructions, the good faith of the prosecutor, or the number of questions the prosecutor asks to determine the extent of the prejudice and to determine whether it has been cured.  

This is not to say that a focus on the evidentiary value of the practice is inappropriate. Indeed, the *Namet* decision arose in the context of the Supreme Court's treatment of the witness' invocation of the fifth amendment privilege as an evidentiary question, although Congress had not enacted the Federal Rules of Evidence at the time of the decision. However, *Namet* can only be understood as a reflection of the Court's focus on the evidentiary aspects of the question without consideration of the important issue of the defendant's right of cross-examination.

**B. Constitutional Considerations**

The sixth amendment to the Constitution guarantees the defendant the right to confront the witnesses against him. When a witness asserts the fifth amendment privilege, a defendant is unable to exercise his sixth amendment right to confrontation through cross-examination. *Douglas* makes clear that the confrontation clause requirement is not satisfied by the mere presence of the witness in the courtroom, but rather by the availability of the witness for cross-examination. This situation is exacerbated when the witness provides no relevant testimony on which the defense can cross-examine the witness, but instead repeatedly asserts the fifth amendment privilege in response to the prosecution's questions.

In the absence of actual testimony, the only purpose of placing a witness on the stand to assert his fifth amendment privilege is to create inferences of guilt that the prosecution can use against the defendant. If these infer-
ences are in fact contributing to the case against the defendant, it follows that the defendant’s inability to challenge these inferences infringes his right to confrontation.\footnote{197}

Courts sometimes view jury instructions as “curing” any prejudice to the defendant.\footnote{198} However, the Supreme Court has held that jury instructions are not an adequate substitute for the constitutional guarantee of confrontation.\footnote{199} Therefore, in the absence of any substantial testimony from the witness, the prejudice to the defendant’s constitutionally protected interest would seem to outweigh the government’s minimal or nonexistent interest in placing the witness on the stand to invoke his fifth amendment privilege in the presence of the jury.

III. PROPOSED SOLUTION: RECONCILING CONFLICTING EVIDENTIARY AND CONSTITUTIONAL CONSIDERATIONS

Courts should clarify the extent to which the prosecution may use the forced invocation of the fifth amendment privilege in the jury’s presence within the framework of the \textit{Namet} and \textit{Douglas} decisions. The issue is when, if ever, the government may call a witness knowing that the witness will assert the fifth amendment privilege and refuse to testify. In addressing this issue, courts must recognize the tension between the rights of the witness, the rights of the defendant, and the legitimate interests of the government.

To establish a uniform test for addressing these issues, courts should adopt a procedure that recognizes both the evidentiary standards applied in \textit{Namet}\footnote{200} and the constitutional standards applied in \textit{Douglas}.\footnote{201} At a minimum, courts should adopt a bright-line test to distinguish those witnesses who provide some relevant testimony (with an occasional claim of privilege)
from those witnesses who will do nothing more than assert the claim of privilege to any substantive question. This procedure is outlined below in the context of the relevant interests at stake.

**A. The Rights of the Witness**

The fifth amendment provides a witness with a privilege to decline to testify on matters on which he may incriminate himself. In ordinary circumstances, when a witness asserts the privilege, the trial court must determine whether the claim of privilege is legitimate and whether a narrower privilege is available to protect the witness. In making this determination, the court must consider whether a real danger of self-incrimination exists because harm would result to the witness if he provided an answer to the question asked.

Courts have developed procedures to determine the validity of a claim of the privilege against self-incrimination. The best procedure, although one not always used, is for the court to examine the witness outside the presence of the jury to determine the validity of the witness’ claim of privilege and to determine which, if any, of the government’s questions the witness will answer. When courts follow this procedure, they place themselves in a position to properly determine whether a witness will provide probative testimony or merely claim the privilege if called to testify.

**B. The Rights of the Defendant**

Once the trial court makes this initial determination of the validity of the claim of privilege and the value of the proposed testimony, the right of the defendant to cross-examine the witness is appropriately protected. If the trial court determines that the witness will provide no relevant testimony, protection of the defendant’s constitutional rights requires that the court dis-

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202. See supra note 4 and accompanying text. However, 18 U.S.C. § 6002 (1982) authorizes the government to compel a witness to testify by granting immunity to that witness.
204. Rogers v. United States, 340 U.S. 367, 374 (1951); see also Marchetti v. United States, 390 U.S. 39, 53 (1968) ("substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination").
207. Comment, supra note 7, at 157.
miss the witness and not require the witness to assert the privilege in the presence of the jury. This is so because the defendant cannot exercise his sixth amendment right to cross-examine the witness when the witness does nothing more than claim the fifth amendment privilege. Under such circumstances, if the court requires the witness to claim the privilege in the presence of the jury, there is a distinct possibility that the witness’ claim of privilege will give rise to inferences against the defendant, which necessarily add some weight to the government’s case in a form not subject to cross-examination.

Furthermore, the procedure proposed above protects the evidentiary interests outlined in Namet. If the trial court determines that the witness may properly assert the privilege to some questions, but nevertheless may provide some probative testimony, the court is in a position to balance the probative value of the testimony against any potential prejudice to the defendant. Thus, use of this procedure would avoid the unnecessary and prejudicial practice of placing the witness on the stand solely for the purpose of invoking the fifth amendment privilege.

Of course, courts may still consider, both at trial and on appeal, all of the factors currently relied upon, including the relationship between the witness and the defendant, the number of questions asked, the jury instructions, and the prosecutor’s conduct in determining whether the probative value of the testimony outweighs its prejudice. However, in making this determination, courts must emphasize the most important factor indicative of potential prejudice, impingement of the defendant’s right to cross-examine the witness.

208. See supra notes 192-97 and accompanying text; see also Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

209. See supra note 6 and accompanying text; see also Carlson, Argument to the Jury and the Constitutional Right of Confrontation, 9 CRIM. L. BULL. 293, 299 (1973) (the confrontation clause guarantees were enacted as a reaction to a practice of trying defendants on ex parte affidavits or depositions that did not allow the defendant to effectively challenge the statements made against him).

210. See supra notes 196-97 and accompanying text.

211. Namet v. United States, 373 U.S. 179, 189-91 (1963); see also supra notes 189-91 and accompanying text.

212. See supra notes 60-77 and accompanying text; 1 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE 403-13 (1986) (process of balancing probative value against prejudice constitutes "search for truth").

213. See supra text accompanying notes 78-89.

214. See supra text accompanying notes 90-105.

215. See supra text accompanying notes 106-29.

216. See supra notes 130-77 and accompanying text.

217. See supra notes 208-12 and accompanying text. See generally R. McNAMARA, CON-
This suggested procedure protects the government's interest in presenting its case because the trial court weighs the probative value of the proposed testimony and the possible unfair prejudice to the defendant. Thus, if the witness has probative testimony to provide, the court and the jury can receive that testimony. If the witness will not provide such testimony, or if the court concludes that the prejudice to the defendant outweighs the probative value of such testimony, then excluding the witness deprives the government of no legitimate advantage. Although the government has the right to place a witness under oath to test his assertion that he will claim the privilege, the exercise of that right does not require that the government undertake that test in the presence of the jury.

If the government is not permitted to call a witness, the jury may notice the witness' absence and infer that the witness' testimony would have favored the defendant. Although this is a legitimate concern, it does not justify permitting the government to call a witness if he will do nothing more than invoke his fifth amendment privilege in the presence of the jury. Instead, if appropriate, the court should simply instruct the jury that the witness is "unavailable" to testify and that the jury should draw no inferences from either party's failure to call the witness. With this instruction, both the government and the defendant are protected from the inferences drawn from a "missing" witness, without abridging the defendant's constitutional rights.
IV. Conclusion

In Namet and Douglas, the Supreme Court established broad guidelines for trial courts to follow when determining the permissibility of a witness' forced invocation of the fifth amendment privilege in the presence of the jury. The federal courts of appeals, however, continue to struggle with the questions of when, if ever, to allow the government to call a witness when it knows that the witness will invoke the fifth amendment and when, if ever, such a practice constitutes reversible error. Because of the lack of clear standards, courts have reached inconsistent and widely varying conclusions on these issues.

The constitutional principle involved, the defendant's sixth amendment guarantee of confrontation through cross-examination, is sufficiently important to justify a clarification of the Namet and Douglas standards. When the government calls a witness to testify, and the witness informs the court of his intention to invoke his fifth amendment privilege, the court should examine the witness outside the presence of the jury to determine the validity and scope of the claim of privilege. If the court determines that the witness will do nothing more than invoke the privilege, the court should dismiss the witness without allowing questioning in the presence of the jury. However, if the court determines that the witness will provide some relevant testimony, the court should balance the probative value of that testimony against the prejudicial effect of the witness' claim of privilege to some questions. Of course, the court should be particularly sensitive to claims of prejudice arising out of the defendant's inability to exercise his constitutional right to cross-examine the witness. If the court determines that the witness cannot testify, the court should protect the government's legitimate interests by instructing the jury that the proposed witness is unavailable.

By requiring trial courts to follow this suggested procedure, the courts of appeals will provide necessary protection to constitutional rights without hampering legitimate prosecutorial interests in presenting the best possible defense.

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case. Courts also will avoid the uncertainty and conflicts that unnecessarily surround this area of the law by imposing a rule that will avoid prejudice to the defendant before it occurs.

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