Damning the Defendant: How an invalid invocation of the Fifth Amendment by a co-conspirator strips the Defendant of his right to a fair trial.

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Preface

Growing up in Prosser, Washington, I have always been intrigued by cases that come from the surrounding area. The case that introduced me to the issue discussed in this article is State v. Ruiz, which took place just twenty-five miles east of where I grew up. I had never heard of a case where a witness, who was a prior co-defendant, continued to plead the Fifth after being ordered to answer a question, and I felt compelled to research this topic.

Of course, developing an issue that has been rarely written about required the help of several individuals. I must thank two individuals who preferred not to be named because of their profession. Without these two people, I would have never come across the case. I would like to thank Connor Jepson from Gonzaga School of Law who helped me analyze the underlying case. Naturally, I would like to thank my parents for their unconditional love and support. Brady Espeland and Professor Aliza Cover own every ounce of gratitude I have. Brady Espeland sat with me in a restaurant at 6:00 AM on a Friday and helped me lay out the issues in this article by diagraming it on a paper napkin. Getting my thoughts in order has been the biggest challenge of this article and I am grateful to Brady for his patience. Professor Aliza Cover is, hands down, the most diligent person I have ever had the pleasure of working with. I was humbled when Professor Cover first agreed to be my faculty advisor for this article, but I soon realized that I was being challenged beyond what I thought I could do. Between the tight deadlines and endless rewrites, Professor Cover dedicated the time and energy to make this article of publishable quality.

I. Introduction

A legal oddity exists in the nation's justice system involving the invalid invocation of the Fifth Amendment. Imagine a situation where a defendant is on trial and his co-conspirator, who was already convicted of the same charge in a separate trial, is called to the stand to testify against the defendant. Upon direct questioning by the prosecution, the co-conspirator invokes the Fifth Amendment, but is instructed by the judge that he, the co-conspirator, no longer has the privilege to invoke the Fifth because he does not risk further incrimination on the charge. Nevertheless, the co-conspirator continues to exercise the privilege he no longer has despite the judge's instruction.[1]

In this particular situation, when a co-conspirator invalidly invokes the privilege to remain silent in front of a jury, there is a substantial likelihood that the defendant's Sixth Amendment right to a fair trial is implicated.[2] The jury is likely to infer that since the co-conspirator can no longer risk self-incrimination, he is protecting the defendant rather than himself by continuously invoking the Fifth Amendment.[3] This inference has the danger of unfairly prejudicing the jury into believing the defendant is guilty because, after all, an innocent man would not need protecting.[4] Further, the prosecution is allowed to treat such a co-conspirator as a hostile witness and ask him leading questions to provoke an answer.[5] If the co-conspirator still refuses to testify to the leading questions, the defendant will not have the opportunity to effectively cross-examine the co-conspirator and combat the inference created by the leading questions, because the hearsay introduced by the prosecution in their questioning is not admitted evidence, and the co-conspirator did not provide any answers.[6] What is the fair legal remedy to protect the defendant's Sixth

[1] State v. Ruiz, 309 P.3d 700 (Wash. Ct. App. 2013).
[2] State v. Abbott, 552 P.2d 238, 241 (Or. 1976).
[3] Namet v. United States, 373 U.S. 179, 188 (1963).
[4] *Id*. at 186.
[5] Douglas v. Alabama., 380 U.S. 415, 420 (1965).
[6] Douglas v. Alabama, 380 U.S. 415, 420 (1965).

Amendment right to a fair trial? This article introduces an alternative and uniform approach that courts should take when confronted with a co-conspirator who has lost a valid claim to the Fifth Amendment at the defendant's trial but continues to invoke the invalid claim.

Two constitutional amendments interplay in this situation. The Fifth Amendment allows a witness to remain silent so as to not further incriminate himself.[7] However, courts have found that an invalid invocation of the co-conspirator's Fifth Amendment privilege can possibly affect the defendant's Sixth Amendment right to confront the witness against him and the defendant's right to a fair trial.[8] Defendants who find themselves in this scenario have argued that their right to confront the witness is violated because, as previously explained, the prosecution is allowed to ask leading questions to the co-conspirator who refuses to testify[9] to the hearsay within the prosecutor's leading questions. Because the hearsay within the prosecutor's leading questions is not considered evidence, but rather part of direct examination, the defendant cannot effectively defend himself against it.[10] The defendant's right to a fair trial is implicated by the jury's prejudicial inference that the defendant is guilty, because the suggestion that the co-conspirator is protecting the defendant has the effect of biasing the jury.[11] Here, the defendant is unable to effectively refute the prejudicial inference created against him by the co-conspirator's constant silence.[12]

Although the defendant's Sixth Amendment right to a fair trial and right to confront the witness may be implicated by a co-conspirator's repeated invalid Fifth Amendment invocation, state courts throughout the country differ on whether the defendant's Sixth Amendment rights have

[7] U.S. CONST. amend. V.
[8] State v. Abbott, 552 P.2d 238 (Or. 1976).
[9] FED. R. EVID. 804.
[10] *Douglas*, 380 U.S. at 420.
[11] *Abbott*, 552 P.2d at 240.
[12] *Id.*; *see also Douglas*, 380 U.S. at 419.

actually been violated.[13] Specifically, the inference that implicates the defendant's right to a fair trial is only likely to arise when the co-conspirator repeats his invalid invocation after the judge instructs the co-conspirator to answer.[14] A single invalid invocation is not enough to trigger suspicion.[15] In Washington State, the courts have held that when a co-conspirator who has been convicted, on the same charge as the defendant, repeatedly invokes the Fifth Amendment, the defendant's right to confront is not violated because the witness is present and available for cross-examination if they have answered some of the questions asked on direct questioning, even if the answers are not to substantive questions.[16] Washington State courts have only addressed the right to confront, not the right to a fair trial.[17]

Other courts, specifically Minnesota state courts, have held that the availability of the co-conspirator for cross-examination is not an issue when the co-conspirator invalidly invokes the Fifth Amendment.[18] Given that this invalid invocation is so prejudicial against the defendant when combined with leading questions, Minnesota state courts have determined that the invalid invocation violates the defendant's Sixth Amendment right to a fair trial in certain circumstances when the prejudice is substantial.[19] The Minnesota courts are correct that, in the specific circumstance where a co-conspirator invalidly invokes the Fifth Amendment at his co-defendant's trial because he has already been convicted of the crime, the defendant's Sixth Amendment right to a *fair trial* is violated. This fair trial right is violated because of an unfairly prejudicial inference

[13] State v. Ruiz, 309 P.3d 700, 708 (Wash. Ct. App. 2013); *see also* State v. Morales, 788 N.W.2d 737, 766 (Minn. 2010).
[14] *Ruiz*, 309 P.3d at 704.
[15] *Id.* at 705.
[16] *Id.* at 707.
[17] *Id.* at 707-08.
[18] *Morales*, 788 N.W.2d at 753.
[19] *Id.* at 752.

that is created in the minds of the jury.[20] The unfair inference is that, since the witness no longer has a Fifth Amendment right to silence because he cannot be further incriminated on that charge, the witness must not be protecting himself by his invocation.[21] Instead, he must be protecting the defendant, leading the jury to believe that the defendant is guilty since the defendant needs protecting.[22] These state courts do not focus their analysis on the right to confront, and therefore do not address if the fair trial violation can be remedied by cross-examination of the witness. [23]

These Sixth Amendment concerns, arising from a co-conspirator's illegitimate claim to the Fifth Amendment at his co-defendant's trial, have yet to be addressed by the United States Supreme Court, and courts throughout the country are inconsistent in confronting an invalid invocation of the Fifth Amendment.[24] State courts are incorrect in addressing either the Confrontation Clause issue or the fair trial issue. They should be addressing these separate issues together. When a co-conspirator has been convicted on the same charge as the defendant and has lost his Fifth Amendment privilege to silence, both the defendant's right to confront and right to a fair trial are implicated. Therefore, both rights must be considered by the court.[25] If there is a violation of either right, the courts must then determine what the best remedy is so that the defendant may fully exercise his Sixth Amendment rights.

Because the prejudicial inference only arises when a co-conspirator asserts the Fifth Amendment privilege of silence, which he no longer has the power to exercise due to his conviction, some legal scholars may question if this inference is realistic because the jury may not realize the difference between a valid and invalid invocation.[26] Some jurors may not understand

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[20] *Id.* at 753.
[21] *Id.*
[22] *Morales*, 788 N.W.2d at 753; s*ee also*, State v. Abbott, 552 P.2d 238, 240-42 (Or. 1976).
[23] *Morales*, 788 N.W.2d at 766-67.
[24] State v. Ruiz, 309 P.3d 700, 706-707 (Wash. Ct. App. 2013); s*ee also, Morales*, 788 N.W.2d at 747-50.
[25] *See, Ruiz*, 309 P.3d at 707.
[26] Billeci v. United States, 184 F.2d 394, 398 (D.C. Cir. 1950).

that an invalid invocation is even possible. As case law shows, this inference is not only realistic, it is a dangerous infringement on the defendant's presumption of innocence. The jury is usually present as the judge instructs the co-conspirator that he no longer has the right to Fifth Amendment protection, even if the details of why the privilege has been lost have not been disclosed to the jury.[27] After the explanation, a lay juror is likely to understand that this co-conspirator does not need to protect himself with the Fifth Amendment. The inference of the defendant's guilt is then introduced in the minds of the jury if they are led to believe the co-conspirator is protecting the defendant by his refusal to answer fact-laden questions.[28] This subsequently results in an unfair prejudice, which can be supported by the leading questions asked by the prosecution.

Because this issue is so rare, courts have little authority to look to when addressing the situation quickly, which can leave the courts in a position of setting their own standards. Since this lack of authority allows courts to make mistakes in addressing the co-conspirator's invalid invocations, courts should take a uniform approach when confronted with a co-conspirator who has lost a valid claim to the Fifth Amendment at the defendant's trial but continues to invoke the invalid claim. When a co-conspirator invalidly invokes the Fifth Amendment and does so again after he has been corrected by the judge, the jury should be excused. In the jury's absence, the court should then allow the prosecution to continue questioning the co-conspirator to determine whether the co-conspirator will continue defying the court's order to testify. If it is found that the co-conspirator continues to defy the court's order, then there should be no further questioning of the witness.

This new approach encourages courts to preserve the Sixth Amendment right of the defendant to effectively confront the witnesses against him and the right to a fair trial. This article is presented in five parts, the first being the introduction explained above. The second part explains that a co-

[27] State v. Mitchell, 487 P.2d 1156, 1161 (Or. Ct. App. 1971).
[28] State v. Abbott, 552 P.2d 238, 615-16 (Or. 1976).

conspirator may lose his privilege to the Fifth Amendment after he has been convicted of the crime he has been asked to testify about, with no further opportunity to appeal. This is known as an invalid invocation because the co-conspirator no longer has a valid Fifth Amendment privilege to invoke with regards to that crime. The third part describes how the Sixth Amendment, specifically the Confrontation Clause and the right to a fair trial, is implicated by an invalid invocation of the Fifth Amendment. When a co-conspirator invalidly asserts the Fifth Amendment while testifying, the prosecution is allowed to ask leading questions of the co-conspirator, which the jury is likely to improperly consider when determining the defendant's guilt. These questions are not subject to cross-examination if they are unanswered and can unfairly prejudice the defendant. The fourth part explains the approach courts should take in this situation. Specifically, courts should dismiss the jury and continue the questioning to determine if the co-conspirator will continue to invalidly invoke the Fifth. If so, he should be dismissed as a witness. This approach will allow defendants in these situations to fully maintain and exercise their right to confront and their right to a fair trial.

II. An Invalid Claim to the Fifth Amendment

The Fifth Amendment protection against self-incrimination is a highly valued privilege in the United States. Because the protection against self-incrimination is a privilege, it is not a definite guarantee in all circumstances.[29]

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[30]

[29] *Id.*
[30] U.S. CONST. amend. V (emphasis added).

The provision against self-incrimination was originally interpreted to apply to a defendant at his own criminal trial and to protect him from being called by the prosecution.[31] The modern application of the self-incrimination privilege has "expanded its text".[32] For example, the Supreme Court has applied the self-incrimination privilege to civil and criminal proceedings, grand jury testimony, congressional investigations, and juvenile proceedings.[33] This provision has also been expanded to apply to witnesses testifying at another defendant's trial rather than applying solely to a defendant at his own trial, as well as non-trial settings.[34]

To validly assert the privilege against self-incrimination, the claimant must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."[35] A convicted defendant who has not been sentenced retains his Fifth Amendment rights.[36] However, when an accomplice or co-conspirator has been convicted of a crime and has exhausted his appeals, he no longer has a valid right to remain silent when asked to speak about the specific charge.[37] The Fifth Amendment privilege is no longer valid to that person because there is no possibility of further incrimination on that charge.[38] In *United States v. Cioffi*, at the defendant's trial, his co-conspirator, who previously pleaded guilty, was called as a witness by the prosecution and invoked his privilege against self-incrimination.[39] When the defendant appealed to the United States Court

[31] Geoffrey B. Fehling, Note, *Verdugo, Where'd You Go?: Stoot v. City of Everett and Evaluating Fifth Amendment Self-Incrimination Civil Liability Violations*, 18 GEO. MASON L. REV. 481, 488-89 (2011).
[32] *Id.* at 490.
[33] *Id.*
[34] *Id.* at 482.
[35] United States v. Apfelbaum, 445 U.S. 115, 128 (1980) (quoting Marchetti v. United States, 390 U.S. 39, 53 (1968)); Brown v. Walker, 161 U.S. 591, 600 (1896); s*ee also* Marchetti v. United States, 390 U.S. 39, 53 (1968).
[36] *Apfelbaum,* 445 U.S. 115, 128 (1980).
[37] Mitchell v. United States, 526 U.S. 314, 326 (1999); s*ee also* Reina v. United States, 364 U.S. 507, 513 (1960).
[38] *Mitchell*, 526 U.S. 314, 326 (1999).
[39] 242 F.2d 473, 476 (2d Cir. 1957).

of Appeals for the Second Circuit, that court held that it was not an error for the prosecution to call the witness nor to question him as it did.[40]

The court did not explicitly state that the privilege against self-incrimination is lost after a guilty plea, but it did hold that it was appropriate to question the witness as to whether the proceedings against him under the indictment had been exhausted because it was crucial in determining if he could claim the privilege.[41] Now, a final conviction removes the risk of self-incrimination from the witness or co-conspirator regarding that charge, so the co-conspirator is not in jeopardy of further incrimination and can be compelled to testify.[42]

Unless instructed beforehand, most co-conspirators who have been called to testify are unaware that they have lost their protection against self-incrimination.[43] It is common for a co-conspirator to be called to testify against the current defendant, but based on the limited case law, it is uncommon for a co-conspirator to repeatedly invoke a claim to the Fifth Amendment protection they no longer have. If the co-conspirator is called as a witness to speak to the specific charge he is convicted of, the witness has lost his privilege to remain silent on that issue.[44] If the co-conspirator invokes the Fifth Amendment regarding a charge that he can no longer be incriminated for, then he has invalidly, or improperly invoked the privilege.[45]

III. Sixth Amendment Implications of an Invalid Invocation of the Fifth Amendment

The Sixth Amendment lays out the rights of the defendant in a criminal proceeding.[46] Most court proceedings abide by pretrial and trial rules to ensure the defendant's due process rights and

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[40] *Id.* at 476-77.
[41] E.R. Soeffing, Annotation, *Plea of Guilty of Conviction as Resulting in Loss of Privilege Against Self-incrimination as to Crime in Question*, 9 A.L.R. Fed. 3d. 990, 991-92 (1966).
[42] Mitchell v. United States, 526 U.S. 314, 326 (1999).
[43] State v. Ruiz, 309 P.3d 700 (Wash. Ct. App. 2013); s*ee also*, State v. Morales, 788 N.W.2d 737 (Minn. 2010).
[44] *Mitchell*, 526 U.S. at 326.
[45] State v. Barone, 986 P.2d 5, 21 (Or. 1999).
[46] U.S. CONST. amend. VI.

Sixth Amendment rights are not violated.[47] Interestingly, a co-conspirator who invalidly invokes the Fifth Amendment may implicate the defendant's Sixth Amendment right to a fair trial and right to confront the witnesses against him.[48]

The Sixth Amendment guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[49]

There are two parts of the Sixth Amendment that can be affected by a witness who invalidly invokes the Fifth Amendment: the Confrontation Clause and the right to a fair trial.[50] The case law shows that the courts tend to not consider these two provisions together when dealing with a co-conspirator's invalid invocation of the Fifth Amendment. Rather, courts seem to address one without much acknowledgement to the other.[51]

A. The Sixth Amendment Right to Confront the Witness

In Washington State, the court only addressed a co-conspirator's invalid invocation of the Fifth Amendment in a single case, *State v. Ruiz*.[52] There, the right of the defendant to confront the witnesses against him, not his right to a fair trial, was the turning point in deciding whether the witness's invalid invocation violated the defendant's Sixth Amendment right.[53] The Confrontation

[47] Symposium, *Civil Rights And Civil Justice: 50 Years Later: Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 372 (2014).
[48] State v. Irlas, 888 N.W.2d 709, 714 (Minn. Ct. App. 2016).
[49] U.S. CONST. amend. VI.
[50] *Irlas*, 888 N.W.2d at 715.
[51] State v. Ruiz, 309 P.3d 700 (Wash. Ct. App. 2013); s*ee also*, *Irlas*, 888 N.W.2d at 715.
[52] 309 P.3d 700.
[53] *Id.* at 623, 645.

Clause provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."[54]

According to the precedent set by *Pointer v. Texas*, this right to confront applies to both federal and state courts.[55] Because this right to confront now applies to the individual states, the state courts must determine when the right to confront is violated in their courts.[56] The state courts approach the situation where a co-conspirator invalidly invokes the privilege against self-incrimination differently with regards to the right to confront because the issue is so fact specific.[57] As a result, state courts do not have a uniform approach to the issue. An important characteristic of the right to confront is that it is not an absolute right and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[58] For example, when the Fifth Amendment is *validly* invoked by a witness, the Sixth Amendment right for the defendant to confront that witness must yield to the witness's Fifth Amendment right, and the witness is unavailable for cross-examination.[59]

In order for the Confrontation Clause to be implicated, an out of court statement must be testimonial.[60] A statement is testimonial when it is made to a court official in a proceeding, or if the declarant's purpose in making the statement was so that it would be used in a future criminal prosecution.[61] In the event that a co-conspirator who has lost his privilege against self-incrimination attempts to invoke the Fifth, the prosecutor may treat the co-conspirator as a hostile

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[54] U.S. Const. amend. VI.
[55] 380 U.S. 400, 406 (1965).
[56] *Id.* at 407.
[57] State v. Irlas, 888 N.W.2d 709, 713-14 (Minn. Ct. App. 2016); s*ee also*, State v. Ruiz, 309 P.3d 700, 707 (Wash. Ct. App. 2013).
[58] Vasquez v. Jones, 496 F.3d 564, 573 (6th Cir. 2007) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).
[59] *Irlas*, 888 N.W.2d at 712.
[60] Crawford v. Washington, 541 U.S. 36, 50-51 (2004).
[61] *Id.* at 51-52.

witness and provoke a substantive answer through asking the co-conspirator leading questions.[62] If the prosecutor asks leading questions that reflect statements made by the co-conspirator in his own criminal prosecution, or if transcripts are read from the co-conspirator's trial, then these non-evidentiary statements will be introduced to the jury and are testimonial, meaning they are subject to the Confrontation Clause.[63] Although the statements reflected in the leading questions are not evidence, there is a strong risk that the jury will construe the statements as evidence, which will unfairly prejudice the defendant.[64]

The United States Supreme Court has recognized that the defense is unable to effectively cross-examine and confront a co-conspirator witness when the witness continues to assert an invalid Fifth Amendment privilege during a series of direct questioning, effectively violating the Sixth Amendment.[65] In some cases where a co-conspirator invalidly invokes the Fifth Amendment, and the prosecution continues to ask prejudicial leading questions, defendants appeal on the ground that their right to confront the witness was violated.[66] Specifically, defendants have argued that their right to confront is violated since the prosecution has asked leading questions that the co-conspirator has not answered questions, leaving the defense with nothing to cross-examine.[67]

Washington State courts have only dealt with invalid invocations of the Fifth Amendment in a sole case, *State v. Ruiz*.[68] In *Ruiz*, the defendant and co-conspirator were tried separately for the murder of five men in 1987.[69] The co-conspirator was convicted of five counts of first-degree

[62] *Id.*
[63] *Id.*
[64] *Id.* at 36.
[65] Douglas v. Alabama, 380 U.S. 415 (1965).
[66] State v. Ruiz, 309 P.3d 700 (Wash. Ct. App. 2013); s*ee also* State v. Morales, 788 N.W.2d 737 (Minn. 2010).
[67] State v. Irlas, 888 N.W.2d 709, 713 (Minn. Ct. App. 2016).
[68] 309 P.3d 700 (Wash. Ct. App. 2013).
[69] *Id*. at 702.

murder in 1993, while the defendant fled to Mexico and was later extradited and arrested in 2007.[70] At the defendant's trial, the co-conspirator was called to the stand by the prosecution. After the first substantive question, the co-conspirator invoked the Fifth Amendment.[71] The judge instructed the co-conspirator that he did not have a valid privilege against self-incrimination, but the co-conspirator continued to invalidly invoke the Fifth Amendment to the next twenty-seven questions.[72] The court held that the defendant's right to confront the witnesses against him is not violated when the co-conspirator does not have a valid privilege against self-incrimination because he is physically present and available for cross-examination.[73] Since the co-conspirator could not technically refuse to answer due to his lack of privilege, the court held there was no reason that the defense could not ask leading questions of the co-conspirator as well.[74] The court further reasoned that if the uncooperative co-conspirator wrongly asserted the privilege on cross-examination, the defense would be able to point this fact out for himself and argue that the co-conspirator was actually protecting someone else.[75]

Few cases in other jurisdictions address this issue of invalid Fifth Amendment invocations, but Minnesota state courts have addressed the Confrontation Clause when a co-conspirator invalidly invokes the Fifth Amendment at his co-defendant's trial in one case, *State v. Irlas*.[76] There, the appellant Irlas and his cousins, Salinas and W.B., were involved in a burglary and assault where they were separately charged.[77] Prior to Irlas's trial, his co-conspirator Salinas entered a guilty plea of first-degree burglary and second-degree assault and agreed to testify at

[70] *Id*. at 703.
[71] *Id.*
[72] *Id*. at 704-06.
[73] *Ruiz*, 309 P.3d at 710.
[74] *Id*.
[75] *Id*. at 710.
[76] 888 N.W.2d 709 (Minn. Ct. App. 2016).
[77] *Id*. at 711.

Irlas's trial.[78] The State called Salinas to the stand where he answered some preliminary questions, but when asked more detailed questions about the burglary, Salinas invoked the Fifth Amendment.[79] This invocation was not valid because Salinas had agreed to waive the privilege and testify at Irlas's trial in his plea agreement.[80] Upon his invocation, the State asked Salinas leading questions, and read back part of his testimony from his guilty plea.[81] Because Salinas invoked the Fifth Amendment, he was unavailable for cross-examination under Minnesota state law.[82] The defendant appealed the case, arguing that his right to confront the witness was violated when the trial court determined that the witness was unavailable for cross-examination.[83]

The Confrontation Clause does not allow for the admission of a witness's out-of-court testimonial statement when the witness does not appear at trial unless the witness is unavailable and was previously subjected to cross examination. [84] Here, the defendant argued that the witness was not subjected to cross-examination, thus violating his right to confront.[85] The State argued that Salinas did not have a valid Fifth Amendment privilege and his refusal to testify was not legitimate, therefore the refusal to testify is better characterized as "an uncooperative witness who feigns memory loss or is too afraid to testify."[86] The State also argued that "Salinas was available, despite his refusal to cooperate or testify, and the appellant was responsible to take steps to compel Salinas's testimony."[87]

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[78] *Id*.
[79] *Id*. at 711.
[80] *Id.* at 714.
[81] *Irlas*, 888 N.W.2d at 712.
[82] *Id.* at 713.
[83] *Id.* at 712.
[84] Crawford v. Washington, 541 U.S. 36, 59 (2004).
[85] *Irlas*, 888 N.W.2d at 709.
[86] *Id*. at 713; s*ee also*, State v. Plantin, 682 N.W.2d 653, 660 (Minn. App. 2004).
[87] *Irlas*, 888 N.W.2d at 713.

The Minnesota court rejected the State's arguments.[88] It recognized that, "Ordinarily, a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions."[89]Although Salinas answered some preliminary questions, he refused to testify and respond willingly to questions about the underlying facts of his guilty plea by invoking the Fifth Amendment.[90] The court strictly held that when a witness, who is present at trial, invokes the Fifth Amendment, whether or not the invocation is valid, he is unavailable and not subject to cross-examination for Confrontation Clause purposes, which bars the admission of that witness's out-of-court testimonial statement.[91]

After comparing *Irlas* and *Ruiz*, it is likely that the court in *Ruiz* was incorrect to dismiss the defendant's confrontation claim so quickly.[92] When the prosecution asks leading questions and the co-conspirator continues his invalid refusal to testify, the prosecution effectively introduces non-evidence hearsay into the court.[93] The specific danger is when the prosecution asks leading questions by providing facts or reading a transcript from the co-conspirator's own trial.[94] If the co-conspirator refuses to answer, the defense cannot effectively cross-examine the co-conspirator with regard to the leading questions because no answers were provided. [95] "The Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." [96] Unlike the court's holding in *State v. Ruiz*, the simple fact that the co-conspirator, or declarant, is in the courtroom

[88] *Id.*
[89] *Id*. at 714 (citing United States v. Owens, 484 U.S. 554, 561 (1988)).
[90] *Id.* at 713.
[91] *Id*. at 714.
[92] State v. Ruiz, 309 P.3d 700, 710 (Wash. Ct. App. 2013).
[93] Douglas v. Alabama, 380 U.S. 415, 420 (1965).
[94] *Ruiz*, 309 P.3d at 638.
[95] *Id.*
[96] California v. Green, 399 U.S. 149, 158 (1970).

does not mean he is subject to full and effective cross-examination.[97] Instead, because he is unwilling to answer the leading questions, the defense is not able to effectively combat the prejudicial inference that has been introduced by the fact laden questions of the prosecution.[98]

The prosecution can ask leading questions when a witness is hostile.[99] Under the Federal Rules of Evidence ("FRE"), a "hostile witness" is one who is unwilling or biased under FRE 611 (c).[100] To address a hostile witness, FRE 607 states that the "credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."[101] When a party calls a hostile witness, interrogation may be conducted with leading questions so that the witness will answer.[102] "A leading question is one that suggests to the witness the answer desired by the examiner."[103]

When the co-conspirator refuses to testify without forewarning, the prosecution is taken by surprise because the prosecution is not permitted to call witnesses whom they know will plead the Fifth, regardless of whether the invocation is valid.[104] Because the prosecution is taken by surprise, and invalidly refusing to testify can hurt the prosecution's case, the prosecution is allowed to ask the co-conspirator leading questions by reading back the transcript from his own trial or by repeating facts found in his trial to refresh the co-conspirator's memory.[105]

Douglas v. Alabama is an important case in allowing for a full and effective opportunity to cross-examine the witness.[106] In that case, the petitioner and the alleged accomplice were tried

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[97] *Id*.
[98] *Douglas*, 380 U.S. at 420.
[99] FED. R. EVID. 611(c)(2).
[100] FED. R. EVID. 611 (advisory committee notes).
[101] FED. R. EVID. 607; *see also,* State v. Johnson, 55 N.E.3d 648, 658 (Ohio Ct. App. 2015).
[102] FED. R. EVID. 611(c).
[103] State v. Diar, 900 N.E.2d 565, 592 (Ohio 2008).
[104] United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).
[105] *Johnson*, 55 N.E.3d at 661-62.
[106] 380 U.S. 415 (1965).

separately in state court for assault with intent to murder.[107] The alleged accomplice was called as a state witness in the petitioner's trial but repeatedly refused to testify.[108] The prosecutor began cross-examining the accomplice as a hostile witness over petitioner's objections.[109] The accomplice continued his refusal to answer, and so the prosecutor read, in the presence of the jury, the accomplice's confession from his own trial, which implicated the petitioner.[110] Although the statement was read by the prosecutor to "refresh" the witness's memory, the witness's confession was not admitted into evidence, and the jury found petitioner guilty.[111] The Supreme Court held that the petitioner was denied the right of cross-examination secured by the Confrontation Clause of the Sixteenth Amendment. The Court's holding was based on the petitioner's inability to cross-examine the alleged accomplice about the confession and the prosecutor's reading of the confession.[112]

Since the prosecutor was not a witness, the inference of guilt from reading the transcript during direct questioning could not be cross-examined.[113] Similarly, the accomplice could not be cross-examined, in reference to the statement read by the prosecution, because although it is inferred that the accomplice made the statement, he refused to testify rather than admit that he made that statement.[114] Police officers at the accomplice's trial confirmed that the accomplice made the confession, but those officers were not at the petitioner's trial and the defense had no opportunity to cross-examine their confirmation.[115] In fact, the Court found that the officer's

[107] *Id.* at 416.
[108] *Id.* at 416-17.
[109] *Id.* at 421-22.
[110] *Id.* at 416.
[111] *Douglas*, 380 U.S. at 416-17.
[112] *Id.* at 423.
[113] *Id.* at 419.
[114] *Id.*
[115] *Id.* at 419-20.

testimony likely enhanced the danger that the jury would treat the prosecutor's questioning of the petitioner and the subsequent refusal to answer as proving the truth of the alleged confession.[116] "Since the evidence tended to show that the accomplice made the confession, cross-examination as to its genuineness could not substitute for cross-examination of the petitioner to test the truth of the statement itself."[117] In short, the Court found that because the defense did not have a full and effective opportunity to cross-examine the accomplice, since the accomplice refused to testify rather than provide answers to the leading questions, the petitioner's Sixth Amendment right to confront had been violated.[118]

Applying the reasoning from *Douglas v. Alabama*, the Washington State courts are incorrect to hold that since the witness is physically present and technically cannot refuse to testify, he is available for cross-examination and the defendant's right to confront is not violated.[119] When the prosecution asks the co-conspirator leading questions and the co-conspirator continues his invalid refusal to testify, the defense is unable to combat the prejudicial information introduced by the questions because there are no answers from which the defense can base their cross-examination.[120] Further, the information in the prosecution's leading questions was so likely to be used by the jury as substantive evidence, that it is nearly impossible for the defense to accurately question the co-conspirator to negate the inference, thereby violating the defendant's right to confront.[121]

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[116] *Douglas*, 380 U.S. at 419-20.
[117] *Id.; see also*, Motes v. United States, 178 U.S. 458 (1900); *cf.* Kirby v. United States, 174 U.S. 47 (1899).
[118] *Douglas*, 380 U.S. at 420.
[119] Johnson v. People, 384 P.2d 454, 457 (1963).
[120] *Douglas*, 380 U.S. at 415.
[121] *Id.*

B. Defendant's Right to a Fair Trial and the Prejudicial Inference

The second provision of the Sixth Amendment implicated by a co-conspirator who continuously invokes an invalid privilege against self-incrimination is the defendant's right to a fair trial.[122] Minnesota and Washington State are two states which actually address this issue.[123] However, the Washington courts focus primarily on the Confrontation Clause, rather than the defendant's right to a fair trial in the *Ruiz* case.[124] In contrast, the Minnesota State courts tend to focus on the right to a fair trial.[125] The Minnesota courts consistently find that when the Fifth Amendment is invalidly invoked the defendant's Sixth Amendment right to a fair trial is violated, even if the witness was available for cross-examination. This invalid invocation creates an inference in the jury's mind that the witness is protecting the defendant rather than protecting himself.[126] This inference is unfairly prejudicial against the defendant, thereby hindering his right to a fair trial.[127]

In court proceedings, the parties must oblige by the court's rules of evidence, many of which are based upon the FRE. One of the fundamental principles of the FRE is upholding the defendant's right to a fair trial.[128] Even if the evidence in a particular case is admissible under the other rules of evidence, it must still pass FRE 403, which does not allow for the admission of evidence that is substantially unfairly prejudicial in a case, even if the evidence has a probative value.[129] Not permitting unfairly prejudicial evidence is a way of protecting the defendant's Sixth

[122] U.S. CONST. amend. VI.
[123] *See generally* State v. Ruiz, 309 P.3d 700 (Wash. Ct. App. 2013).
[124] *Id.*
[125] State v. Morales, 788 N.W.2d 737, 758 (Minn. 2010).
[126] *Id.* at 747; s*ee also*, State v. Irlas, 888 N.W.2d 709, 712-13 (Minn. Ct. App. 2016).
[127] *Morales*, 788 N.W.2d at 747.
[128] Strickland v. Washington, 466 U.S. 668, 684-85 (1984).
[129] FED. R. EVID. 403.

Amendment right to a fair trial.[130] Although the Sixth Amendment trumps the FRE, the FRE manifests the importance of the right to a fair trial by emphasizing the right explicitly in its rules.[131] As can be shown by the rules of evidence, upholding the defendant's right to a fair trial is crucial when conducting a court proceeding.

When a co-conspirator invalidly invokes the Fifth Amendment at his co-defendant's trial, Minnesota courts analyze whether the invalid invocation has the tendency to expose the defendant to a substantially unfair prejudice, violating his right to a fair trial.[132] The theory of prejudicial inference is introduced through prosecutorial misconduct.[133] It is prosecutorial misconduct for the prosecution to call a witness knowing that the witness would claim immunity and that the only purpose for calling the witness is to discredit the defendant with the jury.[134] Even if the prosecutor knows with a high-degree of certainty that the witness would invoke their Fifth Amendment privilege, it is not prosecutorial misconduct if the state has other reasons for calling the witness besides creating a prejudice.[135]

It is common for prosecutors to call a defendant's co-conspirator to the stand in the defendant's trial when the co-conspirator has already been convicted of the charge.[136] However, it is not always known to the prosecutor whether the co-conspirator will invoke the Fifth Amendment. If the prosecutor calls a witness to the stand whom he knows will invalidly invoke the Fifth, then there is a risk of prosecutorial misconduct.[137] Therefore, it is reasonable for a prosecutor to assume the co-conspirator will testify when he is called, even if he does so with hesitation.

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[130] *Id.* (advisory committee's notes to 1975 enactment).
[131] *Id.*
[132] *Morales*, 788 N.W.2d at 758.
[133] De Gesualdo v. People, 364 P.2d 374, 376-77, 431 (Colo. 1961).
[134] *Id.* at 429.
[135] *Morales*, 788 N.W.2d at 768.
[136] *De Gesualdo*, 364 P.2d at 377.
[137] *Id.* at 376.

It is prosecutorial misconduct for a prosecutor to call a witness whom he knows will invalidly invoke the Fifth Amendment because: "[I]n the circumstances of a given case, 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."[138]

In other words, the prosecutor cannot call a co-conspirator to the stand whom he knows will invoke the Fifth Amendment because the refusal to answer works strongly in favor of the prosecution's case since the co-conspirator no longer needs the protection against self-incrimination, and can imply to the jury that a truthful answer would be in the affirmative.[139] *Namet v. United States* held that such refusals to testify should not be a permissible basis for inferring what would have been the answer, and that the inference is so prejudicial that calling a witness who will knowingly invoke his Fifth Amendment privilege is prosecutorial misconduct.[140] This demonstrates how inferences of any form can be unfairly prejudicial against the defendant when the inferences are created recklessly.[141]

The Oregon Supreme Court recognizes a different kind of inference and has held that when a witness invalidly invokes the Fifth Amendment, an inference is created in the mind of the jury that the witness is protecting the defendant because the witness himself can no longer be incriminated.[142] The court stated directly, "Viewed realistically, a refusal to testify by an already convicted accomplice cannot stem from his desire to protect himself and must, therefore, stem from his desire to protect the Defendant."[143] When this inference is created, it can lead the jury to

[138] Namet v. United States, 373 U.S. 179, 187 (1963).
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] State v. Abbott, 552 P.2d 238, 241 (Or. 1976).
[143] *Id.*

erroneously believe that the defendant is guilty because of the witness's attempt to protect the defendant, when in fact the defendant had no control over the witness asserting the Fifth.[144]

Although there is little case law on point with this issue, the Minnesota courts have implicitly adopted the Oregon Supreme Court's approach and have focused on the fair trial aspect of the Sixth Amendment when a co-conspirator invalidly invokes the Fifth Amendment.[145] The rationale is that when the co-conspirator continuously refuses to testify, despite his lack of privilege, it allows the jury to infer what the co-conspirator's answer would have been. Therefore, the jury would infer that because the co-conspirator cannot be further incriminated, his refusal to answer is to protect the defendant.[146] This is a dangerously unfair prejudice that could adversely affect the defendant's presumption of innocence.[147]

In *State v. Morales*, the jury found defendant Morales guilty of second-degree felony murder during the commission of an aggravated robbery.[148] At trial, the State alleged that the defendant's accomplice, Vega-Lara, shot and killed the victim.[149] The district court granted Vega-Lara use immunity under the state statute Minn. Stat. § 609.09 (2008), and witnesses in Minnesota who have been granted use immunity do not have a valid claim to the Fifth Amendment privilege.[150] The State called accomplice Vega-Lara to testify at the defendant's trial even though Vega-Lara planned to assert a Fifth Amendment privilege.[151] Over the defendant's objections, the court allowed the State to question Vega-Lara about the testimony he gave at his trial, and when Vega-Lara refused to answer, the State continued their direct examination with leading

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[144] *Id.*
[145] State v. Morales, 788 N.W.2d 737, 760 (Minn. 2010).
[146] *Abbott*, 552 P.2d at 238.
[147] *Id.* at 240.
[148] 788 N.W.2d at 741.
[149] *Id.*
[150] Minn. Stat. Ann. § 609.09 (West 2008); *Morales*, 788 N.W.2d at 742.
[151] *Morales*, 788 N.W.2d at 742-44.

questions.[152] The court also allowed the State to introduce out-of-court statements by Vega-Lara under the statement-against-interest exception to the hearsay rule.[153]

Morales appealed his conviction, which the Minnesota Court of Appeals reversed.[154] The Minnesota Supreme Court found that the State did not call the accomplice as a witness in bad faith, even though the State knew with a high degree of certainty that the witness would refuse to testify, because the State may have had other reasons for calling the accomplice other than creating a prejudicial atmosphere.[155] The State argued that *State v. Mitchell* and *Namet v. United States* do not apply when a witness does not have a valid claim to the Fifth Amendment.[156] The court held in *Mitchell* that since the individual is refusing to testify under the privilege against self-incrimination, there is a strong platform for the jury to draw unfavorable inferences about what the witness would likely have answered and impute the culpability of the defendant.[157] In those circumstances, the act of calling a witness whom the prosecutor knows will claim a privilege can constitute prejudicial misconduct.[158] The court in *State v. Morales* disagreed with the State's argument and held that *Mitchell* applies in situations where the witness invokes either a valid or invalid privilege.[159]

The Supreme Court of the United States has acknowledged in *Namet v. United States* that this inference can pose a risk of unfair prejudice against the defendant quoting the approach in *United States v. Maloney*, "inferences from a witness refusal to answer added critical weight to the

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[152] *Id.* at 744.
[153] *Id.* at 745.
[154] *Id.* at 746.
[155] *Id.* at 755.
[156] *Morales*, 788 N.W.2d at 751-52; *see also* Namet v. United States, 373 U.S. 179 (1963); State v. Mitchell, 130 N.W.2d 128, 130 (Minn. 1964) (citing United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959)).
[157] *Mitchell*, 130 N.W.2d at 130 (citing *Maloney*, 262 F.2d at 537).
[158] *Id.*
[159] State v. Morales, 788 N.W.2d 737, 752 (Minn. 2010).

prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant," constituting a harmful, reversible error.[160]

The Court has also recognized the danger of this inference in *Douglas v. Alabama*.[161] Specifically, the accomplice's "alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so. . .[and] . . . formed a crucial link in the proof."[162] Although the prosecutor's reading of the accomplice's statement and accomplice's refusals to answer were not technically testimony, the Court found the prosecutor's "reading may well have been the equivalent in the jury's mind of testimony that the accomplice in fact made the statement."[163] Further, the accomplice's "reliance on the Fifth Amendment created a situation in which the jury might improperly infer both that the statement had been made and that it was true."[164]

The court in *Mitchell* addressed the unfair prejudice created by a co-conspirator who refuses to testify when asked leading questions by the prosecution.[165] The court found the State's questioning of an accomplice who refused to testify was prejudicial because the State's questioning was extensive, fact-laden, and went to the substance of the charged offense.[166] The State used the accomplice's prior testimony to impeach the accomplice, which supplied the jury with specific incriminating instances that strengthened the State's theory of the case.[167] The court in *State v. Morales* found that, by applying *State v. Mitchell* and *Namet v. United States*, the State's questioning of a witness who refused to testify was so prejudicial that it denied the defendant a

[160] *Namet*, 373 U.S. at 187 (citing *Maloney*, 262 F.2d at 536-37).
[161] 380 U.S. 415, 420 (1965).
[162] *Id.* at 419.
[163] *Id.*
[164] *Id.*; *see also* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557-58 (1956); *Maloney*, 262 F.2d at 537.
[165] State v. Mitchell, 130 N.W.2d 128, 131 (Minn. 1964).
[166] *Id.* at 521.
[167] *Id.*

fair trial because the leading questions were likely to lead the jury to believe the defendant was guilty.[168] It is important to note that the court did not address the Confrontation Clause in *State v. Morales* because the Confrontation Clause only applies to testimonial statements, and the co-conspirator's statement that was introduced through the leading questions was a casual statement to a friend, not testimonial.[169]

The ultimate issue with both the right to confront and the right to a fair trial in this situation is that the defendant is unable to effectively cross-examine the witness.[170] This is important for the right to confront because the defense can only cross-examine the witness, or co-conspirator, based on the answers he gives to the prosecutor's direct questioning.[171] If the co-conspirator refuses to provide answers, the defense is not able to question the defendant so as to rebut the argument from the leading questions.[172] Although the defense is able to cross-examine, the defendant's right to confront is violated because the defense cannot *fully* and *effectively* cross-examine.[173] For example, the defense will not be able to rebut the leading questions, and although the defense would be able to ask their own leading questions, that would likely not be to the benefit of the defendant because most of the material to form leading questions would be inculpatory to the defendant.[174] With regard to the right to a fair trial, the prosecution's leading questions introduce substantive material to the jury about the co-conspirator and the defendant, generally using statements made during the co-conspirator's trial.[175] Because the co-conspirator has not answered the questions, the defense is

[168] State v. Morales, 788 N.W.2d 737, 760 (Minn. 2010).
[169] *Id.* at 767.
[170] Douglas v. Alabama, 380 U.S. 415, 419-20 (1965).
[171] State v. Ruiz, 309 P.3d 700, 707-08 (Wash. Ct. App. 2013).
[172] State v. Mitchell, 130 N.W.2d 128, 133 (Minn. 1964).
[173] *Douglas*, 380 U.S. at 420.
[174] *Ruiz*, 309 P.3d at 708.
[175] State v. Morales, 788 N.W.2d 737, 756 (Minn. 2010).

unable to effectively cross-examine the co-conspirator to rebut or erase the prejudice that has been set into the minds of the jury.[176]

IV. The Solution to the Confrontation Clause and Fair Trial Issues

Courts have not yet approached the situation of a co-conspirator invalidly invoking the Fifth Amendment in a way which fully addresses both of the Sixth Amendment concerns. If a co-conspirator invalidly invokes the Fifth Amendment and does so again after the judge corrects him, the jury should be excused. In the jury's absence, the court should then allow the prosecution to continue questioning the co-conspirator to determine if he will continue to defy the court by invalidly invoking the Fifth Amendment. If so, the co-conspirator should be excused as a witness. If the co-conspirator decides to answer the questions, then questioning in front of the jury may continue because the defense will be able to cross-examine the co-conspirator based on his answers to the leading questions.

This solution will permit the court to hear the prosecution's leading questions and determine if they will provoke a response. If the witness does respond, then questioning in front of the jury can reconvene because the defense will be able to cross-examine the witness and challenge the content of the leading questions. This ability to effectively cross-examine allows the defendant the right to confront the witness in front of the jury and allows for a fair trial by challenging the answers of the co-conspirator.

If the co-conspirator invalidly invokes the Fifth Amendment to avoid the prosecutor's questions, the questioning will cease and the co-conspirator will be excused as a witness because it is the continuous invalid invocation that leads the jury to a prejudicial inference. If the jury does not know about the repeated invocations, then they cannot create a prejudicial inference. If the co-

[176] *Mitchell*, 130 N.W.2d at 133.

conspirator answers the leading questions, then the defense will have the full opportunity to combat any inference the questions may provoke. This opportunity to fully cross-examine the co-conspirator will allow the defendant to exercise his right to confront and right to a fair trial.

A general solution to limit the use of potentially harmful evidence is an FRE 105 limited jury instruction.[177] With this instruction, the party opposing the harmful evidence that the judge has allowed in can ask that the jury be instructed to use the evidence for certain purposes, but not others.[178] However, when a co-conspirator endlessly invokes an invalid Fifth Amendment, an instruction may not be enough because it is nearly impossible to erase the bias, even with an FRE 105 limiting instruction, because the invocation is so prejudicial without the opportunity for the defense to challenge it.[179]

A direct example of how ineffective the instruction can be to erase the bias formed by the jury is the case *Bruton v. United States*.[180] There, during a joint trial of Evans and Bruton, at which Evans did not testify, a postal inspector testified to Evans' oral confession that Evans and Bruton had committed the robbery.[181] The court instructed the jury that although the confession was admissible evidence against Evans, it was inadmissible hearsay against Bruton because Bruton could not confront Evans with regards to the statement because Evans was a defendant and had a valid Fifth Amendment right against self-incrimination.[182] The court ruled that the confession must be disregarded in determining Bruton's guilt or innocence.[183] Both were convicted.[184]

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[177] FED. R. EVID. 105.
[178] *Id.*
[179] Bruton v. United States, 391 U.S. 123, 126 (1968).
[180] *Id.* at 124.
[181] *Id.*
[182] *Id.* at 124-25.
[183] *Id.* at 125.
[184] *Bruton*, 391 U.S. at 124.

On review of Bruton's conviction, the Supreme Court of the United States reversed.[185] The Court held that since Evans did not testify, the introduction of his confession added substantial weight to the government's case because the jury was able to hear a confession that incriminated Bruton.[186] The statement was not subject to cross-examination since Evans was a co-defendant in the same trial, and thereby violated Bruton's Sixth Amendment right to cross- examination.[187] This encroachment on Bruton's constitutional right could not be avoided by a jury instruction to disregard the confession as to Bruton because the confession substantially incriminated Bruton, and a reasonable jury would not be able to simply ignore the confession when considering Bruton's guilt.[188]

This compares to a co-conspirator invalidly invoking the Fifth Amendment when testifying at the defendant's trial because the leading questions by the prosecution can add substantial weight to the jury's consideration if the questions have incriminating information regarding the defendant.[189] If a prosecutor is asking a co-conspirator about statements made at his own trial regarding the defendant and the co-conspirator refuses to answer, then those statements cannot be cross-examined because no answer was provided.[190] Crossing a co-defendant can expose the jury to information they should not consider to determine guilt, but the information is so prejudicial that it is nearly impossible to erase the bias.[191]

Washington State courts were incorrect to hold that the witness was available for cross-examination and the defendant's right to confront was not violated since the witness was physically

[185] *Id.* at 126.
[186] *Id.* at 128.
[187] *Id.*
[188] *Id.* at 126.
[189] Douglas v. Alabama, 380 U.S. 415, 419 (1965).
[190] *Id.*
[191] *Bruton*, 391 U.S. at 126.

present and technically could not refuse to testify.[192] When the prosecution asks leading questions, and the co-conspirator continues his invalid refusal to testify, the defense does not have any information from the co-conspirator to base their cross-examination on, which prevents the defendant from exercising his right to confront. If Washington courts were to apply this alternative approach, the court would be able to first determine if the witness will answer the questions. If so, the defense will then be able to fully cross-examine. If he does not answer he can be excused as a witness, and there is no further issue.

The Minnesota Supreme Court suggested a similar solution to this approach, in *State v. Morales*, to uphold the defendant's right to a fair trial.[193] In the opinion, the Court stated:

> Given the State's difficult position and the risk of unfair prejudice, a better course of action may have been for the district court to allow the State to question Vega-Lara outside of the presence of the jury in order to "lay foundation," or, in other words, to ascertain if Vega-Lara would testify in a manner inconsistent with his previous testimony. Under such a scenario, if the district court ultimately determined that the evidence is not admissible as substantive evidence as the court did here, there would have been no unfair prejudice to Morales because the prejudicial questioning would have occurred outside the presence of the jury.[194]

When suggesting this, the court was addressing an issue where the prosecutor asked leading questions of the witness because he was invalidly invoking the Fifth Amendment. However, the prosecutor was laying foundation to impeach the witness with the leading questions, and the Minnesota Supreme Court held that the leading questions used for impeachment were so prejudicial that the jury could not help but consider it as substantive evidence as well.[195]

In practice, if a co-conspirator who has lost his Fifth Amendment privilege to silence invokes the Fifth Amendment at the defendant's trial, the judge should instruct the witness that he has lost

[192] Johnson v. People, 384 P.2d 454, 457 (1963).
[193] 788 N.W.2d 737, 758 (Minn. 2010).
[194] *Id.*
[195] *Id.* at 759.

his privilege. If the witness invalidly invokes the privilege a second time, the jury should be dismissed. The repeated invocation may lead a jury to conclude that the co-conspirator would have answered in the affirmative. Therefore, dismissing the jury is appropriate to preserve the defendant's right to a fair trial.[196]

While the jury is absent, the prosecutor should continue questioning the co-conspirator as if the jury was still present. This allows the prosecutor to ask leading questions of the co-conspirator without revealing prejudicial information to the jury.[197] If the co-conspirator answers some substantive questions, the jury should be allowed back in the courtroom for questioning to proceed. Because the co-conspirator answers questions, the defense will be able to cross-examine the co-conspirator on the answered questions. That way, the defendant is able to exercise his right to confront. If the co-conspirator does not answer any substantive questions, then he should be dismissed as a witness.

Conclusion

Few courts in the country have dealt with the issue of a co-conspirator, who has already been convicted of the crime, invalidly invoking the Fifth Amendment while testifying at his co-defendant's trial. However, the courts which have addressed this issue tend to look at either the defendant's right to confront or right to a fair trial, but both rights are hardly analyzed in the same case. It is important to know what to consider and how to analyze this invalid invocation of the Fifth Amendment so that all of the defendant's rights are maintained. If a defendant is not able to fully exercise his right to confront when the prosecutor introduces leading questions, the jury may be considering non-evidential statements which may unfairly prejudice the defendant. Further, if the defendant is unable to exercise his right to a fair trial, he loses one of the most valuable rights

[196] State v. Abbott, 552 P.2d 238, 241 (Or. 1976).
[197] *Morales*, 788 N.W.2d at 759.

to criminal defendants guaranteed by the Constitution. This solution is likely to achieve the goals of the Sixth Amendment and should be seriously considered by courts when a co-conspirator invalidly invokes the Fifth Amendment at the defendant's trial.