

**The Putatively Curative Instructions that Informed the Jury that the Prosecutor's
Provocative Statements that the Defendant Had Lied Reflected the Prosecutor's Personal
Opinion
(May 31, 2008, rev. July 15, 2008)**

In the initial closing argument and his rebuttal, Associate Independent Counsel Robert E. O'Neill repeatedly asserted, often in very provocative terms, that the defendant Deborah Gore Dean had lied on the stand, and also frequently asserted that she had falsely accused others of lying.¹ As made clear, among other places, in the December 1, 1994 materials posted (or to be posted) on this site, materials filed in connection with Dean's own motions of November 30, 1993, December 24, 1996, and February 4, 1997 (also eventually to be posted on this site), in most or all of the cases where O'Neill stated that Dean had lied on the stand he had compelling reason to believe, or knew with certainty, that Dean had not lied, and, with respect to the statements that Dean had falsely accused others of lying, O'Neill had compelling reason to believe, or knew with certainty, that the others had lied. In other cases, he mischaracterized the testimony that he asserted was a lie.

O'Neill's statements were a significant element in Dean's motion for a new trial. But both the district court and the court of appeals would regard these matters to have been adequately addressed with by the district court's curative instruction.²

The case law regarding a prosecutor's stating in closing argument that a defendant lied on the stand may be roughly characterized as reflecting two considerations, one being that the argument ought not to be too provocative and the other being that the prosecutor may never offer his personal opinion on a matter. Thus, for example, for a prosecutor to say, "in my personal opinion the defendant lied" would be absolutely forbidden and a clear basis for overturning a verdict. And, as the Independent Counsel would point out, O'Neill never explicitly stated that anything was his personal opinion. The difficulty in this area is that, even if the prosecutor does not say that he is expressing his personal opinion, the statements that a defendant lied may be perceived by the jury as the prosecutor's personal opinion.

After the oral argument, at a bench conference on October 22, 1993, Judge Thomas F. Hogan informed counsel that he was troubled by O'Neill's statements because of case law in the D.C. Circuit that statements that a witness lied were improper "personal comment by counsel." After consultation with counsel,³ he delivered the following instruction to the jury:

¹ See Section D of the December 1, 1994 document styled "Introduction and Summary." One needs to read the entire closing argument, including rebuttal, to appreciate precisely how provocative it was and how pervasive were the statements that Dean had lied. Dean's Rule 33 Mem. (at 172-220) gives some impression of the matter.

² The district court also relied in part of the fact that the case involved perjury and that "it's very hard to argue a case of perjury unless you are allowed to refer to the defendant's testimony and have the jury consider what it's worth ..." Feb. 14, 1994 Tr. 31. But none or virtually none of the statements that Dean lied on the stand related to the perjury counts, which were almost entirely ignored in the closing argument.

³ In addressing the matter with counsel, Hogan noted that he read the case law, in particular the *Harris* case as "holding it's improper conduct to characterize a person as a liar, a witness as a liar, that is, personal

Okay. All right, Ladies and Gentlemen, first as to the arguments you heard yesterday and the day before, I take it, but particularly as to yesterday and the day before, the closing argument and more particularly as to the prosecutors' closing arguments, there were comments made as to using the word "liar" or "lying" and the like, and it is obviously, the issue is for you as the jury to make a decision keeping in mind the evidence in the case, and *it is not the opinion of counsel, that is, whatever their personal belief is, that is appropriate, so that an argument to you that someone is lying is really an expression of personal opinion by the attorney*, as opposed to pointing you to the evidence and saying it's for you to make up your mind whether or not someone is telling the truth. I want you to keep that in mind.

It's the evidence you have to focus on and not the statements of counsel, which I informed you previously are not evidence in the case.

The Court will be sending back to you shortly the exhibits in the case, and as I said previously, then you review the exhibits along with your recollection jointly of what the evidence is in the case, the testimony of the witnesses, and in following my instructions, you deliberate on that basis. And you're not to be influenced by any *personal expressions of whether someone is worthy of belief or not by counsel* in the case.

Tr. 3593-94 (emphasis added).

Thus, while the instruction advised the jury that it ought not to consider the personal opinion of counsel and to instead rely on the evidence, it also informed the jury that the statements that Dean had lied were in fact the personal opinion of the prosecutor. An irony in this aspect of the court's instruction is that in reality the statements that Dean had

comment by counsel," thus reflecting Judge Hogan's view – or his view of the court of appeals' view – that the characterizations of a defendant's testimony as lies would at least be perceived as the opinion of counsel. Hogan then said: "I thought perhaps I should have let the jury know at least that what counsel says, obviously, as we said in instructions, about a matter is not evidence in the case, and it's their personal opinion." Tr. 3590. Prosecutor Robert O'Neill then proposed the following instruction: "Don't forget your testimony has to be based on the evidence. What counsel for either side says is not evidence." Tr. 3592.

After Hogan called a break to allow counsel to review, the case law, the conference resumed. O'Neill then proposed an instruction similar to that he had previously proposed. Defense counsel then said: "Your Honor, I don't think Mr. O'Neill's suggested instruction addresses the point with regard to substituting his personal opinion with regard to Ms. Dean's veracity as taking her testimony and throwing it out in the garbage." The court then stated: "I'm going to give an ameliorating instruction about what is for the jury to decide is the issues and it's not the opinion of counsel that is appropriate in the case, because I think the case law in our circuit, referring to *Harris v. United States*, 402 F.2d 656, is fairly clear as well as subsequent expressions of that, although the latest case I have is 424 F.2d 769, a civil case, *Olenin v. Curtin & 2 Johnson, Inc.*" Without further consultation, Hogan then called the jury in to give the instruction.

lied on the stand were not O'Neill's personal opinion. In almost every situation, his personal opinion had to be that Dean had not lied.

The significance of Judge Hogan's telling the jury that the statements were O'Neill's personal opinion is best reflected by the Independent Counsel's brief in the court of appeals. There the Independent Counsel twice emphasized the distinction between "personal opinion" and argument. Citing *Stewart v. United States*, 247 F.2d 42, 45-46 (D.C. Cir. 1957), *Harris v. United States*, 402 F.2d 656 (D.C. Cir. 1957), the stated: "This Circuit has long recognized the distinction between a prosecutor's expression of his personal opinion as to a witness's veracity and his argument based on the evidence that a witness's testimony is a lie." Gov. App. Br. at 53 n.25. The Independent Counsel also stated that "[a]t no point did the prosecutor violate the injunction against expressing his personal opinion regarding Dean's credibility." *Id.* at 53-54.

Whether or not it correctly characterized the way O'Neill's comments would be perceived by the jury, the Independent Counsel accurately identified the absolute prohibition of a prosecutor's expression of what would be perceived as a personal opinion because of the weight such opinion would be expected to carry with a jury. Yet, when the Independent Counsel then went on to argue that, in any event, the district court's curative instructions had satisfactorily addressed the matter, the Independent Counsel would describe those instructions as follows:

[T]he court specifically instructed the jury that while the words "lie" and "lying" had been used in the closing arguments, the "issue is for you as the jury to make a decision depending on the evidence in the case," since "[i]t's the evidence you have to focus on and not the statements of counsel, which I informed you previously are not evidence in the case." Tr. 3593-94.

Independent Counsel App. Br. at 58.

The following are the words that the Independent Counsel elided from its quotation of the district court's instructions (though not so indicating by ellipses, but rather by the word "since," as if in fact it were simply paraphrasing):

... and it is not the opinion of counsel, that is, whatever their personal belief is, that is appropriate, so that an argument to you that someone is lying is really an expression of personal opinion by the attorney, as opposed to pointing you to the evidence and saying it's for you to make up your mind whether or not someone is telling the truth. I want you to keep that in mind.

Tr. 3594.

The court of appeals went on to discuss at length the importance of the prosecutor's not giving his personal opinion. But it concluded:

In this case, to the extent the prosecutor's remarks spilled over into expressions of personal belief, or may have been so perceived by the jurors-for example, "she's the only one we know who definitively did lie"- the district court cured the problem. The court instructed the jury not to consider the opinion of counsel about who lied because it was up to the jury alone to decide who was telling the truth.

The statement, while seeming not to recognize the extent to which the district court's instruction confirmed any impression that the remarks were counsel's opinion, seems to recognize at least that the court curative instruction did make a reference to personal opinion. Given the impact of the perception that the remarks are a prosecutor's personal opinion has on a jury, it would seem virtually impossible to correct the problem by telling a jury that, while it is the prosecutor's personal opinion, the jury should simply disregard the prosecutor's personal opinion. Thus, the court's handling of the matter seems rather casual and thoughtless.

In any case, when Dean sought review in the Supreme Court, the Independent Counsel's response again reflected its concern about the problematic nature of the district court's instruction. In this instance, while purporting to be quoting the court's "curative instructions," the Independent Counsel ignored those instructions entirely and instead quoted from the court's earlier general instructions on credibility. Independent Counsel Cert. Opp. at 12 (available at: http://www.appellate.net/briefs/Gore_Dean.pdf)

Whether the Independent Counsel's approach in either court would be deemed an honest one – and I doubt that either of the courts would so regard it – the manner in which the Independent Counsel characterized the curative instruction does highlight the problems with an instruction that tells a jury that the prosecutor's statements that a defendant had lied were in fact the prosecutor's personal opinion.

That prosecutor Robert O'Neill had no role in causing this aspect of the instruction is reflected in the material in note 3 supra. That material also provides a basis for appraising whether defense counsel could have prevented the inclusion of these words in the instruction and whether his objection to O'Neill's suggested instruction may have had a role in causing the references. But the colloquy, in light of the case law, also suggests the larger issue of whether it in fact is ever possible for a curative instruction to correct the impact of jury's perceptions that statements that defendant lied are the prosecutor's personal opinion, given the weight juries are presumed to accord such opinions. At any rate, when four months later Judge Hogan relied on his instructions as having addressed the problem, he by then had ample reason to recognize that a great many, if not most or all, of Robert E. O'Neill's statements that Dean had lied on the stand, including the most provocative of those statements, in fact did not reflect O'Neill's personal opinion.

This point applies both to the court's ruling of February 14, 1994, in which it recognized that the Independent Counsel had reason to believe that many of the government's crucial witnesses were not telling the truth (Feb. 14, 1994 Tr. 24-31) and to the court's ruling of February 23, 1994 when it denied discovery into whether the Independent Counsel's most crucial witness in

attacking Dean's credibility had given false testimony with knowledge of Independent Counsel attorneys (as discussed in many places, including most recently in the May 31, 2008 document styled "The Independent Counsel's Use of Dean's Off-the-Stand Remark about David Barrett and the Judge," available at http://www.jpscanlan.com/images/David_Barrett_and_the_Judge.pdf).

A transcript of the bench conference of October 22, 1993 follows. It is drawn from a text version of a scanned copy of the original and may be imperfect.

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1 PROCEEDING S

2 (Defendant present, Jury out.)

3 THE COURT: Good morning, counsel.

4 THE CLERK: Criminal No. 92-181, United States of

5 America v. Deborah Gore Dean. We have Robert O'Neill and Paula

6 Sweeney for the government, Stephen Wehner for Ms. Dean.

7 THE COURT: The jury is all back, and Juror No. 4 has

8 indicated to the staff that she feels better and is fine and

9 ready to proceed.

10 I had another matter that I wanted to discuss briefly

11 with counsel, and before I have the jury deliberate, I think I'll

12 let counsel look at these case law and see if there's any

13 response to it.

14 Closing argument got very much into the prosecutor's

15 attack on Ms. Dean as a liar based upon her testimony, and it's

16 certainly appropriate to comment on her testimony as a defendant,

17 but as to the methodology used by counsel for the government, I

18 had some concerns, and it occurred to me last night, did not

19 occur to me during the argument, but last night, we had a case on

20 this in this circuit that I found this morning in doing some

21 research by Circuit Judge Burger at that time, a 1968 case,

22 402 F.2d 656, Harris v. U.S.

23 That was followed by several subsequent cases, one

24 being a civil case, per curiam, again Burger on the opinion,

25 referencing the Harris case, as holding it's improper conduct

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1 to characterize a person as a liar, a witness as a liar, that is,

2 personal comment by counsel, and that merits reversal at times.

3 I wonder if we should not give an instruction to the

4 jury about that.

5 MR. O'NEILL: Well, Your Honor, I am familiar –

6 THE COURT: I mean, it's a perjury case, and you're

7 going to have to make comments upon her credibility. I

8 understand that, and that's one reason I did not stop it,

9 obviously, but I had known about this rule, because I had been
10 subject to it myself in closing argument in this circuit for a
11 long time, and I went back and read it again, and I thought
12 perhaps I should have let the jury know at least that what
13 counsel says, obviously, as we said in instructions, about a
14 matter is not evidence in the case, and it's their personal
15 opinion. In the context of a criminal case, I didn't want to see
16 any concerns raised in that.

17 Let me let you all look at these cases. I think you
18 probably have seen them.

19 MR. O'NEILL: Yes, Your Honor. Also, as a possibility,
20 you might want to, since you have to call them in anyway to let
21 them deliberate, say, "Don't forget your testimony has to be
22 based on the evidence. What counsel for either side says is not
23 evidence."

24 THE COURT: That's what I'm talking about, an
25 ameliorating instruction before they begin to deliberate, but

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1 maybe a little more pointedly, but something like that. But you
2 both can look at this. The first one you want to look at is
3 Harris. 402. That's the criminal one. This is a civil case
4 that follows Harris.

5 I'm just going to take a short break so you can look at
6 those cases for a minute. There are some other ones I just
7 didn't pull. There are about seven or eight in this circuit
8 following that line of reasoning.

9 We'll take a short break.

10 (Recess from 10:25 a.m. to 10:45 a.m.)

11 MR. WEHNER: Your Honor, could I have a minute to speak
12 to Ms. Whyte?

13 THE COURT: Sure.

14 Are you all right?

15 MR. WEHNER: Yes, sir. I think we've got the
16 exhibits –

17 THE CLERK: Not quite.

18 THE COURT: All right. Let me ask counsel if they've
19 had a chance to briefly look at the cases I've pulled and have
20 any comment about an ameliorating instruction or not to the jury.

21 MR. O'NEILL: Judge, from the government's point of
22 view, the government would have no problem with Your Honor,
23 before sending them out once again, just stating, you know, "It's
24 your recollection of the evidence that controls. What counsel
25 for each side says is not evidence. As I told you at the

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1 beginning of the case and as I told you again before closing
2 argument, it's your determination that controls. You're the
3 judges of the facts."

4 THE COURT: Mr. Wehner, do you have any comment?

5 MR. WEHNER: Your Honor, I don't think Mr. O'Neill's
6 suggested instruction addresses the point with regard to
7 substituting his personal opinion with regard to Ms. Dean's
8 veracity as taking her testimony and throwing it out in the
9 garbage. If Your Honor will recall, I did not object to that
10 during his opening. I did object to it during his rebuttal.

11 THE COURT: Right, eventually in rebuttal.

12 MR. WEHNER: Yes, sir. And I was overruled as to that
13 objection.

14 THE COURT: Well, the objection was that it was a
15 mischaracterization of her testimony, as opposed to improper
16 argument.

17 MR. WEHNER: Fair enough. Whatever it says, Judge.

18 THE COURT: I'm going to give an ameliorating
19 instruction about what is for the jury to decide is the issues
20 and it's not the opinion of counsel that is appropriate in the
21 case, because I think the case law in our circuit, referring to
22 *Harris v. United States*, 402 F.2d 656, is fairly clear as well
23 as subsequent expressions of that, although the latest case I
24 have is 424 F.2d 769, a civil case, *Olenin v. Curtin &*
25 *Johnson, Inc.*

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1 THE COURT: All right, I'll have the jury in. They're
2 ready to go. They'd like to get going, I'm sure, in the
3 deliberations. And I'll let the alternates go.

4 If you all wish, you may speak to the alternates, but
5 I'm going to advise them, obviously, they can't talk to anybody
6 else about this case.

7 (Jury in.)

8 THE COURT: All right, good morning.

9 THE JURORS: Good morning.

10 THE COURT: I'm glad you're all here. I take it you're
11 feeling well and ready to proceed? You have no concerns?
12 All right. What we're going to do now, Ladies and Gentlemen,
13 I have a couple of matters. One, I'm going to give a very brief
14 instruction to you concerning the arguments you heard yesterday
15 before you begin your deliberations, remind you of some things
16 that were said earlier, in essence, and then secondly, we're
17 going to be saying good-bye to Ms. Lea and Ms. Chisolm in a

18 minute.

19 Let me ask Ms. Lea and Ms. Chisolm, do you have
20 anything in the jury room back here, coats and belongings, books,
21 papers, purses, anything like that?

22 ALTERNATE JUROR LEA: No.

23 ALTERNATE JUROR CHISOLM: No.

24 THE COURT: Okay. All right, Ladies and Gentlemen,
25 first as to the arguments you heard yesterday and the day before,

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1 I take it, but particularly as to yesterday and the day before,
2 the closing arguments and more particularly as to the
3 prosecutor's closing arguments, there were comments made as to
4 using the word "liar" or "lying" and the like, and it is,
5 obviously, the issue is for you as the jury to make a decision
6 keeping in mind the evidence in the case, and it is not the
7 opinion of counsel, that is, whatever their personal belief is,
8 that is appropriate, so that an argument to you that someone is
9 lying is really an expression of personal opinion by the
10 attorney, as opposed to pointing you to the evidence and saying
11 it's for you to make up your mind whether or not someone is
12 telling the truth. I want you to keep that in mind.

13 It's the evidence you have to focus on and not the
14 statements of counsel, which I informed you previously are not
15 evidence in the case.

16 The Court will be sending back to you shortly the
17 exhibits in the case, and as I said previously, then you review
18 the exhibits along with your recollection jointly of what the
19 evidence is in the case, the testimony of the witnesses, and in
20 following my instructions, you deliberate on that basis. And
21 you're not to be influenced by any personal expressions of
22 whether someone is worthy of belief or not by counsel in the
23 case,

24 Now, Ladies and Gentlemen, with that advice to you, I'm
25 going to ask you to go back and begin your deliberations. A copy

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1 of the instructions will be sent back to you, the exhibits, as
2 soon as they're finished being prepared, will be sent back to
3 you, and you should now begin your deliberations.

4 That means you keep in mind my instructions and proceed
5 to follow them in your deliberations. You're now free of the
6 admonition we've had for six weeks about not talking about the

7 case among yourselves. You only still talk about it among
8 yourselves when all twelve of you are together in this room at
9 one time.

10 If you need to take breaks, that's fine. If you take a
11 break and somebody wants to walk outside, go down the hall and
12 smoke or something, that's fine. I'd ask you not to smoke in the
13 jury room, for those people who don't smoke. But once someone
14 takes a smoke break, remember the others no longer continue with
15 deliberations. You wait until they're back.

16 All right, so you can be excused now.

17 I would like Ms. Lea and Ms. Chisolm to stay for one

18 minute so we could talk to them.

