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**SUPREME COURT OF NEW YORK  
QUEENS COUNTY**

People v. Tam<sup>1</sup>  
(decided July 7, 2006)

The defendant, Cedric Tam, was indicted on several counts for a robbery that occurred on April 14, 1994.<sup>2</sup> On May 3, 1995, a jury convicted him of ten counts related to the incident, including six robbery and attempted robbery counts,<sup>3</sup> three criminal possession of a weapon counts,<sup>4</sup> and one criminal possession of stolen property in the fifth degree count.<sup>5</sup> He was sentenced to seven to twenty-one years in prison for the most serious conviction, and concurrent terms for the remaining convictions.<sup>6</sup>

Tam appealed on January 21, 1998 and filed a *pro se* brief in which he claimed trial errors due to the prosecutor's conduct during summation.<sup>7</sup> In particular, he alleged that the prosecutor became a witness in the trial when she "spontaneously performed a demonstration with the gun that was in evidence, drawing it at the

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<sup>1</sup> No. 1667/94, 2006 N.Y. Misc. LEXIS 1800, at \*1 (Sup. Ct. July 7, 2006).

<sup>2</sup> *Id.*, at \*\*1-2.

<sup>3</sup> *Id.*, at \*2. He was convicted of "robbery in the first degree[,] robbery in the second degree, [and] two counts of attempted robbery in the second degree." *Id.*

<sup>4</sup> *Id.* These counts included one count of "criminal possession of a weapon in the second degree" and "two counts of criminal possession of a weapon in the third degree." *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Tam*, 2006 N.Y. Misc. LEXIS 1800, at \*2.

<sup>7</sup> *Id.*, at \*\*2-3.

jurors while stating ‘He’s looking at that – the perpetrator’s face.’<sup>8</sup> Tam’s conviction was affirmed on January 7, 1999.<sup>9</sup> Since then, Tam filed many petitions in both state and federal courts, all of which were denied.<sup>10</sup>

In the current petition, Tam raised a new claim that his Sixth Amendment right to confrontation<sup>11</sup> was violated because he was not able to cross-examine the prosecutor regarding her summation.<sup>12</sup> For authority, he cited the United States Supreme Court’s decision, *Crawford v. Washington*,<sup>13</sup> which held that testimonial evidence may only be admitted without the declarant available for cross-examination only if the declarant is “unavailable” and the defendant had “a prior opportunity for cross-examination.”<sup>14</sup> Tam characterized the prosecutor as testifying against him during her summation,<sup>15</sup> and therefore believed that *Crawford* would entitle him to an opportunity to cross-examine the prosecutor regarding her statements.<sup>16</sup> However, *Crawford* was decided nearly a decade after Tam was convicted.<sup>17</sup> Therefore, the *Tam* court needed to decide whether or not *Crawford* should be applied retroactively to Tam’s case.<sup>18</sup>

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<sup>8</sup> *Id.*, at \*4.

<sup>9</sup> *Id.*, at \*3.

<sup>10</sup> *Id.*, at \*\*3-4.

<sup>11</sup> 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 . . .”; N.Y. CONST. art. I, § 6 which states in pertinent part: “In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her.”

<sup>12</sup> *Tam*, 2006 N.Y. Misc. LEXIS 1800, at \*\*4-5.

<sup>13</sup> 541 U.S. 36 (2004).

<sup>14</sup> *Id.* at 68.

<sup>15</sup> *Tam*, 2006 N.Y. Misc. LEXIS 1800, at \*3.

<sup>16</sup> *Id.*, at \*5.

<sup>17</sup> *Id.*, at \*7.

<sup>18</sup> *Id.*

To make its decision, the court referred to *People v. Eastman*,<sup>19</sup> in which the New York Court of Appeals stated that New York applies the two-part United States Supreme Court *Teague*<sup>20</sup> test for retroactivity.<sup>21</sup> The *Teague* test applies to new rules, and the court decided that the *Teague* test was applicable because *Crawford* created a new rule.<sup>22</sup> The new rules may be applied retroactively if either one of two situations exist.<sup>23</sup> The first situation exists if the new rule legalizes a previously illegal action, and the court determined this first situation was not applicable.<sup>24</sup> The court then summarily concluded that the second condition, whether the rule change affected the “fundamental fairness and accuracy of the trial,”<sup>25</sup> was not met because *Crawford* did “not alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding.”<sup>26</sup> Therefore, *Crawford* failed the *Teague* test and was not retroactively applicable to Tam’s case.<sup>27</sup> An analysis of the cases cited in the decision sheds light on the court’s reasoning.

In *Teague v. Lane*, the United States Supreme Court was asked to decide whether its decision requiring jury pools to be drawn from “a fair cross section of the community” should be extended to the jury itself.<sup>28</sup> The petitioner was an African-American man who

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<sup>19</sup> 648 N.E.2d 459 (N.Y. 1995).

<sup>20</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>21</sup> *Tam*, 2006 N.Y. Misc. LEXIS 1800, at \*8.

<sup>22</sup> *Id.*, at \*\*8-9.

<sup>23</sup> *Id.*, at \*8.

<sup>24</sup> *Id.*, at \*9.

<sup>25</sup> *Id.*, at \*8 (quoting *Eastman*, 648 N.E.2d at 465).

<sup>26</sup> *Tam*, 2006 N.Y. Misc. LEXIS 1800, at \*\*9-10.

<sup>27</sup> *Id.*, at \*10.

<sup>28</sup> *Teague*, 489 U.S. at 292.

had been convicted of multiple counts of murder, robbery, and battery by an all-white jury.<sup>29</sup> All ten of the prosecutor's peremptory challenges had been used to exclude African-Americans.<sup>30</sup> The fair cross section requirement was announced after the petitioner's conviction was final, so it could not be applied unless the requirement was retroactively applicable.<sup>31</sup> The Court adopted Judge Harlan's philosophy<sup>32</sup> that, in general, new rules are not to be applied retroactively to collateral attacks<sup>33</sup> unless one of two special conditions existed:<sup>34</sup> either the new rule de-criminalized certain types of private conduct,<sup>35</sup> or it created new procedures that were fundamental to ensuring a fair trial.<sup>36</sup> Applying the test to the fair cross section rule, the Court found that the first condition was not relevant<sup>37</sup> and that a "fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction," so retroactivity did not apply.<sup>38</sup>

The *Tam* court also referred to *People v. Dobbin*,<sup>39</sup> a case in which a New York County Supreme Court considered whether

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<sup>29</sup> *Id.* at 292-93.

<sup>30</sup> *Id.* at 293.

<sup>31</sup> *Id.* at 311.

<sup>32</sup> *Id.* at 310. Justice Harlan stated these views in *Mackey v. United States*, 401 U.S. 667 (1971), in which he concurred in the judgments in part and dissented in part. *Teague*, 489 U.S. at 303-04.

<sup>33</sup> *Teague*, 489 U.S. at 305.

<sup>34</sup> *Id.* at 307.

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 312 (modifying Harlan's second condition to be more precise by explicitly specifying accuracy and "fundamental fairness" considerations).

<sup>37</sup> *Id.* at 311.

<sup>38</sup> *Teague*, 489 U.S. at 315.

<sup>39</sup> 791 N.Y.S.2d 897 (Sup. Ct. 2004).

*Crawford* should be applied retroactively to collateral reviews.<sup>40</sup> The defendant in *Dobbin* claimed that his Sixth Amendment right of confrontation was violated because he did not have the opportunity to cross-examine the caller of a 911 call whose transcript was introduced into evidence.<sup>41</sup> Citing the New York Court of Appeals in *Eastman*, the court applied the retroactivity test outlined in *Teague*.<sup>42</sup> The court found that *Crawford* was a new rule and was fundamental to fairness because the right of confrontation is “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”<sup>43</sup> Therefore, *Crawford* should have been applied retroactively.<sup>44</sup> However, the defendant’s motion was ultimately denied because *Eastman* held Confrontation Clause errors to a harmless review standard, and the court found that given the overwhelming evidence, the introduction of the 911 call’s transcript was harmless.<sup>45</sup>

In contrast, a Queens County Supreme Court came to a different conclusion when asked to decide whether *Crawford* should be applied retroactively in *People v. Perfetto*.<sup>46</sup> Like the *Dobbin* court, the two-part *Teague* test was applied, and the first condition, where a new rule makes previously prohibited conduct now legal, was found to be inapplicable.<sup>47</sup> The court noted that the United

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<sup>40</sup> *Id.* at 898.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 903-04.

<sup>43</sup> *Id.* at 905 (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)).

<sup>44</sup> *Dobbin*, 791 N.Y.S.2d at 905.

<sup>45</sup> *Id.* at 905-06.

<sup>46</sup> 801 N.Y.S.2d 240 (Sup. Ct. 2005).

<sup>47</sup> *Id.*

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States Supreme Court intended for the second condition, that retroactivity only be applied to “watershed rule[s] of criminal procedure,” to be very hard to meet.<sup>48</sup> It observed that the right in *Crawford* was not nearly as fundamental to fairness as the right to counsel, which the Supreme Court indicated only “might” satisfy the accuracy and fairness test.<sup>49</sup> Therefore, it concluded that *Crawford* did not meet the second consideration and should not be applied retroactively.<sup>50</sup>

The Supreme Court decided *Crawford*, but did not declare whether or not it was to be applied retroactively. Instead, courts all over the country have had to independently address the issue. Even though New York courts apply the *Teague* test for determining the retroactive applicability of a new rule, different interpretations of the two conditions in the test may lead to different results. For example, a split between counties regarding this issue may be observed from the cases discussed above. The *Dobbin* court from New York County held that *Crawford* should be applied retroactively, whereas the *Perfetto* and *Tam* courts from Queens County held that *Crawford* should not be applied retroactively.<sup>51</sup> Until the New York Court of Appeals resolves the difference, there will be some uncertainty as to whether or not New York will apply *Crawford* retroactively. However, of the cases discussed, the analysis in *Perfetto* seems to most closely comport with the Supreme Court’s intention in defining

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See supra* pp. 473-76.

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*CONFRONTATION CLAUSE*

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the *Teague* test.

*Elaine Yang*