

CLOSING ARGUMENT CHARACTERIZATION OF TESTIMONY ON THE DADE COUNTY SELECTION

Summary: Former HUD General Counsel J. Michael Dorsey testified that at a Spring 1987 moderate rehabilitation selection committee meeting, Assistant Secretary for Housing-Federal Housing Commissioner Thomas T. Demery had pushed for funding the Dade County moderate rehabilitation request that was the subject of Counts Three and Four of the Superseding Indictment. Dorsey also stated that he did recall Deborah Gore Dean's saying anything about the request.

In closing argument, the prosecutor characterized Dorsey's testimony in a manner to lead the jury to believe that Dorsey had said that Dean had spoken on behalf of the request.

Pursuing a theme advanced by the OIC that public housing authorities had been cut out of the moderate rehabilitation process, the prosecutor also explicitly stated that Dade County was selected at the meeting before Dade County had requested the units. The prosecutor knew, however, that his statement was directly contrary to the record.

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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 187-91 (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 44-47 (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 133-15 (Jan. 7, 1994) ("Dean Reply")

A. Background

Former HUD General Counsel J. Michael Dorsey was a member of the moderate rehabilitation selection committee (comprised of Dorsey, Deborah Gore Dean, and Assistant Secretary for Housing Thomas T. Demery) that in a meeting in April 1987 selected Dade County, Florida to receive 203 units of moderate rehabilitation funding. Counts Three and Four of the Superseding Indictment alleged that Dean had caused the 203 unit Dade County selection for Atlanta consultant Louis F. Kitchin. The units would go to two projects of developers Claude Dorsy and Jim Mitchell called Springwood and Cutlerwood.

There was documentary evidence that Demery was involved in promoting moderate rehabilitation requests for the benefit of Kitchin at least as early as the fall of 1987, which Demery admitting to doing during cross-examination. Tr. 1911. Kitchin's telephone number appeared on a wallet-sized phone listing that contained numbers for Demery's 20 closest associates, though this particular phone listing had been created at a later point in time. Kitchin also had acknowledged an intimate relationship with Demery's Executive Assistant, though that may have developed some time later. Tr. 1455-59. Claude Dorsy, one of the developers of the Springwood/Cutlerwood projects, testified that at some point in time, Kitchin indicated that he had been dealing with Demery. Tr. 1335-36. Dorsy also testified that Kitchin never mentioned Dean to him. Tr. 1337.

The 203-unit Metro Dade selection was one of 17 on a handwritten list prepared by Dean at a meeting between Dean and Demery prior to the selection committee meeting. Gov. Exh. 202. The handwritten list started with the total number of available units and subtracted the number of units for each contemplated award. Next to the 203 units listed for Metro Dade was the word "letter" and a specific bedroom configuration (153 one-bedroom, 48 two-bedroom, and 2 zero-bedroom). This configuration matched that in a February 13, 1987 letter request from the Metro Dade Housing Authority to Secretary Pierce. The copy of that document introduced into the record (Gov. Exh. 198) contained the words "MOD REHAB file" at the top, then "Lou and file," and then the word "Funded".

The Metro Dade request was one of four on the handwritten list that had a square drawn around it. The others were Prince George's County, Michigan State Housing Development Agency, and Wisconsin. Dean testified that she had written the list as Demery described to her the requests he wanted to bring up at the meeting the following day. Tr. 2572-80. She stated that the boxes indicated the selections she wanted to discuss with Secretary Piece before the meeting. With regard to Metro Dade, she stated that Demery had mentioned that Louis Kitchin was behind the project, and, since she was decorating an apartment for Kitchin, she did not believe she should be voting on the selection. She stated that she discussed the matter with Pierce who

told her just not to vote on it, and she remained silent during the discussion of the Dade County request. Tr. 2575-76,¹ 2579-80.

Dean testified that she squared Prince George's County because Richard Shelby had approached her about it and because it was in her home state of Maryland. Tr. 2576-77. She stated that she squared Michigan because it was Demery's home state. Tr. 2578. She stated that she squared Wisconsin because Demery had said Senator Proxmire (then head of the Senate Banking Committee) had contacted Demery about it and she thought the Secretary should know that Proxmire was contacting Demery directly. Id.

As indicated in the Narrative Appendix styled "Testimony of Thomas T. Demery," Demery testified that Dean brought the 203-unit Dade County request to his attention. Tr. 1939.

B. J. Michael Dorsey's Testimony

In his direct examination as a defense witness, former HUD General Counsel J. Michael Dorsey testified with regard to his recollection of a Metro Dade funding on the Spring of 1987 (1) that the request had been promoted by Demery, and (2) that he did not recall Dean saying anything about the request. Tr. 3176-77. The exact questioning was as follows:

Q. Directing your attention to the date of the early spring, or spring of 1987, do you recall being involved in the selection process for Moderate Rehabilitation units?

A. Yes.

Q. Do you recall sitting in a discussion with Mr. Tom Demery and Miss Deborah Gore Dean regarding Moderate Rehabilitation funding?

A. Yes.

¹ This is an accurate, though inexact, account of Dean's testimony. Throughout the trial, the court sustained government hearsay objections to Dean's attempts to say what Pierce had told her. The court, however, would allow her to testify as to her understanding after a conversation.

Q. Directing your attention to that meeting, do you recall any discussion regarding a funding of 200 units to Metro-Dade Florida?

A. I recall that there was an allocation of units to Metro-Dade and I asked Mr. Demery why we were funding Metro-Dade because as Assistant Secretary for Public Housing I was aware that there was a grand jury investigation of Metro-Dade Housing Authority and also that the Executive Director of the Housing Authority had been fired. Mr. Demery's response was that he had looked into this. He was aware of the problems that Metro-Dade had had, but he was also aware that they had an ability to do development or do development units and also that they had a great need because of refugees coming from Cuba and other parts of Latin America.

Q. Do you recall Miss Dean saying anything about that allocation of units.

A. I don't have any recollection of her saying anything, no.

Questioned about the same meeting on cross-examination, Dorsey stated that Dean had mentioned the names of persons associated with some of the requests at the meeting, but that he could not recall which requests. Tr. 3182.²

² The exact questioning was as follows:

Q. So as the list was read she identified a number of individuals associated with particular projects, is that right?

A. Yes.

Q. During the meeting she did not tell you that Secretary Pierce had conveyed an interest in any specific projects, is that right?

A. I don't recall any instance of this.

Q. The names that Miss Dean mentioned included names that you did not recognize, is that right?

A. Yes.

Q. You don't recall at the present time which particular projects she identified names for, is that right?

A. No, I don't.

C. OIC's Closing Argument

In closing argument, after noting Dean's statement to the Senate Banking Committee that the selection committee "goes solely on information provided by Secretary for Housing," Associate Independent Counsel Robert E. O'Neill would describe Dorsey's testimony regarding the Dade County selection in the following terms:

Mr. Wehner talked about 1987 and "that goes solely on information provided by the Secretary for Housing." That's not true, ladies and gentlemen, because once again we have a list, Government's Exhibit 202. That's in Miss Dean's handwriting, and you heard, just like we saw at the beginning of my closing argument yesterday, the Government's exhibit 28, the letter to Louie Nunn at Global Research, referencing a conversation with John Mitchell. The defendant had to admit that that letter existed because we had it, but she denied being involved in that, saying Mr. Barksdale gave me that information. Just like this. This is a handwritten list of the various projects, the amounts funded, and in fact on Metro-Dade, the exact bedroom configuration. It's in her handwriting.

So she says to you, well, yes, this is mine, this is my handwriting, but Thomas Demery is the one who told me this and I wrote it down very quickly.

Well, you remember Michael Dorsey's testimony, a witness testifying for the defense. He said that Miss Dean did speak during that meeting and was saying who was behind the project.

In her own handwriting she had the bedroom configurations and the number of bedrooms, and then it says "letter.["] They are funding 203 units to Metro-Dade before Metro-Dade even asks for them.[] Is that the way the program was supposed to operate? Is that the way it's supposed to run?

Tr. 3514-15 (emphasis added).

D. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean argued that, although O'Neill knew that Dorsey had stated the Demery had supported the Dade request and that he (Dorsey) did not recall Dean's speaking about it, O'Neill nevertheless sought to make the jury believe that Dorsey had said Dean spoke about the project. Dean argued that, even without using the singular for "project" in the underscored portion of the above passage, the use of Dorsey's testimony would have been severely misleading. Yet, by the use of the singular for "project," O'Neill had translated Dorsey's statement into a precise statement that Dean had stated who was behind the Dade County project, which the OIC knew was absolutely contrary to Dorsey's testimony. Dean Mem. at 187-90.

Dean also argued that O'Neill had stated that Dade County was being selected before the Dade County housing authority requested the units in order to support a theme, pursued both in the OIC's opening and closing arguments, that the local housing authorities were being cut out of the process, even though O'Neill knew that the meeting took place in April 1987, and the letter referenced in the list was submitted by the Dade County housing authority on February 13, 1987, and that said letter had itself stated the bedroom configuration. Dean pointed out that the letter had been admitted into evidence and that she had presented unrefuted testimony that the copy used as Government Exhibit 198, which had the words "Lou" and "file" penned in the top right hand corner, also bore markings found on all Demery's correspondence on the moderate rehabilitation program. Tr. 3153-54. Dean argued that the inference suggested by those markings is that Demery did in fact tell her which requests were to be funded, which she then recorded on the handwritten list, just as she had stated, but O'Neill avoided dealing with that inference by representing to the jury that a letter from Dade County did not even exist. Id. at 190-91.

E. OIC's Opposition

The OIC set out the entire passage quoted above,³ and argued that O'Neill's statement "was responding directly to defense counsel's argument that the Spring, 1987, funding round was based 'solely on information provided by [the Assistant] Secretary for Housing,' Thomas Demery." Gov. Opp. at 44-45. Suggesting that O'Neill had misspoken, the OIC argued that in context, the jury would have understood that O'Neill was referring to the fact that Dean mentioned who was behind various projects, not who was behind the Dade County project. Id. at 45-46.

With regard to O'Neill's statement that the funding took place before the Dade County PHA had requested them, the OIC cited testimony of Claude Dorsey that "in late 1986 or early 1987" Kitchin had told him he could get moderate rehabilitation units and that this occurred six months before Dorsey retained Kitchin, and that the retainer was signed on May 28, 1987. Observing also that there was evidence that Kitchin got the

³ In her Memorandum, Dean had picked up the quotation at the point that begins: "This is a handwritten list...." Dean Mem. at 187.

units from Dean, the OIC argued that there was evidence supporting "the inference that defendant had promised the units for Metro Dade to Kitchen [sic] prior to the PHA's letter request dated February 13, 1987, giving the prosecutor a proper foundation on which to argue that the funding decision (albeit not formally) was made before Metro Dade asked for the units." Id. at 46-47.

F. Dean's Reply

In her Reply, Dean argued that, given the placement of the word "project" between discussions of the Metro Dade funding, it was manifestly disingenuous of the OIC to suggest either that the jury would have understood O'Neill to mean that Dean had spoken on projects generally or that O'Neill expected the jury to so understand. Dean also argued that the OIC's argument that the O'Neill had merely spoken inexactly "was inapt in the extreme in this case, where so many others aspects of government counsel's arguments of a similarly misleading nature had obviously been crafted with extreme care." Dean Reply at 13-14.

With regard to O'Neill's statements about the Dade Letter, Dean argued that the OIC's argument had simply failed to address her argument that O'Neill had made a patently false statement "they are funding 203 units to Metro-Dade even before Metro-Dade asks for them." Id. at 14-15.

G. The Court's Ruling

In its ruling of February 14, 1994, the court did not comment on this matter.

I. Comments

There was some legitimacy to the OIC's point that O'Neill's statement about Dean's speaking at the April 1987 meeting was in the context of a discussion of the perjury charge regarding Dean's statement before the Senate Banking Committee that the moderate rehabilitation selection committee goes "solely" on information provided by Demery. Further, O'Neill continued with the discussion of the perjury counts after making the remark that Metro Dade had been funded before it had requested units. On the other hand, the discussion had shifted rather clearly to the Dade selection when O'Neill stated that Dean spoke on behalf of "the project." It would have made no sense to reference the Dade selection in pursuing the theme that Dorsey said Dean spoke about some projects, when Dade is the project that Dorsey specifically stated that he did not recall Dean speaking about.

It may not be entirely impossible that O'Neill had meant merely to say that Dean spoke about some projects, and in other circumstances there might be reason to give the prosecutor the benefit of the doubt in interpreting his actions. Given the substantial other evidence of O'Neill's willingness to mischaracterize the record in order to mislead the jury, however, the reasonable inference here is that he calculatedly chose words that would mislead the jury regarding Dorsey's testimony.

The OIC's argument that O'Neill was merely arguing that Dean had promised the units to Kitchin before the PHA had requested them was based on a wholly insupportable construction of O'Neill's statement. The OIC's willingness to make the argument is a further illustration of its adamant refusal ever to acknowledge that O'Neill had misrepresented the record regardless of how clear it was that he had done so. The OIC's failure to acknowledge improper conduct of any sort on the part of its trial counsel is an additional consideration to be borne in mind in determining whether it is reasonable to believe that the OIC would conceal knowledge of misconduct of an even more serious nature.