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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 129

JEAN CANTAVE,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 29, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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CHIEF JUDGE LIPPMAN: Number 129.

Counselor, would you like some rebuttal time?

MS. POWELL: Yes, Your Honor. I would like to reserve a minute for rebuttal.

CHIEF JUDGE LIPPMAN: One minute, sure.

MS. POWELL: One minute.

CHIEF JUDGE LIPPMAN: Go ahead.

MS. POWELL: My name is De Nice Powell. I'm here representing Jean Cantave in this appeal.

The first question that this appeal asks is should the Betts rule be extended to Sandoval rulings where the People seek to cross-examine the defendant regarding a conviction that is pending on direct appeal.

CHIEF JUDGE LIPPMAN: Would we be extending the law in our state in relation to - - - to the Sandoval ruling?

MS. POWELL: Are we - - -

CHIEF JUDGE LIPPMAN: Would we be extending the law, in this particular case, where you have the conviction but it's on appeal?

MS. POWELL: It would be a slight extension.

1 CHIEF JUDGE LIPPMAN: What is the law and  
2 what's the slight extension?

3 MS. POWELL: The law at the current time is  
4 that the People cannot - - - cannot seek and obtain a  
5 Sandoval ruling that permits them to burden the  
6 defendant's right to testify by basically forcing him  
7 to give up his Fifth Amendment right as to another  
8 pending collateral matter. That's the rule that the  
9 court provide that - - -

10 JUDGE SMITH: The question here is just  
11 whether it counts as pending if it's on appeal?

12 MS. POWELL: It's the case - - -

13 JUDGE SMITH: That's the issue. If the  
14 case - - - if you've been convicted and you're on  
15 appeal, is your case still pending?

16 MS. POWELL: Yes. And the - - - well, I  
17 should really reframe it. The question really - - -  
18 the key question here is really whether or not the  
19 defendant has a Fifth Amendment right that survives  
20 the conviction and sentence. I mean - - -

21 JUDGE GRAFFEO: How does - - -

22 MS. POWELL: - - - it doesn't really turn  
23 on whether that's pending.

24 JUDGE GRAFFEO: - - - Federal Rule 609  
25 handle that issue?

1 MS. POWELL: The Federal Rule 609 permits  
2 the prosecutor to impeach a defendant witness with  
3 prior convictions or pleas.

4 JUDGE GRAFFEO: While they're pending on  
5 appeal?

6 MS. POWELL: While they're pending.

7 However - - -

8 JUDGE GRAFFEO: So you're asking us to do a  
9 more restrictive -

10 MS. POWELL: No, I'm actually not, Your  
11 Honor.

12 JUDGE GRAFFEO: - - - rule?

13 MS. POWELL: I think that the - - - this  
14 court, in fact, cited another rule in the Federal  
15 Rules, that's at 608, that limits 609(e). I know the  
16 People cite that in their brief, but 608 of the  
17 Federal Rules of Evidence limits 609(e). It says  
18 that by taking the stand - - - basically, it's a  
19 codification of this court's holding in Betts. That  
20 is, that by taking the stand, a defendant does not  
21 automatically waive his Fifth Amendment rights as to  
22 - - -

23 JUDGE PIGOTT: Well, separate and apart  
24 from that, though, I mean, let's assume that it's not  
25 on appeal, I mean, is there any thought given to the

1 fact that when you're talking about an assault that  
2 ends up - - - I mean it's an assault third where  
3 they're fighting over a license plate. The fact not  
4 only that he's been convicted of a felony, but that  
5 he was convicted of a rape, and the judge says, and  
6 you can bring in the facts and circumstances  
7 surrounding the rape and the sentence, isn't that  
8 over the line in terms of what a Sandoval compromise  
9 is in a case such as this?

10 MS. POWELL: I would agree with Your Honor.  
11 I mean, I don't think that a rape necessarily is  
12 indicative or probative of a defendant's credibility  
13 - - -

14 JUDGE SMITH: But our cases give quite a  
15 lot of scope to lower courts in fashioning those  
16 Sandoval compromises, don't they?

17 MS. POWELL: That's correct. But this is  
18 not an issue of, you know, whether or not the court  
19 properly exercised its discretion in arriving at its  
20 Sandoval ruling. The question is really a question  
21 of law, and that is, can the court burden the  
22 defendant's right to testify by forcing him,  
23 essentially, to, you know, waive his Fifth Amendment  
24 rights as to - - -

25 JUDGE SMITH: Okay. Obviously, every

1 defendant who testifies is waiving his Fifth  
2 Amendment right to some degree. But what we held in  
3 Betts was the waiver doesn't extend to other pending  
4 cases.

5 MS. POWELL: Correct. I'm not quarreling  
6 with the general rule that when a defendant takes the  
7 stand he exposes himself to, you know, the - - - just  
8 like any other witness, to cross-examination as to  
9 other bad acts. That's not the issue here. The  
10 issue here is whether or not the court can force - -  
11 - can, by virtue of the Sandoval ruling, force a  
12 defendant to choose, you know, take the stand; if I  
13 take the stand I have to waive my Fifth Amendment  
14 rights as to a pending matter, where he is obviously  
15 in danger of future prosecution.

16 JUDGE ABDUS-SALAAM: Counsel, is it - - -  
17 but he had already been convicted in this case.

18 MS. POWELL: Correct.

19 JUDGE ABDUS-SALAAM: And in Betts there  
20 wasn't a conviction; that was a collateral - - -  
21 those were collateral cases, right?

22 MS. POWELL: It was an open indictment - -  
23 -

24 JUDGE ABDUS-SALAAM: Right.

25 MS. POWELL: - - - yes.

1                   JUDGE ABDUS-SALAAM: So isn't that a  
2                   distinction that we should consider here, that once  
3                   you've been convicted, you're not exactly, you know,  
4                   giving up - - - you know, most convictions are  
5                   affirmed, so you're not exactly - - - it just so  
6                   happened that this one was later overturned after  
7                   this trial, but most convictions are affirmed, so  
8                   should we take into account that once someone has  
9                   been convicted of a crime that they're not really  
10                  giving up Fifth Amendment rights because they've  
11                  already been convicted?

12                 MS. POWELL: No, Your Honor, I - - -

13                 JUDGE ABDUS-SALAAM: They're not likely to  
14                  be retried.

15                 MS. POWELL: No, in every criminal  
16                  conviction, a defendant has the absolute right to  
17                  appeal to an intermediate court, in every conviction.  
18                  So if you - - - if you appeal your conviction,  
19                  there's clearly a possibility of winning a reversal,  
20                  and if you win a reversal, the charges don't go away.  
21                  You're typically remitted for resentencing. So the  
22                  question is what is the scope of the Fifth Amendment?  
23                  The scope of the Fifth Amendment - - - Fifth  
24                  Amendment protects every defendant from being  
25                  compelled to make - - - to answer questions when he's

1 facing a future danger or risk of future prosecution.  
2 Clearly, when a defendant is convicted and appeals  
3 that conviction, he still remains at risk of future  
4 prosecution - - -

5 JUDGE SMITH: Well - - -

6 MS. POWELL: - - - because it is - - -

7 JUDGE SMITH: - - - why - - - why, then,  
8 did we decide in Brady that it was okay to use - - -  
9 to use his plea?

10 MS. POWELL: Brady is a completely  
11 different case. In Brady there was a plea - - - the  
12 court held - - -

13 JUDGE SMITH: It was still - - - it was  
14 just as much pending as the rape case was here,  
15 wasn't it?

16 MS. POWELL: It was pending, but because  
17 the court ruled against Brady because he was not  
18 presently in - - - when he was being tried and when  
19 the Sandoval ruling was issued, he was not then in  
20 danger of future prosecution because of the facts of  
21 those - - - that case. Eighteen months had  
22 transpired between the plea in Brady and when he was  
23 subsequently tried, and in that eighteen-month  
24 period, the defendant Brady did nothing to attack  
25 that plea. He never asserted to the court that it

1 was vulnerable to attack.

2 JUDGE SMITH: So the defendant in Brady  
3 made a mistake. If he just made a motion to withdraw  
4 his plea in the other case, he would have - - - he  
5 would have been protected from cross-examination?

6 MS. POWELL: It would - - - it would have  
7 been a different case. I think that the court likely  
8 would have decided in Brady's favor, had he made - -  
9 -

10 JUDGE ABDUS-SALAAM: Counsel, if we adopt -  
11 - -

12 JUDGE PIGOTT: What is - - - I'm sorry. Go  
13 ahead.

14 JUDGE ABDUS-SALAAM: I'm sorry. If we  
15 adopt the rule that you're suggesting, counsel, won't  
16 everybody who gets convicted just appeal just so they  
17 won't have to - - - if they get arrested again, they  
18 won't have to testify in their other case, or they  
19 would say well, my - - - this case that I've been  
20 convicted on is on appeal, so I don't want to - - -  
21 you know, I want a ruling that will allow me to  
22 testify?

23 MS. POWELL: I - - - I don't know if that's  
24 - - - if that would be the thought process of  
25 defendants, but I think that - - - you know, I

1 understand that it may - - - that if the court, you  
2 know, extends Betts - - - the Betts rule to encompass  
3 this case, that it may very well make it more  
4 difficult for the prosecutor to prove their case.  
5 They may lose a certain amount of impeachment  
6 material available - - - they won't have that  
7 available to them. But the Fifth Amendment - - - the  
8 Fifth Amendment is a Constitutional right, and while  
9 it may make prosecuting defendants more difficult,  
10 the right should not be diminished because it's more  
11 difficult for the prosecutor.

12 JUDGE PIGOTT: On top of that, it seems to  
13 me if the court had done what we normally call a  
14 Sandoval compromise - - - I'm just talking in terms  
15 of felonies - - - instead of the fact that it was a  
16 rape and all of the details that went with it, he  
17 would have been more inclined, had he chosen to take  
18 the stand - - - and I don't know it to be much of a  
19 complaint if that felony ultimately got overturned.  
20 I don't know if an appeal at that point, would have -  
21 - - you know, would have gone anywhere. I think  
22 that's the beauty of the Sandoval compromise, rather  
23 than getting into the actual charge in this case and  
24 in the subsequent - - - and the facts underlying it.

25 MS. POWELL: In this - - - in this case,

1 the court allowed the prosecutor to not only ask  
2 about the sentence and the nature of the charge, but  
3 also to go under - - -

4 JUDGE SMITH: Well, I mean, the question -  
5 - -

6 MS. POWELL: - - - cross the underlying  
7 facts.

8 JUDGE SMITH: The question - - - if the  
9 only question he'd been allowed to ask were, were you  
10 convicted of such and such a charge on such and such  
11 a date, I suppose that doesn't raise any Fifth  
12 Amendment problem, does it? He doesn't incriminate  
13 himself by saying yes; everyone knows the answer's  
14 yes, anyway.

15 MS. POWELL: I think that - - - I would  
16 actually think - - - I think that that would be a  
17 problem in itself. I don't think - - - I think it  
18 would be completely off points - - -

19 JUDGE SMITH: You mean, you have a Fifth  
20 Amendment right to deny you were convicted?

21 MS. POWELL: Because it exposes - - -

22 JUDGE SMITH: I mean, not to deny it, but  
23 you have a Fifth Amendment right as to the - - - how  
24 does that incriminate you?

25 MS. POWELL: Well, the Fifth Amendment is

1 broad. It protects the defendant from being  
2 compelled to answer specific questions that go to - -  
3 - that might lead to criminality or prosecution, but  
4 it also protects the defendant from being even - - -  
5 being presented with a question. So I think that it  
6 was completely off-limits once this conviction was  
7 pending on direct appeal.

8 CHIEF JUDGE LIPPMAN: Okay, thanks,  
9 counselor.

10 Counselor?

11 MR. BRANIGAN: William Branigan for the  
12 People. Good afternoon, Your Honors, may it please  
13 the court.

14 Your Honors, as a threshold matter, by  
15 waiting to raise this current Sandoval claim until  
16 after both parties had rested and were prepared to  
17 give summations, the defendant failed to preserve  
18 this claim for this court's review.

19 JUDGE SMITH: Isn't - - - I mean, all that  
20 happened between the initial argument of the motion  
21 and the - - - the would you please reconsider it, all  
22 that happened in the case was the defendant said that  
23 I rest. He never called any witnesses, right?

24 MR. BRANIGAN: Well, they rested. There  
25 was - - - there was motions at the end of the case,

1 and the court was adjourned for summation. So it was  
2 a little more than that.

3 JUDGE SMITH: But - - -

4 MR. BRANIGAN: - - - more than that.

5 JUDGE SMITH: But essentially, nothing happ  
6 - - - I mean, was there any prejudice to the - - -  
7 would there have been any prejudice to the People if  
8 the judge had said, oh, okay, go ahead and reopen,  
9 call your client?

10 MR. BRANIGAN: Your Honor, there's nothing  
11 particularly apparent from the record, but there  
12 could be in - - - there could have been, if the  
13 motion to reopen was made and the People would have  
14 had a chance to respond to that.

15 JUDGE PIGOTT: Well, you - - - all that  
16 would have happened, presumably, is he'd gotten on  
17 and testified to his side of the story. This - - -  
18 this was a pretty - - - I don't want to call it  
19 silly, because a guy got hurt, but I mean, you're  
20 fighting over a license plate. It ended up, you  
21 know, as the jury found, that it was a misdemeanor.  
22 What was the thinking of the District Attorney in  
23 suggesting that if the man takes the stand to talk  
24 about this fight over a license plate, that the fact  
25 that he was convicted of a rape, the fact that all of

1 the underlying circumstances of that, and the  
2 sentence, would be relevant to his credibility as to  
3 whether - - - as to who pushed who over the license  
4 plate? I mean, isn't the prejudice there clear?

5 MR. BRANIGAN: Okay. First, Your Honor,  
6 you're talking about the - - - the discretion of the  
7 court - - -

8 JUDGE PIGOTT: Yes.

9 MR. BRANIGAN: - - - rather than the per se  
10 rule that the defendant is advocating. But looking  
11 at the discretion, though, Your Honor, a case like  
12 this, where we have - - - we have basically two - - -  
13 two witnesses of the People stating the defendant  
14 committed this assault. The defendant wants to take  
15 the stand on his own behalf and raise - - -

16 JUDGE PIGOTT: The two witnesses are a  
17 husband and wife - - -

18 MR. BRANIGAN: Yes, Your Honor.

19 JUDGE PIGOTT: - - - fighting over a  
20 Massachusetts license plate.

21 MR. BRANIGAN: That is what happened, Your  
22 Honor. That is what happened.

23 Your Honor, the - - - and the defendant - -  
24 - the defendant wishes to put what seems to be a very  
25 far-fetched story regarding justification. The

1 defendant's credibil - - -

2 JUDGE PIGOTT: Why? The thing happened at  
3 his business. It wasn't - - - it wasn't like he went  
4 to the victim's house and beat him up. He's at - - -  
5 he's at the used car lot and this guy comes to get  
6 his license. To me, it's not like there's a predator  
7 here. At least a jury could find that this was  
8 nothing but a scuffle between two people, you know,  
9 over - - - over who was supposed to drive what car  
10 wherever it was supposed to go. And in the bottom of  
11 that, to suggest that you're a rapist, it would just  
12 seem to me that the jury's minds would not go any  
13 further than the fact that there was a conviction for  
14 rape on one person's part and he's got to be guilty.

15 MR. BRANIGAN: Your Honor, the fact that he  
16 was convicted for rape is highly probative concerning  
17 his credibility. And the court - - -

18 JUDGE PIGOTT: Why?

19 MR. BRANIGAN: - - - would have to give it  
20 - - -

21 JUDGE PIGOTT: Why wouldn't it simply be  
22 that he was convicted of a felony? That's what  
23 happens. I don't know, you know, maybe I'm crazy,  
24 but upstate New York, it just seems to me, there's  
25 always what's called a Sandoval compromise. And

1 people come in and say we want to prove this, and the  
2 defense says that's prejudicial, and the judge will  
3 say I think you're right, I'll let you say, isn't it  
4 true that you were convicted of a felony back in  
5 whatever the year it was and a jury found you guilty  
6 of a felony? And that's enough. I mean, it - - -  
7 now you're done. But to go into the fact that this  
8 was the victim and this was a rape, and then, as this  
9 one happens, as it turns out, he gets acquitted, you  
10 can see the problem. I don't know why if you had  
11 said felony, you wouldn't have had the same case.

12 MR. BRANIGAN: Your Honor, it is more  
13 probative if the jury hears that he was convicted of  
14 rape. And while it's not cited in our papers, if you  
15 look at the Appellate Division's decision, they do  
16 rely on a case from the 1970s regarding the facts of  
17 a - - - of a child rape or child sex assault that  
18 were relevant to the defendant's credibility in that  
19 case. So the type of crime - - -

20 JUDGE PIGOTT: What was the crime he was  
21 charged with in that one?

22 MR. BRANIGAN: The - - - I'm sorry, in the  
23 case cited in the Appellate Division?

24 JUDGE PIGOTT: Yeah.

25 MR. BRANIGAN: Your Honor, I - - - I don't

1 remember, and I think that actually might have also  
2 been a sex assault. But I - - -

3 JUDGE PIGOTT: Right.

4 MR. BRANIGAN: - - - I'll rely on the - - -  
5 the Appellate Division decision.

6 JUDGE PIGOTT: Do you - - - do you - - -  
7 can you objectively see that a jury might be swayed  
8 by the - - - by a rape conviction and the underlying  
9 details and the sentence, when we're talking about a  
10 fight between two people that happened in a used car  
11 lot one day?

12 MR. BRANIGAN: Your Honor, there's always a  
13 danger of prejudice in these cases. That's why we  
14 have Sandoval. That's why we vest the trial court  
15 with the discretion over how much of these - - -  
16 these decisions to let in - - - into a trial. But  
17 that, again, goes to the discretion of the trial  
18 court. And what Your Honor seems to be complaining  
19 about is a fundamental Sandoval question, whether  
20 this is simply more prejudicial than - - - or it's  
21 simply too prejudicial - - -

22 JUDGE PIGOTT: Well, there's supposed to be  
23 a weigh - - -

24 MR. BRANIGAN: - - - but not sufficiently  
25 probative.



1 him to go into the underlying facts as well as the  
2 rape.

3 JUDGE SMITH: Why don't you tell us why  
4 People v. Betts doesn't apply?

5 MR. BRANIGAN: People v. Betts doesn't  
6 apply because in that case the defendant was still  
7 presumed innocent, the prejudice was immediate and  
8 apparent if he had to give up his Fifth Amendment  
9 right by testifying at the trial. Here - - -

10 JUDGE SMITH: I mean, you admit that he  
11 still - - - at the time he's on appeal, he still has  
12 Fifth Amendment rights in the rape case?

13 MR. BRANIGAN: Your Honor, there could be  
14 some residual Fifth Amendment right, but the - - -

15 JUDGE SMITH: Well, suppose - - -

16 MR. BRANIGAN: - - - the presumption - - -

17 JUDGE SMITH: Suppose in the pendency of  
18 the appeal, you wanted to subpoena him and put him in  
19 a grand jury and ask him about the rape, you couldn't  
20 do that.

21 MR. BRANIGAN: If - - - no, Your Honor.

22 JUDGE SMITH: So the question is - - - the  
23 question isn't whether he had a Fifth Amendment  
24 right; the question is whether - - - whether they - -  
25 - whether his taking the stand would constitute a

1 waiver of the right he had.

2 MR. BRANIGAN: Yes, Your Honor.

3 JUDGE SMITH: And why doesn't Betts say no  
4 to that question?

5 MR. BRANIGAN: Your Honor, Betts creates a  
6 balancing test. The reason why Betts excludes this  
7 is because what would ultimately result; allowing  
8 defendants who are still to be tried for a case to  
9 have to testify to that same case would reduce a  
10 chilling effect that would discourage them from  
11 testifying.

12 JUDGE PIGOTT: Well, wouldn't it - - -

13 MR. BRANIGAN: It would prejudice - - -

14 JUDGE PIGOTT: Wouldn't it - - - it would  
15 go back to what the Sandoval compromise, in my view,  
16 should be. In other words, you don't bring out all  
17 of the facts and the details and things like that.  
18 He was convicted of a felony. I think if you'd said  
19 that in this case, the fact that it was on appeal  
20 would have been irrelevant. And it's a felony. It's  
21 not like it's going to, you know, kill his ability to  
22 get up and testify. And he could say, yeah, I was  
23 convicted of a felony and I've got it on appeal and I  
24 think I'm innocent. I don't - - - I don't see the  
25 problem with that as much as when you - - - when you

1 want to bring in the victim and the circumstances  
2 under which the rape happened and the fact that he  
3 got sentenced to all this time, when, as it now turns  
4 out - - - and this isn't fair to you, but as it now  
5 turns out, he was acquitted after it was reversed. I  
6 mean, that - - - the Sandoval compromise would have  
7 satisfied this, it seems to me - - - would have  
8 solved the problem.

9 MR. BRANIGAN: But again, Your Honor, what  
10 you seem to be addressing, or what you seem to be  
11 saying, is that the court abused its discretion under  
12 Sandoval in this case.

13 JUDGE PIGOTT: Right.

14 JUDGE SMITH: Well, no - - -

15 MR. BRANIGAN: The court could surely - - -

16 JUDGE SMITH: - - - I think the point of  
17 the question, of Judge Pigott's question, as I  
18 understand it, is that if - - - apart from whether it  
19 abused its discretion or not, is couldn't the court  
20 have solved the problem by not letting them go into  
21 the underlying facts and still preserved a good deal  
22 of the People's ability to impeach him?

23 MR. BRANIGAN: Your Honor, the court could  
24 have done that in its discretion, and the reason - -  
25 - again, maybe this particular rape case, it doesn't

1           seem like the underlying facts are relevant, but the  
2           court can imagine that in a larceny case, in a  
3           perjury case, the underlying facts become highly  
4           relevant to defendant's credibility.

5                    JUDGE PIGOTT: That's true, but I mean,  
6           you're arguing discretion, and I'm not - - - I'm not  
7           disputing that. I'm just saying it's not unfettered.  
8           I mean, there can be an abuse of that discretion, an  
9           improvident exercise of that discretion when it comes  
10          to what you're going to allow in. Don't you agree?

11                   MR. BRANIGAN: I agree, Your Honor.

12                   JUDGE PIGOTT: Okay.

13                   MR. BRANIGAN: But what's being asked for  
14          here is a per se exclusion of all cases pending  
15          appeal.

16                   JUDGE PIGOTT: Right.

17                   MR. BRANIGAN: So - - -

18                   JUDGE SMITH: As I under - - - well, maybe  
19          - - - I'm not sure your adversary agrees with me, but  
20          I would suggest that all that's - - - all that you -  
21          - - the only per se exclusion would be as to the  
22          underlying facts. No one's - - - no, well, someone's  
23          saying, but we aren't - - - we wouldn't necessarily  
24          have to hold that you could exclude the fact of  
25          conviction. Do you see - - - do you understand what

1 I'm asking?

2 MR. BRANIGAN: Yes, Your Honor. That's  
3 correct, Your Honor. The fact of the conviction,  
4 going back to your question to - - - to the  
5 defendant, is a different question. But again, in  
6 this case, whether it's a fact of the conviction - -  
7 -

8 JUDGE SMITH: But - - -

9 MR. BRANIGAN: - - - or it's a fact - - -

10 JUDGE SMITH: - - - doesn't that suggest,  
11 though, that the People should be able to live with a  
12 rule that says as long as the case is pending, even  
13 if it's still on appeal, stick to the fact of  
14 conviction and don't go into the underlying events.

15 MR. BRANIGAN: Well, Your Honor, the fact  
16 that the defendant was convicted of rape was highly  
17 relevant. And if that were the only issue - - -

18 JUDGE PIGOTT: Why? Could you tell me why  
19 that - - - again? I mean, this is an assault third.  
20 Let's assume that it was a petty larceny; they're  
21 both A misdemeanors. So the guy's convicted of  
22 shoplifting something out of a Stop & Shop, and you  
23 want to bring in the fact that he was - - - that he  
24 was convicted of rape five years ago. Is that  
25 relevant?

1                   MR. BRANIGAN: Your Honor, it's - - -  
2                   you're - - - we're getting into - - - it is relevant  
3                   to credibility, but again, it does start to seem  
4                   prejudicial at a certain case, if you get more  
5                   distant in time, for instance. But here, the point  
6                   of having the discretion in the trial court to  
7                   address these questions pending - - - cases pending  
8                   appeal is that if you have a recent case, if the  
9                   conviction is relevant, if the underlying facts are  
10                  relevant, the court should have discretion to bring  
11                  them in, and they should be presumed valid after the  
12                  conviction, just as the plea in Brady was valid.

13                  JUDGE PIGOTT: Well, presumed valid - - - I  
14                  mean, would you draw a distinction between somebody  
15                  who pleads guilty and then makes whatever arguments  
16                  he wants to make, as opposed to someone who is  
17                  convicted by a jury and still has never conceded his  
18                  innocence, has never admitted to the fact, never  
19                  admitted to the - - - to the crime. Is there a  
20                  difference there, in your view?

21                  MR. BRANIGAN: There - - - there might be a  
22                  factual difference, Your Honor, but the fact is that  
23                  in both cases the conviction is presumed valid. In  
24                  both cases, whether it's the defendant pleading  
25                  guilty or a trial in court, until the defendant is

1           able to rebut that by attacking his conviction  
2           through direct appeal or a collateral attack, that  
3           conviction should be presumed valid, and it should be  
4           available as evidence for the use of trial.

5                    JUDGE SMITH: Well, the fact that there's a  
6           valid conviction doesn't mean that the Fifth  
7           Amendment right is gone.

8                    MR. BRANIGAN: Not entirely, Your Honor.  
9           But in this case, the way that this court has  
10          addressed it in Betts, it is a balancing test. We do  
11          want to protect the defendant's right. We don't want  
12          to pervert the truth-finding function at trial. So  
13          if there are convictions in the future that are  
14          highly relevant to the defendant's - - - to the  
15          defendant's credibility, and that credibility is  
16          central - - - is central in a case, we don't want to  
17          - - - we don't want to take the discretion from the  
18          trial court to be able to admit both the conviction,  
19          the fact of what is the conviction for and the  
20          underlying facts in that case.

21                    CHIEF JUDGE LIPPMAN: Okay, counselor.  
22          Thank you, counselor.

23                    MR. BRANIGAN: Thank you, Your Honors.

24                    CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

25                    MS. POWELL: Oh, yes, Your Honor, just

1           briefly. I just wanted to highlight the rule I  
2           referred to before. It's 608 of the Federal Rules of  
3           Evidence, and it says, "By testifying on another  
4           matter, a witness does not waive any privilege  
5           against self-incrimination for testimony that relates  
6           only to the witness' character for truthfulness." So  
7           608 does limit 609(e).

8                    JUDGE ABDUS-SALAAM: Counsel, could you - -  
9           -

10                   MS. POWELL: And the People - - -

11                   JUDGE ABDUS-SALAAM: - - - could you  
12           clarify what rule you're asking for? Are you asking  
13           for a per se exclusion of the conviction and the  
14           underlying facts, or just the underlying facts?

15                   MS. POWELL: Well, if - - - if I had my  
16           druthers, I would ask for a preclusion of - - - of  
17           the - - - con - - - the fact of the conviction, the  
18           name of the conviction, as well as the underlying  
19           facts.

20                   JUDGE PIGOTT: One of the things that's  
21           happened, I remember from my time on the Appellate  
22           Division - - - I don't know if others do - - - but  
23           the DA, the People never moved to dismiss appeals.  
24           And to some extent, that's a credible - - - I mean,  
25           that's a nice thing to do. There are defendants who

1 have had appeals pending for fifteen years. Now, are  
2 they ever going to perfect them? Who knows? But  
3 they are on appeal. Is that a factor?

4 MS. POWELL: In - - - well, in - - - in my  
5 neck of the woods, the appeals are - - - are  
6 dismissed if they're not prosecuted.

7 JUDGE PIGOTT: So - - -

8 CHIEF JUDGE LIPPMAN: Okay. Thanks. Thank  
9 you both.

10 MR. BRANIGAN: Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE OF THE STATE OF NEW YORK v. JEAN CANTAVE, No. 129 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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