

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

1		
2	UNITED STATES OF AMERICA,	Criminal No. 92-181-01
3		
4	vs.	Washington, D.C.
5		February 23, 1994
6	DEBORAH GORE DEAN,	3:20 p.m.
7		
8	Defendant.	
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TRANSCRIPT OF PRESENTENCING HEARING
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

VOLUME II

APPEARANCES:

11		
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P R O C E E D I N G S

(Defendant present.)

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3 THE CLERK: Criminal No. 92-181, United States of
4 America v. Deborah Gore Dean. We have Bruce Swartz and Claudia
5 Flynn for the government, Stephen Wehner for Ms. Dean.

6 THE COURT: All right, we're resuming the hearing we
7 had for some time in length yesterday in the case of the
8 presentencing hearing involving Deborah Gore Dean. Yesterday I
9 had made certain rulings. Today I had received a motion for the
10 Court to reconsider the obstruction of justice ruling. I'll
11 address that today as well.

12 Also, I had asked the probation officer to look at the
13 issue of fraud as being an analogous appropriate offense to
14 consider, which I, the more I look at this, consider rather
15 unique and unusual circumstances we have before us now because
16 of the age of this case, of the activities originally in this
17 case, some happened eight years ago or more, and the change of
18 guidelines that occurred in the meantime and the nature of the
19 offenses and the somewhat hybrid situation before the Court now
20 because we have some that are covered by guidelines, some that
21 aren't, and the ones covered by guidelines, the guidelines have
22 changed, it does not make it a simple operation.

23 The Court has been presented with cases, I guess, from
24 the Independent Counsel. One is, I'm not sure of the status of
25 the case, but it says, "This disposition is not appropriate for

1 publication and may not be cited to or by courts of this Circuit
2 except" by some local rule in the Ninth Circuit. I don't know
3 what that means, but it's a case involving the Ninth Circuit,
4 United States v. Harris, as to the amount of loss that could
5 be calculated by the Court appropriately in its sentence, and a
6 printed reported case, U.S. v. Sneed, F.Supp. case, 814
7 F.Supp. 964, District of Colorado 1993 case, again as to the
8 dollar loss not fully capturing the harmfulness and seriousness
9 of the conduct so the guidelines permit upper departure 2F1.1,
10 comment n.9.

11 There's another case, I'm not sure where it came from,
12 Freedlander, United States v. Freedlander. Is that also
13 from Independent Counsel?

14 MR. SWARTZ: Yes.

15 THE COURT: All right. I appreciate the help.
16 October 26, 1993, Eastern District of Virginia, Richmond
17 Division. Mr. Freedlander was acting pro se from Lompoc,
18 California, I suppose serving his sentence. He had a 73-count
19 conviction of conspiracy and fraud of various types.

20 He received a sentence when the guidelines came into
21 effect, he apparently had counts that spanned the pre- and
22 post-guidelines, he had a nine-year sentence. All remaining
23 pre-guideline counts received a suspended sentence of five years
24 probation and \$70 million in restitution. The 1987 guidelines
25 were applied because it was an older, apparently it happened

1 before the 1991 versions were in effect. And there was an
2 upward departure for loss of confidence in important financial
3 institutions and then multiple levels for the amount of the
4 losses.

5 All right, when the court actually relied upon the
6 later guideline note but held that that was not error, it wasn't
7 an ex post facto application of it, that he was using that for a
8 commentary for assistance in determining an appropriate
9 sentence. All right, I appreciate those additions.

10 Let me ask you a question at the beginning of this
11 hearing today: Did Mr. Hunt's materials get to anyone? They
12 got to both counsel?

13 MR. SWARTZ: Yes.

14 THE COURT: I've seen his supplemental filing, and I'm
15 going make that part of the presentence report by Mr. Greg Hunt,
16 approved by Mr. Meczowski, supervising probation officer. My
17 copy starts with page 2, but I just think it was reversed for
18 some reason, but anyway, it starts with the heading of February
19 23, '94, Memorandum to the Court, and he recalculated the
20 guidelines using 2F1.1, fraud and deceit, 1990 edition, and
21 went through his figures on that, the base figure being 6, and
22 then increased by the various factors that he suggested.

23 All right, let's try to come around to this and
24 resolve this if we can now. The Court had made certain rulings
25 yesterday, and today it wants to decide the guidelines that are

1 in effect as to the sentence that will be applied in the case,
2 whether 1990 or the more recent version of the guidelines; two,
3 revisit the obstruction of justice as to Mr. Mitchell at least;
4 and three, the appropriate category we go into, gratuity
5 guideline, conflict of interest guideline, or fraud guideline,
6 as suggested by the Court.

7 Do any of the cases, Ms. Flynn, you've just submitted
8 to me on the, just given to me affect the ex post facto issue?
9 Is there anything new on that?

10 MS. FLYNN: Your Honor, Freedlander addresses the ex
11 post facto issue. In Freedlander, the court used the 1987
12 version of the guidelines but then turned under 2F1.1 to the
13 provision in the application notes that suggests that an upper
14 departure is appropriate if the loss isn't adequately reflected
15 by the guidelines or the seriousness of the crime isn't
16 adequately reflected, and in deciding to assess a four-point
17 enhancement on the defendant for the loss of confidence in a
18 financial institution, the court looked to later amendments to
19 the guidelines in which such a four-point enhancement is a
20 specific --

21 THE COURT: Sure.

22 MS. FLYNN: -- specific offense characteristic.

23 And the court did that in determining that this was
24 the measure of an upward departure that would be appropriate.
25 So under --

1 THE COURT: Well, he didn't go to the new guideline
2 specifically. He just went to the commentary to determine what
3 would be appropriate.

4 MS. FLYNN: That's correct. Now under our argument,
5 you can go to the new guidelines, the conspiracy to defraud the
6 United States guideline, for guidance in determining under the
7 fraud, the 2F1.1 guideline, what should be an appropriate
8 sentence, because it's the government's position that the
9 calculations that the Probation Office did don't adequately
10 reflect the seriousness of the crime.

11 THE COURT: I see.

12 MS. FLYNN: So for example -- well, let me back up a
13 little bit. As an initial matter, the government's position is
14 that the Probation Office errs in failing to assess any number
15 for loss.

16 The two cases that we've submitted to you, Sneed and
17 Harris, both involve circumstances in which the court looked
18 to some alternative computation for assessing loss. In Sneed,
19 it was the anticipated gain by the defendants who negotiated in
20 a sting operation to receive certain amounts of money from the
21 government in connection with a bank loan. The court looked at
22 the anticipated gain as being the fairest measure of what the
23 loss was to cover the kind of harm that the defendant's conduct
24 caused.

25 In Harris, likewise, the court looked at the gain to

1 the defendant. In that case, the defendant stole some credit
2 cards and then sold -- without having used them, sold them to
3 another individual, again who didn't use them, and received
4 \$2,400 for the credit cards. The court looked at that amount of
5 money, the \$2,400, which was solely the gain to the defendant,
6 because there was no loss there at all in terms of monetary
7 value, as the, quote-unquote, loss for guidelines purposes in
8 assessing the increase under 2F1.1.

9 So our position, our first position is that the Court
10 can look here in this case to the amounts of money that the
11 defendant and her co-conspirators received from the consulting
12 payments, etc., as a result of their manipulation of the Mod
13 Rehab program in determining what is the loss, because probation
14 recognizes there was harm that was done in this case, and so not
15 to assess some kind of dollar value seems a bit anomalous.

16 THE COURT: Let me ask you because this is perhaps
17 within the purview of the HUD Independent Counsel's Office but
18 maybe other attorneys, have there been HUD cases where people
19 improperly who inflated financial statements or appraisals of
20 buildings obtained HUD loans or through improper methods
21 obtained HUD financing and then were convicted and sentenced and
22 the courts did not look at the value of that mortgage or the
23 value of that refinancing, whatever was gained, as the loss
24 figure? Do you know if that's true?

25 And I have in my mind a couple of judges here have

1 sentenced but they did not include the value of the illegally
2 obtained financing or something which, where payments were being
3 made, there was no defaults or anything like that, but sort of
4 like this case, where things were gotten improperly, but what
5 was gotten was appropriate, if that's the way to say it.

6 Do you follow what I mean? I don't know if there's
7 any history of that or not. I have heard that, but I've never
8 seen a case on that, but I have heard that happened.

9 I asked the probation officer, frankly, to find that.
10 He did not. He told me that he had understood that that was
11 what had happened previously. He thought it was through the
12 U.S. Attorney's Office, though, and not through the Independent
13 Counsel's Office, where judges had ruled that there was no loss
14 there, where there was improperly gained mortgages, for
15 instance, where the mortgage was being paid, the security was
16 valid, it was just granted improperly, and that they did not
17 calculate that in the loss column, but I did not get any
18 evidence of that actually happening. It was perhaps hearsay.

19 MS. FLYNN: Your Honor, I think we would have to
20 check. Nothing springs to mind immediately, and because of the
21 limitations of our mandate, it may not be something that we
22 would be handling, but it's analogous to a circumstance where
23 somebody applies for a bank loan and makes the -- does it on
24 fraudulent grounds and yet still makes the payments.

25 THE COURT: Right.

1 MS. FLYNN: I think in that kind of circumstances,
2 there's still a need to assess some kind of monetary value on
3 the loss.

4 So our argument would be that --

5 THE COURT: What is a loss to? Does a loss have to be
6 to the institution involved, or do you try to look at monetary
7 value? If the money the co-conspirators gained -- these large
8 sums of money for these phone calls and few meetings did not
9 come directly out of HUD apparently. I mean, they came from the
10 developers' pockets, from their profits they would have made
11 from these deals. Is that any bar to considering what that
12 monies as part of the loss I should calculate?

13 MS. FLYNN: Well, Your Honor, it's true that HUD
14 didn't pay the money, but there's a -- that assumes that, that
15 dollars come from separate pots and that money isn't fungible
16 and that to the extent that HUD is enabling the developers to
17 put money into a project to make that project viable, to the
18 extent that that developer has another pot of money that it can
19 spend to get that, then it doesn't put that money into the
20 project.

21 So I think that there, there is much more of a
22 connection between the amounts of money that the consultants
23 received and the, quote-unquote, loss even though it didn't
24 technically come out of HUD's pot.

25 THE COURT: All right, thank you.

1 MS. FLYNN: In addition to which the government -- I'm
2 sorry.

3 THE COURT: I just wanted to ask my clerk about a case
4 I thought he had brought out.

5 All right, thank you. I'm sorry.

6 MS. FLYNN: That's okay, Judge. The other thing is
7 that 2C1.7, which I think the Court can look to for guidance,
8 measures the harm and the seriousness of the crime alternatively
9 either in terms of the loss sustained or the gain to the
10 defendant and others acting in connection with the defendant.
11 So that would be another reason why we think that, that gain
12 could be an appropriate measure for enhancing the sentence in
13 this case.

14 One of the application notes to section 2F1.1, I think
15 it's application note 8, in fact acknowledges that in certain
16 circumstances, gain is an alternative measure of harm. The
17 application note specifically discusses securities fraud cases
18 in which the market is improperly manipulated by securities
19 fraud perpetrators, and the application note, interestingly,
20 says that in most circumstances, the gain to those manipulators
21 will understate the loss, but it doesn't suggest that simply
22 because the loss would be greater, that measuring the loss in
23 terms of the gain to the manipulators would not -- would be
24 improper. In fact, it suggests that it is an alternative.

25 And finally, all of these really are, are simply

1 proxies to, to address what, what the application notes to 2F1.1
2 discuss as a measure of the seriousness of the crime. Whether
3 it is a traditional out-of-pocket loss or it's some other
4 measurement of harm, it all acknowledges the seriousness of the
5 crime, and in this circumstance, I think that the, the gain to
6 the defendant and, and her co-conspirators is an adequate and
7 appropriate measure of the seriousness of the crimes for which
8 she was convicted.

9 THE COURT: All right, let me just talk to Mr. Wehner
10 for a minute and get back to a couple of issues, and then I want
11 to move ahead on this.

12 All right, Mr. Wehner --

13 MR. WEHNER: Yes, sir.

14 THE COURT: -- yesterday I believe you took the
15 position that the guideline that should apply should not be the
16 fraud guideline under the 1990 guidelines. Am I correct in
17 that?

18 MR. WEHNER: I think it's, well, it's a multi-step
19 position, Your Honor, if I could step back for a minute and
20 state it more clearly.

21 THE COURT: All right.

22 MR. WEHNER: The fraud guideline clearly from anything
23 other than 1990 cannot be applied due to ex post facto
24 considerations. That's the first position, that you have to
25 apply the 1990 guidelines.

1 There are three possible applications from the 1990
2 guidelines: gratuity, conflict of interest --

3 THE COURT: Right.

4 MR. WEHNER: -- and I overnight took a closer look at
5 the fraud guideline, and frankly, a strong case can be made that
6 that is an appropriate guideline in this case.

7 I think that it is consistent with an analysis of the
8 case in the sense that, to use the Independent Counsel's phrase
9 in terms of the ex post facto analysis, the base level is
10 essentially the same. 6, 6, and 6 are the base levels you're
11 dealing with.

12 THE COURT: All right.

13 MR. WEHNER: So to the extent I stated yesterday, and
14 I believe I did, that the fraud guideline, I think my words were
15 a poor third, I think that they are equally applicable or could
16 be made equally applicable, depending on which one, frankly, the
17 Court feels most clearly --

18 THE COURT: If the Court feels the fraud guidelines
19 are applicable, where do you go with this loss issue then as to
20 the amount of loss, being those monies, one measure of that is
21 the monies made by the consultants that they would not have made
22 other than, at least the government has alleged and the jury has
23 accepted, the conspiracy existing of Ms. Dean and the
24 co-conspirators in counts 1 and 2?

25 MR. WEHNER: I think you go three places with that,

1 Judge. The first place you go is, is under the guidelines, the
2 term "loss" means loss. It means palpable loss. And this Court
3 found throughout the trial even before the sentencing issue was
4 before the Court that there was no loss to the government. The
5 reason there was no loss to the government was because these
6 funds were used to benefit the very people they were intended to
7 benefit, so there was no loss in terms of the sentencing
8 guidelines.

9 No. 2, the Independent Counsel pled this case
10 specifically in terms of the gains to Ms. Dean, not the gains to
11 co-conspirators. In other words, if there is a loss in terms of
12 calculating a gain to someone, you cannot tag Ms. Dean with the
13 consulting fees that clearly the evidence is absolutely clear
14 she did not receive any of those funds.

15 They are not a gain to her, nor were they a loss to
16 the federal government, going down the second track, because the
17 evidence was also clear that none of those -- that those dollars
18 all came out of the developers' profits. They did not come from
19 HUD monies.

20 THE COURT: Then if the amount of loss does not fully
21 capture the seriousness of the conduct, there could be an upward
22 departure, I take it --

23 MR. WEHNER: Yes, sir.

24 THE COURT: -- if I can't calculate the loss from the
25 gain to the co-conspirators?

1 MR. WEHNER: Yes, sir. I would argue strenuously that
2 you should not, but I think that in all fairness, that that is
3 where that factor is to be considered.

4 THE COURT: All right.

5 MR. WEHNER: Because I don't think you can fairly
6 calculate the loss as being attributable to Ms. Dean within the
7 parameters of the guidelines themselves, and you may come to the
8 conclusion that it understates the seriousness of the offense.
9 The guidelines clearly contemplate that you could come to that
10 conclusion and then make an enhancement. I would argue that
11 it's inapplicable, but clearly you have the authority to do it.

12 THE COURT: All right, thank you. I'm going to make a
13 couple of rulings at this time, and then we'll reach other
14 issues we have pending. The first before the Court is as to the
15 appropriate year of guidelines that applies. As I said, because
16 it's rather, I think this case is sui generis, I don't think it
17 will exist again this way, but whether to apply the 1990
18 guidelines or the more recent guidelines in effect after '91 is
19 before the Court and whether it would be an ex post facto
20 application of the new guideline.

21 Recognizing that the new guideline, which is 2C1.7,
22 seems to read to the Court as could be argued would be an
23 appropriate description of counts 1 and 2 which the defendant
24 was convicted, under the earlier guidelines, it could be
25 arguably either a conflict of interest, could be the fraud

1 guidelines, or it could be gratuity guidelines.

2 The probation officer recommended the gratuity
3 guidelines. I believe they should apply in 1990 guidelines.
4 The defendant, I believe, argued for the conflict of interest
5 guidelines, and as I said, the government originally, I think,
6 argued conflict of interest or the new guidelines would apply --
7 not conflict -- of gratuities with the increase that would come
8 into it for a high government official or the new guideline
9 would apply.

10 It's clear to the Court either if the fraud guideline
11 is the most analogous or the conflict of interest guideline or
12 the gratuity guideline of 1990, they all have a base level of 6
13 you start with. The new guideline after 1991, 2C1.7 starts with
14 a 10 base level, which is higher than the base levels for the
15 other guidelines in 1990.

16 This would seem to the Court to cause a concern with
17 the ex post facto considerations as set forth in the case law,
18 United States v. Molina, 952 F.2d 514, at 522, D.C. Circuit
19 1992 case, where a defendant would normally be sentenced under
20 the guidelines in effect on the date of sentencing, but where an
21 amendment increases the punishment previously imposed under the
22 guidelines, the ex post facto clause prohibits the application
23 of the amendment to crimes committed prior to the effective date
24 of the amendment, and where this section does not take effect
25 until November 1, 1991, with a base level of 10 in cases of

1 fraud involving deprivation of the intangible right to honest
2 services of public officials, which as I said, seems to fit this
3 position we are in here, the situation we're in here, it has a
4 greater base under the old guidelines, I cannot see therefore it
5 could be applied legally to Ms. Dean even though it is in
6 description closer in context of the offenses of which she's
7 been convicted in counts 1 and 2 than the earlier guidelines.
8 Therefore, I'm going to apply the 1990 guidelines.

9 As to the 1990 guideline that would be most
10 appropriate, what we have here is a rather interesting situation
11 with the guideline. The 371 conspiracies are governed under
12 1990 guidelines by 2X1.1. That provides the base offense level
13 for a 371 conspiracy conviction should be the base offense level
14 for the object offense. There is no specified base level for
15 the crime of defrauding the United States as charged in counts 1
16 and 2 in this indictment.

17 So when the defendant was convicted of conspiring to
18 defraud the United States, the object offense is not obvious to
19 which I would refer normally to determine the appropriate base
20 offense. Here the only statutory violation was a section 1001
21 violation of Title 18.

22 The probation officer recommended, and we give strong,
23 at least I think most courts give strong presumption to the
24 probation officer as the expert in these areas, classifying the
25 underlying offense as gratuity offenses under 201(c)(1) of Title

1 18, count 4 that was charged.

2 Counts 1 and 2 don't charge the conspiracy related to
3 receiving gratuities, but to defraud the United States, and it
4 seems to me the gratuities in those two counts are really
5 incidental, cup and saucer, whatever. They were not the real
6 objects of the conspiracy, and that wasn't the object, I think,
7 of conspiracy that Independent Counsel sought to prove.

8 I think, in fact, the correspondence to the Probation
9 Office from the Independent Counsel points out fairly well their
10 theory was not only to funnel rehab projects to particular
11 developers, but to deprive the government of her honest
12 services, to defraud the government of her loyalty, and that the
13 gratuities to herself or her family were really byproducts of
14 the conspiracy and gave some reason for her participation to
15 some extent and to violate 1001 as set forth in the indictment.

16 So to find an analogous defense in the absence of a
17 specific object offense, section 2X5.1 directs the Court to
18 apply the most analogous offense guideline, and if there is not
19 one, I can apply Title 18 U.S.C. 3553(b), but I do believe that
20 there is some analogous offense the Court can go to.

21 Some of those we considered were the offenses
22 involving public officials, and that would be the gratuity
23 offenses and conflict of interest offenses. And then the
24 government had argued in support of gratuity and the defendant
25 in conflict of interest, I can understand how they went to those

1 offenses and as to where they would be coming from, but if you
2 look at 2F1.1, fraud, as analogous, and I believe it is for the
3 following reasons, and this will be the ruling of the Court:

4 One, she was convicted of conspiracy to defraud the
5 United States, according to the indictment. The object of the
6 offense was a fraudulent and deceitful activity.

7 The primary object of the offense, at least as
8 Ms. Dean was concerned, was non-monetary, but really I think is
9 argued by the Independent Counsel at various times of one that
10 caused harm to the institution, a loss of confidence in the
11 public in an important institution, and application note 9
12 certainly provides an upward departure may be warranted where
13 fraud does not cause a significant dollar loss, at least one
14 that may not be recoverable or quantifiable in the context of a
15 particular case.

16 And by analogy, going to the new guideline provision
17 as according to the case that the, the Freedlander case
18 referred to in the Eastern District of Virginia the government
19 just supplied to me, 2C1.1 addresses this type of conspiracy and
20 refers to fraud and deceit and seems to consider the factors
21 where you have a high public official engaged in fraud, where
22 it's difficult to quantify the monetary loss.

23 The only specified statutory violation charged as an
24 object of this offense was the 1001 loss, and therefore 2F1.1 is
25 the appropriate guideline for that offense. It seems to me

1 using the false statement offense is what was charged as the
2 most analogous offense under the guidelines, it would allow the
3 Court then to apply the fraud provision, and it seems to fit
4 into what actually was the evidence in the case, according to
5 the Court's recollection as to fraud and deceit that she engaged
6 in, and as I said, I believe that was the Independent's Counsel
7 view of the case.

8 The probation officer in the presentence report, well,
9 it's a 58-page report, but the probation officer in the
10 presentence report noted, one, that he was concerned about the
11 ex post facto application and, under the case cited by the Court
12 already, indicated that he would have to apply the 1990
13 guidelines.

14 I have disagreed with the probation officer in that he
15 thought the gratuity section should apply. That was his page 32
16 is where he did the offense level computation, where he used the
17 1990 edition of the guidelines manual and suggested that the
18 1990 guidelines apply or there would be an ex post facto
19 consideration. He also referred to certain cases as to why that
20 should apply.

21 The fraud guidelines, according to the Court's
22 rationale, being the more appropriate provision to apply, since
23 it's the most analogous offense under the guidelines or he could
24 find the specified object of the offense was the 1001 violation,
25 but I think reality is simply the most analogous, because

1 essentially that's what Ms. Dean is charged with in counts 1 and
2 2 is defrauding the government, would mean the Court would have
3 to apply 2F1.1 of the 1990 guidelines. That would have a base
4 offense level of 6, and then consideration would be given to
5 upward departures as appropriate.

6 I've already ruled on the minimal planning, and I'm
7 going to hear the reconsideration of the obstruction of justice,
8 and I can consider the appropriate departure upward because of
9 the harm for the institution and comparing the new guideline as
10 to the concerns that could be raised with this type of offense.
11 Under comment 9 of the fraud guideline, the reference is made to
12 an eight-level increase warranted for high government officials
13 under 2C1.2(b)(2)(B).

14 So for the purposes of the sentencing, the Court is
15 going to apply the fraud guideline in existence in 1990 and then
16 will discuss the additions to the base level of 6. The
17 probation officer has now recommended a two-point increase for
18 more than minimal planning, which I have already ruled is
19 appropriate. As to the adjustment for abuse of public trust,
20 that's warranted. That may be, however, encapsulated in the,
21 some type of increase as to the suggested eight-level increase
22 or some type of increase that could be possible under note 9
23 with reference to the new guideline.

24 The obstruction of justice, I'll hear now as to
25 whether that should be changed from the Court's ruling. I was

1 given by the defendant a copy of her testimony in part as to her
2 reference to Mr. Mitchell and whether or not the reference she
3 didn't know him well until after she left HUD was sufficient to
4 base an obstruction of justice finding, when she made other
5 reference to him, indicating she was close to him, etc. So I
6 want to consider that at this time.

7 I'd like to hear from, is it Ms. Flynn who's going to
8 take that?

9 MS. FLYNN: Yes.

10 THE COURT: Okay. Have you had a chance to review
11 Mr. Wehner's memo with the attached documentation?

12 MS. FLYNN: Yes, Your Honor.

13 THE COURT: Had I misread that when I gave my ruling
14 and the probation officer misread it as to the import of that
15 obstruction of justice? I'm referring to page 13 of the
16 presentence report, paragraph 41, where she testified, he said,
17 falsely in regard to the relationship with Mr. Mitchell, that
18 she didn't know he was being paid, that she -- well, Al Cain I'm
19 not worried about, I already ruled on that -- that she testified
20 that she did not know Mr. Mitchell very well prior to leaving
21 HUD, but then she had admitted to the writer, that is, to the
22 probation officer, that she had known him since she was a
23 teenager and that he was a friend of the family.

24 I think the guidelines on obstruction of justice as to
25 the testimony indicate I have to consider the defendant's

1 testimony in the light most favorable to her as I weigh this.

2 MS. FLYNN: Yes, that's right.

3 THE COURT: Does that change the equation I use then
4 by supplying this additional information about where she
5 admitted to certain things in her testimony about her
6 relationship with Mr. Mitchell?

7 MS. FLYNN: No, Your Honor, I don't think so. While
8 the defendant did acknowledge that she knew John Mitchell, that
9 he was a friend of the family, that she was close to him at
10 certain periods of time, what she was attempting to do by
11 denying that she was close to him until after she left HUD was
12 again to distance herself from him at the very point in time
13 when the relationship with him was most inappropriate in terms
14 of what her job was at, at HUD.

15 She -- you know, it was part of a larger pattern of,
16 of trying to hold for as long as she could at arm's length those
17 individuals with whom she was conspiring until circumstances
18 presented themselves that she couldn't deny. She couldn't deny
19 that she knew John Mitchell. It was well established that he
20 was a very close, he had a very close relationship with her
21 mother and that she had known him for a long time.

22 But the point that she was trying to convince the jury
23 of was that during the point in time when he was making money
24 off of, as a consultant on Mod Rehab projects, she really wasn't
25 that close, that she was more than an arm's length away from

1 him, and that in fact it didn't have an effect on, on how she
2 dealt with him or on her relationship with him.

3 Likewise, as other examples of this, she, she
4 testified in connection with questions about Colonel Brennan,
5 who as Your Honor will recall was Mr. Mitchell's partner at
6 Global Research, she testified when asked about Mr. Brennan that
7 she never had a very good understanding of if Mr. Brennan worked
8 for John, with John: "I never really understood exactly how it
9 worked." She said, you know, at another point that she didn't
10 know if they were partners. If there was a salary, she didn't
11 know. She never saw them working on anything together. She
12 didn't know.

13 Now as Your Honor knows, she worked there for a period
14 of time. She was very close to John Mitchell. She certainly
15 had at least one if not more meetings with Colonel Brennan. And
16 again, it's a way to try to convince the jury that there wasn't
17 this relationship and this connection during the very point in
18 time when she was making decisions on Mod Rehab.

19 So for that reason, Your Honor, the government
20 believes that your, your decision was appropriate, that you can
21 look at, even looking at the testimony in the light most
22 favorable to her, you can look at it as a whole as to what, in
23 fact, was happening here, and it's the position of the
24 government that that's, in fact, what she was trying to do by
25 denying that she was close to him until after she left HUD.

1 THE COURT: All right. I'm just looking at a summary
2 of the situation as put forth by the Independent Counsel letter
3 of January 18 to Mr. Hunt on obstruction of justice, just at
4 least to the part that goes to Mr. Mitchell. All right, thank
5 you.

6 Mr. Wehner, what about this matter on the cross
7 examination of Mr. Mitchell, where she answered she didn't know
8 him very well prior to leaving HUD, which was obviously not
9 true?

10 MR. WEHNER: Your Honor, I think that the
11 interpretation put on that statement by the Independent Counsel
12 is fair if you take it in the light most favorable to the
13 Independent Counsel as opposed to the light most favorable to
14 Ms. Dean. The Independent Counsel would have you believe that
15 Ms. Dean attempted to say during her testimony that she wasn't
16 that close to John Mitchell when she was at HUD and that that
17 was the fair import and the fair inference that should be drawn
18 from the testimony.

19 If you look specifically at the testimony, in 1983,
20 when she was at HUD, Ms. Dean acknowledges writing to John
21 Mitchell as "Dear Dad" or "Daddy." This is when she was at HUD.
22 And she acknowledges in her testimony, I've given Your Honor the
23 exact transcripts of that testimony, she acknowledges signing
24 such letters "Love, Deborah" or "Love, D."

25 When she was at HUD, she also testifies -- and I found

1 this after I'd submitted this memo, Your Honor -- she testified
2 that she had, in fact, been helped getting her job, her initial
3 government job at the Department of Energy by Mr. Mitchell even
4 prior to her tenure at HUD. She testified that when she was at
5 HUD, that John Mitchell acted as a mentor, I would say, to both
6 my brother and I.

7 And then, Your Honor, most explicitly and what clearly
8 demonstrates that, taken in the light most favorable to
9 Ms. Dean, she was not lying or obstructing justice about her
10 relationship with John Mitchell, was the direct question by
11 Mr. O'Neill, the transcript page 2960: "Is it fair to say that
12 you were close to John Mitchell?"

13 "Answer: Yes."

14 Now, Judge, that type of -- it doesn't get any better
15 than that in terms of acknowledging the precise relationship
16 that the Independent Counsel was trying to prove. When you
17 contrast that type of testimony with her response to a question
18 about these lunches that she had when she worked at HUD and the
19 number of times she had lunch with John Mitchell, which is truly
20 what the question was looking to, I think it falls clearly into
21 that category of questions, where taken in the light most
22 favorable to Ms. Dean, you cannot infer the negative, that she
23 was attempting to cover up the relationship.

24 It is much more likely, Your Honor, logically and
25 given Your Honor's experience in hearing many, many witnesses

1 testify, that Ms. Dean was referring more to the number of times
2 she saw John Mitchell for lunch, the time she spent alone with
3 him, and frankly, Judge, the maturation of their relationship.
4 She'd known John Mitchell admittedly on the witness stand from
5 the time before she went to HUD.

6 She could hardly intend to say, "I wasn't that close
7 to John Mitchell when I was at HUD," when she had previously
8 testified and intended to mislead the jury by saying she wasn't
9 close to John Mitchell when she called him a mentor and had
10 written him "Dear Daddy" letters and signed letters "Love,
11 Deborah" and testified that he'd gotten her, helped her get her
12 job at the Department of Energy.

13 That's not intentional obstruction of justice, Your
14 Honor. It may be confusion, it may be inaccurate, it may be a
15 mistake, but if you look at the different testimony in context,
16 I do not believe that Your Honor can reasonably rule that it
17 rises to the level of an obstruction.

18 Finally, Your Honor, for the last perhaps point that
19 she was not intending to obstruct justice is when she had a full
20 discussion about that issue with the probation officer, and Your
21 Honor has in front of you the statement she made regarding her
22 relationship with John Mitchell, and I believe the probation
23 officer stated accurately she freely acknowledged what that
24 relationship was and the length of that relationship, and that
25 is not inconsistent with the thrust of her testimony at trial.

1 It is inconsistent with one small sentence of
2 testimony given in response to a nondirect question which she
3 was otherwise asked and answered directly when she was asked
4 what the relationship was that was picked out in terms of
5 picking out a snippet of her testimony during approximately,
6 what, three-and-a-half days on cross examination, and taken in
7 the light most favorable to Ms. Dean, it was not obstruction.

8 THE COURT: All right. We're talking about
9 obstruction under 3C1.1. Application note 1 indicates, "In
10 applying this provision, the defendant's testimony and
11 statements should be evaluated in a light most favorable to the
12 defendant." I'm looking at the '90 guideline statements.
13 Application note 2 says, "Although the conduct to which this
14 enhancement applies is not subject to precise definition,
15 comparison of the examples set forth in application notes 3 and
16 4 shall assist the court in determining whether application of
17 this enhancement is warranted in a particular case." And I've
18 gone through those examples.

19 The probation officer did not put forth to the Court,
20 and perhaps because of the time frame when the guidelines
21 applied, that much of the evidence asserted by the Independent
22 Counsel in their letter of January 18 to the probation officer
23 as obstruction of justice regarding her testimony at trial, not
24 only the Kitchin loan, which is another count, but as to other
25 matters besides Agent Cain, but as to other matters, her

1 relationship to other individuals and her statements to the
2 probation officer of what her knowledge was of these areas and
3 how she's misled the probation officer, and he did not make his
4 findings on those areas but only on the Louis Kitchin loan and
5 on her relationship to Mr. Mitchell, and those are the two that
6 he relied upon.

7 Earlier he knocked out the one about the Kitchin loan,
8 and now we're considering, reconsidering the one about
9 Mr. Mitchell, and I had made that ruling based on my
10 recollection it was very clear it was correct as to she said
11 that she was not that close to Mr. Mitchell until after she left
12 HUD, and my recollection was that was totally contrary to the
13 evidence, and I felt that was warranted.

14 Counsel has pointed out to me she made other
15 statements in the same time frame she was testifying over, I
16 think, six to eight days on the stand acknowledging her
17 closeness to Mr. Mitchell, although I'm sure the import of her
18 statement that she gave to that one answer was to try to
19 distance herself from him while she was at HUD, because that was
20 what she was accused of doing wrong, being involved with him
21 while she was at HUD along with Mr. Nunn and the others.

22 The Court has got to be guided by the guidelines, and
23 it is concerned that I think the defendant's whole approach to
24 this situation has sometimes not been in accordance with reality
25 as to what occurred. But as to this one issue, I am convinced

1 by the refiling of the materials and the testimony given at
2 trial that that alone cannot be found to be obstruction of
3 justice. I think that's reversible error, where she had talked
4 about he raised her as a mentor to her as a young person, he
5 helped her to get her job at Energy, and then she said in one
6 question among many that she really wasn't that close to him
7 until after she left HUD, it was a question about having lunch
8 with him while she was at HUD or dinner.

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

13 The final ruling of the Court is going to be as
14 follows to the guidelines that apply therefore for the reasons
15 I've given -- and this bench opinion will be the opinion of the
16 Court; there will not be a written opinion. I'm going to
17 summarize where we came from from yesterday through today so
18 it's clear for the record where we are.

19 One, the sentencing guidelines apply to counts 1 and
20 2, not to counts 3 and 4. I did not accept the government's
21 theory of continuation of the conspiracy by the continued rehab
22 payments and for 15-year periods these contracts were in
23 existence, which would mean the government could still charge
24 offenses and could still have sentences based upon whatever
25 offenses occurred in the past for several more years. I don't

1 think that that follows under the case law that I cited,
2 United States v. Doherty, from the First Circuit, so that the
3 guidelines will apply to counts 1 and 2 only. The others will
4 be pre the guideline counts.

5 And I found that by using a preponderant standard that
6 certain payments under counts 1, Louie Nunn from Martinez, and
7 count 2, the payments to Sankin, and find them sufficiently tied
8 into the conspiracy, that they were necessary and natural
9 consequences in furtherance of the conspiracy.

10 Secondly, under the ex post facto clause, I believe it
11 prohibits under the case law in this circuit the application of
12 the new guideline, which does seem to the Court more akin to the
13 offenses for which Ms. Dean has been convicted, that is, 2C1.7,
14 being barred by the application of the ex post facto law, and
15 therefore I have to apply the 1990 guidelines.

16 Thirdly, the 1990 guidelines, there is no specific
17 offense unless you consider section 1001 of Title 18, and
18 therefore going to the next most analogous offense, it seems to
19 the Court that it would not be the gratuity, it would not be the
20 conflict of interest, but rather would be the fraud guidelines
21 that should apply based upon the nature of the offense, the
22 evidence and, as I said, the government's own submissions in
23 this case all point towards that's the nature of the offense.

24 The government in its letter to the probation officer
25 setting forth the nature of the offense says, "The government

1 proved and the jury found that defendant -- a high-level
2 official who wielded enormous power at HUD -- corrupted a
3 federal program designed to aid low-income families and used it
4 to benefit her family, her friends, and herself," and that she
5 perjured herself, which is not a guideline offense at this
6 point.

7 This case does not involve simply a series of
8 gratuities or a conflict of interest. It involves a corruption
9 of a critical government program that cause loss or actions
10 precisely the type that cause loss of public confidence in
11 government, and therefore accordingly, in the Court's view, that
12 here they are talking about fraud as the appropriate guideline
13 at this point.

14 That being the analogous offense, the guideline of
15 2F1.1 of 1990 will apply, with a 6 base.

16 The offense computation would be a base level of 6;
17 that is, it's a criminal category history of I, no prior
18 offenses, and a base level of 6. Specific offense
19 characteristic, more than minimal planning, two-point increase
20 under 2F1.1(b)(2)(A).

21 Adjustment for role in the offense, she abused a
22 position of public trust in a manner that significantly
23 facilitated the commission and concealment of the offense,
24 two-level increase under guideline 3B1.3. No obstruction of
25 justice is available anymore. That is a base offense level, or

1 a total offense level before any adjustments upward would be 10.

2

3 However, the Court believes, according to the comment
4 of 2F1.1, note 9, where the amount of loss does not fully
5 capture the harmfulness and seriousness of the conduct, an
6 upward departure may be warranted.

7 I am not using the loss provisions specifically set
8 forth in 2F1.1 for the following reasons: One, in looking at
9 the definition of what a loss is and in looking at the
10 definitions set forth as to the values therein, there is no loss
11 directly to HUD.

12 Two, I do not see how we can quantify the amount of
13 loss by claiming whatever was allegedly made by the consultants
14 as a result of these deals that they were engaged in. It was
15 agreed and I believe the jury was instructed that the awards
16 that were made in themselves were appropriate awards of these
17 contracts, and that does not mean about the improper influence
18 in getting them, but they were all qualified developers who met
19 all the criteria for such awards. There was no fraud in that
20 instance, no illegally getting funds, no bribery or siphoning
21 off or somehow improper or unqualified applicants receiving
22 these awards. There's no allegation the monies were pocketed,
23 nothing was billed -- or nothing was rehabbed, whatever it be.

24 There's no direct, it seems to the Court, quantifiable
25 loss, and going through the definition of loss as set forth in

1 the provision under 2F1, I agree with the Probation Office that
2 there was no actual monetary loss set forth that I could
3 recapture in this case unless I looked only at the monies
4 allegedly Ms. Dean received as gratuities, which would have it a
5 very low category and would not make any significant difference.

6 But the Court is going to consider an appropriate
7 upward departure and will consider what departure would be
8 appropriate at the time of sentencing based upon factors to be
9 advanced by the parties, whether an eight-level increase using
10 as an analogy the new guideline of 2C1.7, fraud involving
11 deprivation of the intangible right to the honest services of
12 public officials; conspiracy to defraud by interference with
13 government functions, which is very close to the issues as set
14 forth in this case, is that an appropriate eight-level increase
15 or some other lesser increase. Probation indicates that any
16 such increase would be minus then the two-level increase for
17 abuse of trust that would be subsumed in that.

18 So that will be the ruling of the Court as to the
19 appropriate guidelines it will apply in this case, and at the
20 sentencing, I'll listen to the parties as to an appropriate
21 sentence to be imposed and the terms of that guideline as to the
22 upward departure that should be imposed, if any, and as to then
23 the amount of time that should be assessed under the guideline
24 that will apply for Ms. Dean to serve.

25 I take it, also, at that point the government would be

1 prepared with a position on whether or not there should be a
2 granting of stay of the service of the sentence pending appeal?
3 Are you ready to address that at that time?

4 MR. SWARTZ: Yes, Your Honor.

5 THE COURT: All right, I'll wait until then to hear
6 that.

7 All right, thank you, counsel. That will be the
8 ruling of the Court. We'll return at 10:00 Friday, I believe it
9 is.

10 MR. WEHNER: Yes, Your Honor. Thank you.

11 (Which were all the proceedings had
12 at this time.)


13
14 CERTIFICATE OF THE REPORTER

15 I certify that the foregoing is a correct transcript of the
16 record of proceedings in the above-entitled matter.

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Anneliese J. Thomson

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