

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

*Summary: 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 possessed 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, the 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 interview 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.*

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Attachments:

1. Martin Fine memorandum of July 31, 1985
2. Park Towers Chronology, with attached Martin Fine memoranda of February 5, 1986, March 4, 1986, April 5, 1986, and letter from Fine to Eli Feinberg dated February 14, 1986
3. August 20, 1993 letter from Associate Independent Counsel Robert E. O'Neill and Paula A. Sweeney to Stephen V. Wehner
4. August 29, 1993 letter from Associate Independent Counsel Robert E. O'Neill and Paula A. Sweeney to Stephen V. Wehner
5. Listing of Jencks Material provided by the Office of Independent Counsel
  - 5a. Report of Interview of Eli Feinberg on May 15, 1992
  - 5b. Report of Interview of Richard Shelby on May 19, 1992
  - 5c. Report of Interview of Aristides Martinez on May 18, 1992
  - 5d. June 5, 1986 letter from Richard Shelby to Eli Feinberg
6. OIC 's Park Towers Chart
7. Revised Presentence Investigation Report, pp. 1, 6, 47 (Feb. 7, 1994)

Principal References:

1. Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal at 14-15, 17 (Oct. 4, 1993) ("Gov. Acq. Opp.")



2. Government's Supplemental Opposition to Defendant Dean's Motion for Judgment of Acquittal at 16-18 (Oct. 29, 1993) (Gov. Supp. Acq. Opp.)
3. 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 95-107, 201-03 (Nov. 30, 1993) ("Dean Mem.")
4. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 (Dec. 21, 1993) at 4-10, 49 ("Gov. Rule 33 Opp.")
5. Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(c) and (d) at 16, 19, 22-23 (Dec. 21, 1993) ("Gov. Rule 29 Opp.")
6. Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial at 2, 5-7, 17-18 (Jan. 7, 1994) ("Dean Reply")
7. Brief of the United States of America as Appellee, United States v. Deborah Gore Dean, No. 94-3021 (D.C. Cir., Sep. 16, 1994) at 5, 24 ("Gov. App. Br.")

A. Background

1. Judge Gesell's Instructions Regarding  
Brady Material

Deborah Gore Dean was originally indicted on April 28, 1992. At a hearing on May 6, 1992, the Honorable Gerhard A. Gesell admonished the Office of Independent Counsel ("OIC") as to the importance of being forthcoming with regard to Brady material, stating:

... we ought to have an understanding that, without any question, that the Brady material that's in the -- a generous interpretation of existing rules -- ought to be turned over because the prosecutor has an obligation to lean backwards on Brady, not lean forward.

Transcript of Hearing at 26.

Associate Independent Counsel Jo Ann Harris expressed complete agreement with Judge Gesell's views: "Absolutely agreed, Judge." Id.

In a hearing on June 3, 1992, Judge Gesell again admonished the OIC concerning the OIC's Brady obligations:

If you have some exculpatory material of any kind that really relates to the kind of information that the defendant is entitled to in order to frame its own defense in part, as I understand Brady, you have got an obligation to turn that over right away, as soon as you know it.

Transcript of Hearing at 8.

Associate Independent Counsel Harris responded: "I do want to recognize our obligation should we come across anything like that to turn it over when we find it." Id. at 9-10.

Judge Gesell then asked: "Well, do you have any of it that you know of? Now?." Id. at 10.

Harris responded: "Not to my knowledge, Your Honor." Id.

The OIC would adhere to the position that its attorneys were aware of no exculpatory material for more than fourteen months.

At the time of Harris's June 3, 1992 representation to Judge Gesell that she was aware of no Brady material in the OIC's possession, Dean was subject only to her original indictment. That indictment was more limited in scope than the Superseding

Indictment and contained allegations that would later form parts of Counts 3 and 4 of the Superseding Indictment. Even as to the limited issues raised in the initial indictment, however, the OIC possessed materials that qualified as Brady material at the time of Harris's representation to the contrary to Judge Gesell.<sup>1</sup>

2. Allegations in the Superseding Indictment  
Regarding Park Towers

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<sup>1</sup> Among the materials that the OIC would eventually provide as Brady material fourteen months later were at least two statements taken prior to June 3, 1992, that directly related to issues in the first indictment. That indictment involved allegations that Dean had accepted a gratuity from Atlanta consultant Louis Kitchin for official acts in late 1986 and early 1987. The first Brady statement directly relating to those allegations was an April 13, 1992 statement by Kitchin that Dean had done no favors for him at HUD and that he had not given Dean money in return for any official acts. The second statement was a May 15, 1992 statement by Florida Developer Claude Dorsy that at some point in time Kitchin indicated that he was working with Thomas Demery. See Dean Mem. at 97 n.70; see generally Narrative Appendixes styled "Testimony of Thomas T. Demery" and "Closing Argument Characterization of the Dade Selection."

The principal matters addressed in this appendix, however, involve the Superseding Indictment, issued on July 6, 1992, and allegations contained in Count One of that Indictment related to a 143-unit moderate rehabilitation project in Dade County, Florida called Park Towers. Count One alleged a conspiracy among Dean, John Mitchell (identified as Co-conspirator One)<sup>2</sup> and Richard Shelby (identified as Co-conspirator Three) with regard to securing HUD funding for the Park Towers project. Park Towers was one of three moderate rehabilitation projects that were the subject of the conspiracies charged in Count One. With regard to the two others, Arama (funded in 1984) and South Florida I (funded in 1986), Dean was alleged to have conspired with Mitchell and former Kentucky governor Louie B. Nunn.<sup>3</sup>

The Superseding Indictment alleged that Shelby had retained Mitchell to assist in securing moderate rehabilitation funding for Park Towers. Shelby was working with a Miami attorney and consultant named Eli Feinberg and was seeking funding for a property owned by a Miami attorney and developer named Martin Fine. Fine had originally contacted Feinberg in early 1985. Feinberg contacted Shelby, who then retained Mitchell. The Park Towers project came to fruition as a result of HUD's sending 266 units to Dade County in November 1985, with the funding documents signed by Acting Assistant Secretary for Housing Janet Hale, and as a result of certain waivers signed in 1986 by then Acting Assistant Secretary for Housing Silvio DeBartolomeis.

Central to each of the conspiracies charged in Count One were the allegations that Dean had considered Mitchell her stepfather and that she had facilitated HUD's funding of projects in order to benefit Mitchell and his co-conspirators. In the section of the Superseding Indictment styled "Goals of the Conspiracy Charged in Count One," it was alleged:

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<sup>2</sup> When Dean learned that the Superseding Indictment was to name John Mitchell as an alleged co-conspirator with regard to three projects in Count One, she sought to have Independent Counsel Arlin M. Adams recused from the case. Citing an April 11, 1990 USA Today article in which Adams had been quoted as observing that he might have been on the Supreme Court had he not offended John Mitchell (Attachment 8 to Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."), Dean wrote to Attorney General Richard Thornburgh and to Adams himself, requesting that Adams be recused or recuse himself from any further role relating to matters involving John Mitchell. Thornburgh and Adams both summarily denied Dean's request.

<sup>3</sup> See Narrative Appendix styled "Arama: The John Mitchell Messages and Maurice Barksdale."

10. It was a goal of the conspiracy that the defendant **DEBORAH GORE DEAN** would use her official position to benefit and enrich herself and her family, and in particular Co-conspirator One [Mitchell], whom she considered to be her stepfather and a family member.

11. It was a further goal of the conspiracy that the defendant **DEBORAH GORE DEAN** would use her official position to benefit and enrich her other Co-conspirators, who had retained Co-conspirator One for the purpose of obtaining HUD benefits, and that they would in fact be benefited.

Superseding Indictment at 10.

The Superseding Indictment further stated with regard to Count One:

It was further part of the conspiracy that the Co-conspirators would tell developer/clients that the defendant Deborah Gore Dean was Co-conspirator One's stepdaughter.

Superseding Indictment at 11 ¶ 16.

The charge relating to Park Towers rested on the inferences that Shelby had retained Mitchell because of Mitchell's relationship to Dean and that Dean had then facilitated the funding of Park Towers to benefit Mitchell. In support of those inferences, the Superseding Indictment made the following specific allegations about Shelby's contacts with Mitchell and Dean between May 1985 and February 1986:

60. On or about May 23, 1985, Co-Conspirator One [Mitchell] met with Co-Conspirator Three [Shelby].

61. On or about May 30, 1985, Martin Fine, a Florida attorney with an interest in a project known as the Park Towers Apartment Building Project, in Dade County, Florida, wrote a letter to Eli Feinberg, an associate/client of Co-conspirator Three, regarding an agreement for Feinberg to obtain an allocation of HUD Mod Rehab funds for the Park Towers project, and suggesting a fee of \$150,000 if the unit allocation was obtained before December 31, 1985. Feinberg entered into an agreement with Co-conspirator Three for the purpose of obtaining these units.

62. On or about June 20, 1985, the defendant **DEBORAH GORE DEAN** wrote a letter to Co-Conspirator Three.

63. On or about July 11, 1985, Martin Fine entered into a letter agreement with Eli Feinberg, increasing the total fee for obtaining an allocation of Mod Rehab units for Park Towers to \$225,000.

64. On or about July 31, 1985, Martin Fine had a conversation with Eli Feinberg, in which Feinberg said that "our friend is meeting with the contact at HUD this coming week."
65. On or about August 1, 1985, Co-conspirator Three was scheduled to meet with the defendant **DEBORAH GORE DEAN**.
66. On or about August 9, 1985, Co-conspirator Three met with the Defendant **DEBORAH GORE DEAN**.
67. On or about September 9, 1985, the defendant **DEBORAH GORE DEAN** met with Co-conspirator One and Co-Conspirator Three.
68. On or about September 10, 1985, Co-conspirator Three sent a letter to the defendant **DEBORAH GORE DEAN** enclosing information regarding the Park Towers project.
69. On or about November 22, 1985, Co-conspirator Three met with defendant **DEBORAH GORE DEAN**.
70. On or about November 26, 1985, the defendant **DEBORAH GORE DEAN** facilitated and caused to be facilitated the award of 143 Mod Rehab units to the Metro-Dade PHA, with a yearly contract authority of approximately \$935,000, and an overall budget authority of approximately \$14,000,000.
71. On or about November 27, 1985, Co-conspirator Three obtained an internal HUD funding document, dated November 26, 1985, known as a "Rapid Reply Letter," indicating that Mod Rehab units had been awarded to the PHA for Metro-Dade, Florida.
72. On or about November 27, 1985, Co-conspirator Three caused his employer to fax a copy of the "Rapid Reply Letter," dated November 26, 1985, to Martin Fine in Florida.
73. On or about November 27, 1985, Co-conspirator Three's employer sent a bill for \$45,000 to the developer of Park Towers Apartment, per a July 18, 1985 agreement requiring the payment of \$45,000 if an allocation of Mod Rehab units specifically for Park Towers Apartments was obtained before December 31, 1985.
74. On or about January 17, 1986, the developer of Park Towers Apartments sent a check for \$45,000 to the company that employed Co-conspirator Three.

75. On or about February 3, 1986, Co-conspirator Three met with the defendant **DEBORAH GORE DEAN** and discussed a waiver of HUD regulations in connection with Park Towers Apartments.

76. On or about February 4, 1986, Co-conspirator Three's employer sent a check to Co-conspirator One in the amount of \$10,000.

Superseding Indictment at 20-23 (emphasis added).

These allegations were evidently intended to imply, as the OIC would eventually acknowledge, that "the contact at HUD" referenced in Paragraph 64 was Dean. They were also intended to imply that, consistent with the theory that Shelby had retained Mitchell because of his (Mitchell's) relationship with Dean, that Park Towers was discussed at the September 9, 1985 meeting among Dean, Mitchell, and Shelby. The allegations apparently were also intended to suggest that Shelby acquired the rapid reply referenced in Paragraph 70 from Dean.<sup>4</sup>

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<sup>4</sup> Certain of the allegations, including the allegation in Paragraph 71 regarding Shelby's securing the internal memorandum, must be interpreted through reference to the "Manner and Means" section of the Superseding Indictment, which alleged that Dean would provide internal documents to her co-conspirators who then would provide them to the developers. Similarly, although the November 1985 funding of Dade County that would benefit Park Towers was actually for 266 units (Gov. Exhs. 78 and 81), the funding of 143 units was consistent with a theme, pursued by the OIC in the Superseding Indictment and in argument, that awards were made for the specific number of units sought by a particular developer.

The pertinent paragraphs in the "Manner and Means..." section of the Superseding Indictment were the following:

17. It was further part of the conspiracy that the defendant **DEBORAH GORE DEAN** would facilitate the awards of Mod Rehab units in the amounts sought by her Co-conspirators.

18. It was further part of the conspiracy that the defendant **DEBORAH GORE DEAN** would provide internal HUD documents and information to her Co-conspirators.

19. It was a further part of the conspiracy that the Co-conspirators would provide their developer/clients with the internal HUD documents and information provided by the defendant **DEBORAH GORE DEAN**.

3. Information Possessed by the OIC Contradicting Inferences in the Superseding Indictment

Yet, prior to the issuance of the Superseding Indictment containing these inferences, Richard Shelby, already under a grant of immunity, had told representatives of the OIC that none of the above inferences, including the inference that Shelby had retained Mitchell because of Mitchell's relationship with Dean, was true.

In interviews with the OIC conducted on April 8 and 16, 1992, and May 6, 1992, Shelby had been shown the July 31, 1985 memorandum to the file by Martin Fine that formed the basis for Paragraph 64. In the memorandum ((Attachment 1 hereto), Fine stated that he had been informed by Eli Feinberg that "our friend is meeting with the contact at HUD this coming week." The interview report indicated that Shelby "acknowledged that 'our friend' referred to him (Shelby)," but stated that "the contact at HUD" did not refer to Dean. The report stated:

Shelby believed that 'the contact at HUD' meant [Silvio] DeBartolomeis rather than Dean, because as of August, 1985, most of his contacts at HUD regarding Park Towers had been with DeBartolomeis and usually with DeBartolomeis alone, although not behind closed doors. Shelby reported that Cushing came in the office one time when Shelby was meeting with DeBartolomeis. By the time of Fine's July 31, 1985 memo, Shelby had known Dean at most six weeks.

Dean Mem., Exh. CC at 8.

Silvio DeBartolomeis was at that time Deputy Assistant Secretary for Multi-family Housing, whom in various places Shelby had identified as his principal contact on the Park Towers project. In a December 13, 1988 interview with investigators from the HUD Inspector General's Office, Shelby had stated with regard to Park Towers that "the majority of his contacts were with DeBartolomeis. However, he did speak to Dean and [Hunter] Cushing about Park Towers on one or two occasions."<sup>5</sup> On May 17, 1989, Shelby had told the Senate Banking Committee that with regard to Park Towers, "probably 98% of all my conversations, contacts, et cetera, were with Mr. DeBartolomeis." Transcript at 107.<sup>6</sup>

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<sup>5</sup> 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 752.

<sup>6</sup> Earlier in the same interview in which Shelby stated that he believed DeBartolomeis was "the contact at HUD" referenced in the July 31, 1985 Fine memorandum, he had stated:

Before TKC [Shelby's employer, The Keefe Company] decided to move



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forward, Shelby had talked to Silvio DeBartolomeis of HUD headquarters in Washington, D.C. (HUD Central) about the project. Shelby did not believe that he knew DeBartolomeis before that, but it was possible that their paths had crossed. Shelby believed that he telephoned DeBartolomeis, and that possibly TKC had given him the telephone number.

Thereafter, Shelby met with DeBartolomeis. At the outset, they focused on the application process, and whether Park Towers was suitable property for Mod Rehab funding. DeBartolomeis told Shelby what was required for a project to be eligible for Mod Rehab and told Shelby to provide him with all the information on the project so he could take a look at it.

Shelby actually met with DeBartolomeis two to four times and had numerous telephone conversations with him about Park Towers. The nature of the contacts were Shelby asking if HUD had gotten the application and if it was in order, and about the timing of the selection process. Shelby's later contacts with DeBartolomeis were for status reports, and other substantive issues that came up. Shelby reported back to Fine and Feinberg about the results of his contacts with DeBartolomeis. About 90% of Shelby's contacts at HUD regarding Park Towers were with DeBartolomeis.

Apart from the July 31, 1985 Martin Fine memorandum referencing "the contact at HUD," various Martin Fine memoranda impliedly or explicitly referenced Shelby's contacts with DeBartolomeis with regard to the securing of certain waivers that were necessary in order for Park Towers ultimately to be approved for moderate rehabilitation subsidy. See Park Towers Chronology (Attachment 2 hereto).

In the same interview in which Shelby told representatives of the OIC that he believed that DeBartolomeis was "the contact at HUD" referenced in the Fine memorandum of July 31, 1985, Shelby had also informed the OIC that he did not believe that Dean knew about Mitchell's involvement with Park Towers. With regard to the September 9, 1985 meeting referred to in Paragraph 67 of the Superseding Indictment, which actually was a lunch, Shelby had told representatives of the OIC that he made special efforts to ensure that Park Towers was not mentioned at that lunch. The interview report stated:

Shelby did not believe that the subject of Mitchell's interest in the Park Towers project was mentioned during the lunch he had with Mitchell and Dean on September 9, 1985. Shelby had no knowledge that Dean was aware of Mitchell's interest in the project. Shelby tried to go out of his way in conversations with Mitchell and Dean to stay as "far afield" of everything related to that as he could. If conversations drifted in that direction, Shelby tried to change the course of the conversation. To the best of Shelby's recollection, the subject of Park Towers never came up in conversations with Mitchell and Dean.

Dean Mem., Exh. CC at 9.

In an interview on May 18, 1992, Shelby repeated that he did not believe Park Towers ever came up in discussions with Mitchell and Dean. He stated that he always tried to steer conversations away from business when he was with Mitchell and Dean.<sup>7</sup> Shelby also stated that "sometimes [he] would discuss business items with Dean after they left Mitchell, such as in cars transporting them back to work, but not when they were with Mitchell." Dean Mem., Exh. DD at 9-10.

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<sup>7</sup> To correct any false impression as to the frequency of lunches among Shelby, Mitchell, and Dean, it is noted here that, in addition to September 9, 1985, calendar entries indicate that, while Dean was Executive Assistant, Shelby, Mitchell, and Dean were also scheduled to meet for lunch on January 28, 1987, and April 17, 1987. A line drawn through the April 17, 1987 entry and the fact that Dean had lunch with Shelby and another person on April 16, 1987, suggests that the April 17, 1987 lunch was cancelled. Thus, it appears that Dean had lunch with Mitchell and Shelby together twice while she was Executive Assistant, once in 1985 and once in 1987.

Interviewed on May 29, 1992, Shelby again stated that he did not discuss the particulars of HUD projects when he was with Dean and Mitchell. He stated that at the time when he had lunch with Dean and Mitchell in September 1985, he had been calling Dean on a regular basis, "and visiting her with regard to the whole matrix of HUD issues he was involved with" and that Dean had alerted him to coinsurance. Shelby was advised that the letter to Dean of September 10, 1985, the day after he had had lunch with Dean and Mitchell, suggested that they had discussed Park Towers. Shelby stated that "they may have discussed it, but he did not remember that they did." Dean Mem., Exh. ZZ at 2.

In the interview on May 18, 1992, Shelby further advised representatives of the OIC that he had initially secured the services of Mitchell prior to his becoming aware of the relationship between Mitchell and Dean. He explained that his employers who informed him of the relationship also advised him that Mitchell ought not to work on the Park Towers project because of a perceptual problem, and he described a meeting on the matter that he remembered in the office of one of the principals of his firm who had raised the issue. Shelby stated that thereafter, he did not seek further assistance from Mitchell other than to seek Mitchell's advice on how an agreement should be extended. Shelby stated that his employer paid Mitchell solely because of a commitment Shelby had made prior to Shelby's learning of Mitchell's relationship to Dean. Dean Mem., Exh. DD at 9-10.

Testifying under oath before the grand jury on June 4, 1992, Shelby would again state that, to the best of his knowledge, Dean was not aware that Mitchell was involved in the Park Towers project. He also stated that, to the best of his knowledge, the Park Towers project was not discussed at the luncheon with Mitchell and Dean on September 9, 1985. Shelby also stated that, to his knowledge, Mitchell did not utilize Dean in securing funding for the project. Grand Jury Testimony at 22-24 (Dean Mem., Exh. EE).

Further, in the interview conducted on April 8 and 16, and May 6, 1992, Shelby told representatives of the OIC that he believed that he had received a form relating either to Park Towers or Foxglenn (a project funded in 1986) from Hunter Cushing. Dean Mem., Exh. CC at 20. In an interview on May 18, 1992, Shelby stated that "he believed that he got the copy of the [Park Towers] Rapid Reply letter from DeBartolomeis, and that he asked for it to be faxed to him." Dean Mem., Exh. DD at 6.

4. The OIC's Belated Brady Disclosures

Shelby never withdrew from, or qualified, any of these statements.<sup>8</sup> Nevertheless, despite the fact that Shelby's statements patently contradicted certain of the incriminating inferences created by allegations in the Superseding Indictment issued on July 6, 1992, as well as the basic premise of the Park Tower charge, the OIC did not advise Dean of any of the statements until August 20, 1993.

In fact, on June 8, 1993, in a Supplemental Opposition to a defense motion for exculpatory material, the OIC again specifically represented to the court that it was aware of no exculpatory material, stating (at 39 n.27): "The government is not aware of any exculpatory evidence or information, but it will certainly make such information known to the defendant in the event it discovers such evidence."

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<sup>8</sup> The arguable exception to that statement would be that before the Grand Jury on June 4, 1992, Shelby stated that the rapid reply could have come from Dean, DeBartolomeis, or Cushing, but that he could not remember at the moment. Grand Jury Testimony at 23 (Dean Mem., Exh. EE).

On August 20, 1993, less than two weeks before jury selection, the OIC provided an eight-page listing of statements by 23 persons. The letter, authored by Associate Independent Counsel Robert E. O'Neill and Paula A. Sweeney<sup>9</sup> referenced the OIC's obligations to provide exculpatory material pursuant to Brady and the court's discovery orders, but asserted that most of the material was not exculpatory, and was merely being provided "in an abundance of caution." Dean Mem., Exh. AA at 1 (Attachment 3).

On page 7 of the 8-page letter were brief summaries of Shelby's statements that "the contact at HUD" was DeBartolomeis, not Dean, and that to the best of Shelby's knowledge, Dean did not know of Mitchell's involvement in Park Towers. Dean Mem., Exh. AA at 7 (Attachment 3 hereto). The August 20, 1993 letter did not disclose the dates when the statements it summarized had been made. Only after specific request from Dean's counsel did the OIC, by letter dated August 30, 1993, disclose the dates of the statements. That letter indicated that almost all of the statements were made prior to the issuance of the Superseding Indictment. Dean Mem., Exh. BB (Attachment 4 hereto).

The OIC still did not disclose Shelby's statements that he had retained Mitchell prior to learning of Mitchell's relationship with Dean; that, after learning of that relationship, he (Shelby) had ceased to seek material assistance from Mitchell; or that his (Shelby's) firm had paid Mitchell only because of a prior commitment. The OIC also still did not disclose Shelby's statements, made in interviews and before the grand jury, that he believed that Park Towers was not discussed at the September 9, 1985 lunch and that he had attempted to ensure that it was not discussed. And the OIC still did not disclose Shelby's statements that he believed that DeBartolomeis or Cushing had sent him (Shelby) the rapid reply letter.

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<sup>9</sup> Jo Ann Harris and Paula A. Sweeney appear to have been the principal trial counsel from the time of the issuance of the initial indictment until late 1992. For a period in the latter part of 1992, a person named Mary Ellen Fleck assumed some role as well. Robert E. O'Neill apparently took over for Harris some time near the end of 1992.

Dean moved to dismiss on the basis of the belated disclosure of Brady information, noting the OIC's prior representations to both Judge Gesell and Judge Hogan that the OIC was aware of no exculpatory information.<sup>10</sup> Arguing on behalf of the OIC, Associate Independent Counsel Sweeney first stated that the material that had been provided was in the nature of Giglio material, which would become clear when the Jencks productions were made. The court asked Sweeney if she meant that the witnesses "said different things at different times," and Sweeney responded: "That's correct, Your Honor." Transcript of Status Call at 12. Pressed further by the court, Sweeney stated: "Your Honor, as time progressed, these witnesses admitted that they had not been candid and had not been forthright, and these stories developed over time, and that -- really -- the witnesses will testify consistently with the indictment..."Id. at 12-13.

The court rejected that argument out of hand at least with respect to exculpatory statements in the OIC's possession prior to the changing of testimony, but refused to dismiss the indictment. Id. at 13. There was no discussion of how much of the withheld material was of the nature described by Sweeney when she represented to the court the OIC's reasons for having withheld it.

As noted, however, Sweeney's representation regarding the modification of testimony plainly did not apply to the statements by Shelby that the Independent Counsel summarized in the August 20, 1993 letter. That representations also did not apply to the other statements Shelby had made prior to the issuance of the Superseding Indictment and contradicting inferences therein, but which the OIC still had not provided. Shelby, not only had never qualified these statements prior to the August 31, 1993 hearing, he testified entirely consistent with those statements when he appeared at trial. It is not evident that Sweeney's representation regarding the changing of stories applied to any of the statements in the August 20, 1993 letter.

At the August 31, 1993 hearing, while the court refused to dismiss the Superseding Indictment because it did not think that Dean had been sufficiently prejudiced because of wasted effort "or the inability to use this information appropriately in a short time remaining to develop at trial," the court indicated that it regarded the failure of production to be a serious matter and that "if there are further instances of this, the Court will consider what would be appropriate actions." Transcript of Status Call at 13-14. After further chastising the Independent Counsel, the court stated:

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<sup>10</sup> Following the death of the Honorable Gerhard A. Gesell, the case was reassigned to the Honorable Thomas F. Hogan.

"There's been a warning made, and if anything else comes up like this, I'll take another look at what should be done about it." Id. at 15.

The Independent Counsel did not respond to that warning by turning over the other statement of Shelby's that contradicted inferences in the Superseding Indictment. Those statements would only be provided at the beginning of trial when Shelby's Jencks material was turned over among a massive collection of Jencks material sufficient to fill over 15 large ring 3-ring binders. Shelby's material, which would be provided on September 13, 1993, the day of opening arguments and three days before Shelby testified as the OIC's twelfth witness, was comprised of ten items including grand jury testimony and interview reports running as long as 27 single-space pages. Along with Jencks materials provided for 35 other witnesses on September 13, 1993, and for 21 witnesses several days earlier, there would be Jencks material produced for 57 OIC witnesses.<sup>11</sup>

Shelby's statements regarding Park Towers were not the only materials that the Independent Counsel possessed prior to issuance of the Superseding Indictment that contradicted its allegations that Dean facilitated HUD funding decisions for the benefit of Mitchell, nor were they the only such materials that the Independent Counsel failed to provide under Brady. As a result of a review of John Mitchell's files in May 1992, the Independent Counsel secured two telephone messages showing that, in January of 1984, at the same time that Louie Nunn was entering into a contract to secure 300 moderate rehabilitation units for the Arama project in Dade County in return for fees to be paid to Nunn and Mitchell, Mitchell was talking to Dean's predecessor, Lance Wilson, about securing 300 moderate rehabilitation units. One of the messages also indicated that Wilson had told Mitchell that he (Wilson) was talking to then acting Assistant Secretary for Housing Maurice Barksdale about the matter. The Arama project would come to fruition as a result of Barksdale's sending 293 units to Dade County in mid-July 1984, shortly after Wilson had left HUD and had been replaced as Executive Assistant by Dean. The Independent Counsel had evidence indicating that at least one other large allocation approved by Barksdale after Wilson left HUD had been funded at the behest of Wilson.<sup>12</sup>

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<sup>11</sup> Though the earlier production had purported to include Jencks materials for the OIC's first week of witnesses, the material for Shelby, who would testify on Thursday of the first week, was produced with that for 35 other witnesses on Monday, September 13, 1993. Nine of the 21 persons for whom Jencks material was provided in advance of September 13, 1993, either testified after Shelby or did not testify at all. See Attachment 5.

<sup>12</sup> The matter discussed in this and the three paragraphs that follow is treated at greater length in the Narrative Appendix styled "Arama: The John Mitchell Messages and Maurice Barksdale."

The Mitchell messages, however, were never provided to Dean under Brady. Rather, they were merely provided among several hundred thousand pages of documents made available for Dean's review during discovery.<sup>13</sup>

Equally germane to the issues addressed in this Narrative Appendix is the following matter. Subsequent to securing the Mitchell messages referencing Wilson's discussion with Barksdale, the OIC would call Barksdale before the grand jury, and later call him as a OIC witness for the purpose of implicating Dean in the Arama funding, without ever confronting Barksdale with the information reflected on the Mitchell messages. In ultimately acknowledging that it had failed to confront Barksdale with the information, the OIC would argue that the government does not have an obligation "to seek out all potentially material evidence conceivably related to the defense." Gov. Rule 33 Opp. at 16-17 (original emphasis).

The OIC's actions with regard to those messages and its asserted defense of those actions, as well the Independent Counsel's actions with regard to matters addressed in several other of the Narrative Appendixes, must be especially borne in mind in interpreting the conduct of lawyers for the OIC with regard to the testimony of Eli Feinberg, a matter that will be discussed at some length below.

#### B. The OIC's Case-in-Chief

In opening argument Associate Independent Counsel Robert E. O'Neill laid out the OIC's theory with regard to Park Towers by first describing developer Martin Fine's difficulty in securing moderate rehabilitation funding through the local housing authority, and how Fine resorted to hiring a Miami consultant, Eli Feinberg, who, in turn, retained Richard Shelby, whom O'Neill would describe as "a political consultant, a guy who had access and who had access to the defendant." Tr. 56.

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<sup>13</sup> It is not known exactly how many pages of documentary material were made available during discovery. In an August 27, 1992 letter from Sweeney to Dean's counsel, Sweeney appeared to refer to something in excess of 20 boxes of material that had already been reviewed by Dean. Sweeney advised that, as of that date, there were approximately 45 more boxes being provided, which Sweeney estimate to contain about 200,000 pages of material.



Relying on a chart based largely on allegations in the Superseding Indictment (and somewhat similar to that discussed in Section E infra and attached as Attachment 4)<sup>14</sup>, O'Neill then stated:

What's the first thing Rick Shelby does? Again, in black and white, the document, Mr. Shelby goes to John Mitchell, and he requests John Mitchell's assistance in securing units for Park Towers. Mitchell agrees to help him.

What's the next thing he does. You'll see he meets with the defendant. The evidence will show that Shelby meets with Mr. Mitchell, has lunch with him, discusses the project, goes out with the defendant, has lunch with her, discusses the project, has lunch with the three of them. And the evidence will show Park Towers gets awarded. Mr. Fine gets his units for Park Towers.

And how much money is made? The consultants made approximately \$175,000, and John Mitchell through his company received an additional \$50,000.

Tr. 56-67.

The first underscored section can only refer to the July 31, 1985 discussion between Fine and Feinberg regarding Shelby's upcoming meeting with "the contact at HUD," read in conjunction with the August 1, 1985 scheduling of lunch and the August 9, 1985 lunch that actually occurred. Given Shelby's prior statements to the Independent Counsel, however, the documents actually showed that "the next thing [Shelby did]" after meeting with Mitchell, was to meet with DeBartolomeis, a person whom Feinberg had evidently described to Fine as "the contact at HUD."

The second underscored statement -- "has lunch with her, discusses the project" -- would be an evident reference to the August 1, 1985, and August 9, 1985 entries in the Superseding Indictment that followed the entry referencing Shelby's planned meeting with "the contact at HUD." The only basis for asserting that Park Towers was discussed would be the fact that the entries followed the discussion between Feinberg and Fine of the upcoming meeting with "the contact at HUD." The Independent Counsel would introduce no testimony that Dean and Shelby discussed Park Towers on either of those dates.

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<sup>14</sup> At some point the charts used in opening argument were modified in part because of defense complaints regarding duplicative entries. See Tr. 1954, 2917.

Though the OIC's case with regard to Park Towers would ultimately rest on the inference that Park Towers was discussed at the September 9, 1985 lunch, it is to be noted here that O'Neill would not explicitly state that the project was discussed at the lunch, or even that it is reasonable to infer that the project was discussed at the lunch. As will be shown, the failure, along with O'Neill's similar failure to explicitly state that the reference to "the contact at HUD" was a reference to Dean -- both of which would be observed again in closing argument and in various memoranda -- reflect a pattern observed often in the Independent Counsel's prosecution of Deborah Dean. That is, while its attorneys would engage in a wide range of tactics to lead the jury and the court to believe things that those attorneys knew not be true, those attorneys would endeavor to do so while avoiding as much as possible explicitly stating, or even explicitly arguing, facts that they knew to be contradicted by documents in the possession of the defendant.<sup>15</sup> As will be shown, however, ultimately, both orally and in writing, attorneys for the Independent Counsel would state many things that they knew to be false.

The OIC would introduce the July 31, 1985 Fine memorandum that referenced the meeting with "the contact at HUD" through the testimony of Martin Fine. Though the OIC would call Shelby, Feinberg, and Fine, it would elicit no testimony from any of them as to the content of the memorandum or the identity of the referenced "contact at HUD." The OIC would, however, endeavor to cause the jury to believe that this conspiratorial reference was a reference to Dean.

As will be shown below, through similar means of presenting evidence, the OIC, in order to illustrate the conspiratorial nature of Shelby's interactions with Mitchell and Dean, would attempt to show that Shelby had concealed Mitchell's involvement from Feinberg and Fine and had concealed Dean's identity from Fine. The OIC would also seek to cause the jury to believe certain other things that the OIC knew not to be true.

As in the case of Arama and South Florida I, the other moderate rehabilitation projects in Count One, no witness testified that he or she knew or believed that Dean knew that Mitchell had earned a fee related to Park Towers.

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<sup>15</sup> O'Neill's statement that Park Towers was discussed at the August lunch between Shelby and Dean is not inconsistent with this pattern. Though the OIC would present no evidence that Park Towers was discussed, as indicated earlier, Shelby's Jenks material indicated that Shelby said Park Towers might have been discussed.

A more detailed discussion of the relevant testimony is set out below.

1. Richard Shelby

a. Shelby Direct Examination

Richard Shelby testified on Thursday, September 16, 1993, the third day after opening argument. As previously noted, the OIC did not provide Shelby's Jencks material when it provided the Jencks material for the first week's witnesses. Rather, the OIC provided Shelby's Jencks material along with material for 35 other witnesses produced on September 13, 1993. (Materials on Feinberg and Fine had been provided on September 9, 1993.) See Attachment 5. Though Shelby would be the second witness called on September 13, 1993, at the close of the preceding day, when defense counsel had requested the names of the persons to be called on September 13, Associate Independent Counsel Robert E. O'Neill had not named Shelby. In identifying the types of witnesses who would be called, O'Neill stated that local HUD people would be called, a designation that would not include Shelby.<sup>16</sup>

To summarize O'Neill's direct examination of Shelby, O'Neill would not ask Shelby about the identity of "the contact at HUD" referenced in the July 31, 1985 Martin Fine memorandum, nor would he ask Shelby about any of the following issues that

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<sup>16</sup> After O'Neill had stated that he would call Maurice Barksdale and a person named Norman Larsen, "who is a custodial type witness out of the Georgetown Club," this colloquy ensued:

MR. O'NEILL: Right. And then with the Jewish holiday, we had Eli Feinberg, Martin Fine and Eli Feinberg, but we had to push those back. We're trying to get local HUD people we will call in to fill in, but we will have --

THE COURT: That's Thursday.

MR. WEHNER [defense counsel]: Local Washington HUD people?

MR. O'NEILL: Yeah, whoever lives here local.

MR. WEHNER: Can you be any more specific? Bob, I'd appreciate it. If I call you later, I'd appreciate it.

MR. O'NEILL: Yeah.

Tr. 424-25. It is not known when O'Neill told Wehner that he was calling Shelby on September 13.

would be highly relevant to contentions the OIC would expressly or impliedly assert to the jury and the court:

- (1) whether he knew of Mitchell's relationship with Dean when he first retained Mitchell;
- (2) whether Dean was aware of Mitchell's involvement with Park Towers;
- (3) whether Park Towers was discussed at the September 9, 1985 lunch with Mitchell and Dean;
- (4) whether he concealed his contacts with Dean from Feinberg and Fine;
- (5) whether Dean had been responsible for the post-allocation waiver regarding Park Towers;
- (6) whether Dean had provided him with a copy of the post allocation waiver;
- (7) whether he concealed Mitchell's involvement with Park Towers from Feinberg and Fine.

It will be shown below that the answers to those questions that O'Neill would have expected Shelby to provide would have been contrary to conclusions that the Independent Counsel intended the jury and the court eventually to reach, and would have been contrary as well to the sworn testimony that the Independent Counsel intended to elicit from one of its witnesses.

O'Neill first asked Shelby questions that elicited testimony about his initial contacts with Feinberg and the initial contacts with Mitchell that followed. O'Neill did not, however, ask Shelby about whether he had advised or consulted with Feinberg regarding Mitchell's involvement. O'Neill then asked this question:

Q. And how much was he [Mitchell] to receive, did you know that point?

A. I can't recall at this point whether I had had the conversation with Mr. Feinberg in which a fee was specifically discussed or whether that was subsequent to my first conversation with Mr. Mitchell. I believe that the discussion relative to a fee may have occurred subsequent to that conversation, but I can't be certain.

Tr. 546.

O'Neill did not then inquire as to the nature of the discussion with Feinberg to which Shelby referred or as to whether, as Shelby seemed to suggest, Feinberg had a role in determining Mitchell's fee. Rather, O'Neill dropped the subject of what fee Mitchell was supposed to receive, and simply asked whether the agreement was in

writing, which it was not. Tr. 546. O'Neill would later ask Shelby how much money Mitchell received, and Shelby would state that Mitchell received \$50,000. Tr. 556.

O'Neill did not question Shelby about whether he expected Mitchell to contact Dean or about Shelby's knowledge of Dean's knowledge of Mitchell's involvement with the project. Though O'Neill brought out that Shelby was not then aware that Mitchell had experience in the moderate rehabilitation program (Tr. 546), O'Neill did not question Shelby as to what he expected Mitchell to do in connection with Park Towers. O'Neill did bring out that Mitchell seemed to have done very little. Tr. 556-57.

O'Neill then questioned Shelby about his dealings with HUD officials with regard to Park Towers. After Shelby stated that he believed that he had had three meetings with HUD officials, though it might have been two or four, this questioning followed:

Q. Well let's use your initial number then. Within these three meetings, do you recall who within the Department that you dealt with.

A. On this project [Park Towers], primarily with Silvio DeBartolomeis, but I also had conversations at one time or another with Miss Dean and Hunter Cushing.

Q. Now, did you review any records, trying to refresh your recollection as to who you dealt with at HUD on this project?

A. I had an opportunity last evening to review some of the records, yes. I believe they've been entered as exhibits.

Q. And was that in my presence?

A. Yes.

Q. Are there any records indicating any dealings with Mr. DeBartolomeis at this period of time?

A. No, there are not.

Q. Are there any records indicating dealings with the defendant Deborah Gore Dean?

A. In the March-April-May time frame or -- I think the records indicate that there was some correspondence in June and a meeting in August?

Q. And is that when the correspondence first started showing between yourself and Miss Dean.

A. Yes, it is.

Q. And are there any correspondence detailing your connection between yourself and Hunter Cushing?

A. Not during that time frame, no. At least not that I recall.

Tr. 547-48.

The OIC would later rely on this testimony of Shelby in defending its efforts in closing argument to cause the jury to believe that the reference to "the contact at HUD" was a reference to Dean.

Shelby's answer regarding DeBartolomeis indicate that he was not shown the July 31, 1985 Martin Fine memorandum that Shelby had previously stated referred to DeBartolomeis as "the contact at HUD" or his (Shelby's) own prior statement where he had said that "as of August, 1985, most of his contacts at HUD regarding Park Towers had been with DeBartolomeis and usually with DeBartolomeis alone.... By that time he had known Dean at most six weeks." Nor, apparently, had he been shown the various Fine memoranda referenced in the attached Park Towers Chronology specifically referencing Shelby's contacts with DeBartolomeis or a copy of a note of his own in which Shelby sent a copy of a waiver to Feinberg advising that it had been "received from Silvio." See Sections B.2. and B.3. *infra*.

After some further questioning about how he knew DeBartolomeis, Cushing, and Dean, Shelby was asked how he learned that Park Towers had been funded. Shelby indicated that he had received a telephone call. Asked from whom he had received the call, Shelby stated he could not recall. Tr. 554.<sup>17</sup> This questioning then occurred regarding the rapid reply referenced in Paragraph 71 of the Superseding Indictment and which would later be introduced as Government Exhibit 79:

Q. Now, are you familiar with a HUD document known as a rapid reply?

A. Yes, I am.

Q. And what is that?

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<sup>17</sup> Shelby had previously indicated first that he believed he received notification from DeBartolomeis, but it could have been Dean (Dean Mem., Exh. DD at 6), and later that he received the call from either Dean, Cushing, or DeBartolomeis. Dean Mem., Exh. ZZ at 2.

A. It's a document that indicates that, in this case at least, a certain number of housing units have been assigned to a particular Housing Authority.

Q. Was there an occasion in which you received a rapid reply letter concerning Park Towers?

A. Yes.

Q. Can you relate to the ladies and gentlemen of the jury how you received that document?

A. As I recall, via fax?

Q. Do you know who you received that fax from?

A. I don't specifically recall. I believe it was Hunter Cushing but I don't specifically recall.

Q. What makes you believe it was Hunter Cushing?

A. It's just the best recollection I have of the circumstance.

Tr. 554-55.<sup>18</sup>

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<sup>18</sup> Following this questioning, O'Neill would elicit from Shelby that the document was not signed. O'Neill also elicited that Shelby then faxed it to Martin Fine. Tr. 555. Government Exhibit 79 (introduced through Shelby, Tr. 574-76; and introduced again through Fine, Tr. 663) is Shelby's fax cover sheet to Fine with an unsigned rapid reply attached. Government Exhibit 79 (introduced through Fine, Tr. 663) is a Fine memorandum to file with Shelby's cover sheet and a signed rapid reply attached. The reason for, and any significance of, this apparent discrepancy is not known.

Still on direct, Shelby was asked to identify a receipt for an August 9, 1985 lunch and testified that he had lunch with Dean on that date. Tr. 567. This is one of the two entries in early August 1985 following the July 31, 1985 Fine memorandum's reference to Shelby's upcoming meeting with "the contact at HUD."<sup>19</sup> As noted earlier, it would have been to these entries that O'Neill must have referred in opening argument when he said that Dean and Shelby had discussed Park Towers. O'Neill did not, however, question Shelby as to what was or may have been discussed at this lunch.

When interviewed by representatives of the OIC in April and May 1992, Shelby, who had said that he believed he talked to Dean about Park Towers on "at least one if not two occasions," had been shown Dean's calendars indicating a scheduled lunch on August 1, 1985 and receipt for a lunch on August 9, 1985. According to the interview report, Shelby stated that he believed that he discussed HUD at the lunch and thought Park Towers "may very well have come up," though he was "surprised to learn that lunches with Dean were as early as August 1985, as before seeing these records [reflecting the August 9, 1985 lunch], he had believed that conversations with her about Park Towers would have been in September or October, 1985." Dean Mem., Exh. CC at 8. As will be shown, however, while the Independent Counsel would derive a benefit from the fact that this lunch followed so closely after Fine's July 31, 1985 memorandum referencing Shelby's upcoming meeting with "the contact at HUD," it was not in the Independent Counsel's interest for Shelby to state that he might have mentioned Park Towers at the August 9 lunch or anytime prior to September 9, 1985. For that would diminish the inference that Park Towers had to have been discussed among Dean, Mitchell, and Shelby at the September 9, 1985 lunch.

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<sup>19</sup> Though Dean's calendar shows that Shelby had been scheduled to have lunch with Dean on August 1, 1985, that lunch apparently was cancelled and rescheduled for the following week. See Tr. 3008-10.



A few moments later, O'Neill would enter into evidence, as Government Exhibit 74, an August 15, 1985 letter from Shelby to Dean thanking Dean for taking time to have lunch with him on August 9. Shelby also stated that he "especially appreciated your advice and counsel relative to certain areas that we should focus our attention on over the course of the next few months. In fact, at your convenience, I would very much like to take advantage of your kind offer to sit down with certain of your technical people in order to learn more about the co-insurance program." O'Neill did not, however, question Shelby about the contents of the letter. Tr. 572.<sup>20</sup>

O'Neill then introduced, as Government Exhibit 75, a September 4, 1985 letter from Dean to Shelby sending him materials about the Co-insurance program. Dean stated that, after Shelby looked over the material, "we would be happy to schedule an oral briefing." Apart from asking Shelby to describe the letter, O'Neill did not question him about any contacts with Dean relating to the letter. Tr. 572.

O'Neill then marked as Government Exhibit 76 a handwritten note from Shelby to Dean dated September 10, 1985, which had been referenced in Paragraph 68 of the Superseding Indictment. The note indicated that Shelby had enclosed materials "concerning the Section 8 Moderate Rehab Program in Miami," and materials related to cable television service in a housing project in Marathon, Florida. The note, which came from Dean's files, had a handwritten note from Dean to Dave Turner, saying to see her on the matter. Handed the note by O'Neill, Shelby described it as one "directing to her some information concerning the Section Eight project in Miami and also a question relating to the provision of cable television service to a Departmental project in Marathon, Florida." O'Neill asked: "This Section Eight project you're referring to in Miami, was that the Park Towers project." Shelby responded affirmatively to that question as well as to the following question of whether he had sent the note to Dean. Tr. 572-73 (emphasis added).

After then introducing the exhibit, O'Neill read the beginning of the document, noting that it said "Debbie, enclosed please find the information concerning the Section Eight moderate rehab program in Miami and the contract for Cable Television Service

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<sup>20</sup> When previously asked about the statement "I especially appreciated your advice and counsel relative to certain areas that we should focus our attention on over the course of the next few months," Shelby had stated that he believed that it related to a discussion of HUD's co-insurance program. Dean Mem. Exh. CC at 9.

for the Marathon Housing project in Marathon, Florida," and asked Shelby if he could make out the date. Shelby said the date was September 10, 1985. Tr. 572-73.

O'Neill did not ask what the materials were or what prior exchange could have caused Dean to expect to receive the material. O'Neill did not question whether the materials in fact referenced a particular project, or had merely referenced the moderate rehabilitation program in Miami, as the actual wording of the note suggested.<sup>21</sup> O'Neill did not question Shelby about the fact that he had had lunch with Mitchell and Dean on the day preceding his (Shelby's) sending the materials to Dean. Nor did O'Neill ask Shelby about what was discussed at the luncheon of September 9, 1985.

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<sup>21</sup> Previously, Shelby had told the OIC that he "guessed that he was referring to the Park Towers project with his statement 'Enclosed please find the information concerning the Section 8 Moderate Rehabilitation Program in Miami,' but he did not know what was sent." Dean Mem., Exh. CC at 9. In order to enhance the impression that the material necessarily related to the Park Towers project, rather than some more general matter involving the Miami moderate rehabilitation program, the OIC would invariably in its documents avoid using the word "program," and merely reference "the Miami Mod Rehab." Gov. Acq. Opp. at 17; Gov. Supp. Acq. Opp. at 17; Gov. Rule 29 Opp. at 23; Gov. App. Br. at 22. (In oral argument, OIC counsel would refer to "the Miami Mod Rehab project." See Section I.2. infra.) In the latter three documents the OIC would underscore "the," arguing that use of "the" indicates there had been prior discussion. That contention would hold only if the actual reference was to "the Miami Mod Rehab project," not "the Miami Mod Rehab program." Prior discussion with Dean is suggested, however, by the word "the" modifying "material." But it is a prior discussion of the Miami moderate rehabilitation program not necessarily a particular project.

It is to be noted at this point that neither Government Exhibit 74 nor Government Exhibit 75 would later be referenced in the charts that, notwithstanding the statements by Shelby to the contrary, the Independent Counsel would use to lead the jury to believe that Park Towers was discussed among Shelby, Dean, and Mitchell at the lunch on September 9, 1985. As with the possibility that Shelby had mentioned something about Park Towers at the August 9, 1985 lunch with Dean alone, it would not be to the Independent Counsel's advantage to indicate possibilities where Shelby could have mentioned the Miami moderate rehabilitation program (or project) to Dean other than at the September 9, 1985 lunch with Mitchell.

O'Neill then had marked for identification as Government Exhibit 79 the rapid reply referenced in Paragraph 72 of the Superseding Indictment. As shown above, O'Neill had previously questioned Shelby about the document, which O'Neill there made clear was a rapid reply, with Shelby testifying that he believed it had been sent to him by Hunter Cushing, and adhering to that testimony when further questioned by O'Neill. On this occasion, however, O'Neill would not refer to the document as a rapid reply and would not ask Shelby who sent it to him. Tr. 574.<sup>22</sup> O'Neill then introduced the document into evidence without further comment. Tr. 574-75.

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<sup>22</sup> The following was the questioning:

Q. Do you recognize that, sir?

A. Yes, I do.

Q. Have you seen that document before?

A. Yes.

Q. Do you recall receiving that document?

A. Yes.

Q. When did you receive that document?

A. November 27, 1985.

Q. How did you receive that document?

A. Again my recollection is that it was faxed to me.

Q. I would direct your attention to the second page of that document. Have you seen that document before?

O'Neill then questioned Shelby about contacting Dean in 1986 (Foxglenn) and 1987 (Eastern Avenue) with regard to projects involved in Count Two. Shelby stated that he had approached Dean to request funding on both projects. Shelby also indicated with regard to Foxglenn that his contacts had been with Dean more than DeBartolomeis. Tr. 559.<sup>23</sup>

During Shelby's direct examination, however, O'Neill would not question Shelby about why he retained Mitchell or about his (Shelby's) knowledge regarding Dean's knowledge of Mitchell's involvement with Park Towers. Nor would O'Neill question Shelby about what he told Feinberg or Fine about his contacts with Dean or about the involvement of John Mitchell in the Park Towers project.

O'Neill also would not question Shelby about the July 31, 1985 Martin Fine memorandum that discussed Feinberg's informing Fine of Shelby's meeting with "the contact at HUD" and that had formed the basis for Paragraph 64 in the Superseding Indictment. That document would not be introduced until Martin Fine testified. See Section B.3. infra.

O'Neill also would not ask Shelby about the February 3, 1986 meeting referenced in Paragraph 75 of the Superseding Indictment, which had alleged that Shelby met with Dean on that date and discussed a waiver of HUD regulations in connection with Park Towers. That entry in the Superseding Indictment would be based on a Martin Fine memorandum dated February 3, 1986, in which Fine stated that Feinberg had called to say that Shelby called Feinberg to say that "he had lunch with his friend at HUD and that she had indicated that this matter could be dealt with in a favorable manner." The friend, who was evidently a woman, presumably was Dean, whose calendars show her scheduled to have lunch with Shelby that day.

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A. Yes.

Q. Do you recall whether that was a document that was sent to you?

A. Yes, I believe it was.

<sup>23</sup> DeBartolomeis was no longer at HUD at the time of Eastern Avenue.

The February 3, 1986 memorandum, which would later be introduced through the testimony of Fine as Government Exhibit 85, would eventually have a large role in the Independent Counsel's case, in several respects. First, the fact that the memorandum merely referenced Shelby's "friend at HUD," rather than naming Dean, would be cited as evidence that Shelby concealed his contacts with Dean from Fineberg and Fine. Second, that the friend was a "she" would be used with regard to a number of arguments that Dean was the person with whom Shelby principally dealt on Park Towers, including an argument that it was permissible for the Independent Counsel to seek to cause the jury to believe that the reference to "the contact at HUD" in the Fine memorandum of July 31, 1985, was a reference to Dean.

Third, February 3, 1986 memorandum would be relied upon by the OIC in what the OIC eventually would acknowledge to have been an effort to show that Dean was the person responsible for granting a waiver of HUD Regulation 282.401(c)(2). That waiver would be signed by DeBartolomeis on May 28, 1986, following a number of contacts between Shelby and DeBartolomeis recorded in Fine memoranda described in Section B.3. *infra*. After signing it, DeBartolomeis provided a copy to Shelby, who then faxed it to Fine on May 29, 1986.

The effort to show that Dean was responsible for the waiver would be accomplished principally through the placement of the following entries in the Independent Counsel's Park Towers chart used in closing argument (Attachment 6):

February 3, 1986: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 7B); **SHELBY** sends **DEAN** Fine's letter about a problem with eligibility in light of past federal subsidies. (Government Exhibit 84B); **FINE** memo to file: "Rick said that he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner..." (Government Exhibit 85).

February 4, 1986: **SHELBY**'s employer pays \$10,000 to **MITCHELL** (Government Exhibit 87)

March 21, 1986: **DEAN** schedules meeting w/**SHELBY** (Government Exhibit 7D)

April 7, 1986: **DEAN** schedules meeting w/**SHELBY** (Government Exhibits 7F, 88)

May 28, 1986: Park Towers waiver (Government Exhibit 90)

May 29, 1986: **SHELBY** sends a copy to **FINE** (Government Exhibit 90).

The effort would be facilitated in closing argument by O'Neill's referring to the meetings on March 21, 1986, and April 21, 1986, as "continuing meetings on Park Towers." See Section E infra.

O'Neill, however, did not ask Shelby at all about the lunch on February 3, 1986. He did not ask whether Shelby had merely referred to the woman he had lunch with as "his friend" because it was his habit not to mention Dean's name to Feinberg. Shelby's Jencks material indicated that, though he had been shown the February 3, 1986 Fine memorandum to refresh his recollection as to whether he had ever spoken to Dean about the waiver, he was never asked whether he had avoided mentioning Dean's name in conversations with Feinberg. Dean Mem., Exh. ZZ at 3. Feinberg, however, had made it clear that Shelby had told him about talking Dean to check about how things were going in the HUD bureaucracy. See Section B.2. infra.

O'Neill also did not ask Shelby how he had secured the post-allocation waiver that DeBartolomeis signed in May 1986. O'Neill did not ask Shelby about the materials the chart indicated he had sent Dean on February 3, 1986, and whether he had sent them to anyone else at HUD.<sup>24</sup> O'Neill did not ask Shelby about the meetings Fine's memoranda indicated that Shelby had with DeBartolomeis in March and April in which DeBartolomeis advised Shelby that he would be approving the waiver. See Attachment 2.

O'Neill did not ask Shelby about whether the meetings with Dean on March 21, 1986 and April 7, 1986 were in fact about Park Towers, as O'Neill would later tell the

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<sup>24</sup> Previously, Shelby had told the Independent Counsel that if he had sent these materials to Dean, he had probably sent them to Cushing and DeBartolomeis as well. Dean Mem., Exh. DD at 7.

jury.<sup>25</sup> Nor did O'Neill ask Shelby from whom he had secured a copy of the waiver in order to send to Fine on May 29, 1986, and if in fact, it had been provided to him by DeBartolomeis, as he (Shelby) had informed Feinberg. The copy of the waiver, and Shelby's letter sending it Fine, would not be shown to Shelby at all. Rather, they would later be introduced through the testimony of Martin Fine, and then referenced in the OIC's Park Tower chart in a manner to suggest that Dean had provided the copy of the waiver to Shelby.

b. Shelby Cross-Examination

On cross-examination, Shelby testified that to the best of his knowledge Dean did not know that Mitchell received a fee on Park Towers (Tr. 587) and that he (Shelby) had intentionally kept information about Mitchell's involvement from Dean. Tr. 603. Shelby also testified that he had met Dean outside of DeBartolomeis' office in June 1985. Tr. 594. Shelby testified that while DeBartolomeis had said he would help Shelby with his projects, Dean had never said that she would help him, but had merely said that the projects would be put in the mix and compared with other projects. Tr. 596.

Shelby also testified on cross-examination that he had retained Mitchell prior to learning of Mitchell's relationship with Dean and that he had paid Mitchell \$50,000 out

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<sup>25</sup> Three days after the April 7, 1986 lunch Dean wrote Shelby telling him she enjoyed lunch and enclosing "the outline I promised." The enclosed document, in the form of an outline, was headed "Outline of PHA Proposal to Waive Waiting List" and had headings of "I. Identify the Problem," and "II. Solutions," and referenced, *inter alia*, the high concentration of low income persons in Buffalo. Gov. Exh. 88. O'Neill would introduce that document as the last OIC exhibit introduced through Shelby, which Shelby would describe as a letter thanking him for lunch. Tr. 582. Shelby was not asked about the attachments, which he had previously told representatives of the OIC related to a problem with an existing project in Buffalo, and not to Park Towers. Dean Mem., Exh. CC at 14.

of a sense of obligation. That testimony was elicited in response to questioning by Dean's counsel focused on whether Shelby had retained Mitchell to introduce him to Dean. Tr. 583-84. The nature of the questioning suggests that Dean's counsel was not at that time aware of the statement in Shelby's May 18, 1992 interview that he retained Mitchell prior to learning of the relationship from his employers and, after learning of the relationship, ceased to seek material assistance from Mitchell.

As noted, that statement had not been provided as Brady material. Rather, it would be found on pages 8-10 of a 13-page single-space interview report (Dean Mem., Exh. DD) that would be provided along with the rest of Shelby's Jencks material and Jencks material for 35 other witnesses three days before Shelby took the stand.

Dean's counsel did not examine Shelby about whether he had advised Feinberg or Fine about Mitchell's involvement with Park Towers or about Shelby's contacts with Dean. There was at this time no suggestion that the OIC would eventually claim that Shelby had concealed from Feinberg and Fine either Mitchell's involvement with Park Towers or Shelby's contacts with Dean. O'Neill had stated nothing to that effect during opening argument. And, as noted earlier, the Superseding Indictment had reflected a theory that was directly to the contrary. The Superseding Indictment had alleged that it was "part of the conspiracy that the Co-conspirators would tell developer/clients that the defendant Deborah Gore Dean was Co-conspirator One's stepdaughter." Superseding Indictment at 11 ¶ 16.

c. Shelby Redirect Examination

On redirect examination, O'Neill conducted the following questioning related to the September 9, 1985 lunch:

Q. Mr. Shelby, do you recall whether you had lunch with Deborah Gore Dean and John Mitchell on September 9, 1985?

A. Yes.

Q. And you're absolutely certain about that?

A. I believe based upon a review of the documents that that is correct, yes.<sup>[26]</sup>

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<sup>26</sup> For purposes of subsequent discussion of Shelby's review of documents, it is noted here that Shelby's response indicated that, when Shelby reviewed documents in O'Neill's presence for the supposed purpose of refreshing Shelby's recollection as to whom he dealt with on Park Towers, the review had not been limited to documents from Shelby's files. Only documents from Dean's and Mitchell's files reflected that lunch.



Q. I now show you what's been previously marked as Government's Exhibit 76 for identification, and you looked at that yesterday? [<sup>27</sup>]

A. Yes, I did.

Q. On September 10, 1985, a day after you had lunch with John Mitchell and Deborah Dean, did you send information to Deborah Dean about Park Towers?

A. Yes, I did.

Tr. 603.

O'Neill did not then ask Shelby whether Park Towers had been discussed among Mitchell, Dean, and Shelby at the lunch on the day before. As noted, however, assuming that Shelby would testify in accordance with what he had previously told representatives of the OIC, however, had O'Neill asked that question, Shelby would have stated that to the best of his recollection Park Towers had not been discussed, and that he (Shelby) had gone out of his way in order not see that Park Towers was not discussed. As also noted, that statement had not been provided as Brady material. It would be found on page 9 of a 27-page single-space interview report (Dean Mem., Exh. CC) provided as Jencks material three days before Shelby took the stand.

Dean's counsel conducted no recross-examination, and hence did not elicit from Shelby whether the Park Towers project was discussed at the lunch on September 9, 1985.

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<sup>27</sup> Shelby's redirect examination occurred on the day following his direct examination. The reference to looking at Government Exhibit 76 the day before evidently referred to Shelby's looking at the exhibit in court.

2. Eli Feinberg

Eli Feinberg, the Miami consultant whose firm received \$80,000 of the \$225,000 fee Fine paid Shelby's firm on Park Towers, testified as a government witness on September 17, 1993. Feinberg was examined by Associate Independent Counsel Paula A. Sweeney. On direct examination, Sweeney first elicited from Feinberg that Shelby's role had been to work with the HUD Washington bureaucracy. When Sweeney asked who Shelby's contacts were at HUD, Feinberg stated that Shelby had mentioned DeBartolomeis and Dean. Tr. 636-37.

This questioning then followed:

Q. To your knowledge, was an individual named John Mitchell working as a consultant on this project?

A. Not to my knowledge.

Q. To your knowledge, was Mr. Mitchell was [sic] going to receive any consulting fees on this project.

A. Not to my knowledge.

Tr. 637.

Sweeney asked Feinberg whether he received a fee and he responded that he and an associate had split a fee of \$80,000. Tr. 637. Sweeney did not then ask how that fee had been arrived at or raise any of the issues regarding how one might differently allocate the \$225,000 fee for Park Towers depending on whether there were two or three persons sharing the fee.

O'Neill would later elicit testimony from Martin Fine, the developer of Park Towers, that he, too, was unaware of Mitchell's involvement. Tr. 657-58.

The fact that both Feinberg and Fine testified that he was not aware that Mitchell was involved with Park Towers would later be heavily relied upon by the OIC as evidence of the conspiratorial nature of the relationship between Shelby and Mitchell. The point would be first made orally and in writing when the OIC opposed Dean's Motion for Judgment of Acquittal at the close of the OIC's case-in-chief. Tr. 2029-30 (oral argument of Paula A. Sweeney); Gov. Acq. Opp. at 17; Gov. Supp. Acq. Opp. at 16-17, 18. O'Neill would make the point again in the rebuttal part of his closing argument, this time noting that "both of those testimonies were unimpeached. Nobody ever contended that they did know." Tr. 3519.<sup>28</sup> The OIC would twice note the

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<sup>28</sup> After observing that secrecy is "the hallmark of conspiracy," O'Neill would state:

Feinberg and Fine testimony in its Opposition to Dean's Rule 29 Motion following the verdict. Gov. Rule 29 Opp. at 22-23, 25. In its appellate brief, the OIC would twice stated that Fine was never told that Mitchell was involved. Gov. App. Br. at 5, 24.

Yet, in an interview conducted during April 8 and 16, and May 6, 1992, Shelby, then already under a grant of immunity, had told representatives of the OIC that Feinberg knew of Mitchell's involvement and that he (Shelby) assumed that Feinberg had told Fine. Dean Mem., Exh. CC at 2. On May 18, 1992, Shelby had again told representatives of the OIC that he had told Feinberg that he (Shelby) had contacted Mitchell. Mem., Exh. DD at 8.

Feinberg apparently first informed the OIC that he was unaware of Mitchell's involvement with Park Towers in a telephonic interview on May 18, 1992. Interview Report at 4 (Attachment 5a hereto).<sup>29</sup> The interview report indicates that Feinberg was asked about his knowledge of Mitchell's involvement toward the end of the interview.

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Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid \$225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

<sup>29</sup> The interview is believed to have been conducted by Associate Independent Counsel Robert E. O'Neill.

The report gives no indication that Feinberg was at that time advised of Shelby's statements that Feinberg was aware of Mitchell's involvement.

On May 19, 1992, the OIC again interviewed Shelby, who once more stated that Feinberg was aware of Mitchell's involvement with Park Towers. Shelby provided a detailed account of how he and Feinberg had first decided to divide up the consulting fee among Shelby, Feinberg, and Mitchell, with \$80,000 of (at that time) \$150,000 fee going to Shelby and with \$35,000 each going to Feinberg and Mitchell. Interview Report at 2 (Attachment 5b hereto). Apparently in response to being advised in some manner of Feinberg's May 18, 1992 denial of knowledge of Mitchell's involvement, Shelby also stated that he (Shelby) knew of no reason why Feinberg would not want to mention that he knew of Mitchell's involvement, but that if Feinberg had stated that Mitchell was not involved, he was mistaken. Interview Report at 4.<sup>30</sup>

On May 19, 1992, the OIC also reinterviewed Clarence James, the President of The Keefe Company, which had employed Shelby while he was attempting to secure funding for Park Towers. James had previously been interviewed on February 6, 1992, and, like Feinberg, had denied any knowledge of Mitchell's involvement with Park Towers. At that time of James's first interview, Shelby, who was no longer with The Keefe Company,<sup>31</sup> had not yet been interviewed by the OIC. In the first interview James had told representatives of the OIC that he did not think The Keefe Company had paid Mitchell any money in connection with Park Towers and that Shelby had never told him that Mitchell had anything to do with Park Towers. Interview Report at 3. Subsequent to that interview, however, Shelby had made clear that James was aware of Mitchell's involvement. For example, in Shelby's May 18, 1992 interview, Shelby had described discussions with James about Mitchell's role. Shelby also stated that The Keefe Company had agreed to pay Mitchell because of Shelby's prior commitment to Mitchell, though The Keefe Company had not been pleased in doing so. Dean Mem., Exh. DD at 9-10.

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<sup>30</sup> Despite the fact that these statements contradicted what the OIC had evidently intended to present as an incriminating piece of evidence from a sworn government witness, neither statement had been provided as Brady material.

<sup>31</sup> Shelby left The Keefe Company in 1988. The Keefe Company had brought a civil action against him in 1990.

In the May 19, 1992 interview, while still vague about his recollection of Mitchell's having a role in Park Towers, James acknowledged that he had been the person who authorized payments totalling \$50,000 to Mitchell and that there would have had to have been some discussion of the payments. James suggested that a possible scenario was that he had agreed to honor a prior obligation to Mitchell by Shelby. Interview Report at 4.<sup>32</sup> The May 19, 1992 interview of James and O'Connell do not indicate that either of them was asked whether he knew whether Feinberg had been aware of Mitchell's involvement with Park Towers.

During the sixteen months between the time that the OIC's immunized witness Shelby had reaffirmed in detail that Feinberg was aware of Mitchell's involvement with Park Towers and the time that the OIC elicited from Feinberg the sworn testimony that he was unaware of that involvement, the OIC apparently did not confront Feinberg with Shelby's statements that Feinberg was aware of Mitchell's role. At any rate, if the OIC did confront Feinberg with Shelby's statement, no record of the matter would be provided to the defense. See Attachment 5 at 2.

Feinberg had a partner named Marie Petit, who received half of Feinberg's \$80,000 fee. If the OIC ever contacted Petit to inquire whether she knew of Mitchell's involvement with Park Towers (or of Feinberg's knowledge of that involvement), no record of that contact would be provided to the defense.

If indeed Feinberg had not told the truth when he first denied knowing of Mitchell's involvement, any thoughtful questioning by counsel for the OIC ought to have revealed that. Among other things, given the detail with which Shelby had accounted for the fee split, it would seem difficult for Feinberg to construct an alternative rationale for a fee split among two persons instead of three. There would be reason to expect, however, that confronted with Shelby's statement, Feinberg would simply have acknowledged that in fact he had been aware of Mitchell's involvement, if such was the

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<sup>32</sup> On May 19, 1992, the OIC also reinterviewed Terrence M. O'Connell, II, Executive Vice President of The Keefe Company. Like James, O'Connell had been previously interviewed on February 6, 1992. In the earlier interview, O'Connell had stated that he had been aware that Mitchell had been involved in Park Towers, indicating that he thought Mitchell had received "some sort of a finder's fee," and suggesting that because of the payment to Mitchell, The Keefe Company had not received an appropriate share of the fee on Park Towers. Interview Report at 2. In the May 19, 1992 interview O'Connell reaffirmed his knowledge of Mitchell's involvement in Park Towers, indicating that Mitchell had been paid because Shelby had made an agreement with Mitchell that The Keefe Company felt obliged to fulfill. Interview Report at 3.

case, just as Clarence James had essentially done when confronted with the fact that his firm had paid Mitchell \$50,000.<sup>33</sup>

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<sup>33</sup> Notwithstanding Shelby's statement that he did not know why Feinberg would not want to mention his knowledge of Mitchell's involvement, it is understandable that Feinberg, like James, would be reluctant to acknowledge involvement with a person of Mitchell's notoriety. A general reason why Feinberg would be inclined not to state that he knew Mitchell was involved is that admitting to such knowledge would likely have resulted in his (Feinberg's) being named as a co-conspirator, as Shelby and Mitchell would be named six weeks later. More specific reasons include the following: Feinberg may have known that both Fine and Shelby had never mentioned Mitchell's involvement when interviewed by investigators from the HUD Inspector General's office about Park Towers. See Hearings Before the Subcommittee on Housing and Community

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Development of the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, 101st Cong., 1st Sess. at 752-53 (Shelby), 764 (Fine). Feinberg may also have been aware that, on May 13, 1992, five days before he (Feinberg) was interviewed, Fine had told the representatives of the OIC that he (Fine) was not aware of Mitchell's involvement. This placed Feinberg in the position of either contradicting Fine or raising the question of why he (Feinberg) would have kept the information from Fine unless there was a conspiratorial element to Feinberg's relationship with Shelby and Mitchell.

Further, Feinberg, who would testify that he knew Shelby had talked to Dean, might understandably have been concerned about the implications of the connection between Dean and Mitchell, which had received considerable publicity. For example, in the August 7, 1989 issue of Newsweek, a feature article focusing on Pierce and Dean would note that a Miami developer had paid Mitchell \$75,000 to lobby at HUD and that Mitchell was a close companion to Dean's mother. At the end of 1989, People Magazine had profiled Dean as one of "The 25 Most Intriguing People of the Year." The magazine concluded its profile with a discussion of Dean's relationship with Mitchell, observing: "So here's a mystery for a rainy night: how Dean, with Mitchell's notorious example before her, fell into the same sink--and even cut Mitchell in for \$75,000 in consulting fees."

In any event, as a result of Dean's Rule 33 motion, the post-trial record would include portions of Shelby's Jencks material showing that, unless the OIC had some basis for disbelieving the testimony of its immunized witness Shelby, Sweeney had intentionally elicited testimony that she believed to be perjured. The existence of these references as part of the record may account for the following shift in the approach taken to this matter by the OIC in its appellate brief. In the district court, the OIC had repeatedly stated that Shelby had concealed Mitchell's involvement from Fine and Feinberg. Concealment from Feinberg was crucial to the OIC's point, since Fine learned most of what he knew from Feinberg. In its appellate brief, however, while twice stating that Shelby had concealed Mitchell's involvement from Fine (Gov. App. Br. at 5, 24), the Independent Counsel would no longer state that Shelby had concealed Mitchell's involvement from Feinberg.<sup>34</sup>

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<sup>34</sup> The OIC would also pursue the theme that Mitchell's role was concealed from developers with regard to the other developer involved in Count One, Aristides Martinez. Martinez was the developer of Arama and South Florida I who had contracted with Louie Nunn to assist in securing moderate rehabilitation funding for those projects. Martinez had provided the basis for the OIC originally in the Superseding Indictment to allege that the co-conspirators would tell their developer/clients that Dean was Mitchell's stepfather. In an interview on May 15, 1992, Martinez had told representatives of the OIC that in a 15-minute meeting with Mitchell and others in early 1984, he had been told that Mitchell was Dean's stepfather. Interview Report at 4 (Attachment 5c hereto). In the same interview, Martinez stated that he knew that Mitchell was helping Nunn with regard to Arama. He also stated Nunn had told him (Martinez) that he (Nunn) was associated with Mitchell's company, Global Research International. *Id.* at 3-4.

When Martinez testified on the first day of trial, O'Neill sought to elicit testimony that at a meeting with Nunn and Mitchell at Mitchell's office, either Mitchell or Nunn had told Martinez words to the effect, as described by O'Neill, that Mitchell "had some sort of relationship to Dean and she's at HUD and important to know" (Tr. 232), or that "John Mitchell is related to Deborah Dean and that she is an important person at HUD." Tr. 246-47. The court refused to permit the questioning because of the absence of evidence that the statements were part of a conspiracy. Tr. 228-35, 245-250.

Following the court's second refusal to permit the questioning (Tr. 246-50), O'Neill conducted this questioning of Martinez:

Q. Mr. Martinez, you mentioned your meeting with John Mitchell at Global research. Was that the only time that you met with John Mitchell in relation to Arama?

A. Yes.

Q. Now, when you hired Mr. Nunn to represent you as a consultant and attorney



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in order to get moderate rehabilitation units for Arama, to your knowledge, were you hiring anyone else?

A. No.

Q. Did know whether Mr. Nunn was hiring anyone else?

A. No.

Tr. 250-51 (emphasis added).

O'Neill did not seek to clarify the precise meaning of the two negative responses. It was evident from Martinez's interview, however, that he knew that Mitchell and Nunn had some business relationship and knew that Mitchell was helping Nunn on Arama.

That Martinez knew that Mitchell was assisting Nunn in some manner on Arama was additionally clarified through the testimony of Nunn, who appeared as an immunized OIC witness ten days later. At that time, O'Neill questioned Nunn about what he had told Martinez about involving Mitchell with Arama, and Nunn testified with abundant clarity, as he had before, that he had discussions with Martinez about Mitchell's involvement. First, this questioning occurred:

Q. Okay. Did you have a conversation with Mr. Martinez in which you asked him to bring Mr. Mitchell into the Arama project?

A. I don't know that I asked him to bring Mr. Mitchell in. I asked him if he had any objections if I brought Mr. Mitchell in, because Mr. Mitchell had worked on the other three projects with me, too.

Tr. 1359. Thereafter, O'Neill elicited testimony, based on Nunn's earlier grand jury testimony, concerning why Nunn had told Martinez that he wanted to involve Mitchell, with the reason being Mitchell's Washington contacts or experience. O'Neill did not question whether it was in fact true that Nunn had told Martinez that Mitchell was involved, but merely made a point of what Nunn had told Martinez about the reason for involving Mitchell. See Tr. 1361-62.

Nevertheless, the OIC would repeatedly rely on Martinez's statements as establishing that Nunn had concealed Mitchell's role from Martinez. See Gov. Supp. Acq. Opp. at 17 n.18; Gov. Rule 29 Opp. at 19, 23 n.23; Gov. App. Br. at 5, 24.

Sweeney did not ask Feinberg about the February 3, 1986 Fine memorandum (Gov. Exh. 85) in which Fine reported that Feinberg had told him that Shelby "said he had lunch with his friend at HUD and she indicated that this matter could be dealt with in a favorable manner." Thus, Feinberg would not be asked whether Shelby failed to inform Feinberg of the identity of the person, and had thereby caused Feinberg merely to advise Fine that Shelby had met with his "friend at HUD." Inasmuch as Feinberg had already indicated that Shelby did not conceal his contacts with Dean from him (Feinberg),<sup>35</sup> however, it can be presumed that the response would not have supported the Independent Counsel's intended use of the February 3, 1986 memorandum.

Nor did Sweeney ask Feinberg about his understanding of the securing of the post-allocation waiver. That omission would eventually allow the OIC to contend that Dean had been Shelby's principal contact in securing that waiver notwithstanding, as shown in Section B.3 *infra*, the extensive documentation the OIC possessed to the contrary. Feinberg would not be asked about the June 6, 1986 note he received from Shelby enclosing a copy of the waiver executed by DeBartolomeis on May 28, 1986, and stating that it had been "received from Silvio." Attachment 5d.

Sweeney also did not ask Feinberg about his communication to Feinberg that caused Fine to write on July 31, 1985, that he had been informed by Feinberg that "our friend in Washington is meeting with the contact at HUD this coming week."

On cross-examination, Feinberg testified that Shelby had told him that "he was having meetings with Ms. Dean," and that he got the impression she would look into something. He said he got the same impression as to DeBartolomeis. Tr. 640.

Despite the fact that Feinberg acknowledged that Shelby had told him about meetings with Dean, and the fact that the Fine memorandum of February 3, 1986 (Gov. Exh. 85) merely recorded what Feinberg had told Fine, in opposing Dean's motions in the district court, the OIC still would cite that document as evidence that "Shelby avoided identifying 'his friend' in his dealings with Fine and Feinberg."<sup>36</sup> In the court of

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<sup>35</sup> Apart from disclosing in his in-court testimony that Shelby would mention his contacts with Dean, Feinberg had also stated in an interview that "he became aware that Shelby and Dean were good friends and that Shelby would check with Dean on the status of how things were going through the bureaucracy regarding Park Towers." Dean Mem., Exh. AA at 5-6.

<sup>36</sup> Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal (Oct. 4, 1993) at 16-17; Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(c) and (d) (Dec. 21, 1993) at 22.

appeals, however, the OIC apparently recognized that, in light of Feinberg's testimony, it could not explicitly assert that Shelby concealed his contacts with Dean from Feinberg. The OIC would nevertheless continue to rely on the February 3, 1986 Fine memorandum, which merely recorded what Feinberg had told Fine, as evidence that Shelby "was careful not to identify [Dean] by name to the developer who hired him. GX 85; 3021." (Gov. App. Brief at 22), and that "Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others. Tr. 678-87 [Fine]; GX 85." Gov. App. Brief at 24.

### 3. Martin Fine

Martin Fine, the developer of Park Towers, testified as a government witness on September 20, 1993. As earlier noted, O'Neill questioned Fine as to whether he knew that Mitchell was involved in Park Towers, and Fine stated that he did not. Tr. 657. Immediately afterwards, O'Neill asked Fine if he knew Dean, and Fine stated that he did not. Tr. 658. During Fine's direct examination, O'Neill introduced into evidence the July 31, 1985 memorandum referencing Shelby's upcoming meeting with "the contact at HUD" (Gov. Exh. 78), without eliciting comment as to its contents.

O'Neill also introduced, without eliciting testimony as to the contents, the Fine memorandum to file dated February 3, 1986 (Gov. Exh. 85) (Tr. 664-65), in which Fine recorded that Feinberg had told him that "Rick said that he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner. She requested information about the length of ownership of the property etc."

And, as previously indicated, the OIC also introduced through Fine the May 29, 1986 letter by which Shelby had sent to Fine the waiver that DeBartolomeis had signed the day before. Tr. 665-66; Gov. Exh. 90. O'Neill did not question Fine at all about securing a waiver in order for the Park Towers project to receive mod rehab subsidy.

Thus, through Fine, the OIC introduced two documents that referenced Shelby's meetings or discussions with persons at HUD and that would later be the basis for entries in the OIC's Park Towers chart used in closing argument. One was the July 31, 1985 pre-award memorandum with the reference to "the contact at HUD" that Shelby stated referred to DeBartolomeis. The other was the February 3, 1986 post-allocation memorandum referencing Shelby's "friend at HUD" that a calendar indicated very likely referred to Dean.

As indicated in the Park Towers Chronology, however, these did not comprise the total of Fine memoranda referencing meeting with HUD officials relative to Park Towers. Others included

- a) a February 5, 1986 memorandum referencing Shelby's meetings with "some people from HUD" and giving the name of DeBartolomeis as a person to whom a waiver request should be sent;<sup>37</sup>

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<sup>37</sup> Dean's calendars (Gov. Exh. 6) showed that such meetings as she had scheduled for that day were cancelled because she was in Cleveland, Ohio.

b) a February 21, 1986 memorandum stating that Feinberg said that Shelby had spoken to "his friend at HUD during the day and was assured that they would promptly be sending a waiver to Mel Adams [director of the Dade County housing authority] granting the waiver that he requested";

c) a March 4, 1986 memorandum stating that Mel Adams had met with DeBartolomeis and DeBartolomeis had indicated that he would be granting both waivers;

d) a March 10, 1986 memorandum indicating that Shelby "had met with Debartolomeis who advised him that he would approve the waiver subject only to the two mortgages being paid off prior to the first payment";

e) an April 15, 1986 memorandum indicating that DeBartolomeis had contacted Shelby stating that there was a letter being sent to Dade County to request additional information relative to the waiver;

f) a November 19, 1986 memorandum indicating that Shelby stated that "his friend Silvio had a good meeting in Washington with Mr. Chaplin [director of HUD's Jacksonville office, which had jurisdiction over Miami]; and

g) a December 3, 1986 memorandum stating "Rick Shelby called me and said that he had had a meeting with Silvio .. Rick feels certain the request we have previously made will be granted... he will follow up and keep Silvio posted and likewise keep me posted."

As previously shown, the waiver that DeBartolomeis signed on May 28, 1986, and Shelby's letter sending a copy of it to Fine on the following day would later be entries in the Park Towers chart the OIC used in closing argument following entries that O'Neill would describe as "continuing meetings [between Dean and Shelby] on the Park Towers project." As previously noted, the OIC would eventually acknowledge that it had sought to cause the jury to believe that Dean was responsible for the post-allocation waiver signed by DeBartolomeis on May 28, 1986.

During Fine's cross examination, Dean's counsel elicited testimony that Fine took extensive notes and endeavored to show that the note-taking reflected the unconspiratorial nature of Fine's relationship with Feinberg and Shelby. Tr. 674-75. It was also brought out that two waivers were required, one relating to eligibility for subsidy in light of prior subsidy and one related to a similar matter regarding a Section 312 loan. Fine stated that he was made aware by Shelby and Feinberg that DeBartolomeis was signing each waiver. Fine stated that he did not recall if he had discussions with Feinberg or Shelby about whether DeBartolomeis had made the decision to grant the waivers. Tr. 679-81.<sup>38</sup>

Dean's counsel then asked Fine whether, when representatives of the OIC interviewed him, they asked him about Deborah Dean or John Mitchell. Fine indicated that he could not recall as to either Dean or Mitchell. Dean's counsel then confronted Fine with a report of a telephonic interview on May 13, 1992, where Fine had said that he had no knowledge that Mitchell was involved with the Park Towers project. Fine acknowledged that he may have said that. Questioned as to whether it was consistent with his testimony today, Fine said that it was and restated that he never knew that Mitchell was involved with Park Towers. Tr. 683-84.<sup>39</sup>

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<sup>38</sup> The Park Towers chronology does not indicate when the second waiver was signed. Since DeBartolomeis left HUD in December 1986, presumably it was during 1986.

<sup>39</sup> Fine first stated that he did not recall whether the Independent Counsel ever questioned him about John Mitchell. When confronted with his May 13, 1992 telephone interview in which he denied knowledge of Mitchell's involvement with Park Towers, Fine stated that "I may very well have said that." Tr. 684. No Jenks material was provided for Fine for an interview subsequent to the May 13, 1992 telephonic interview. That, and Fine's failure to recall that he had even been asked about Mitchell in the May 13, 1992 interview, would suggest that subsequent to that interview, the Independent

It is not known whether by this questioning Dean's counsel was attempting to show the limited role of Mitchell in Park Towers or was trying to contradict the allegation in the Superseding Indictment that the co-conspirators represented to their developer/clients that Dean was Mitchell's stepdaughter.

In any case, the following would comprise O'Neill's redirect examination of Fine:

Q. Mr. Fine, during cross-examination you were asked about you notetaking and your habits of doing so. When you make those notes, are they made at or about the time -- as the events are taking place?

A. They are.

Q. And do you try to be as accurate as possible in your notes?

A. I do.

Q. Now, Mr. Wehner asked you about when was the first time you heard the defendant Deborah Gore Dean's name. Did you ever hear her name at all in any way, shape or form in relation to the Park Towers project?

A. I have no recollection that I did.

Q. But you did hear the name Silvio DeBartolomeis?

A. Yes, I did.

Q. And that's reflected in your notes.

A. Yes, it is.

Tr. 687.

At this point, it might seem odd that, after earlier seeking to establish through Shelby's testimony that there were no documents reflecting Shelby's contacts with DeBartolomeis but that there were documents reflecting Shelby's contacts with Dean, O'Neill would now elicit from Fine that he did have notes reflecting contacts with

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Counsel did not confront Fine with Shelby's statements indicating the he (Shelby) was certain that he told Feinberg and assumed Feinberg told Fine.

DeBartolomeis but had not even heard Dean's name. Despite the tension between these two approaches, however, both would ultimately serve the Independent Counsel's ends. The former testimony (Shelby's) would assist in, and be used to justify, leading the jury to believe that Dean was "the contact at HUD" referenced in the July 31, 1985 memorandum, and, more generally, that Dean was Shelby's principal contact at HUD on Park Towers. The latter testimony (Fine's), along with the February 3, 1986 memorandum referencing Shelby's "friend at HUD," would be used to support the Independent Counsel's claim before the court of appeals that "Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others." Gov. App. Br. at 24.

4. Janet Hale

Janet Hale, who had signed the funding documents relating to Park Towers, testified that the 266 units sent to Dade County in November 1985 were awarded as result of a note from Dean stating that she had talked to Senator Paula Hawkins about the funding. Tr. 766-68.

5. Silvio DeBartolomeis

Silvio DeBartolomeis was called as an OIC immunized witness, having pled guilty to certain misdemeanors. He testified about Dean's role in the moderate rehabilitation process, including that Dean had on occasion told him to have certain things funded. Tr. 816. DeBartolomeis, who had dated Dean, also testified about Dean's relationship with Mitchell, including that Dean had told him that her mother did not marry Mitchell because of Mitchell's poor financial condition. Tr. 816-820. DeBartolomeis also stated that he was aware that Mitchell had done HUD consulting work and that Nunn, though not Mitchell, had come to see him (DeBartolomeis) with regard to certain projects. Tr. 819-220. DeBartolomeis also testified about being instructed by Dean to sign moderate rehabilitation funding documents that he did not wish to sign. Tr. 824-26. DeBartolomeis also testified about covering up how the moderate rehabilitation program worked in a letter to two congressmen and that he had done that in cooperation with Dean. Tr. 827-29.<sup>40</sup>

O'Neill did not ask DeBartolomeis any questions about his contacts with Shelby. He did not ask DeBartolomeis whether Shelby contacted him about seeking funding for Park Towers. He did not ask DeBartolomeis whether Shelby had contacted him to secure waivers on Park Towers, or whether, in signing those waivers, DeBartolomeis had done so in the exercise of his own discretion or at the direction of someone else.

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<sup>40</sup> This was the subject of one of DeBartolomeis' misdemeanor counts. Dean was not charged on the matter.



On cross-examination, DeBartolomeis acknowledged that he knew Shelby as a result of Shelby's consulting on several projects. DeBartolomeis was not asked about Park Towers; when asked whether Shelby contacted him on another project, DeBartolomeis said he could not recall. Tr. 931-32.

O'Neill conducted a fairly lengthy redirect, but again asked no questions about Shelby or Park Towers. Tr. 980-96.

C. Dean's Motion for Judgment of Acquittal

Dean moved for a judgment of acquittal at the close of the OIC's case. In opposing that motion, the OIC made the following argument that is germane to the issues treated in this Narrative Appendix:

Finally, with regard to Park Towers, the evidence also established defendant's involvement. Shelby testified that he met with defendant regarding the allocation of units for this project. Tr. 553. The memoranda of the developer -- Martin Fine -- to file also indicated that Shelby met with "his friend at HUD" and "she indicated that this matter [the post-allocation waiver] could be dealt with in a favorable manner." G. Ex. 85 (emphasis added). Significantly, Shelby avoided identifying "his friend" in his dealings with Fine and Feinberg. Moreover, neither Fine nor Feinberg were aware that Mitchell was involved in the Park Towers project, even though, through Shelby's company, Fine paid Mitchell \$50,000. Finally, although Shelby denied discussing this project with Mitchell and Dean at the same time, on September 9, 1985, Mitchell's and defendant's calendars reflect that defendant, Mitchell, Shelby, and defendant [sic] were to meet for lunch; and on September 10, 1985, Shelby forwarded information on "the Miami Mod Rehab." G. Ex. 5k, 9g & 76.

In sum, this evidence, and the other evidence set forth on the government's summary charts, demonstrates defendant's direct involvement with her co-conspirator's requests for Mod Rehab units. That evidence also shows that defendant and her co-conspirators, particularly after the Arama project, took pains to avoid referring to Mitchell's or defendant's involvement in these projects in any documents; indeed, as noted above, neither the developer of Park Towers, nor his Florida consultant, even knew that Mitchell was involved.

Gov. Supp. Acq. Opp. at 16-17. See also Gov. Supp. Acq. Opp. at 16-18.

In oral argument, Paula Sweeney, referring to summary charts similar to those used in closing argument, would again emphasize that Shelby forwarded the documents "what he calls the Miami mod rehab" the day after the September 9, 1985

lunch and that Fine was not aware that Mitchell was involved. Tr. 2029-30. Sweeney would stated:

As was the case in the Nunn matters, Mr. Mitchell is getting a fee from Mr. Shelby but doesn't appear in any of the documents. His role is concealed from anybody -- from everybody including the individual who ultimately is paying his fee, that being Mr. Fine.

Id.

As noted in Section E infra, those charts to a large extent tracked the allegations in the Superseding Indictment. But they also included references to the waiver that DeBartolomeis had signed on May 28, 1985, and the sending of that waiver by Shelby to Fine on May 26, 1985. Those references would be based on Government Exhibit 90, which O'Neill had introduced through the testimony of Fine, though without inquiring of Shelby, Feinberg, Fine, or DeBartolomeis as to how DeBartolomeis had come to sign the waiver or how Shelby had come to secure a copy of it to send to Fine.

In denying Dean's motion, the court would state the following with regard to Park Towers (Tr. 2046-47; emphasis added):

The meetings occurred obviously between Mr. Shelby and Miss Dean, the meetings were scheduled. It's inferred that they met, Miss Dean, Mr. Shelby and Mr. Mitchell. Mr. Shelby sent information to Miss Dean about the project and the rapid replies were issued for the units to be sent to Dade and those documents forwarded to Mr. Shelby and forwarded to his employer.

Eventually, again there were payments made and again correspondence occurring -- occurred regarding further lunches with Mr. Shelby and Miss Dean, regarding further problems in the project, and eventually after the continued meetings there was a waiver which concerns Park Towers, the continued meeting with Mr. Shelby and Miss Dean and some with Mr. Mitchell and eventually according to the government, Shelby's organization of Miss Dean's campaign to be assistant secretary. With various correspondence to Mr. Shelby thanking Miss Dean for her work in the past year, et cetera. And the payments made by the contractors for the services rendered by Mr. Shelby and Mr. Mitchell.

D. Testimony of Deborah Gore Dean

During her direct examination Deborah Gore Dean first mentioned Shelby in a discussion of learning of Mitchell's having received consulting fees. After Dean described her call to Special Agent Alvin R. Cain, Jr., in which she had questioned Cain as to whether he had a check to prove that Mitchell had received \$75,000 from Louie Nunn for consulting on the Arama project,<sup>41</sup> this questioning occurred:

Q. Did you have any further conversation with anyone else other than Mr. Cain shortly after you discovered that information?

A. Yes. I called Jack Brennan and told Jack Brennan that I wanted him to come to my office with all of John's papers so that I could prove that John hadn't done any business with HUD and hadn't gotten any money.

Q. Did you learn during that conversation that Mitchell had received money?

A. Yes. He told me that --

MR. O'NEILL: Objection once again, Your Honor.

THE COURT: All right.

Q. Based on your conversation with Mr. Brennan, did you reach an understanding as to what Mr. Mitchell's role was in the mod rehab process?

MR. O'NEILL: It's hearsay, Your Honor.

THE COURT: Yes, it's hearsay. I think she can say what actions she took and what she learned of things.

Q. Did you speak to Mr. Shelby at that point?

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<sup>41</sup> See Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

A. No. I understood from Mr. Brennan that Mr. Shelby might be involved, and I have never spoken to Mr. Shelby since that day, and I didn't call him. I didn't understand how it could have happened.

Tr. 2618-19.

Later, when asked whether she had any recollection of discussing the Park Towers project with Shelby, Dean answered:

I might have but I just don't remember. I know that it was back in 1985 and I know that he testified that he believed he spoke to me about it, but I just don't recollect him talking to me about it.

Tr. 2685. Dean testified to much the same effect shortly thereafter:

Q. Now, Miss Dean, did you ever have any conversations with Mr. Shelby regarding the Park Towers project?

A. I don't recall. It could very well have been. I just don't recall having any specific conversations. I don't recall the name Park Towers, for instance.

Q. All right.

A. He may have asked me a question about something to do with it. I just don't remember him ever saying anything about Park Towers, or I have a project, is there anything you can do to help me about it, but he may have said to me I'm working on a project in wherever. I just don't recall.

Tr. 2696.

Dean went on to describe meeting Shelby in 1985. She stated that she had spoken to him on the phone some years earlier, but actually met him with DeBartolomeis and then ran into him after a meeting with DeBartolomeis. She then scheduled the lunch with Shelby and Mitchell, after Shelby mentioned he knew Mitchell. Dean stated that they had talked politics at the lunch. Dean indicated that she had learned of the consulting relationship between Shelby and Mitchell from the Independent Counsel. She indicated that she had had various discussions with Shelby regarding HUD business but does not recall Shelby's requesting her assistance to secure funding for a specific project until the Eastern Avenue project, which was funded in 1987. She indicated that she felt Shelby was imposing on the relationship at that time, but told him that she would bring the project to Secretary Pierce's attention. Tr. 2685-92.

With regard to the 266 units sent to Dade County in November 1986, Dean stated that they had been funded at the request of Paula Hawkins, and, along with 131 units for Miami Beach, were part of 400 units that had been promised to Hawkins to go to the areas Hawkins designated (actual total 397). Tr. 2392-93. Dean introduced into evidence her letter to Hawkins that the funding would be forthcoming and her (Dean's) memorandum to Hale referencing a conversation with Hawkins relative to the funding. Tr. 2421-23; Dean Exhs. 877, 71.

On cross-examination, O'Neill questioned Dean about the lunches scheduled for August 1 and August 9, 1985. She indicated that the first lunch was probably cancelled and rescheduled and stated that she did not remember Park Towers being discussed at the lunch. Tr. 3008-12. O'Neill did not ask her anything about the July 31, 1985 Fine memorandum referencing Shelby's upcoming meeting with "the contact at HUD," or whether the reference was in fact to her.

O'Neill questioned Dean about the materials attached to the September 10, 1985 letter, and Dean indicated that she did not know what the attached materials had been and that the letter did not refresh her recollection regarding whether Shelby discussed Park Towers with her. She stated that the notation indicated that she sent one or both of the attachments to Dave Turner who worked with public housing. Tr. 3011-12. O'Neill asked Dean whether she had met with Shelby and DeBartolomeis and whether Park Towers had been discussed at the September 9, 1985 lunch. Dean denied meeting with Shelby and DeBartolomeis, and denied discussing Park Towers at the lunch with Mitchell and Shelby, stating "definitely I would remember that." She also said that Shelby asked her a lot of questions and she tried to answer them. Tr. 3012-13.<sup>42</sup>

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<sup>42</sup> The questioning was as follows:

Q. And the meetings he was having with Mr. DeBartolomeis and other people, included you, ma'am. Is that correct?

A. I do not recall having a meeting with Mr. Shelby about anything except a coinsurance briefing that I did once, sending him some things on tenant waiting list eligibility criteria and his coming to see me about the Prince George's 88 units. Other than that, the lunches were social, but he did ask me a lot of questions, and I tried to answer them when I could.

Q. Now, Ms. Dean, when you had lunch with Mr. Shelby and Mr. Mitchell, do you remember discussing the Park Towers project?

A. Oh, no. That would have, that would -- definitely I would remember that.

O'Neill questioned Dean about Fine's February 3, 1986 memorandum where Fine stated that Feinberg had said "Rick said he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner." After having Dean read the memorandum aloud, O'Neill asked: "Ms. Dean, to your knowledge, are you Mr. Shelby's friend at HUD?" Dean responded that she could very well be the person referred to in the letter, particularly since they were having lunch around that time. She answered succeeding questions by stating that she assumed that Shelby discussed some issue that he thought could be resolved, but "I have no idea what that issue was." She reiterated that Shelby often asked her questions and she answered them the best she could. Asked whether she knew that Shelby was a paid consultant on Park Towers, Dean stated that she assumed he was being paid for whatever information he was asking her about, but that she did not remember him talking about a project called Park Towers. Tr. 3012, 3022-23.

O'Neill did not ask Dean whether Shelby might have been asking her about a post-allocation waiver or show her the materials that Government Exhibit 84B indicated Shelby had sent her that day or otherwise attempt to refresh her recollection about the possible subject of the discussion. Nor did O'Neill question Dean about the subjects of the various meetings and lunches that followed during the ensuing months that O'Neill would later describe as "[c]ontinuing meetings on the Park Towers project." Tr. 3394. As he had done when questioning the OIC's witnesses listed in Section B supra, O'Neill avoided any use of the word "waiver."

On cross-examination, Dean also described the friendship she formed with Shelby, indicating that they had lunch "once a month, once every two months" (Tr. 3009) or "every two to three weeks." Tr. 3102. See also Tr. 3022-26. Dean was also questioned about Shelby's contacts to her on the Foxglenn project. Tr. 3101-06.

#### E. OIC's Charts and Closing Argument

The OIC sought to have admitted into evidence certain summary charts based on documents that were admitted into evidence, so that the summary charts themselves could be taken into the jury room. Ultimately, however, in the face of vigorous argument from the OIC,<sup>43</sup> the court ruled that the chart's would not be admitted into evidence, though they could be used in closing argument. Tr. 2947-60.

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<sup>43</sup> Sweeney had argued that she disagreed that the charts were argument, asserting that "we have made every attempt to use neutral language and to summarize the documents in evidence the same way that the charts that were used in the Williams case were prepared..." Tr. 2947. After the court's ruling, Sweeney argued:

The OIC's Park Towers Chart (Dean Mem., Exh. FF), which is attached as Attachment 6, was comprised of four pages. Among other things, it listed most contacts between Dean and Mitchell, Dean and Shelby, or Shelby and Mitchell indicated on an admitted exhibit, even where there was evidence that the meeting did not take place. It did not, however, include the letters from Shelby to Dean of August 15, 1985 (Gov. Exh. 74), or from Dean to Shelby of September 4, 1985 (Gov. Exh. 75), that had mentioned various matters relating to Shelby's consulting. As stated earlier, to a large extent, the chart tracked the allegations in the Superseding Indictment, and included the July 31, 1985 Fine memorandum referencing Shelby's meeting with "the contact at HUD" and the September 9, 1985 lunch among Shelby, Mitchell, and Dean. Whereas the Superseding Indictment had made no reference to the granting of a waiver, however, entries for the May 28, 1986 waiver, along with Shelby's transmitting a copy of it to Fine the following day, would be included in the chart between a number of entries relating to meetings of Shelby and Dean.

The entries on the first two pages of the chart, along with the first two entries from the third page, are set out below.

**PAGE 1:**

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With all due respect, the Government would have a continuing objection to Your Honor's ruling in this matter. We believe that the charts are permissible to organize what's been a voluminous amount of data in a chronological fashion and by count and that is a use that has been recognized in the case law. So, with all due respect, Your Honor, we wish to note our continuing objection to Your Honor's ruling.

Tr. 2959-60.

December 5, 1983 thru February 27, 1984: **FINE** asks local PHA about Mod Rehab. (Government Exhibits 62, 63)

May 1, 1985: **FEINBERG** sends **FINE** Shelby's new business announcement. (Government Exhibit 66)

May 23, 1985: **SHELBY** meets **MITCHELL** for lunch. (Government Exhibits 9D, 68, 11A)

May 30, 1985: **SHELBY** scheduled to meet Mitchell. (Government Exhibit 9F). **FINE** offers **FEINBERG** \$150,000 to obtain 143 units for Park Towers.

June 20, 1985: **DEAN** congratulates **SHELBY** on new job (Government Exhibit 69)

July 31, 1985: **FEINBERG** tells **FINE** "our friend" is meeting with the "contact at HUD this coming week." (Government Exhibit 72)

August 1, 1985: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 5H)

August 9, 1985: **DEAN** and **SHELBY** meet for lunch (Government Exhibits 5I, 11B, 73, 74).

September 9, 1985: **DEAN** schedules lunch w/**SHELBY** and **MITCHELL**. (Government Exhibits 5k, 9G)

September 10, 1985: **SHELBY** sends **DEAN** information on Miami Mod Rehab and thanks her for her time and effort on his behalf. (Government Exhibit 76).

October 15, 1985: **DEAN** schedules briefing for **SHELBY**. (Government Exhibit 5M)

November 22, 1985: **DEAN** schedules meeting w/**SHELBY**. (Government Exhibit 5M)

**PAGE 2:**

November 26, 1985: HUD Rapid Reply for 266 Mod Rehab units to Dade. (Government Exhibit 78)

November 27, 1985: **SHELBY**'s Employer faxes Rapid Reply to **FINE**. (Government Exhibits 79, 79A); **SHELBY**'s employer bills **FINE** for \$45,000. (Government Exhibit 80).



December 2, 1985: HUD Atlanta is notified of 266 Mod rehab units for Dade County. (Government Exhibit 81)

December 9, 1985: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 50)

January 16, 1986: **FINE**'s partner pays **SHELBY**'S employer \$45,000.

February 3, 1986: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 7B); **SHELBY** sends **DEAN** Fine's letter about a problem with eligibility in light of past federal subsidies. (Government Exhibit 84B); **FINE** memo to file: "Rick said that he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner..." (Government Exhibit 85).

February 4, 1986: **SHELBY**'s employer pays \$10,000 to **MITCHELL**. (Government Exhibit 87)

March 21, 1986: **DEAN** schedules meeting w/**SHELBY**. (Government Exhibit 7D)

April 7, 1986: **DEAN** schedules meeting w/**SHELBY**. (Government Exhibits 7F, 88)

May 28, 1986: Park Towers waiver. (Government Exhibit 90)

May 29, 1986: **SHELBY** sends a copy to **FINE**. (Government Exhibit 90)

**PAGE 3:**

July 25, 1986: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 7n)

July 28, 1986: **MITCHELL** notes on his calendar "12:00 Rick **SHELBY** - Picture." (Government Exhibit 10A)

August 5, 1986: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 7O)

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In closing argument, O'Neill would conclude his discussion of the funding of Arama and South Florida I (the other moderate rehabilitation projects in Count One)

observing: "All arrows lead to her. She is the one controlling, directing the awarding of the mod rehab units." Tr. 3391.

O'Neill then placed the first page of the Park Towers Chart on the visual presenter and proceeded as follows:

Now you still have Park Towers, and Park Towers is interesting, because that, too, is Miami, and you'll remember he testified a long time ago, Martin Fine, the developer. Mr. Fine is a prominent attorney in Miami and also well known in the housing field, did many things in housing.

Mr. Fine puts an application in to local public housing authority in mod rehab. He's not going anywhere with it. He's not getting anything. Why isn't he getting anything? Because the local public housing authority has no power. Finally, Mel Adams [from Dade County housing authority] tells him that.

Even Mr. Fine, a prominent lawyer down there with a big housing background, can't get anything. He, too, must hire a consultant. So he hires Eli Feinberg, somebody he knows. Well, Feinberg is local. He needs somebody in D.C., so they hire Richard Shelby.

Again, are they hiring a consultant on housing matters, a guy familiar with housing and the housing industry and what the Mod Rehab Program is? No, they're hiring a political consultant. They're hiring an influence peddler, a guy who can go to the right place, knock on the right doors, and get the right answers.

And why will they listen to him? Because he can do something for them. It's a big you-scratch-my-back-I'll scratch yours. That's what this is about. It's a little club, and if you're not a member of the club, you're out of luck.

What happens? Shelby meets with Mitchell for lunch. A contract is put in, 150,000. What happens with the contract? Does it stay at \$150,000? No, we heard testimony it went up to 225,000. It's a valuable commodity. What's it for? It's for 142 [sic] units. Now the price had gone up. It's no longer \$1,000 an unit; it's closer to \$2,000 an unit.

What do we see during this time? We have the defendant congratulating Shelby on his new job. We have her scheduling lunch with Shelby, actually meeting him for lunch because sometimes there was a lot of talk about whether it was actually meeting for lunch or not.

Well, the calendars can only tell you what was going to happen. We have the backup documentation such as on this one, where it's an

expense account with her name on it. Then we show she actually met for lunch. Who meets for lunch this time? The three of them are now meeting.

The very next day, he sends her information on Park Towers. It's in evidence. Again, it's in black and white. It can't be disputed. The defendant is saying, "I didn't know he was working on these projects. He didn't ask me for anything." It's in black and white. This is back in 1984 [sic], way before she says he spoke to her."

And it goes on. Dean schedules a briefing with Shelby. Dean schedules a meeting with Shelby. She's constantly meeting with him.

[Presumably, at this point, O'Neill placed the second page on the visual presenter.]

And you'll see a HUD rapid reply for 266 units. You might remember that gets fax'd almost immediately to Mr. Fine down in Miami. Why? Because the contract called for a \$45,000 payment to go out. That's what this case is about -- money, Ladies and Gentlemen, and what people will do with money.

HUD Atlanta is notified 266 units. This is after Rick Shelby knows. This is after Martin Fine has found out. The HUD people don't learn until days later. That's how the system has been perverted by these individuals, prominent people in this little circle.

Again we see another luncheon and another payment of \$45,000.

Again, this correspondence going back and forth. Dean, Shelby, all this coming back and forth at this time frame. Shelby's employer paid him \$10,000. He gets some up front money. We're going to find out he gets \$50,000 on Park Towers. Mr. Shelby said he got nothing on Park Towers. Absolutely nothing.<sup>[44]</sup> Yet he gets \$50,000. Why, ladies and gentlemen? It's for access to the defendant.

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<sup>44</sup> The Chart makes clear that O'Neill in intending to communicate that Shelby's employer paid Mitchell \$10,000. The statement that follows to the effect that "Shelby said he got nothing on Park Towers" is either a mistranscription or a misstatement by O'Neill. It is clear that O'Neill said or meant to say that Shelby stated that Mitchell "did nothing on Park Towers."

And you'll see how it keeps going. Continuing meetings on the Park Towers project, and I won't even comment, you'll see there's just a lot of entries.

[Presumably, at this point O'Neill is switching to the third page of the Park Towers chart.]

Mitchell meeting with Rick Shelby. Again, Dean, Shelby scheduled to have lunch. Once again they're going to have a meeting.

Now, you'll see, Shelby sends a telegram. You saw that telegram. When the defendant wants something, she reaches out to Richard Shelby, to Louis Nunn, to Louis Kitchin. Because she's reaching out to people who can help her now. She's helped them. They'll help her. They'll get her her job as Assistant Secretary.

Tr. 3391-94 (emphasis added).

Later on, in discussing Dean's denial that Shelby sought anything of her until Eastern Avenue, and noting the frequency with which Shelby and Dean had lunch during periods when Shelby was promoting an earlier project (Foxglenn), O'Neill stated:

They weren't friends before her position as Executive Assistant to HUD. You will hear from her they're not friends any longer. They're only friends when she's Executive Assistant. Ask yourself does that make sense that they're not talking about Mod Rehab, about these projects while she's Executive Assistant and having lunch with him on a very frequent basis as she says.

Tr. 3406.

In rebuttal the following day, O'Neill would again discuss Park Towers, responding to a point by Dean's counsel concerning the fact that certain persons did not even know that Mitchell was involved with certain projects. O'Neill stated:

Mr. Wehner mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?

Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid \$225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

F. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean discussed the OIC's use of the reference to "the contact at HUD," the September 9, 1985 lunch, and the faxed rapid reply in a background section dealing with the OIC's belated disclosure of Brady materials. Dean pointed out that, as with most of the other belatedly produced Brady material, the reasons offered by the OIC for its delinquent production did not apply to the Shelby statements at all. Dean also argued that, though the OIC had not specifically referenced "the contact at HUD" in closing argument, the purpose of talking at length about the adjacent entries while the conspiratorial reference to "the contact at HUD" was displayed was to lead to jury to believe that Dean was the contact even though the OIC knew she was not.

Dean also argued that the OIC sought to lead the jury to believe that Park Towers had been discussed among Mitchell, Shelby and Dean at the September 9, 1985 luncheon, even though the OIC knew that it was not. Dean Mem. at 98-103. Finally, Dean argued that the OIC used the reference to the rapid reply in a manner to lead the jury to believe that she had provided it to Shelby. Dean Mem. at 103-07.

Dean pointed out the similar arguments that the OIC had orally made with regard to the motion for judgment of acquittal, and noted that, in denying the motion, the court itself had appeared to rely on the beliefs that Park Towers had been discussed at that September 9, 1985 lunch and that Dean had provided Shelby the rapid reply. Id. at 107.

Dean also cited O'Neill's statement that Dean and Shelby were not friends after she was no longer Executive Assistant. She pointed out that the OIC was possessed of materials showing that Shelby and Dean remained friends until the April 1989 release of the IG report, but nevertheless, in order to make a point about the lunches, O'Neill falsely represented to the jury that Dean and Shelby were not friends after she left her position as Executive Assistant. Dean Mem. at 201-03.

Dean did not assert that the placement of the entry relating to the waiver among the several entries related to Dean, along with O'Neill's statement in discussing those

entries that Dean and Shelby were having "[c]ontinuing meetings on the Park Towers project," had been intended to lead the jury to believe that Dean was responsible for the May 28, 1986 waiver. Nor did Dean note that the court itself had appeared to interpret the charts used in the argument on Dean's motion for judgment of acquittal to suggest that Dean had been responsible for the post-allocation waiver. The Fine memoranda covering that period and reflecting Shelby's contacts with DeBartolomeis had not been made evidence, and Dean did not make these documents exhibits to her Rule 33 Motion.

Nor did Dean point out that there was information in Shelby's Jencks material contradicting Feinberg's statement that he did not know that Mitchell was involved in Park Towers. As indicated, however, the Shelby Jencks material that Dean would make part of the record with regard to other matters would include two statements by Shelby that he had told Feinberg of Mitchell's involvement. Dean Mem., Exhs. CC at 2, DD at 8.

G. OIC's Rule 33 Opposition

In its Opposition, the OIC treated most of the above matters in the context of an argument that it had not violated its Brady obligations, arguing that "it remains the government's position that the statements at issue constituted Giglio materials, rather than Brady information per se," and thus "there was no intentional disregard of Brady by the government." Gov. Rule 33 Opp. at 6-7.<sup>45</sup>

The OIC limited its discussion of its use of the "contact at HUD entry" in its Park Towers Chart in closing argument to a footnote. In that footnote, however, the OIC acknowledged that it had in fact sought to "imply in the indictment and in closing argument that defendant was 'the contact at HUD' referred to in the Fine memorandum." The OIC argued that its action was permissible because:

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<sup>45</sup> Associate Independent Counsel's Robert E. O'Neill and Paula A. Sweeney had left the OIC by the time of the filing of the Rule 33 Opposition. That Opposition would be signed by Associate Independent Counsel Robert J. Meyer, with Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce C. Swartz also named. These three names would also appear on the Independent Counsel's appellate brief.

...the jury was entitled to discredit Shelby's testimony and conclude on the basis of the circumstantial evidence -- including Shelby's numerous contacts with defendant (Tr. 567-73), the lack of any corroboration of the contacts with DeBartolomeis and Cushing (Tr. 547-48), the fact that Shelby sent defendant material regarding "the Miami Mod Rehab" on September 9 [sic], 1985 (Gov't Exs. 5k, 9g, and 76) (Appendix tab H), and the fact that a subsequent Fine memorandum regarding the same housing project referred to Shelby's "friend at HUD" as a "she" (Gov't Ex. 85) (Appendix tab H) -- that defendant was in fact "the contact at HUD."

Gov. Rule 33 Opp. at 9 n.5.

With regard to the faxed rapid reply, the OIC argued that it had not argued to the jury that Dean had faxed it. Gov. Opp. at 10. The OIC also argued that Shelby's Jencks material had been provided on September 13, 1993, "the day the jury was sworn and long before Shelby testified." Gov. Rule 33 Opp. at 10 n.7.

The OIC did not discuss Dean's allegation regarding the attempt to cause the jury to believe that Park Towers was discussed at the September 9, 1985 luncheon. In the OIC's contemporaneously filed Opposition to Dean's Rule 29 Motion, however, the OIC argued that despite the fact that Shelby denied discussing Park Towers with Dean and Mitchell at the same time, the sending of the Miami mod rehab materials on the day following the lunch, "clearly indicates that the project had been discussed." Gov. Rule 29 Opp. at 22-23.

As previously noted, in that Opposition the OIC also argued that it was significant that neither Feinberg nor Fine knew of Mitchell's involvement with Park Towers. Id. at 22. Relying on the February 3, 1986 memorandum, the OIC would argue that it was significant that "Shelby avoided identifying 'his friend' with Fine and Feinberg." Responding to Dean's point that Fine had stated that Shelby told him that the waiver was signed by DeBartolomeis and that Fine had not even heard Dean's name in connection with Park Towers, the OIC argued that these facts, together with the evidence of Dean's involvement and the fact "that Fine was not told the name of Shelby's 'friend at HUD' -- who was clearly female," supported the "conclusion that Dean's involvement was deliberately kept secret to the extent possible." Id. at 22 n.22.

With regard to the statement in closing that Dean and Shelby had not been friends after she was Executive Assistant, the OIC cited the frequency of contacts while Dean was Executive Assistant and argued: "Further, there was little if any evidence of contact between Shelby and Dean after she left her position at HUD. On this record, it was entirely proper for the government to argue that defendant's position at HUD drove their relationship." Gov. Opp. at 49.

H. Dean's Rule 33 Reply

In her Reply, Dean argued that, with regard to the belated Brady disclosure, the OIC's point was only valid to the extent that its position on Brady was sufficiently colorable that the OIC might reasonably have misinterpreted its Brady obligation, which could not have been the case as to materials such as Shelby's statement on "the contact at HUD." Dean also noted that the OIC's argument as to why it failed to disclose the Mitchell phone messages under Brady (see Narrative Appendix styled "The John Mitchell Messages and Maurice Barksdale") must be regarded as a representation as its true reason for doing so, and that the proffered reason was sufficiently groundless that the representation must be deemed a false representation. Dean Reply at 5-6.

Dean noted that the OIC had acknowledged that it had intended the jury to infer that Dean was "the contact at HUD" referenced in the Fine Memorandum. She argued that, rather than giving the jury a basis for disbelieving Shelby, a witness the OIC itself had no basis for disbelieving, the OIC never elicited from Shelby any testimony that the jury could discredit. Dean Reply at 2 n.2. Dean also noted that the OIC had never explicitly argued the point in its many documents filed with the court on the issue of whether there was sufficient evidence to sustain a verdict. Mainly, however, Dean argued that the issue before the court did not involve what the jury could reasonably infer; it concerned the fact that the OIC, while having no basis for believing that Dean was "the contact at HUD" referenced in the memorandum, nevertheless placed this conspiratorial reference on its chart, and by talking at length about the adjacent entries relating to Dean, sought to lead the jury to believe what the OIC itself did not believe. Dean Reply at 2-3.

Dean also argued that the OIC's failure to discuss the September 9, 1985 luncheon ought to be read as an acknowledgment that the OIC had also intended to cause the jury to infer that Park Towers was discussed among Mitchell, Shelby, and Dean at that luncheon. Dean Reply at 3.<sup>46</sup> As to the rapid reply, Dean noted that the reference was placed before the jury in the same manner as the reference to "the contact at HUD." She argued that, only if one would expect the jury to remember the testimony of a month before that Cushing had faxed the document, would one expect the jury to respond differently. Id. at 3 n.3.

With regard to Dean's friendship with Shelby, Dean pointed out that the OIC had exaggerated the frequency of contacts found in the record. Dean also argued that, having full knowledge of the continued relationship between Shelby and Dean after she had ceased to be Executive Assistant, the OIC decided not question either of them on the matter. In these circumstances, she argued, the absence of evidence of continued contacts cannot form the basis for the OIC's representation to the jury. Id. at 17-18.

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<sup>46</sup> Dean did not point out that the OIC was apparently arguing in its Opposition to the Rule 29 motion that the sending of the materials on the day following the lunch indicated that Park Towers "had been discussed" (Gov. Rule 29 Opp. at 23), although there as elsewhere failing to add that words "in the presence of Mitchell."



While Dean had dismissed the OIC's arguments defending the attempt to cause the jury to believe that Dean was "the contact at HUD" because the OIC had no basis for disbelieving Shelby, Dean did not directly address the OIC's point regarding the lack of corroboration of contacts between Shelby and DeBartolomeis. And she did not submit with her Reply the various Fine memoranda that did document Shelby's contacts with DeBartolomeis.

I. Hearing of February 14, 1994

1. Brady Issues

At the hearing on February 14, 1994, the Brady issues did not receive great attention. Deputy Independent Counsel Bruce C. Swartz touched briefly on the issue of the OIC's disclosures in insisting that the OIC had engaged in no misconduct involving the concealing of evidence or the use of false evidence. Swartz stated:

To the contrary, we believe that the practice of the government in this particular case in terms of the extensive discovery provided defendant, in terms of the early Jencks production, as Your Honor knows, far beyond the time required under the statute, in terms of the early Giglio production that the government's conduct here was well beyond that certainly required and, as the Court recognized at one point in the trial, it was a trial that was being conducted in an exemplary manner. The repeated accusations against the ethical standards of the prosecutors in this case, we think, have no basis in fact.

Transcript of Hearing at 21-22.

In the course of leading up to its ruling denying the motion for a new trial, the court acknowledged that some of the OIC's misconduct involved the withholding of material evidence to the eve of trial. The court observed:

... The Court does have its concerns, as it's voiced them previously, over some of the conduct of the Independent Counsel in the case and continually made rulings during the trial, recognizing it was a long, multiple-week trial, so there's obviously many witnesses that testified, but did have to make rulings during the trial at times concerning the failure of the Independent Counsel to be forthcoming as to its evidence in the files either that would fall under Brady or would be Giglio material, and being produced shortly before a witness testified, after having asked for it two years or so earlier, is really not a complete answer. As everyone recognizes, the defendant is entitled to due process in the trial.

Id. at 24.

Later in listing actions that the court felt indicated "at least a zealouslyness that is not worthy of prosecutors in the federal government," the court would again discuss the government's Brady failures and, alluding to matters that are treated in certain of the other narrative appendixes,<sup>47</sup> would also express its recognition that Independent Counsel had put witnesses on the stand to testify under oath when evidence in its files indicated that the witness was not telling the truth. The court stated:

It evidences to me in the Independent Counsel's Office, where there were Brady requests made a long time ago, statements that there were no Brady materials, which is obviously inaccurate, where these witnesses are put on that I've just reviewed, where there was substantial questions and information that they may not have been telling the truth in the prosecution's files or the prosecution didn't ask if they were telling the truth to make sure they were before they went on stand, it evidences to me a zealouslyness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors I'm very familiar with, and that concerns the Court and is not the first time I've seen it in Independent Counsel cases.

Id. at 27.

The court did not otherwise specifically comment on the Brady issue, although in treating certain other matters the court would note the OIC's failure to provide materials showing witnesses were not testifying accurately. See Narrative Appendix styled "Testimony of Thomas T. Demery."

2. "The Contact at HUD," etc.

With regard to Dean's claims that the OIC had sought to cause the jury to believe things that the OIC knew were false, the court questioned Swartz as follows:

Let me move to the next issue then, the issue as to Mr. Shelby's testimony and whether because he was a government witness, that it was then fair to say he shouldn't be believed as to her [sic] statements that he

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<sup>47</sup> See Narrative Appendixes styled "Testimony of Ronald L. Reynolds," "Testimony of Thomas T. Demery," and "The Andrew Sankin Receipts."

made when you called him. This concerns Mitchell's involvement or not and the contact that [sic] HUD referred to in a memorandum and whether it was the defendant who fax'd him the rapid reply letter or whether it was DeBartolomeis or Hunter Cushing and that there was in the government's files evidence of what was said or that was at least elicited by the government that was not accurate and that was then left up to defendant to try and straighten out.

Transcript of Hearing at 9.

Swartz responded as follows:

Well, Your Honor, I think that the, the evidence there with regard to Mr. Shelby's involvement with Ms. Dean is evidenced by a number of different means, not only his statements, which were somewhat ambiguous about who his contacts were with regard to this particular project, but beyond that, the documents that were in evidence. Those documents showed, among other things, that when he referred to his contact, particularly in regard to the post-allocation waiver, that it was a she, not a he. The evidence also showed that there was no indication of contacts with DeBartolomeis, as opposed to the defendant on this particular project.

Finally, I think that it's also clear from the, the very letter he sent to the defendant in September the day after he met with the defendant and with the, John Mitchell [sic] that the Park Towers project had been discussed with the defendant.

We believe that that certainly was enough to permit the jury to draw the conclusion that Dean was the contact that Mr. Shelby had with regard to this particular project. The government was not -- of course, does not vouch for Mr. Shelby just by calling him as, as a witness, and on this particular matter, we believe that there was more than sufficient evidence to permit the jury to conclude that he had contact with the defendant about the project.

In fact, we -- in terms of the, letter to her about the Miami Mod Rehab project, we think that it's basically an inescapable conclusion that that's what took place in this particular instance. But, at a minimum, it was for the jury to decide.

The contacts with DeBartolomeis and Cushing, particularly when the post-allocation waiver came into context, were matters to be argued to the jury, and indeed the defendant did argue them to the jury.

Id. at 9-11 (emphasis added).

Later, Swartz would return to the matter after discussing the OIC's use of the Andrew Sankin receipts:<sup>48</sup>

Similarly, the testimony about Shelby -- or the testimony of Shelby, the issue about whether the defendant was the contact of [sic] this particular project is again at the margin of what Mr. Shelby's testimony was. It is clear from his testimony as well as all of the other evidence that defendant took steps to aid Mr. Shelby's receipt of funds. That's made clear not only from his testimony but from Pam Patenaude's testimony and from the testimony of Sankin and others.

Again, the notion that on this particular project, the Park Towers project, that it's not clear whether defendant was his contact and that it would have made a difference to the, to the defense to be able to elicit that, although in fact they did elicit that, when all the evidence even on that particular account, on that particular project was that notwithstanding Shelby's ambiguity on that matter, that he had contact with Dean, that his contact at HUD was a, was a woman, and that, of course, Mitchell was paid on the project.

Id. at 23 (emphasis added).

The court mentioned the matter briefly in summarizing its ruling:

Mr. Shelby, I think, is somewhat of a collateral matter as to the one document we're discussing, but again standing alone is a concern that was not further reviewed with the Court at least as well as the counsel for the defendant as to his deliverance or acceptance of this receipt and who his contact was at HUD.

Id. at 26.

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<sup>48</sup> See Narrative Appendix styled "The Andrew Sankin Receipts."

#### J. OIC's Appellate Brief

On appeal, Dean argued that she had been prejudiced by the belated Brady disclosure and the failure still to turn over other Brady material prior to the Jencks production. Dean App. Brief at 46, 48. In addition to still maintaining that the withheld material was not Brady material, the OIC argued that Dean had not been prejudiced by the late disclosures either as to the material provided in the August 20, 1993 letter or the material that the OIC did not turn over until the beginning of trial. Gov. App. Brief at 45-48. The OIC argued that Dean had used the Shelby statements provided on August 20, 1993 by eliciting Shelby's testimony that Mitchell was paid a fee based on a commitment made before Shelby learned of Mitchell's relationship to Dean and that, to Shelby's knowledge, Dean was unaware that Mitchell had earned a consulting fee. Id. at 46.

The OIC would not discuss the materials withheld until the beginning of trial that Dean had not effectively used, such as Shelby's statements that Park Towers was not discussed at the September 9, 1985 lunch and that he had gone out of his way to avoid such discussion.<sup>49</sup> At the same time, however, elsewhere in its brief, the OIC would cite as its only evidence that Dean knew of Mitchell's involvement in Park Towers the fact that on the day following the lunch Shelby "forwarded Dean information on 'the Miami Mod Rehab,'" arguing that the proximity of the events "allowed the jury to conclude that the project had in fact been discussed." Id. at 22. As with every other argument the it had so far made in that regard, however, the OIC still would not explicitly state the words "when Shelby and Dean were with Mitchell."

The OIC also did not discuss Dean's counsel's inability to bring out Shelby's testimony that, in the July 31, 1985 Fine memorandum that would be placed before the jury with the conspiratorial reference to "the contact at HUD," that reference was to DeBartolomeis, not to Dean. Even though in the district court the OIC had acknowledged seeking to cause the jury to believe that the reference was to Dean, in arguing to the court of appeals that there had been sufficient evidence to persuade a reasonable jury beyond a reasonable doubt that there existed a conspiracy among Dean, Shelby, and Mitchell, the OIC did not cite that document at all.

As already indicated, however, the OIC would place much weight on the evidence of conspiracy in Shelby's supposed concealment of the role of Mitchell and of his (Shelby's) contacts with Dean. In arguing that Mitchell's involvement was kept secret, the OIC would no longer reference Feinberg's sworn testimony that he was unaware of Mitchell's involvement, which Paula Sweeney had elicited despite the statements of the OIC's immunized witness indicating that such testimony was false.

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<sup>49</sup> Dean's appellate brief did not cite the failure to disclose Shelby's statement about the lunch as an example of a Brady violation that had prejudiced Dean.

The OIC would now rely solely on Fine's testimony in twice making that point that Shelby concealed Mitchell's involvement from Fine. Gov. App. Brief at 5, 24.

In each of the passages in which the OIC asserted that Mitchell's role in Park Towers had been kept from Fine, it also asserted that Mitchell's role in Arama had been kept from Martinez. In making that assertion, the OIC would ignore Nunn's explicit testimony to the contrary as well as the understanding that it had gained from the Martinez interview. See note 34 supra.

As also already noted, given Feinberg's testimony that Shelby talked to him about his (Shelby's) contacts with Dean, the OIC would no longer explicitly state that Shelby concealed his contacts with Dean from Feinberg. The OIC would still, however, continue to rely on the Fine memorandum of February 3, 1986, which merely recorded what Feinberg had told Fine, as evidence that Shelby "was careful not to identify [Dean] by name to the developer who hired him. GX 85; [Tr.] 3021," (Gov. App. Brief at 22); and that "Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others. Tr. 678-87 [Fine]; GX 85." Gov. App. Brief at 24.

Thus, while the OIC no longer relied on the absence of documentation of Shelby's contacts with DeBartolomeis to justify leading the jury to believe that the reference to "the contact at HUD" was a reference to Dean, it now relied on Fine's testimony that he did have documents reflecting Shelby's contacts with DeBartolomeis as evidence that "Shelby avoided using Dean's name, but freely told his clients and others about DeBartolomeis and others." Id. at 24.

Nowhere in the OIC's appellate brief, however, did it argue that anything whatsoever -- including either the documentation of contacts with DeBartolomeis or the absence of documentation of contacts with DeBartolomeis -- suggested a reason why it believed that its immunized witness Richard Shelby would have lied.

#### K. Comments

One of the most serious abuses discussed above was not addressed in Dean's Rule 33 Motion. Given the OIC's actions recorded throughout these Narrative Appendixes, there seems little reason to doubt that its attorneys decided not to confront Feinberg with Shelby's testimony, or otherwise to verify whether Feinberg was telling the truth, and instead to elicit Feinberg's sworn testimony that he was unaware of Mitchell's involvement whether it be true or not. Those attorneys would do so, moreover, not in an effort to prove a conspiracy that there was powerful reason to believe in fact existed. Rather, they did so in an effort to prove a conspiracy where their immunized witness had contradicted the central premises of the conspiracy even before the indictment had been issued.

There also seems little doubt that at the time that they first decided not to confront Feinberg with Shelby's statements and at the time that they elicited and relied

on Feinberg's testimony, OIC counsel believed that Feinberg's statement that he was unaware of Mitchell's involvement was probably or certainly false.

O'Neill's remarks on this testimony in closing argument deserve special attention. It must be remembered that O'Neill was in the process of carrying out a protracted diatribe in which he repeatedly told that jury that a criminal defendant had lied and that, in a course of that diatribe, he had mischaracterized the record and relied on evidence that he had overwhelming reason to believe was false. It is against that background, that one must view O'Neill's statements, with regard to Feinberg's and Fine's testimony about Mitchell, that "both of those testimonies were unimpeached. Nobody ever contended that they did know." And against that background, O'Neill seems to have been flaunting his success at presenting unrebutted testimony that was almost certainly false despite being required ultimately to provide the defendant materials indicating that the testimony was false.<sup>50</sup>

The foregoing discussion assumes, as seems likely, that the OIC never confronted Feinberg with Shelby's statements that Feinberg was aware of Mitchell's involvement. Suppose, however, that the OIC did in fact confront Feinberg with Shelby's statements and Feinberg still insisted he was unaware of Mitchell's involvement. That would hardly resolve the prosecutorial misconduct issue, just as it would hardly resolve the question of whether Feinberg or the OIC's immunized witness Shelby was telling the truth. Nor would it resolve the question of whether, at the time the OIC put Feinberg on the stand, OIC counsel believed it more likely than not that Feinberg's testimony regarding Mitchell would be false. To resolve that question one still needs to know the nature of the exchange with Feinberg and what OIC counsel then proceeded to do to resolve the conflicting testimony. Given the OIC's conduct with regard to similar matters discussed elsewhere,<sup>51</sup> however, confronting Feinberg with

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<sup>50</sup> Originally Feinberg was to testify before Shelby. See Attachment 5. That arrangement would have increased the possibility that, after Feinberg testified that he did not know of Mitchell's involvement, Dean's counsel would recognize the OIC's purpose in eliciting that testimony, would have the opportunity to review Shelby's Jenks material for contrary evidence, and would then elicit from Shelby detailed statements about his discussions with Feinberg of Mitchell's involvement and the fee arrangement. The OIC, however, reordered its witnesses and had Feinberg testify after this issue did not arise with Shelby. The OIC had the option of not calling Feinberg at all if Shelby testified that he had told Feinberg about Mitchell's involvement. When Shelby mentioned his discussions with Feinberg about the fee in response to O'Neill's question about the amount of Mitchell's fee, O'Neill immediately changed the subject to whether the arrangement was in writing. Tr. 546.

<sup>51</sup> See, e.g., Narrative Appendixes styled "Arama: The John Mitchell Messages and Maurice Barksdale," "The Russell Cartwright Receipt," and "The Andrew Sankin Receipts."

Shelby's testimony would reflect a significant departure from the OIC's standard approach to such issues in this case. In any event, there seem few plausible scenarios that would place OIC counsel in any better light than that of preferring to rely on evidence that is probably false rather than to take the modest steps necessary to determine the truth. It seems clear enough, moreover, that the failure to take those steps was not here motivated by resource considerations, but by a concern that the truth was not as likely to advance the OIC's case.

With regard to the matters Dean did raise in her Rule 33 Motion, the following appear to be fair inferences:

The OIC knew that Dean was not "the contact at HUD" referenced in the July 31, 1985 Martin Fine memorandum, yet included Paragraph 64 in the Superseding Indictment in order to cause readers to believe that Dean was person to whom the conspiratorial reference applied. Whatever intention or hope the OIC had of eventually persuading a jury that Dean was "the contact at HUD," it sought to derive a benefit from the use of the reference in the Superseding Indictment by causing the charge to appear stronger in the eyes of the public and also by enhancing the OIC's position in any plea bargaining with Dean.

The OIC withheld that material notwithstanding Judge Gesell's instruction of June 3, 1992, in order to continue to derive the above benefits. The OIC's June 8, 1993 explicit representation that the OIC was aware of no exculpatory material was false and known to be false when made. Sweeney's representations at the August 31, 1993 hearing on Dean's motion to dismiss, as well as the assertion in the OIC's Opposition to Dean's Rule 33 Motion, as to the basis for withholding the Shelby statements and other Brady material -- offered, as they were, as the actual reasons for the OIC's past conduct -- were false representations as well.

In its brief in the court of appeals, seemingly reluctant to make again such implausible representations as to what its attorneys' true motivations had been, the OIC would merely state that "the government had argued below that the items of evidence cited by Dean either were not exculpatory or were more accurately described as Giglio material." Gov. App. Br. at 45. In oral argument on November 15, 1994, however, Judge Laurence Silberman would press Swartz as to the actual reason for the OIC's withholding the material. Swartz's rather evasive response is difficult to characterize.<sup>52</sup> But it seems fair to say that ultimately he responded that there had been no intentional violation of the OIC's Brady obligation. Rather, Swartz would represent to Judge Silberman, trial counsel may simply have too narrowly interpreted the OIC's Brady obligation. Swartz would also represent that it was pre-trial reexamination of the materials that led the OIC to make the August 20, 1993 disclosure. Thus, Swartz would represent to the court of appeals that, in truth, the OIC had withheld such material as

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<sup>52</sup> A transcript is not available as of this writing.



Shelby's statements that, to his knowledge, Dean was unaware of Mitchell's involvement with Park Tower because the OIC had failed to perceive that such statement fell under Brady. Swartz's statement must be read as well as a representation that, even though the inference that Park Towers had been discussed at the September 9, 1985 lunch was a critical element of the OIC's proof on the Park Towers charge, in truth, even after that reexamination, the OIC's attorneys failed to perceive that Shelby's statement that Park Towers was not discussed at the September 9, 1985 lunch was exculpatory.

Finally with regard to the Brady issue, though there may be a tendency to interpret the large volume of material described in the OIC's August 20, 1993 letter as an indication of the scope of the Brady violation, that could be misleading. Much of the material was inconsequential. It is very possible that the OIC included so many statements precisely to obscure to the extent possible the implications of the critical disclosures, with regard both to the seriousness of the Brady violation and to the extent to which the information undermined the OIC's claims. In any event, had the August 20, 1993 letter been limited to Shelby's statements and the several other items that obviously contradicted the OIC's claims, Dean would probably had been able to present a starker picture of abuse to the court. Thus, to the extent that the OIC's August 20, 1993 letter contained disclosures not required by Brady, it by no means suggests a belated decision on the part of the OIC to err on the side of disclosure. And, as noted, the OIC continued to withhold material that were as obviously of an exculpatory nature as the Shelby statements provided in the August 20 letter.

There also seems no room for doubt that the OIC introduced the July 31, 1985 Martin Fine memorandum into evidence without adducing testimony as to the identity of "the contact at HUD," in order that the OIC might be able to lead the jury to believe that the conspiratorial reference was to Dean. When Dean's counsel failed to bring out Shelby's prior statement in Shelby's cross-examination, the OIC then included the entry in its chart in order to cause the jury to believe that the reference was to Dean, as the OIC would later acknowledge. The fact that O'Neill would not specifically refer to the entry in his closing argument seems but further evidence that the OIC believed that the reference was not to Dean, HUD, O'Neill apparently being chary of too explicitly arguing a point that a letter he had written two months earlier showed to be false. The same may be said of the OIC's failure to argue in any of its briefs on the merits that the reference was to Dean.

The same applies, more or less, to the rapid reply, where O'Neill had made a point of the fact that the system had been perverted because Shelby had the rapid reply before the Atlanta office knew about the funding. The point would contribute to the OIC's case only if the document had been provided to Shelby by Dean, rather than one of the other officials whose contacts with Shelby O'Neill had sought to diminish.<sup>53</sup>

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<sup>53</sup> A question arises as to why O'Neill asked Shelby who had faxed the rapid reply to him, if O'Neill knew the answer was going to be that Shelby believed it was Hunter

Although the OIC would argue in Opposition to Dean's Rule 33 Motion that it had not sought to cause the jury to believe that Dean had provided the rapid reply to Shelby, the OIC nevertheless managed to cause the U. S. Probation Officer to believe that Dean "sent a 'rapid reply letter' to Shelby indicating that the units had been awarded." Revised Presentence Investigation Report at 6 (Feb. 7, 1994).<sup>54</sup> And when it was pointed out to the Probation Officer that Shelby had testified that he had not received the document from Dean, the OIC would evidently assert to the Probation Officer, that evidence at trial showed that "although [Dean] did not personally send the rapid reply letter to Mr. Shelby, she had it sent." Id. at 47.<sup>55</sup> There was, however, no evidence

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Cushing. According to the Jenks material, Shelby's last statement on that point had allowed that it could have been Dean. See note 8 supra. Possibly, O'Neill asked the question hoping that Shelby would either state that it could have been Dean or that he could not remember at all. But when Cushing adhered to his statement that he believed Cushing had sent him the rapid reply, O'Neill would introduce the rapid reply later as if it were a completely different document.

<sup>54</sup> The relevant pages of the Revised Presentence Investigation Report are attached as Attachment 7.

<sup>55</sup> The quoted material reflects the Probation Officer's language, not necessarily the OIC's.

whatever to support that proposition, nor had the OIC any basis for believing that it was true.<sup>56</sup>

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<sup>56</sup> The OIC was somewhat bolder in representing the content of the trial record to the Probation Officer even than it was in representing that record to the courts. Apparently, the OIC would also represent to the Probation Officer that the evidence at trial proved that both the August 9, 1985 lunch and the September 9, 1985 lunch involved discussion of Park Towers. Id. See also Narrative Appendixes styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr." and "Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD."

Most of these points apply as well not only to the use of the September 9, 1985 luncheon meeting, but to the varied allegations in the Superseding Indictment intended to suggest, or explicitly stating, that Dean was facilitating HUD's funding of Park Towers in order to benefit Mitchell. More generally, it seems a more than fair inference that the OIC -- which had no evidence whatever indicating that Dean was aware of Mitchell's involvement with Park Towers and, at a minimum, had Shelby's testimony that she was not -- believed it extremely unlikely that Dean was aware of Mitchell's involvement in Park Towers. Nevertheless, the OIC based a felony charge on the existence of such knowledge and sought, through the use of false or misleading evidence, to cause the jury to believe what the OIC itself had no basis for believing. When the OIC's actions with regard to Park Towers are considered in light of its actions with regard to the Mitchell telephone messages and Maurice Barksdale, as well as the presumed awareness of what Jack Brennan's testimony would be,<sup>57</sup> it seems a fair inference that the OIC believed that it was very unlikely that Dean was aware that Mitchell was being paid for any HUD work.

With regard to Park Towers in particular, it is noteworthy that O'Neill did not explicitly argue that there was any evidence that Dean was aware of Mitchell's involvement with Park Towers. More generally, most of O'Neill's argument with regard to Dean's knowledge of Mitchell's HUD consulting was based on attacking as lies Dean's statements that she was not aware of that consulting.<sup>58</sup> And, in its Opposition to Dean's Motion, while the OIC would make various arguments as to why it was

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<sup>57</sup> See Narrative Appendixes styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale" and "The Testimony of Supervisory Special Agent Alvin R. Cain, Jr." Appearing with immunity, Mitchell's partner Colonel Jack Brennan testified that Mitchell refused to do any work on South Florida I because of Dean's position at HUD. Tr. 319-22. Brennan also testified that when he later told Dean of Mitchell's HUD involvement, she was shocked. Tr. 369.

<sup>58</sup> See Narrative Appendixes styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.," "Testimony of Ronald L. Reynolds," "Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD," and Dean Mem. at 204-10.

reasonable for O'Neill to attempt to lead the jury to believe certain things about Shelby's contacts with Dean relating to Park Towers, the OIC would never assert that it had some reasonable basis for leading the jury to believe that Dean was aware of Mitchell's involvement with that project. The same essentially applies to Swartz's oral argument at the February 14, 1994 hearing. The most Swartz can say appears to be that Shelby sent Dean some materials on Park Towers following the September 9, 1985 lunch and that Mitchell was paid. Tr. 23. Yet, the OIC would never argue that Shelby's explanation regarding either of these matters was implausible.

In any event, one of the more sinister aspects of the OIC's approach with regard to Park Towers may be found in the questioning of Shelby about his review of documents. O'Neill evidently reviewed with Shelby only certain documents that the OIC wished to rely upon. Then, by eliciting from Shelby that the records he reviewed related to Dean but not to DeBartolomeis or Cushing, the OIC made its first insinuation to the jury that Dean was the more important contact. The OIC would later rely on the absence of documentation of contacts between Shelby and DeBartolomeis or Cushing in asserting in its Opposition that such contacts were not documented and in arguing at the February 14, 1994 hearing that there was no evidence of any contacts with DeBartolomeis and Cushing.

But whether or not such contacts were documented in Shelby's correspondence, they clearly were documented in certain places, such as Fine's notes. Indeed, presumably Shelby would have testified that the reference in the Fine memorandum of July 31, 1985, was to DeBartolomeis, if he had been confronted with it. In any case, the Park Towers Chronology (Attachment 2) indicates that there clearly were significant other contacts as well.

O'Neill's questioning of Shelby about the documents warrants close examination. O'Neill asked Shelby: "Did you review any records, trying to refresh your recollection as to who you dealt with at HUD on this project." Tr. 547 (emphasis added). Plainly, Shelby's review had not been for the purpose of refreshing his recollection as to whom he dealt with at HUD on the project. The purpose, effected through the exclusion from the documents provided for Shelby's review of the Fine memoranda referencing Shelby's contacts with DeBartolomeis, had been to allow O'Neill to elicit from Shelby that he had only seen Dean's name in the documents he reviewed.<sup>59</sup> Shelby probably

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<sup>59</sup> It is not clear why O'Neill focused Shelby on "this period of time" when he asked Shelby whether any documents showed dealings with DeBartolomeis. Tr. 547. It may have had to do with the fact that, apart from the July 31, 1985 memorandum, the Fine memoranda referencing Shelby's contacts with DeBartolomeis appear to involve the post-allocation period. In any event, whatever the reason for the reference to a time frame, it is no less clear that O'Neill's purpose in having Shelby review documents had not been to "refresh [Shelby's] recollection as to who [he] dealt with at HUD on this project."

was testifying truthfully in his response. Indeed, O'Neill may well have said to Shelby the evening before something to the effect that he (O'Neill) would like Shelby to review some documents to refresh his recollection. And there is no reason to expect Shelby even to know that Fine had written memoranda referencing his (Shelby's) contacts with DeBartolomeis, apart from the July 31, 1985 memorandum Shelby had been shown in the Spring of 1992. Even though Shelby was testifying truthfully, however, it seems evident that O'Neill was attempting to elicit false testimony from Shelby.<sup>60</sup>

The same applies to O'Neill's eliciting from Martinez the responses that the OIC would later rely on to assert that Nunn concealed Mitchell's role from Martinez. There is little reason to believe that Martinez believed he was not testifying truthfully when he responded that he did know that he was hiring anyone other than Nunn and did not

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<sup>60</sup> A recent case that is relevant to a number of aspects of the OIC's conduct deserves mention here. In United States v. Tarricone, 11 F.3d 24 (2d Cir. 1993), the government had relied on the testimony of two lay witnesses that the handwriting on an agreement was the defendant's, even though the government had been advised by a handwriting expert that the handwriting was not the defendant's. The Second Circuit's rejection of the government's claim that it was merely putting on opinion testimony that was inconsistent with other opinion testimony is relevant to several contentions of the government that are treated here and in other sections. Of particular relevance to O'Neill's eliciting of Shelby's statement that he had reviewed documents in order to refresh his recollection is the court's rejection of the government's argument in Tarricone that it was permissible to elicit the testimony that the handwriting was the defendant's because the testimony was not perjurious. As the Second Circuit observed in Tarricone, that the witness may have believed he was telling the truth can only exculpate the witness, not the government.

know that Nunn was hiring anyone else. But the OIC's use of those responses was no more defensible than if the OIC had known that Martinez was in fact testifying falsely.

Swartz's argument at the February 14, 1994 hearing warrants separate comment. The argument is entirely couched in terms of what the jury could have reasonably believed in light of the evidence that was put forward. Swartz does not confront the crucial issue of whether the OIC had any basis for disbelieving what Shelby had told it about the reference in the July 31, 1985 Fine memorandum, nor is any such basis to be inferred from Swartz's argument or from materials known to be possessed by the OIC. Moreover, in determining whether the OIC had any such basis, it must be remembered that the OIC had had full opportunity to discuss the matter at length with its immunized witnesses Shelby and DeBartolomeis.

More generally, Swartz tries to show why it was reasonable for the jury to conclude that, in a broader sense, Dean was "the contact" implying thereby that she was either the sole contact or at least the principal contact. Swartz avoids discussion either of whether Dean was the person referenced in the Fine Memorandum of July 31, 1985, or of whether the OIC had any basis for believing that she was. Yet, on the basis of Shelby's many statements, as well as the references to DeBartolomeis in other Fine memoranda, the OIC had to believe that Dean was not "the contact" even in a broader sense. In nevertheless attempting to assert that it was reasonable for the jury to so conclude, Swartz says some things that are simply false, such as that there was no evidence of contacts with DeBartolomeis and Cushing. Even at trial, the testimony of Fine and Feinberg corroborated Shelby's statements as to his contacts with DeBartolomeis, and with regard to the actual issue of what the OIC believed, the OIC was possessed of much additional evidence such as the various Fine memoranda specifically referencing DeBartolomeis. The fact that another Fine memorandum (the February 3, 1986 memorandum) showed at least one contact with a woman (who presumably was Dean) does nothing to contradict Shelby's statements that principally he dealt with DeBartolomeis though he also spoke to Dean.

After Dean had failed to submit the additional Fine memoranda relating to the post-allocation waiver, Swartz apparently believed that he was then free to assert that Dean was the official responsible for the waiver. His statements in that regard would be only marginally defensible even if the issue involved what the evidence at trial suggested. But the issue raised by Dean's Rule 33 Motion concerned whether the OIC acted reasonably in light of what it knew, and in that context, Swartz's assertion to the court that Dean was responsible for the post-allocation waiver was false.

What Swartz's remarks regarding the post-allocation waiver do show, however, is that by inserting the reference to the waiver among several entries relating to meetings between Dean and Shelby -- and by having O'Neill state that the March and April 1986 meetings were "continuing meetings on Park Towers," despite the absence of any evidence to indicate they did relate to Park Towers and compelling reasons to believe that they did not -- the OIC had indeed intended to lead the jury to believe that Shelby

had secured the waiver through Dean. It seems even equally clear that, as with the rapid reply, the reference to Shelby's sending of the waiver to Fine on May 29, 1986, could only have been intended to convey that Shelby had secured the document from Dean, notwithstanding that the OIC knew for a fact that Shelby had been provided the document by DeBartolomeis.

In any case, in seeking to persuade the jury of the broader point that Dean was the principal contact, the OIC was willing to use an incriminating reference in the July 31, 1985 Fine memorandum that the OIC had overwhelming reason to believe did not actually refer to Dean. That does not seem different from using any other type of false evidence, such as a document with an incriminating reference to "Deborah" even though the OIC knows that reference not to be to Deborah Dean.

Swartz's discussion of the September 9, 1985 lunch is a model of evasion. He finally asserts that the sending of the document on the day following the lunch indicates "that the Park Towers project had been discussed with the defendant." The time sequence may in fact suggest that at some point, perhaps even the day of the lunch, Shelby mentioned to Dean that he would be sending her some materials. But Swartz avoids discussion of the fact that the OIC's use of that lunch, and the discussion of it in closing, had been intended to suggest to the jury that the project was discussed among Shelby, Dean, and Mitchell, despite the fact that Shelby had told the OIC that such was not the case. Swartz can neither deny that such was the OIC's intention nor assert that the OIC had some reasonable basis for believing that, notwithstanding Shelby's statements to the contrary, Park Towers had been discussed among Dean, Shelby, and Mitchell.

O'Neill's statement in closing that Dean and Shelby were not friends after Dean ceased to be Executive Assistant is a matter of much less consequence. Still, it is an instance of O'Neill's making a statement that he knew to be false in order to add some further weight to his argument that Dean had been responsible for various HUD actions on Park Towers. The OIC's defense of its actions on this point also warrant noting, because the OIC's argument -- like its argument about the lack of documentation of the DeBartolomeis and Cushing contacts -- illustrates the approach of creating a partial record, then on the basis of that partial record seeking to lead the jury to believe things the OIC knows to be false.

The court's observations reflect little understanding of what actually was at issue. The court seems to see the faxed rapid reply as the more important matter, but, in any event, the court sees the issue as one of a failure to disclose exculpatory material, not as one of the OIC's attempt to lead the jury to believe matters the OIC knew to be false.

Finally, a word is in order about the OIC's manner of providing Jencks material. In an early conference, Judge Gesell had pressed Harris about turning over Jencks material at an early time. He noted that he could not require the early production of Jencks material, but that if it was not provided until a witness testified, there would be



lengthy delays. The OIC turned over Jencks material for what were supposed to be the first week's witnesses on September 9, 1993, with trial starting on September 13. It turned over the remainder of the material by September 13, 1993, the day of opening arguments, with Giglio materials being provided each day for witnesses who would testify the following day. Voluminous materials on Shelby were provided as part of the massive production on September 13, three days before he testified. A great deal of material was produced for 20 witnesses whom the OIC ultimately would not have testify in the OIC's case-in-chief.

Swartz would insist that the OIC had gone beyond what was required by the Jencks law, because it turned over all the Jencks material before the witnesses testified. Yet, like the OIC's withholding of all Brady material until the eve of trial, and the continued withholding of portions of that material even after the court's admonishment at the hearing of August 31, 1993, the OIC's manner of producing Jencks and Giglio materials seem part of a calculated effort to deny Dean a reasonable opportunity to respond to the false impressions on which so much of the OIC's case against her would be based.

ADDENDUM TO NARRATIVE APPENDIX STYLED  
"PARK TOWERS: 'THE CONTACT AT HUD'; DEAN'S KNOWLEDGE OF MITCHELL'S  
INVOLVEMENT; THE POST-ALLOCATION WAIVER;  
AND THE ELI FEINBERG TESTIMONY"  
(January 1995)

In the Park Towers Narrative Appendix, there are a number of references to a June 5, 1986 letter from Richard Shelby to Eli Feinberg by which Shelby transmitted a copy of the post-allocation waiver signed by Silvio DeBartolomeis on May 28, 1986. See pages 29, 35, 36, 46, 47, 64, 81. The letter itself is Attachment 5d to the Narrative Appendix. Lest there be any suggestion that OIC attorneys could have been unaware of the letter, it is to be noted that the copy of the letter used as Attachment 5d was provided to the defense as part of the OIC's preliminary production of exhibits to be used at trial. The stamping machine number 000660 on the upper left part of the document reflects the OIC's numbering of the materials then provided. At that time, the OIC also provided the copy of the waiver that Shelby had transmitted with the letter, with that copy of the waiver bearing the stamping machine number 000661. Thus, it seems not possible to doubt that OIC attorneys were fully aware of Shelby's letter, though they would decline ultimately to use it as an exhibit.

In footnote 34, which commences on page 43, and on page 72, some attention is given to the OIC's contending that the Arama developer, Aristides Martinez, was unaware of John Mitchell's involvement with the Arama project, despite the fact that OIC attorneys knew with absolute certainty that Martinez was aware of Mitchell's involvement. That matter is treated at greater length in Supplement I, which is a Narrative Appendix styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee." Supplement I also shows how, when initially planning to emphasize Martinez' knowledge of Mitchell's involvement, the OIC made representations in the Superseding Indictment known to be false and introduced documents into evidence while representing them to be things they were not.