SHORT FORM ORDER INDICTMENT NO. 0904-97

County Court of the County of Suffolk
Part 7 – State of New York

PRESENT:
Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

-against-

ABDUL WAHEDI,

Defendant.

ORIG. RETURN DATE: 01/31/08
FINAL SUBMIT DATE: 02/07/08

PLTF'S/PET'S ATTY:
HON. THOMAS J. SPOTA
Suffolk County District Attorney
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New York, New York 10016

Upon the following papers numbered 1 to__ read on this motion to vacate judgment of conviction Notice of Motion and supporting papers 1-4; Affirmation/affidavit in opposition and supporting papers 5-6, 7-8; Affirmation/affidavit in reply and supporting papers 9-10; Other 11-12; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED, that Mr. Abdul Wahedi's application to vacate his judgment of conviction is denied in its entirety without a hearing.

Before the Court is a motion by Mr. Abdul Wahedi to vacate his judgment of conviction pursuant to Criminal Procedure Law §440.10(1)(f),(h). On December 16, 1998, Mr. Wahedi was convicted of intentional second degree murder pursuant to Penal Law §124.25[1], and sentenced to a term of twenty-five years to life imprisonment. Mr. Wahedi appealed his conviction to the Appellate Division, Second Department. His conviction was affirmed, and leave to appeal denied (*People v. Wahedi*, 301 A.D.2d 541, 752 N.Y.S.2d 904 [2 Dept., 2003]; *lv to app den,* 99 N.Y.2d 659 [2003]). After exhausting his direct appeals, Mr. Wahedi, through counsel, motioned to vacate his judgment. This motion was denied in a Decision and Order dated January 5, 2004, by the Hon. Judge Hinrichs. His subsequent request for leave to appeal was denied on February 25, 2004. Mr. Wahedi next petitioned the United States District Court, Eastern District of New York, for habeas corpus relief pursuant to 28 U.S.C. §2254. This petition was still pending upon the commencement of the current *coram nobis* motion.

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In his current motion Mr. Wahedi now argues that his judgment of conviction should be vacated on Constitutional grounds because of a violation of the Confrontation Clause (USCS Const. Amend. 6). More specifically, he maintains that the holding in *Crawford v. Washington* (541 U.S. 36 [2004]) should apply retroactively to cases on collateral review, and therefore his conviction should be reversed. Mr. Wahedi avers that by allowing the victim's statement identifying him as the assailant into evidence without being afforded the benefit of cross-examination, the trial court committed an error vital to the determination of his guilt or innocence.

Turning first to the issue of whether *Crawford* applies retroactively to cases on collateral review, this Court holds that it does not. According to the Court of Appeals decision in *People v. Eastman* (85 N.Y.2d 265, 684 N.E.2d 459 [N.Y. 1995]), "new rules of constitutional criminal procedure are applied retrospectively in one of two situations: where the new rule places 'certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe', or 'where the new rule alters a bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial'" (see, *Teague v. Lane*, 489 U.S. 288 [1989]). Although neither the Appellate Divisions nor the Court of Appeals has addressed this issue directly, several lower courts have rendered judgments implicating the retroactive application of *Crawford* on collateral review. Namely, at least two courts in Queens County have held that *Crawford* should not be applied retroactively on collateral review (see, *People v. Tam*, 12 Misc.3d 1179 [A] [Sup. Ct., Queens Co. 2006]; *People v. Perfetto*, 7 Misc.3d 1031 [A] [Sup. Ct., Queens Co. 2005]), while at least two courts in New York County have held that *Crawford* should apply in such instances (see, *People v. Watson*, 14 Misc.3d 942 [Sup. Ct., N.Y. Co. 2007]; *People v. Dobbin*, 6 Misc.3d 892 [Sup. Ct., N.Y. Co. 2004]).

This court's determination that *Crawford* should not be applied retroactively to cases on collateral review follows logically from the decision in *Eastman*, in which the Court of Appeals adopted the current federal test for retroactive application as announced in *Teague*, as well as two recent United States Supreme Court decisions. Our first guiding case is *Whorton v. Bockting* (127 S.Ct. 1173 [2007]), in which the United States Supreme Court held, "*Crawford* announced a new rule of criminal procedure that does not fall within the *Teague* exception for watershed rules" (*Whorton*, 127 S.Ct. 1173, 1175). In holding that *Crawford* announced a new rule but not a "watershed" rule "implicating the fundamental fairness and accuracy of the criminal proceeding", the Court held that *Crawford* would not be applied retroactively to cases on collateral review (*Whorton*, 127 S.Ct. 1173, 1181). The second guiding case is *Danforth v. Minnesota* (522 U.S. ___ [2008]), in which the Court held, "*Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion" (*Danforth*, at ___).

Although *Danforth* sets forth the rule that state courts are not bound to follow the *Teague* standard for the retroactive application of "new" rules of criminal procedure, it does not change the applicability of the rule announced in *Crawford* (*Danforth*, at ___). The *Danforth* decision clarifies the law as it pertains to how state courts may determine their retroactive application procedures (*Danforth*, at ___, stating; '[f]ederal law, in fact, imposed no constraints on the procedures that state courts could or should follow in imposing criminal sanctions on their citizens.'). The holding in *Danforth* stands for the policy that state courts may choose their own procedure for applying new rules retroactively in collateral proceedings. The Court of Appeals, through its holding in *Eastman*, aligned the law of New York in this area with that of the federal courts, thereby adopting the *Teague* standard for determining retroactive applicability (see, *Eastman*, 85 N.Y.2d 265, 684 N.E.2d 459 [1995]; *Teague v. Lane*, 489 U.S. 288 [1989]), generally). This Court will therefore follow suit and apply the Supreme Court's ruling in *Whorton*, denying the retroactive application of *Crawford* in collateral proceedings.

Assuming, *arguendo*, that *Crawford* did apply retroactively to Mr. Wahedi's current motion, we hold that any error committed by the trial court in admitting the victim's statement was harmless beyond a reasonable doubt (*People v. Hamlin*, 71 N.Y.2d 750, 530 N.Y.S.2d 74 [N.Y. 1988]). As the Court of Appeals explained in *Eastman*, "[a]n alleged violation of the Confrontation Clause is subject to a harmless error analysis" (*Eastman*, at 276). This Court must determine the "probable impact of the admission on the minds of an average jury" (*Id.*, citing, *Hamlin*, at 758). Applying these principles to the case at bar, we have concluded that any prejudice that may have arose from the admittance of the victim's statement was harmless when viewed in totality with the testimony of Mr. Wahedi, and therefore reversal of the conviction is not mandated (*Hamlin*, at 758). Although the statement of the victim identified Mr. Wahedi as his assailant, it was Mr. Wahedi's counsel, during opening statements, that conceded Mr. Wahedi's actions, and put forth the defense of extreme emotional disturbance (Trial minutes, 911-13). Furthermore, Mr. Wahedi took the witness stand and confessed to the killing (Trial minutes, 1520-21). In light of the foregoing, there is no reasonable possibility that the error affected the jury's verdict (*People v. Crimmins,* 36 N.Y.2d 230, 367 N.Y.S.2d 213 [N.Y. 1975]).

Moreover, as pointed out by defense counsel, the statements made by the victim prior to his death may be categorized as dying declarations (Trial minutes, 871). At least one Appellate Division has discussed whether admitting a dying declaration at trial can violate the Confrontation Clause. The First Department, in *People v. Ahib Paul* (25 A.D.3d 165, 803 N.Y.S.2d 66 [1 Dept. 2005]), found the issue unpreserved for review, yet highlighted the current case law surrounding the question (*Id.*). The *Ahib Paul* court stated that historically, the dying declaration exception to the hearsay rule as set forth in *Mattox v. United States* (156 U.S. 237 [1895]), has evolved in New

York to be predicated "upon the theory that 'awareness of impending death ... is presumed to remove from the mind all motivation and inclination to lie'" (*Ahib Paul*, at 167, citing: *People v. Nieves,* 67 N.Y.2d 125, 132 [1986]). The *Ahib Paul* court, again citing *Nieves* stated, "we must examine the statement carefully to be certain that the declarant correctly understood death to have been imminent at the time he made the statement (*Id.*, at 168).

Ultimately, although the *Ahib Paul* court determined that the Confrontation Clause argument was unpreserved, it held, "[w]ere we to review it ... we would find no reason for reversal" (*Ahib Paul*, 170), based upon the reasoning, "[that] if the inability of a witness to testify... is attributable to wrongdoing by the accused, then the accused may be deemed to have forfeited the confrontation right" (*Ahib Paul*, citing: Friedman and McCormack, *Dial-In Testimony,* 150 U Pa L Rev 1171, 1240-1241 [2002]). We find this reasoning persuasive, and therefore hold that even in the absence of a finding of harmless error, the admission of the statements against Mr. Wahedi do not warrant the vacatur of his conviction. When the victim was found by the police he had already suffered the life threatening injuries that eventually led to his death. There is nothing in the record to indicate that the victim was not aware of his impending death, or that he had any motive to lie.

Based on the reasons stated above, and pursuant to Criminal Procedure Law §440.30[4][a], Mr. Wahedi's motion is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
March 17, 2008

JAMES HUDSON
J.C.C.