

KITCHIN'S DELIVERY OF THE ATLANTA REQUEST

Summary: The OIC presented provocative testimony by two witnesses that consultant Louis Kitchin needed a letter from an Atlanta housing authority in order that he could deliver it to Deborah Gore Dean during a brief period at the end of October 1986. The OIC, however, had not alleged in the indictment that Kitchin had brought the letter to Dean; and during Kitchin's direct testimony, the OIC failed to question him about it. On cross-examination Kitchin testified that he probably was in Atlanta during the period in question. Documentary evidence also indicated Kitchin and Dean did not meet during this period.

In closing argument, however, the prosecutor explicitly stated to the jury that Kitchin had brought the letter to Dean in Washington.

In support of her Rule 33 Motion, Dean argued that, in light of the record, it was improper for the prosecutor to tell the jury that Kitchin brought the letter to Washington. Dean argued further that there was reason to believe that the OIC knew for a fact that Kitchin had not brought the letter to Washington.

In its Opposition, the OIC acknowledged that the prosecutor intended to state to the jury that Kitchin had brought the letter with him, asserting that the prosecutor was making a reasonable argument to the jury. The OIC failed to address any of Dean's contentions as to why the record did not support the prosecutor's statement and as to why there was reason to believe that the OIC knew for a fact that Kitchin had not brought the letter when the prosecutor told the jury that he had.

The record strongly suggests that when the prosecutor stated to the jury that Kitchin delivered the letter to Dean, the prosecutor knew for a fact that Kitchin had not delivered the letter.

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Attachments:

1. List of moderate rehabilitation fundings, dated October 29, 1986, with notations in handwriting other than Deborah Gore Dean's.
2. List of moderate rehabilitation fundings with dates of letter requests.
3. List of moderate rehabilitation funding decisions, undated.

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 184-87 (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 43-44 (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 3-6 (Jan. 7, 1994) ("Dean Reply")

A. Background

Count Three of the Superseding Indictment alleged that on two occasions, Deborah Gore Dean caused moderate rehabilitation units to be sent to certain public housing authorities (PHAs) for the benefit of Atlanta consultant Louis Kitchin. The first occasion was in the Fall of 1986, when 200 units were sent to Atlanta where Kitchin was working with an Atlanta developer named Nicholas Bazan. The Superseding Indictment alleged the Dean had promised the units to Kitchin in the fall of 1986. It also alleged that on or just before October 27, 1986, Bazan caused the Atlanta PHA to write a letter to HUD requesting 250 moderate rehabilitation units and that on or about October 29, 1986, Dean had "facilitated and caused to be facilitated" an award of 200 units to the Atlanta PHA. The Superseding Indictment, however, alleged nothing with regard to the delivery of the letter to Washington.

Three matters appear undisputed. The Atlanta PHA's request for 250 units is dated October 27, 1986. Also, some time on or before October 29, 1986, Dean provided Assistant Secretary for Housing Thomas T. Demery a listing of nine PHAs to receive moderate rehabilitation funding and a 200-unit allocation for Atlanta was at the top of the list. Demery had provided a copy of the list to the House Banking Committee, which reproduced it at page 371 of its hearings volume (Attachment 1).¹ The list that was reproduced in the hearings volume bore the date October 29, 1986, in handwriting other than Dean's, and next to the Atlanta 200-unit allocation was the notation "letter S.Z." in handwriting other than Dean's. Presumably the notation meant that Deputy Assistant Secretary Susan Zagame possessed, or would secure, the letter request from Atlanta.² On October 29, 1986, Zagame then sent a memorandum requesting the Funding Control Office to prepare the funding documents. Gov. Exh. 182. A rapid reply for the funding, which is the first step in the formal allocation of funds, is dated October 30, 1986. Gov. Exh. 183.

The OIC presented provocative testimony about this funding that, at the time the testimony was presented, seemed particularly damaging to Dean. First, developer Nicholas Bazan testified that Kitchin advised him that "there was a window apparently

¹ Hearings Before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, 101st Cong., 1st Sess., at 371.

² The inference that Zagame had yet to secure a letter is supported by the fact that the list contained an identical notation for a 118-unit award to Palm Beach Co. Housing Authority. Another document that Demery provided to Congress indicated that the Palm Beach letter request would be dated November 3, 1986, indicating that, at least in the case of Palm Beach, the notation indicated that Zagame did not yet have the letter. See Hearings Before the Employment and Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong., 1st Sess., Pt. 5, at 353 (Attachment 2).

that was getting ready to close on the Mod Rehab program," and requested that Bazan secure a moderate rehabilitation application from Robert Sumbry of the Atlanta Department of Housing and Physical Development and give it to Kitchin in order that Kitchin "could then take it to Washington because he was going to be having lunch apparently that day or the next day with Ms. Dean." Tr. 1313-14. Then, David Westcott, who worked for Bazan, testified that he (Westcott) picked up the letter from the housing authority and delivered it to Kitchin's office in the late afternoon with the understanding that Kitchin needed to have the letter right away in order to take it to Washington. Tr. 1326-27.

As noted, however, the OIC had not alleged in the Superseding Indictment that Kitchin had delivered the letter to Dean. And when Kitchin testified as an immunized government witness, Associate Independent Counsel Robert E. O'Neill did not ask Kitchin about delivering the letter to Dean.³ Cross-examined with phone records for the

³ With regard to his conversations about securing units for Atlanta, Kitchin testified as follows:

I talked to her, I am sure, about the need for, for low-income housing Atlanta and asked, what was, what were the chances of a specific, or not a specific developer, but that I knew a specific developer who was in, worked with the Atlanta Housing Authority constantly, and they would like to get some units, 200 units of mod rehab units in Atlanta.

It was a long time ago. I'm -- she said that that number for Atlanta could be done, or that was a reasonable number to, for a city like Atlanta to request, or something of that nature.

Tr. 1433.

period between October 27 and October 29, 1986, Kitchin stated that he was "probably" in his office in Atlanta (though the phone records neither refreshed his recollection nor assured him that he was in Atlanta). Tr. 1504-06. Neither of the two sets of Dean's 1986 calendars that had been admitted into evidence indicated a meeting with Kitchin during this period. See Gov. Exhs. 6 and 7.

Though Kitchin's redirect examination commenced immediately after the questioning as to his whereabouts at the time he was supposed to have been delivering the letter to Dean, O'Neill did not address the matter during redirect.

The OIC introduced the letter from the Atlanta PHA dated October 27, 1986 (Gov. Exh. 179). It also introduced the list Dean had given Demery, though the OIC used a copy that had no date or any other markings (Gov. Exh. 181, Attachment 3 hereto), rather than the list bearing the October 29, 1986 date and notation "letter S.Z." next to the Atlanta allocation.

Susan Zagame was called as a government witness and was questioned by the OIC, inter alia, about her role in securing PHA letters with regard to an earlier funding round. Tr. 1724-27. Zagame was not questioned about whether HUD possessed a letter request from the Atlanta PHA at the time she instructed funding control to implement the Atlanta funding on October 29, 1986.

Thomas T. Demery was called as a government witness and was asked to testify about Dean's providing him the list of nine PHAs to be funded at the end of October 1986. Tr. 1892. Demery was not questioned about whether there existed a letter request from the Atlanta PHA at the time Dean gave him the list or about how or when he secured a letter request. He was not confronted with Attachment 1 and questioned as to the meaning of the notation "letter S.Z."

Dean testified that she did not discuss moderate rehabilitation funding with Kitchin.⁴ Dean also testified that she had been instructed to fund the units by Secretary Pierce who had sent her a note referencing Matt Mattingly, the Republican Senator from Georgia who was in a close Senate race at the time. Dean noted that the President was in Georgia campaigning for Mattingly just as the units were going out. Tr. 2561.⁵ On cross-examination, Bazan had indicated that Kitchin may have

⁴ Dean's secretary, Sherrill Nettles-Hawkins, testified that Kitchin had called her asking something to the effect of when the moderate rehabilitation units were coming and that she took a call from someone she believed to be Kitchin asking whether a letter request could name a specific project. Tr. 1550-52. Dean testified that, while Nettles-Hawkins would not lie, she (Dean) could not imagine a consultant making a call asking "where my units are" unless it was a political call relating to when units could be announced in a particular area. Tr. 3128.

⁵ Dean would not be allowed to introduce an October 30, 1986 New York Times article showing that on October 29, 1986, President Reagan was in Atlanta

mentioned that he was helping Mattingly with his senate race, but stated that Kitchin did not tell him the units had anything to with the race. Tr. 1320.

B. OIC's Closing Argument

In closing argument, O'Neill would discuss the Atlanta funding as follows:

Mr. Kitchin says I'm going up to meet with Dean in a couple of days. I need a letter from the Housing Authority very quickly. Please get it for me. Bazan has his employee, you might remember David Westcott, he testified for maybe ten minutes, he went, got the letter, brought it back to Kitchin's office. Kitchin brings it up with him. He asks for 200 units for Atlanta.

A couple of days later, just a couple of days later, as that will show, the units come down. The letter is dated the 27th. On the 30th, three days later, the rapid reply for 200 units to Atlanta.

Tr. 3410-11 (emphasis added).

C. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean argued that the issue of whether Kitchin in fact brought the letter to Dean was an important one in light of the provocative testimony of Bazan and Westcott. She argued that there was no evidence in the record to support a claim that Kitchin had brought the letter though considerable evidence to indicate that he had not. Thus, Dean argued, it was manifestly improper for the prosecutor to state to the jury that Kitchin had brought the letter to her. Dean Mem. at 184-87.

Further, Dean argued, the record suggested that governmental misconduct went beyond the mischaracterization of evidence adduced in court, and that the prosecutor had stated as a fact to the jury something that he knew to be untrue. Dean provided additional phone records of Kitchin that had been provided to her by the OIC, arguing that these records also corroborated that Kitchin was in Atlanta during the relevant period. She argued that, with the OIC's power to subpoena credit card records, both from individuals and credit card companies, all the business records of Kitchin's organization, and airline and phone records, the OIC was presumably capable of

campaigning for Mattingly. The article stated that Wyche Fowler, who had trailed Mattingly by 10-15 points in the polls earlier in the fall, had pulled to within 3 points.

determining where Kitchin was between October 27 and October 30, 1986. Noting that the OIC did not even allege in the Indictment that Kitchin had traveled to Washington between October 27 and October 30, 1986, Dean argued that the record strongly suggested that the OIC knew for a fact that Kitchin did not travel to Washington between those dates. Id. at 186-87.

D. OIC's Opposition

In its Opposition, the OIC described the Bazan and Westcott testimony, and argued that "[o]n this record, it was perfectly appropriate for the jury to infer -- and for the prosecutor to argue to the jury -- that Kitchin in fact did that which he said he was going to do, namely, deliver the request to the defendant." Gov. Opp. at 43-44.

The OIC did not address Dean's argument as to why the record did not support the inference that Kitchin delivered the letter or her argument regarding the reasons to believe that the OIC knew for a fact that Kitchin did not deliver the letter to Dean.

E. Dean's Reply

In her reply, Dean pointed out that OIC had acknowledged that the statement "Kitchin brings it up with him" had been intentional. She also argued that the statement was not an argument as to what the jury should infer from the facts stated, but a statement of fact that the prosecutor expected the jury to accept as fact because the prosecutor had stated it as fact. Dean Reply at 3-4.

Dean pointed out that the OIC had relied on an undated copy of the list she had given to Demery, though the OIC was presumably aware of the dated version of the note that bore a notation suggesting that at the time Dean transmitted the note to Demery she did not have a copy of the Atlanta letter. Dean Reply at 4 n.4.⁶

Finally, Dean noted the failure of the OIC to discuss her arguments regarding the reasons to believe that the OIC knew for a fact that Kitchin did not deliver the letter to Dean. Id. at 4.

⁶ Dean did not make the point regarding the other notation of "letter S.Z." and the implication of the fact that the Palm Beach County was dated more than a week later. See note 2 supra.

F. Hearing of February 14, 1994

In denying Dean's motion at the hearing on February 14, 1994, the court did not discuss any of Dean's arguments about the OIC's mischaracterization of the record in closing argument.

G. Comments

O'Neill's statement that Kitchin brought the Atlanta letter to Dean filled an important gap in otherwise provocative testimony by OIC witnesses. Even if the OIC believed that Kitchin had delivered the letter, O'Neill's statement would have been improper argument given the evidence of record.

The failure of the OIC to allege that Kitchin had brought the letter in the Superseding Indictment and the failure to question Kitchin about it certainly suggests that the OIC knew that Kitchin had not brought the letter with him. The OIC's failure to use the dated version of the list Dean gave to Demery may have been prompted by the fact that the notation "letter S.Z." would be read to suggest that Dean did not have a letter when she gave Demery the list. Although the OIC had alleged that Dean "facilitated and caused to be facilitated" the funding on or about October 29, 1986, in the chart used in closing argument, the OIC would put a question mark for the date. Thus, it seems that in order not to have to use the dated copy of the list, the OIC was willing to forego some precision in its chart and in its closing argument.

The OIC's failure to address Dean's contentions about what the OIC knew on the basis of matters outside the record would seem additional evidence that the OIC knew that Kitchin did not deliver the letter. It must also be borne in mind that the other Narrative Appendixes make it clear enough that O'Neill was willing to make statements in closing argument that he knew to be false if it would in some manner enhance the OIC's case. Even without consideration of the information in the other Narrative Appendixes, however, the inference would be strong that O'Neill made the statement about the delivery of the letter knowing it also to be untrue.

Higher levels of the OIC may not have approved of O'Neill's making that particular statement or even have been aware that it was false at the time O'Neill made it. After the filing of Dean's motion, however, the OIC had an obligation to determine whether O'Neill knew the statement was false and, if such was the case, to reveal that matter to the court rather than impliedly represent that O'Neill did not believe the statement to be false. Nothing in the OIC's actions throughout its response to Dean's motion suggests that it recognized any such obligation.