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Self-Incrimination: Are Underlying Questions about a Pending Conviction on Appeal a Violation of a Defendant's Fifth Amendment Privilege Against Self-Incrimination?

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Self-Incrimination: Are Underlying Questions about a Pending
Conviction on Appeal a Violation of a Defendant's Fifth Amendment
Privilege Against Self-Incrimination?

Cover Page Footnote

30-4

**SELF-INCRIMINATION: ARE UNDERLYING QUESTIONS
ABOUT A PENDING CONVICTION ON APPEAL A VIOLATION
OF A DEFENDANT’S FIFTH AMENDMENT PRIVILEGE
AGAINST SELF-INCRIMINATION?**

COURT OF APPEALS OF NEW YORK

People v. Cantave¹
(decided June 25, 2013)

I. INTRODUCTION

The Fifth Amendment privilege against self-incrimination (the “Privilege”) has been a staple of our constitution since its inception. It continues to protect witnesses who are called involuntarily for the purpose of testifying against themselves and from answering questions that may serve to accomplish the same.² This Privilege was the result of “centuries of persecution and struggle” our forefathers faced in forming this Union.³ Chief Justice Marshall stated that certain basic rights, including the Privilege, are secure “for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it.”⁴ This Privilege extends to all areas of justice, including both criminal and civil proceedings where a witness may subject himself to criminal culpability, and it applies to not only a defendant party, but also to any witness.⁵

This case note explores the expansiveness of the Privilege.

¹ 993 N.E.2d 1257 (N.Y. 2013).

² Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

³ Miranda v. Arizona, 384 U.S. 436, 442 (1966).

⁴ *Id.* (quoting Cohens v. Virginia, 19 U.S. 264, 387 (1821)).

⁵ *Turley*, 414 U.S. at 77 (quoting McCarthy v. Arndstein, 266 U.S. 34, 40 (1924));

[T]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does who is also a party defendant.

Id.

Specifically, this case note addresses the issue presented in *People v. Cantave*—whether a defendant’s Fifth Amendment privilege against self incrimination is violated when the court allows the cross-examination of the defendant about underlying facts of a prior conviction that is on direct appeal.⁶ Case law supports that, under such circumstances, the defendant’s Privilege was violated.

II. FACTUAL BACKGROUND

Jean Cantave was charged with assault in the second degree and assault in the third degree.⁷ The alleged assault occurred during a confrontation outside Cantave’s place of business.⁸ The only parties present during the confrontation were Cantave, complainant Andre Elbresius, and the complainant’s wife.⁹ Prior to the alleged assault, Elbresius gave Cantave a ride in his car.¹⁰ During the car ride, Cantave and Elbresius argued about Cantave’s “unauthorized use of Elbresius’ spare license plate.”¹¹ When they arrived at Cantave’s place of business, the argument escalated, and the alleged assault occurred.¹² Elbresius claimed that Cantave attacked him, but he did not retaliate.¹³ More specifically, he claimed that Cantave pushed and bit Elbresius’s ear and finger, causing injuries which resulted in Elbresius needing surgery.¹⁴ Cantave claimed that Elbresius instigated the confrontation when Elbresius hit Cantave in the face with a gun—a fact that was reported to the operator during the 911 emergency call placed by Elbresius.¹⁵

Defense counsel’s initial strategy was to argue that Cantave was justified in his actions because Elbresius had a gun.¹⁶ Defense counsel planned to establish this defense through testimony that would have been elicited by using Cantave as a witness.¹⁷ However,

⁶ *Cantave*, 993 N.E.2d at 1260.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Cantave*, 993 N.E.2d at 1260.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Cantave*, 993 N.E.2d at 1260.

¹⁷ *Id.*

pursuant to the court's decision after a *Sandoval* hearing, the People were granted permission to question Cantave on cross-examination about the underlying facts of Cantave's recent rape conviction, facts which were still pending on direct appeal.¹⁸ After the defense rested, without calling Cantave as a witness, it renewed its objection to the court's *Sandoval* ruling.¹⁹ Defense counsel argued that the appeal of the rape conviction was still pending and if the witness was forced to answer questions concerning the rape conviction and the underlying facts, he might incriminate himself, thereby violating his Privilege.²⁰ Defense counsel's objection was denied and, as a result, Cantave was convicted of assault in the second and third degree.²¹ Shortly after Cantave's assault conviction, his rape conviction was reversed due to ineffective assistance of counsel when Cantave's prior attorney failed to use vital hospital records to impeach the complainant.²²

On appeal, the Appellate Division, Second Department, affirmed the assault conviction.²³ The court ruled that the *Sandoval* issue was not properly preserved and that even if it had been properly preserved, the admission of the underlying facts to the rape conviction was not an abuse of the trial judge's discretion.²⁴ The defendant then appealed to the New York Court of Appeals.²⁵

The Court of Appeals quickly addressed the *Sandoval* issue, ruling that it had, indeed, been properly preserved.²⁶ The court reasoned that the objection was preserved because defense counsel renewed its objection at trial after it had rested but before either side made closing remarks, informed the court that the rape conviction was under appeal, and argued that Cantave's Privilege had been vio-

¹⁸ *Id.* *Sandoval* hearings were established to determine the scope of the prosecutions cross-examination regarding specific prior criminal, vicious, and immoral acts in the event the defendant chooses to take the stand. *People v. Sandoval*, 314 N.E.2d 413, 418 (N.Y. 1974).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Cantave*, 993 N.E.2d at 1260.

²² *Id.* (citing *People v. Cantave*, 921 N.Y.S.2d 278, 280 (App. Div. 2d Dep't 2011)).

²³ *Id.* (citing *People v. Cantave*, 941 N.Y.S.2d 163, 164 (App. Div. 2d Dep't 2012)).

²⁴ *Cantave*, 941 N.Y.S.2d at 164 (“[F]elony conviction was relevant to the issues of his credibility because it demonstrated his willingness to put his own self interests above those of society.”) (citing *People v. Bennette*, 436 N.E.2d 1249, 1252 (N.Y. 1982) (noting that the defendant in this case was asked questions about a conviction that was not on appeal)).

²⁵ *Cantave*, 993 N.E.2d at 1261.

²⁶ *Id.*

lated.²⁷ The trial court retained the ability to change its ruling at the time the objection was renewed; therefore, the objection was preserved and the Court of Appeals addressed the *Sandoval* issue on its merits.²⁸

III. THE COURT'S ANALYSIS IN *PEOPLE V. CANTAVE*

The particular issue before the New York Court of Appeals is one of first impression. The Privilege, however, is an area of the law that the New York Court of Appeals has addressed many times before. The court has recognized that “a defendant who elects to testify places his credibility at issue and may generally be cross-examined about past criminal or immoral acts that bear upon his credibility, veracity, or honesty.”²⁹ However, the court later held that a defendant does not automatically waive his Privilege when his past criminal history involves a pending criminal charge.³⁰

In *Cantave*, the court discussed *People v. Betts*,³¹ a case that shared a similar fact pattern to that in *Cantave*.³² In *Betts*, the defendant was charged with rape.³³ During a pretrial *Sandoval* hearing, defense counsel attempted to preclude the People from cross-examining the defendant, Betts, about a pending burglary charge.³⁴ Counsel argued that forcing Betts to answer the questions would violate his Privilege.³⁵ The trial court allowed the questioning, but the Court of Appeals reversed, holding that “prosecution may not cross-examine a defendant about a pending, unrelated criminal matter for the purpose of impeaching his credibility.”³⁶ The court in *Betts* was concerned that by allowing the prosecution to cross-examine a defendant on a pending, unrelated charge for the purposes of attacking

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (citing *Bennett*, 593 N.E.2d at 279).

³⁰ *Cantave*, 993 N.E.2d at 1261 (citing *People v. Betts*, 514 N.E.2d 865, 865 (N.Y. 1987)).

³¹ 514 N.E.2d 865 (N.Y. 1987).

³² *Cantave*, 993 N.E.2d at 1261.

³³ *Betts*, 514 N.E.2d at 865.

³⁴ *Id.*

³⁵ *Id.* at 865-66.

³⁶ *Cantave*, 993 N.E.2d at 1261 (“[A]llowing a defendant-witness’ credibility to be assailed through the use of cross-examination concerning an unrelated pending criminal charge unduly compromises the defendants right to testify with respect to the case on trial, while simultaneously jeopardizing the correspondingly important right to incriminate oneself as to the pending matter.”) (quoting *Betts*, 514 N.E.2d at 868).

the defendant's credibility it would severely limit the defendant's right to defend himself when weighed against his Privilege.³⁷

Cantave urged the court to extend the *Betts* holding to include not only a pending criminal charge but also the underlying facts of a conviction on appeal.³⁸ The court agreed with Cantave for the same reasons and concerns that it expressed in *Betts*.³⁹ The court held that because Cantave was continuing to pursue an appeal of his rape conviction as a matter of right, he continued to run the risk of self-incrimination by answering any questions regarding the rape conviction until he had "fully exhausted his right to appeal."⁴⁰

The court reasoned that "pleading the Fifth" is in and of itself prejudicial in that it commonly suggests guilt.⁴¹ Further, prior holdings have made it much more complicated for defendants to exercise their right to defend themselves by greatly limiting the Privilege.⁴² These limitations complicate testifying as a defendant and risk exposing the defendant's past criminal history to the jury.⁴³ The court also stated that the trial court's *Sandoval* ruling in this case essentially prevented the defendant from testifying on his own behalf.⁴⁴ More specifically, the court reiterated what it found in *Betts* when it stated that "being questioned about the facts underlying the previous conviction while it is pending appeal, 'unduly compromises the defendant's right to testify with respect to the case on trial, while simultaneously jeopardizing the corresponding important right not to incriminate oneself as to the pending matter.'"⁴⁵

Finally, the New York Court of Appeals ruled in favor of

³⁷ *Betts*, 514 N.E.2d at 866.

³⁸ *Cantave*, 993 N.E.2d at 1262.

³⁹ *Id.*

⁴⁰ *Id.* (citing *Mitchell v. United States*, 526 U.S. 314, 326 (1999) (providing that "if no adverse consequences can be visited upon the convicted person by reason of further testimony, then there is no further incrimination to be feared.")).

⁴¹ *Id.*

⁴² *Id.*; see also *Brown v. United States*, 356 U.S. 148, 155-56 (1958) (holding that a defendant must invoke his Fifth Amendment privilege against self-incrimination as to both exculpatory and inculpatory questions to protect himself, or he runs the risk of waiving the privilege); *People v. Bagby*, 482 N.E.2d 41, 43 (N.Y. 1985) (citing *People v. Cassidy*, 107 N.E. 714, 715 (N.Y. 1915) ("A person cannot waive his privilege under the constitutional provisions and give testimony to his advantage, or the advantage of his friends, and at the same time and in the same proceeding assert his privilege and refuse to answer questions that are to his disadvantage or the disadvantage of his friends.")).

⁴³ *Cantave*, 993 N.E.2d at 1263.

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting *Betts*, 514 N.E.2d at 868).

Cantave, holding that “the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction on appeal for the purpose of impeaching his credibility.”⁴⁶ The court liberally construed the applicability of the Privilege.⁴⁷ It recognized that the purpose of the Privilege in our judicial system is to protect a defendant from incriminating himself and to provide a defendant with the opportunity to testify in his own defense without fear of incrimination in a separate, non-related judicial proceeding.⁴⁸ Specifically, the court realized that allowing the prosecution to cross-examine Cantave about the underlying facts of his unrelated criminal conviction that was still on appeal, for the purpose of impeaching his credibility, had a dramatic effect on Cantave’s decision as to whether to testify, as well as its potential effect on future defendants’ decisions about testifying.⁴⁹ Therefore, the court in *Cantave* reversed the trial court decision to allow questions pertaining to defendant’s ongoing conviction on appeal.

IV. THE UNITED STATES SUPREME COURT DECISIONS

The Privilege has continually evolved throughout the history of the United States but maintains a deep-rooted purpose within our constitutional rights. The founders created the Privilege, so that “no person shall be compelled in any criminal case to be a witness against himself.”⁵⁰ The Supreme Court of the United States recognizes the need to protect defendants from being involuntarily called to testify against themselves and answer potentially incriminating questions.⁵¹ In *Counselman v. Hitchcock*,⁵² the Supreme Court held that the intent of the Privilege was to “insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.”⁵³

⁴⁶ *Id.*

⁴⁷ *Id.* at 1261 (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

⁴⁸ *Cantave*, 993 N.E.2d at 1263 (citing *Turley*, 414 U.S. at 77).

⁴⁹ *Id.* at 1263 (citing *Betts*, 514 N.E.2d at 868).

⁵⁰ *Turley*, 414 U.S. at 77 (quoting U.S. CONST. amend. V) (providing in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law”).

⁵¹ *Turley*, 414 U.S. at 77.

⁵² 142 U.S. 547 (1892).

⁵³ *Id.* at 562.

A. Federal Construction of the Privilege and Limitations Placed upon It

The United States Supreme Court has placed many limitations on the Privilege over the past century. For example, in *Brown v. United States*,⁵⁴ the defendant was accused of being a member of the Communist Party and charged for fraudulently obtaining citizenship.⁵⁵ She was called to testify by the prosecution.⁵⁶ The defendant did not invoke her Privilege prior to taking the stand.⁵⁷ On the stand, the defendant testified that she was part of a communist group but not during the period in question, and she refused to answer any questions pertaining to her activities while a part of that communist group to avoid providing potentially incriminating answers.⁵⁸ The defendant took the stand a second time during the defense's case-in-chief as a witness on her own behalf, where she was asked, on cross-examination, by the prosecution the same questions she had refused to answer while she was on the stand as an adverse witness for the prosecution's case-in-chief.⁵⁹ The trial court held that she had waived her Privilege and directed her to answer the questions.⁶⁰ The defendant refused and was held in contempt of court.⁶¹ The defendant appealed the contempt charge, and, on appeal, the Court held that if a witness voluntarily testifies, the witness could not then attempt to invoke the Privilege.⁶² The Court reasoned that to allow defendants the ability to pick and choose the questions they answer would give defendants too much protection and unreasonably burden the prosecution of crimes and the court's ability to ascertain the truth.⁶³ Essentially, the Court in *Brown* established that defendants must either testify about everything, or they must not testify at all.

Several years later, in *Malloy v. Hogan*,⁶⁴ the Court interpret-

⁵⁴ 356 U.S. 148 (1958).

⁵⁵ *Id.* at 149.

⁵⁶ *Id.* at 150.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Brown*, 356 U.S. at 150-52.

⁶⁰ *Id.* at 152.

⁶¹ *Id.*

⁶² *Id.* 155-56.

⁶³ *Id.* at 156-57 (clarifying that the mere taking of the stand alone does not waive the Fifth Amendment privilege against self-incrimination, but taking the stand combined with the substance of the defendant's testimony may open him up to waiver).

⁶⁴ 378 U.S. 1 (1964).

ed the Privilege to include not only defendants in a criminal proceeding, but all witnesses.⁶⁵ In *Malloy*, the petitioner was arrested in Hartford, Connecticut during a gambling raid.⁶⁶ He pleaded guilty to the criminal charge of pool selling,⁶⁷ a misdemeanor, and was sentenced to one year in prison.⁶⁸ After serving ninety days and being placed on probation, the petitioner was ordered to testify by the Superior Court of Hartford County before a referee who was investigating the gambling activities that the petitioner was involved in.⁶⁹ The petitioner refused to respond to the questions because they involved the events “surrounding his prior arrest and conviction,” which tended to incriminate him; as a result, he was held in contempt.⁷⁰

In *Malloy*, the Court relied on the opinion in *Hoffman v. United States*.⁷¹ The Court in *Hoffman* held that the Privilege extends to “witnesses in similar federal inquiries.”⁷² The Court in *Hoffman* further explained that the Privilege not only protects those statements that would help support a conviction, but it also applies to information that would help fill a missing “link in the chain of evidence” that could tend to incriminate the giver of that information.⁷³ Further, an implication that the information may tend to incriminate the witness need only be possible—based on the implication of the question.⁷⁴ Additionally, when conducting this test, the judge must be certain that the witness is mistaken as to the incriminating factors that an answer to a potentially injurious question may pose.⁷⁵ The Court in *Malloy*, using this test and the proper standards of applying it, found the questions to have a tendency to be injurious to the witness and held that he could invoke his Privilege.⁷⁶

⁶⁵ *Id.* at 11.

⁶⁶ *Id.* at 3.

⁶⁷ *State v. Fico*, 162 A.2d 697, 699 (Conn. 1960) (noting that “pool selling” is generally defined as “the receiving from several persons of wagers on the same event, the total sum of which is to be given the winners, subject ordinarily to a deduction of a commission by the seller of the pool.”).

⁶⁸ *Malloy*, 378 U.S. at 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Malloy*, 378 U.S. at 11-12; 341 U.S. 479 (1951).

⁷² *Malloy*, 378 U.S. at 11.

⁷³ *Id.* at 11-12 (quoting *Hoffman*, 341 U.S. at 486).

⁷⁴ *Id.*

⁷⁵ *Hoffman*, 341 U.S. at 488.

⁷⁶ *Malloy*, 378 U.S. at 14.

B. Privilege Applicable to Pending Matters Only

Courts have consistently held that the Privilege applies only to pending cases or future criminal proceedings.⁷⁷ This limitation was demonstrated in *Kastigar v. United States*.⁷⁸ In *Kastigar*, the petitioners were subpoenaed to appear before a United States Grand Jury.⁷⁹ The prosecution believed that the petitioners would attempt to invoke their Privilege; so, prior to the grand jury proceeding, the government offered the petitioners immunity.⁸⁰ The petitioners rejected the government's offer and proceeded to invoke their Privilege.⁸¹ They were then ordered by the Court to answer the prosecutor's question, but they refused and were held in contempt.⁸² Justice Marshall argued in his dissent that the government could compel the petitioners to testify so long as the immunity protected them from being used against the petitioners in any future criminal proceeding.⁸³ The majority believed that Justice Marshall's dissent provided more protection for the criminal defendant than the Fifth Amendment did on its own and, therefore, held that the level of protection offered by the immunity need not be broader than the level of protection that is offered under the Privilege; rather, it need only be equal to it.⁸⁴ The

⁷⁷ *Hitchcock*, 142 U.S. at 562; *see also* *Bram v. United States*, 168 U.S. 532, 542 (1897) (stating that the privilege protects a party who is compelled to answer potentially injurious questions by providing an accusatory statement made by a third party for fear that silence would infer guilt); *Boyd v. United States*, 116 U.S. 616, 634 (1886) (stating that if a prosecutor decides not to press criminal charges against a person and instead files a civil suit against that person, their Fifth Amendment privilege is protected).

⁷⁸ 406 U.S. 441 (1972).

⁷⁹ *Id.* at 442.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Kastigar*, 406 U.S. at 471 (Marshall, J., dissenting).

⁸⁴ *Id.* at 453 (majority opinion); *contra id.* at 467-68 (Marshall, J., dissenting) (stating that the Fifth amendment privilege does not allow for courts to compel a defendant to testify, and then allow that testimony to be used to incriminate that same defendant);

The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, vis-a-vis the government that has compelled his testimony, as he would have been in had he remained silent in reliance on the privilege.

Id.

Court's decision in *Kastigar* made it clear that a witness is only protected by the Privilege until the potential for incrimination in either a pending or future criminal proceeding has been eliminated or until he has been provided with immunity, at which point he may be compelled to testify.⁸⁵

The Court expanded the holding from *Kastigar* in *Leftkowitz v. Turley*⁸⁶ by stating that, for answers to be required, the government must offer the level of immunity that is necessary to supplant the protection that the Privilege provides and that the government may not insist that an employee or contractor waive such immunity.⁸⁷

What the courts deem "pending" is also central to understanding how the Privilege ought to be applied. This was partially answered in *Mitchell v. United States*.⁸⁸ In *Mitchell*, the petitioner and twenty-two other defendants were charged with conspiracy to distribute cocaine, and the petitioner pleaded guilty to all four counts.⁸⁹ During sentencing, the petitioner was told that she would not be afforded the Privilege because of her guilty plea.⁹⁰ The prosecution called forth two other defendants during the petitioner's testimony to present evidence that she played a leading role in the conspiracy to sell and distribute drugs, a fact that the petitioner specifically denied when she pleaded guilty.⁹¹ The petitioner took her attorney's advice by choosing not to testify.⁹² The judge sentenced the petitioner to a minimum of ten years in prison, citing her choice not to testify as a compelling factor of her guilt.⁹³ The petitioner appealed the conviction, and the Third Circuit Court of Appeals affirmed.⁹⁴

The Supreme Court disagreed with both lower courts, holding that the Privilege ought not to be viewed so narrowly or "entail such an extensive waiver of the privilege."⁹⁵ The Court determined that a guilty plea ought to be treated like an offer to stipulate, reasoning that

⁸⁵ *Id.* at 453, 461.

⁸⁶ 414 U.S. 70 (1973).

⁸⁷ *Id.* at 84-85.

⁸⁸ 526 U.S. 314 (1999).

⁸⁹ *Id.* at 317 (including one count of conspiring to distribute five or more kilograms of cocaine and three counts of distributing cocaine within 1,000 feet of a school or playground).

⁹⁰ *Id.* at 319.

⁹¹ *Id.* at 318.

⁹² *Id.* at 319.

⁹³ *Mitchell*, 526 U.S. at 319.

⁹⁴ *Id.*

⁹⁵ *Id.* at 322.

a guilty plea does not pose a threat to the fact-finding process of the courts and that the defendant, by pleading guilty, is actually taking all matters out of dispute.⁹⁶ Therefore, a defendant's guilty plea does not waive his Privilege.⁹⁷

V. NEW YORK STATE: ADDED LIMITATIONS AND EXPANSION OF THE FIFTH AMENDMENT

New York Courts have closely followed the applicability of the Fifth Amendment as articulated by the federal courts. A criminal defendant has the constitutional right not to be compelled to testify in his or her own trial.⁹⁸ Further, if a criminal defendant exercises his right not to testify, that choice may not be used as a presumption of guilt against him.⁹⁹ If a defendant does not exercise the right and testifies voluntarily, the defendant must be treated like any other witness.¹⁰⁰ Originally, this meant that the accused would be forced to answer any and all questions that were relevant to the issue no matter how injurious they were.¹⁰¹ The New York Court of Appeals' original approach was to allow a defendant to either exercise the Privilege by not testifying or forgo the Privilege by availing himself to the dangers associated with testifying, but, either way, the defendant could not pick and choose his testimony.¹⁰² In *People v. Casey*,¹⁰³ the Court of Appeals expanded this rule to include questions involving the testifying defendant's past "life and conduct" to impeach his credibility.¹⁰⁴ The Court of Appeals expanded the rule once more in *People v. Shapiro*¹⁰⁵ to include any questions that were relative to the is-

⁹⁶ *Id.* at 323.

⁹⁷ *Id.* at 325.

⁹⁸ *People v. Tice*, 30 N.E. 494, 495 (N.Y. 1892).

⁹⁹ *See* N.Y. CRIM. PROC. LAW § 300.10 (McKinney 1970).

¹⁰⁰ *Tice*, 30 N.E. at 496; *see also* *Brandon v. People*, 42 N.Y. 265, 268 (1870) (stating that the criminal defendant left her position as a defendant when she elected to testify and was, therefore, subject to the same rules as any other witness); *Connors v. People*, 50 N.Y. 240, 242 (1872) ("[B]y consenting to be a witness in his own behalf under the statute of 1869, the accused subjected himself to the same rules and was called upon to submit to the same tests which could by law be applied to the other witnesses.").

¹⁰¹ *Tice*, 30 N.E. at 496.

¹⁰² *Id.*

¹⁰³ 72 N.Y. 393 (1878).

¹⁰⁴ *Id.* at 398-99.

¹⁰⁵ 126 N.E.2d 559 (N.Y. 1955).

sue no matter how injurious to the defendant-witness.¹⁰⁶

The harsh traditional approach of the New York Court of Appeals has since evolved, and more protection has been granted to criminal defendants who choose to testify. In *People v. Johnston*,¹⁰⁷ the New York Court of Appeals held, with respect to a defendant's waiver of the Privilege, that the rule, extended only to relevant matters of the charge, not collateral matters.¹⁰⁸ That is to say, it did not apply to matters used merely to impeach a defendant-witness' credibility.¹⁰⁹

The Court of Appeals continued to narrow the waiver rule in *People v. Sorge*.¹¹⁰ In *Sorge*, the defendant was on trial for performing illegal abortions.¹¹¹ The prosecution, in an attempt to merely impeach the defendant's credibility, asked the defendant on cross-examination questions concerning previous abortions.¹¹² When the defendant answered the prosecution's questions by denying the accusations, the prosecution continued to delve deeper into the prior abortions.¹¹³ The court held that it is not improper for a prosecuting attorney to continue asking questions for which he has a good faith belief that the questions have a basis in fact, even though the questions were merely being used to impeach the defendant's credibility.¹¹⁴ Therefore, the court in *People v. Betts* properly recognized that the major factor that the court in *Sorge* weighed in reaching its decision was that the questions by the prosecution did not concern a pending criminal charge;¹¹⁵ therefore, there was no unduly prejudicial effect on a pending criminal matter.¹¹⁶

In *Betts*, the New York Court of Appeals addressed the effect of New York's approach toward testifying criminal defendants who are questioned about the underlying facts of a pending unrelated

¹⁰⁶ *Id.* at 561 (forcing the defendant to answer the prosecutor's questions about whether he had told anyone, including his attorney, the whereabouts of his girlfriend after the defendant claimed that he had been waiting for her prior to his arrest for burglary).

¹⁰⁷ *People v. Johnston*, 127 N.E. 186 (N.Y. 1920).

¹⁰⁸ *Id.* at 188.

¹⁰⁹ *Id.*

¹¹⁰ 93 N.E.2d 637 (N.Y. 1950).

¹¹¹ *Id.* at 638.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 639.

¹¹⁵ *Betts*, 514 N.E.2d at 867.

¹¹⁶ *Id.*

criminal charge.¹¹⁷ The defendant was charged with rape in the first degree.¹¹⁸ During a pre-trial hearing, the defendant attempted to prevent any questions on cross-examination that related to an “earlier youthful adjudication and a pending burglary charge” based on the theory that the questions would be “unduly prejudicial.”¹¹⁹ The defendant believed that if he were asked questions about those incidents, he would have to exercise his Privilege, which may have an unduly prejudicial effect.¹²⁰ The trial court disagreed and allowed questions about the pending burglary charge, requiring the defendant to answer them if he chose to take the stand.¹²¹ The New York Court of Appeals reversed the decision, holding that “a defendant does not, by testifying, automatically and generally waive the privilege against self-incrimination with respect to questions concerning pending unrelated criminal charges.”¹²² It agreed with the defendant’s original argument, holding that by allowing the prosecution the opportunity to attack the witness’s credibility on cross-examination, regarding an unrelated, pending criminal charge, would unduly compromise the defendant’s right to testify on his own behalf in the case at hand, while at the same time substantially limiting his right to not incriminate himself in the pending matter.¹²³ Essentially, the court in *Betts* explained that had the defendant been forced to answer questions about an unrelated burglary charge during his trial for rape, he may have been forced to answer an incriminating question for the pending burglary charge, unduly prejudicing him to the jury.

VI. *PEOPLE V. CANTAVE*: FEDERAL AND STATE APPLICATION

To reiterate, the court in *Cantave* held that the prosecution should not have been allowed to question the defendant about the underlying facts of an unrelated, pending rape charge during the de-

¹¹⁷ *Id.* at 865.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 865-66.

¹²⁰ *Betts*, 514 N.E.2d at 865-66.

¹²¹ *Id.* at 866.

¹²² *Id.*

¹²³ *Id.* at 868 (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 42, p. 92 (3d ed. 1984) (“While an accused, unlike an ordinary witness, has an option whether to testify at all, exacting such a [sweeping] waiver as the price of taking the stand leaves little of the right to testify on one’s own behalf.”)).

defendant's separate trial for assault.¹²⁴ This holding honors the long held principle that a person should not be compelled to testify against himself when he exercises his right to give testimony in his own defense.¹²⁵ The Fifth Amendment provides a vast and far reaching privilege encompassing many nuances that the court must explore in order to determine whether certain questions ought to be answered by the defendant-witness or even asked by the prosecutor to begin with. Courts face the challenge of balancing a defendant's constitutional privilege against self-incrimination in a pending matter and his right to testify on his own behalf in the case at trial.¹²⁶ In *Cantave*, the defendant was, essentially, forced not to testify after the trial judge granted the prosecution the ability to question him about his pending rape charge.¹²⁷ If the defendant had taken the stand, the judge would have compelled him to answer questions, and the defendant would have run the risk of incriminating himself in the pending rape trial.¹²⁸ The courts must determine whether the underlying facts of the prosecution's inquiry are related or unrelated, pending or final, and whether the questions are unduly prejudicial on the defendant.

A. Related: Prior Act's Connection to Present Action

New York courts have continually attempted to narrow and define the requisite level of "relatedness" that separate matters must have for a defendant to be compelled to answer a potential injurious question while voluntarily testifying.¹²⁹ In order for the prosecution to ask a defendant-witness questions concerning the underlying facts of a separate matter, that matter must be related.¹³⁰ A matter is deemed related if it concerns an issue of the case or serves to impeach the credibility of the witness.¹³¹ If the matter being inquired about is related to the matter at hand, then regardless of how injurious the evidence is to the defendant, the prosecution will be allowed to ask the defendant-witness questions pertaining to that matter.¹³² If

¹²⁴ *Cantave*, 993 N.E.2d at 1263.

¹²⁵ *Hitchcock*, 142 U.S. at 562.

¹²⁶ *Cantave*, 993 N.E.2d at 1263.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Shapiro*, 126 N.E.2d at 561.

¹³⁰ *Tice*, 30 N.E. at 496.

¹³¹ *Casey*, 72 N.Y. at 398-99.

¹³² *Shapiro*, 126 N.E.2d at 561. In *People v. Trybus*, the defendant broke into a home and

the matter does not go to an issue of the case at hand, then the matter must go to impeaching the defendant's credibility.¹³³

In *Cantave*, the underlying facts of the rape conviction were not related to the assault charge for which the defendant was on trial. The incidents happened separately in location and time, and involved different victims. However, the two cases are related for impeachment purposes. It is well established in New York that a criminal defendant may be interrogated about the "commission of other specific criminal or immoral acts."¹³⁴ In this case, a rape charge would likely be deemed a "specific criminal or immoral act"; therefore, they are related, for impeachment purposes, under New York law. That is to say, the prosecution would be permitted, assuming the act was final, to question the defendant regarding the rape conviction. While the court in *Cantave* did not directly address why it found the rape charge unrelated to the assault charge, the analysis would not have changed the outcome because the rape charge was still pending.

B. Pending: Prior Act's Status During Present Action

In order for a prosecutor to inquire about the underlying facts of another case, the matter must be closed.¹³⁵ However, if the matter is still pending and the issue is collateral, that is to say that the evidence is being introduced for impeachment purposes and is not related to an issue of the case, then the New York courts have firmly held that a defendant-witness does not automatically waive his constitutional Privilege.¹³⁶ In other words, the traditional rule set forth in *Tice* that a criminal defendant avails himself of all the dangers of any

murdered the resident. 113 N.E. 538, 539 (1916). While incarcerated, the defendant made several statements, including admissions of guilt. *Id.* The defendant claimed that the statements were coerced. *Id.* He was convicted, and on appeal, he argued that the prosecutor made an improper reference to the defendant's failure to deny committing the crime while testifying. *Id.* at 540. Defense counsel argued that the sole purpose for the defendant taking the stand was to describe the circumstances under which he made those statements. *Id.* The court held that the defendant cannot claim the right to testify, but also argue that a presumption cannot be created against him when he refuses to answer questions on a matter at hand. *Trybus*, 113 N.E. at 540.

¹³³ *Casey*, 72 N.Y. at 398-99.

¹³⁴ *Sorge*, 93 N.E.2d at 638; see also *People v. Webster*, 34 N.E. 730, 733 (N.Y. 1893) (stating that defendants may be interrogated upon cross-examination in regard to any vicious or criminal acts of his life that has a bearing on his credibility as a witness).

¹³⁵ *Betts*, 514 N.E.2d at 867-68.

¹³⁶ *Id.*

other witness is not necessarily true anymore.¹³⁷ The Court of Appeals has begun to realize that if the courts were to allow prosecutors the opportunity to question defendant-witnesses about a pending matter, then defendants' right to testify would be all but destroyed.¹³⁸ In other words, a defendant's only choice is not to testify if he knows he will be asked incriminating questions in another matter, regardless of whether he is guilty.

The United States Supreme Court has also taken a firm stance on preventing defendant-witnesses from being questioned about incidents concerning a pending matter. The Supreme Court has determined that incrimination is not complete until a sentence has been handed down and that conviction has become final.¹³⁹ Further, a witness is only protected until he no longer has the ability to incriminate himself, but as long as the potential for self-incrimination remains, so too does the privilege unless supplanted by immunity.¹⁴⁰

In *Cantave*, the court considered a new wrinkle to the issue of what it deems a pending matter. The defendant was convicted of rape, but his conviction was still on appeal.¹⁴¹ Following the teachings of the Supreme Court is the only logical conclusion that the New York Court of Appeals should have made. Incrimination, as set forth in *Mitchell*, has not occurred because the judgment of the conviction has not become final.¹⁴² That is to say, the defendant in *Cantave* still had the opportunity to overturn his rape conviction on appeal, which is what ultimately occurred.¹⁴³ Again, a witness is only protected until he can no longer incriminate himself or is granted immunity in exchange for his testimony.¹⁴⁴ At the time of the assault trial, it was still highly likely that Cantave could potentially answer a question with injurious testimony to the rape conviction on appeal.

¹³⁷ *Tice*, 30 N.E. at 496.

¹³⁸ *Betts*, 514 N.E.2d at 868.

¹³⁹ *Mitchell*, 526 U.S. at 325-26 (quoting J. WIGMORE, EVIDENCE § 2279, p. 991 n.1 (A. Best ed. Supp. 1998) ("Although the witness has pleaded guilty to a crime charged but has not been sentenced, his constitutional privilege remains unimpaired.")).

¹⁴⁰ *Kastigar*, 406 U.S. at 444-45, 453.

¹⁴¹ *Cantave*, 993 N.E.2d at 1260.

¹⁴² *Mitchell*, 526 U.S. at 325-26.

¹⁴³ *Cantave*, 993 N.E.2d at 1262.

¹⁴⁴ *Kastigar*, 406 U.S. at 444-45, 453.

C. Unduly Prejudicial: Prior Act's Effect on Defendant

The greatest harm that the court must consider and protect against is the unduly prejudicial effect that evidence of a pending matter may have on a defendant.¹⁴⁵ If the defendant is faced with the risk of incriminating himself and the prosecution's purpose for using the unrelated, pending action is to impeach the witness's credibility, then undue prejudice will result.¹⁴⁶ The defendant is faced with a double-edged sword. He may choose to testify, but in doing so, he may be asked questions regarding the facts of a criminal act in a case that has yet to be determined. If the defendant chooses to answer, any answer he provides may be used against him in that separate ongoing or future trial.¹⁴⁷ If the defendant chooses not to answer the question and instead exercises the Privilege, assuming he is not compelled to answer, a juror may naturally assume that the defendant is hiding something.¹⁴⁸ In essence, every time a defendant takes the stand and is placed in this scenario, he has no good options and is forced to choose between the lesser of two evils. On the other hand, if the defendant chooses to take the stand and testify, then he may not be able to present the best defense before the court and the jury.¹⁴⁹

This was exactly the situation in *Cantave*. The defense was planning on a justification defense.¹⁵⁰ In order to effectively present that defense, Cantave would have to testify so that he could provide the jury with his version of what had occurred.¹⁵¹ After the judge ruled that the prosecutor could inquire about the pending rape charge, defense counsel's justification defense became nearly impossible to prove because Cantave could not testify to what happened without placing himself at risk of having to answer potentially incriminating questions.¹⁵² Had the prosecution not been allowed to ask about those underlying facts, Cantave would have been free to testify on his own behalf. The court in *Cantave* recognized that had the defendant been forced to testify, he would have jeopardized the Privilege and was, therefore, forced to limit his right to testify in order

¹⁴⁵ *Cantave*, 993 N.E.2d at 1263.

¹⁴⁶ *Betts*, 514 N.E.2d at 868.

¹⁴⁷ *Cantave*, 993 N.E.2d at 1263; see also *Mitchell*, 526 U.S. at 325 (involving fear of future incrimination).

¹⁴⁸ *Cantave*, 993 N.E.2d at 1262.

¹⁴⁹ *Betts*, 514 N.E.2d at 866.

¹⁵⁰ *Cantave*, 993 N.E.2d at 1260.

¹⁵¹ *Id.*

¹⁵² *Id.*

to protect himself.¹⁵³

VII. CONCLUSION

People v. Cantave presented an issue of first impression in New York: whether questions concerning the underlying facts of an unrelated, pending matter unduly prejudice a defendant's Fifth Amendment privilege against self-incrimination. Questions of this type clearly present major roadblocks in ensuring that criminal-defendants are provided with a fair trial. Federal and state case law support this contention by providing strong persuasive authority that it would be unduly prejudicial to allow questions concerning pending criminal matters. Moreover, employing both the federal and state approaches, the New York Court of Appeals recognized that a conviction on appeal can still be changed and, therefore, must be treated as pending. The Fifth Amendment was created to ensure that citizens would not be compelled to testify against themselves, thereby aiding in their own prosecution. To further safeguard the constitutional privilege, it is necessary for the courts to weigh the prosecutor's duty to seek justice for the defendant's Privilege and his right to testify on his own behalf. Both are invaluable rights that require protection. In *Cantave*, while the prosecution may have asked questions regarding the rape conviction, the fact that the rape conviction was still pending should have negated that ability because there is clearly an unfair prejudicial effect that the defendant would be hard-pressed to overcome. Therefore, the New York Court of Appeals decision in *Cantave* ensures that the criminal defendant is provided with a fair trial, free from the threat of self-incrimination and falls within the purview and reasoning of its prior decisions as well as the Supreme Court's prior Fifth Amendment decisions regarding the self-incrimination privilege.

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¹⁵³ *Id.* at 1263.

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