ADVANCE SHEET HEADNOTE
June 12, 2023

2023 CO 35

No. 21SC458, *Rios-Vargas v. People*—Criminal Law—Fifth Amendment—Sixth Amendment—Alternate Suspect Defense.

The supreme court overrules *People v. Dikeman*, 555 P.2d 519 (Colo. 1976), and holds that a defendant is entitled, in the presence of the jury, to question a nonparty alternate suspect who intends to invoke their Fifth Amendment privilege under the circumstances and procedures set forth in this opinion. First, at a hearing outside the jury's presence, the court should determine whether (1) there is a non-speculative connection between the alternate suspect and the crime with which the defendant is charged, and (2) the alternate suspect has a valid claim of Fifth Amendment privilege. Then, the court should exercise discretion to impose reasonable limits on questioning that implicates the Fifth Amendment to avoid unnecessary courtroom drama. Finally, after the defendant has questioned the witness before the jury, the court should instruct jurors that a witness has a constitutional right to invoke the Fifth Amendment.

Here, the trial court erroneously accepted the alternate suspect's blanket Fifth Amendment invocation without holding a hearing. Because this error was not harmless, we reverse the judgment of the court of appeals and remand for a new trial consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 35

Supreme Court Case No. 21SC458
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 18CA1848

Petitioner:

Nora Hilda Rios-Vargas,

v.

Respondent:

The People of the State of Colorado.

Judgment Reversed
en banc
June 12, 2023

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JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **JUSTICE GABRIEL, JUSTICE HART**, and **JUSTICE SAMOUR** joined.
CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE HOOD** and **JUSTICE BERKENKOTTER,** dissented.

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 In this case, there is reason to believe the defendant, Nora Hilda Rios-Vargas, did not commit the burglary with which she was charged. At trial, she argued the crime was committed by a nonparty alternate suspect, Sylvia Villalobos, who knew when the owner would be away, knew the location of the items that were stolen, had unique reasons for wanting those items, and had a motive for framing Rios-Vargas. Even the victim suspected Villalobos.

¶2 Despite the strength of the connection between Villalobos and the burglary, and even though Rios-Vargas's defense hinged on this connection, the jury was not allowed to see or hear from Villalobos. The trial court accepted Villalobos's blanket invocation of her Fifth Amendment privilege against self-incrimination and ruled that Rios-Vargas could not call her to the stand. It further prohibited defense counsel from informing the jury why Villalobos did not testify. As a result, the prosecution was able to tell two conflicting narratives. Before the judge, the prosecution argued that Villalobos's connection to the crime was so strong that any testimony she gave would be necessarily incriminating. But to the jury, which convicted Rios-Vargas, the prosecution called the alternate suspect theory the "[v]ery definition of imaginary and speculative."

¶3 We granted certiorari review to decide whether a defendant may call to the witness stand a nonparty alternate suspect who intends to assert their Fifth

Amendment privilege against self-incrimination, and if not, what the jury may be told about the alternate suspect's failure to appear.[1] Today, we revisit *People v. Dikeman*, 555 P.2d 519 (Colo. 1976), which overruled *O'Chiato v. People*, 214 P. 404, 405 (Colo. 1923), a half-century-old decision holding that a criminal defendant's right to compel the attendance of witnesses at trial includes the right to propound incriminating questions to a nonparty witness in the presence of a jury, even when the witness intends to assert their Fifth Amendment privilege. In *O'Chiato*, we reasoned that the privilege against self-incrimination is an option of refusal, not a prohibition of inquiry; thus, while a witness may refuse to give an answer that would tend to incriminate them, the privilege "does not bar the asking of the

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[1] We granted certiorari to review the following issues:

1. Whether a defendant is entitled to question an alternate suspect in the jury's presence when a defendant asserts that someone else committed the offense for which they are on trial, that assertion possesses evidentiary support, and the alternate suspect invokes their Fifth Amendment privilege concerning the matter.
2. Whether, when a court prohibits the defense from questioning, in the jury's presence, an alternate suspect who has invoked their Fifth Amendment privilege, the defendant may inform the jury why it did not question the alternate suspect.
3. Whether, when a trial court erroneously prevents a defendant from questioning an alternate suspect, an appellate court may deem the error harmless without a remand hearing to establish what evidence was improperly excluded.

question." 214 P. at 405. But in *Dikeman*, we reversed course. With little analysis, and no discussion of the principles of stare decisis, we overruled *O'Chiato* and held that the general rule prohibiting the *prosecution* from calling a witness who intends to invoke the Fifth Amendment extends equally to the defense. *Dikeman,* 555 P.2d at 520–21. Today, we come full circle and overrule *Dikeman*. We conclude that *Dikeman* was erroneously decided because it was based on unsound reasoning, disregarded defendants' constitutional rights, and overlooked asymmetries between the prosecution and defense in this context.

¶4 We now hold that a defendant is entitled to question a nonparty alternate suspect in the jury's presence under the circumstances and procedures set forth in this opinion. First, the trial court must determine whether, under *People v. Elmarr*, 2015 CO 53, ¶ 32, 351 P.3d 431, 439, there is a non-speculative connection between the nonparty alternate suspect and the crime with which the defendant is charged. Second, if the requirements of *Elmarr* are met, the court must determine whether the alternate suspect has a valid claim of Fifth Amendment privilege at a hearing outside the presence of the jury. Third, if the alternate suspect has a valid claim of privilege, the court should determine the areas of questioning that implicate the Fifth Amendment, exercising discretion to impose reasonable limits on such questioning to avoid unnecessary courtroom drama. The defense then should be permitted to call the nonparty alternate suspect in front of the jury and ask any

questions the court has determined do not implicate the Fifth Amendment. When those questions have been asked, defense counsel may ask the questions to which the witness may invoke the privilege. Finally, after the witness testifies, the court should excuse the witness and instruct the jury that a witness has a constitutional right to invoke the Fifth Amendment and refuse to answer questions.

¶5 In practice, our holding today will apply in relatively narrow circumstances. But there are cases where the trial court, in refusing a defendant's request to question a nonparty alternate suspect in the jury's presence, infringes on the defendant's constitutional right to present a defense. This is such a case. Because the trial court erred in accepting Villalobos's blanket Fifth Amendment invocation without holding a hearing outside the presence of the jury, and because that error was not harmless, we reverse Rios-Vargas's conviction and remand for a new trial consistent with this opinion.

I. Facts and Procedural History

¶6 In September 2013, Bobby Vialpando's trailer home was burglarized while he was away on vacation. Vialpando's sister called the police to report that the back door to the trailer was open.

¶7 Upon arriving, the police found a hole in the master bedroom door and two kitchen knives nearby. They theorized that the burglar used the knives to carve a hole in the door to reach through and unlock it. Next to two additional knives in

the master bathroom, the police found a piece of latex glove with a smear of blood on it. Of the samples collected, the latex glove was the only item submitted for DNA analysis.

¶8 When Vialpando returned, he identified the missing items, including over $15,000 in jewelry, a wallet, and a five-gallon bottle filled with approximately $3,000 in loose coins. Vialpando also discovered that his ownership title for a trailer located across the street was missing. Vialpando rented that trailer to his niece, Villalobos.

¶9 Vialpando immediately suspected that Villalobos burglarized his trailer. He explained to the police that just before leaving for vacation, he had threatened to evict Villalobos for nonpayment of rent. Moreover, Villalobos knew Vialpando would be gone for the week, and she was one of the few people who knew the location of the stolen items in his master bedroom. Vialpando added that Villalobos had previously stolen from his family; that Villalobos was living with a tattoo artist who had access to latex gloves; that Villalobos knew the value of the stolen jewelry because she was with Vialpando when he pawned similar pieces; and that Villalobos had moved out of the trailer right around the time of the burglary. Later, Vialpando contacted the police to show them handfuls of coins he discovered scattered in and around the trailer Villalobos had recently vacated. Vialpando assumed the coins had been his.

¶10 During the initial investigation, the police uncovered other information linking Villalobos to the burglary. While interviewing Rios-Vargas and her ex-husband, Paciano Garcia-Escobar, about a robbery involving Villalobos's boyfriend,[2] the police inquired about the burglary of Vialpando's trailer. Garcia-Escobar told the police he overheard Villalobos talk about robbing a family member. And Rios-Vargas told the police that Villalobos said she would make her uncle pay for kicking her out of his trailer. Rios-Vargas also said she was with Villalobos when Villalobos cashed approximately $120 worth of coins at a cashing machine. In addition, both Garcia-Escobar and Rios-Vargas told the police they noticed Villalobos had new pieces of jewelry, which Villalobos said she had purchased from an uncle.

¶11 Although the police considered Villalobos "suspect number 1," they never interviewed her. The police documented several unsuccessful attempts to contact Villalobos. But they did not visit Villalobos's new address, nor did they interview Villalobos's family or friends. Approximately four months after the burglary, the police stopped working on the case.

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[2] On one occasion, Villalobos referred to this individual as a "family friend." On another occasion, she denied knowing him at all. Because the prosecution referred to him as "Villalobos's boyfriend," we do the same here.

¶12 More than a year later, in April 2015, the police learned that the DNA sample from the blood on the latex glove found in Vialpando's trailer matched a DNA sample from Rios-Vargas. Based on this evidence, Rios-Vargas was charged with second degree burglary.

¶13 At trial, Rios-Vargas argued that Villalobos committed the burglary and framed her for it. The defense theory included Villalobos's motive for framing Rios-Vargas: Around the time someone burglarized Vialpando's trailer, Rios-Vargas and her ex-husband cooperated in the robbery investigation involving Villalobos's boyfriend, who was subsequently arrested. Thus, defense counsel theorized, Villalobos committed the burglary and framed Rios-Vargas in retaliation for Rios-Vargas's cooperation in the investigation of her boyfriend.

¶14 Both the prosecution and the defense subpoenaed Villalobos to testify at trial. But mid-trial, the prosecution announced it would not call Villalobos and argued that Villalobos should be advised of her Fifth Amendment rights before Rios-Vargas could call her as a witness. According to the prosecution, there was "no way [defense counsel] ask[s] a question that doesn't lead into potential incrimination." The prosecution made clear that it had not offered Villalobos immunity and did not intend to do so. The trial court appointed alternate defense counsel, who subsequently informed the court that Villalobos would be "taking the Fifth."

¶15 The trial court declined to determine whether Villalobos would claim a valid privilege in response to specific questions. Instead, it accepted Villalobos's blanket invocation of the Fifth Amendment, reasoning that it was supported by objective evidence, including that (1) Villalobos lived across the street from Vialpando; (2) coins were taken from the burglary, and coins were found in front of Villalobos's trailer; (3) Villalobos knew when Vialpando would be on vacation; and (4) Villalobos had been "at least in the Court's opinion, not just coincidentally difficult to get a hold of by either side." The trial court further ruled that because Villalobos indicated her intent to exercise her Fifth Amendment privilege, Rios-Vargas could not call Villalobos to the stand "only to take the Fifth" before the jury. The trial court explained that Villalobos's Fifth Amendment rights were "paramount to the rights of Ms. Rios-Vargas to put on a defense." Finally, the court rejected Rios-Vargas's request to explain to the jury why she didn't call Villalobos as a witness. Specifically, the court prohibited the defense from informing the jury that it had subpoenaed Villalobos, who declined to testify on Fifth Amendment grounds, and that the prosecution declined to give Villalobos immunity.

¶16 After the trial court's ruling, defense counsel rested. Meanwhile, the prosecution capitalized on Villalobos's absence. During closing arguments, it summarized the case to the jury as one "about facts versus speculation." At

various times before the jury, the prosecution called Rios-Vargas's framing theory "a story without support"; "vague"; and the "[v]ery definition of imaginary and speculative." During rebuttal closing, it told the jury that the defense was asking it "to speculate and use [its] imagination to come up with a story that fits these facts" and urged the jury to "[r]eject that speculation."

¶17 The jury convicted Rios-Vargas of second degree burglary, and a division of the court of appeals affirmed. *People v. Rios-Vargas*, No. 18CA1848 (May 6, 2021). Relying on *Dikeman*, the division rejected Rios-Vargas's argument that she was entitled to call Villalobos as a witness. *Rios-Vargas*, ¶¶ 17–18. The division held that the trial court erred in accepting Villalobos's blanket invocation of her Fifth Amendment privilege and should have conducted a hearing outside the presence of the jury to determine the propriety of Villalobos's assertion. But it concluded that this error was harmless. *Id.* at ¶¶ 21, 29.

II. Analysis

¶18 We first lay the groundwork for this case by discussing the standard of review, the constitutional rights implicated, and our prior case law discussing whether a defendant can question a witness who intends to invoke the Fifth Amendment. We then explain why the *Dikeman* court's ruling on this issue was erroneous. Next, we set forth the procedure trial courts should employ when a defendant seeks to call a nonparty alternate suspect witness to the stand who

intends to invoke their Fifth Amendment privilege not to testify. Finally, we apply our holding to the facts of this case and describe why the trial court's error was not harmless.

A. Standard of Review

¶19 We review de novo a defendant's claim that the government violated their constitutional right to present a defense. *United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005); *see also Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005) (reviewing de novo whether the defendant was denied due process of law).

B. The Right to Present a Defense and the Privilege Against Self-Incrimination

¶20 The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)); *People v. Salazar*, 2012 CO 20, ¶ 17, 272 P.3d 1067, 1071. The right to present a defense has roots in the Sixth Amendment. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."); *see also* Colo. Const. art. II, § 16 ("[T]he accused shall have the right . . . to have process to compel the attendance of witnesses in his behalf . . . ."). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

¶21 The right to present a complete defense also has roots in due process, which requires that criminal prosecutions "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also People v. Chastain*, 733 P.2d 1206, 1212 (Colo. 1987) ("A defendant's right to compel the attendance of witnesses and to offer testimony at trial is 'a fundamental element of due process of law.'" (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967))). In plain terms, this constitutional right encompasses "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." *Washington*, 388 U.S. at 19.

¶22 The right to present a defense includes presenting one or more forms of evidence that an alternate suspect committed the crime. *Elmarr*, ¶ 30, 351 P.3d at 439. As we explained in *Elmarr*, alternate suspect evidence seeks to cast reasonable doubt on the material element of identity. *Id.* at ¶¶ 28–29, 351 P.3d at 438–39. "In other words, evidence indicating that someone else committed the crime tends to make the *defendant's* identity as the perpetrator less probable and, thus, creates reasonable doubt as to the defendant's guilt." *Id.* at ¶ 29, 351 P.3d at 439.

¶23 This case, which concerns whether a defendant relying on an alternate suspect defense may call a nonparty alternate suspect to testify at trial, implicates another constitutional right: the alternate suspect's Fifth Amendment privilege

against self-incrimination. *See* U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

¶24 The Fifth Amendment privilege extends to non-defendant witnesses, *Ohio v. Reiner*, 532 U.S. 17, 21 (2001), who are not required to answer questions "where the answers might incriminate [them] in future criminal proceedings," *People v. Ruch*, 2016 CO 35, ¶ 20, 379 P.3d 309, 313 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). An answer is incriminating "not only when it would itself support a conviction, but also when it would furnish a link in the chain of evidence needed to prosecute the accused." *Id.* at ¶ 21, 379 P.3d at 313.

¶25 Although a criminal defendant cannot be forced to take the stand and invoke the Fifth Amendment at his own trial, *see Griffin v. California*, 380 U.S. 609, 613–15 (1965), it is well-established that a witness who "'desires the protection of the privilege . . . must claim it' at the time he relies on it." *Salinas v. Texas*, 570 U.S. 178, 183 (2013) (omission in original) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). This is because the privilege against self-incrimination "is an option of refusal, not a prohibition of inquiry." *Ruch*, ¶ 23, 379 P.3d at 313 (quoting *People v. Austin*, 412 P.2d 425, 427 (Colo. 1966)). As such, a witness cannot assert the privilege "as a blanket claim in advance of the questions actually propounded" because to do so impermissibly converts the privilege into a "prohibition against inquiry." *Id.* at ¶¶ 23–24, 379 P.3d at 313–14. Thus, a witness may invoke the

privilege only when there is "reasonable cause to apprehend danger from a direct answer" to a question. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

¶26 We now turn to our case law.

C. *O'Chiato* and *Dikeman*

¶27 The question before us is whether a defendant may call a nonparty alternate suspect to the witness stand when that alternate suspect intends to exercise their Fifth Amendment privilege against self-incrimination.[3]

¶28 A century ago, in *O'Chiato*, we held the answer is "yes." 214 P. at 405. There, the defendant was charged with statutory rape. *Id.* at 404. As evidence that the defendant had sexual intercourse with the victim in February 1921, the victim

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[3] Other jurisdictions confronted with this issue have reached a variety of results that defy easy categorization. Numerous federal circuits simply afford trial courts discretion to determine whether the defendant can call a witness who intends to invoke the Fifth Amendment. *See, e.g.*, *United States v. Deutsch*, 987 F.2d 878, 883–85 (2d Cir. 1993); *United States v. Ballard*, 280 F. App'x 468, 470 (6th Cir. 2008). Many states follow this same approach. *See, e.g.*, *Gray v. State*, 796 A.2d 697, 714–15 (Md. 2002); *People v. Thomas*, 51 N.Y.2d 466, 472 (1980). Elsewhere, a nonparty witness who intends to invoke the Fifth Amendment must do so in the presence of the jury. *See, e.g.*, *State v. Herbert*, 767 S.E.2d 471, 479 (W. Va. 2014). Of the federal and state court decisions that bar the defendant from calling a witness who will assert the privilege, several involve codefendants (rather than nonparty witnesses), *see, e.g.*, *State v. Mitchell*, 487 P.2d 1156, 1161 (Or. Ct. App. 1971); *State v. Travis*, 541 P.2d 797, 798–99 (Utah 1975), while others neither acknowledge nor discuss defendants' countervailing Sixth Amendment rights, *see, e.g.*, *United States v. Harris*, 542 F.2d 1283, 1297–98 (7th Cir. 1976); *United States v. Licavoli*, 604 F.2d 613, 624 (9th Cir. 1979). In short, the case law does not break down neatly along majority or minority lines.

testified at trial that she gave birth to a child in November 1921 and that the defendant was the father. *Id.* at 404–05. The defendant sought to present evidence that another man, Sarno, had intercourse with the victim in January or February 1921 and that Sarno was the father of the child. *Id.* at 405. The defendant called Sarno to the stand. After being advised of his Fifth Amendment privilege, Sarno testified that on the occasion in question he was riding in an automobile with the victim and three other boys, that one of them suggested sexual intercourse, and that the victim responded, "All right." *Id.* At that point, the jury was sent out of the room, and defense counsel asked Sarno whether he had sexual intercourse with the victim on that occasion. *Id.* Sarno refused to answer. *Id.* Defense counsel then sought to ask Sarno the same question before the jury, and the trial court denied the request. *Id.* The jury convicted the defendant. *Id.* at 404.

¶29 On appeal, this court reversed and remanded for a new trial, holding that it was "error to refuse to permit the question to be asked in the presen[ce] of the jury." *Id.* at 405. We reasoned that defendants have the right to "compel the attendance of witnesses in [their] behalf," and that "[w]hile a witness may refuse to answer if the answer would tend to incriminate [them], . . . the privilege does not bar the asking of the question." *Id.* We further explained that the privilege is not violated merely by posing a question that the witness refuses to answer because "[t]he privilege is 'an option of refusal, [and] not a prohibition of

inquiry.'" *Id.* (quoting 8 John Henry Wigmore, Evidence in Trials at Common Law § 2268, at 402 (McNaughton rev. 1961)).

¶30 *O'Chiato* was the law in Colorado for over fifty years until this court abruptly reversed course in *Dikeman*. 555 P.2d at 520–21. There, the defendant and Mark Benning were charged with first-degree assault, although the charges against Benning were later dismissed for lack of probable cause. *Id.* at 519. At trial, the defendant sought to call Benning as a witness. *Id.* At an in camera hearing, Benning was questioned to determine whether he would invoke his Fifth Amendment privilege. *Id.* Benning refused to answer questions about the assault. *Id.* Relying on *O'Chiato*, the trial court permitted the defendant to ask Benning the same questions before the jury "even though it was evident that Benning would refuse to answer . . . on the grounds of self-incrimination." *Id.* at 519–20. The jury acquitted the defendant, and the prosecution appealed on a question of law. *Id.* at 519.

¶31 In disapproving the judgment and holding that the trial court erred, we relied on the rule that "the prosecution may not call a witness to testify before the jury if it knows that the witness will claim his privilege against self-incrimination." *Id.* at 520 (citing *De Gesualdo v. People*, 364 P.2d 374 (Colo. 1961)). We observed that a prosecution witness's refusal to answer questions on the ground of self-incrimination can improperly prejudice a defendant because the jury may

interpret such refusal as implying the defendant's guilt. *Id.* We further observed that the defendant is unable to counter that inference of guilt through further questioning of the witness. *Id.* Thus, concerns for fairness prohibit a prosecutor from using a witness's claim of privilege to the prosecution's advantage. *Id.*

¶32 We then decided that "[c]onsistency . . . requires Colorado to likewise adopt the same rule for the prosecution and for the defense." *Id.* Without discussing the principles of stare decisis, the *Dikeman* court overruled *O'Chiato* and held that "the defense may not ask a defense witness questions which it knows the witness will refuse to answer because of a valid claim to a privilege not to testify." *Id.*

¶33 Writing in dissent, Chief Justice Pringle asserted that this court's rule in *O'Chiato* was "eminently correct" and that a defendant's right to a jury trial includes the right to ask a witness questions before the jury, the answers to which would in effect exonerate the defendant if the privilege were not exercised. *Id*. at 521 (Pringle, C.J., dissenting).

D. *Dikeman* Was Erroneously Decided

¶34 Stare decisis is "a judge-made doctrine that promotes uniformity, certainty, and stability of the law." *People v. LaRosa*, 2013 CO 2, ¶ 28, 293 P.3d 567, 574. While the principles of stare decisis provide that this court will follow the rule of law it established in earlier cases, *Bedor v. Johnson*, 2013 CO 4, ¶ 23, 292 P.3d 924, 929, "[we] are not without power to depart from a prior ruling, or to overrule it, where

sound reasons exist," *Creacy v. Indus. Comm'n*, 366 P.2d 384, 386 (Colo. 1961); *see also People v. Porter*, 2015 CO 34, ¶ 23, 348 P.3d 922, 927 ("[Stare decisis] is not so rigid as to prevent us from reevaluating our precedent."). "We will depart from our existing law only if we are clearly convinced that (1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come from departing from precedent." *Love v. Klosky*, 2018 CO 20, ¶ 15, 413 P.3d 1267, 1270.

¶35 We conclude that *Dikeman* was erroneously decided when it deviated from *O'Chiato*'s longstanding rule and that departing from *Dikeman* will bring more good than harm.

¶36 *Dikeman*'s rationale was unsound for several reasons. First, as an overarching matter, *Dikeman* failed to consider defendants' right to present a defense. In fact, the majority opinion's limited analysis contains no discussion at all of defendants' constitutional rights.

¶37 Second, in concluding that the rule meant to constrain prosecutors should be extended to defendants, *Dikeman* relied principally on *State v. Smith*, 446 P.2d 571, 581 (Wash. 1968), *vacated in part on other grounds by Smith v. Washington*, 408 U.S. 934 (1972), *and overruled on other grounds by State v. Gosby*, 539 P.2d 680 (Wash. 1975), a Washington case that did not involve a nonparty alternate suspect. *Dikeman*, 555 P.2d at 520. *Smith* concerned a defendant who was denied the

opportunity to call his *codefendant* (not a nonparty witness) to the stand during their joint trial. 446 P.2d at 580. In short, *Smith* concerned codefendants in a joint trial and the issue of severance—a situation that raises entirely different concerns than a single defendant who seeks to call a nonparty alternate suspect witness. The Washington Supreme Court itself apparently recognized this distinction, acknowledging that had there been separate trials, the defendant *would* have been permitted to call the other accused, who would have had to assert his privilege on the stand. *Id.*

¶38 Third, *Dikeman* failed to consider the inherent asymmetries between the prosecution and the defense. A prosecutor "is a judicial officer sworn to uphold the constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant." *De Gesualdo*, 364 P.2d at 378. It is therefore problematic if the prosecution puts one of the defendant's confederates on the stand for the purpose of extracting a Fifth Amendment claim of privilege, because in doing so, the prosecution generates for the jury an adverse inference against the witness that by extension, implies the defendant's guilt.[4] *Id.* at 377–78. The prosecution's conduct thereby improperly

[4] In *Griffin*, the Supreme Court recognized that the jury may naturally infer guilt from a witness's refusal to testify to facts within the witness's knowledge. 380 U.S. at 614. Indeed, we expressly allow jurors to draw an adverse inference from a Fifth

inculpates the defendant by infringing on the defendant's Fifth Amendment right to remain silent. *See Bowles v. United States*, 439 F.2d 536, 545 n.11 (D.C. Cir. 1970) (Bazelon, C.J., dissenting) (describing the "outright denial of the defendant's Fifth Amendment right to remain silent" that occurs when the prosecution "attempt[s] to insinuate that a defendant is guilty because his confederates refuse to answer incriminating questions"). Moreover, by bolstering its case with the negative inference stemming from a witness's claim of the privilege that is not subject to cross-examination, the prosecution violates the defendant's Sixth Amendment confrontation rights. *See* 6 Wayne R. LaFave et al., Criminal Procedure § 24.4(c) (4th ed. 2015); *see also Douglas v. Alabama*, 380 U.S. 415, 418–20 (1965) (concluding the prosecution violated the defendant's Sixth Amendment right to confrontation when it questioned a witness who asserted the privilege and the defense could not cross-examine the witness as a result).

¶39 In contrast, a defendant who calls a nonparty alternate suspect to the stand does so to *exculpate* herself. Any inference from the alternate suspect's refusal to testify is being used merely to corroborate the theory of defense and raise

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Amendment invocation in the civil context. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

reasonable doubt as to the material element of the identity of the perpetrator of the crime. *See* LaFave, *supra*; *Bowles*, 439 F.2d at 545 n.11 (Bazelon, C.J., dissenting).

¶40 Finally, the prosecution and the defense do not stand on equal footing in their ability to respond to a witness's refusal to testify. To the extent the prosecution believes a nonparty alternate suspect's claim of privilege will confuse or mislead jurors, it alone has the power to grant immunity and force the witness to testify. *See* § 13-90-118, C.R.S. (2022). By granting immunity, the prosecution may then cross-examine the witness not only to correct any misleading impressions, but also to have the witness testify to what they may know regarding the defendant's guilt.

¶41 We note that, unlike in a codefendant situation, an assertion of the privilege poses no prejudice to a nonparty alternate suspect. The alternate suspect is not on trial and is not in jeopardy; their liberty interest is not at stake. Even if the alternate suspect were to be later prosecuted, their earlier invocation cannot be used against them. *See Griffin*, 380 U.S. at 615 (holding the Fifth Amendment prohibits comment on the defendant's silence).

¶42 Conversely, allowing a defendant to question a nonparty alternate suspect protects the constitutional rights of the defendant whose liberty *is* at stake. A defendant who claims a nonparty alternate suspect committed the crime can suffer prejudice if the jury is prevented from seeing that alternate suspect. Particularly

where a witness is critical to an alternate suspect defense, "excluding th[at] witness from the jury's presence may cause jurors to unfairly assume that the defense was frivolous or insincere because they did not see the witness be questioned." *State v. Herbert*, 767 S.E.2d 471, 481 (W. Va. 2014). Similarly, a defendant who calls the alternate suspect witness can be prejudiced if the defendant is completely prohibited from investigating the alternate suspect's involvement in the crime. In this circumstance, the jury might conclude that the defendant "chose[] not to ask [the alternate suspect] any questions about the [crime] out of a lack of confidence in his defense." *Gray v. State*, 796 A.2d 697, 708 (Md. 2002). For all of these reasons, we are convinced that *Dikeman* was erroneously decided. *See Love*, ¶ 15, 413 P.3d at 1270.

¶43 We further conclude that more good than harm will come from departing from *Dikeman*. *See id.* For more than fifty years, defendants in Colorado were permitted to question a nonparty alternate suspect witness before the jury, even if that witness intended to assert the privilege. *See O'Chiato*, 214 P. at 405. As discussed, the *Dikeman* rule failed to consider defendants' constitutional rights or the asymmetries between the prosecution and defense when it created a contrary rule. Because *Dikeman* deviated from the constitutional principles underpinning *O'Chiato,* and did so with no discussion of stare decisis, our decision today is about righting the ship.

¶44 In sum, while we affirm that the prosecution may not call a witness who intends to invoke the Fifth Amendment, *see De Gesualdo*, 364 P.2d at 378, we overrule the *Dikeman* court's holding extending that prohibition to defendants. We hold that defendants are entitled to question a nonparty alternate suspect in the jury's presence under the circumstances and procedures set forth below.

E. Procedure for Calling a Nonparty Alternate Suspect

¶45 When a defendant seeks to call a nonparty alternate suspect who intends to invoke the Fifth Amendment privilege against self-incrimination, the trial court must begin with two threshold determinations.

¶46 First, the trial court must determine whether there is a non-speculative connection between the nonparty alternate suspect and the crime with which the defendant is charged. This threshold test comes from *Elmarr*, where we observed "the right to present a defense is generally subject to, and constrained by, familiar and well-established limits on the admissibility of evidence." *Elmarr,* ¶ 27, 351 P.3d at 438. We conclude that the *Elmarr* test likewise governs whether a defendant can call a nonparty alternate suspect as a witness to testify in a criminal case. That is, before a defendant can question an alternate suspect in the presence of the jury, the trial court must determine that there is a "non-speculative connection or nexus between the alternate suspect and the crime charged." *Id.* at ¶ 32, 351 P.3d at 439. Under this case-by-case approach, an alternate suspect's

mere motive or opportunity is insufficient to permit the defendant to call the alternate suspect to testify. *Id.* at ¶ 34, 351 P.3d at 440. A defendant "must proffer something 'more' to establish the non-speculative connection." *Id.*

¶47 Next, if the requirements of *Elmarr* are met, the trial court must make the second threshold determination: whether the witness has a valid claim of Fifth Amendment privilege. At a hearing outside the presence of the jury, defense counsel may examine the witness as they would at trial. If the alternate suspect invokes the privilege in response to specific questions, the trial court must determine "whether [their] silence is justified." *Hoffman*, 341 U.S. at 486. If the trial court determines the witness does not have a valid Fifth Amendment claim of privilege, then the defendant may question that witness before the jury. *Reiner*, 532 U.S. at 19 (stating the trial court should "order the witness to answer questions if the witness is mistaken about the danger of incrimination").

¶48 Third, if the trial court determines the witness has a valid claim of Fifth Amendment privilege, the trial court should determine the areas of questioning that do and do not implicate the Fifth Amendment. In doing so, the court should exercise discretion to impose reasonable limits on the scope and form of such questioning to comply with CRE 401 and 403 and to avoid unnecessary courtroom

drama.[5] In most cases, it is likely that a few questions intended to elicit the witness's Fifth Amendment invocation will suffice.

¶49 Once the court has determined the scope of the questioning, the defense is entitled to call the nonparty alternate suspect to the stand. The defense should first ask any questions that the court has determined do not implicate the Fifth Amendment. Once those questions have been asked, defense counsel may ask the questions to which the witness may invoke the privilege.

¶50 Finally, after the witness testifies, the trial court should excuse the witness and instruct the jury about the witness's Fifth Amendment invocation. The instruction should include the standard required to support a valid Fifth Amendment invocation. *See, e.g.*, *Hoffman*, 341 U.S. at 486 (stating a witness can invoke the privilege when they "ha[ve] reasonable cause to apprehend danger from a direct answer"). The instruction should also explain the reasons a witness might invoke the Fifth Amendment. *See, e.g.*, *Reiner*, 532 U.S. at 21 (stating the

[5] For example, the trial court may rule that it would be improper to permit counsel to ask numerous leading questions when it is clear that the witness will refuse to answer them.

Fifth Amendment protects the "truthful responses of an innocent witness, as well as those of a wrongdoer").[6]

F. Application

¶51 We now apply the procedure for questioning a nonparty alternate suspect witness to the facts of this case.

¶52 Because Villalobos was not a codefendant and because she indicated her intent to invoke the Fifth Amendment, the trial court should have held a hearing outside the presence of the jury to (1) determine whether there was a non-speculative connection between Villalobos and the burglary, *see Elmarr,* ¶ 32, 351 P.3d at 439; and (2) confirm that Villalobos had a valid Fifth Amendment privilege, *see Hoffman*, 341 U.S. at 486. Thus, we agree with the division that the trial court erred when it permitted Villalobos to assert a blanket Fifth Amendment privilege. *See Rios-Vargas*, ¶¶ 21–22.

¶53 But we disagree with the division's conclusion that the trial court's error was harmless. Because the error was of a constitutional dimension, and because Rios-Vargas preserved the issue, we apply constitutional harmless error review.

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[6] Because we conclude that a defendant is entitled to question a nonparty alternate suspect in the jury's presence, we need not address the question of what a defendant prohibited from questioning the alternate suspect witness can say about the alternate suspect's failure to appear.

Hagos v. People, 2012 CO 63, ¶ 11, 288 P.3d 116, 119; *see also People v. Thames*, 2019 COA 124, ¶ 59, 467 P.3d 1181, 1193 ("An erroneous evidentiary ruling may constitute constitutional error if it deprives a defendant of, among other things, his right to present a defense."). Thus, the trial court's error requires reversal unless it was harmless beyond a reasonable doubt. Specifically, we reverse if "there is a reasonable possibility that the [error] might have contributed to the conviction." *Hagos*, ¶ 11, 288 P.3d at 119 (alteration in original) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

¶54 In this case, there is a reasonable possibility that the trial court's refusal to hold a hearing contributed to Rios-Vargas's conviction. The first threshold determination was satisfied: The record establishes there was a non-speculative connection between Villalobos and the burglary. The defense presented the following evidence: (1) the victim, Vialpando, believed Villalobos was responsible for the theft; (2) Villalobos knew when Vialpando's trailer would be empty, and she knew the location and value of the stolen items; (3) Villalobos had said she would make Vialpando pay for evicting her; (4) the burglar stole Vialpando's title to trailer number 115—the trailer Villalobos lived in before Vialpando evicted her; (5) there were loose coins in and around the trailer Villalobos had been renting; and finally, (6) Villalobos evaded attempts by the police to contact her about the burglary.

¶55 Taken together, this evidence easily satisfies the *Elmarr* threshold test. In addition to establishing motive and opportunity, Rios-Vargas presented evidence that Villalobos engaged in behavior indicating her involvement in the crime, possessed property resembling the stolen items, was overheard describing a similar crime, and committed similar crimes in the past. Indeed, the police themselves considered Villalobos "suspect number 1" until they received the DNA results.

¶56 And regardless of the trial court's ruling on the second threshold determination, the defense could have called Villalobos as a witness. This would certainly be the result had the trial court determined Villalobos *did not* have a Fifth Amendment privilege. *See Reiner*, 532 U.S. at 19 (stating the trial court should "order the witness to answer questions if the witness is mistaken about the danger of incrimination"). And in light of our decision today, it would be the result even if the trial court determined Villalobos *did* have a valid claim of privilege. Thus, even if defense counsel were limited to a few questions, the jury would have seen and heard from Villalobos, which would have made meaningful Rios-Vargas's fundamental right to present a complete defense. *See Trombetta*, 467 U.S. at 485; *Washington*, 388 U.S. at 19.

¶57 Instead, the trial court erroneously accepted Villalobos's blanket Fifth Amendment invocation without further inquiry. As a result, the jury did not see

Villalobos, and the prosecution took advantage of this fact by portraying Rios-Vargas's framing theory as "a story without support"; "vague"; and the "[v]ery definition of imaginary and speculative." "[T]here is nothing," the prosecution argued, "that moves [Villalobos] from the suspect column to the column that the defendant is in." Notably, the prosecution's statements to the jury contrast sharply with the concerns it raised to the judge. To the court, the prosecution argued that Rios-Vargas should not be allowed to call Villalobos to the stand precisely because any questioning of Villalobos would undoubtedly elicit incriminating information—whether Villalobos committed the burglary, lied about the burglary, or lied about framing Rios-Vargas.

¶58 Given that Rios-Vargas's defense hinged on the theory that Villalobos committed the burglary, Rios-Vargas was prohibited from calling Villalobos, and the prosecution cast heavy doubt on Rios-Vargas's theory of the case, there is a reasonable possibility that the trial court's failure to conduct a hearing outside the presence of the jury contributed to Rios-Vargas's conviction. Because we conclude that the trial court's error violated Rios-Vargas's constitutional right to present a defense, we reverse the conviction and remand for a new trial consistent with this opinion. *See Hagos*, ¶ 11, 288 P.3d at 119.

III. Conclusion

¶59 "[F]undamental fairness . . . require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta*, 467 U.S. at 485. Put simply, this trial was not fair. According to the prosecution, Villalobos's guilt was both *so obvious* that she could not testify and *so speculative* that the jury should dismiss her involvement in the crime as an imaginative theory concocted by the defense. This case demonstrates the unfairness of a rule prohibiting defendants from calling as a witness an alternate suspect who intends to exercise their Fifth Amendment privilege. Thus, we overrule *Dikeman*.

¶60 Where a defendant establishes a non-speculative connection between a nonparty alternate suspect and the crime charged, and the alternate suspect has a valid Fifth Amendment privilege, the defendant should be permitted to question the alternate suspect in the jury's presence. By imposing reasonable limits on such questioning, the trial court protects the defendant's fundamental right to present a defense while avoiding unnecessary courtroom drama. And by providing a limiting instruction after the alternate suspect witness has been excused, the trial court provides jurors context for the invocation.

¶61 Because the trial court did not hold a hearing in this case, and because the failure to hold a hearing was not harmless, we reverse the judgment of the court of appeals and remand for a new trial consistent with this opinion.

CHIEF JUSTICE BOATRIGHT, joined by **JUSTICE HOOD** and **JUSTICE BERKENKOTTER,** dissented

CHIEF JUSTICE BOATRIGHT, joined by JUSTICE HOOD and JUSTICE BERKENKOTTER, dissenting.

¶62 The majority contends that there is reason to believe that Nora Hilda Rios-Vargas did not commit the burglary here. In response, it is overruling a law that has existed for nearly fifty years. Since 1976, the definitive rule in Colorado has been that neither the prosecution nor the defense may call a witness knowing that the witness will invoke their Fifth Amendment privilege against self-incrimination before the jury. To depart from such long-standing and sound precedent when there have been zero changes in conditions violates one of the bedrock principles in our jurisprudence—stare decisis.

¶63 In *People v. Dikeman*, 555 P.2d 519, 520–21 (Colo. 1976), this court held that "the defense may not ask a defense witness questions which it knows the witness will refuse to answer because of a valid claim to a privilege" on the grounds that neither party "has the right to deliberately and unfairly benefit from any speculative inferences the jury might draw simply from a witness'[s] assertions of the privilege." Today, the majority overrules this long-standing precedent, asserting that this court's analysis in *Dikeman* was incomplete because it did not consider the defendant's right to present a defense. However, because the rule in *Dikeman* was not erroneous—as evidenced by the majority of jurisdictions that continue to adhere to a similar rule—and because any non-speculative probative value is just as lacking now as it was in 1976, I see no meaningful reason to depart

from a half century of precedent and violate the principles of stare decisis. Thus, I respectfully but strongly dissent.

¶64 "The Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense." *People v. Salazar*, 2012 CO 20, ¶ 17, 272 P.3d 1067, 1071. But that right is not absolute; "the Constitution requires only that the accused be permitted to introduce all *relevant and admissible* evidence." *Id.* (emphasis added). Evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401.

¶65 For the reasons discussed below, I conclude that because no party can or should be permitted to benefit from an adverse inference associated with a witness's assertion of their Fifth Amendment privilege, calling a witness whom the party knows will invoke their constitutional right has only unfair speculative probative value. This is equally true for the prosecution and the defense. Therefore, such testimony should always be excluded under the rules of evidence. *See* CRE 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

¶66 In *Dikeman*, the trial court permitted the defendant to call an alternate suspect to the stand after the alternate suspect made it clear during an in camera hearing that he would assert his Fifth Amendment privilege in response to any

substantive questions. 555 P.2d at 519–20. Predictably, the alternate suspect refused to answer the questions while on the stand, and despite competent evidence to the contrary, the jury acquitted Dikeman of first degree assault. *Id.*

¶67 Relying on the rationale for the prosecution's prohibition against calling a witness it knows will claim their privilege, *this court* concluded that such prohibition should also apply to the defense. *Id.* at 520. Specifically, we reasoned that because "[i]dentical deception can be introduced into a trial if a defense counsel is allowed to manipulate a witness'[s] claim of privilege[,] . . . [n]either the prosecution nor the defense . . . has the right to deliberately and unfairly benefit from any speculative inferences the jury might draw simply from a witness'[s] assertions of the privilege." *Id.* at 520–21. Despite *Dikeman*'s brevity, this court's reasoning and holding could not have been clearer nor more sound. It is just as true today as it was in 1976 that no party should unfairly benefit from pure speculation.

¶68 Our holding in *Dikeman* is supported by the enduring belief that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing." *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557 (1956). To safeguard against this fear, the United States Supreme Court requires that the right to remain silent "be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Accordingly, this court has held that "when a witness demonstrates a possibility of prosecution that is more than fanciful, he or she has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster" to invoke their Fifth Amendment privilege. *People v. Ruch*, 2016 CO 35, ¶ 21, 379 P.3d 309, 313. And because the standard by which a witness may invoke their Fifth Amendment privilege is so undemanding, it entirely undercuts any non-speculative probative value that invoking the privilege may have.

¶69 To demonstrate my point, consider the following illustration. A defendant is on trial for burglary of a home where a female victim's underwear was stolen. There is video evidence from the victim's home that shows that the perpetrator acted alone and was a white, tall, slightly overweight male. A registered sex offender who matches that physical description lives down the street from the victim, and he and his wife have been to the victim's house for dinner in the past month. Assume for the sake of this hypothetical that the sex offender had absolutely nothing to do with the burglary. But were the defendant to call the sex offender to testify, the sex offender's testimony would reveal that he had a history of sexual assault, he had spoken with the victim's husband and learned that the victim's family was going to be out of town the night of the burglary, and he was familiar with the layout of the victim's home; additionally, his DNA may be discovered in the victim's home. Accordingly, the sex offender could demonstrate

a more than fanciful possibility of prosecution to justify an invocation of his Fifth Amendment privilege. But today, under a post-*Dikeman* regime, the defendant could locate that sex offender on a sex offender registry, call him as a witness knowing he will invoke his right to remain silent, and benefit from the inference of guilt that the jury will likely draw from his silence.[1]

¶70 This illustration demonstrates why neither party should be permitted to call a witness whom it knows will invoke their Fifth Amendment privilege. Absent speculation to the contrary, the sex offender's testimony in my hypothetical does not make it any more or less likely that the defendant committed the crime. The only possible probative value from his testimony is the unfair speculative inference that because the witness invoked his Fifth Amendment privilege, he—and not the defendant—is guilty. *See State v. Bryant,* 523 A.2d 451, 456 (Conn. 1987) ("Reason and human experience indicate that inferences are certainly suggested by [a witness invoking the Fifth Amendment]; the danger inherent in this

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[1] I recognize that "[t]o be admissible, alternate suspect evidence must be relevant . . . and its probative value must not be sufficiently outweighed by the danger of confusion of the issues or misleading the jury." *People v. Elmarr*, 2015 CO 53, ¶ 22, 351 P.3d 431, 438. This court has stated that to be relevant, "mere motive or opportunity is insufficient; a defendant must proffer something 'more' to establish the non-speculative connection." *Id.* at ¶ 34, 351 P.3d at 440. That something "more" can include "evidence that the alternate suspect committed other similar acts or crimes." *Id.* at ¶ 35, 351 P.3d at 440.

circumstance is that the inference or inferences drawn may have little, if any, juristic relation to the issues before the jury."). Therefore, because the testimony lacks any non-speculative probative value, this court should continue to adhere to the rule established in *Dikeman* that neither the defense nor the prosecution may call a witness knowing that the witness will invoke their Fifth Amendment privilege before the jury.

¶71 The majority contends that this rule infringes on the defendant's constitutional right to present a complete defense because "excluding th[e] witness from the jury's presence may cause jurors to unfairly assume that the defense was frivolous or insincere because they did not see the witness be questioned." Maj. op. ¶ 42 (quoting *State v. Herbert*, 767 S.E.2d 471, 481 (W. Va. 2014)). However, the jury here was instructed after being sworn in that "[t]he defendant does not have to prove her innocence or call any witnesses or introduce any evidence." And because there is a presumption that jurors are able to understand and follow a trial court's instructions, *see People v. Kembel*, 2023 CO 5, ¶ 50, 524 P.3d 18, 28, we trust that jurors will not draw conclusions from an alternate suspect's missing testimony.

¶72 Importantly, the majority's decision violates the well-established principles of stare decisis. "Under the doctrine of stare decisis courts are very reluctant to undo settled law" in favor of promoting "uniformity, certainty, and stability of the

law." *Creacy v. Indus. Comm'n*, 366 P.2d 384, 433 (Colo. 1961). This court should not depart from its existing law unless it is "clearly convinced that (1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come from departing from precedent." *Love v. Klosky*, 2018 CO 20, ¶ 15, 413 P.3d 1267, 1270. Because (1) the rule in *Dikeman* was not erroneous nor has there been a change in conditions and (2) more harm than good will come from departing from *Dikeman*, I find no persuasive justification to overrule *Dikeman*.

¶73 First, there has been no change in conditions justifying a departure from *Dikeman*. Any probative value beyond speculation in the testimony of a witness who invokes the Fifth Amendment is just as lacking now as it was in 1976. Additionally, the rule in *Dikeman* was not erroneous because, as discussed above, a witness's invocation of their Fifth Amendment right has no non-speculative probative value.

¶74 Perhaps if Colorado were an outlier, I would be more inclined to agree that *Dikeman* was wrongfully decided. But not only are we not an outlier, we are in the *majority* of jurisdictions that prohibit both parties from calling a witness who they know will invoke their Fifth Amendment privilege. In fact, nearly three-fifths of state jurisdictions that have ruled on the issue and half of federal jurisdictions continue to adhere to a similar rule as *Dikeman*. *See Hamm v. State*, 782 S.W.2d 577,

580 (Ark. 1990); *People v. Mincey*, 827 P.2d 388, 407–08 (Cal. 1992); *Bryant*, 523 A.2d at 455–56; *Banther v. State*, 823 A.2d 467, 489 (Del. 2003); *Martin v. United States*, 756 A.2d 901, 904 (D.C. 2000); *State v. Sale*, 133 P.3d 815, 822 (Haw. Ct. App. 2006), *overruled on other grounds by State v. Loher*, 398 P.3d 794, 808 n.20 (Haw. 2017); *People v. Myers*, 220 N.E.2d 297, 311 (Ill. 1966); *State v. Heard*, 934 N.W.2d 433, 444 (Iowa 2019); *State v. Bliss*, 498 P.3d 1220, 1242–43 (Kan. Ct. App. 2021); *Clayton v. Commonwealth*, 786 S.W.2d 866, 868 (Ky. 1990); *State v. Berry*, 324 So. 2d 822, 830 (La. 1975); *State v. Cross*, 732 A.2d 278, 280 (Me. 1999); *Commonwealth v. Gagnon*, 557 N.E.2d 728, 736–37 (Mass. 1990); *People v. Dyer*, 390 N.W.2d 645, 649 (Mich. 1986); *State v. McGraw*, 608 A.2d 1335, 1339 (N.J. 1992); *State v. Crislip*, 796 P.2d 1108, 1113 (N.M. Ct. App. 1990), *overruled on other grounds by Santillanes v. State*, 849 P.2d 358, 363 (N.M. 1993); *State v. Branham*, 662 N.E.2d 54, 57 (Ohio Ct. App. 1995); *Pavatt v. State*, 159 P.3d 272, 286 (Okla. Crim. App. 2007); *State v. Mitchell*, 487 P.2d 1156, 1161 (Or. Ct. App. 1971); *Commonwealth v. Greene*, 285 A.2d 865, 867 (Pa. 1971); *State v. Ramirez*, 936 A.2d 1254, 1265 (R.I. 2007); *State v. Hughes*, 493 S.E.2d 821, 823–24 (S.C. 1997); *State v. Rollins*, 188 S.W.3d 553, 569–70 (Tenn. 2006); *Horner v. State*, 508 S.W.2d 371, 372 (Tex. Crim. App. 1974); *State v. Travis*, 541 P.2d 797, 798–99 (Utah 1975); *State v. Smith*, 446 P.2d 571, 581 (Wash. 1968), *vacated in part on other grounds by Smith v. Washington*, 408 U.S. 934, 934 (1972); *State v. Heft*, 517 N.W.2d 494, 500–01 (Wis. 1994); *United States v. Santiago*, 566 F.3d

65, 70 (1st Cir. 2009); *United States v. Reed*, 173 F. App'x 184, 189 (3d Cir. 2006); *United States v. Harris*, 542 F.2d 1283, 1297–98 (7th Cir. 1976); *United States v. Licavoli*, 604 F.2d 613, 624 (9th Cir. 1979); *United States v. Rivas-Macias*, 537 F.3d 1271, 1275 n.3 (10th Cir. 2008); *Bowles v. United States*, 439 F.2d 536, 541–42 (D.C. Cir. 1970).

¶75 The majority claims that the case law on this issue defies classification; I disagree. While there are certainly some nuances in the facts of each case (i.e., a handful involved a codefendant witness), those nuances had little to no bearing on the ultimate holding that a defendant should not be permitted to call a witness who they know will assert their Fifth Amendment right in front of the jury. *See, e.g.*, *Horner*, 508 S.W.2d at 372 (holding that the defendant was not allowed to call the codefendant witness under "the general rule that when a witness, other than the accused, declines to answer a question on grounds of self-incrimination, his refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant"). Therefore, not only does the majority believe that this court erroneously decided *Dikeman*, but that the plurality of other jurisdictions who have addressed this issue have likewise erroneously adopted a rule similar to the one we adopted in *Dikeman*.

¶76 Additionally, the American Bar Association Criminal Justice Standards have recommended a rule similar to the one in *Dikeman* since 1971. *See* Standards

Relating to the Prosecution Function & the Def. Function § 7.6(c) (Am. Bar Ass'n 1971) ("A lawyer should not call a witness who he knows will claim a valid privilege not to testify . . . ."); Crim. Just. Standards: Def. Function § 4-7.7(c) (Am. Bar Ass'n 2017) ("Defense counsel should not call a witness in the presence of the jury when counsel knows the witness will claim a valid privilege not to testify."). In sum, given the breadth of authority adhering to the same rule we adopted in *Dikeman* fifty years prior, there is no reason to conclude that *Dikeman*'s rationale was erroneous.

¶77 I recognize that in the absence of a change in conditions, there are certain situations where it is appropriate for us to overrule an erroneous decision. For example, the Supreme Court overruled *Minnersville School District v. Gobitis*, 310 U.S. 586, 591, 600 (1940), which upheld a local school board requirement that all students, including those with religious objections, salute the American flag as part of a daily school exercise. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Despite zero changes in conditions justifying the departure, the Court overruled *Gobitis* based on the notion that forcing students to confess a certain belief was inherently antithetical to the Constitution. *See id.* Another example is when the Supreme Court overruled *Adkins v. Children's Hospital*, 261 U.S. 525, 561–62 (1923), which struck down a minimum wage law for women on the grounds that it interfered with the freedom of contract. *W. Coast Hotel Co. v.*

Parrish, 300 U.S. 379, 400 (1937). Recognizing that the need to protect women from oppressive contracts outweighs the freedom of contract, the Court concluded that *Adkins* "was a departure from the true application of [constitutional] principles" from the day it was decided. *See id.* at 394, 397. Both examples overruled precedent not on a perceived incomplete legal analysis, but on the belief that the prior precedent was fundamentally and deeply flawed.

¶78 As these two cases demonstrate, overruling long-settled precedent "require[s] 'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). "[I]t is not alone sufficient that we would decide a case differently now than we did then." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Here, in my view, the majority does just that—overruling a fifty-year-old precedent because it would have decided *Dikeman* differently and not because *Dikeman* was fundamentally and deeply flawed.

¶79 Second, more harm than good will come by shifting from the bright-line rule in *Dikeman* to the discretionary rule the majority outlines. In my view, the speculation it promotes is unfair. How can the other party cross-examine a witness who invokes their Fifth Amendment privilege? They can't. As a result, the majority's holding can easily be abused by a party seeking to benefit from an inference of guilt from a witness's invocation of their Fifth Amendment privilege.

See Herbert, 767 S.E.2d at 490 (Loughry, J., concurring in part and dissenting in part) (reasoning that, by allowing the defense to call a witness whom it knows will invoke the Fifth Amendment, the majority's new rule is "fraught with problems, including the potential for manipulation"); *Heard*, 934 N.W.2d at 444 (agreeing with the trial court that permitting the defense to compel a witness to invoke their privilege against self-incrimination in the presence of the jury is an "invitation for jurisprudential mischief in the criminal process"). Referring to my previous illustration, the defendant, knowing that the sex offender would invoke his right to remain silent, could call that witness to the stand and unjustly use his Fifth Amendment invocation to try to create reasonable doubt as to the defendant's guilt.[2] And because the prosecution would be unable to cross-examine the witness, the prosection would have no effective way to combat that speculative inference.

¶80 Furthermore, the jury considering the witness's invocation of her right to remain silent here adds very little substance to Rios-Vargas's case. Rios-Vargas had ample opportunity to present evidence of Sylvia Villalobos's potential guilt. The defense presented evidence that Villalobos was not interviewed during the

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[2] I assume complete good faith on defense counsel's part in calling this witness. They would have no knowledge that the alternate suspect is innocent.

course of the investigation; owed the victim money at the time of the burglary; knew the victim was going to be in Mexico around the time of the burglary; rented a trailer across the street from the victim and vacated the trailer around the time of the burglary; lived with someone who had access to latex gloves, which were found at the crime scene; and was the only person who knew where specific items were in the victim's trailer. Additionally, the defense mentioned Villalobos in both opening and closing statements, claiming that Rios-Vargas "was [an] easy frame" for Villalobos and that it "is pretty clear [that] Sylvia Villalobos burglarized the [victim's] trailer." In sum, Rios-Vargas was able to present her entire defense. Given that one could reasonably infer from the evidence that Villalobos and Rios-Vargas committed this crime together, calling Villalobos to the stand to assert her Fifth Amendment privilege in front of the jury would not have even exculpated Rios-Vargas. To say Rios-Vargas was deprived of the opportunity to present a defense is inaccurate, and to depart from fifty years of precedent because of it is erroneous. Accordingly, there is no persuasive justification to overrule *Dikeman*; the rule it set forth was not erroneous, there has been no change in conditions since we decided *Dikeman,* and more harm than good would come from departing from *Dikeman*. I would adhere to *Dikeman*'s clear guidance and reaffirm its rule that "the defense may not ask a defense witness questions which it knows the witness

will refuse to answer because of a valid claim to a privilege." *Dikeman*, 555 P.2d at 520.

¶81 The defendant in this case also contends that if the court prohibits the defense from questioning an alternate suspect who has invoked their Fifth Amendment privilege, (1) the defendant should be allowed to inform the jury why it did not question the alternate suspect, and (2) an appellate court should not be able to affirm the conviction where the trial court allowed a witness to make a blanket assertion of their privilege.

¶82 Regarding the first issue, I would conclude that allowing the defendant to comment on why the alternate suspect was not questioned lacks any non-speculative probative value. Like calling a witness whom the defense knows will assert their Fifth Amendment privilege, mentioning why the alternate suspect did not testify is only relevant if the defense is permitted to benefit from an inference of guilt from the alternate suspect's refusal to testify, which it is not.

¶83 Regarding the second issue, I agree with the division that while the trial court should have held an in camera hearing to allow the alternate suspect to invoke her privilege in response to specific areas of inquiry, the record adequately supports a conclusion that there is no reasonable possibility that the court's failure to hold an in camera hearing could have impacted the outcome of the trial.

¶84 In sum, because neither party to a criminal case should be permitted to benefit from an adverse inference associated with a witness's assertion of their Fifth Amendment privilege, calling a witness whom the party knows will invoke their constitutional right has only speculative probative value and thus, should be prohibited. Therefore, I find no persuasive justification to depart from nearly fifty years of precedent holding as much. Additionally, I reject the defendant's arguments that she should have been allowed to inform the jury why she did not question the alternate suspect or that the division should not have affirmed the conviction on the grounds that the trial court permitted the alternate suspect to make a blanket assertion of her privilege. Accordingly, I respectfully but strongly dissent.

I am authorized to state that JUSTICE HOOD and JUSTICE BERKENKOTTER join in this dissent.