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**SUPREME COURT OF NEW YORK
NEW YORK COUNTY**

People v. Vasquez¹
(decided January 18, 2005)

On January 25, 1999, Christopher Vasquez was convicted of first-degree manslaughter.² He was sentenced to imprisonment for a period of three and one-third to ten years.³ The defendant sought to vacate his conviction pursuant to section 440.10 (1)(h)⁴ and (2)(a)⁵ of the New York Criminal Procedure Law. Specifically, he claimed that his rights were violated under the Confrontation Clauses of both the federal and state constitutions.⁶ Vasquez argued that the 2004 Supreme Court decision in *Crawford v. Washington*⁷ should apply

¹ 795 N.Y.S.2d 820 (Sup. Ct. 2005).

² *Id.* at 821.

³ *Id.*

⁴ N.Y. CRIM. PROC. § 440.10 (1)(h) (McKinney 2005) which states: At any time after entry of a judgment, in which it was entered may, upon motion by the defendant, vacate such judgment upon the ground that . . . [T]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

⁵ N.Y. CRIM. PROC. § 440.10 (2)(a) (McKinney 2005) which states:

Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been retroactively effective change in the law controlling such issue . . .

⁶ U.S. CONST. amend. VI which states: “In all criminal prosecutions, the accused shall enjoy . . . to be confronted with the witnesses against him”; N.Y. CONST. art. I, § 6 provides “In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witness against him or her.”

⁷ 541 U.S. 36 (2004).

retroactively.⁸ In essence his argument is that his procedural due process rights have been violated.⁹ However, the court held that *Crawford* was not intended to apply retroactively when asserted on direct appeal from a final¹⁰ judgment.¹¹ Therefore, the court concluded that Vasquez's due process rights had not been violated.¹²

During Vasquez's¹³ trial, portions of a co-defendant's plea allocution were admitted into evidence as a declaration against penal interest.¹⁴ In holding that the plea allocution was admissible, the court applied the existing standards set forth in *Ohio v. Roberts*¹⁵ to determine whether the introduction of the plea allocution without the co-defendant taking the stand at trial, was a violation of the defendant's Sixth Amendment rights.¹⁶ The court found that the co-defendant's plea allocution fell within a "deeply rooted" exception to the hearsay rule and there was sufficient evidence of "particularized guarantees of trustworthiness."¹⁷ Furthermore, the court found the

⁸ *Vasquez*, 795 N.Y.S.2d at 825.

⁹ U.S. CONST. amend. XIV which states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law"

¹⁰ *People v. Watson*, 798 N.Y.S.2d 712, 2004 NY Slip Op 51364U, *6 (stating that a conviction is final when the availability of appeal has been exhausted, and the time to petition for a writ of certiorari elapsed or cert. has been denied).

¹¹ *Vasquez*, 795 N.Y.S.2d at 840.

¹² *See id.* What is inherent the court's holding, is that if the court had determined that the defendant's due process rights were violated, the court would have had to find that *Crawford* was to be applied retroactive because the court would have determined that the defendant was convicted by unconstitutional means.

¹³ *People v. Vasquez*, 686 N.Y.S.2d 624 (Sup. Ct. 1999).

¹⁴ *Vasquez*, 795 N.Y.S.2d at 823-24.

¹⁵ 448 U.S. 56 (1980). The Supreme Court stated that in order for the admissibility of a hearsay statement to not run afoul of the Confrontation Clause, the statement must bear adequate indicia of reliability. A statement would be considered reliable if it fell within a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness." *Id.* at 66.

¹⁶ *Vasquez*, 795 N.Y.S.2d at 822-23.

¹⁷ *Id.* at 824. Specifically, the court found that the plea allocution fell into the hearsay

defendant's constitutional right to confront his own witnesses was not violated because the prosecution established "sufficient independent evidence of its reliability."¹⁸

However, Vasquez claimed that in light of the recent decision by the Supreme Court in *Crawford* the plea allocution was inadmissible, and that the *Crawford* decision should be applied retroactively on collateral review.¹⁹ The court determined that *Crawford* should not be "applied retroactively on a post-conviction motion, collaterally attacking a judgment which has become final on direct review."²⁰ The court reasoned that the *Crawford* decision was a procedural rule and that in order for it to be applied retroactively it would have to fall within one of the exceptions set forth in the United States Supreme Court case of *Teague v. Lane*.²¹ The court found that *Crawford* did not fall within one of these exceptions.²²

Initially, the *Vasquez* court concluded that *Crawford* was not a new substantive rule.²³ The Supreme Court of the United States has determined that substantive rules apply retroactively in decisions that in effect "narrow the scope of a criminal statute . . ." as well make a "constitutional determinations" that make certain conduct no longer

exception of a statement against penal interest. That normally an individual would not make a statement that would subject him to prosecution, therefore when he does make such a statement he is "responding to a truth-revealing compulsion as great as that to which he would be likely be subjected to be cross-examined as a witness when an individual makes a statement." *Id.* at 823. The court also found that "when the prosecution sought to introduce the plea allocution on their direct case, several independent pieces of evidence had already been placed before the jury, which directly corroborated" the plea allocution. *Id.* at 824.

¹⁸ *Id.* at 825.

¹⁹ *Id.*

²⁰ *Id.* at 822, 840.

²¹ *Vasquez*, 795 N.Y.S.2d at 834-35.

²² *Id.* at 840.

²³ *Id.* at 834.

punishable by the state.²⁴ The purpose of holding a substantive rule retroactive is because these rules carry a risk that a defendant has been convicted of a crime that the law does not make criminal.²⁵ In determining that the rule derived from *Crawford* was not substantive, the *Vasquez* court stated that a court applying *Crawford* is now limited to whether or not the declarant was unavailable and that he or she had been subject to prior cross-examination, this did not change the criminal conduct that is subject to a criminal proceeding.²⁶ What the new rule in *Crawford* does is regulate “the manner of determining an individual’s culpability.”²⁷

Further, the *Vasquez* court stated that this new rule will be applied retroactively is if it falls into the second exception addressed in *Teague*. The analysis that the *Vasquez* court engaged in whether *Crawford* implicated the “fundamental fairness and accuracy of the criminal proceeding.”²⁸ In concluding that *Crawford* did not fall into this exception, the *Vasquez* court reasoned that by following the *Robert’s* criteria, the likelihood of an accurate conviction was not diminished.²⁹ The question is not whether applying *Crawford* would have an effect on the outcome of the case, but rather, whether in applying *Roberts* it so “seriously diminished accuracy that it constituted an impermissibly large risk that an innocent person would

²⁴ *Id.* at 826.

²⁵ *Id.*

²⁶ *Vasquez*, 795 N.Y.S.2d at 834.

²⁷ *Id.*

²⁸ *Id.* at 836.

²⁹ *Id.* at 836-37.

be convicted.”³⁰ Although, the *Vasquez* court acknowledged that the *Crawford* decision changed the foundation of the Confrontation clause, the court concluded that this does not render previous procedures unconstitutional for not comporting with the current understanding.³¹ Moreover, it does not warrant a conclusion that the use of the previous procedure is so flawed that risk of an innocent person will be incarcerated because of its use.³² In the trial of *Vasquez* there was other evidence, besides the plea allocution, for the jury to consider.³³ Therefore, it cannot be said that the introduction of the plea allocution was the only reason why the defendant was convicted.

In *Crawford v. Washington*,³⁴ the Supreme Court rejected the standard set forth in *Roberts v. Ohio*.³⁵ The Court in *Roberts* held that the admissibility of a hearsay statement depended on “ ‘particularized guarantees of trustworthiness.’ ”³⁶ In *Crawford*, the issue was whether the tape recorded statements of defendant’s wife to police were admissible although the wife could not testify at trial due to spousal privilege.³⁷ The Supreme Court remanded the case but not

³⁰ *Id.* at 836.

³¹ *Vasquez*, 795 N.Y.S. at 836.

³² *Id.*

³³ *Id.* at 835. The Court notes earlier in its decision that the other evidence was that the defendant and co-defendant were the last people to see the victim. The defendants were also seen in the lobby bathroom of the victim’s apartment washing blood off each other. The defendant Vasquez’s blood was found in large quantities at the crime scene. The defendant Vasquez had numerous injuries and the knife used on the victim had the defendant’s blood and the victim’s blood on it. *Id.* at 824-25.

³⁴ 541 U.S. 36 (2004).

³⁵ 448 U.S. 56 (1980).

³⁶ *Crawford*, 541 U.S. at 60 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

³⁷ *Id.* at 40.

without first changing the procedure of when such a statement would be considered admissible.

Crawford explained that the *Roberts* test made testimonial statements contingent upon “vagaries of the rules of evidence.”³⁸ If the Confrontation Clause is not considered and the rules of evidence just applied, the Court warned, it would in effect render the clause powerless.³⁹ Whether or not the evidence is admitted will depend upon how much weight a certain judge gives it.⁴⁰ The unpredictability of the *Roberts* test shows that there is “capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁴¹ Therefore, the Court held that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”⁴²

The issue of retroactivity has been formulated by the United States Supreme Court in *Teague v Lane*.⁴³ The Supreme Court determined that the issue of retroactivity is a threshold question and should be dealt with at the time the new rule⁴⁴ is handed down.⁴⁵ Accordingly, new rules are always applied retroactively to cases on

³⁸ *Id.* at 61.

³⁹ *Id.* at 51.

⁴⁰ *Id.* at 63.

⁴¹ *Crawford*, 541 U.S. at 63.

⁴² *Id.* at 68.

⁴³ 489 U.S. 288 (1989) (plurality opinion).

⁴⁴ *Id.* at 300. The Court states “a case announces a new rule when it breaks ground or imposes a new obligation on the States or the Federal Government . . . if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* at 301.

⁴⁵ *Id.* at 300.

direct review.⁴⁶ Yet, the new rules generally should not be applied retroactively to criminal cases on collateral review.⁴⁷

There are only two exceptions for when a new rule should be applied on collateral review. First, if the new rule places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” it should be applied retroactively.⁴⁸ Second, “a new rule should be applied retroactively if observance of those procedures that . . . are ‘implicit in the concept of ordered liberty.’ ”⁴⁹ The Court classifies these as “watershed rules of criminal procedure.”⁵⁰ A watershed rule of criminal procedure is one that “alter[s] our understanding of the bedrock procedural elements” which are essential to the fundamental fairness and accuracy of the trial.⁵¹

Further elucidating the decision of *Teague*, the Supreme Court in *Schriro v. Summerlin*,⁵² held that when a United States Supreme Court decision results in a new rule, the rule applies to all criminal cases pending direct appeal.⁵³ However, on convictions that are final, the rule only applies in very limited circumstances.⁵⁴ Additionally, when the new rule is substantive it will generally apply

⁴⁶ *Id.* at 303-04.

⁴⁷ *Id.* at 316.

⁴⁸ *Teague*, 489 U.S. at 307 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971) (stating that these types of new rules apply to substantive due process)).

⁴⁹ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁵⁰ *Id.* at 311.

⁵¹ *Id.*

⁵² 542 U.S. 348, 124 S. Ct. 2519 (2004).

⁵³ 124 S. Ct. at 2522 (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)).

⁵⁴ *Id.* (citing *Bousley v. United States*, 523 U.S. 614 (1998)).

retroactively,⁵⁵ but procedural rules will only apply retroactively when it implicates “the fundamental fairness and accuracy of the criminal proceeding.”⁵⁶ The *Schriro* Court went even further and stated that “a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished.”⁵⁷ This is extremely narrow and unlikely that any have emerged.⁵⁸

The New York Court of Appeals dealt with the issue of retroactivity in *People v. Eastman*.⁵⁹ In *Eastman*, two defendants were jointly charged for acting in concert when they committed a robbery.⁶⁰ Defendant Eastman sought to sever his case from the co-defendant, claiming that his constitutional right to confront his witness would be violated if the co-defendant’s statement could be used against him at trial.⁶¹ After the defendant was convicted, he moved to vacate on the grounds that his conviction was obtained in violation of his Sixth Amendment rights pursuant to *Cruz v. New York*,⁶² which held that “the Confrontation Clause bars the introduction of a confession of a non-testifying codefendant, not directly admissible against the defendant, that inculcates the

⁵⁵ *Id.* The Court includes in this definition those decisions that narrow the scope of a criminal statute by interpreting its terms, “as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.” *Id.* The logic the Court uses is that if the new substantive rule did not apply retroactively there is a great risk that a defendant stands convicted of an act that is not criminal. *Id.* at 2522-23.

⁵⁶ *Vasquez*, 795 N.Y.S.2d at 826 (quoting *Teague*, 489 U.S. at 311 (1989)).

⁵⁷ *Summerlin*, 124 S. Ct. at 2523.

⁵⁸ *Id.*

⁵⁹ 648 N.E.2d 459 (N.Y. 1995).

⁶⁰ *Id.* at 462.

⁶¹ *Id.*

⁶² *Id.* at 460 (citing *Cruz v. New York*, 481 U.S. 186 (1987)).

defendant.”⁶³ The *Cruz* decision was rendered after Eastman’s conviction became final.⁶⁴

The court in *Eastman* held that when a Supreme Court’s decision breaks from established precedent and “fundamentally” alters the way in which a constitutional right is applied, the law of retroactivity that has been developed by the Supreme Court will govern the case at bar.⁶⁵ The Court of Appeals held that this new rule was to be applied retroactively to the case at bar.⁶⁶ It reasoned that *Cruz* “unquestionably departs from established precedent, and implicates a bedrock procedural element—the Sixth Amendment right of confrontation.”⁶⁷ Therefore, since the rule in *Cruz* is central in determining guilt or innocence, an admission of an inculpatory statement would undermine “the fundamental fairness of trial.”⁶⁸

A different interpretation of whether *Crawford* was to be applied retroactive was reached by the court in *People v. Dobbin*,⁶⁹ which held that *Crawford* should be applied retroactively.⁷⁰ *Dobbin*, involved the admission of a 911 tape-recorded statement and the defendant’s inability to cross-examine the witness.⁷¹ The court found that the 911 call fell into the category of a testimonial statement within the meaning of *Crawford*.⁷²

⁶³ *Id.*

⁶⁴ *Eastman*, 648 N.E.2d at 460.

⁶⁵ *Id.* at 464

⁶⁶ *Id.* at 465.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 791 N.Y.S.2d 897 (Sup. Ct. 2004).

⁷⁰ *Id.* at 905.

⁷¹ *Id.* at 898.

⁷² *Id.* at 903.

Next, the court addressed the issue of retroactivity. Following the reasoning of the New York Court of Appeals in *Eastman*, this court determined that *Crawford* created a new rule.⁷³ Further, it fell within one of the exceptions articulated in *Teague* because it involved a bedrock procedural element, the Sixth Amendment's right of confrontation, which in turn " 'implicates fundamental fairness and accuracy of the trial.' "⁷⁴ The right to confront one's own witness is fundamental; it is "more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation."⁷⁵

Further in *People v. Watson*,⁷⁶ the court also held that the *Crawford* rule should be applied retroactively,⁷⁷ because the Supreme Court in *Crawford* acknowledged that the Sixth's Amendment right of Confrontation is a "bedrock procedural guarantee."⁷⁸ Therefore, the *Watson* court reasoned that *Crawford* falls within the type of "watershed rule of criminal procedure."⁷⁹ Cross-examination is deemed fundamental because it is extremely helpful in determining the truth.⁸⁰ The right to confront one's own witness is a "fundamental right" that is essential to ensure that a defendant has a fair trial.⁸¹ Relying on *Eastman*, the *Watson* court held, that since there are no contrary

⁷³ *Id.* at 905.

⁷⁴ *Dobbin*, 791 N.Y.S.2d at 905.

⁷⁵ *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)). Even though the court found that the law in *Crawford* was to be applied retroactively, it held that the admission of the 911 tape-recorded statement was harmless error. *Id.* at 905.

⁷⁶ 798 N.Y.S.2d 712, 2004 NY Slip Op 51364 U (Sup. Ct. 2004).

⁷⁷ 2004 NY Slip Op 51364 U, at *5.

⁷⁸ *Id.*, at *7 (citing *Crawford*, 541 U.S. 36, 42 (2004)).

⁷⁹ *Id.*

⁸⁰ *Id.*

Court of Appeals rulings, it is fair to conclude that the present state of the law in New York is that a new federal constitutional criminal procedural rule announced by the United States Supreme Court will be given retroactive application to cases on collateral review, where the new rule alters our understanding of the Sixth Amendment right of confrontation, affects the fundamental fairness of the trial and is central to an accurate determination of innocence or guilt.⁸²

In conclusion, both federal and state courts are bound to apply the standard set forth in *Crawford* when dealing with the Confrontation Clause. However, the state courts remain in disagreement as to whether *Crawford* is a “watershed” rule of criminal procedure which should be applied retroactively. Although the Supreme Court has given guidelines as to when a new rule should be applied retroactively, it seems as though such a decision will depend on whether a judge finds that the new rule is a “bedrock procedural” rule. One of the major concerns discussed in *Crawford* was the amount of judicial discretion needed to evaluate the testimonial nature of an out-of-court statement. Thus, a statement might be admissible in one court but not another, depending on the judge’s assessment of the statement’s reliability.⁸³ Until the Supreme Court addresses the issue of whether the rule set forth in *Crawford* is

⁸¹ *Id.*

⁸² 2004 NY Slip Op 51364 U, at *6.

⁸³ *Crawford*, 541 U.S. at 63 (2004).

to be applied retroactively in cases on collateral review, the problem regarding judicial discretion remains.

Jessica Goodwin

EFFECTIVE ASSISTANCE OF COUNSEL

United States Constitution Amendment VI:

*In all criminal prosecutions, the accused shall enjoy the right to . . .
have the Assistance of Counsel for his defence.*

New York Constitution article I, section 6:

*In any trial in any court whatever the party accused shall be allowed
to appear and defend in person and with counsel as in civil actions . .
. .*

