# C WITNESS OTHER THAN THE DEFENDANT INVOKING THE FIFTH AMENDMENT

1. You have heard [*insert witness’s name*] exercise his right under the Fifth Amendment to the United States Constitution to refuse to answer questions because the testimony might tend to incriminate him.
2. You must not infer anything at all, for or against either the government or the defendant, because the witness did not answer.

# Use Note

This instruction should be used when a witness other than the defendant declines to answer questions because of the Fifth Amendment.

# Committee Commentary 7.02C

(current as of October 1, 2021)

This instruction is a cautionary instruction to help offset any prejudice that may arise when a witness declines to testify based on the Fifth Amendment.

The Sixth Circuit has quoted limiting instructions which helped avoid error when witnesses asserted the Fifth Amendment. *See* United States v. Mack, 159 F.3d 208, 217 (6th Cir. 1998); United States v. Okeezie, 1993 WL 20997, 10, 1993 U.S. App. LEXIS 1968, 4 (6th Cir. 1993) (unpublished). The language of Instruction 7.02C is based on these quoted instructions.

The Fifth Amendment to the United States Constitution states that “No person shall be . .

. compelled in any criminal case to be a witness against himself . . . .” This privilege applies to a witness at a trial as well as to the defendant. *See, e.g., Mack, supra*; United States v. Gaitan- Acevedo, 148 F.3d 577, 588 (6th Cir. 1998). Thus, the parties’ right to compel witnesses to testify must yield to the witness’s assertion of the Fifth Amendment, assuming it is properly invoked. *Mack, supra*; *Gaitan-Acevedo,* 148 F.3d at 588, *citing* United States v. Damiano, 579 F.2d 1001, 1003 (6th Cir. 1978).

To assert the privilege, the witness must have a reasonable fear of danger of prosecution. *Mack*, *supra*; *Gaitan-Acevedo, supra* at 588, *citing Damiano, supra*. *See also* In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) (“reasonable cause to apprehend a real danger of incrimination”), *citing* Hoffman v. United States, 341 U.S. 479 (1951). The privilege can be asserted to cover answers which would themselves support a criminal conviction, and also to cover answers which would furnish a link in the chain of evidence needed to prosecute. *In re* Morganroth, *supra* at 164, *citing Hoffman*, 341 U.S. at 486.

Although a witness has a right to assert the Fifth Amendment when called to testify, there

is some danger in allowing the witness to assert it in front of a jury. In United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980), the court explained:

There are two constitutional problems which may arise when a witness is presented who refuses to testify relying upon the fifth amendment privilege. The first problem is that such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, a violation of due process. “Neither side has the right to benefit from any inferences the jury may draw from the witness’ assertion of the privilege alone or in conjunction with questions that have been put to him.” Nevertheless, although guilt is not properly inferable from the exercise of the privilege, it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.

Second, calling such a witness encroaches upon the right to confrontation. The

probative value of this sort of testimony is almost entirely undercut by the impossibility of testing it through cross-examination.

*Vandetti, supra* (citations omitted). In addition, the American Bar Association Standards for Criminal Justice provide that the prosecution and defense should not call a witness in the presence of the jury who the party knows will claim a valid privilege not to testify. See American Bar Association Standards for Criminal Justice, the Prosecution Function, Standard 3- 5.7(c) and *id.*, the Defense Function, Standard 4-7.6(c).

Notwithstanding these dangers, parties may still seek to call a witness, subject to the court’s discretion, knowing the witness will refuse to answer under the Fifth Amendment. United States v. Vandetti, *supra* at 1147, *citing* United States v. Kilpatrick, 477 F.2d 357, 360 (6th Cir. 1973) and United States v. Compton, 365 F.2d 1, 5 (6th Cir. 1966). *See, e.g.,* United

States v. Mack, *supra* at 217. *See also* Lindsey v. United States, 484 U.S. 934 (1987) (White and Brennan, JJ., dissenting from denial of cert., acknowledging Sixth Circuit law that party may seek to call witness whom party knows will assert the Fifth Amendment and noting circuit split on this issue).

Because of the competing interests involved, *i.e.*, the constitutional concerns versus the factfinders’ need to operate with as much relevant information as possible, the judge should “closely scrutinize” requests to call a witness who has indicated he will assert the Fifth Amendment. *Vandetti*, 623 F.2d at 1147, *citing* United States v. Maffei, 450 F.2d 928, 929 (6th Cir. 1971). The judge should “weigh a number of factors in striking a balance between the competing interests.” *Vandetti,* 623 F.2d at 1149, *citing* Eichel v. New York Central R. Co, 375

U.S. 253, 255 (1963). “The judge must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice.” *Vandetti,* 623 F.2d at 1149, *citing* F. R. Evid. 403. Factors to balance include: (1) the extent of the questioning following the witness’s assertion of the Fifth Amendment, *see Vandetti*, 623 F.2d at 1149; (2) the value of the testimony sought, *id.*; (3) the phrasing of the questions to minimize prejudice, *id.* at 1150; and (4) the effect of a limiting instruction, United States v. Epley, 52 F.3d 571, 577 (6th Cir. 1995) and *Vandetti*, 623 F.2d at 1149.

The Sixth Circuit has elaborated on the role of cautionary instructions, stating:

Even though a cautionary instruction may be useful, it may not be sufficiently ameliorative in all cases. Some courts have suggested that any prejudice to

the government arising from the absence of a witness, who, if called, would assert his fifth amendment privilege, can be dissipated by an instruction that the witness is not available to either side and that no inferences about his testimony may be drawn by the jury.

*Vandetti*, 623 F.2d at 1148 & 1150 (citations omitted).