

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS.

SUPERIOR COURT
JUL 14 11 12 31
RECEIVED

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

**DEFENDANT’S OBJECTION TO STATE’S MOTION *IN LIMINE*
**SEEKING THE COURT’S PERMISSION TO ADMIT CERTAIN
**DOMESTIC RECORDS UNDER RULE 902(11) AND TO
NOTICE PURSUANT TO N.H. RULE OF EVIDENCE 902(11)******

Defendant Jesse Brooks, by and through counsel, hereby objects to the State’s Motion in Limine Seeking the Court’s Permission to Admit Certain Domestic Records Under Rule 902(11) and to Notice Pursuant to N.H. Rule of Evidence 902(11). The State, which did not confer with defense counsel before filing its motion and notice, seeks to admit at least 36 different categories of documents—totaling an unknown volume of pages—into evidence “through certificates of authenticity.” See State’s Motion at 1; see also State’s Notice Pursuant to N.H. R. Evid. 902(11) (July 31, 2009) (listing categories of records). The State, however, miscasts the constitutional requirements for such evidence following United States v. Melendez-Diaz, 129 S. Ct. 2527 (June 25, 2009), which invalidates, under the Confrontation Clause of the Sixth Amendment to the United States Constitution, the very “certificates of authenticity” that are the subject of the State’s motion.

Nevertheless, Defense counsel believe that they may be able to reach agreement with the State regarding many of the records that are the subject of the State’s motion and notice. Accordingly, defense counsel submits that the Court should deny the State’s motion without prejudice to any future stipulations on authenticity—or admissibility—of such records.

In further opposition to the State’s motion, counsel for Defendant states as follows:

1. The primary authority on the issues raised in the State’s motion is the six-week-old decision of the United States Supreme Court in Melendez-Diaz. The State, which cites the decision for the first time on page 6 of its motion, substantially misstates the holdings in that case applicable here. The State notes correctly that the Supreme Court held that evidentiary hearsay rules allowing for the admission of business records do not generally violate the Confrontation Clause. See State’s Motion at 6 (citing Melendez-Diaz, 129 S. Ct. at 2539-40). “Business and public records [themselves] are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” Melendez-Diaz, 129 S. Ct. at 2539-40.

2. The State errs, however, in extending Melendez-Diaz to validate the “certificates of authenticity” by which the State seeks to authenticate such business records. Such certificates, unlike the business records themselves, are “prepared specifically for use at trial.” See id. They are, therefore, now “subject to confrontation under the Sixth Amendment.” See id.¹ The

¹ [I]t appears that [following Melendez-Diaz] prosecutors cannot lay the foundation for admission of business records by using a certification. Both by statute and under the Federal Rules of Evidence, domestic and foreign business records can be offered at trial through the use of a sworn certification or declaration. Melendez-Diaz casts doubt on the prosecution’s use of these rules. In dissent, Justice Kennedy lamented that live testimony now may be required in these instances, contrary to several post-Crawford decisions.

Under the reasoning in Melendez-Diaz, business record certifications are testimonial: they are sworn affidavits ‘prepared specifically for use’ at trial. In rebutting this argument, prosecutors may look to the Court’s comment that ‘[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record,’ but the Court also explains that the declarant cannot ‘create a record for the sole purpose of providing evidence against the defendant.’

Supreme Court language that the State cites to suggest otherwise is taken from a discussion, in the past tense, of common law prior to Crawford v. Washington, 541 U.S. 36 (2004), by which “a clerk’s certificate authenticating an official record” “*was traditionally* admissible.” See Melendez-Diaz, 129 S. Ct. at 2538 (emphasis added); see also State’s Motion at 8-9.

3. In other words, contrary to the State’s position, the State may not authenticate by certificate any business record at trial in this case under Rule 902(11) over Mr. Brooks’ objection. Such a certificate would be testimonial hearsay, and would violate the Confrontation Clause. If, for example, the State sought to admit any of the 36 categories of documents listed in its Rule 902(11) notice on the basis of such a certificate, and Mr. Brooks asserted his rights under Melendez-Diaz, such records would be inadmissible. The State would be required to authenticate such records through a witness subject to confrontation and cross-examination.

4. Defense counsel believes, however, that this outcome and the attendant time, expense, and effort required may be largely if not entirely avoided. As noted above, the State did not confer with defense counsel prior to filing its motion and notice. Moreover, the State has, for approximately two months, been unable to accommodate defense counsel’s request to the Clerk of the Court to review the exhibits marked and admitted at the trials of co-defendants John Brooks and Robin Knight. That review, which has finally been scheduled to occur on August 14, will likely facilitate defense counsel’s understanding of the records and other exhibits that the State has *actually used* at co-defendants’ trials (as opposed to those provided in discovery or marked but not admitted in evidence), and thereby facilitate agreement among the parties on evidentiary issues including those raised in the State’s motion. Following that review, and on

Harry Sandick & Justin Mendelsohn, *Divided Supreme Court Extends Reach of Confrontation Clause*, N.Y. Law Journal, July 20, 2009; see also Melendez-Diaz, 129 S. Ct. at 2547 (Kennedy, J., dissenting) (acknowledging that “breadth of the Court’s ruling” may eliminate the “long-accepted practice of authenticating copies of documents by means of a certificate”).

further examination of the 36 categories of documents listed in the State's motion (and the corresponding certificates of authenticity), defense counsel may well be able to stipulate to the authenticity, and perhaps as well to the admissibility, of many of the records listed in the State's notice.²

5. Accordingly, although Melendez-Diaz requires denial of the State's motion, defense counsel submits that such denial should be without prejudice to future stipulations as to the authenticity and, potentially, admissibility of the records listed in the State's motion and notice.

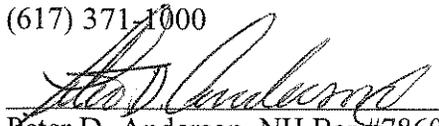
WHEREFORE, Defendant Jesse T. Brooks respectfully requests that this Honorable Court:

- A. Deny the State's Motion in Limine Seeking the Court's Permission to Admit Certain Domestic Records Under Rule 902(11) without prejudice to any future stipulation regarding the authenticity of a record otherwise subject to N.H. R. Evid. 902(11); and
- B. Grant such other relief as is just and appropriate.

² Defense counsel may seek to admit at trial additional records with certificates of authenticity pursuant to Rule 902(11) after proper notice to the State. See Rule 902(11) (requiring notice "sufficiently in advance" of record being offered "to provide an adverse party with a fair opportunity to challenge it"). Of course, the State, unlike Defendant, could have no Confrontation Clause objections to the authenticity of such records under Crawford and Melendez-Diaz. See U.S. Const. Amend. VI ("In all criminal prosecutions, *the accused* shall enjoy the right ... to be confronted with the witnesses against him" (emphasis added)); see also United States v. Paguio, 114 F.3d 928, 934 (9th Cir. 1997) ("The Constitution gives the 'accused,' not the government, the right of confrontation.").

Respectfully submitted,
JESSE T. BROOKS,
By his attorneys,

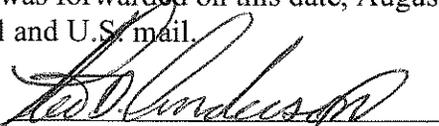
William H. Kettlewell (*pro hac vice*)
Maria R. Durant (*pro hac vice*)
Dwyer & Collora, LLP
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 371-1000


Peter D. Anderson, NH Bar #7860
McLane, Graf, Raulerson & Middleton, PA
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
(603) 625-6464

Dated: August ~~14~~ 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, August ~~14~~ 2009, to all counsel of record by electronic mail and U.S. mail.


Peter D. Anderson, NH Bar #7860