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Court of Appeals of New York - People v. Leon

Madeline Katz

Madeline Klotz

COURT OF APPEALS OF NEW YORK

People v. Leon[1]

(decided February 19, 2008)

Jose Leon was convicted of sexual abuse in the first degree and endangering the welfare of a child.[2] He was sentenced to a term of fifteen years to life as a persistent violent offender resulting from two prior convictions for violent felonies.[3] The Appellate Division, First Department, unanimously affirmed.[4] Leon appealed to the New York Court of Appeals, arguing that his right of confrontation as granted by the United States Constitution[5] and the New York Constitution[6] was violated at his sentencing hearing when he was denied the ability to confront the author of a report who had certified that the defendant's fingerprints matched those found on two fingerprint cards which listed two prior convictions.[7] The New York Court of Appeals affirmed, holding that Leon's constitutional rights were not violated because the right to confrontation is a "trial right" that does not apply

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[1] People v. Leon (*Leon II*), 884 N.E.2d 1037 (N.Y. 2008).

[2] People v. Leon (*Leon I*), 827 N.Y.S.2d 156, 157 (App. Div. 1st Dep't 2007).

[3] *Id.*; *Leon II*, 884 N.E.2d at 1038.

[4] *Leon I*, 827 N.Y.S.2d at 157.

[5] U.S. CONST. amend. VI, states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

[6] N.Y. CONST. art. I, § 6, states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him . . . ."; N.Y. CRIM. PROC. LAW § 400.15(17)(a)(McKinney 2008), which states, in pertinent part, that at a persistent violent felony hearing, "[the] burden of proof is upon the people and a finding that the defendant has been subject to a predicate violent felony conviction must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to a trial on the issue of guilt."

[7] *Leon II*, 884 N.E.2d at 1038.

at sentencing hearings.[8]

Leon was convicted of sexually abusing a thirteen-year-old.[9] The hearing court determined that Leon was "a persistent violent felony offender" after finding that Leon had previously been convicted of first-degree manslaughter in both 1976 and 1983.[10] A public official compared two fingerprint cards that bore identical identification numbers for a "Jose Leon" who had been convicted in 1976 and 1983, and determined that the fingerprints on the cards matched.[11] Leon claimed that he was the same "Jose Leon" that had been convicted in 1976, but not the same "Jose Leon" identified for the 1983 conviction.[12] Relying on *Crawford v. Washington*,[13] Leon asserted he was denied the right to confront the official who had compared the fingerprint cards at his sentencing hearing, a right granted in both the Confrontation Clause of the Sixth Amendment, and by operation of New York Criminal Procedure Law 400.15(7)(a) ("CPL 400.15(7)(a)").[14] Leon argued that the trial right to confrontation is incorporated into CPL 400.15(7)(a)."[15]

On appeal, the New York Court of Appeals addressed

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[8] *Id.* at 1039.

[9] *Id.* at 1038.

[10] *Id.*

[11] *Id.*

[12] *Leon II*, 884 N.E.2d at 1039.

[13] 541 U.S. 36 (2004).

[14] *Leon II*, 884 N.E.2d at 1038. *See* N.Y. CRIM. PROC. LAW § 400.15(7)(a), which states, in pertinent part: "[t]he burden of proof is upon the people and a finding that the defendant has been subject to a predicate violent felony conviction must be based upon proof . . . by evidence admissible under the rules applicable . . . ."

[15] *Leon II*, 884 N.E.2d at 1039. Implicit in this argument is that Leon was denied his right of confrontation as granted by the New York Constitution, Article 1, Section 6.

whether *Crawford* applied at sentencing hearings.[16] In *Crawford*, the defendant stabbed a man who allegedly attempted to rape his wife.[17] Subsequently, the police arrested the defendant and twice interrogated both the defendant and his wife.[18] Defendant's wife confirmed the defendant's story except for her account of the fight, and whether the victim had drawn a weapon before the defendant had assaulted him.[19] The defendant was charged with assault and attempted murder, to which he claimed self-defense.[20] At trial, his wife did not testify because of marital privilege; however, the prosecution played a tape recording of the wife's statement to the police which described the stabbing incident.[21] Accordingly, the defendant had not been given the opportunity to cross-examine.[22]

The Supreme Court, relying on *Ohio v. Roberts*,[23] stated that the Confrontation Clause "does not bar admission of an unavailable witness's statement against a criminal defendant if the statement [is] reliab[le]," reliability being found if the evidence is either a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."[24] The trial court admitted the statement, finding it

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[16] *Id.*

[17] *Crawford*, 541 U.S. at 38.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 40.

[21] *Id.* According to Washington state law, the marital "privilege does not extend to a spouse's out-of-court statements . . . so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not self-defense." *Id.* (internal citation omitted).

[22] *Crawford*, 541 U.S. at 40.

[23] 448 U.S. 56 (1980).

[24] *Crawford*, 541 U.S. at 40.

to be trustworthy.[25] The Washington Court of Appeals reversed after determining that the statement was not trustworthy for several reasons, including the fact that the statement contradicted a prior statement, and because the witness had admitted to having her eyes closed when the stabbing occurred.[26] However, the defendant's conviction was reinstated by the Washington Supreme Court which found that the wife's statement was reliable.[27]

On appeal, the United States Supreme Court decided whether the prosecution's use of the wife's statement to the police violated the defendant's Sixth Amendment rights.[28] The defendant argued that the *Roberts* test, which allows an "out-of-court statement . . . so long as it has adequate indicia of reliability . . . , strays from the original meaning of the Confrontation Clause."[29] After considering the historical background of the Confrontation Clause,[30] the Court articulated two main inferences about the meaning of the Sixth Amendment: first, the Confrontation Clause was aimed to protect against the "use of *ex parte* examinations as evidence against the accused";[31] and second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[32] Thus, the Court reasoned that a prior op-

[25] *Id.*
[26] *Id.* at 41.
[27] *Id.*
[28] *Id.* at 42.
[29] *Crawford*, 541 U.S. at 42.
[30] *Id.* at 43-52.
[31] *Id.* at 50.
[32] *Id.* at 53-54.

portunity to cross-examine is a requisite condition for admitting testimonial statements.[33] The Court further reasoned that the rationale behind *Roberts* departed from the historical principles not only because it was too broad, in that the analysis did not differentiate between ex-parte and non-ex-parte hearsay, but also because it was too narrow, in that it admitted statements that contained ex-parte testimony upon a "mere finding of reliability."[34] The Court concluded that the State's admission of the wife's statement against the defendant violated the defendant's Sixth Amendment right of confrontation.[35]

In a concurring opinion, Chief Justice Rehnquist disagreed with the majority's decision to overrule *Roberts*.[36] He believed that while the Framers were concerned with the accused's inability to confront sworn affidavits and depositions, they may not have been concerned about the "broader category of testimonial statements" that the majority's new rule encompassed.[37] Chief Justice Rehnquist did not see a reason for the majority to establish a distinction between testimonial and nontestimonial statements, noting that unsworn testimonial statements were treated the same way as nontestimonial statements at common law, and that precedence has shown that some nontestimonial statements admitted as evidence can raise confrontation concerns as well.[38] Chief Justice Rehnquist also expressed his

[33] *Id.* at 55.
[34] *Crawford*, 541 U.S. at 60.
[35] *Id.* at 68.
[36] *Id.* at 69 (Rehnquist, C.J., concurring).
[37] *Id.* at 71.
[38] *Id.*

discontent over the fact that the majority did not provide a "comprehensive definition" of the kind of testimony the new rule would encompass, thus leaving prosecutors in the dark.[39] Chief Justice Rehnquist's concurrence brings into question the extent of protection that the Framers intended, and whether the protection was intended to encompass only testimonial statements.

Crawford represents the rule that "where testimonial statements" are involved, the U.S. Constitution requires a right of confrontation.[40] If *Crawford* applied at sentencing hearings, then Leon was denied both his federal and state constitutional rights "to be confronted with the witnesses against him."[41] However, the New York Court of Appeals determined that "sentencing hearings are not trial prosecutions."[42] The court interpreted *Crawford* as addressing "testimonial hearsay *at trial*."[43]

When interpreting whether *Crawford* applies at sentencing hearings, the New York Court of Appeals looked to the Supreme Court's decision in *Barber v. Page*.[44] In *Barber*, the Court addressed whether a defendant was deprived of his right of confrontation when the key evidence used against him was the testimony of a witness who was incarcerated at the time of trial.[45] At a preliminary hearing, both the defendant and the witness were charged with armed rob-

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[39] *Crawford*, 541 U.S. at 75-76.
[40] *Id.* at 68-69.
[41] U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6.
[42] *Leon II*, 884 N.E.2d at 1039.
[43] *Id.*
[44] 390 U.S. 719 (1968).
[45] *Id.* at 720.

bery.[46] The witness's testimony at the preliminary hearing incriminated the defendant, but the defendant's attorney did not cross-examine the witness.[47] Subsequently, at trial, the court allowed the introduction of the transcript of the witness's testimony from the preliminary hearing because the witness was incarcerated in a federal prison and unavailable to testify.[48] The jury convicted the defendant, and the conviction was affirmed by the Oklahoma Court of Criminal Appeals.[49]

"The defendant sought federal habeas corpus," arguing that the state deprived him of his Sixth Amendment right of confrontation at his trial by using the transcript of the witness's testimony.[50] The district court and the Tenth Circuit Court of Appeals rejected defendant's argument.[51] However, the Supreme Court reversed, noting that the primary purpose of the Sixth Amendment's Confrontation Clause " 'was to prevent depositions or *ex parte* affidavits . . . being used . . . in lieu of a personal examination and cross-examination of the witness.' "[52] The prosecution argued that the introduction of the transcript fell within an exception to the confrontation requirement as the witness was unavailable at the time of trial, and the defendant had an opportunity to cross-examine the witness at the preliminary hearing, even though he did not avail himself of it.[53]

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Barber*, 390 U.S. at 720-21.
[50] *Id.* at 721.
[51] *Id.*
[52] *Id.* (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).
[53] *Id.* at 722.

The Court determined that regardless of the fact that the defendant did not cross-examine the witness at the preliminary hearing, the right to confrontation applies mainly at trial because a trial encompasses cross-examination and observation of witnesses by a jury, whereas a preliminary hearing serves the more limited function of determining whether probable cause exists to go to trial.[54] Thus, while there may be occasions in which the opportunity to cross-examine a witness at a preliminary hearing satisfies the Confrontation Clause because a witness is unavailable,[55] in *Barber*, the prosecution made no effort to obtain the presence of the witness at trial, and the defendant was denied his right to confrontation at trial.[56]

In *Pointer v. Texas*,[57] the Supreme Court recognized that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[58] In *Pointer*, the defendant was arrested for robbery.[59] The robbery victim testified at the preliminary hearing, identifying the defendant as the perpetrator of the robbery.[60] The defendant, who did not have an attorney present at the preliminary hearing, did not cross-examine the victim.[61] The victim subsequently moved to California and was not present at the trial.[62] At the trial, the prosecution offered the transcript of the victim's testimony at the prelimi-

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[54] *Barber*, 390 U.S. at 725.
[55] *Id.* at 725-26.
[56] *Id.* at 723.
[57] 380 U.S. 400 (1965).
[58] *Id.* at 405.
[59] *Id.* at 401.
[60] *Id.*
[61] *Id.*
[62] *Pointer*, 380 U.S. at 401.

nary hearing as evidence, and the trial judge allowed the evidence, reasoning that the defendant had been given an opportunity to cross-examine the witness at the preliminary hearing.[63] The Texas Court of Criminal Appeals affirmed.[64]

The United States Supreme Court reversed, holding that the right to confrontation is a fundamental right granted by the Sixth Amendment, and is read into the Fourteenth Amendment to apply to states.[65] The Court concluded that the defendant's Sixth Amendment right to confront and cross-examine the witness at trial had been "unquestionably denied."[66]

Additionally, the First Circuit Court of Appeals in *United States v. Luciano*,[67] addressed whether the Sixth Amendment right to confront witnesses applies at sentencing hearings.[68] In *Luciano*, the defendant had an altercation with his girlfriend at a bus stop in Rhode Island.[69] A witness, who had seen the defendant aim a gun at the defendant's girlfriend, flagged down a police officer to tell him what he had seen.[70] The police officer apprehended the defendant based upon the description given by the witness.[71] At the defendant's sentencing hearing, the police officer testified concerning the witness's activities, and the prosecution offered both evidence of the detective's report containing the statement given by the witness, and evidence of

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[63] *Id.* at 401-02.
[64] *Id.* at 402.
[65] *Id.* at 403.
[66] *Id.* at 406.
[67] 414 F.3d 174 (1st Cir. 2005).
[68] *Id.* at 178.
[69] *Id.* at 175-76.
[70] *Id.* at 176.
[71] *Id.*

the witness's testimony before the grand jury.[72] The defendant argued that his inability to cross-examine the witness at his sentencing hearing violated his right to confrontation.[73] The prosecution had not provided any evidence that the witness had been unavailable for the trial, nor had the prosecution attempted to secure his presence.[74]

The First Circuit looked at its prior decisional law which held that the Sixth Amendment right to confront witnesses did not apply at sentencing hearings,[75] and noted that other circuits shared the same view.[76] The court further stated that the decision in *Crawford* did not change its analysis that the right to confront witnesses is not applicable at sentencing hearings.[77] Thus, the court concluded that "there is no Sixth Amendment Confrontation Clause right at sentencing" hearings.[78]

Similarly, the Second Circuit Court of Appeals, in *United States v. Martinez*,[79] determined that "the Sixth Amendment does not bar the consideration of hearsay testimony at sentencing proceedings."[80] In *Martinez*, the defendant was involved in an altercation which resulted in a gun fight.[81] The defendant pled guilty "to unlaw-

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[72] *Luciano*, 414 F.3d at 176.

[73] *Id.* at 178.

[74] *Id.*

[75] *Id.* (citing United States v. Rodriguez, 336 F.3d 67, 71 (1st Cir. 2003)).

[76] *Id.* at 178-79 (citing United States v. Navarro, 169 F.3d 228, 236 (5th Cir. 1999); United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994); United States v. Petty, 982 F.2d 1365, 1369-70 (9th Cir. 1993); United States v. Silverman, 976 F.2d 1502, 1508-16 (6th Cir. 1992) (en banc); United States v. Wise, 976 F.2d 393, 401 (8th Cir. 1992) (en banc); United States v. Kikumura, 918 F.2d 1084, 1102-03 (3d Cir. 1990)).

[77] *Luciano*, 414 F.3d at 179.

[78] *Id.*

[79] 413 F.3d 239 (2d Cir. 2005).

[80] *Id.* at 244.

[81] *Id.* at 240.

ful possession of a firearm."[82] At his sentencing hearing, the district court allowed a police detective's testimony as to the events surrounding the altercation, partially based upon his interviews with assorted witnesses, even though the testimony was hearsay.[83]

The court emphasized that both its own decisions and those of the Supreme Court have consistently held that the Confrontation Clause does not apply at sentencing hearings and does not prevent testimonial hearsay.[84] Once a defendant has been found guilty, the sentencing judge is not limited to evidence obtained by examination and cross-examination of witnesses, when making the punishment determination.[85]

However, in *United States v. Fortier*,[86] the Eighth Circuit Court of Appeals reached the opposite result, finding that a defendant's right to confrontation was violated when unreliable hearsay evidence was considered at his sentencing hearing.[87] In *Fortier*, the defendant, as part of a plea bargain, "pleaded guilty to . . . possession with intent to distribute 139 grams of cocaine" in exchange for the dismissal of two other counts against him.[88] One of the dismissed counts was for possession of 249 grams of cocaine acquired from a confidential informant who alleged that the defendant had possessed the cocaine and intended to distribute it.[89] A presentence report

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[82] *Id.* at 241.
[83] *Id.*
[84] *Martinez*, 413 F.3d at 242.
[85] *Id.* (quoting Williams v. New York, 337 U.S. 241, 246-51 (1949)).
[86] 911 F.2d 100 (8th Cir. 1990).
[87] *Id.* at 101.
[88] *Id.* at 101-02.
[89] *Id.*

stated that defendant had possessed 388 grams of cocaine, which included the 249 grams of cocaine of the dismissed charge.[90] The district court sentenced defendant to twenty-seven months in prison based upon the sentencing report's data.[91]

The defendant argued that consideration of the 249 grams of cocaine when calculating his sentence had violated his right to confrontation because the district court had failed to make "an independent finding that the hearsay was reliable."[92] The presentence report was based upon ambiguous taped conversations and an informant's statements that a third person had informed him that the drugs belonged to the defendant.[93]

The Eighth Circuit concluded that the reliability of the fact-finding process is questionable when there is no proper confrontation of witnesses.[94] The court reasoned that courts may rely on presentencing reports only when "the facts in the presentence report are not disputed by the defendant."[95] Since no finding of reliability was made concerning the testimony of the informant or the admission of the taped conversations, the use of the presentence report violated the defendant's right to confrontation.[96]

Unlike the Eighth Circuit, when addressing the argument that a defendant's right to confrontation was violated at a sentencing hearing by the withholding of presentencing investigative reports, the

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[90] *Id.* at 102.
[91] *Fortier*, 911 F.2d. at 102.
[92] *Id.* at 102-03.
[93] *Id.* at 103.
[94] *Id.*
[95] *Id.*
[96] *Fortier*, 911 F.2d. at 103-04.

New York Court of Appeals reached the same conclusion as the majority of the aforementioned courts.[97] The court stated that "neither the Supreme Court nor this court has ever held, nor do we now believe, that the full panoply of constitutional rights should be applied to the sentencing process."[98] It reasoned that presentencing reports are compiled in a non adversarial context, and their main purpose is to provide courts with information which is used to decide a sentence.[99] The court saw no reason for mandatory disclosure of presentencing reports provided that the defendant had an opportunity to present any relevant evidence, and the court had the ability to resolve any disparities.[100]

The New York Court of Appeals recently decided whether evidence of latent fingerprint comparison reports prepared by experts who did not testify at trial were " 'testimonial' statements within the meaning of *Crawford*."[101] *People v. Rawlins* was a consolidation of two cases: *People v. Rawlins* and *People v. Meekins*.[102] In *Rawlins*, the defendant was convicted of six counts of burglary and sentenced as a persistent felony offender.[103] Rawlins was arrested after burglarizing a florist in midtown Manhattan on May 5, 2003.[104] A police officer had obtained five latent prints from the store's cash register, and Detective Arthur Connolly, a fingerprint examiner, later matched one

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97 New York v. Perry, 324 N.E.2d 878, 879 (N.Y. 1975).
98 *Id.* at 880.
99 *Id.* at 881.
100 *Id.*
101 People v. Rawlins (*Rawlins II*), 884 N.E.2d 1019, 1022 (N.Y. 2008).
102 *Id.*
103 *Id.*
104 *Id.*

of the prints with the defendant's fingerprints.[105]

Prior to the robbery on May 5, 2003, police officers had responded to five other burglaries in Manhattan, and in each burglary the police had lifted latent fingerprints which Detective Connolly was later able to match to defendant's fingerprints.[106] Prior to Detective Connolly's assignment to the cases, another detective, Artis Beatty, had performed latent fingerprint comparison reports for two of the robbery incidents, which were later admitted as business records at trial.[107] Connolly testified that he had independently compared the fingerprints pertaining to those robberies, and had agreed with Beatty's conclusion.[108] Rawlins challenged the admission of Beatty's reports because Beatty did not testify at trial.[109] Rawlins motioned to set aside the conviction for insufficiency, but the Supreme Court denied his motion and Rawlins was subsequently sentenced as a persistent felony offender.[110] The Appellate Division, First Department, affirmed the decision, holding that "although Beatty did not testify, his 'reports qualified as nontestimonial business records . . . [because they] were not prepared for the specific purpose of litigation.' "[111]

The New York Court of Appeals noted that the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the *witnesses* against

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[105] *Id.*
[106] *Rawlins II*, 884 N.E.2d at 1022-23.
[107] *Id.* at 1023.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Rawlins II*, 884 N.E.2d at 1024 (quoting People v. Rawlins (*Rawlins I*), 829 N.Y.S.2d 79, 81 (App. Div. 1st Dep't 2007)).

him," and that the New York Constitution contains similar wording.[112] The court discussed the Supreme Court's analysis of police interrogations in its decision in *Davis*.[113] It quoted *Davis* for the proposition that statements made in the context of police interrogations are nontestimonial when made for the purpose of " 'enabl[ing] police assistance to meet an ongoing emergency,' " whereas statements made for the purpose of " 'prov[ing] past events potentially relevant to later criminal prosecution' " are testimonial.[114] Thus, *Davis'* "primary purpose" test distinguishes between "statement[s] . . . that [accuse] a perpetrator of a crime" and those which "serve . . . nontestimonial purpose[s]."[115]

Rawlins argued that the fingerprint reports were unmistakably testimonial because they were prepared by Detective Beatty solely for the objective of prosecution, and because they were accusatory and used to ascertain Rawlins' identity.[116] The Court of Appeals agreed that Beatty's fingerprint reports were undoubtedly testimonial because they were inherently accusatory and were used to prove that Rawlins had committed the robberies.[117] The court reasoned that the purpose behind gathering the latent fingerprints and comparing them with known prints was to apprehend the perpetrator, and that the detective had no other expectations when making his reports.[118] However, the court ultimately concluded that the "admission of Beatty's

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[112] *Id.* at 1025 (quoting U.S. CONST. amend. VI) (emphasis added).
[113] *Id.* at 1026. *See* Davis v. Washington, 547 U.S. 813, 822 (2006).
[114] *Rawlins II*, 884 N.E.2d at 1026 (quoting *Davis*, 547 U.S. at 822).
[115] *Id.* at 1027.
[116] *Id.* at 1033.
[117] *Id.*
[118] *Id.*

reports was harmless error" because Detective Connolly, who had testified at trial, had compared the same fingerprints and reached the same conclusion.[119] Though the court determined that the fingerprint reports at issue were, in fact, testimonial evidence,[120] the court never reached the issue of whether using the evidence of the fingerprint reports at Rawlins' sentencing violated his right to confrontation.

In *Leon*, the New York Court of Appeals, in addition to having to decide the Sixth Amendment Confrontation Clause issue, had to decide whether New York's CPL 400.15(7)(a) incorporates the right of confrontation in a sentencing hearing.[121] Inherent in that issue was whether the right of confrontation, as found in the New York Constitution, applies at sentencing hearings. Leon argued that the statute's requirement that evidence at a persistent violent offender's hearing be subjected to "the rules applicable to a trial of the issue of guilt" granted in the right of confrontation.[122]

The Court of Appeals determined that the legislature did not intend such a broad interpretation of CPL 400.15(7)(a).[123] Even after the legislature had passed CPL 400.15, testimonial hearsay continued to be admitted "both at trial and predicate felony hearings."[124] The New York Court of Appeals further reasoned that because it did not believe that *Crawford* applies at sentencing hearings, it would not

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[119] *Rawlins II*, 884 N.E.2d at 1034.
[120] *Id.* at 1033.
[121] *Leon II*, 884 N.E.2d at 1039.
[122] *Id.*
[123] *Id.*
[124] *Id.*

construe CPL 400.15 as permitting the opposite result.[125] The court noted that while the other hearsay statutes work in tandem, construing CPL 400.15 in a manner as suggested by defendant would create an unworkable result.[126] When the court ruled that Sixth Amendment's Confrontation Clause does not apply at sentencing hearings,[127] it was, by analogy, also implying that the New York Constitution's right to confrontation, which contains nearly identical wording, is also not implicated at sentencing hearings.[128]

New York has chosen a narrow interpretation of *Crawford*, determining that *Crawford* applies only at the trial level.[129] Since sentencing hearings are not trial prosecutions, *Crawford* does not provide a guaranteed right to confrontation at them.[130] Though New York's interpretation of *Crawford* is consistent with the majority of the other federal circuit courts who have considered the issue,[131] it does little to relieve the defendant who has been denied the ability to cross-examine a witness at a crucial sentencing hearing.

In the case of a defendant, like that in *Leon*, in which the defendant was denied the ability to confront a witness who presented key evidence bearing on his sentencing,[132] the fact that the evidence was presented at a hearing to determine his jail term, rather than at a

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[125] *Id.*

[126] *Leon II*, 884 N.E.2d at 1039.

[127] *Id.*

[128] *See* U.S. CONST. amend. VI, which states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him."; N.Y. CONST. art. I, § 6, states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him . . . ."

[129] *Leon II*, 884 N.E.2d at 1039.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1038.

hearing to determine his guilt, should not be determinative. The fact remains that the defendant is denied the ability to challenge evidence that implicates him in a crime.[133] It would seem that the spirit of both the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" and of the New York Constitution, which states that "[i]n any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him" is ultimately defeated by such a result.[134]

Perhaps, to obtain a more equitable result for defendants, New York courts should focus on the nature of the evidence at issue, specifically whether the evidence is testimonial or nontestimonial, as suggested by the Supreme Court in *Davis*,[135] rather than focusing on the nature of the court proceeding, and whether it is a trial or a sentencing hearing. However, in view of the fact that New York is supported by the majority of courts in refusing to provide the right to confrontation at sentencing hearings, this change is not likely to occur any time soon.

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[133] *Id.* at 1039.
[134] *See* U.S. CONST. amend. VI ; N.Y. CONST. art. I, § 6.
[135] 547 U.S. at 822.

EQUAL PROTECTION

United States Constitution Amendment XIV:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution article I, section 11:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.