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**THE RELUCTANT WITNESS FOR THE PROSECUTION**

**Inference of Defendant's Guilt Arising From a Prosecution Witness's Invocation of the Privilege Against Self-Incrimination: Analysis and Proposal**

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When the privilege against self-incrimination is invoked by a prosecution witness whom the jury understands to have been involved in the circumstances which gave rise to the criminal charge against the defendant, the jury may infer the guilt of the witness and in turn the guilt of the defendant. How can the criminal defendant protect himself against the prejudicial effects of such inferences? How does existing law treat this problem? And how can the law be improved to insure both a fair trial to the defendant and a fair opportunity to the prosecution to present its case? In the following article, the author considers these questions, critically analyzing the existing law and proposing a new approach to the problem.—EDITOR.

Although the privilege against self-incrimination<sup>1</sup> "serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances,"<sup>2</sup> and the United States Supreme Court recently condemned "the practice of imputing a sinister meaning"<sup>3</sup> to the exercise of this constitutional right, it must be conceded that most laymen tend to infer guilt from invocation of the privilege.<sup>4</sup> The fact that motives other than concealment of

guilt may be the basis for refusal to testify<sup>5</sup> refutes the validity of an inference of guilt; moreover, the principles which underlie the fifth amendment privilege demand that such an inference be prohibited.<sup>6</sup> Since the fifth amendment applies only to the federal government, however,<sup>7</sup> the states remain free to allow inferences of guilt to be drawn from invocation of their respective versions of the privilege against self-incrimination.<sup>8</sup>

\* This article is a revision of a paper originally submitted to Professor Fred E. Inbau, in his Criminal Evidence Seminar, Northwestern University School of Law, March, 1963.

<sup>1</sup> The privilege is guaranteed by the federal government in U.S. CONST. amend. V, and by all the states except Iowa and New Jersey by express state constitutional provision. Iowa construes its state constitutional due process clause as including the privilege, *State v. Height*, 117 Iowa 650, 91 N.W. 935 (1902), while New Jersey recognizes the privilege as a common law guarantee, *State v. Zdanowicz*, 69 N.J.L. 619, 55 Atl. 743 (1903), implemented by N.J. REV. STAT. 2:97-7 (1937).

<sup>2</sup> *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956).

<sup>3</sup> *Id.* at 557.

<sup>4</sup> "[I]n the public mind an odium surrounds the claim of constitutional privilege by a witness in refusing to testify on the ground that his testimony would tend to incriminate him . . ." *DeGesualdo v. People*, 147 Colo. 426, 432, 364 P.2d 374, 378 (1962).

<sup>5</sup> See Noonan, *Inferences From the Invocation of the Privilege Against Self-Incrimination*, 41 VA. L. REV. 311, 322 (1955), for a discussion of various motivations for claiming the privilege.

<sup>6</sup> *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). See *id.* at 144-50 for an excellent and well-documented discussion of the history and purposes of the privilege. See also *United States v. Shaughnessy*, 212 F.2d 128, 130 (2d Cir. 1954). *Cf. People v. Maunusau*, 60 Mich. 15, 20, 26 N.W. 797, 799 (1886).

<sup>7</sup> *Twining v. New Jersey*, 211 U.S. 708 (1908).

<sup>8</sup> See note 1 *supra*. 8 WIGMORE, EVIDENCE §2272, at 427 n.2 (McNaughton Rev. 1961) [hereinafter cited as WIGMORE], contains a discussion of state cases dealing with comment on defendant's failure to testify. Six states permit such comment: California and Ohio by constitutional provision, Connecticut, Iowa and New Jersey by judicial decision, and New Mexico by rule of court. *Adamson v. California*, 332 U.S. 46 (1947), reaffirming the principle announced in *Twining*, *supra* note 7, upheld California's constitutional pro-

Since any inference of guilt regarding a person who avails himself of his privilege against self-incrimination is merely that—an inference—, it seems illogical and unjust to permit a jury to infer the guilt of a criminal defendant from the refusal of another to testify—an inference piled upon an inference.<sup>9</sup> Further compounding the possible prejudice to the defendant is the well settled rule that the witness cannot be examined as to his reason for claiming the privilege.<sup>10</sup> The defendant therefore cannot rebut the inference of his own guilt that the jury may draw from the witness's invocation of his privilege. Yet some courts permit juries to use this tenuous reasoning in criminal cases, either by expressly allowing the "double inference" to be drawn or by gullibly presuming that cautionary instructions prevent its being drawn.

It might appear that the claim of privilege against self-incrimination by a prosecution witness allegedly connected with the crime of which the defendant is charged presents no problem of prejudice to the defendant in jurisdictions which permit the initial inference of guilt to be drawn, inasmuch as the basis for the inference of the defendant's guilt is the permissible inference of the witness's guilt. However, the possibility of prejudice to the defendant is as real in those jurisdictions which do permit the initial inference as in those which do not, since in both instances the premise from which the defendant's guilt is inferred is the mere *inference* that the witness claiming his own privilege against self-incrimination is guilty.

Thus, theoretically, the problem can exist every-

vision permitting comment on defendant's failure to explain or deny evidence against him. See *Hutcheson v. United States*, 369 U.S. 599 (1962), for the Supreme Court's most recent statement of the proposition that the fifth amendment privilege does not apply to the states as part of fourteenth amendment due process.

<sup>9</sup> Since the witness's answer, if given, "might conceivably be that he but not the defendant was guilty of the offense, or . . . that both he and the defendant were guilty; or it might relate entirely to some other offense," *Billeci v. United States*, 184 F.2d 394, 398 (D.C. Cir. 1950), or might be wholly unrelated to guilt, Noonan, *supra* note 5, the witness's claim of privilege has been, and, it seems, should be, held incompetent as evidence of guilt of the defendant. See, e.g., *Billeci v. United States*, *supra*; *Beach v. United States*, 46 Fed. 754, 755 (C.C.N.D. Cal. 1890); *Powers v. State*, 75 Neb. 226, 229, 106 N.W. 332, 333 (1905). See also cases cited in note 32 *infra*.

<sup>10</sup> 8 WIGMORE §2279, at 815 n.9; Recent Decisions, 23 U. PITT. L. REV. 813 (1962). *Accord*, *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853).

where in the United States. And, because of certain practical considerations, it does everywhere exist. The prosecution's failure to produce an accomplice or similarly situated witness may give rise to the inference that his testimony, if given, would have been unfavorable to the prosecution;<sup>11</sup> consequently, such witnesses are frequently called, and often they refuse to testify.

The purpose of this paper is to examine how courts deal with this problem, to analyze the validity and desirability of the various approaches, and finally, to present a therapeutic proposal.

### EXISTING LAW

Several factors must be present before an appellate court will reverse a conviction on the ground that a defendant's rights were prejudiced by the prosecution's calling of a witness who invoked his privilege against self-incrimination:

1. The witness must be so factually connected with the defendant that the witness's claim of privilege leads the jury to infer the defendant's guilt;
2. The witness must have a valid right to invoke the privilege;
3. The defendant must establish that the prosecution called the witness in bad faith; *i.e.*, that the prosecution knew or reasonably believed that the witness would, when called, assert his privilege;
4. Timely objection must have been made; and
5. Prejudicial error, not cured by cautionary instructions, must be found.

#### 1. *Witness's Relation to Defendant*

The reason for this requirement is both logical and clear. Absent a relationship between the witness and the defendant with regard to the transaction out of which grew the present criminal charge against the defendant, a jury is unlikely to imply the defendant's guilt from the witness's refusal to testify on grounds that his answer would tend to incriminate him. In light of its basis, then, the requirement should further stipulate that the jury must be aware of the relationship before a reviewing court will entertain the argument that a witness's refusal to testify prejudiced defendant's right to a fair trial. Since the relationship naturally precedes possibility of prejudice, defendants rarely assign as error the calling of a witness not so re-

<sup>11</sup> McCORMICK, EVIDENCE §249 (1954) [hereinafter cited as McCORMICK]; Annot., 135 A.L.R. 1375 (1941).

lated who refuses to testify. Thus the requirement is implicit, seldom, if ever, being overtly stated in cases dealing with the problem.<sup>12</sup>

<sup>12</sup> The relationships most frequently appearing in the cases are those wherein the witness is known by the jury to have allegedly been culpably involved in the criminal conduct with which the defendant is charged. See, e.g., *codefendant witnesses*: *Namet v. United States*, 373 U.S. 179 (1963); *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959); *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957); *People v. Plyler*, 121 Cal. 160, 53 Pac. 553 (1898); *State v. Hogan*, 145 Iowa 455, 88 N.W. 1074 (1902); *State v. Addington*, 158 Kan. 276, 147 P.2d 367 (1944); *Davis v. Commonwealth*, 191 Ky. 242, 229 S.W. 1029 (1921); *People v. Malloy*, 204 Mich. 524, 170 N.W. 690 (1919); *People v. Maunusau*, 60 Mich. 15, 26 N.W. 797 (1886); *State v. Greer*, 321 Mo. 589, 12 S.W.2d 87 (1928); *Froding v. State*, 125 Neb. 322, 250 N.W. 91 (1933); *Powers v. State*, 75 Neb. 226, 106 N.W. 332 (1905); *Washburn v. State*, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956); *Johnson v. State*, 158 Tex. Crim. 6, 252 S.W.2d 462 (1952); *Rice v. State*, 123 Tex. Crim. 326, 59 S.W.2d 119 (1933); *Rice v. State*, 121 Tex. Crim. 68, 51 S.W.2d 364 (1932); *co-conspirator witnesses*: *United States v. Cioffi*, 242 F.2d 473 (2d Cir.), *cert. denied*, 353 U.S. 975 (1957); *accomplice witnesses*: *People v. Kynette*, 15 Cal. 2d 731, 104 P.2d 794 (1940); *People v. Black*, 73 Cal. App. 13, 238 Pac. 374 (1925); *DeGesuado v. People*, 147 Colo. 426, 364 P.2d 374 (1961); *State v. Harper*, 33 Ore. 524, 55 Pac. 1075 (1899); *Garland v. State*, 51 Tex. Crim. 643, 104 S.W. 898 (1907).

In a few cases, defendants have complained of prejudice where the witnesses claiming the privilege were not known to have been so involved. In each of these cases, however, facts existed which connected the witness to the defendant in such a way that, even if the witness could not be found criminally responsible in some degree for the crime with which the defendant was charged, the witness's claim of privilege might nevertheless be considered by the jury as bearing on the defendant's guilt. In *United States v. Amadio*, 215 F.2d 605 (7th Cir. 1954), the witnesses whose refusal to testify was complained of were men implicated in illicit activities with the prosecutrix in a Mann Act prosecution against defendant. Although the witnesses were not actually involved in the commission of the crime for which defendant was tried, the inference of their guilt of illicit conduct with the prosecutrix, which might be drawn from their refusals to testify, might lead the jury to believe that defendant committed the alleged Mann Act violation. *McClure v. State*, 95 Tex. Crim. 53, 251 S.W. 1099 (1923), involved a witness who, although unindicted, was probably an accomplice. The witnesses whose claims of privilege were objected to in *State v. Snyder*, 244 Iowa 1244, 59 N.W.2d 223 (1953), were women whom defendant was charged of aborting. See also *Beach v. United States*, 46 Fed. 754 (C.C.N.D. Cal. 1890).

Occasionally a defendant urges that a witness's refusal to testify is relevant to issues in the case. In *State v. Weber*, 272 Mo. 475, 199 S.W. 147 (1917), the defendant complained not of the refusal of a prosecution witness to testify, but of the trial court's failure to admit as evidence a claim of privilege given at defendant's preliminary hearing by a witness who, at the time of trial, had left the jurisdiction. The defendant unsuccessfully argued on appeal that the witness's claim of privilege against self-incrimination to the question whether he had had intercourse with the

## 2. Validity of Witness's Claim of Privilege<sup>13</sup>

The question whether a witness has a right to invoke the privilege is decided by the trial court,<sup>14</sup> and absent a valid claim, the witness can be compelled to testify on pain of being held in contempt of court for refusal to answer. A witness's prior conviction of or plea of guilty to a crime growing out of the transaction with regard to which the defendant is being tried generally precludes that witness from validly claiming his privilege, since it is assumed that he can incriminate himself no further.<sup>15</sup>

Appellate courts refuse to reverse on the ground that the prosecution called such a witness, even if he persists in refusing to testify after his claim of privilege has been held invalid.<sup>16</sup> Two bases for

prosecutrix prior to the date on which the defendant was alleged to have committed statutory rape upon her should have been admitted as evidence of her prior unchastity, a defense to the charge against defendant.

Phrases such as "crucial relationship" and "crucially connected" or "crucially related" witness will herein-after be used in this paper as referring to the relationship necessary to satisfy this first requirement; i.e., where the witness is so connected with the defendant that an inference of the witness's guilt will lead to an inference of the defendant's guilt.

The related problem of prejudice occasioned by comment by the prosecution on simple failure of an accomplice or similar person to testify is beyond the scope of this paper. See note 34 *infra*.

<sup>13</sup> "Witness," as used in this paper, refers only to a person not actually a defendant in the criminal proceeding during which he is called to the stand. A different rule, of course, obtains with respect to a defendant, who may not be called except at his option. A non-defendant, though he may claim his privilege against self-incrimination, must first be sworn, and may be involuntarily called to the stand. *McCORMICK* §122.

<sup>14</sup> *Id.* §129; 8 *WIGMORE* §2271. The trial judge's determination of this issue will be overturned on appeal only if clearly wrong. *McCORMICK* §129, at 270.

<sup>15</sup> *Namet v. United States*, 373 U.S. 179 (1963); *United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968, *rehearing denied*, 357 U.S. 944 (1958); *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957); *United States v. Cioffi*, 242 F.2d 473 (2d Cir.), *cert. denied*, 353 U.S. 975 (1957); 8 *WIGMORE* §2279. *Contra*, *Froding v. State*, 125 Neb. 322, 250 N.W. 91 (1933), where what the court perfunctorily terms "exercise of his privilege" by a witness previously convicted on a plea of guilty of the same crime for which defendant was on trial seems rather to be refusal to testify absent a valid claim of privilege, allowed by the trial court in light of the circumstances under which the witness entered his guilty plea.

<sup>16</sup> See, e.g., *United States v. Gernie*, *supra* note 15; *United States v. Romero*, *supra* note 15; *United States v. Cioffi*, *supra* note 15. *But see* *State v. Harper*, 33 Ore. 524, 55 Pac. 1075 (1899), where the court held that comment by the prosecution on the refusal to testify of a witness whose claim of privilege was invalid because of prior conviction constituted reversible error, stating, "[T]o hold otherwise is, in effect, to punish a party for

this position have been stated, both related to lack of bad faith by the prosecution. One basis seems to be that the witness's lack of motive for invoking his privilege against self-incrimination negates the idea that the prosecution called him solely to evoke from him the claim of privilege, *i.e.*, in bad faith.<sup>17</sup> Another is that calling the witness is justified because failure of the prosecution to call as a witness one convicted of a crime related to or the same as that with which the defendant is charged would result in the inference that his testimony, if given, would be unfavorable to the prosecution.<sup>18</sup>

No cases relevant to the topic under discussion were discovered wherein a witness's claim of privilege was held invalid on grounds other than prior conviction or guilty plea. It would appear that where other grounds are involved, the witness's refusal to answer after an adverse ruling on his invocation of privilege would not be prejudicial to the defendant; the trial court's ruling would theoretically rule out any inference of the witness's guilt. However, the jury might construe the witness's continued refusal to answer as a subjective determination of guilt, or, at least, of incriminating circumstances by the witness, regardless of the technical invalidity of his privilege claim.

### 3. Prosecution's Bad Faith

Appellate courts always require the defendant to prove that the prosecutor called the witness in "bad faith." In part, this factor is deemed essential in order to discipline the prosecutor who became more partisan than minister of justice.<sup>19</sup> Most

the refusal of a witness to obey the order of a court." *Id.* at 529, 55 Pac. at 1077.

<sup>17</sup> *Namet v. United States*, *supra* note 15, at 188-89; *United States v. Cioffi*, *supra* note 15, at 477. The bad faith factor is discussed in the text at 4-5 & 8-11 *infra*.

<sup>18</sup> See note 11 *supra*. This factor seems to have influenced the court to affirm defendant's conviction in *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957). While dealing with a previously convicted witness, *United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968, *rehearing denied*, 357 U.S. 944 (1958), indicates that the possibility of an unfavorable inference against the prosecution would justify calling a witness connected with defendant's alleged crime even if the witness retained a valid right to claim his privilege.

<sup>19</sup> See, *e.g.*, *United States v. Amadio*, 215 F.2d 605, 613 (7th Cir. 1954); *United States v. Five Cases, More or Less, Containing "Figlia Mia Brand"*, etc., 179 F.2d 519, 523 (2d Cir. 1950); *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961); *McClure v. State*, 95 Tex. Crim. 53, 59, 251 S.W. 1099, 1102 (1923); *Garland v. State*, 51 Tex. Crim. 643, 645, 104 S.W. 898, 899 (1907). But see *United States v. Maloney*, 262 F.2d

cases, however, simply state the requirement without explaining its basis. Although the requirement of bad faith is universal, there are two irreconcilable theories regarding proof of bad faith. Some courts hold that evidence of knowledge or reasonable cause to believe<sup>20</sup> that the witness intended to claim his privilege suffices,<sup>21</sup> while others assert that since the potential witness may suffer a last-minute change of heart and decide to testify, evidence that the prosecution possessed information regarding his intention not to testify does not prove bad faith.<sup>22</sup>

535, 537 (2d Cir. 1959), where the court suggests that the prosecution could disclose it had reason to believe that the witness would refuse to testify only if the defendant first argued that the prosecution's failure to call that witness gives rise to an inference against the prosecution. *Cf.* note 33 *infra*.

After stating the language quoted in note 4 *supra*, the Colorado Supreme Court continued, "A district attorney, although in a sense a partisan, is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant." *DeGesualdo v. People*, *supra* note 19, at 433, 364 P.2d at 378. The court had previously indicated, *id.* at 430, 364 P.2d at 377, that lack of bad faith would have precluded reversal. In *McClure v. State*, *supra* note 19, the court stated, "If the state's purpose . . . was to compel or invite . . . [the witness's] refusal to testify, in order to use this as an incriminating fact against appellant, the state was guilty of an injustice." See also *United States v. Tucker*, 267 F.2d 212 (3d Cir. 1959), in which the court, reversing on other grounds, uttered the following dictum:

"[A]n interrogating official himself gravely abuses the privilege against self-incrimination when, believing a truthful answer will incriminate a witness, he nevertheless insists on asking the incriminating question with a view to eliciting a claim of privilege and thereby creating prejudice against the witness or some other party concerned."

*Id.* at 215.

<sup>20</sup> Query whether reasonable cause to believe a potential witness will invoke his privilege should be *presumed* where defendant shows that the prosecution knew of the witness's relationship of accomplice, co-defendant, etc., to the defendant. One court indicates that where the witness was an accomplice, the burden of proving good faith was on the prosecution: "[The] . . . state should not attempt to place her on the stand unless she proposes to turn state's evidence." *Garland v. State*, *supra* note 19. See also *United States v. Tucker*, *supra* note 19, in which the court indicated that bad faith existed where a witness who had claimed his privilege at defendant's first trial was again called and again refused to testify at the second trial, since the prosecution had no reason to believe the witness had changed his mind in the interim.

<sup>21</sup> *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959); *Johnson v. State*, 158 Tex. Crim. 6, 252 S.W.2d 462 (1952); *Rice v. State*, 123 Tex. Crim. 326, 59 S.W.2d 119 (1933); *Rice v. State*, 121 Tex. Crim. 68, 51 S.W.2d 364 (1932).

<sup>22</sup> "The fact that these witnesses previous to the trial had asserted extrajudicially their constitutional

While paying lip-service to the doctrine that convictions should be reversed if procured by the prosecution's calling in bad faith of a witness who invokes his privilege against self-incrimination, courts adhering to the latter view actually preclude its application; for to say that knowledge of the witness's prior manifestations of intention not to testify does not evidence bad faith is simply to say that bad faith cannot be proved.

Although proof of bad faith is always requisite to reversal, it will not compel reversal in absence of a showing that prejudicial error occurred which was not cured. Such showing, of course, depends on the defendant's standing to urge that calling the witness was prejudicial error, which in part depends on the scope of the reviewing court's approach to a witness's claim of privilege.<sup>23</sup>

#### 4. *Timely Objection*

Timely objection to a prosecutor's calling of a witness who claims his privilege against self-incrimination<sup>24</sup> or to a prosecutor's comment on the witness's invocation of privilege<sup>25</sup> is required

right to refuse to answer did not preclude the prosecution from calling them upon the trial and interrogating them under oath . . . in the hope that in the interim they might have undergone a change of mind and be willing . . . [to testify]." *People v. Kynette*, 15 Cal. 2d 731, 747, 104 P.2d 794, 802 (1940). See *Commonwealth v. Granito*, 326 Mass. 494, 498-99, 95 N.E.2d 539, 542 (1950).

In *Weinbaum v. United States*, 184 F.2d 330 (9th Cir. 1950), where the prosecution had been warned by the witness's attorney that the witness would, if called, assert his fifth amendment privilege, the court approved both the prosecution's subsequent calling of the witness and continuing to question him after he initially claimed the privilege, stating, "It is conceded that before . . . [the witness] was called other witnesses who had, before trial, threatened to refuse to testify on this ground, nevertheless had testified without claiming any privilege," and reasoned that the witness's uncertainty as to whether to assert his privilege in the first place justified the prosecution's asking of the second question, since between his first claim and the second question, the witness might have changed his mind.

<sup>23</sup> While a defendant may lose standing to object by waiver, i.e., by failure to object in an attempt to cure prejudice and to preserve the claimed error for review, he never has standing to object to a witness's claim of privilege if the appellate court views the privilege against self-incrimination as strictly personal to the witness for all purposes. See note 31 *infra* and accompanying text.

<sup>24</sup> See, e.g., *Namet v. United States*, 373 U.S. 179, 190 (1963); *United States v. Hiss*, 185 F.2d 822, 831-32 (2d Cir. 1950).

<sup>25</sup> See, e.g., *McClure v. State*, 95 Tex. Crim. 53, 251 S.W. 1099 (1923), where, although mere calling of the witness in absence of bad faith was condoned, comment by the prosecution on his claim of privilege constituted reversible error. See note 34 *infra* and accompanying text.

for reversal only if, in the appellate court's view, any prejudice caused by the conduct complained of is curable by cautionary instructions.<sup>26</sup> Moreover, if the court holds the error curable, failure to request cautionary instructions may be found to constitute waiver.<sup>27</sup> It may be said that where an appellate court believes the error is curable, failure to request cautionary instructions nullifies the validity of an objection to the prosecutor's conduct, even if the objection is otherwise timely. It further seems that an objection which cannot be reviewed on appeal for want of other conduct—in this instance, requesting cautionary instructions—cannot be deemed "timely." Thus, from a procedural point of view, for a reviewing court holding such error curable to consider the defendant's argument that a witness's claim of privilege prejudiced him, the defendant must show not only that he objected to the conduct complained of, but also that he made a futile request for cautionary instructions.

The Second Circuit,<sup>28</sup> however, which regards such error as curable, has held that, even absent defendant's request for cautionary instructions that no inference should be drawn from a co-defendant witness's claim of privilege, the trial court's failure to give such instructions *sua sponte* is reversible error under the "plain error" rule.<sup>29</sup> Hence, the requirement of timely objection as defined above has been limited to cases where the error is deemed curable *and* does not amount to "plain error." It is probably safe to assume, however, that most courts would hold that failure to make such timely objection to plain error constitutes waiver if the error could have been cured.<sup>30</sup>

#### 5. *Uncured Prejudicial Error*

In the restrictive view of some courts, a defendant cannot successfully argue that he was

<sup>26</sup> This qualification of the requirement of timely objection exists because, unless the error is curable by some corrective action, objecting is futile; thus, the reason for requiring timely objection—to cure errors which can be cured at the trial level—is absent.

<sup>27</sup> *Weinbaum v. United States*, 184 F.2d 330 (9th Cir. 1950) (dictum).

<sup>28</sup> *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959).

<sup>29</sup> *FED. R. CRIM. P.* 52(b).

<sup>30</sup> The United States Supreme Court in *Namet v. United States*, 373 U.S. 179, 190-91 (1963), held that the trial court's instruction permitting the jury to infer defendant's guilt from the valid privilege claims of two witnesses did not constitute plain error under Rule 52(b) where defendant did not object to the instruction. See note 36 *infra*.

prejudiced by a witness's invocation of his privilege against self-incrimination, since use of the privilege, being personal to the individual claiming it, cannot be the basis of objection by another.<sup>31</sup> Most courts, however, realizing that invocation of the privilege, though personal to the witness, can indeed result in prejudice to the defendant, allow him to complain.<sup>32</sup> They must then consider whether the conduct of which he complains was in fact prejudicial, and, if so, whether the prejudice was cured by cautionary instructions.

The elements numbered 1 through 4, discussed above, must be found before the calling of a witness who claimed his privilege against self-incrimination will be deemed prejudicial. Once these requirements have been satisfied, the question is whether the defendant's substantial rights have been prejudiced by the occurrence. Generally, courts find such prejudice where an inference of defendant's guilt was probably drawn from the witness's refusal to testify on grounds of the privilege.<sup>33</sup> If the prosecutor has not only called

the witness but also has commented on his refusal to testify, courts more readily find that the incompetent evidence was considered by the jury than if the incident has been more or less ignored.<sup>34</sup>

because it could be used as an incriminating fact against appellant." *Washburn v. State*, 164 Tex. Crim. 448, 451, 299 S.W.2d 706, 708 (1956). "It would, indeed, be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness, . . . had refused to testify in order to protect himself." *Beach v. United States*, *supra* note 32, at 755. See *Powers v. State*, 75 Neb. 226, 229, 106 N.W. 332, 333 (1905) (exercise of witness's privilege cannot "in any legal degree be considered as tending to prove the guilt" of defendant; prejudice because may have been so considered). In *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959), the court found the calling of the co-defendant witness prejudicial to defendant, stating that, while it is logically persuasive to infer a possible answer from the witness's refusal to testify, refusal was not a legally permissible basis for such inference. See *Rice v. State*, 123 Tex. Crim. 326, 330, 59 S.W.2d 119, 121 (1933) (prejudicial because witness's claim of privilege could be used as an incriminating fact against defendant); *Garland v. State*, 51 Tex. Crim. 643, 104 S.W. 898 (1907) (prejudicial because witness's claim of privilege usable as a "circumstance of guilt" against defendant).

See also *DeGesualdo v. People*, 147 Colo. 426, 364 P.2d 374 (1961); *Johnson v. State*, 158 Tex. Crim. 448, 252 S.W.2d 462 (1952); *Rice v. State*, 121 Tex. Crim. 68, 51 S.W.2d 364 (1932). In these cases, the trial court's prior knowledge of the witness's intention to claim his privilege may have contributed to the appellate court's finding of prejudice.

Only one case was discovered in which a court not taking the restrictive view, see note 31 *supra* and accompanying text, failed to find that bad faith calling of a witness who claimed the privilege did not constitute prejudicial error. In *People v. Moloy*, 204 Mich. 524, 170 N.W. 690 (1919), the witness was under indictment for the same act of adultery with which defendant was charged. The conduct was held not prejudicial because the witness claimed her privilege only to part of the inquiry and denied much incriminating testimony.

<sup>31</sup> See, e.g., *Billeci v. United States*, *supra* note 32; *Beach v. United States*, *supra* note 32; *People v. Glass*, 158 Cal. 650, 112 Pac. 281 (1910); *McClure v. State*, 95 Tex. Crim. 53, 251 S.W. 1099 (1923).

The related issue of whether the prosecution may comment not on a witness's refusal to testify but on the defense's failure to call as a witness an accomplice or similar person is beyond the scope of this paper. Generally, such conduct is deemed prejudicial. *Annot.*, 5 A.L.R.2d 893, 942-44 (1949). In jurisdictions with statutes prohibiting comment on failure of certain classes of persons to testify, which classes do not include a co-defendant or accomplice not himself on trial in the proceeding during which he was not called, the comment is held not prejudicial because not included within the statute, which, the courts apparently presume, is exhaustive. See, e.g., *State v. Madden*, 170 Iowa 230, 148 N.W. 995 (1914); *State v. Hogan*, 115 Iowa 455, 88 N.W. 1074 (1902); *State v. Addington*, 158 Kan. 276, 147 P.2d 367 (1944); *State v. Jones*, 137 Kan. 273, 20 P.2d 514 (1933); *Davis v. Commonwealth*, 191 Ky. 242, 229 S.W. 1029 (1921); *State v. Greer*, 321 Mo. 589, 12 S.W.2d 87 (1928).

<sup>31</sup> These courts seem to adhere to this restrictive view even where prejudice to the defendant is conceded. The rationale seems to be simply that the defendant lacks standing to object. See, e.g., *People v. Plyler*, 121 Cal. 160, 162, 53 Pac. 553, 554 (1898). Cf. *State v. Addington*, 158 Kan. 276, 147 P.2d 367 (1944). In *State v. Snyder*, 244 Iowa 1244, 59 N.W.2d 223 (1953), defendant appealed from the trial court's denial of his motion to quash notice of additional testimony or to strike names of certain proposed witnesses (women whom defendant was charged of aborting), and of his objections to the appearance of certain of these witnesses who invoked the privilege, contending that such denial was prejudicial and constituted reversible error. The state and the court were advised prior to calling the witnesses that they would do so. The Supreme Court of Iowa misconstrued defendant's argument, stating, "Immunity is a privilege of the witness only, and may not be urged by the party against whom the witness is offered." *Id.* at 1248, 59 N.W.2d at 226. Defendant, of course, was not seeking to insist that one who could assert his privilege do so—which is the only contention satisfactorily answered by the above statement—but rather argued that because the witnesses intended to and did claim the privilege, the trial court's denial of his motion and objections was reversibly prejudicial.

<sup>32</sup> See, e.g., *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950); *Beach v. United States*, 46 Fed. 754 (C.C.N.D. Cal. 1890). In the latter case, the court held that invocation of the privilege was the witness's "constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of . . . [the witness's claim]." *Id.* at 755. *Accord*, *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853).

<sup>33</sup> "The trial court committed reversible error in permitting the state to call . . . [the co-defendant] to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. Such refusal to testify was prejudicial

Further, the prosecutor's continuing to ask the witness questions containing material tending to incriminate the defendant after the witness has claimed his privilege against self-incrimination to similar questions is generally held prejudicial.<sup>35</sup> However, if the witness in fact gave relevant, non-privileged testimony, his exercise of valid privilege claims to a few questions is generally found not to be prejudicial.<sup>36</sup>

Should the appellate court decide that the prosecution's conduct in calling the witness prejudiced defendant, the remaining issue is whether the prejudicial error was cured by cautionary instructions.<sup>37</sup> If cautionary instructions were not given,<sup>38</sup>

<sup>35</sup> See, e.g., *People v. B* 238lack, 73 Cal. App. 13, Pac. 374 (1925); *Commonwealth v. Granito*, 326 Mass. 494, 95 N.E.2d 539 (1950); *Washburn v. State*, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956).

<sup>36</sup> In *Namet v. United States*, 373 U.S. 179 (1963), the Court affirmed defendant's conviction for federal gambling offenses over his contention that he was prejudiced by the prosecution's calling of two co-defendant witnesses who had pleaded guilty and exercised valid privilege claims as to only a few of many questions. The Court stated:

"The effect of these questions was minimized by the lengthy nonprivileged testimony which the witnesses gave. . . . [T]he present case is not one . . . in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant."

*Id.* at 189. See also *People v. Moloy*, 204 Mich. 524, 120 N.W. 690 (1919), discussed in the last paragraph of note 33 *supra*.

<sup>37</sup> In the following cases, prejudicial error was found, but was deemed cured by cautionary instructions: *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950); *Weinbaum v. United States*, 184 F.2d 330 (9th Cir. 1950); *People v. Kynette*, 15 Cal. 2d 731, 104 P.2d 794 (1940); *Commonwealth v. Granito*, *supra* note 35.

<sup>38</sup> Prejudicial error required reversal in absence of cautionary instructions in *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959) (see note 28 *supra* and accompanying text); *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950) (denial of cautionary instruction that no inferences should be drawn from fact that numerous witnesses claimed privilege; trial court allowed prosecution to argue that the inference should be drawn that their testimony, if given, would be unfavorable to defendant); *DeGesualdo v. People*, 147 Colo. 426, 430, 364 P.2d 374, 377 (1961) (dictum that cautionary instructions would have cured the prejudicial error); *McClure v. State*, 95 Tex. Crim. 53, 251 S.W. 1099 (1923) (refusal to give cautionary instruction *re* comment on accomplice's refusal to testify).

In *Beach v. United States*, 46 Fed. 754 (C.C.N.D. Cal. 1890), the trial court not only permitted the prosecutor to argue that a witness's claim of privilege tended to prove defendant's guilt, but also gave an instruction expressly allowing the jury to draw such an inference. The trial court in *People v. Black*, *supra* note 35, refused to give cautionary instructions and instructed the jury that it could draw such inferences from an accomplice's claim of privilege as it desired as the case may justify. Both convictions were reversed.

or if they were given but did not cure the prejudice, either because the instructions were inadequate<sup>39</sup> or because the prejudice was so great that it could not be cured,<sup>40</sup> the defendant's conviction will be reversed.

#### ANALYSIS OF THE EXISTING LAW

Analyzing the validity and desirability of currently existing approaches to the question whether the calling of a witness who refuses to testify is prejudicial to the defendant has been postponed until all the factors generally viewed as essential to reversal were examined, in order that each may be analyzed in the light of existence of the others.

##### 1. *Witness's Relation to Defendant*

No issue will be taken with this requirement, since absent the crucial relationship between the witness and the defendant,<sup>41</sup> there is no reasonable possibility that the jurors will infer defendant's guilt from the witness's refusal to testify, even if they do infer the witness's guilt therefrom.<sup>42</sup>

##### 2. *Validity of Witness's Claim of Privilege*

This requisite for reversal is meaningful only if the reason for reversing convictions based in part on a witness's assertion of privilege is to preserve the integrity and purpose of the privilege against self-incrimination or to discipline the prosecution for resorting to what appellate courts consider unfair practices, rather than to insure that the trial of the particular defendant in question was fair.<sup>43</sup>

<sup>39</sup> See, e.g., *People v. Glass*, 158 Cal. 650, 112 Pac. 281 (1910), where refusal to give a specific cautionary instruction not to consider the prosecutor's comment on the witness's refusal to testify constituted reversible error, even though a general cautionary instruction to consider only the evidence was given.

<sup>40</sup> In *Washburn v. State*, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956) (see text accompanying note 35 *supra*), the trial court granted defendant's request for an instruction not to consider for any purpose questions asked by the prosecution of an accomplice who refused to testify, but denied his motion for mistrial. The reviewing court found the calling and questioning of the witness so prejudicial that only the granting of a mistrial could have prevented defendant's substantial rights from being prejudiced. See, e.g., *Powers v. State*, 75 Neb. 226, 106 N.W. 332 (1905) (rev'd although cautionary instructions given because error too prejudicial thus to be cured).

<sup>41</sup> See note 12 *supra*.

<sup>42</sup> The remote possibility that, absent the required relationship, the jury will nevertheless infer defendant's guilt from the witness's claim of privilege if they have reason to believe that the witness does not fear incrimination for himself but rather seeks to protect the defendant from incriminating testimony, will not be considered.

<sup>43</sup> Another possible premise for the requirement is that calling the witness is justifiable because failure to



If it is a witness's refusal to testify that leads a jury to infer first his guilt and next the defendant's, then the jury, it would seem, is likely to draw this double inference whether the trial court rules favorably or unfavorably on his claim of privilege. Regardless of the trial court's adverse ruling on the technical validity of his invocation, the jury can simply reason that the witness was aware of circumstances which he could not reveal to the trial court but which warranted his subjective belief that answering the questions put to him would tend to incriminate him. Moreover, where the reason for denying the witness's claim of privilege is prior conviction or plea of guilty, as is usually the case,<sup>44</sup> his refusal to testify in defiance of a court order can be construed as consistent either with his fear of incriminating himself of a further crime involving the defendant, or with his desire to protect the defendant even though the witness can incriminate himself no further. Either may be prejudicial to the defendant—the first for the same reasons that a claim of privilege by any crucially connected witness as to questions regarding the transaction with which he and the defendant are connected can be prejudicial; the second self-evidently. The mental processes that jurors would have to use to infer defendant's guilt from a witness's refusal to testify in absence of a valid privilege claim are less obvious and may be less likely to occur than when the privilege claim is upheld; therefore, the reviewing court should regard such a case in light of all the circumstances, not finding prejudice so readily as where a valid claim exists. However, since the defendant nonetheless can be prejudiced by the refusal of a crucially related witness to testify even though his claim of privilege was not upheld,<sup>45</sup> such a case should be treated the same as one involving a valid claim of privilege, unless other principles outweigh this consideration.

Language in some cases involving a witness's invocation of privilege indicates that the principles which underlie the privilege compel reversal—that the privilege is perverted if the "double inference"

produce him could result in an inference that, had he been called, his testimony would have been unfavorable to the prosecution. See notes 11 & 18 *supra* and accompanying text. This element will also be discussed in the text in the section on Proposed Solution, *infra*.

<sup>44</sup> See notes 15–17 *supra* and accompanying text. No cases dealing with this issue were found where denial of a witness's claim of privilege was based on any ground other than prior conviction or guilty plea.

<sup>45</sup> See *State v. Harper*, 33 Ore. 524, 55 Pac. 1075 (1899) (more fully discussed in note 16 *supra*).

against defendant is drawn from a witness's claim.<sup>46</sup> It is submitted, however, that the prejudice resulting to the particular defendant in question, rather than preservation of the privilege, is the actual reason for reversal. Prejudice can result from a witness's refusal to testify in absence of a valid privilege claim just as it can where the privilege is available. Therefore, the actual basis of the cases referred to is not inconsistent with reversing when prejudice results in a given case from a witness's refusal to testify over a court order in absence of availability of his privilege claim.

The only remaining rationale for refusing to reverse where the witness lacked a valid privilege claim is that lack of validity of the claim negates the idea that the prosecution anticipated the witness's refusal to testify, i.e., that the prosecution called the witness in bad faith.<sup>47</sup> If the bad faith requirement can be justified, the fact that absence of a valid privilege claim negates bad faith is a persuasive reason for retaining the requirement that the witness have a valid claim of his privilege against self-incrimination.

### 3. *Prosecution's Bad Faith*

There are two possible reasons for requiring the defendant to show that the prosecutor was in bad faith when he called to the stand the witness who claimed his privilege: first, to discipline prosecutors by reversing convictions obtained by unfair methods, a "policy" reason; and second, to provide a ground for finding that the defendant's trial was rendered unfair by "state action," a "legal" reason. It is submitted that, regardless of the validity of either reason, bad faith in fact can never be shown; therefore, unless one is willing to say that a conviction should never be reversed on the ground that a witness's claim of privilege prejudiced the defendant, bad faith must not be required as a condition for reversal. Further, it will be demonstrated that state or federal action can be found without resting this legal conclusion on the premise that the prosecutor acted unfairly.

As mentioned earlier, some courts virtually never reverse for prejudice due to a witness's refusal to testify, because under their view regarding proof of bad faith, it can never be shown.<sup>48</sup> The approach most frequently used by these courts—that a prosecutor cannot be in bad faith because not

<sup>46</sup> See note 6 *supra* and accompanying text.

<sup>47</sup> See note 17 *supra* and accompanying text.

<sup>48</sup> See note 22 *supra* and accompanying and following text.

until the witness in fact is sworn and claims his privilege is there a certainty that he will in fact do so—seems logical and persuasive. A second and equally valid reason for stating that bad faith cannot be shown and therefore should not be required for reversal is that, until the trial court upholds the validity of a witness's claim of privilege, there is no assurance that the witness will in fact have a privilege to rely on, regardless of how manifest was his intention to invoke it.<sup>49</sup>

If proof of bad faith thus should not be required, there is no longer any valid reason for distinguishing between a witness's refusal to testify after an adverse ruling on his claim of privilege and his refusal pursuant to valid invocation of the privilege against self-incrimination, since either type of refusal may result in prejudice to the defendant.<sup>50</sup>

The "State Action" Concept. A recent case dealing with a related problem will serve to illustrate the proposition that state or federal action need not be limited to affirmative conduct by the government. In *DeLuna v. United States*,<sup>51</sup> defendant complained of comment on his own failure to testify, not, as would be expected, by the prosecutor, but rather by his co-defendant's counsel, contending that he was denied a fair trial when the trial court permitted such comment to be made over his objection. Finding no case directly in point, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the references complained of<sup>52</sup> violated both the fifth amendment

and the federal statute allowing a criminal defendant, at his option, to be a competent witness,<sup>53</sup> and that although neither the prosecutor nor the judge made the comments, the district judge's refusal to disapprove the private attorney's conduct and to take steps to prevent defendant from being penalized for relying on his constitutional right to remain silent amounted to prohibited federal participation in or sanction of the comments.<sup>54</sup>

Language used by the court in reaching this result is applicable to state as well as federal judges:<sup>55</sup>

"The federal government cannot wash its hands of responsibility . . . from the court's inaction. The exclusive control of the conduct of the trial is in the hands of the presiding federal judge. He is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'<sup>56</sup> He has the decisive role in assuring an accused a fair trial according to federal standards."<sup>57</sup>

The appellate court's rationale is that, once prejudicial conduct has taken place, the trial court's failure to cure it amounts to governmental action. The crucial element is that uncured prejudice rendered the trial unfair, regardless of the identity of or good or bad faith of the actor. That

<sup>49</sup> 18 U.S.C. §3481 (1958) provides, in pertinent part, that a defendant "shall, at his own request, be a competent witness," but that his "failure to make such request shall not create any presumption against him."

<sup>54</sup> "The trial judge's approval of an improper comment and refusal to disapprove the comment and do whatever is necessary to protect a defendant from being penalized by relying on his constitutional right amounts, in our opinion, to sufficient participation in the comment so that it may be properly characterized as a violation of the fifth amendment and section 3481." 308 F.2d at 154. *Cf. Baker v. Carr*, 369 U.S. 186 (1962); *Branche v. Board of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962). These cases seem to stand for the proposition that where non-state action which results in the infringement of a constitutional right is not prevented by the state, the state becomes responsible, via the state action concept, for the harm occasioned by its failure to act.

<sup>55</sup> I do not, of course, mean to imply that federal standards are to be applied to state judges in cases dealing with the subject of this paper. However, where the court speaks of "a fair trial according to federal standards," the duty imposed on a state court would be to assure the defendant a fair trial according to state standards, provided that such standards comply with the sixth amendment right to a fair trial which applies to the states through the due process clause of the fourteenth amendment. *Cf. Irvin v. Dowd*, 366 U.S. 717 (1961).

<sup>56</sup> Quoting from *Quercia v. United States*, 289 U.S. 466, 472 (1933).

<sup>57</sup> 308 F.2d at 153.

<sup>49</sup> See note 14 *supra* and accompanying text. See also *People v. Kynette*, 15 Cal. 2d 731, 104 P.2d 794 (1940), wherein this factor, as well as the often-used reason that the potential witnesses might change their minds, contributed to the California Supreme Court's determination that bad faith by the prosecution had not been shown.

<sup>50</sup> It is not likely, however, that refusal after adverse ruling will cause serious prejudice to as many defendants as will refusal on a valid claim of privilege, simply because the reasoning leading to an inference of defendant's guilt is much less obvious and probably less often indulged in by juries in the former case. Another reason is that the basis for any inference of defendant's guilt which may be drawn in the first case is not merely the inference of the witness's guilt, but the fact thereof, as proved by his conviction. See note 44 *supra*. Therefore, just as trial courts in the first instance and appellate courts on review manage to weigh possibly prejudicial conduct of various types in order to determine whether the conduct was in fact prejudicial to a defendant, they can do so where the alleged prejudicial event consists of a witness's refusal to testify despite a court order to do so.

<sup>51</sup> 308 F.2d 140 (5th Cir. 1962).

<sup>52</sup> *E.g.*, that co-defendant "was honest enough and had courage enough to take the stand," while "you haven't heard a word from . . . [defendant]." *Id.* at 143.

the conduct need not be initiated by an agent of the government is clear:

"If comment on an accused's silence is improper for judge and prosecutor, it is *because of the effect on the jury*, not just because the comment comes from representatives of the state."<sup>58</sup>

<sup>58</sup> 308 F.2d at 153 (citation omitted). (Emphasis added.) Cf. *Martin v. People*, 114 Colo. 120, 162 P.2d 597 (1945). Defendant had been convicted of committing an act of crime against nature with one of several sailors who spent the night at defendant's apartment. At the trial, the sailors testified that defendant had given them various valuables "in consideration of their promise not to reveal his alleged conduct . . . while defendant stated that the sailors had robbed him of . . . [the goods]." *Id.* at 122, 162 P.2d at 598. On direct examination, one of the sailors voluntarily exclaimed that they had previously been acquitted of robbery growing out of the above transaction. Noting that this testimony conveyed improper information which could lead to an inference that the jury should not have considered—that they should believe the sailors rather than the defendant because another jury had done so—the Supreme Court of Colorado held that failure of the trial judge to grant defendant's motion for mistrial based on the volunteered information constituted reversible error, stating: "There is nothing to indicate that the district attorney promoted the witness' outburst, but that does not detract from its damaging effect." *Id.* at 128, 162 P.2d at 600.

The following recent cases indicate that courts seem increasingly to be recognizing that the real issue presented when prejudice is alleged is whether the trial was fair. In *People v. Roof*, — Cal. App. 2d —, — P.2d —, —, 30 Cal. Rptr. 619, 622 (Dist. Ct. App. 1963), which involved a police officer witness's volunteered statement containing inadmissible information that defendant was implicated in other criminal offenses, the court reversed, stating, "It is the effect of the . . . statement, not the motive behind it, which is determinative of the question whether the case of defendant was substantially impaired." In *State v. Green*, — Iowa —, 121 N.W.2d 89 (1963), the Iowa Supreme Court found reversible error in the prosecutor's reference in his opening statement to the defendant's failure to take a polygraph test, stating:

"The trial court attempted to excuse the statement and action of the county attorney by saying he acted in good faith. This is not the measuring stick to be used. The criterion is whether or not the defendant was improperly and unduly prejudiced."

*Id.* at —, 121 N.W.2d at 92. The New York Court of Appeals reversed a conviction based in part on unintentionally false testimony, stating, "The fault of the offender [witness] may be less but the effect is the same. . . ." *People v. Robertson*, 12 N.Y.2d 355, 360, 190 N.E.2d 19, 21, 239 N.Y.S.2d 673, 677 (1963). In *State v. Lea*, 259 N.C. 391, 130 S.E.2d 688 (1963), the Supreme Court of North Carolina granted a new trial on grounds of prejudice caused by the trial judge's extensive questioning of witnesses, stating:

"[T]he . . . judge . . . did not intend to do anything to prejudice the rights of the defendants, but it is the probable effect or influence upon the jury . . . and not . . . [the judge's] motive, that determines whether the right of the defendants to a fair trial has been

The United States Supreme Court recently used this reasoning in reversing a state murder conviction on the ground that the trial court's refusal to grant a change of venue constituted a denial of due process in light of the prejudice against defendant generated by pre-trial television broadcast of defendant's extra-judicial confession. The Court held that denial of change of venue was a denial of due process regardless of who instigated the broadcast, stating, "the question of who originally initiated the idea of the television interview is . . . a basically irrelevant detail."<sup>59</sup>

It is submitted that this same rationale should be applied to cases where the allegedly prejudicial occurrence consists of refusal of a crucially connected witness to testify. Once a trial judge determines that a witness's refusal is prejudicial to the defendant, he should erase the prejudice by cautionary instructions, if they could be effective under the circumstances, or, if not, by granting a mistrial. Application by analogy of the doctrine of *DeLuna* to the instant issue does not depend on the fact that the privilege against self-incrimination is involved in both; rather, it depends on the fact that in both types of cases—comment by a private party on an accused's silence, and refusal to testify by a witness crucially connected with the accused—there is an occurrence which, the defendant complains, may cause the jury to find him guilty because of impermissible inferences. In the *DeLuna* situation, the inference is impermissible in federal courts by virtue of the fifth amendment and the implementing statute,<sup>60</sup> not merely because a constitutional right is involved which would be subverted were the inference permitted,<sup>61</sup> but also because the drawing of inferences from a defendant's failure to testify, which may result from motives other than concealment of guilt, prejudices him to the extent that his trial becomes unfair.<sup>62</sup>

Prejudice resulting from the refusal of a witness to testify with or without a valid claim of privilege presumably would not occur as often as would prejudice resulting from comment on a defendant's failure to testify, either because the witness, though in theory crucially related, is not so closely related

impaired to such an extent as to entitle them to a new trial."

*Id.* at —, 130 S.E.2d at 689.

<sup>59</sup> *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

<sup>60</sup> See note 53 *supra* and accompanying text.

<sup>61</sup> See notes 6 & 46 *supra* and accompanying text.

<sup>62</sup> 308 F.2d at 152, 154.

to the defendant that the "double inference" is likely to be indulged in, or for the reason that, while there is a crucial relationship of which the jury is aware, its significance with regard to the case is not apparent to them. Nevertheless, situations do arise where a witness's refusal to testify can have the prejudicial effect which should be prohibited.<sup>63</sup>

#### 4. *Timely Objection*

The requirement of timely objection for reversal is a fair and reasonable one, if the prejudice is curable.<sup>64</sup> Similarly, the defendant should be required to request cautionary instructions before his initial objection to the possibly prejudicial conduct will be deemed timely only if an instruction would cure the prejudice.<sup>65</sup> However, the Second Circuit's view that, where prejudice is curable by cautionary instructions, failure to grant such instructions even in absence of request is reversible as *plain error*,<sup>66</sup> seems more consistent than does the strict requirement with the concept that a trial judge is under a duty to insure that a trial is fair<sup>67</sup> and must not allow the rights of a criminal defendant to be prejudiced by error which affects his substantial rights, even if the defendant neither objected to nor otherwise sought to cure the prejudicial effects of the error.

It would appear that where the prejudice is not curable by cautionary instructions, a defendant should have to move for mistrial before he can be heard to complain on appeal that he was prejudiced by a witness's refusal to testify,<sup>68</sup> for even if the prejudice cannot be erased to the extent that the trial may fairly continue, declaration of mistrial can prevent the prejudicial occurrence from leading to an unfair trial terminating in conviction, subsequent appeal, and retrial.<sup>69</sup>

<sup>63</sup> See discussion in text at 7-8 *supra*.

<sup>64</sup> See note 26 *supra*.

<sup>65</sup> See note 27 *supra* and accompanying and following text.

<sup>66</sup> *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959), applying *FED. R. CRIM. P.* 52(b).

<sup>67</sup> See text accompanying notes 56 & 57 *supra*.

<sup>68</sup> In *Washburn v. State*, 164 Tex. Crim. 448, 299 S.W.2d 706 (1956), the defendant's request for cautionary instructions to consider neither a co-defendant's claim of privilege nor questions put to him by the prosecution was granted, but the trial court refused to grant his motion for mistrial, requested on the ground that the cautionary instructions failed to cure the prejudice. The Court of Criminal Appeals reversed and remanded, holding that since cautionary instructions in fact could not cure the prejudice, a mistrial should have been declared.

<sup>69</sup> See note 26 *supra*. The granting of a motion for

If bad faith were deemed irrelevant to reversal, no objection could be made to the prosecutor's act of calling the witness. Request for cautionary instructions or for mistrial alone would be available. The conduct complained of on appeal, then, would be not the calling of the witness or his refusal to testify, but rather the trial court's failure to remedy the prejudice suffered by defendant by reason of the occurrence.

#### 5. *Uncured Prejudicial Error*

"The harmless error rule has restricted applicability in criminal cases. Since the defendant holds a carefully guarded right to have his guilt adjudged by the jury, an appellate court should be slow to assume that an error in the trial was inconsequential."<sup>70</sup>

The implication of this statement is clear. The trial court that must decide what action to take when a defendant complains of prejudice occasioned by a witness's refusal to testify, or the appellate court that must ascertain whether the trial court was justified in doing nothing (i.e., whether there was prejudice), or whether such action as it took was effective (i.e., whether the prejudice was cured), must determine the effect of the occurrence complained of on the fairness of the defendant's trial. If the effect was to present to the jury evidence incompetent to prove the defendant's guilt, but which they nevertheless might well have considered as tending to prove his guilt, then the occurrence was prejudicial.

An inference of the defendant's guilt is likely to be stronger—and to occur in more cases—where the witness's claim of privilege is upheld than where it is denied.<sup>71</sup> The reasons which could cause a jury to draw the prejudicial "double inference" may be absent in some cases involving privilege claims held invalid due to prior conviction, but these reasons are always present where a valid

mistrial would prevent appeal from an arguably unfair conviction. Requiring that the motion be made would thus serve the purpose of curing whatever is curable at the trial level; for even if a new trial is the only way to cure the prejudice, it is less of a burden on the judicial system that this new trial result from declaration of a mistrial by the trial court than from remand after reversal by an appellate court.

<sup>70</sup> *DeLuna v. United States*, 308 F.2d 140, 155 (5th Cir. 1962).

<sup>71</sup> See text at 7-8 *supra*. The reasoning process a jury would have to use in order to arrive at an inference of defendant's guilt from refusal to testify by a witness who lacks a valid privilege claim is less likely to occur to the jurors than is the simple "double inference" process used where the claim is valid.

privilege claim is exercised. Furthermore, since prior conviction removes from the jury's collective mind the mere inference of the witness's guilt and replaces it with conclusive proof of guilt, an inference of defendant's guilt is no longer an inference piled upon an inference; it is now an inference based on the facts that the witness is guilty and that the witness and the defendant are crucially related to one another. It is submitted that the occurrence wherein the witness refuses to testify on a valid claim of his privilege against self-incrimination will always be prejudicial,<sup>72</sup> while his refusal to testify despite an unfavorable ruling on his claim of privilege may or may not be, depending on all the circumstances.<sup>73</sup>

To find prejudice, then, a trial or appellate court should find (1) that the crucial relationship existed between the witness and the defendant and was known to the jury; and (2) that the witness was called and refused to testify, in whole or in part, either with or without valid claim of privilege; and an appellate court must also find (3) that the defendant attempted to cure the prejudice at the trial level by requesting cautionary instructions and/or moving for mistrial. The requirements of valid claim of privilege and bad faith on the part of the prosecution should be eliminated.

Next, if the privilege claim was valid, the court should presume that the occurrence was prejudicial, and, if it is a trial court, proceed to determine what action is necessary to cure the prejudice; or, if an appellate court, whether the trial court's course of action adequately preserved the defendant's right to a fair trial. If the privilege claim was not upheld in whole or in part, the trial or appellate court should look to all the circumstances and decide whether the jury might use incompetent evidence to infer defendant's guilt; if so, then the occurrence was prejudicial, and the trial court and appellate court respectively should proceed as where prejudice was presumed.

Where prejudice is found, an appellate court should reverse only if the trial court failed to grant cautionary instructions where the prejudice was thus curable, or if the court failed to grant a mistrial where the prejudice was not curable by

cautionary instructions. However, it is submitted that, although cautionary instructions may suffice to erase the prejudicial effect of a crucially connected witness's refusal to testify after his privilege claim was held invalid, such instructions are not likely to cure the prejudice where a valid claim was asserted. The reason is simply that since the inference of the defendant's guilt in the first situation is less apt to be strong, if drawn at all, instructions not to consider the refusal for any purpose will probably avert any possible prejudice, while in the second situation, because of the layman's view of the privilege against self-incrimination and the jury's knowledge of the crucial relationship, the inference of the defendant's guilt is so likely to be drawn and to be strong that cautionary instructions will probably be to no avail.

That instructions not to consider for any purpose or to draw any inference from otherwise prejudicial information are ineffectual has been suggested by the United States Supreme Court: "The influence that lurks in an opinion once formed fights detachment from the mental processes of the average man."<sup>74</sup> Judge Learned Hand, as well, has commented on the futility of such instructions, stating, "[This] recommendation to the jury...[is] a mental gymnastic which is beyond, not only their power, but anybody's."<sup>75</sup> Moreover, noting that cautionary instructions are likely to place special emphasis on the occurrence sought to be cautioned against, the Court of Appeals for the Second Circuit has stated: "[I]t is doubtful whether such admonitions are not as likely to prejudice the interest[s] of the accused as to help them..."<sup>76</sup>

It would seem, then, that an occurrence as prejudicial to a defendant's rights as a crucially related witness's valid claim of privilege cannot be cured by cautionary instructions, since such instructions cure substantial prejudice only in the eyes of unenlightened appellate courts—rarely, if ever, in reality. Thus, the only way to vitiate a defendant's right to a fair trial where a crucially connected witness validly claims his privilege against self-incrimination is for the trial court at that time to grant a mistrial, or, if it has refused to do so, for the appellate court to reverse and remand, the

<sup>72</sup> See note 33 *supra* and accompanying text. The view expressed in note 31 *supra* and accompanying text is clearly wrong in the light of the foregoing discussion.

<sup>73</sup> E.g., did the jury know of the witness's prior conviction? How closely connected *re* the transaction giving rise to the charge against the defendant was the witness, to the jury's knowledge?

<sup>74</sup> *Irvin v. Dowd*, 367 U.S. 717, 727 (1961).

<sup>75</sup> *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). See also *State v. Selle*, — Mo. —, —, 367 S.W.2d 522, 531 (1963).

<sup>76</sup> *United States v. Maloney*, 262 F.2d 535, 538 (2d Cir. 1959). *Cf.* *State v. Selle*, *supra* note 75, suggesting that defense counsel's objections convince the jury that the matter objected to is true.

reversible error being the trial court's refusal to declare a mistrial.

Where the appellate court decides that refusal of a witness to testify despite invalidity of his claim of privilege was prejudicial, however, the strength of the inference against the defendant is not likely to be so great that carefully worded cautionary instructions could not have cured the prejudice.

#### POSSIBLE SOLUTIONS

While the view that bad faith of the prosecution need not be shown and that the requisite governmental action can be found in the trial court's failure to cure the prejudicial effect seems logically correct and would protect the defendant from a conviction based on the jury's consideration of incompetent and prejudicial "evidence," the rights of the sovereign must not be overlooked. As has been mentioned, where a person crucially related to the defendant with regard to the crime with which the defendant is charged is not produced, an inference unfavorable to the prosecution may be drawn.<sup>77</sup> For this reason, the proposed view would burden the judicial process with repeated mistrials, appeals, and retrials, inasmuch as in a large number of criminal cases such potential witnesses exist, are called by the prosecution in order to avoid the unfavorable inference, and often in fact refuse to testify. Thus there is a direct conflict between the prosecution's right to call the witness to avoid the inference and the defendant's right to a fair trial in which the jury considers only competent evidence.

#### *Use of Immunity Statutes*

A possible solution is to grant immunity from prosecution to one of several persons all culpably involved in a single criminal transaction. This individual then could legally be compelled to testify against his partner or partners.<sup>78</sup> This approach would eliminate the problem of prejudice to the defendant, except, of course, where the immunized witness nevertheless refused to testify although the grant of immunity replaced his privilege against self-incrimination.<sup>79</sup> It would also relieve the

prosecution of the precarious task of deciding whether to call a witness whose likely or probable refusal to testify might result in a mistrial or reversal,<sup>80</sup> or to refrain from calling him, thus assuming the risk of the unfavorable inference.

However, three factors stand in the way of effective utilization of the immunity statute device: First, many acts simultaneously constitute crimes in more than one jurisdiction—e.g., robbery of a federal bank is both a state and a federal offense—and the immunity statutes of some states operate only where the testimony sought to be compelled will incriminate the witness under the laws of no sovereign other than the immunizing jurisdiction;<sup>81</sup> second, the sovereign is interested in convicting criminals, and the practice of granting immunity to at least one member of every group of criminally related offenders would be detrimental to this policy; and third, the granting of immunity to one person in all cases where several persons are criminally connected with a single transaction would result in the arbitrary singling out and

federal immunity statutes do not coincide. While Congress can and has extended some federal immunity statutes to grant immunity from prosecution in state as well as federal courts on a federal pre-emption theory [e.g., Narcotic Control Act of 1956, 18 U.S.C. §1406 (1958), held to grant immunity from state criminal prosecution in *Reina v. United States*, 364 U.S. 507 (1960); 18 U.S.C. §3486 (Supp. II, 1954), held to grant immunity from state criminal prosecution in *Ullmann v. United States*, 350 U.S. 422 (1956)], the immunity granted by a state can extend only so far as does the state's version of the privilege against self-incrimination; i.e., to that state's own criminal proceedings. *Feldman v. United States*, 322 U.S. 487 (1944). Hence a witness immunized by a state, or by the federal government under a less comprehensive immunity statute than those above cited, may choose to be held in contempt rather than incriminate himself under the law of jurisdictions not covered by the scope of the particular statute under which he was immunized.

<sup>80</sup> It is not intended here to revert to terminology reminiscent of the bad faith requirement, abolition of which is advocated. "Likely" or "probable" refusal to testify goes not to the question whether the prosecution has "reasonable grounds" to believe the witness will refuse to testify; rather, such language refers to the likely or probable effect that the witness's precarious status as accomplice or the like will have on his decision whether or not to testify. A prosecutor must take this possibility into consideration when preparing the strategy of his case.

<sup>81</sup> See, e.g., ILL. CODE CRIM. PROC. §106 (1963), permitting the court, on motion of the State's Attorney, to grant immunity from prosecution to a material witness before a grand jury or in a criminal case, unless "it reasonably appears to the court that such testimony . . . would subject the witness to . . . prosecution . . . under the laws of another State or of the United States." *Id.* §106-4. See Johnson, *Organized Crime: Challenge to the American Legal System—Part II*, 54 J. CRIM. L., C. & P.S. 1, 6 (1963).

<sup>77</sup> See note 11 *supra* and accompanying text.

<sup>78</sup> See 8 WIGMORE §2281 for a compilation of state immunity statutes.

<sup>79</sup> For an immunity statute to be upheld against state or federal constitutional attack, the immunity granted need extend only so far as does the privilege it seeks to replace. See generally Comment, 57 NW. U.L. REV. 561 (1962). And since the fifth amendment does not apply to the states, the scopes of state and

favoring of one of these persons to the prejudice of the others. It appears that these considerations would prevent effective use of immunity statutes to solve the problem.

### *Proposed Solution*

(1) **Rationale.** In order to protect all the rights involved—that of the defendant to a fair trial, of the sovereign qua prosecutor to avoid needless unfavorable inferences, and of the sovereign qua sovereign to administer criminal justice without an inordinate number of mistrials and reversals—the mechanics of any solution adopted must prevent the crucially connected witness from refusing to testify in the presence of the jury, and must compensate by carefully drafted cautionary instructions against any inference against the prosecution that the jury might otherwise draw from its failure to produce the witness.<sup>82</sup> A solution incorporating these elements would result neither in prejudice to the defendant nor in interference with the expedition of criminal justice by the sovereign, since lack of prejudice to the defendant necessarily means that no mistrials or reversals will be occasioned by a witness's refusal to testify. Inasmuch as the opportunity for legally significant inferences arising from failure to produce a witness usually results in comment by opposing counsel and instruction by the trial court that such inferences are permissible, it is submitted that, absent comment or instruction advocating or allowing the inference, a proper cautionary instruction against drawing an inference unfavorable to the prosecution from its failure to call a crucially connected witness will adequately insure that the inference will not be drawn. Moreover, since the potential witness generally is equally available to both the prosecution and the defense, it seems unlikely that the jury will reach an inference unfavorable to either side.

In light of the distinction previously suggested, between refusal to testify where no valid right to exercise the privilege exists and refusal where the privilege does obtain, with regard to the probable strength and frequency of an inference of a criminal defendant's guilt, it appears that only valid in-

vocations of privilege need always be kept from the jury's knowledge, since prejudice due to refusals to testify over a court order will often be curable by cautionary instructions.

(2) **Implementation.** Certain procedures presently existing in criminal law may be drawn upon in order to determine how this proposed solution may be given effect. Pre-trial hearings on admissibility of tangible evidence<sup>83</sup> and of confessions<sup>84</sup> provide the best analogy, since in these proceedings, as in the one here sought to be developed, determinations are made out of the presence of the jury as to whether proffered evidence is of such a nature that the jury is entitled to consider it. That courts use the existing procedures to determine legal questions of admissibility on the basis of principles of federal constitutional law,<sup>85</sup> while the proposed proceeding would not be a vehicle for constitutional determinations, is of no consequence for present purposes, inasmuch as the reason for both the existing and the proposed proceedings is to assure that, if the evidence sought to be admitted proves inadmissible, the jury will never know of its existence.

Some states provide that a defendant intending to plead an affirmative defense must file notice of his intention to do so within a specified time before trial or he will be estopped from urging it at the trial.<sup>86</sup> It is suggested that, similarly, the prosecution intending to call as a witness one crucially related to the defendant be required to file notice to that effect. Just as the Illinois Code of Criminal Procedure provides that the prosecution's failure to comply with certain notice requirements regarding confessions precludes their admissibility,<sup>87</sup> so

<sup>82</sup> *E.g.*, ILL. CODE CRIM. PROC. §114-12 (1963).

<sup>83</sup> *E.g.*, ILL. CODE CRIM. PROC. §114-11 (1963).

<sup>84</sup> The admissibility of both tangible evidence alleged to have been illegally seized and confessions alleged to have been coerced must be determined by state as well as federal courts in accordance with federal constitutional principles. *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963) (tangible evidence); *Rogers v. Richmond*, 365 U.S. 534 (1961) (confessions).

<sup>85</sup> See generally Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L., C. & P.S. (1964). Proposed Ill. Sup. Ct. Rules on Discovery in Crim. Cases, rule 25-2(b) (Proposed Draft 1962), requires that notice of intention to interpose the defense of insanity, self-defense, or alibi be furnished to the prosecution at least 20 days before trial. [The Proposed Supreme Court Rules are authorized by ILL. CODE CRIM. PROC. §114-13 (1963).] Cf. ILL. CODE CRIM. PROC. §114-9, regarding the prosecution's duty to furnish a list of witnesses to defendant.

<sup>87</sup> ILL. CODE CRIM. PROC. §§114-10(a), 114-10(c) (1963).

<sup>82</sup> Just as the necessary element of a crucially connected witness was qualified by adding the requirement that the jury know of the crucial relationship, so should any cautionary instruction requirement intended to prevent the drawing of inferences unfavorable to the prosecution be qualified by stipulating that before such a requirement should become operative, the jury must be aware that a crucially connected witness exists.

should a similar provision treat the calling of a crucially connected witness where the prosecution has not filed notice.

Once notice has been given, the defendant should be entitled to move for a *voir dire* hearing, similar to a hearing on admissibility of evidence or confessions, to determine whether or not the witness will testify. That this procedure can serve to avert prejudice has recently been recognized by the United States Supreme Court in *Namet v. United States*.<sup>88</sup> At the envisioned hearing, the witness is actually sworn, with the prosecutor asking him the questions he intends to put to him at the trial, and defense counsel having a right to cross-examine. It will previously have been stipulated that all parties will be bound by the questions asked and answers given or not given at the hearing. If the witness refuses to answer all questions, and the judge upholds his claim of privilege, then the witness should not be called at the trial.<sup>89</sup> If the witness answers some questions but not others, then, whether or not his privilege claim is held valid as to those he does not answer, the trial judge in

the exercise of his discretion may permit all his testimony at the hearing to be repeated at the trial, or may permit only those questions which were answered at the preliminary hearing to be asked and answered at the trial.<sup>90</sup> If the witness refuses to answer all the questions and his claim of privilege is denied, then the prosecution may be allowed to call him at the trial.<sup>91</sup> If the witness is not called at the trial because of the results of the preliminary hearing, and if the jury is aware both of the witness's existence and of his crucial relationship to the defendant, then the prosecution will be granted an instruction at the conclusion of the trial that, due to procedural and evidentiary rules, "X" could not be called as a witness, and that no inferences may be drawn against either party for failure to call him.

### CONCLUSION

Analysis of the existing law indicates that two of the factors, in absence of which a reviewing court will not consider a defendant's contention that refusal of a crucially connected witness to testify rendered his trial unfair, are neither logically sound nor relevant to the central issue of whether the trial was fair. Elimination of these two elements—validity of the witness's claim of privilege and bad faith on the part of the prosecution—will certainly be a step in the right direction even if the proposed solution is not adopted. As an alternative to the proposal, it is submitted that these two factors no longer be required, and the question of prejudice resulting from refusal of a witness to testify be treated in the same manner as such questions are decided whenever a defendant claims that any occurrence or omission at his trial results in the denial of his right to a fair trial.

<sup>90</sup> Whether any or all of the questioning should be repeated at the trial should be left to the discretion of the trial court. See *People v. Moloy*, 204 Mich. 524, 170 N.W. 690 (1919) (discussed in note 33 *supra*). Considerations such as the relevance of those questions which were answered, the probable importance the jury will place on the answers and refusals given, the validity of the privilege claim, and the possible prejudice to the defendant as weighed against the probative value, if any, of the evidence, should be taken into account by the trial judge. See also Brief of Respondent, *supra* note 89.

<sup>91</sup> Such an occurrence may or may not be prejudicial, depending on all the circumstances, for reasons heretofore discussed. The statement in the text is predicated on the assumption that, where the incident is not very likely to be prejudicial to the defendant, the prosecution should be allowed to call the witness. The trial court should consider the factors stated in note 90 *supra* in determining whether or not to permit the witness to be called at the trial.

<sup>88</sup> 373 U.S. 179 (1963). Although the defendant in that case had not requested a preliminary hearing, the Court noted that "in appropriate circumstances the defendant may be entitled to request a preliminary screening of the witness' testimony, outside the hearing of the jury." *Id.* at 190 n.9. The Court characterized a screening as a "curative device."

The Government in its memorandum brief stated:

"If petitioner believed that the invocation of the privilege by the . . . [witnesses] would prejudice him, he had ample means of protecting himself. He could have requested a preliminary inquiry outside the presence of the jury to demonstrate that the witnesses would assert the privilege under oath and to identify the questions to which such claims would be asserted and the extent to which such claims would be sustained by the trial court. In fact, the [trial] court suggested such a procedure prior to the appearance of . . . [a witness] . . . , but defense counsel never responded to the suggestion. Had petitioner availed himself of this right, there would have been no refusals to answer in the presence of the jury and no possibility of the prejudice claimed."

Brief of Respondent in Opposition, pp. 10-11, *Namet v. United States*, *supra*. Counsel who argued for the United States before the Supreme Court in *Namet* has suggested that, in some circumstances, the hearing might be requested by the Government. Letter from Stephen J. Pollak, Assistant to the Solicitor General, to Carolyn Jaffe Andrew, Oct. 3, 1963.

<sup>89</sup> Such an occurrence at the trial will be prejudicial per se, for reasons previously set forth. In its main brief in the *Namet* case, the Government stated:

"[W]here there are overwhelming probabilities that the witness will claim the privilege and will be sustained in his claim as to his entire testimony, he ought not be called at all, or at least not called before the jury until the matter has been explored by the trial court."

Brief of Respondent, pp. 15-16, *Namet v. United States*, *supra* note 88. (Emphasis in original.)