

1. TESTIMONY OF SUPERVISORY SPECIAL AGENT ALVIN R. CAIN, JR.

A critical issue in United States of America v. Deborah Gore Dean concerned whether Deborah Gore Dean was aware that former Attorney General John N. Mitchell earned HUD consulting fees. One immunized witness who retained Mitchell on a HUD matter testified that he deliberately concealed Mitchell's role from Dean. Mitchell's partner, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he knew or thought that Dean was aware of Mitchell's HUD consulting.

Dean denied knowing that John Mitchell earned HUD consulting fees until she read the HUD Inspector General's Report when it was issued in April 1989. The report had stated that Louie B. Nunn paid Mitchell \$75,000 for assistance in securing funding for the Arama project in 1984. Dean gave emotional testimony about calling HUD IG investigator Alvin R. Cain, Jr., who had prepared the report, to express her anger about statements in the report that Mitchell earned the \$75,000 consulting fee and to demand to know if there was a check proving that Mitchell earned that fee.

Dean started to testify as to what Cain had told her when she called him. A prosecution objection to that testimony would be sustained, however, so Dean would not be allowed to testify as to what Cain had told her.

Though OIC counsel would not cross-examine Dean about the call to Cain, the OIC called Cain as a rebuttal witness. Cain, who had been detailed to the OIC for the preceding three years, firmly stated that he had no recollection of any such call.

In closing argument, the prosecutor relied heavily on Cain's testimony in asserting that Dean lied when she testified that she did not know that John Mitchell had earned HUD consulting fees.

In support of a motion for a new trial, Dean argued that Cain was one of at least three government witnesses who lied and who the OIC knew or should have known had lied. (The others are Ronald L. Reynolds and Thomas T. Demery.) Dean provided an affidavit stating that when she asked Cain about the check from Nunn to Mitchell, he said it was maintained in the HUD regional office. Dean also stated that, after talking to Cain, she told James Scanlan what Cain had told her. Scanlan, a career government attorney, filed an affidavit stating that in April 1989, Dean had told him about the call to Cain and had said that Cain had told her the check was in a field office. Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.

In its opposition to Dean's motion, the OIC said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. In a reply, Dean noted that the OIC's failure to discuss the check suggested that the check was in fact

maintained in a field office in April 1989 and that the OIC did not have a plausible theory as to how she could have learned of that matter other than through her call to Cain.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the U.S. Probation Officer, the OIC relied on Cain's testimony in arguing that Dean committed perjury during her trial and should therefore have her sentence increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the Probation Officer agreed, recommending a two-level upward adjustment that would increase Dean's minimum sentence by six months.

On February 14, 1994, the court denied Dean's motion for a new trial. The court essentially agreed with Dean's claims that Reynolds and Demery lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Cain and the OIC's heavy reliance on Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the OIC's failure to respond regarding the whereabouts of the check in April 1989 is probative that the OIC knew that Cain lied.

Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the OIC's argument that Cain's testimony contradicting Dean showed that she lied during trial. Dean also argued that, whatever may have been the OIC's knowledge regarding the truth of Cain's testimony at the time of trial, the OIC had continued to rely on Cain's testimony having the additional information provided in the Dean and Scanlan affidavits as well as the opportunity to investigate such matters as the whereabouts of the check.

Dean requested the court to defer final ruling on her motion for a new trial and on the sentencing until the matter of the whereabouts of the check was resolved. Dean argued that, if the check was maintained in a field office in April 1989, there should be discovery as to whether the OIC knew or should have known that Cain committed perjury and whether such perjury should be imputed to the OIC.

At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. The OIC still refused to state what it knew about the check, but argued that Dean could have surmised that the check was maintained in a field office through a statement in the HUD Inspector General's Report. That statement, however, could not reasonably have provided a basis for Dean's knowledge. The court denied Dean's motion without indicating what it believed about who was telling the truth about the call.

Later in the day at the February 22, 1994 hearing, the court refused to accept the Probation Officer's recommendation to increase Dean's sentencing level on the basis of Cain's contradiction of Dean's statement about her call to him. The court stated that it believed that Dean may have in fact called Cain.

The court, however, accepted the Probation Officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement Dean had made that she did not know Mitchell that well until after she left HUD. In so ruling, the court relied on Dean's testimony about her call to Cain as evidence of the closeness of Dean's relationship to Mitchell. That reliance would only have made sense if the court accepted that Dean in fact had told the truth about the call to Cain.

Ultimately, the court would reconsider the obstruction of justice ruling, indicating that Deans' statement about Mitchell would only seem misleading when taken out of context.

2. TESTIMONY OF RONALD L. REYNOLDS

Ronald L. Reynolds is a HUD driver whom the OIC called as a rebuttal witness to testify that he had driven Dean Gore Dean to lunch in a HUD car when she told him she was having lunch with John Mitchell. The OIC recognized that Reynolds was not a credible witness. The court also recognized that the OIC recognized that Reynolds was not credible.

Despite the court's recognition of Reynolds' unreliability, the court, over defense objections, allowed Reynolds to testify during the OIC's rebuttal case. Reynolds then made statements during direct and cross-examination that the OIC had to know were false. Instead of correcting that testimony, the OIC attempted to rehabilitate Reynolds on redirect by eliciting further testimony that OIC counsel also knew had to be false. In light of the OIC's objections, the court denied Dean the opportunity for re-cross-examination of Reynolds and denied Dean the opportunity to present surrebuttal regarding Reynolds' testimony.

In closing argument, the prosecutor relied extensively on Reynolds' testimony in attacking Dean's credibility and mischaracterized Dean's own testimony in order to further contrast it with that of Reynolds.

Dean raised these matters in a Rule 33 Motion, inter alia, citing documentary material possessed by the OIC demonstrating that Reynolds' testimony was false.

Ruling on Dean's Motion, the court admonished the OIC for its use of Reynolds as a witness because the OIC knew he was not a believable witness and because documents in the OIC's possession showed that his statements were not true. The court nevertheless denied the motion for a new trial without discussing how Reynolds' testimony had been used to attack Dean's credibility.

3. ARAMA: THE JOHN MITCHELL TELEPHONE MESSAGES AND MAURICE BARKSDALE

Count One of the Superseding Indictment alleged that Deborah Gore Dean had caused 293 units of moderate rehabilitation subsidy to be allocated to Dade County, Florida in order to benefit John Mitchell. The units would go to a project called Arama of developer Art Martinez, who had retained former Kentucky governor Louie B. Nunn to assist in securing moderate rehabilitation funding. Nunn paid Mitchell \$75,000 for his assistance on the matter. The funding occurred as a result of documents signed by Assistant Secretary for Housing Maurice C. Barksdale in mid-July 1984, several weeks after Dean assumed the position of Executive Assistant.

John Mitchell had died in November 1988. Mitchell's files secured by the Office of Independent Counsel in May of 1992 contained telephone messages indicating that in January 1984, at the same time Nunn was working out a consulting agreement to secure 300 moderate rehabilitation units for Martinez, Mitchell was talking to Dean's predecessor, Lance H. Wilson, about securing 300 moderate rehabilitation units, and that Wilson had told Mitchell he was talking to Barksdale about the units. Though the Superseding Indictment alleged that Dean had caused the Arama funding to benefit Mitchell, the OIC would not turn the Mitchell messages over under Brady. Further, the OIC would eventually acknowledge that it had brought Barksdale before the grand jury and had called him to testify in court for the purpose of tying Dean to the Arama funding without ever confronting Barksdale with the information contained in the Mitchell message indicating that Wilson had been talking to him (Barksdale) about the matter. In eliciting Barksdale's testimony in court, the prosecutor focused the inquiry solely on the period after Wilson had left HUD, and asked no questions about the messages or about Wilson.

In support of her motion for a new trial, Dean pointed out that the failure to disclose the messages violated Brady. Dean also argued that the OIC had apparently never confronted Barksdale with the messages when preparing the indictment, presumably because the only recollections they might have refreshed would have been exculpatory as to Dean.

In its Opposition, the OIC acknowledged awareness of the messages but argued that it did not turn them over under Brady because they were as consistent with guilt as with innocence. The OIC also acknowledged that it never confronted Barksdale with the information on the messages, arguing that the government does not have an obligation "to seek out all potentially material evidence conceivably related to the defense."

4. PARK TOWERS: "THE CONTACT AT HUD";
DEAN'S KNOWLEDGE OF MITCHELL'S INVOLVEMENT;
THE POST-ALLOCATION WAIVER;
AND THE ELI FEINBERG TESTIMONY

Park Towers is a 143-unit moderate rehabilitation project in Dade County, Florida that was funded as a result of HUD actions in 1985 and 1986. The most important of these actions were the allocation of 266 moderate rehabilitation units at the end of November 1985 and the approval of a post-allocation waiver of certain HUD regulations in April 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Fine secured the services of a Miami consultant named Eli Feinberg in order to assist in securing HUD funding for Park Towers. Feinberg then secured the services of Washington consultant Richard Shelby, who then retained John Mitchell. Martin Fine wrote many memoranda to his file recording Shelby's progress on the Park Towers project. Usually, these memoranda would record what Feinberg had told Fine about that progress.

Count One of the Superseding Indictment alleged that Shelby had secured funding of Park Towers through a conspiratorial relationship with Mitchell and Deborah Gore Dean, and that Dean had facilitated the funding of Park Towers in order to benefit Mitchell, whom she considered to be her stepfather. The Superseding Indictment also alleged that Dean furnished internal documents to her co-conspirators, which they would then provide to the developers they represented. Fine ultimately would pay \$225,000 to Shelby's employer, The Keefe Company, which then paid Mitchell \$50,000 in connection with the Park Towers project.

The OIC included allegations in the Superseding Indictment intended to suggest that in a July 31, 1985 Martin Fine memorandum to the file relating to the Park Towers project, a reference to "the contact at HUD" whom Shelby was supposed to be meeting the following week was a reference to Dean and that the Park Towers project was discussed at a September 9, 1985 lunch attended by Dean, Shelby, and Mitchell. The Superseding Indictment was also intended to suggest that in late November 1985, Dean had provided Shelby a copy of a HUD document known as a rapid reply letter. More generally, the central premise of the Park Towers conspiracy charge was that Shelby had secured the services of Mitchell because of Mitchell's relationship to Dean and that Dean had caused Park Towers to be funded in order to benefit Mitchell.

Before the Superseding Indictment had been issued, however, Shelby, already under a grant of immunity, had informed representatives of the OIC that "the contact at HUD" referenced in the July 31, 1985 Martin Fine memorandum was not Dean, but a Deputy Assistant Secretary named Silvio DeBartolomeis, and that almost all of his (Shelby's) HUD contacts on Park Towers were with DeBartolomeis. The OIC had no reason to disbelieve this. Various other Martin Fine memoranda discussed Shelby's meetings with DeBartolomeis concerning Park Towers, particularly with regard to a

post-allocation waiver, and recorded that in March 1986 DeBartolomeis had advised Shelby that he (DeBartolomeis) would approve the waiver. DeBartolomeis then signed the waiver in April 1986. Documents in the OIC's files also showed that DeBartolomeis had immediately provided a copy of the waiver to Shelby, which Shelby then sent to Fine. DeBartolomeis was an immunized OIC witness as well.

Before the Superseding Indictment was issued, Shelby had also informed representatives of the OIC that Park Towers was not discussed at the September 9, 1985 lunch he had with Dean and Mitchell and that he had gone out of his way to ensure that it was not discussed. Shelby also stated that, to the best of his knowledge, Dean did not know that Mitchell was involved with the Park Towers project. Shelby indicated that he had retained Mitchell before he knew of Mitchell's relationship with Dean, and, after learning of the relationship, no longer sought Mitchell's assistance. Shelby had also informed representatives of the OIC that someone other than Dean had provided the rapid reply letter to him.

Although in June 1992 the court ordered the OIC to provide any exculpatory material to Dean as soon as it was discovered, none of the above information would be provided to Dean for more than a year, with counsel for the OIC explicitly representing to the court that they were aware of no exculpatory material.

Just prior to trial, the OIC made a Brady production that included statements of Shelby that "the contact at HUD" referenced in the July 31, 1985 Martin Fine memorandum was not Dean and that he believed that Dean did not know of Mitchell's involvement in Park Towers (though the OIC did not then provide certain other statements by Shelby that also specifically contradicted inferences in the Superseding Indictment). At that time, the OIC represented to the court that the exculpatory statements then being provided did not fall under Brady because witnesses had qualified their statements over time. That explanation, however, applied to none of the Shelby statements then being produced, nor did it appear to apply to any of the other material produced at that time.

At the beginning of trial, the OIC produced massive Jencks materials that included further information specifically contradicting inferences contained in the Superseding Indictment.

Appearing as an immunized government witness, Shelby testified, consistent with his prior statements, that most of his contacts on Park Towers were not with Dean, but with DeBartolomeis. The OIC would not question Shelby about the Martin Fine memorandum referencing "the contact at HUD" or about the upcoming meeting that was discussed in the memorandum. Instead, after Shelby testified, the OIC would introduce that document through Fine, without eliciting comment regarding its contents.

The OIC would question Shelby whether he reviewed any documents "to refresh [his] recollection as to who he dealt with at HUD" on the Park Towers project. Shelby's answers revealed that on the previous evening he had been shown all documents referencing his contacts with Dean, but had not been shown the various documents referencing his contacts with DeBartolomeis and specifically relating to Park Towers.

More generally, the OIC would question Shelby, Feinberg, and Fine in a manner to allow the OIC later to lead the jury and the courts to believe that the following propositions were true, even though statements of its immunized witness and other materials in its files indicated that the propositions were not true:

- that the reference to "the contact at HUD" was a reference to Dean
- that Park Towers was discussed at the September 9, 1985 lunch attended by Shelby, Mitchell, and Dean
- that Dean provided Shelby a copy of the rapid reply
- that Dean had been responsible for the post-allocation waiver of HUD regulations that allowed the Park Towers project to go forward
- that Dean had provided Shelby a copy of that waiver
- that Shelby concealed his contacts with Dean from Feinberg and Fine
- that Shelby concealed Mitchell's involvement from Feinberg and Fine

In presenting evidence to allow it later to lead the jury and/or the trial and appellate courts to believe that these propositions were true, the OIC was materially aided by its delinquent disclosure of materials directly contradicting various propositions. As in the case of "the contact at HUD," the OIC employed the tactic of placing materials in the record in order to create false impressions without eliciting from its immunized witness Shelby and others, including the OIC's immunized witness DeBartolomeis, testimonial evidence that the OIC knew would contradict the impression. For example, with regard to the September 9, 1985 lunch, knowing that Shelby would testify that he had gone out of his way to ensure that Park Towers was not discussed at the lunch, the OIC avoided asking him about it. Dean's counsel, who had been provided copies of the interviews containing Shelby's statement that Park Towers was not discussed at the lunch as part of a massive Jencks production three days before Shelby testified, did not raise the matter either. Ultimately, the suggestion that Park Towers was discussed at the September 9, 1985 lunch attended by Shelby, Mitchell, and Dean would be the OIC's principal evidence that Dean was aware that Mitchell had earned a fee on Park Towers.

The OIC would also place in the record a memorandum that referred to Dean as Shelby's "friend at HUD" without eliciting testimony regarding the contents of the memorandum. The OIC then would later argue that the failure to name Dean in the memorandum reflected Shelby's concealment of his contacts with Dean from Feinberg and Fine, even though the OIC knew with certainty that Shelby had not concealed those contacts.

Similarly, the post-allocation waiver that Shelby had faxed to Fine would be introduced through Fine after Shelby had already testified and without eliciting from anyone how Shelby had secured a copy of the document. The OIC then would attempt to lead the jury and the court to believe that Dean had provided Shelby the document, even though the OIC was possessed of a letter in which Shelby had informed Feinberg that he had received the document from DeBartolomeis.

In acknowledging that during closing argument the prosecutor had sought to cause the jury to believe that Dean was the person referred to as "the contact at HUD" in the July 31, 1985 Martin Fine memorandum, the OIC would justify that action on the basis of Shelby's testimony that when refreshing his recollection, he had seen documents that referenced his contacts with Dean but had not seen documents that referenced his contacts with DeBartolomeis. The OIC would also justify its action on the basis that Dean had been responsible for the post-allocation waiver, with the Deputy Independent Counsel stating to the court that Dean had been responsible for the waiver, even though the OIC knew with absolute certainty that Dean had not been responsible for the waiver.

The OIC's misconduct with regard to Park Towers, however, was not limited to misleading the jury and the courts on the basis of a partial record. Evidence suggests that with regard to a key element of the OIC's contentions regarding Park Towers, the OIC also intentionally elicited sworn testimony that the OIC's attorneys had compelling reason to believe was false.

The Superseding Indictment had alleged that the co-conspirators involved in Count One would tell their developer/clients that Mitchell was Dean's stepfather. Ultimately, however, OIC would argue that Shelby had concealed Mitchell's involvement from Feinberg and Fine, and that argument would play a large role in the OIC's attempt to show that Shelby, Mitchell, and Dean were involved in a conspiratorial relationship. The OIC would also argue that Mitchell's involvement with a project in Count One called Arama had been concealed from the developer of that project.

With regard to Park Towers, the key testimony in this regard would be that of Eli Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Feinberg of May 18, 1992, Shelby, already under a grant of immunity, had twice told representatives of the OIC that he (Shelby) had told Feinberg about Mitchell's involvement, and assumed that Feinberg told Fine. In the telephonic interview of May

18, 1992, Feinberg then stated that he was not aware of Mitchell's involvement. Feinberg's interview report indicates that he was not at that time advised by the OIC that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, Shelby was apparently advised by the OIC that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of Feinberg's involvement in determining Mitchell's fee. Even though there were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement, apparently between the time of Feinberg's May 18, 1992 telephonic and his being called to testify under oath, on September 17, 1993, that he was unaware of Mitchell's involvement, the OIC never confronted Feinberg with Shelby's statements.

Without advance notice, the OIC would put Shelby on the stand out of order and ahead of Feinberg. Then, though knowing beyond any doubt that its immunized witness Shelby would deny that he had concealed Mitchell's involvement from Feinberg, OIC counsel would avoid any questions that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, OIC counsel changed the subject. After Shelby had testified, the OIC then called Feinberg, and, despite the evidence that such testimony would be false, OIC counsel directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement. The OIC then elicited sworn testimony to the same effect from Fine.

In closing argument, in addition to seeking to cause the jury to draw various false inferences already discussed, OIC counsel would give special attention to the testimony that Feinberg and Fine were unaware of Mitchell's involvement, asserting that such concealment was "the hallmark of conspiracy." And despite knowing with complete certainty that the OIC's immunized witness Shelby would have contradicted Feinberg's testimony, and having strong reason to believe that Feinberg's testimony was in fact false, OIC counsel would make a special point of the fact that the testimony was unimpeached.

In Dean's motion for a new trial, she raised a number of issues involving the matters discussed above. Dean did not, however, raise an issue regarding the use of Feinberg's testimony, and there is no indication that her counsel was aware of Shelby's statements contradicting Feinberg. Yet, in support of the issues Dean did raise, she provided two lengthy reports of interviews of Shelby that happened to contain Shelby's statements that Feinberg was aware of Mitchell's involvement with Park Towers. Evidently aware that documents had been placed in the record that included Shelby's statements that Feinberg knew of Mitchell's involvement, the OIC in its appellate brief would no longer rely on Feinberg's testimony that he was unaware that Mitchell was involved with Park Towers. The OIC would, however, continue to place great emphasis on Shelby's concealment of Mitchell's role, but in doing so, the OIC would rely solely on Fine's testimony, ignoring that Fine principally relied on what Feinberg told him.

5. TESTIMONY OF THOMAS T. DEMERY

Appearing pursuant to a cooperation agreement with the Office of Independent Counsel, former Assistant Secretary for Housing Thomas T. Demery explicitly and repeatedly testified on cross-examination that he had not lied when he previously testified under oath before Congress. The OIC knew that Demery was committing perjury when he denied having lied to Congress. The OIC had previously indicted Demery for lying to Congress when he denied knowing that certain developers were involved with the moderate rehabilitation program. The OIC and Demery reached a plea agreement that did not involve a perjury charge, but in the course of negotiating that agreement, Demery had admitted that he had known that the developers were involved in the moderate rehabilitation program.

After Demery lied under oath during his cross-examination, the OIC did not fulfill the government's obligation to reveal the perjury of its witness. Instead, on redirect, OIC counsel proceeded to elicit the most important part of Demery's testimony. Later, in closing argument, OIC counsel would accuse Dean of falsely accusing Demery of having lied, adding that Dean "is the only we know who definitively did lie."

Dean raised this issue in her motion for a new trial. In defending its failure to reveal Demery's perjury, the OIC OIC made a number of evasive arguments, while never acknowledging that it knew Demery had lied during his testimony.

In ruling on Dean's motion for a new trial, the court accepted that the OIC knew that Demery had previously lied to Congress, but treated the matter as if it were a Brady issue, and did not address the implications of Demery's further perjury in this case.

6. THE RUSSELL CARTWRIGHT RECEIPT

The OIC cross-examined Dean with an expense record of a consultant named Russell Cartwright indicating that Cartwright paid for an October 1987 dinner for Dean and a HUD employee named Abbie Wiest. When Dean denied that she ever had dinner with Cartwright, the prosecutor badgered her into saying the receipt must be false. The prosecutor then relied on Dean's denial of the receipt in attacking her credibility in closing argument, arguing that though Dean asserted that "all Russell Cartwright's receipts are lies," her calendars showed that she often met with him for lunch.

In support of her motion for a new trial, Dean argued that the OIC knowingly confronted her with a false receipt in order that she would deny it and the OIC could then assert to the jury that she had lied when she stated that other persons had created false receipts. Dean showed that Wiest had told the grand jury that she (Wiest) was certain that Dean was not at the October 1987 dinner in question. Dean also stated that her calendars show no meeting of any sort with Russell Cartwright.

Dean advised the court that the OIC had been requested to produce material on its contacts with Cartwright to show whether Cartwright also told the OIC that Dean was not at the dinner.

The OIC did not respond to Dean's request for information on Cartwright. It responded evasively in its Opposition to Dean's motion. In the Opposition, the OIC offered no reason for questioning Wiest's statement that Dean was not present at the October 1987 dinner and did not challenge the statement in Dean's Memorandum that Cartwright never appears in Dean's calendars at all. The OIC made no reference whatever to what Cartwright had told it about the receipt.

At a February 14, 1994 hearing, the court denied Dean's motion for a new trial. The court viewed the Cartwright receipt solely in terms of the OIC's failure to ensure that the receipt was valid. In a motion for reconsideration, Dean emphasized that her position was that the OIC had knowingly used a false receipt in order to cause her to deny it and thereby allow the OIC to argue that she had lied. Dean argued that the court should not rule until the OIC produces the requested material on Cartwright.

At February 22, 1994 hearing, the OIC responded orally attempting to divert court to separate issue of whether Dean ever ate with Cartwright. The OIC produced certain Cartwright grand jury testimony, solely for the court's examination, that OIC counsel maintained provided support for questioning Dean about the receipt, though acknowledging that Cartwright had testified that he at times submitted false receipts. The court refused to allow Dean's counsel to review the material and denied Dean's request to have Cartwright called as a witness. The court denied Dean's motion without revealing the content of the Cartwright grand jury testimony, though seeming to

suggest that the testimony somewhat supported Dean's argument that the OIC did not believe that Dean was at the event in question.

7. THE ANDREW SANKIN RECEIPTS

In the Superseding Indictment, the OIC relied on eight receipts of Andrew Sankin to establish meetings between Sankin and Dean and one receipt to show a gift from Sankin to Dean. These receipts each bore a notation whereby Sankin had referenced Dean or her title, though most of the receipts were not consistent with Dean's calendars. The OIC sought to introduce these receipts at trial.

At trial, the OIC also sought to introduce nine receipts bearing notations referencing unspecified HUD officials or titles other than Dean's. The OIC sought to cause the jury to believe that these receipts also applied to Dean notwithstanding the failure of the receipt to reference her by name or title and, in some cases, other evidence showing that the receipts had not applied to her. The OIC had not relied on these receipts in the Superseding Indictment, evidently reflecting the OIC's view that they did not apply to Dean. Nevertheless, the OIC refused to review the receipts with Sankin before attempting to introduce them at trial.

After the OIC presented the receipts in a manner that would lead the court and the witness to believe that all the receipts were being introduced because they related to Dean, Sankin advised the prosecutor that many of the receipts did not relate to Dean. The prosecutor did not disclose that statement to the court or the defense. Instead, on the following day, the prosecutor questioned Sankin about a receipt that unequivocally related to Dean, thereby reinforcing the impression that all the receipts related to Dean.

During cross-examination Sankin revealed the off-the-stand statement he had made to the prosecutor. During a bench conferences that followed, the prosecutor stated that he had refused to review the receipts with Sankin before he testified. The prosecutor also indicated the view that, if any receipts did not relate to Dean, that is a matter for the defense to show.

In the charts used by the OIC in closing argument, the OIC relied on receipts admitted into evidence even though they did not name Dean and even though testimony had made clear that they did not apply to Dean.

When Dean raised these matters in support of her motion for a new trial, the OIC responded evasively. It also asserted that it had not reviewed the receipts with Sankin because of Sankin's hostility toward the OIC's case.

The court expressed the view that it had never heard of a federal prosecutor failing to review evidence with a witness because of the witness' hostility and that the court expected that any Assistant United States Attorney would have immediately informed the court and defense counsel of Sankin's off-the-stand statement. It is clear,

however, that the prosecutor knew that many of the receipts did not apply to Dean before Sankin had made his off-the-stand statement.

8. KITCHIN'S DELIVERY OF THE ATLANTA REQUEST

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.

9. DEAN'S STATEMENT THAT SHE WAS NOT THAT CLOSE TO MITCHELL UNTIL AFTER SHE LEFT HUD

In closing argument the prosecutor took a passing remark by Deborah Gore Dean out of context in order to assert to the jury that Dean had lied in making the remark. When Dean challenged this action in her motion for a new trial, the OIC responded defensively. Nevertheless, the OIC relied on the same remark, misleadingly presented, to successfully persuade the U.S. Probation Officer to increase the recommended sentence on grounds that Dean obstructed justice by falsely testifying about her relationship with Mitchell. For a time, the court followed the Probation Officer's recommendation, but later concluded that Dean's remark had appeared to be misleading only when taken out of context.

10. CLOSING ARGUMENT CHARACTERIZATION OF TESTIMONY
ON THE DADE COUNTY SELECTION

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.

SUPPLEMENT I

NUNN'S ANNOTATION REGARDING MITCHELL'S RIGHT TO HALF THE ARAMA CONSULTANT FEE

In the Superseding Indictment in United States of America v. Deborah Gore Dean, the Office of Independent Counsel alleged that the co-conspirators involved in Count One would tell their developer/clients of their association with John Mitchell, who was Deborah Gore Dean's stepfather. Consistent with that theme, the OIC included allegations in the Superseding Indictment indicating that on January 25, 1984, the day that Louie B. Nunn entered into a consultant agreement with developer Aristides Martinez to secure moderate rehabilitation funding for the Arama project, Nunn wrote on the agreement that Mitchell was to be paid half of the consultant fee. All actions the OIC took with regard to this matter -- including the words chosen in the Superseding Indictment and the presentation in the OIC's summary charts, as well as the actions the OIC took in selecting, introducing, and calling attention to the various copies of agreements between Nunn and Martinez introduced into evidence -- were calculated to support the interpretation that Nunn had annotated the consultant agreement on January 25, 1984, and that, consistent with Nunn's annotating the agreement at the time it was originally executed, Martinez possessed a copy of the agreement bearing Nunn's annotation.

Yet, Nunn would not make that annotation until the original agreement had been modified in several respects, including the addition of a guarantee by the three general partners of Arama Limited, and Nunn would not have a copy of the agreement bearing that guarantee until subsequent to April 3, 1984. There is no reason to think that Martinez ever saw a copy of the annotated agreement. The OIC thus introduced documents into evidence representing them to be things other than what the OIC knew them to be.

The court prevented the OIC from eliciting from Martinez that he had been told by Nunn or Mitchell that Mitchell was Dean's stepfather, as the OIC had alleged in the Superseding Indictment. Possibly because of being denied the opportunity to elicit that testimony, the OIC eventually would change its approach. Instead of arguing that Nunn had emphasized Mitchell's involvement with the Arama project to Martinez, the OIC argued that Nunn had concealed Mitchell's involvement from Martinez. The OIC would make that argument despite knowing with absolute certainty that Nunn had not concealed Mitchell's involvement with Arama from Martinez and despite in-court testimony from Nunn as to his discussions with Martinez about involving Mitchell. In making this argument, the OIC also had to ignore the various exhibits that it had placed in evidence that demonstrated, though falsely, that Martinez possessed a copy of the consultant agreement bearing the annotation indicating that Mitchell was to receive half the consultant fee.