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TRANSCRIPT OF PROCEEDINGS United States Court of Appeals
For the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS **FEB 06 1996**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, :
 :
 Appellee, :
 :
 v. :
 : No. 94-3021
 DEBORAH GORE DEAN, :
 :
 Appellant. :
 :
----- X

No. 94-3021

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1 knew that Dean was providing him with benefits.

2 In fact, even the way he compensated his manager
3 of the apartment, Mr. Sankin compensated his manager,
4 reflected his awareness that there was a relationship
5 between the services he was providing her and the benefits
6 that he was receiving from HUD. Beyond that, of course, he
7 was, as Ms. Dean herself understood, someone she thought of
8 in essence on the family payroll. So, she was free to ask
9 any number of services, which is quite apart as well from
10 the various gifts and other things that he gave her during
11 this time period.

12 Finally, with regard to the third conspiracy, the
13 evidence is uncontradicted. In fact, this is the Kitchin
14 conspiracy. It is uncontradicted that Mr. Kitchin gave
15 Ms. Dean \$4,000 in a check at a time when he was seeking mod
16 rehab units, at a time when she was under investigation in
17 connection with her Senate confirmation proceedings,
18 confirmation proceedings that Mr. Kitchin had already aided
19 her on by contacting the White House.

20 QUESTION: I think that is your strongest bit of
21 evidence of all.

22 You don't have much time left, but I would like to
23 ask you a question about the misconduct charges against the
24 Independent Counsel. I caught at the outset that your trial
25 counsel have flown the coop and returned to Justice. So,

1 they are not sitting at the counsel table to hear any
2 questions from the bench.

3 What are we to make of the misconduct charges?
4 Are you prepared to concede that there is misconduct here?

5 MR. SWARTZ: No, Your Honor, we are not prepared
6 to concede it.

7 QUESTION: None at all?

8 MR. SWARTZ: Your Honor, let me say at the outset
9 that, of course, we are very concerned about the concerns
10 expressed by Judge Hogan in this matter, as any prosecutors
11 would be. We have reviewed our procedures. Insofar--

12 QUESTION: This is the delay stuff you are talking
13 about, the delay in getting the information?

14 MR. SWARTZ: Certainly the delay, Your Honor.

15 If we take first the Brady point--

16 QUESTION: Isn't that unconscionable? Is there
17 any possible justification for that?

18 MR. SWARTZ: Well, Your Honor, let me explain.
19 From the outset--

20 QUESTION: Is this just absolute support for the
21 proposition that the notion of an independent counsel
22 divorced from the Justice Department is inherently a corrupt
23 notion?

24 MR. SWARTZ: Certainly not, Your Honor.

25 QUESTION: I think we have recently had some cases

1 which had similar Brady problems which involved the regular
2 U. S. Attorney component.

3 MR. SWARTZ: As Paxson, for instance, Your Honor,
4 probably the leading Brady case from the circuit involved
5 non-disclosure of very serious material until the trial
6 itself. In this case--and I would refer the court to the
7 record. It's in the Joint Appendix, actually.

8 From the outset, the associate independent counsel
9 who handled this case before Judge Gessell, who is now in
10 fact the Assistant Attorney General of the United States, in
11 charge of the Criminal Division, made clear she was
12 distinguishing between what she thought of as Giglio
13 material, that is, prior witness statements and Brady
14 material. That may have been an erroneous--that may have
15 been a mistaken distinction in her mind, but it is--

16 QUESTION: Counsel, the trial counsel in this
17 case, the one who is responsible for the delay in the Brady
18 material is now the Assistant Attorney General?

19 MR. SWARTZ: No, Your Honor. This case was first
20 brought by an individual who is now the Assistant Attorney
21 General. That was when it was before Judge Gessell, prior
22 to the interrogatory appeal.

23 QUESTION: Oh.

24 MR. SWARTZ: Then the new trial counsel came on.
25 The new trial counsel was also a career federal prosecutor,

1 is now a prosecutor again and has returned to the U. S.
2 Attorney's Office in the Middle District of Florida. Each
3 individual here, Your Honor, has a long record as a
4 Department of Justice attorney.

5 If I could refer the court in this regard to the
6 Brady--

7 QUESTION: His answer is the quick answer that you
8 say they were cutting, perhaps, too fine a point in deciding
9 what had to be given over versus what didn't have to be
10 given? That's not a great excuse.

11 MR. SWARTZ: Yes, Your Honor.

12 QUESTION: I'm just characterizing your reply.

13 MR. SWARTZ: Certainly, Your Honor.

14 QUESTION: Is that what you are saying?

15 MR. SWARTZ: I think if you look at Joint Appendix
16 114, for instance, Ms. Harris' statement, she makes it quite
17 clear the distinction she's drawing. As I say, yes, that
18 may have been too fine a distinction. I think that the
19 critical point here is, the evidence was turned over and it
20 was turned over in advance of trial.

21 QUESTION: How much in advance, just a week or two
22 or something?

23 MR. SWARTZ: Two weeks in advance, in this case,
24 more than a month before the witnesses testified.

25 QUESTION: Enormous preparation. This case was,

1 what, a year between indictment and trial?

2 MR. SWARTZ: That's correct, Your Honor.

3 QUESTION: The preparation is enormous and two
4 weeks beforehand is sufficient time for a defense attorney
5 to absorb all this material?

6 MR. SWARTZ: Well, Your Honor, not only was it--

7 QUESTION: Was this buried or was it segregated?

8 MR. SWARTZ: No, this was segregated, the
9 particular matters here.

10 In the Brady materials, there are four items of
11 evidence that are at issue. Out of all evidence in this
12 case, the first are the so-called notes, the John Mitchell
13 telephone notes. Those were produced more than a year prior
14 to trial. The argument there is, they should have been
15 segregated. The government's position is, that far from
16 being exculpatory, those notes showed that Barksdale was
17 being contacted by the executive assistant.

18 QUESTION: How was the production--was it done by
19 giving the defense counsel access to a big room with a
20 hundred filing cabinets or was it Xerox?

21 MR. SWARTZ: Well, Your Honor, the documents were
22 reproduced from microfilm copies and were given to the
23 defendant in--

24 QUESTION: At defense's request, they had to go
25 through microfilm; is that the way it worked?

1 MR. SWARTZ: No, no, they were microfilm copies,
2 from microfilm but not the actual documents themselves.
3 They were Xeroxed copies of documents for them to review.

4 QUESTION: How were they indexed?

5 MR. SWARTZ: They were provided in sequential
6 production, Your Honor, according to the request of the
7 defendant. The discovery here was massive. I must say
8 that, everything in the record belies any suggestion that
9 the government had an interest in hiding information here.
10 The government exceeded, in almost every area, its statutory
11 obligations in terms of turning over materials.

12 QUESTION: How was it that it was two weeks prior
13 to trial that the lightbulb suddenly went off in the
14 prosecutor's head? How did that happen?

15 MR. SWARTZ: Your Honor, in reviewing the
16 materials prior to trial, in an excess of caution,
17 notwithstanding the position they have been taking before,
18 that these were Giglio materials, this material was
19 segregated. I'd like again to emphasize--

20 QUESTION: Would you go down through them? I know
21 your time is up, but I find this to be important. You have
22 told us--and as briefly as you can--that one of the four
23 Brady, let's just stick with the Brady items--was given
24 actually a year before trial.

25 MR. SWARTZ: That's correct, Your Honor.

1 QUESTION: Tell us what the other three were and
2 when people got them.

3 MR. SWARTZ: Out of the remaining three, one is a
4 statement by Marion Pines, who was a housing official in
5 Baltimore. I think the seriousness of defendant's argument
6 that that was important can be gauged by the fact that,
7 whereas Marion Pines had been listed as a witness by
8 defendant prior to our getting that material over, she was
9 thereafter not used as a witness by defendant,
10 notwithstanding her awareness of what apparently Ms. Pines
11 would say.

12 Similarly, with regard to Mr. Shelby and
13 Mr. Kitchin's statements. Those were statements that were
14 embedded in lengthy 302s or witness reports.

15 QUESTION: That would normally be kind of Jencks
16 material, wouldn't it?

17 MR. SWARTZ: Your Honor, they would normally be
18 part of Jencks material or Giglio material and that is--

19 QUESTION: It wouldn't be Jencks material, would
20 they?

21 MR. SWARTZ: Well, they testified, Your Honor, so
22 they were Jencks materials as well.

23 QUESTION: You don't mean to suggest that, if you
24 have material, if the prosecutor has material that looks
25 like it is exculpatory, it can justify not turning it over

1 to the defense on the grounds that it is Jencks material, so
2 it doesn't have to be turned over until the witness
3 testifies? That's ridiculous.

4 MR. SWARTZ: Your Honor--

5 QUESTION: That's not what he said.

6 MR. SWARTZ: The reason, Your Honor, that we did
7 turn it over in advance--

8 QUESTION: I'm worried about that. That would be
9 ridiculous.

10 MR. SWARTZ: Your Honor, yes. Let me say this.
11 Your Honor, the position that was taken before Judge
12 Gessell--and it is quite clear on the record--is that, there
13 would be a production of these materials, that is, the Brady
14 materials, separate Brady materials and the production of
15 Giglio materials some of the time.

16 QUESTION: But timing is very important here.

17 MR. SWARTZ: Yes, Your Honor.

18 QUESTION: If it is exculpatory, it is important
19 that it be turned over immediately. Jencks material doesn't
20 have to be turned over until after the witness testifies.

21 MR. SWARTZ: Yes, Your Honor. When the government
22 reanalyzed this material prior to trial, the decision was
23 made to make advance disclosure. Then when we realized that
24 there might be a question raised about the argument--

25 QUESTION: Are you saying that, in these

1 statements that were originally not turned over, it is your
2 excuse that the close calls that in the mass of material,
3 all of which was Jencks or Giglio or whatever kind of
4 material, you didn't do a careful enough job in scanning it
5 immediately to find those statements in there that might
6 properly be classified as Brady material, but that they were
7 close?

8 MR. SWARTZ: Yes, Your Honor, I think they were--

9 QUESTION: I'm just asking, is that your basic
10 excuse?

11 MR. SWARTZ: Yes, Your Honor, I think that is
12 certainly part of it. I think the problem arises from the
13 fact, as the Joint Appendix at 114 makes clear, that the
14 government was proceeding on the assumption that Giglio
15 material and witnesses' statements themselves would be
16 turned over at one time.

17 QUESTION: Even if a witness' statement said he
18 didn't do it?

19 MR. SWARTZ: Yes.

20 Well, Your Honor, of course, the problem is that,
21 the witnesses' statements here, as Your Honor noted, are
22 embedded in much broader statements.

23 QUESTION: It doesn't matter whether they are
24 embedded, does it?

25 MR. SWARTZ: Yes, Your Honor, that is correct.

1 That is why when the government reviewed the matter, it did
2 turn it over prior to trial.

3 QUESTION: What about prejudice then? If they had
4 been prejudiced, this excuse, I would agree with Judge
5 Silberman. It wouldn't amount to a hill of beans. Now,
6 what is your argument on the fact they weren't prejudiced?

7 MR. SWARTZ: Well, Your Honor, as Judge Hogan
8 found, they in fact were not prejudiced by this. They had,
9 under the Paxson standard, more than sufficient time to make
10 use of this material prior to trial.

11 QUESTION: Well, how much time? Two weeks except
12 for the Mitchell notes, right?

13 MR. SWARTZ: That's correct, which they had more
14 than a year before and the Pines materials which, of course,
15 they made no use of at all.

16 QUESTION: They didn't use as a witness.

17 MR. SWARTZ: In fact, both Kitchin and Shelby were
18 cross examined on these matters if they needed to be.
19 Kitchin didn't need to be, because he reiterated some of
20 this at trial himself.

21 There is no doubt, as Your Honors have pointed
22 out. We have reviewed our procedures in that regard. I do
23 think that, the record makes clear from the start, the
24 government was operating under a different approach as to
25 how the Jencks materials and the Giglio materials would be

1 turned over, which these fell into.

2 In any event, as Judge Hogan found, found prior to
3 trial, found during trial and after trial, there was no
4 prejudice here. Under the Paxson standard--

5 QUESTION: I have a couple of questions.

6 With respect to any of the mod rehab approvals
7 that are attributed either directly to Ms. Dean or
8 indirectly that she may have had some--were any of those mod
9 rehab units in violation of HUD regs? Were the units not
10 existent? Did the developers not do their job? Were they
11 not qualified? Did they in any way not comport with HUD
12 regulations?

13 MR. SWARTZ: Your Honor, there is no proof that
14 projects were not built. There was proof, however--

15 QUESTION: In fact, one of them got an award in
16 Philadelphia?

17 MR. SWARTZ: That's correct, Your Honor. There
18 was proof, however, from such individuals as the PHA
19 director from the Metro Dade area, Mel Adams and Pat Cherif
20 [phonetic], another witness from there, that the entire
21 system had been turned on its head by the actions of
22 defendant and her co-conspirators.

23 QUESTION: It was run out of HUD, not out of the
24 local--

25 MR. SWARTZ: It was not only run out of HUD, but