



GENERAL ASSEMBLY

STATE OF ILLINOIS

Rep. Jim Durkin
Rep. Lou Lang
House Managers, Select Committee on Discipline
House of Representatives, 97th General Assembly
State of Illinois

July 16, 2012

Rep. Barbara Flynn Currie
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HOUSE MANAGERS' REPLY TO RESPONDENT'S OBJECTION

- I. **Agent Butler's affidavit should be admitted into evidence over Respondent's objection because the document is non-testimonial and self-authenticating.**
 1. An objection based on lack of foundation for a document sought to be introduced in a courtroom rests upon the Sixth Amendment right to confrontation if such evidence is "testimonial". Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). In Melendez-Diaz, the prosecution introduced into evidence certificates of a state laboratory analyst stating that the substance seized and tested was a controlled substance, without testimony from the analyst. The certificates' authenticity was sworn to before a notary public at the state crime lab. The Supreme Court reversed the conviction and held that the certificates' use as evidence violated the defendant's Sixth Amendment right to confrontation.
 2. Out-of-court testimonial statements are inadmissible unless the witness was unavailable and the defendant had a prior opportunity to cross-examine that witness. Crawford v. Washington, 541 U.S. 36 (2004). The United States Supreme Court did not provide a comprehensive definition of "testimonial" evidence in Crawford but stated that such evidence would necessarily include

prior testimony at a preliminary hearing, before a grand jury, or at a formal trial or at a police interrogation. Id. at 51-2.

3. In Davis v. Washington, 547 U.S. 813 (2006), the United States Supreme Court revisited the issue of “testimonial” evidence as it relates to a defendant’s right to confrontation, and stated “without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or non-testimonial, it suffices to decide the present case to hold as follows:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events relevant to later criminal prosecutions. Washington, 813-4.

4. The facts in this case involve Respondent’s acceptance of United States currency (\$7,000) in exchange for using his influence to obtain a State grant. The affidavit of Federal Agent Bryan Butler, for the most part, consists of recorded statements between Respondent and a confidential informant (not a law enforcement officer). These statements were made contemporaneously with Respondent’s alleged unlawful conduct for the purpose of enabling police to address an imminent violation of the law, rather than “to establish or prove past events.”
5. Additionally, the courts have already ruled that the right to confrontation does not apply to “statements made unwittingly or surreptitiously to a government informant”. Bourjaily v. United States 483 U.S. 171 (1987); People of the State of Illinois v. ReDeaux 355 Ill. App. 3d 302 (2nd Dist. 2005).
6. Therefore, Federal Agent Butler’s affidavit is non-testimonial and not subject to the objections relating to foundation under the 6th Amendment.
7. In order to authenticate a document, its proponent must introduce evidence sufficient to support a finding that it is what the proponent claims it to be. People v. Chromik, 408 Ill. App. 3d 1028, 1046, 349 Ill. Dec. 543, 946 N.E.2d 1039, 1055 (3d Dist. 2011).
8. The House Managers have obtained and disclosed their intent to introduce as evidence a certified copy of the affidavit in question from the clerk of the United States District court for the Northern District of Illinois in the case of U.S. v. Derrick Smith, 12 cr 175.

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9. Accordingly, the affidavit in its certified form is self-authenticating under Illinois Rule of Evidence 902(1) as it bears the seal and signatures of Magistrate Judge Nan R. Nolan and court clerk Thomas G. Bruton, or alternatively under Illinois Rule of Evidence 902(4), as it is a certified copy of a public record.

II. Agent Butler's affidavit should be admitted to evidence over Respondent's objection because the Respondent has stipulated to its admission.

1. On July 6, 2012, the House Managers and Counsel for Respondent submitted their lists of proposed exhibits and witnesses as required under the Scheduling Order for the Procedural Rules of the Select Committee on Discipline. Both parties listed the affidavit of Federal Agent Bryan Butler in the submissions. (Respondent document of 7/6/12, section B.2; and House Manager Document of 7/6/12, #15).
2. The Procedural Rules of the Select Committee on Discipline set a deadline of July 13, 2012 for each party to raise objections in writing to evidence submitted by the opposing party. The Scheduling Order specifically states as follows: "On or before Friday, July 13, 2012, each party may raise objection in writing to any or all of the evidence disclosed by the opposing party, with copies to the opposing party and to the Counsel to the Committee by e-mail, in accordance with Rule 7 of the Procedural Rules."

This language communicates the Select Committee's clear intent that the rules regarding the submission of evidence and any objections to that evidence are binding and not advisory.

3. On July 13, 2012 at 12:37 P.M., the House Managers filed a written response stating they had no objections to the exhibits and witnesses proposed by Respondent, including the affidavit of Federal Agent Bryan Butler. That same day at 3:42 P.M. Respondent filed an objection to the House Managers request for the introduction of Agent Butler's affidavit due to "lack of foundation".
4. At no time prior to the House Managers' acceptance of Respondent's witness and exhibit list did Respondent withdraw his request to introduce the affidavit of Federal Agent Bryan Butler.
5. Upon the filing of the House Managers' acceptance of all witnesses and documents, Respondent and House Managers agreed to their use as evidence, including Agent Butler's affidavit. The Respondent's submission of an identical exhibit list to that of the House Managers, and House Managers' acceptance of that list, constitutes a stipulation.
6. A stipulation is defined as "[a] voluntary agreement between opposing parties concerning some relevant point; esp., an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding." Black's Law Dictionary (9th ed. 2009).

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7. "A stipulation is an agreement between the parties with respect to an issue before the court" People v. Woods 214 Ill.2d 455, 468; 828 N.E. 2d 247, 256 (2005). "A stipulation is conclusive as to all matters necessarily included in it, and no proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence. Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated". Woods at 469.
 8. Respondent cannot now object to evidence that he sought to have introduced following the House Manager's acceptance. Accordingly, Respondent's objection to the affidavit of Federal Agent Butler's affidavit is improper, untimely and should be overruled.

Based on the foregoing reasons, the affidavit of Federal Agent Bryan should be admitted into evidence over Respondent's objection. In the alternative, the House Managers move that Agent Bryan's affidavit, with all its contents redacted with the exception of the transcribed communications between Respondent and CS-1, be admitted into evidence.

Respectfully submitted,

Rep. Jim Durkin

Rep. Lou Lang

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