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## Right to Cross-Examine

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## RIGHT TO CROSS-EXAMINE

*N.Y. CONST. art. I, § 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 and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. . . .*

*U.S. CONST. amend. VI*

*In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .*

**SUPREME COURT, APPELLATE DIVISION**

**SECOND DEPARTMENT**

**People v. Pereda<sup>1</sup>**  
(decided January 31, 1994)

Defendant claimed that his right to cross-examine was violated when the trial court limited the cross-examination of a complainant, despite the well-recognized fact that the defendant's right to cross-examine a witness was protected by the Federal<sup>2</sup> and State<sup>3</sup> Constitutions.

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1. 200 A.D.2d 774, 607 N.Y.S.2d 98 (2d Dep't 1994).

2. U.S. CONST. amend. VI. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

3. N.Y. CONST. art. I, § 6. This provision provides in relevant part: "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 and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him . . . ." *Id.*

The reported facts of *Pereda* are sparse and vague. The defendant, *Pereda*, was convicted at a jury trial of rape and assault.<sup>4</sup> Additionally, the court's decision leads the reader to infer that the defendant was also involved with the complainants in civil litigation,<sup>5</sup> and that *Pereda's* cross-examination issue may have pertained to the interest that the complainants could have had in the outcome of the criminal trial.<sup>6</sup> The court, however, held that the latter issue was too remote to permit cross-examination on the subject.<sup>7</sup>

The *Pereda* court agreed with the lower court's limitation on the defendant's right to cross-examine, reasoning that "trial courts retain wide discretion to limit cross-examination"<sup>8</sup> for various concerns, such as when interrogation confuses the issues or when it is only of minimal relevance.<sup>9</sup> The court also explained that the issue of relevancy, or rather, whether the evidence is too remote, "is a question for the court."<sup>10</sup> In other words, whether an issue is relevant is determined by the trial judge, rather than the factfinders.

The basis of a defendant's right to cross-examine a witness is found in the United States Constitution and the New York State Constitution, both of which confer the right to confront witnesses who are testifying against a defendant.<sup>11</sup> This right, however, is

4. *Pereda*, 200 A.D.2d at 774, 607 N.Y.S.2d at 99.

5. *Id.* at 775, 607 N.Y.S.2d at 100. The court made reference to evidence in the jury's possession concerning civil lawsuits in which the complainants were involved. *Id.*

6. *Id.* at 774, 607 N.Y.S.2d at 99.

7. *Id.* at 774, 607 N.Y.S.2d at 99-100. Aside from affirming the lower court's limitation of defendant's cross-examination, the appellate court denied the defendant's motion to suppress his post-arrest statements. *Id.* at 774, 607 N.Y.S.2d at 99. Additionally, the appellate court also denied his request for a jury charge that the complainants were interested witnesses, stating that the jury had already been appropriately charged and, in concluding, dismissed *Pereda's* remaining contentions in light of his overwhelming guilt. *Id.* at 775, 607 N.Y.S.2d at 100.

8. *Id.* at 774, 607 N.Y.S.2d at 99.

9. *Id.*

10. *Id.* at 774, 607 N.Y.S.2d at 100.

11. U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6.

not necessarily absolute in its application,<sup>12</sup> and the denial of confrontation does not automatically mandate reversal of a defendant's conviction.<sup>13</sup>

A recent New York case which synthesized federal and state precedent on the right to cross-examination is *People v. Ashner*,<sup>14</sup> in which the defendant successfully appealed her conviction of grand larceny and twenty-five counts of forgery because there was a reasonable possibility that the court's limitation on her right to cross-examine a witness led to her conviction.<sup>15</sup>

One consideration stated in *Pereda* was whether the evidence obtained through a cross-examination is too remote.<sup>16</sup> In *People*

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12. *Pereda*, 200 A.D.2d at 774, 607 N.Y.S.2d at 99. The court stated that cross-examination may be limited "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

13. *See Van Arsdall*, 475 U.S. at 684 (holding that the denial of cross-examination of a prosecution witness to show bias violated defendant's Sixth Amendment rights subject to harmless-error analysis); *People v. Ashner*, 190 A.D.2d 238, 246, 597 N.Y.S.2d 975, 980 (2d Dep't 1993) (holding that the lower court erred by limiting cross-examination of a witness through the use of harmless-error analysis).

In *People v. Crimmins*, 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975), the New York Court of Appeals distinguished the federal and state tests for harmless error. The federal harmless-error test examined the proof of the defendant's guilt and the effect the error had on the verdict. *Id.* at 241-43, 326 N.E.2d 793-94, 367 N.Y.S.2d 221-23. The New York harmless-error test, however, which is applied to non-constitutional issues, places greater weight on the proof of the defendant's guilt - which can render an error harmless where a defendant's guilt is overwhelming. *Id.* The *Pereda* court points to the "overwhelming evidence of the defendant's guilt," *Pereda*, 200 A.D.2d at 775, 607 N.Y.S.2d at 100, but does so in relation to the defendant's "remaining contentions," not referring to his right to cross-examine. *Id.*

14. 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dep't 1993) (holding that it was not harmless error to limit cross-examination where there may have been a motive to falsely testify).

15. *Id.* at 248-49, 597 N.Y.S.2d at 982.

16. *Pereda*, 200 A.D.2d at 774, 607 N.Y.S.2d at 99-100. *See* JEROME PRINCE, RICHARDSON ON EVIDENCE 117 (10th ed. 1973) ("Evidence, although technically relevant, will be excluded if it is too slight, remote, or conjectural to have any legitimate influence in determining the fact in issue. And the

*v. Feldman*,<sup>17</sup> the court reversed a conviction where the defendant was prevented from discrediting an expert witness' statements.<sup>18</sup> The court held that the question of "[w]hether evidence is 'too remote' . . . is a question for the court . . . ."<sup>19</sup> *Feldman* is but one of five New York state cases the *Pereda* court cites in support of its decision to uphold the limitation placed on the defendant's right to cross-examine.<sup>20</sup> The other cases equally support the premise that if testimony or evidence is too remote or conjectural, the court may limit the cross-examination concerning that testimony or evidence.<sup>21</sup>

Consistent with New York's interpretation, the United States Supreme Court, in *People v. Gordon*,<sup>22</sup> held that "this principle [of wide judicial discretion to control cross-examination] cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony."<sup>23</sup>

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question whether the evidence is of such nature is for the court, not for the jury.").

17. 299 N.Y. 153, 85 N.E.2d 913 (1949).

18. *Id.* at 169-70, 85 N.E.2d at 921.

19. *Id.* at 169, 85 N.E.2d at 921.

20. *Pereda*, 200 A.D.2d at 774, 607 N.Y.S.2d at 99.

21. *See* *People v. Williams*, 188 A.D.2d 382, 383, 591 N.Y.S.2d 390, 391 (1st Dep't 1992) ("Defendant's theory - that the mother, under the influence of hallucinations, persuaded her daughter to fabricate charges against him - was speculative and conjectural . . . ."); *People v. Arthur*, 186 A.D.2d 661, 663, 588 N.Y.S.2d 881, 883 (2d Dep't 1992) (stating that the court's discretion to limit defendant's cross-examination was upheld when defendant's theory that police were under pressure to arrest him was a "remote extrapolation"); *People v. Frejomil*, 184 A.D.2d 524, 525, 584 N.Y.S.2d 181, 182 (2d Dep't 1992) (holding that the court's limitation on defendant's cross-examination of his wife in regard to collateral matters was reasonable); *People v. Martinez*, 177 A.D.2d 600, 601, 575 N.Y.S.2d 938, 939 (2d Dep't 1991) (holding that it was proper to limit defendant's right to cross-examine because defendant's theory that victim's mother might have unconsciously communicated her suspicion that her daughter was having a sexual relationship with defendant was too speculative).

22. 344 U.S. 414 (1952).

23. *Id.* at 423.

Another common consideration made in determining the trial court's discretion in limiting cross-examination, as noted in *Davis v. Alaska*,<sup>24</sup> is whether a witness was possibly motivated to testify falsely against the defendant, which is weighed against the value of the testimony.<sup>25</sup> In *Davis*, the juvenile witness had a history of burglary<sup>26</sup> and the court theorized that the stolen safe, which authorities had found near the witness' stepfather's house, may have caused the witness to testify falsely to avoid being named a suspect himself.<sup>27</sup>

*Davis* set a precedent which supports the right of a defendant to cross-examine the witnesses against him. In *Davis*, the Court stated:

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings. Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination."<sup>28</sup>

The purpose of cross-examining a witness is to put before the jury the facts from which it may infer the witness' reliability.<sup>29</sup>

In conclusion, Pereda's right to confront the witness against him was protected by both the Federal and State Constitutions under the Confrontation Clause of each, but the right is not absolute and can be limited by the discretion of the court depending upon whether the court views the testimony as too remote and whether an appeal based on a violation of that right to

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24. 415 U.S. 308 (1974).

25. *Id.* at 311.

26. *Id.*

27. *Id.* at 310-14.

28. *Id.* at 353 (citations omitted). See *People v. Ashner*, 190 A.D.2d 238, 246, 597 N.Y.S.2d 975, 982 (2d Dep't 1993) ("The right of cross-examination is included in the federal and state constitutional right of the accused to confront the witnesses against her.").

29. *Delaware*, 475 U.S. at 679.

cross-examine will be viewed as harmless beyond a reasonable doubt.