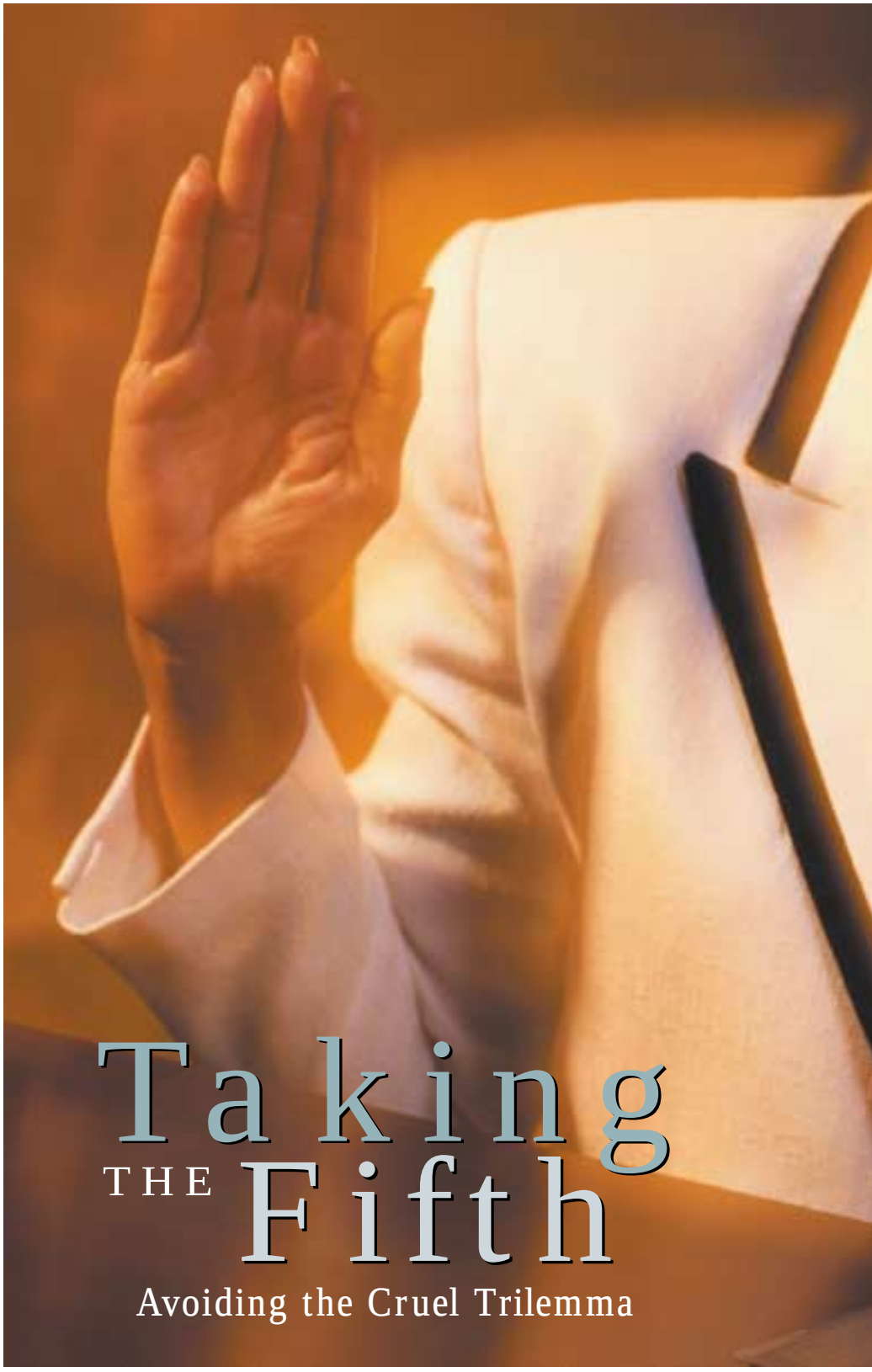
BY HON. ROBERT L. GOTTSFIELD

"To force a person to choose among self-incrimination, perjury and contempt offends notions of human dignity. There must be a fourth choice: the option to remain silent without facing contempt liability."[1]



Taking THE Fifth

Avoiding the Cruel Trilemma

Avoiding the "cruel trilemma" as the rationale for the privilege not to incriminate oneself has been accepted by the United States Supreme Court.[2] The privilege is provided for in both the Arizona[3] and U.S. Constitutions.[4] In pertinent part, the Fifth Amendment provides, "No person … shall be compelled in any criminal case to be a witness against himself."[5]

The Fifth's Modern Relevance

First, what will this article not cover? It will not concern whether *Miranda* rights were properly given or required,[6] what is meant by interrogation while "in custody," whether a confession is voluntary or whether certain statements of a defendant are admissible in court.

This article will deal solely with a review of what it literally means to invoke the Fifth Amendment, colloquially known as "taking the Fifth." This is especially pertinent in this era of corporate and financial excesses, where corporate officers are routinely asserting the privilege before congressional and other investigative bodies.

The privilege has two aspects, both of which will be considered: the right of every person to refuse to answer a particular question creating a risk of incrimination and the right of a defendant in a criminal case not to testify at all.

The article will examine where, when, how and by whom the privilege can be invoked; whether a blanket request is permissible; the principles involved in presenting an invoking witness before the jury in a criminal case; whether a witness can invoke as to some questions, but not all; what constitutes a waiver of the privilege and whether a waiver in one proceeding is a waiver in all proceedings; the pitfalls involved where a prosecutor or judge advises a witness of the consequences of invoking the privilege; and what it means when there is an offer by the prosecuting authority (it is not the court's to give) of use immunity to obtain testimony. The last sec-

tion concerns the effect of invoking the privilege in civil proceedings.

An additional impetus for revisiting "taking the Fifth" was the U.S. Supreme Court's recent decision in *Chavez v. Martinez*,[7] the first post-9/11 decision by our highest court, dealing with the rights of suspects in this War on Terror era. Pertinent for purposes of this article was the holding that questioning a suspect without reading him his *Miranda* rights or other coercive police interrogations alone do not violate the Fifth Amendment. It is not until the state attempts to use compelled testimony in a criminal case that the privilege against self-incrimination—which is a trial right—is violated.

Thus, elaboration of what it actually means to avoid the attempted use of compelled testimony and its ramifications in both the civil and criminal trial contexts is the focus of the following pages.

Who Can Assert

It is well settled that the privilege to refuse to answer a question may be asserted by any person called as a witness in any type of proceeding.[8] The witness may exercise the privilege not only as to answers that would directly support criminal liability but as to answers that would furnish a link in the chain of evidence needed to prosecute him.[9] Because the privilege protects the innocent as well as the guilty, a witness may declare his innocence and still assert the privilege.[10]

Construing the Fifth

Although the Fifth Amendment privilege is construed liberally,[11] the witness "must be faced with real and substantial risks."[12] Once the judge concludes there is a reasonable basis that the answers *might* tend to convict the witness of crime, the court must uphold the privilege, without asking the witness to explain how an answer would incriminate him.[13] Even if direct examination by the defendant of a witness would not cause the witness to incriminate herself, it is sufficient the cross-examination by the state would do so.[14]

Blanket Assertions

The privilege cannot be claimed in advance of questions actually propounded.[15] Moreover, because the right is personal, it cannot be invoked for the protection of a third party.[16] Thus, it is well established that one may not rely on a blanket assertion of the privilege against self-incrimination unless each question clearly seeks testimony incriminating the declarant asserting the privilege.[17]

The trial court is faced with a two-step process: first determining whether the person asserting the privilege may face personal criminal liability and then ensuring that the person is not permitted to go beyond the scope of the privilege and assert it improperly.

An example would be a claim of privilege as to incidents involving others for which one might have been merely a witness and in which one did not personally participate and for which one would have no personal liability. Permitting a blanket assertion where it is improper to do so in

effect wrongly allows the person asserting the privilege to shift the burden of proof to the prosecutor or other person asking the question. That is also why one cannot rely on the privilege as a reason for refusing to attend a deposition.[18] The privilege is normally to be asserted as to each individual question.

Whether To Present the Invoking Witness Before Jury

Earlier Arizona cases held that both the defendant and the state had an absolute right to present before the jury a witness taking the Fifth.[19] This view was modified, and more recent cases provide that it is within the court's discretion to excuse the invoking witness without a jury appearance, if the judge concludes that the witness can legitimately refuse to answer all relevant questions and no valid purpose would be served by requiring the witness to invoke the privilege in front of the jury.[20]

In the case of a witness for the defendant, this is said to be a "narrow exception" to defendant's Sixth Amendment rights[21] (see the sidebar below for a discussion of conflicts between Fifth and Sixth amendment rights). For a trial court in its discretion to excuse an invoking witness without a jury appearance, whether the witness is offered by the state or the defense, the court must have "extensive knowledge"[22] of the case. The extensive knowledge required for a trial judge to exercise his or her discretion can be gained in an in camera proceeding.

In Camera Proceeding

What is the preferred procedure? It is a hearing conducted by the judge outside the presence of the jury with the court asking the invoking witness questions.[23]

Recent cases, however, advise that questioning of the witness by the judge is not a requirement. Those cases indicate that the judge can gain the extensive knowledge required by questioning defense counsel and the prosecuting attorney to gain their insight as to why the witness might be inclined to assert the privilege; reading transcripts or having avowals made concerning any deposition or interview given by the invoking witness; and determining from the attorney for the witness whether a recommendation to assert the privilege was made.[24]

Rule 403 Analysis

What follows comes mainly from *State v. Corrales*,[25] in an opinion written by Justice Feldman in which the *Namet v. United States* rules of the U.S. Supreme Court were first applied in Arizona (for a detailed discussion of *Namet* and its progeny, see the sidebar on page 41).

If the court finds that the Fifth Amendment will be properly invoked, it still has discretion to permit the proponent of the witness to call the witness and elicit the claim of privilege before the jury.[26] The court must determine "whether the interest of the person calling the witness outweighs the possible prejudice resulting from the inferences the jury may draw from the witness's exercise of the privilege."[27]

A proper purpose in a given case may be to provide the jury with an explanation why a witness who would ordinarily be expected to testify "to prove the charge or establish the defense"[28] is not going to testify. Another valid reason to force the privilege to be taken before the jury exists where it is possible the witness will not exercise the privilege or will answer some questions.[29] If the witness will testify at all, both the state and the defendant have the right to put the witness on the stand.[30] It is said that in the latter instance both parties must have a reasonable opportunity to test whether the testimony will be produced by the witness and, if not, whether it can be compelled.

"That question will ordinarily be put to the strongest test if the witness is forced to exercise the privilege in open court, before judge, counsel and jury."[31] If after applying a Rule 403 analysis, the court determines the benefits to be gained will be outweighed by the danger of prejudice, it must refuse to allow the witness to be called to invoke the privilege in front of the jury.[32] It also must refuse, said the *Corrales* court, where either prong of the *Namet* rule will be violated.[33]

Advising Witness of Consequences

When a witness intends to invoke the privilege after advice of counsel, may the prosecutor and / or trial judge advise the witness outside the presence of the jury of the possible consequences of his decision?

Yes, but only within limits. A prosecutor's threat of a perjury prosecution to a witness can constitute witness intimidation and is improper, as is a judge's threatening remarks.[34] But it is not prosecutorial misconduct when the prosecutor merely informs the witness of the possible effect of his testimony. The trial judge also may advise of the penalties for testifying falsely.[35] The prosecutor can contact the witness's counsel to inform of the possible conse-

Fifth and Sixth Amendment Collisions

When a witness other than the defendant asserts the Fifth Amendment during a criminal trial, the Sixth Amendment to the U.S. Constitution comes into play, creating a tension between the two rights.

The Sixth Amendment in pertinent part and its Arizona Constitution counterpart guarantee the right of the criminal defendant "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor."[1] Though an adequate opportunity for cross-examination is the primary interest granted by the Sixth Amendment,[2] it also sets forth the right to compel the attendance of witnesses whose testimony "is both material and favorable to the defense."[3] However, no "material and favorable evidence" is lost when a court in its discretion properly decides that a witness may invoke the privilege.[4] Therefore, the tension between the Fifth and Sixth Amendments has been resolved in favor of the Fifth Amendment: The defendant does not have a right to compel a witness to waive the privilege against self-incrimination once it has been properly asserted by the witness.[5]

endnotes

1. U.S. CONST. amend. VI and ARIZ. CONST. art. 2, 24. They also provide for the right to a speedy and public trial by impartial jury from the district where the crime was committed, to be informed of the "nature and cause of the accusation" and to have an attorney. The confrontation clause of the Sixth Amendment is applicable to the states. *Douglas v. Alabama*, 380 U.S. 415 (1965).
2. *Douglas*, 380 U.S. at 418.
3. *State v. McDaniel*, 665 P.2d 70, 76 (Ariz. 1983), *quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). *See also Washington v. Texas*, 388 U.S. 14, 23 (1967).
4. *State v. Henry*, 863 P.2d 861, 873 (Ariz. 1993).
5. *State v. Fisher*, 686 P.2d 750, 766 (Ariz. 1984), *cert. denied*, 469 U.S. 1066 (1984); *McDaniel*, 665 P.2d at 76; *State v. Mills*, 995 P.2d 705, 713 (Ariz. Ct. App. 1999), *rev. denied*, Feb. 8, 2000; *State v. Maldonado*, 889 P.2d 1, 3 (Ariz. Ct. App. 1994).

quences of perjurious testimony.[36]

Keep in mind, however, that misconduct of counsel alone will not cause a reversal unless the defendant has been denied a fair trial as a result of counsel's improper actions.[37] But such conduct should in any event be brought to the attention of the trial judge to deal with it responsibly, which may include contempt and / or a referral to the State Bar.

Invoking Witness Unavailable

A witness who asserts the Fifth Amendment right not to testify is unavailable.[38] Although beyond the scope of this article, if there are out-of-court statements of an unavailable invoking declarant, they may be admissible if they either fall within a firmly rooted hearsay exception or are supported by a showing of particularized guaranties of trustworthiness such as under Evidence Rules 804(b)(3) or 804(b)(5)—the latter rule being identical to reliable hearsay not meeting an exception in Rule 803 (24).[39]

Effect of Appeal and Rule 32 Petition

The privilege against self-incrimination remains available to a convicted person as long as the conviction or sentence is being appealed.[40] It is not available if there was no appeal and the appeals time has run, the appeal is final, the defendant was acquitted or pardoned or where the statute of limitations has run.[41] A witness who still has time to file a Rule 32 petition can assert the privilege in a co-defendant's trial.[42] The privilege may be raised in juvenile proceedings to determine delinquency but not at a post-disposition hearing where the court imposes drug court as a term of probation.[43]

Granting Use Immunity by the State

To avoid the effect of the Fifth Amendment, the state—not the trial judge[44]—has the discretion to offer use immunity under A.R.S. § 13-4064. The immunity must be as extensive as the privilege itself,[45] which under the statute means no testimony, evidence or information "directly or indirectly" derived therefrom may be "used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order."[46]

A witness granted use immunity by the court after a prosecutor's request who thereafter refuses to testify after ordered to

do so by the court may be found in contempt and ordered to county jail.[47]

An argument is sometimes made that the trial court should not permit the state to withhold the granting of use immunity to a defense witness where the state has offered immunity to prosecution witnesses. The law is clear that the state exercises sole discretion in granting immunity to witnesses.[48] Moreover, there is no due process violation unless the defendant can show either prosecutorial misconduct in some way or make "a showing that the witness would present clearly exculpatory evidence and that the state has no strong interest in withholding immunity."[49]

Defendant's Right Not To Testify

In a criminal case, the defendant has a constitutional right not to testify, and the exercise of that right cannot be considered by the jury in determining guilt or innocence. The Fifth Amendment is the basis for that typical instruction in a criminal case. As such, a criminal jury may not draw any inferences from the circumstance that defendant does not testify. Moreover, in a criminal case, the jury is not entitled to draw any inferences from the decision of a witness who is not the defendant to exercise his Fifth Amendment privilege.[50]

Improper Arguments and Questions

It is obviously very prejudicial and improper to refer in a criminal case to the fact that a defendant has chosen not to testify or that a witness not the defendant has taken the privilege or to assert any inferences therefrom. An appropriate instruction to this effect when requested by the defendant (or the state when the court in its discretion finds no violation of *Namet* by letting the state's witness invoke before the jury) should be given by the trial court.

It is improper for an attorney to argue an adverse inference from the failure of the opponent to call a witness where that attorney knows the opponent could not do so because the witness asserted the Fifth Amendment privilege and thus could not be compelled to testify.[51] It is also improper, of course, for a party who has claimed a privilege to thereafter argue how the other side failed to produce a witness or of the failure of necessary testimony, caused solely by the invocation of the privilege.[52] Asking another witness to speculate on testimony that might have been given by someone who has invoked the privilege is also improper.[53]

Waiver of the Privilege

The self-incrimination privilege may be waived. The waiver, however, affects only the particular proceeding in which the waiver occurs, so that a witness may testify before a grand jury and subsequently take the Fifth at trial.[54] Thus, such other prior testimony may be admissible.

Moreover, unlike a criminal defendant, a witness cannot refuse to take the stand, unless the trial court in an in camera proceeding has gained such extensive knowledge of the case that it rules the witness will take the Fifth Amendment on all relevant questions and no valid purpose would be served by presenting the witness to the jury to invoke the privilege.[55] The normal rule is that the witness on the stand must claim the privilege as to each question he believes will incriminate him.[56] As to any question he answers, he has generally waived the privilege.

Although a defendant in a criminal case has a right not to be called to testify, if he does testify on direct, he has waived the privilege and can be cross-examined the same as any other witness.[57] As noted in the following section, because the defendant has chosen to make an issue of his credibility by testifying, the state can impeach him even by asking questions he refuses to answer by invoking his Fifth Amendment privilege.[58] A defendant in a criminal case who testifies does not waive other privileges, such as the attorney–client privilege or the right of his spouse not to testify, and the defendant may not be asked questions in front of the jury to force a waiver of such privileges.[59]

Witness Invoking as to Some Questions

A witness may invoke the Fifth Amendment after testifying as to certain matters, but then the trial judge has to make a determination whether to strike all or part of the prior testimony. What sometimes occurs is that the witness testifies fully in response to questions on direct but then is asked questions on cross-examination not gone into on direct, prompting the invocation of the privilege. In such cases there is no bright-line rule requiring the trial court to strike the direct testimony. It is clear, however, that where an important prosecution witness invokes on cross-examination, such a refusal to answer will violate a defendant's Sixth Amendment right, and the court must strike all of the witness's direct testimony, either in whole or in part, where the witness invokes (1) on cross-examination as to a matter elicited by the state on direct examination or (2) with respect to matters tending to establish untruthfulness with respect to specific events of the crime charged or (3) precluding the defense from demonstrating bias and interest.[60]

A different rule, of course, pertains where it is the defendant himself asserting the Fifth Amendment on cross-examination, because asking a testifying defendant relevant questions that induce the assertion of the privilege is permissible as a form of comment on the defendant's credibility.[61] Thus, there is no error in requiring a defendant, who is going to or already has testified on direct, to invoke the privilege in front of the jury on cross-examination and no need (or right probably) to strike the defendant's direct testimony.[62] Precluding a defendant from testifying at all or striking his direct testimony when he invokes the privilege on cross-examination undoubtedly infringes on a defendant's constitutional right to testify in his own defense. If inadmissible evidence is sought by the state on cross-examination prompting defendant's invocation (such as evidence of other acts inadmissible under Rule 404(b) and 403), this may require a reversal of any conviction.

Civil Proceedings

A party or a witness can claim the privilege during discovery or at trial in a civil case where there is a reasonable apprehension of future criminal prosecution.[63] As in criminal cases, whether the privilege is properly invoked is a question of law for the court to decide.

With respect to discovery, the invoking person can assert the privilege to justify a refusal to respond to interrogatories, answer deposition questions (once appearing at the deposition[64]), produce documents or answer requests for admission.[65] If the privilege is properly invoked by a party during discovery, the trial court may not subject the party to sanctions such as striking an answer and entering default, because a party does not violate discovery orders when she has a constitutional right to

The *Namet/Corrales* Caveat

Namet v. United States,[1] decided by the U.S. Supreme Court in 1963, involved a prosecution under the federal wagering tax law. Two co-defendants, a husband and wife, ran a retail business and previously advised the prosecutor that defendant was a bookie who collected the wagers made in their store and settled gambling debts with them. They changed their pleas to guilty on the day of trial and advised the prosecutor they would take the Fifth Amendment because they were still being investigated by the IRS. The prosecutor at the trial nevertheless called both witnesses, each of whom invoked the privilege with respect to incriminating questions concerning their relationship with the defendant.

The narrow question presented, as framed by the Supreme Court, was whether it was reversible error to permit the government to question the two invoking witnesses after it was known they were going to invoke their privilege not to incriminate themselves. The defendant argued that when a witness is asked whether he participated in criminal activity with the defendant, a refusal to answer based on the privilege against self-incrimination tends to imply to the jury that a truthful answer would be in the affirmative and that such an inference cannot properly be used as evidence against a defendant in a criminal case.

The Supreme Court, without determining the correctness of certain lower court opinions on which defendant relied, referred to two distinct grounds of error urged by the defendant and found in such opinions.

One ground is prosecutorial misconduct "when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege," especially where the prosecutor in closing argument attempts "to make use of the adverse inferences."[2]

A second ground is where in 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,"[3] such as where the challenged inferences were the only corroboration for the prosecutor's case.

The *Namet* Court, in a 7–2 opinion, upheld the defendant's conviction on the basis that prosecutorial misconduct was not present. It also determined that where the prosecutor only asked four questions held to be privileged, such lapses, when the trial was viewed as a whole, did not amount to a deliberate attempt "to make capital out of witnesses' refusals to testify."[4]

In *Douglas v. Alabama*,[5] decided two years later, the Court recognized the constitutional bases of the *Namet* rule and applied them to the states.

In *State v. Caldwell*,[6] decided in 1977, the Arizona Supreme Court discussed *Namet* and its rules, indicating that in a given situation where a prosecutor called an invoking witness to the stand, *Namet* might be violated. In *Caldwell*, where an alleged accomplice invoked the privilege, *Namet* was not implicated because the prosecutor was not certain the witness would refuse to answer questions and a prosecutor (as well as a defendant) always has a right to present a witness to a jury under such circumstances.[7] Moreover, the prosecutor withdrew the witness as soon as the privilege was invoked.

This led to *State v. Corrales*.[8] There, in 1983, the Arizona Supreme Court used *Namet* principles to reverse convictions, including first-degree murder, kidnapping and aggravated assault. The trial court had permitted the prosecutor to call defendant's alleged accomplice, who had been previously convicted and sentenced, even though court and counsel knew he would invoke his privilege against self-incrimination. The trial court erroneously had ordered the witness to testify under the mistaken belief that the right to invoke the Fifth Amendment ended on sentencing.[9] The witness nevertheless refused to testify and asserted his privilege. The prosecutor continued to ask the witness separate questions that implied defendant's guilt, such as whether he was involved in the burglary of and theft from the victim's residence, whether he knew the defendant, and whether he was involved in the death of the victim.

This line of questioning after the prosecutor knew the defendant was not going to follow the judge's order to answer the questions was held to violate both parts of the *Namet* rule[10] and violated defendant's Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process and a fair trial.[11]

The Court noted what the proper procedure should have been: Once the prosecutor knew the witness was going to invoke the privilege with respect to all questions, instruct the witness and determine whether he was going to obey the court's instructions. Failing that, the witness could have been withdrawn without serious harm to defendant's rights.[12]

In *Corrales*, the prosecutor should not have called the invoking witness before the jury but rather let the court decide the witness's claim of privilege outside the jury's presence. After all, the witness already had been convicted of first-degree murder and sentenced to life imprisonment. In *Corrales*, the Arizona Supreme Court noted the scarcity of cases holding that *Namet* is violated by the mere act of the state calling a witness to the stand to invoke before the jury before any suggestive question. But, the Court went on, it could "easily hypothesize situations where the prosecution could add critical weight to its case merely by putting the witness on the stand."[13] The Court offered the example of a defendant charged with selling narcotics who denies the transaction involved drugs. It would be improper to force the buyer (not a police officer) to claim the privilege before the jury as it "might well lend critical weight to the state's case."[14]

endnotes

1. 373 U.S. 179 (1963).
2. *Id.* at 186.
3. *Id.* at 187.
4. *Id.* at 189.
5. 380 U.S. 415 (1965).
6. 573 P.2d 864 (Ariz. 1977).
7. *Id.* at 873. *See also State v. Corrales*, 676 P.2d 615, 620 (Ariz. 1983); *State v. Blankinship*, 622 P.2d 66 (Ariz. Ct. App. 1980) (where prosecutor has no prior knowledge that witness will refuse to answer, witness may be called to stand).
8. 676 P.2d 615 (Ariz. 1983).
9. *State v. Gortarez*, 686 P.2d 1224, 1230 (Ariz. 1984). *See* discussion in the main text at note 40.
10. *See State v. Skinner*, 515 P.2d 880, 891 (Ariz. 1973), for a further discussion of *Namet* and for an analysis of factors that may be considered on the "critical weight" issue.
11. *Corrales*, 676 P.2d at 626.
12. *Id.*
13. *Id.* n. 4.
14. *Id.*

invoke her privilege against self-incrimination.[66] But because the opposing party usually needs such evidence to prosecute its case or defend itself, the trier of fact is free to draw a negative inference from the invocation of the privilege.[67] Moreover, the invoking party may not testify at the trial and then invoke the privilege with respect to that part of the case about which she does not want to be cross-examined.[68] If she chooses to testify, she waives the privilege against self-incrimination.[69] If she testifies on direct and refuses to be cross-examined, her direct testimony should be stricken.[70]

To retain the protection of the Fifth Amendment, the party may not offer personal testimony to support her case, but she may still offer other evidence to meet her burden of proof.[71] Unlike in other jurisdictions, it has been held by the Arizona Supreme Court[72] that a party who invokes the privilege during discovery may extinguish the negative inference by later choosing to testify at trial. It is difficult to believe in light of Rule 26.1 and Arizona's strong policy against trial by surprise that this will remain law when the Arizona Supreme Court is again presented with the issue.[73]

Finally, there is no constitutional right to a stay of a civil suit until parallel criminal proceedings are completed, but there may be circumstances where such relief should be granted in a given case.[74]

Conclusion

Notwithstanding the cruel events of 9/11, hopefully this short sojourn through trilemmaland will reinforce the well-established notion that taking the Fifth in this

nation of constitutional mandates should always be available for the innocent and the not-so-innocent.

Hon. Robert L. Gottsfield is a judge of the Maricopa County Superior Court in Phoenix. He appreciates the editorial assistance of Tim Eigo.

endnotes

1. J. LIVERMORE, R. BARTELS & A. HAMEROFF, ARIZONA PRACTICE, LAW OF EVIDENCE § 501.1, at 165 (4th ed. 2000).
2. *Id. See also Murphy v. Waterfront Comm'n of New York*, 378 U.S. 52, 55 (1964).
3. ARIZ. CONST. art. 2, § 10.
4. U.S. CONST. amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (Fifth Amendment applicable to states under Fourteenth Amendment).
5. The Fifth Amendment also provides for a grand jury in a capital case, grants double jeopardy protection, prohibits the taking of private property for public use without just compensation and contains the language "nor be deprived of life, liberty, or property, without due process of law."
6. The Supreme Court in its term just ended decided two cases affecting the *Miranda* rule. *United States v. Patane*, No. 02-1183, permitted the police to introduce physical evidence discovered as the result of statements from a suspect who did not receive *Miranda* warnings. *Hiibel v. Sixth Judicial District Court*, No. 03-5554, held that the police are entitled to obtain the name of someone they suspect might be involved in a crime, even in the absence of the probable cause necessary to make an arrest.
7. 538 U.S. 760 (2003).
8. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *State v. Ott*, 808 P.2d 305, 310 (Ariz. Ct. App. 1990), *rev. denied*, April 23, 1991. The privilege is available whether in a civil, criminal, administrative or congressional hearing and whether formal or informal. Corporations, unincorporated entities and partnerships cannot claim the privilege, because it protects only individuals, who cannot invoke their personal privilege to protect the entity. LIVERMORE ET AL. *supra* note 1, at 164. Moreover, the Fifth Amendment offers no protection against compulsion to submit to fingerprinting, photographing, measurements, to write or speak for identification and other such physical characteristics of the accused. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966).
9. *Hoffman v United States*, 341 U.S. 479, 486, (1951); *Flagler v. Derickson*, 655 P.2d 349, 351 (Ariz. 1982); *State v. Maldonado*, 889 P.2d 1, 4 (Ariz. Ct. App. 1994).
10. *Ohio v. Reiner*, 532 U.S. 17 (2001).
11. *Wohlstrom v. Buchanan*, 884 P.2d 687, 692 (Ariz 1994). Although technically a trial judge may overrule a claim of privilege, it is rare to do so except under the clearest of circumstances. See discussion by LIVERMORE ET AL., *supra* note 1, at 166-67.
12. *State v. Mills*, 995 P.2d 705, 713 (Ariz. Ct. App. 1999), *rev. denied*, Feb. 8, 2000.
13. *State v. Cornejo*, 677 P.2d 1312, 1315 (Ariz. Ct. App. 1983), *rev. denied*, Mar. 13, 1984.
14. *Mills*, 995 P.2d at 713. Moreover, under ARIZ.R.EVID. 611(b), cross-examination is not restricted to matters covered on direct examination but the witness "may be cross-examined on any relevant matter."
15. *Thoresen v. Superior Court*, 461 P.2d 706, 711 (Ariz. Ct. App. 1969).
16. *Rogers v. United States*, 340 U.S. 367, 371 (1951); *Flagler*, 655 P.2d at 351. It can only be claimed by an individual about to incriminate oneself. *Maldonado*, 889 P.2d at 3. *See also* note 8 *supra*.
17. This is the rule in civil and criminal cases. *Ott*, 808 P.2d at 312; *Thoresen*, 461 P.2d at 711; *State v. McDaniel*, 665 P.2d 70 (Ariz. 1983) (blanket assertion allowed only where clear any examination will involve risk of incrimination).
18. *State ex rel. Romley v. Sheldon*, 7 P.3d 118 (Ariz. Ct. App. 2000), *rev. denied*, Dec. 5, 2000.
19. *State v. Encinas*, 647 P.2d 624, 626-7 (Ariz. 1982) (defendant should have been permitted to present accomplice to jury even though he was taking the Fifth, but harmless error because defense of duress, which co-felon witness called to testify about, was unavailable by statute in a homicide/serious injury case); *State v. Gretzler*, 612 P.2d 1023 (Ariz. 1980) (co-defendant previously tried should have been presented to jury but error harmless beyond a reasonable doubt because of overwhelming evidence of guilt); *State v. Ortiz*, 546 P.2d 796 (Ariz. 1976) (conviction reversed where defendant not allowed to present two defense witnesses who would take Fifth); *State v. Cota*, 432 P.2d 428, 433 (Ariz. 1967), *cert. denied*, 390 U.S. 1008 (1968) (state had right to present co-defendant to jury who answered a number of questions and then took Fifth: "The state had the right to show that it was presenting all the relevant evidence at its disposal in order to prove its theory of the case"). *Cf. State v. McAnulty*, 909 P.2d 466 (Ariz. Ct. App. 1995) (where defendant in sex case testified but took Fifth on 404(b) other acts evidence, trial court acted within discretion requiring defendant to take Fifth seven times on cross-examination in front of jury), which shows there is a different rule when it is the defendant who is testifying; *see infra* text accompanying notes 57, 58, 61 and 62.
20. *State v. Henry*, 863 P.2d 861, 872 (Ariz. 1993); *State v. Corrales*, 676 P.2d 615, 620 (Ariz. 1983) (decision to permit prosecutor to call witness who will take Fifth is discretionary with trial judge); *McDaniel*, 665 P.2d at 76; *Mills*, 995 P.2d at 713; *State v. Doody*, 930 P.2d 440, 453 (Ariz. Ct. App. 1996), *rev. denied*, Jan. 14, 1997, *cert. denied*, 520 U.S. 1275 (1997); *Maldonado*, 889 P.2d at 3. *Cf. Namet v. United States*, 373 U.S. 179 (1963) (not error for prosecutor to put on two co-defendants who had pleaded guilty even though he knew they would take the Fifth; witness allowed to testify concerning non-privileged information). The Arizona cases cited in this footnote would excuse a witness from testifying in entirety in court's discretion assuming judge has extensive knowledge of the case.
21. *McDaniel*, 665 P.2d at 76.
22. *Id.*
23. *Id.; Cornejo*, 667 P.2d at 1315.
24. *Mills*, 995 P.2d at 712; *Maldonado*, 889 P.2d at 3.
25. 676 P.2d 615 (Ariz. 1983).
26. *Id.* at 620.
27. *Id.*
28. *State v. Williams*, 650 P.2d 1202 (Ariz. 1982).
29. *Corrales*, 676 P.2d at 620.
30. *Id.*
31. *Id.*
32. *Id.* at 620-21.
33. *Id.*
34. *See State v. Jones*, 4 P.3d 345, 355-57 (Ariz. 2000), *cert. denied*, 532 U.S. 978 (2001), and cases there cited.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Henry*, 863 P.2d at 867. *See* ARIZ.R.EVID. 804(a)(1).
39. *Id.*
40. *State v. Gortarez*, 686 P.2d 1224, 1230 (Ariz. 1984).
41. *See* discussion and cases, LIVERMORE ET AL., *supra* note 1, § 501.8, at 170.
42. *State v. Rosas-Hernandez*, 42 P.3d 1177 (Ariz. Ct. App. 2002).
43. *In re Miguel R.*, 63 P.3d 1065, 1074 (Ariz. Ct. App. 2003).
44. *State v. Verdugo*, 602 P.2d 472, 475 (Ariz. 1979).
45. *State v. Gertz*, 918 P.2d 1056 (Ariz. Ct. App. 1995).
46. A.R.S. § 13-4064. *See also* similar protection granted in administrative proceedings § 41-1066. *See Mills*, 995 P.2d at 713, where the court distinguishes a "free talk" interview from a grant of immunity.
47. *Verdugo*, 602 P.2d at 475.
48. *Id.*
49. *See Doody*, 930 P.2d at 453, which cites *State v. Axley*, 646 P.2d 268, 273 (Ariz. 1982). Defense witnesses normally need not be immunized. *State v. Fisher*, 686 P.2d 750 (Ariz. 1984), *cert. denied*, 469 U.S. 1066 (1984). For additional authority, *see* LIVERMORE ET AL., *supra* note 1, at 171 n.38.
50. *Henry*, 863 P.2d at 873; *McDaniel*, 665 P.2d at 75.
51. *Id.* LIVERMORE ET AL., *supra* note 1, at 127.
52. *Id.*
53. *Pool v. Superior Court*, 677 P.2d 261, 266 (Ariz. 1984).
54. *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (witness gave prior grand jury testimony); *Doody*, 930 P.2d at 452-53 (witness gave prior juvenile transfer hearing testimony).
55. *See supra* notes 22-24 and accompanying text.
56. *See supra* notes 15-18 and accompanying text.
57. LIVERMORE ET AL., *supra* note 1, at 173.
58. *Id.* at 173-74.
59. *State v. Holsinger*, 601 P.2d 1054 (Ariz. 1979).
60. *State v. Dunlap*, 608 P.2d 41, 43 (Ariz. 1980).
61. *See supra* discussion accompanying note 57.
62. *Id.*
63. *Lefkowitz v. Turley*, 414 U.S. at 77; *Montoya v. Superior Court*, 840 P.2d 305, 307 (Ariz. Ct. App. 1992); *Ott*, 808 P.2d at 310 (civil racketeering forfeiture case); *see infra* cases cited at note 66.
64. *See supra* note 18.
65. *See* excellent discussion of the area in *Ott*, 808 P.2d at 310, and the general rule that, as in criminal cases, a blanket assertion of the privilege in a civil case is not permitted.
66. *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) (state may not threaten to inflict

potent sanctions unless a witness surrenders his Fifth Amendment privilege, but it is permissible for an inference to be drawn in a civil case from a party's refusal to testify); *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976) (prisoner's silence in a disciplinary hearing can be used against him because any punishment had to be based on more than his assertion of the privilege); *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979) (improper to order plaintiff to answer defendant's questions or suffer dismissal, because it forced plaintiff to choose between his silence and his lawsuit); *Campbell v. Gerrans*, 592 F.2d 1054, 1055 (9th Cir. 1979) (reversing dismissal of lawsuit entered because plaintiffs invoked and refused to answer certain interrogatories); *Chadwick v. Superior Court*, 908 P.2d 4 (Ariz. Ct. App. 1995), *rev. denied*, Dec. 19, 1995; *Wohlstrom v. Buchanan*, 884 P.2d 687, 689 (Ariz. 1994) (claimant to currency that was subject to forfeiture could not have claim struck for failure to disclose how he acquired the property); *Montoya*, 840 P.2d at 307 (reversing striking father's pleadings, entering of default, and award of custody to mother, where father invoked and refused to answer questions about his past drug use); *Ott*, 808 P.2d at 310 (reversing order requiring defendant to respond to requests for admission and summary judgment entered thereon in a civil racketeering forfeiture action); *Buzard v. Griffin*, 358 P.2d 155, 163 (Ariz. 1960) (contestee in election contest could take Fifth at deposition, and trial court properly refused to compel him to answer so contestants not entitled to judgment on that basis).

67. *See supra* cases at note 66; *Wilson v. Allstate Ins. Co.*, 785 F.2d 311 (6th Cir. 1986) (plaintiff insureds at trial may assert privilege and need not produce tax returns, but insurer to prove defense of fraud, needed to cross-examine the plaintiffs and thus their direct testimony is struck and judgment appropriately entered in favor of Allstate); *State v. Heinze*, 993 P.2d 1090 (Ariz. Ct. App. 1999), *rev. denied*, Feb. 8, 2000 (state employee agreeing to invoke Fifth Amendment at trial as part of a *Morris* agreement in a civil case for damages against employee charged with sexual harassment, permits plaintiff's counsel to comment on employee's failure to testify and is not improper under facts presented but in accord with the general rule in civil cases); *see also* Mark R. Kosieradzki & Daniel T. Driscoll, *When the Fifth Amendment Hurts Your Client*, TRIAL, Dec. 2000, at 69-73.
68. *Brown v. United States*, 356 U.S. 148, 155-56 (1958); *Montoya*, 840 P.2d at 307; *Gilbert v. McGhee*, 524 P.2d 157, 160 (Ariz. 1974).
69. *Id.*
70. *Id.*
71. *Montoya*, 840 P.2d at 307.
72. *Buzard v. Griffin*, 358 P.2d at 163; *see Montoya*, 840 P.2d at 307.
73. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2018 (2d ed. 1987), criticizing Arizona's rule that the negative inference can be extinguished because it allows a party to defeat discovery by taking the Fifth and then have full benefit of the testimony at trial.
74. *See* listing of cases in *Chadwick*, 908 P.2d at 4 (teacher had no right to have dismissal hearing stayed pending resolution of criminal charges especially where school board assured teacher his silence during administrative investigation would not be held against him); *Ott*, 808 P.2d at 310.