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Self Incrimination

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N.Y. CONST. art. I, § 6:

No person shall . . . be compelled in any criminal case to be a witness against himself.

U.S. CONST. amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself.

COURT OF APPEALS

People v. Vargas¹
(decided June 13, 1995)

Defendant Manny Vargas appealed his conviction of second degree murder and criminal possession of a weapon.² Vargas argued that the prosecution committed a reversible error that deprived him of a fair trial when the prosecution deliberately called a witness, whom they knew would assert his privilege against self-incrimination,³ for the sole purpose of using that assertion against the defendant.⁴ The New York Court of Appeals held that the prosecution unfairly prejudiced the defendant and deprived him of a fair trial when they used a witness' assertion of his privilege against self-incrimination against the defendant.⁵ The court further held that a curative instruction could not undo the unfairness which resulted from the impression left by the

1. 86 N.Y.2d 215, 654 N.E.2d 1221, 630 N.Y.S.2d 973 (1995).

2. 86 N.Y.2d at 217, 654 N.E.2d at 1222, 630 N.Y.S.2d at 974.

3. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself" *Id.* See also N.Y. CONST. art. I, § 6. This section provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself" *Id.*

4. *Vargas*, 86 N.Y.2d at 217-20, 654 N.E.2d at 1222-24, 630 N.Y.S.2d at 974-76.

5. *Id.* at 222, 654 N.E.2d at 1225, 630 N.Y.S.2d at 977.

witness' repeated invocation of his right to be free from self-incrimination.⁶

On April 9, 1987, Ms. Lourdes Caban was found murdered in her car.⁷ Along with her body, the police found school books belonging to Anthony Arlequin, the defendant's cousin.⁸ The police questioned Arlequin for several hours at the 60th Precinct.⁹ There, he implicated the defendant in Caban's murder.¹⁰ Subsequently, the police brought Arlequin to the 84th Precinct "where he repeated his statement to an Assistant District Attorney, who preserved the statement on audiotape."¹¹ This admission, in conjunction with a purportedly incriminating remark made by the defendant to a friend and the statement of an eyewitness who saw the defendant's car flee the scene, led to the defendant's arrest.¹² Defendant was indicted for murder in the second degree and criminal possession of a weapon in the second degree.¹³

At trial, the prosecution called as their witness Anthony Arlequin, the defendant's cousin. Outside the jury's presence, Arlequin asked for an attorney claiming his previous statement, given at the 60th Precinct, was a lie.¹⁴ His request was granted and he finished testifying with his "attorney by his side."¹⁵ His testimony was replete with Fifth Amendment assertions.¹⁶ After Arlequin's testimony, the court advised the prosecution that if they were to call Arlequin to the stand to testify, they could only ask questions on matters upon which he did not invoke his Fifth Amendment privilege.¹⁷

6. *Id.*

7. *Id.* at 217, 654 N.E.2d at 1222, 630 N.Y.S.2d at 974.

8. *Id.*

9. *Id.* at 218, 654 N.E.2d at 1222, 630 N.Y.S.2d at 974.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 218, 654 N.E.2d at 1223, 630 N.Y.S.2d at 975.

17. *Id.* at 218-19, 654 N.E.2d at 1223, 630 N.Y.S.2d at 975.

Two days later, the prosecution called Arlequin to the stand in front of the jury.¹⁸ The prosecution focused on questions similar to those which were previously asked outside of the jury's presence, which again warranted a Fifth Amendment assertion.¹⁹ Against the defendant's request, the court refused to strike his testimony.²⁰ However, the court did instruct the jury that it was the witness' constitutional right to invoke such a privilege and no inferences should be drawn from such an invocation.²¹

During summation, the prosecutor stated that the reason Arlequin invoked his Fifth Amendment privilege was that he was involved in Caban's murder and he did not want to implicate himself.²² The prosecutor further suggested that the witness was not interested in discussing the incident in court. The prosecutor stated:

[H]e knows more than he wants to say . . . he is covering for this defendant, for this defendant, his cousin. He knows what happened and he won't tell us . . . we know from the evidence he was there . . . if somebody else killed a wife of his cousin[,] brutally executed her, why wouldn't he say who it is . . . The only reason he is not telling us is because he is protecting [his cousin].²³

The defense attorney's repeated objections throughout the prosecution's summation were overruled because, according to the court, the "jury may consider the evidence it has heard."²⁴ The prosecution continued to refer to Arlequin's invocation of the Fifth Amendment as an indication that Arlequin was protecting his cousin and did not want to "pin" the murder on him.²⁵ At the end of trial, the court again instructed the jury that a witness may invoke his constitutional right against self-incrimination.²⁶

18. *Id.* at 219, 654 N.E.2d at 1223, 630 N.Y.S.2d at 975.

19. *Id.*

20. *Id.*

21. *Id.* at 220, 654 N.E.2d at 1223-24, 630 N.Y.S.2d at 975-76.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 220, 654 N.E.2d at 1223, 630 N.Y.S.2d at 975.

26. *Id.* at 220, 654 N.E.2d at 1223-24, 630 N.Y.S.2d at 975-76.

Further, “the jury should not speculate” as to what the witness’ answers may or may not be, nor should they view the refusal to answer as favorable or not to either party.²⁷

The issue presented on appeal was whether the prosecution committed reversible error when, knowing prior to trial that the witness would assert his Fifth Amendment privilege, they deliberately called that witness for the sole purpose of eliciting that privilege in court and using that assertion against the defendant.²⁸

Since Justice Hand’s decision in *United States v. Maloney*,²⁹ courts have been extremely aware that a defendant’s right to a fair trial may be infringed upon when a witness refuses to answer on the grounds that the witness may incriminate himself.³⁰ Based on this awareness, courts have determined that when the prosecution calls a witness whom they know will assert his Fifth Amendment right, reversible error is committed.³¹

The *Vargas* court cited the Supreme Court decision in *Namet v. United States*.³² In *Namet*, the Supreme Court recognized two instances where reversible error may be found when a witness invokes his Fifth Amendment right.³³ The first is “prosecutorial misconduct.”³⁴ The Supreme Court held that it is a reversible error when the prosecution makes a “conscious and flagrant attempt to build its case out of inferences arising from use of the

27. *Id.* at 220, 654 N.E.2d at 1224, 630 N.Y.S.2d at 976.

28. *Id.* at 217, 654 N.E.2d at 1222, 630 N.Y.S.2d at 974.

29. 262 F.2d 535 (2d Cir. 1959).

30. *Id.* at 537. “[T]he prosecution knew that [the witnesses] would refuse to answer, and it seems to us that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the questions touched vital elements of the charge.” *Id.*

31. *Vargas*, 86 N.Y.2d at 221, 654 N.E.2d at 2224, 630 N.Y.S.2d at 976. See *People v. Pollock*, 21 N.Y.2d 206, 212-13, 234 N.E.2d 223, 226, 287 N.Y.S.2d 49, 53 (1967) (calling a witness for the purpose of eliciting a Fifth Amendment claim constitutes prejudicial error); cf. *People v. Berg*, 59 N.Y.2d 294, 298-99, 451 N.E.2d 450, 451, 464 N.Y.S.2d 703, 704 (1983) (holding that a good faith effort to illicit testimony does not constitute reversible error).

32. 373 U.S. 179 (1963).

33. *Id.* at 186-87.

34. *Id.* at 186.

testimonial privilege.”³⁵ The second instance where reversible error may be found is where the witness’ refusal to answer adds weight to the prosecution’s case thereby unfairly prejudicing the defendant.³⁶

According to the *Vargas* court, the Supreme Court of the United States, in *Namet*, laid out a paradigm for courts to utilize in evaluating the prosecution’s management of a witness’ testimony when that witness invokes his Fifth Amendment privilege.³⁷ The trial court must determine “whether the probative value of the testimony of the witness who invoked the Fifth Amendment privilege in the presence of the jury outweighs any prejudice to the defendant.”³⁸ The *Vargas* court evaluated the prosecution’s conduct and held that their conduct during questioning and summation fell under both categories, an attempt by the prosecutor to build his case out of inferences drawn by the assertion of a testimonial privilege and undue prejudice.³⁹ Thus, the court held that the “prejudicial effect of Arlequin’s testimony to defendant outweighed the negligible relevant information he provided, and . . . no curative instruction could temper the impression created by his repeated invocation of the Fifth Amendment in response to the prosecutor’s pointed questions.”⁴⁰

The prosecution questioned Arlequin on many matters of which they knew, prior to trial, that he would assert his Fifth Amendment right to avoid;⁴¹ thus, forcing the witness to reiterate, in front of the jury, that he was asserting his testimonial privilege. During summation, they used Arlequin’s assertions to their advantage by making numerous references to the fact that Arlequin refused to answer because he wanted to protect the defendant and not reveal their involvement in Cuban’s murder.⁴²

35. *Id.*

36. *Id.* at 187.

37. *People v. Vargas*, 86 N.Y.2d 215, 221-22, 654 N.E.2d 1221, 1224-25, 630 N.Y.S.2d 973, 976-77 (1995).

38. *Id.* at 222, 654 N.E.2d at 1225, 630 N.Y.S.2d at 977.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 222-23, 654 N.E.2d at 1225, 630 N.Y.S.2d at 977.

Despite the judge's charge to the jury that the jury should not make any negative inferences when a witness asserts his Fifth Amendment privilege, the prosecution's conduct led to an unfair trial for the defendant.⁴³ Thus, the New York Court of Appeals reversed and ordered a new trial.⁴⁴

In sum, under both the Federal and New York Constitution, reversible error may be committed when the prosecution calls a witness for the sole purpose of using his or her assertion of the privilege against self-incrimination against the defendant. Respectfully enforcing the United State Supreme Court's decision in *Namet*, the New York Court of Appeals held that reversible error may be committed where the prosecution makes a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege"⁴⁵ or where a witness's invocation of the privilege unduly prejudices the defendant.⁴⁶

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Spinelli⁴⁷
(decided September 15, 1995)

The defendant, Thomas Spinelli, was convicted in the Supreme Court, Queens County of second-degree manslaughter and moved to have this verdict reversed on the ground that his right against self-incrimination was violated.⁴⁸ The Appellate Division,

43. *Id.*

44. *Id.* at 224, 654 N.E.2d at 1226, 630 N.Y.S.2d at 978.

45. *See Namet v. United States*, 373 U.S. 179, 186 (1963).

46. *Id.* at 187.

47. 214 A.D.2d 135, 631 N.Y.S.2d 863 (2d Dep't 1995).

48. *Id.* at 138, 631 N.Y.S.2d at 864. *See U.S. CONST.* amend. V. The Fifth Amendment provides in pertinent part: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Id.*; N.Y. CONST.