

DEAN'S STATEMENT THAT SHE WAS NOT THAT CLOSE TO MITCHELL UNTIL AFTER SHE LEFT HUD

Summary: In closing argument the prosecutor took a passing remark by Deborah Gore Dean out of context in order to assert to the jury that Dean had lied in making the remark. When Dean challenged this action in her motion for a new trial, the OIC responded defensively. Nevertheless, the OIC relied on the same remark, misleadingly presented, to successfully persuade the U.S. Probation Officer to increase the recommended sentence on grounds that Dean obstructed justice by falsely testifying about her relationship with Mitchell. For a time, the court followed the Probation Officer's recommendation, but later concluded that Dean's remark had appeared to be misleading only when taken out of context.

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Attachments

1. Pages 1, 8-9 of January 18, 1994 Letter from Arlin M. Adams to Probation Officer Gregory Hunt.
2. Transcript of Hearing of February 22-23, 1994, pages 53-56, 64-67, 88-97.

Principal References:

1. Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F. R. Crim. P. 29(c) and (d) and Motion for New Trial Pursuant to F. R. Crim. P. 33 at 204-07 (Nov. 30, 1993) ("Dean Mem.")
2. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 at 50 (Dec. 21, 1993) ("Gov. Opp.")
3. Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial at 18 (Jan. 7, 1994) ("Dean Reply")

A. Background

Evidence introduced in the OIC's case-in-chief showed that as early as 1983, Dean had written to John Mitchell as "Dear Dad," or "Daddy," signing such letters, "Love, Deborah," or "love, D." In her direct testimony, Dean fully acknowledged such letters. Tr. 2608-11. Dean had also explained that even much earlier, Mitchell had advised her and her brother about school choices and "acted as a -- mentor, I would say, to both my brother and I." Tr. 2595. Speaking of her relationship from the early 1970's until she went to work for Mitchell's company for a brief period in 1980, Dean said: "I really didn't know him that well, but I liked him and I -- I felt terribly sorry for him and what was going on in his life and I tried to be kind to him and he was very kind to me." Tr. 2596-97.

On cross-examination Dean similarly acknowledged a close tie to Mitchell. Asked whether "it is fair to say that you were close to John Mitchell?," Dean responded simply, "Yes." Tr. 2960. Still on cross-examination, in discussing why she had sought Mitchell's assistance when she believed an F.B.I. investigator was acting improperly, an event occurring while she was still at HUD, Dean spoke of Mitchell as someone "I considered to be my mentor/father-like person." Tr. 3019. Moments after that acknowledgement, Dean was asked whether while at HUD she would meet Mitchell occasionally for lunch. She responded as follows:

I believe I was still employed at HUD when I had lunch with he and Mr. Winn, and I know I had lunch with him with Mr. Shelby. I don't believe I ever had lunch with Mr. Mitchell when it was just the two of us and I was at HUD. I really didn't get to know Mr. Mitchell very well until after I left HUD. Then we became very close. We weren't actually that close when I was at HUD.

Tr. 3019 (emphasis added).

B. OIC's Closing Argument

As discussed in several other places, in closing argument Associate Independent Counsel Robert E. O'Neill repeatedly asserted to the jury that Dean had lied throughout her testimony in court. One of the three underscored sentences above would have a significant role in O'Neill's assertions that Dean had repeatedly lied. O'Neill stated:

What does she get out of this? John Mitchell is like a father to her. He is as close as he [sic] comes. Later on, in her testimony, she says, well, I didn't really become close to him until after I left HUD.

Ask yourselves, ladies and gentlemen, is that credible? When she's writing letters to him in 1983 saying Dear Daddy? Would you be calling somebody Daddy if you're not close to him.

She told you that he was her mentor. He was her brother's mentor.

But the story keeps changing. It changes on what question you ask. But there is no doubt in these documents, documents written in 1983, that's her dad, and that's what she's calling him.

Later on when confronted on the stand, I wasn't close to him at that time.

Tr. 3395-96.

O'Neill would return to this theme minutes later:

I mentioned earlier, not close to John Mitchell until after she left HUD. All the letters were written Dear Daddy. Five years earlier. Come on ladies and gentlemen. Does that square with common sense? Does that make any sense at all? She's trying to talk her way out of it.

Tr. 3421.

And in rebuttal the following day, O'Neill would return to the theme once more when listing instances in which, according to O'Neill, Dean had repeatedly lied to the jury, this time observing:

Not close to Mitchell until after she left HUD. In fact, the record shows she was calling him Daddy five years earlier.

Tr. 3506.

C. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean treated O'Neill's use of her remark as one of 14 areas of prosecutorial misconduct in closing argument, in addition to O'Neill's repeated assertions that she had lied to the jury. Dean described the context of the remark, noting that there was nothing in this passing observation to suggest an intent to distance herself from Mitchell, or to do anything other than explain the somewhat curious fact that she never lunched alone with Mitchell while she was at HUD. Dean also noted that these statement could not be regarded as a response to being confronted with anything. She argued that it was abusive for the prosecutor to twist her remarks to support the prosecutor's vouching to a jury that the record showed that a criminal defendant had lied. Dean Mem. at 204-07.

D. OIC's Opposition

In its Opposition, the OIC argued:

At various times during the course of her testimony, defendant admitted (Tr. 2608-11; 2595; 2960) and denied (Tr. 3019) being close to John Mitchell during the years she was a HUD employee. Under such circumstances, it was entirely appropriate for the prosecutor to point out this inconsistency in summation and argue its bearing on defendant's credibility. See Criminal Jury Instructions for the District of Columbia No. 2.11 (3rd ed.).

Gov. Opp. at 50.

E. Dean's Reply

In her Reply, Dean merely argued that the OIC was not pointing out inconsistencies and arguing implications, but was taking statements out of context and baldly stating that a defendant had lied to the jury. Dean Reply at 18.

F. Independent Counsel's Sentencing Letter

In a January 18, 1994 letter to the U.S. Probation Officer (at 8), Independent Counsel Arlin M. Adams would argue that Dean should receive an upward adjustment of her sentencing level for obstruction of justice because Dean "perjured herself on several major issues in an attempt to avoid conviction of count one." With respect to Dean's denial of knowledge that Mitchell was paid to act as a HUD consultant, Adams argued first that Dean had lied when she testified that she had called Supervisory Special Agent Alvin R. Cain, Jr., to complain about the treatment of John Mitchell in the HUD Inspector General's report on the moderate rehabilitation program.¹ Adams then added:

Defendant also sought to distance herself from Mitchell by testifying on cross-examination that she did not know him well until after leaving HUD, Tr. 3019, but the government introduced extensive testimony to the contrary, as well as letters to Mitchell from defendant, while she was at HUD, addressed to "Dad" or "Daddy." See G. Exs. 17, 18.

G. Revised Presentence Investigation Report

¹ See Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

In the revised Presentence Investigative Report, issued February 7, 1994, the U.S. Probation Office would recommend a two level upward adjustment for obstruction of justice because Dean had "testified falsely with regard to her relationship with John Mitchell." In support of that recommendation, the report noted that Dean had testified that she did not know that Mitchell was being paid as a HUD consultant, but had not pointed to evidence to the contrary. It then cited Dean's testimony about calling Agent Cain, and Cain's failure to recall that conversation. Finally, the report noted (at 13):²

The defendant also testified on cross-examination that she did not know Mr. Mitchell very well prior to leaving HUD. However, she readily admitted to this writer that she has known Mr. Mitchell since she was a teenager and that he was friend of the family.

H. Hearing of February 22-23, 1994

At a hearing on February 22, 1994, the court rejected the Probation Officer's recommendation that Dean receive a two-level upward adjustment based on her testimony about calling Agent Cain, because the court believed that Dean might have in fact called Cain as she said. See Narrative Appendix styled "Testimony of Alvin R. Cain, Jr. The court did, however, find that a two-level adjustment for obstruction of justice was warranted because of Dean's statement about not knowing Mitchell well until after she left HUD.

After indicating that it would not add points regarding her testimony about the call to Cain, the court stated:

² The relevant part of the revised Presentence Investigative Report may be found in Attachment 1 hereto.

I am concerned about her testimony about Mr. Mitchell, and I think the testimony about Mr. Mitchell was essential to the case. His efforts involving Mr. Nunn and with her were one of the foundations of one of the counts in the case in which she was found guilty and her involvement with Mr. Nunn and this money being paid by Mr. Nunn [sic]³ for her as to decorating the apartment or not. Whether or not the jury found it an illegal gratuity, I'm not sure it means she's automatically lying about it, because still they could have considered it illegal even if they thought she had gotten it to do something for him but never did the things for him and never paid him back.

But the testimony regarding Mr. Mitchell concerns the Court, because there's no question in my mind that she knew Mr. Mitchell quite well and had for a long time, and I don't understand evidence going -- except to the point that she was not involved with Mr. Mitchell as to HUD matters, and even her recounting the telephone call with Mr. Cain about how upset she was about Mr. Mitchell being named, she didn't believe it, etc, reflects her, I think, relationship with Mr. Mitchell, payment for the birthday party, the letters signed to Daddy, etc. So I believe that it's appropriate to raise for obstruction of justice by two points for that testimony she gave as to Mr. Mitchell, and that's in accordance with what the probation officer found.

Tr. 55-56.

At the close of the hearing on February 22, 1994, Dean's counsel pointed out that Dean had acknowledged her and her family's relationship with Mitchell in clear and unambiguous terms. He pointed out that Dean had described both how her mother's relationship with Mitchell had begun and how it continued, and requested the court to reconsider its ruling on the two-level adjustment in light of the entirety of Dean's testimony regarding Mitchell. Tr. 67.

Dean filed a motion for reconsideration pointing out the earlier briefing on the matter and how, in context, her statement could not fairly be read as an effort to mislead.

When the hearing was continued on February 23, 1994, the court heard argument on this issue. The entire relevant transcript is attached as Attachment 2, but

³ Although Mitchell was involved with Louie Nunn, the third reference to Nunn, which involves the payment of money for decorating an apartment, is clearly a reference to Louis Kitchin. The court may also have intended the second reference to Nunn to be a reference to Kitchin.

the parties arguments do not warrant elaboration at length. The court, while indicating that it did believe that Dean had improperly sought to distance herself from Mitchell, ruled that it would not increase the sentencing points on the basis of the statement, concluding as follows (Tr. 96-97):

The Court has got to be guided by the guidelines, and it is concerned that I think the defendant's whole approach to this situation has sometimes not been in accordance with reality as to what occurred. But as to this one issue, I am convinced by the refiling of the materials and the testimony given at trial that that alone cannot be found to be obstruction of justice. I think that's reversible error, where she had talked about he raised her as a mentor to her as a young person, he helped her to get a job at energy, and then she said in one question among many that she really wasn't that close to him until after she left HUD, it was a question about having lunch with him while she was at HUD or dinner.

Taking that out of context, it seems misleading, and obstruction of justice, putting it in context with all the other answers, I can't find that, so I'm going to strike the finding I made yesterday and omit any increase for obstruction of justice.

Tr. 96-97.

I. Comments

Dean's statement about not knowing Mitchell that well until after she had left HUD was hardly a basis for O'Neill to tell the jury that Dean had lied, though this was a relatively small element in Dean's arguments as to the impropriety of the OIC's closing argument. The OIC's post-trial use of Dean's statement is at least as serious.

The OIC had appeared defensive on this matter in its Opposition to Dean's Motion, it being evident even from the OIC's own citations for the supposedly inconsistent statements that Dean's statement about not being very close to Mitchell until after she left HUD came after all the acknowledgments of a fairly close relationship. Despite the defensiveness of the response to Dean's motion, however, the OIC still would pursue the matter with the Probation Officer, knowing that the Probation Officer would be far less knowledgeable about the context of the remark than the court. In its letter, the OIC then presented the matter as if it had been after Dean made the statement about not knowing Mitchell very well until after she left HUD that the OIC offered evidence to contradict her. And in contrast to the OIC's Opposition, Adams' letter did not even provide the transcript cites that would allow the Probation Officer to recognize that Dean's statement that the OIC had supposedly offered evidence to contradict had followed the introduction of that of the evidence.