

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	08CR888
	)	
ROD BLAGOJEVICH	)	Judge James B. Zagel
	)	

DEFENDANT ROD BLAGOJEVICH'S  
MOTION FOR MISTRIAL BASED UPON THE  
PREVENTION OF MEANINGFUL CROSS-EXAMINATION

Now Comes Defendant Rod Blagojevich, by and through his attorneys, and hereby moves this Court for a mistrial for the reasons contained herein. In support thereof, Defendant states the following:

Cross examination has been called "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367 at 32 (1974).

Defense counsel has been systematically prevented from engaging in meaningful cross-examination by unwarranted sustaining of objections. The result is the deprivation of a fair trial and a mistrial is warranted.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution to be confronted by the witnesses against him. The purpose of the Confrontation Clause is to "secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). See also *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Crawford v. Washington*, 541 U.S. 36 (2004).

The court has ruled that questioning by the defense has gone beyond the scope of direct. In numerous instances, this finding has been erroneous, where indeed the government opened the door to that line of questioning. Nevertheless, Federal Rule of Evidence 611 provides the court with the authority to permit inquiry into additional matters on cross as if on direct examination. See FRE 611(b) (“Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”)

During cross-examination of Michael Horst on June 21, 2010, defense counsel was prohibited from inquiring into areas that were raised by the government on direct. For example, the government inquired as to Horst’s familiarity with Chris Kelly. Horst testified on direct that he was familiar with Chris Kelly, and that he met and interacted with Chris Kelly at the office building rented by one of Horst’s clients (Castle Construction). He testified on direct that he saw Kelly three to four times a year, and met him prior to late 2003/early 2004. Horst testified that he shared a table with Kelly at a Christmas Party held by Castle Construction in 2003/2004.

On cross, defense counsel was prevented from questioning Horst regarding his interactions with Chris Kelly in 2003 or 2004 regarding being interviewed for a position on an Illinois state board. Objections were sustained when defense counsel

asked Horst about meeting with Chris Kelly, an interview and submission of his resume.

John Johnston testified on direct on June 21, 2010 that for four years (from 2003 to 2006) he dealt with Chris Kelly at FOB. Johnston testified on direct that the relationship began as professional and developed into a social relationship. Johnston testified that by December of 2006, he would talk to Kelly about once a week. Johnston testified on direct that he observed Blagojevich and Kelly together at times, about a half dozen times a year (specifically, at fundraisers or at a state fair). Johnston testified that Blagojevich and Kelly were very close friends and Johnston would talk with Kelly about Blagojevich. Johnston testified that he remembered generally what the many conversations included between 2003 and 2006. The government also raised the issue of gaming devices at the racetracks.

After Johnston testified on direct about specific persons including Johnston's professional and social relationship with Chris Kelly, the government's (mostly unspecified) objections were sustained on cross-examination questions which were properly raised in light of the direct examination. Objections were sustained regarding whether Chris Kelly showed an interest in horseracing (the Court ruled that if the defense believes this witness has testimony that is helpful, he should be called in the defense case.) Objections were sustained on questions asking about the relationship between the witness and Chris Kelly – an issue raised on direct. Objection to defense counsel's question regarding campaign contributions with Kelly was sustained.

After Johnston testified that his father, Billy Johnson, was an “ornery S.O.B.”, the defense properly questioned him on cross asking, “Your father is a very frank and outspoken man?” This objection was sustained.

The court sustained an objection as to whether the Governor’s associates ever related to Johnston that contributions resulted in favorable consideration. This is despite the repeated questions by the government along this line.

Despite direct examination eliciting the detailed familiarity of Johnston with the bill (he lobbied himself, living in Springfield while the legislature was in session), and multiple discussions with the governor and his staff, defense counsel was prevented from asking Johnston about a May/June 2008 meeting where Lon Monk arranged for Bill Quinlan to sit down with Johnston to go through the bill.

When asking Johnston about the 2006 and 2008 bills, defense counsel was repeatedly stymied by sustained objections. A question about what work performed by the racetracks to receive the subsidy was sustained. The government’s objection was sustained regarding Johnston’s lobbying of the house bill in 2006.

On June 15, 2010, Lon Monk testified in detail on direct examination about hiring and appointments, alleging that campaign contributions were a factor in hiring. When defense counsel asked Monk if the governor ever fired anyone because of campaign contributions, the government objected and the objection was sustained. The government opened the door to this testimony. Also, the government’s objections were sustained on questions regarding what Monk and

Blagojevich wanted insofar as appointment recommendations (looking for qualified people, recommended by people who knew something about them).

David Abel, on direct (on June 15<sup>th</sup>), testified he was the Director of Debt Management for the State of Illinois and that the POB deal was initiated to help generate revenue. On cross, Abel testified that when Blagojevich first became Governor in 2003, the state had a structural budget deficit of approximately \$5 Billion. On cross-examination, defense counsel inquired as to ways in which revenue can be generated. Objections to these questions were all sustained. The court commented, in front of the jury, that these questions were out of the witness' expertise or its an answer that doesn't need expertise and either way, it doesn't add anything.

Abel also testified on June 15<sup>th</sup> that Bear Stearns was in the "highly qualified" category in the running for underwriters of the POB deal. Defense counsel properly questioned Abel (who testified in detail about the process of the bond deal) if Blagojevich ever told him to put Bear Stearns in the highly qualified category. Follow up questions, which were also proper, were objected to and the objections sustained. (Did Tony Rezko ever tell you to put Bear Stearns in the highly qualified category? –objection, sustained; Did Chris Kelly ever tell you to put Bear Stearns in the highly qualified category? –objection, sustained; Did Lon Monk ever tell you to put Bear Stearns in the highly qualified category? –objection, sustained).

On June 17<sup>th</sup>, Ali Ata testified on direct that he retired early in 2001, shortly after the 911 attacks. Answering the government's questions, Ata testified that "shortly before" he retired early, Ata was "visited by two FBI agents investigating the 911 attacks" and that "based on that visit," he was "given an early retirement package" by his company.

When defense counsel inquired on cross as to the FBI's visit and questioning of Ata in relation to the 911 attacks (based on the direct testimony and Ata's prior statements to the FBI), the court removed the jury from the courtroom and sustained objections, preventing defense counsel from inquiring further.

On June 17<sup>th</sup>, Ata testified on direct regarding his longstanding relationship with the Mell/Blagojevich family. He testified that he knows Blagojevich, he met him 10-15 years ago through his father in law Richard Mell. Ata testified he donated money to support Blagojevich's first run for governor in 2002.

Defense counsel was improperly prevented from asking Ata about the relationship with the Mell and Blagojevich family on cross-examination, as the relationship relates to fundraising and campaign contributions – all of which were raised on direct by the government.

On at least one occasion, the court directed defense counsel to "ask a non-leading question" on cross in order to overcome a sustained objection. During the cross-examination of Johnston, defense counsel referred to "house bill 4570 renewing the subsidy in 2008" instead of "house bill 4758," and the government objected that it "misstates the testimony" and the court responded, "Ask a non

leading question.” This was in contravention of FRE 611(c) which specifically provides that “Ordinarily leading questions should be permitted on cross-examination.”

Additionally, the defense was prevented from impeaching Johnston with prior inconsistent statements made in his February 5, 2009 FBI Interview with Agents Cain and Miller.

Bradley Tusk, testified for the government on June 21, 2010 and stated that Blagojevich said, of the Chicago Academy/AUSL grant, that “before the grant could be released, he wanted Rahm’s brother to hold a fundraiser for him.” Defense counsel tried to impeach Tusk with his statement before the grand jury where he did not say that Blagojevich demanded the fundraiser before the grant money was released. This impeachment was not permitted.

In addition, the court has sustained several government objections, opining that they are so-called ‘mind reading’ objections. For example, on June 15, during the cross-examination of Monk, defense counsel asked if ‘Rezko gave you that money because you and he and Chris Kelly were engaged in a conspiracy and he wanted to keep you quiet?’ The objection was sustained with “you can’t read somebody’s mind”. The witness could answer Yes or No to that question. It was not an improper question. The court also sustains repeated government objections that a question “misstates the evidence” – these objections are improper. The witness can answer a question asking “isn’t it true that you testified that, . . .” with a Yes or No, alleviating the need for any objection by the government.

Again, on cross-examination of John Johnston on June 21<sup>st</sup>, the court sustained an objection, in front of the jury, stating: Don't do that, now we're getting into the mindreading of the prosecution.

The government consistently asks the question, "What did you understand Defendant Blagojevich [or other witness] to be saying?" or "What did you understand Defendant Blagojevich [or other witness] to mean?". It is inconsistent and unfair to permit the government to engage witnesses in these types of questions while prohibiting defense counsel. Moreover, by ruling on these "mind reading" objections orally in front of the jury, it sends an inappropriate message to the jury (when only the defense is sustained on these questions)

Moreover, the government has consistently elicited testimony from witnesses regarding the legality and/or propriety of certain alleged acts. The government has been permitted to elicit testimony regarding quid pro quo, over defense objection.

On June 17<sup>th</sup>, on direct, the government asked Joseph Aramanda about an alleged "mechanism" where Stuart Levine and Chris Kelly would give out contracts for campaign contributions for Blagojevich. When asked, "What did you understand SL to be telling you?," Aramanda testified that "There would be a quid pro quo." Defense counsel's objection was overruled.

Then, on cross, defense counsel asked Aramanda: "There's nothing wrong with writing checks, making donations to someone?" and "You didn't think anything was wrong with [Stuart Levine helping you with Healthpoint]?". Both objections were sustained.

On re-direct, the government asked Aramanda what he understood quid pro quo to mean. The court allowed the question to be asked as: what does quid pro quo mean to you? Aramanda's response was allowed to stand over objection.

Yet, defense counsel has been prevented from asking questions in the same vein. On June 15<sup>th</sup>, in the cross of Monk, questions about why Monk, Blagojevich and his wife allegedly met with a lawyer "to make sure it was legal" was objected to and sustained.

Also on cross examination of Monk, when defense counsel asked, "You told us it was improper because of 'one for another,'" an objection was sustained.

On cross-examination on June 21 of John Johnston, the fact that Johnston told the FBI there was no quid pro quo (despite testifying to the contrary on direct).

Defense counsel further objects to the court's comments to counsel in front of the jury. On cross-examination on June 15<sup>th</sup>, defense counsel asked Monk if the Governor and he developed a philosophy on fundraising (Monk said this was correct.) Defense counsel then asked if it was "fair to say" the philosophy was that 'we have to be independent of other branches of government and other persons in government.' The government objected. In sustaining the objection, the court stated, in front of the jury, "Use less loaded words."

The court halted cross-examination by one attorney with "You're finished." The court also stated at one point, "there are a discrete set of charges against your client. Some things you bring up are not charges and are not relevant." The court

also stated to one attorney, in front of the jury, words to the effect of, ‘if the jury doesn’t get it by now, they never will.’

Defendant has the right to a fair trial and to confront the witnesses against him in a meaningful way. In light of the fact that the majority of the key government witnesses have testified under a plea agreement or immunity deal, the interest is heightened in a thorough cross-examination as “the greatest legal engine ever invented for the discovery of truth.” See Wigmore, *supra*.

Defendant moves this court for a mistrial. In the alternative, defense counsel urges this Court to order the government to state the basis upon which it objects, and urges the court to limit the distracting manner in which prosecutors signal to witnesses by persistently standing to object (many times prior to defense counsel even asking a question). It is a distraction for the jury and serves no legitimate purpose.

WHEREFORE, Defendant Rod Blagojevich prays that this Court grant a mistrial or in the alternative, instruct the government to state the basis for its objections.

Respectfully Submitted,  
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