IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	CR 92-181-TFH
DEBORAH GORE DEAN	

GOVERNMENT'S OPPOSITION TO DEFENDANT DEAN'S MOTION FOR NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States of America, by and through the Office of Independent Counsel, hereby opposes defendant Deborah Gore Dean's motion for a new trial pursuant to Fed. R. Crim. P. 33. Defendant asserts that the Court and government committed a wide variety of errors. In fact, however, defendant received a fair trial in every respect, and she accordingly is not entitled to a new trial.

1. Defendant has not sought to, and cannot, satisfy the rigorous legal standards for granting a new trial. As an initial matter, her assignments of error are without merit. Moreover, even if defendant were correct in arguing that error had occurred, a new trial would nevertheless not be warranted. The alleged errors on which defendant relies, even if proven, are too minor to have "'substantially sway[ed]' the judgment" of the jury. United States v. Hernandez, 780 F.2d 113, 119 (D.C. Cir. 1986). Significantly, most of the alleged errors were not even the subject of objection

at trial. This not only suggests their insignificance, but makes a new trial even more unwarranted, for in the absence of a contemporaneous objection, a new trial will be required only if the error "rise[s] to the level of error so 'obvious and substantial' or so 'serious and manifest' that it affects the very integrity of the trial process." United States v. Blackwell, 694 F.2d 1325, 1341 (D.C. Cir. 1982) (citations omitted). There was no such error here.

2. Defendant argues that she is entitled to a new trial because the government did not disclose certain Brady material until shortly before trial. Even assuming that this material was in fact subject to Brady, there is no basis for a new trial here. This Court already has rejected the argument that defendant was prejudiced by the timing of the disclosure. Defendant had this material for use in trial, and in fact made use of it. Because she was not prejudiced in any way, there was no Brady violation here. United States v. Paxson, 861 F.2d 730, 737 (D.C. Cir. 1988). It follows that there is no basis for a new trial.

3. There is likewise no validity to defendant's argument that she is entitled to a new trial because the government allegedly sought to stir up racial prejudice against her and made improper remarks at trial and in summation. As an initial matter, defendant is wrong on the facts: the record bears out neither her claim that the government sought to interject race into this trial, nor her argument that the government's remarks were impermissible. But even if there had been error on any of these points, it could not

be said that defendant suffered any prejudice, far less substantial prejudice justifying a new trial.

4. Finally, there is no basis for defendant's claim that she is entitled to a new trial because the government allegedly elicited, and covered up, perjured testimony from Thomas Demery, Ronald Reynolds, Pamela Patenaude, and Special Agent Alvin Cain. Rather than addressing the appropriate legal standards, defendant makes what amounts in many respects to be a series of ad hominem attacks on the prosecution. The most serious of these charges is that a government agent -- Special Agent Alvin Cain -- deliberately perjured himself at defendant's trial and that the prosecution knew or should have known of this. Yet her charge of perjury, and the affidavit submitted in support thereof, are demonstrably false. Her attack on Agent Cain is at best reckless and at worst perjurious and a fraud upon the court. Nor is this an isolated incident. The same disregard of the facts characterizes defendant's accusations vis-a-vis Demery, Reynolds, and Patenaude. As we show below, the government did not elicit perjured testimony at defendant's trial. Nor did the government "cover up" any perjury; indeed, it was the government that disclosed to defendant the very materials that defendant claims establish the perjury.

ARGUMENT

The defendant received in every respect a fair trial and hence is not entitled to a new trial in the interests of justice. This Court noted that the trial was being conducted in an exemplary manner. Tr. 1205.[1] To that end, the government had provided defendant a set of the government's proposed trial exhibits one month before trial (see Appendix tab B); the government produced Jencks Act materials for all the government's witnesses no later than the first day of trial, far in advance of the requirements of the Act itself; and, as the Court noted (Tr. 429-30), the government also exceeded its Giglio obligations by providing defendant with cross-referenced materials to assist cross-examination.

Furthermore, the Court also carefully considered and ruled upon all of defendant's objections and arguments at trial, frequently deciding against the government on important issues. See, e.g., Tr. 3143-44 (restricting cross-examination of defendant regarding her post-employment activities); Tr. 2957 (excluding government's charts from evidence). Defendant was given extra time to prepare her defense both before and during trial. See Transcript of Status Hearing, dated June 9, 1993, at 19-20 (Appendix tab C). Finally, the Court afforded defendant the widest

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[1] "Tr." refers to the 3,619-page trial transcript, the cited pages of which are attached hereto at tab A of the Appendix to Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 ("Appendix"). Citations to pages 1 through 1910 of the trial transcript can be found in Volume One of the Appendix, and citations to pages 1911 through 3619 of the trial transcript can be found in Volume Two.

possible latitude in the presentation of her case. In particular, defendant's testimony was subject to no time limits, and virtually no restrictions as to scope; and she was repeatedly successful in her attempts to put self-serving hearsay statements before the jury.

Given all this, it would be surprising indeed to conclude that the Court had not afforded defendant a fair trial in every respect. As we show below, the errors defendant cites are in fact nothing of the kind. But even if defendant were correct in her assignments of error, those errors would be too minor to justify a new trial.

Rule 33 of the Federal Rules of Criminal Procedure provides that a court may, upon motion of a defendant, grant a new trial "if required in the interest of justice." As a general matter, "[a]ny error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial." 3 C. Wright, Federal Practice and Procedure: Criminal § 556, at 306 (2d ed. 1982). But in determining whether an error of such magnitude has occurred, the trial court must apply -- as an appellate court would -- Rule 52's requirements regarding harmless and plain error. Id. § 551, at 237-38; United States v. Bilecki, 876 F.2d 1128, 1129-31 (5th Cir.), cert. denied, 493 U.S. 977 (1989); United States v. Mojica, 746 F.2d 242, 246 (5th Cir. 1984); United States v. Johnson, 769 F. Supp. 389, 395-96 (D.D.C. 1991).

Hence, even where an objection is properly preserved, a new trial is warranted only if it can be said that the error "'substantially sway[ed]' the judgment" of the jury. Hernandez,

supra, 780 F.2d at 119. Where no contemporaneous objection is made, a new trial is appropriate only if the error "rise[s] to the level of error so 'obvious and substantial' or so 'serious and manifest' that it affects the very integrity of the trial process." Blackwell, supra, 694 F.2d at 1341 (citation omitted). None of defendant's claims of error satisfies this rigorous standard for granting a new trial.

I. Having Suffered No Prejudice in the Timing or Manner of Disclosure of Brady Material, Defendant Is Not Entitled to a New Trial on the Basis of any Purported Brady Violations.

Defendant argues she is entitled to a new trial based upon the government's allegedly tardy disclosure of certain Brady material. See Defendant's Memorandum of Law in Support of Motion for Judgment of Acquittal and New Trial ("Defendant's Memorandum"), at 95-120.[2] Without making any showing as to how she was thereby prejudiced, defendant cites several instances in which she claims the government withheld certain allegedly exculpatory statements until just prior to trial and, in one instance, made no explicit Brady disclosure, but instead furnished defendant the exculpatory information among the general documents provided in discovery.

As an initial matter, it remains the government's position that the statements at issue constituted Giglio materials, rather

[2] Defendant herself makes these claims only halfheartedly, stating that she raises these matters "principally for purposes of background, [even though] certain of the described matters . . . are sufficiently egregious to warrant relief from the Court." Defendant's Memorandum, at 95-96.

than Brady information per se.[3] At a minimum, then, there was no intentional disregard of Brady by the government. More important, no prejudice to defendant arose from the timing of these disclosures. Indeed, the Court already so found as to certain of these statements during the August 31, 1993, status hearing. See Transcript of Status Call, dated August 31, 1993, at 13-15 (Appendix tab G). The trial only confirmed the Court's ruling.

In none of the instances of tardy disclosure was defendant deprived of use of the exculpatory information at trial; hence, no Brady "violation" occurred. See United States v. Bishop, 890 F.2d 212, 218-19 (10th Cir. 1989) ("Brady is not violated when the Brady material is available to defendants during trial"), cert. denied, 493 U.S. 1092 (1990). Late access to exculpatory information may entitle a defendant to a new trial only if she has been prejudiced thereby. Paxson, supra, 861 F.2d at 737-38. Prejudice is measured by the likely impact on the judgment. A new trial is required only if the tardy disclosure "could 'in any reasonable likelihood have affected the judgment of the jury.'" Id. at 737 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). So long as defendant "had in fact received the evidence in time to make effective use of it," a new trial is not warranted. Paxson, supra, 861 F.2d at 737.

Defendant cites four examples of what she describes as Brady violations: the Richard Shelby statements; the John Mitchell notes;

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[3] We believe that this position is strengthened by the use made of this material at trial for impeachment. In light of the Court's prior ruling, however, we do not renew our prior argument here.

the Andrew Sankin receipts; and the Maurice Barksdale interview. As we show below, in none of these cases was defendant prejudiced by the government's actions: to the extent there was relevant information to be put before the jury, defendant had in fact received that information in time to make effective use of it. Moreover, even if defendant had not had access to this information in sufficient time -- and there is nothing in the record that so suggests -- a new trial would not be justified in light of the relative insignificance of this evidence when measured against the evidence as a whole.

A. The Richard Shelby Statements

Defendant contends that the government violated its Brady obligations by making tardy disclosure of several statements of Richard Shelby, an unindicted coconspirator in the first and third counts of the indictment. The cited statements are: (1) that, to Shelby's knowledge, Deborah Dean was not aware that John Mitchell was involved in the Park Towers project; (2) that "the contact at HUD" referred to in the so-called Fine memorandum was Silvio DeBartolomeis rather than defendant; and (3) that, to the best of Shelby's recollection, it was either DeBartolomeis or Hunter Cushing, not defendant, who faxed to him the HUD Rapid Reply Letter regarding the Metro Dade funding. As the record demonstrates, each one of these statements was available to defendant in time for her to make effective use of it at trial, as she in fact was able to do.

The "awareness of the Mitchell involvement" and "contact at HUD" statements were provided to defendant via letter from the Office of Independent Counsel dated August 20, 1993 (as defendant herself concedes), over three weeks prior to Shelby's testimony. Moreover, as reflected in the record, defendant made effective use of these statements in cross-examining Shelby, bringing before the jury Shelby's testimony that Mitchell was paid a fee based upon a commitment made prior to Shelby's learning of Mitchell's relationship with defendant, Tr. 583, that Shelby had several contacts at HUD in addition to defendant, including Cushing and DeBartolomeis, Tr. 584, 595-96, and that defendant did not know that Mitchell received consulting fees in connection with HUD projects, Tr. 587, 599-600, 603. On this record, as the Court itself has already concluded,[4] it cannot be said that defendant was in any way prejudiced by late access to this material.[5]

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[4] See Transcript of Status Call, dated August 31, 1993, at 14 (Appendix tab G).

[5] Defendant further argues that, in the face of Shelby's unequivocal testimony regarding his other contacts at HUD, it was improper for the government to imply in the indictment and in closing argument that defendant was "the contact at HUD" referred to in the Fine memorandum. Defendant's Memorandum, at 102-03. In so arguing, however, defendant fails to recognize that the jury was entitled to discredit Shelby's testimony and conclude on the basis of the circumstantial evidence -- including Shelby's numerous contacts with the defendant (Tr. 567-73), the lack of any corroboration of any contacts with DeBartolomeis and Cushing (Tr. 547-48), the fact that Shelby sent defendant material regarding "the Miami Mod Rehab" on September 9, 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."

With regard to the Rapid Reply Letter, the government's theory was not that the defendant herself necessarily had faxed that letter to Shelby. (Indictment ¶ 71; Tr. 56-57 (Opening Statement), 3393-94 (Closing Argument).) The relevance of the Rapid Reply Letter was two-fold: it established that the funding had taken place (Indictment ¶ 71) and, more important, it demonstrated how the Moderate Rehabilitation funding process had been turned on its head, with the developers and the consultants learning of the fundings before the local housing agencies themselves (Tr. 39-44; 3393). It was entirely consistent with the government's theory of the case that Cushing actually transmitted the funding document to Shelby (a point that the government itself developed in its direct examination of Shelby, Tr. 554-55) and the government did not argue otherwise to the jury (Tr. 3391-96). Hence, Shelby's prior statements regarding who had faxed the letter to him were in no way exculpatory;[6] they were merely prior inconsistent statements of Shelby properly provided to defendant as Jencks Act material, 18 U.S.C. § 3500.[7]

B. The John Mitchell Notes

Defendant also contends that the government violated its Brady obligations by not segregating from the mass of documents provided to defendant in discovery two telephone message forms that she

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[6] As the defendant points out in her Memorandum, at 105 & n. 74, Shelby at various times identified Cushing, DeBartolomeis, and defendant as possible sources of the faxed Rapid Reply Letter.

[7] Shelby's Jencks Act materials were produced on September 13, 1993, the day the jury was sworn, and well before Shelby testified.

claims indicate that Mitchell had had contact with Lance Wilson, former Executive Assistant to the Secretary, in connection with the Arama project referred to in Count 1 of the Indictment. Defendant alleges that these telephone message forms -- one dated January 12th referencing "300 units, process + keep advised. Talking to Barksdale" and indicating that Wilson had returned Mitchell's call, and the other dated January 26th and indicating that Wilson had again called Mitchell -- were "strongly exculpatory" as to defendant.

In fact, however, these phone messages are as consistent with guilt as with innocence. The Arama Mod Rehab units were not awarded until June 1984 -- after Wilson had left HUD and defendant had replaced him as Executive Assistant. See Gov't Exs. 27 & 28 (defendant's letter to Nunn) (Appendix tab H). Rather than suggesting that Wilson was responsible for awarding the Arama units, these notes reinforce the importance of defendant's role, and cast light on her phone call with Mitchell that she referenced in her letter to Nunn.[8] Id.

Thus, even assuming these telephone messages met the Brady standard of "evidence favorable to [the] accused" that is "material either to guilt or to punishment," Brady v. Maryland, 373 U.S. 83, 87 (1963), no Brady violation occurred here in light of the fact that the government produced these documents to defendant

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[8] In addition, there was evidence that Wilson was aware of the defendant's interest in Mitchell's HUD dealings and was in communication with her about those dealings. See Gov't Exs. 16, 17, & 18 (Appendix tab H).

sufficiently in advance of trial for defendant to make effective use of them. These documents were produced to defendant for her review on August 7, 1992, and she ordered copies of them shortly thereafter. Defendant placed the documents at issue in evidence and argued their significance to the jury. Tr. 3461-62, 3469-70. On such a record, it cannot be said that defendant was in any way prejudiced by the manner or timing of the government's disclosure of these notes.

C. The Andrew Sankin Receipts

As part of its case-in-chief, the government introduced a number of credit card receipts related to meals and gifts provided in most cases to defendant by Andrew Sankin, a personal friend of defendant and a private consultant involved in HUD matters. In total, fifteen such receipts were received into evidence, all but two without objection. See Appendix tab H. Of the fifteen, eight specifically referred to defendant by name or position as Executive Assistant to the Secretary.[9] One of the other receipts did not involve defendant, but was relevant to the case as a whole (this was Gov't Ex. 11e, which involved a luncheon meeting between Sankin and Richard Shelby, regarding a HUD project at issue in the case).

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[9] See Gov't. Exs. 11f ("Deborah"); 11g ("Exec Asst. to Sec."); 11j ("Debbie Dean"); 11k ("Exec. Asst."); 11l ("DD"); 11p ("Deb Dean"); 11u ("D. Dean"); 11w ("Deborah Dean") (Appendix tab H). During the course of reviewing the receipts, Sankin testified that "[t]he only executive assistant to the secretary who I knew was, was Deborah Dean." Tr. 1146.

Of the remaining six receipts, five arguably related to defendant.[10] With respect to the receipt that clearly did not relate to defendant, it was the prosecutor who demonstrated that Sankin had no recollection regarding the receipt's possible connection to defendant.[11]

The government initially sought the admission of the receipts one-by-one, in each case examining Sankin regarding his specific recollection of the events surrounding the creation of the receipt. The government noted later in the proceeding that it purposely did not preview each of the receipts with the witness as part of its pretrial preparation (Tr. 1200), because of the witness's hostility to the government's case against defendant. For example, in connection with discussing Gov't Ex. 11c, it was the government's own examination that revealed that Sankin could not recall who the unspecified "HUD officials" were who are referred to on the receipt. Tr. 1143.

Government exhibits 11c through 11g were each in turn individually identified and discussed (Exs. 11a and 11b were not

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[10] The five receipts arguably related to the defendant were Gov't Exs. 11m (which bore the reference "Dinner w/ Chief of Staff of HUD," chief of staff being another of the defendant's titles as Executive Assistant to the Secretary, see Tr. 3112); and Exs. 11n ("Staff Asst. to the Sec. of HUD"); 11o ("Staff Asst. to the Sec. of HUD"); 11q ("Asst. to Sec."); and 11v ("Asst. Sec. of HUD"), where on at least one other receipt, Sankin referred to the defendant as "D. Dean Asst. Sec. at HUD." See Gov't Ex. 11u. (Appendix tab H.)

[11] The only receipt that on its face could not arguably be tied to the defendant was Gov't Ex. 11c (which bore a reference to "HUD officials"), but the government clearly brought out that fact in its examination of Sankin. Tr. 1143.

Sankin receipts). Tr. 1143-47. It was only when the Court expressed concern about the time being consumed by this lengthy examination, Tr. 1147, that the government simply moved the remaining receipts into evidence as a group. Tr. 1151.

The next day, in her cross-examination of Sankin, defendant developed a theme that Sankin falsely attributed his receipts to defendant to justify their deductibility as business expenses. Tr. 1188-91. With respect to Gov't Ex. 11q (a receipt from Georgetown Leather Design), defendant sought to suggest that that receipt related to a gift for Sankin's girlfriend and that it was not a properly deductible business expense. Tr. 1191-94. At this point Sankin testified that he had told the Office of Independent Counsel at the end of the previous day's testimony that many of the credit card receipts received into evidence did not relate to defendant. Tr. 1194-95. It is the government's nondisclosure of this statement prior to Sankin's resuming the witness stand that defendant claims justifies a new trial here.

The prosecutor's recollection of the Sankin conversation was different from that of Sankin -- who, of course, was charged as an unindicted coconspirator and was hostile to the prosecution. According to the prosecutor, what Sankin had said was that he could not recall the specific events surrounding <u>any</u> of the receipts or whether they involved defendant or not, even as to the receipts that bore her name. Tr. 1195-96, 1199. As noted above, the government itself had elicited this point with regard to Gov't Ex. 11c, and sought the admission of the remaining receipts as a group

only when the Court expressed concern over delay. Nevertheless, the Court admonished the government for not having brought Sankin's statement to the attention of the Court and opposing counsel. Tr. 1199. At the same time, however, the Court explicitly noted that the trial had been "remarkable for the excellence of trial counsel on both sides." Tr. 1205.

The Court ultimately gave defendant a choice among (1) having the receipts stricken from evidence, (2) having a cautionary instruction read to the jury, or (3) simply leaving matters as they stood to enable defense counsel to cross-examine the witness and make him appear to have been untruthful. Tr. 1200. Defense counsel chose the third option. Tr. 1202.

In light of defendant's choice to cross-examine Sankin regarding his recollection of the receipts, Tr. 1187-1232, defendant was in no way prejudiced here.[12] The fact that defendant had the information at issue and was able to make effective use of it at trial negates any possible finding of prejudice and disposes of whatever Brady claim she might otherwise have had. See United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979) ("[a]s long as ultimate disclosure is made before it is too late for the defendant[] to make use of any benefits of the evidence, Due

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[12] Contrary to defendant's contention, there was nothing improper about the government's reliance on the receipts even though they were inconsistent with the defendant's calendars or testimony. Defendant's Memorandum, at 113-18. It is precisely this sort of conflict in the evidence that it is the jury's duty to resolve, and both sides were entitled to argue their positions regarding the appropriate inferences to be drawn from this evidence.

Process is satisfied"), cert. denied, 444 U.S. 1031 (1980). And in any event, here again prejudice is all the more remote in light of the fact that the receipts played such a minor role at trial.[13]

D. The Maurice Barksdale Interview

Defendant asserts that with regard to Maurice Barksdale, the government was under an obligation when it interviewed Barksdale on June 28, 1992, to show Barksdale the Mitchell telephone message form referencing Barksdale's name. See, supra, subsection B. Defendant's unusual claim is that had that been done, Barksdale would have recalled something exculpatory about defendant (though defendant fails to specify what). Defendant's Memorandum, at 118-20. This contention is not only wholly speculative, but in fact false. Barksdale was shown at trial precisely that document, and it recalled nothing to his mind. Tr. 510-11.

The record thus rebuts defendant's speculative contention that confronting Barksdale with the Mitchell message would have generated exculpatory information as to defendant. Moreover, as noted above, the message slips are at least as consistent with guilt as with innocence.

In any event, defendant's argument is based on the faulty premise that the government's Brady obligations include an affirmative duty to question any potential witness before trial in order to seek out all potentially material evidence conceivably

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[13] Defendant's complaint that the discredited Georgetown Leather Design receipt should have precluded the government from arguing that she had received gifts (rather than one gift) from Sankin ignores Sankin's other testimony that over the years he had given defendant multiple gifts. Tr. 1183-84.

helpful to the defense, and that a failure to do so could result in reversible error. Brady, of course, does not so require. See United States v. Poindexter, 727 F. Supp. 1470, 1485 (D.D.C. 1989); United States v. North, Order, filed July 13, 1988, at 2, 1988 WL 148527.

II. Defendant Is Not Entitled to a New Trial Based on the Comments or Conduct of the Prosecutor.

Defendant contends she is entitled to a new trial on the basis of several instances of prosecutorial comments or conduct that she labels as "unethical and underhanded" (Defendant's Memorandum, at 121, 127) and "inappropriate," "inflammatory," and "improper" (id. at 174, 186, 220). The comments and conduct complained of involve (1) three isolated comments made by the prosecutor during the course of defendant's eight days of testimony, (2) the prosecutor's unobjected to cross-examination of defendant, and (3) the prosecutor's unobjected to closing argument. Id. at 121-33, 172-224. Viewed in the context of the trial as a whole, none of these comments or conduct in any way undermined the fundamental fairness of defendant's trial.

A. The Prosecutor's Three Isolated Comments Over the Course of the Defendant's Eight Days of Testimony Could Not Have So Undermined the Fundamental Fairness of the Trial as to Entitle the Defendant to a New Trial.

Defendant contends that three isolated comments made by the prosecutor comprising thirty lines of transcript of defendant's 891 pages of trial testimony so prejudiced her in the eyes of the jury as to have denied her a fair trial. Defendant's Memorandum, at 121-27. In so arguing, defendant takes the prosecutor's comments

entirely out of context and then -- in combination with a mischaracterization of a statement made by the Court -- argues that the prosecutor was improperly attempting to ridicule defendant and alienate her from the jury on account of her race.

The first comment was made on the fourth day of defendant's testimony, when defendant, in describing the relationship between her mother and John Mitchell, commenced to reminisce about the day they met, testifying:

> I remember the -- I remember that I was with them the night that they met and I had -- it had been a long time since I saw my mother sort [of] act like that. I mean she was acting more like a woman than someone who had been a widow for many many years, and she was twirling her necklace and I remember thinking to myself --.

Tr. 2591-92. This answer to defense counsel's question was objectionable for a number of reasons, including that it was unresponsive to the question ("Would you please describe John Mitchell's relationship to your family, including your mother, from your perspective?"). In an expression of accumulated impatience resulting from several days of irrelevant and hearsay testimony, the prosecutor objected by asking the Court, "Judge, is this Mod Rehab?," which evoked laughter from the jury. (Tr. 2592-93). The Court overruled the objection, admonished the prosecutor, and twice instructed the jury to ignore counsel's comment. Tr. 2592-95.

The second comment came at the end of the next day, as reflected in the following excerpt from the transcript of defendant's direct testimony:

Q. Okay. Now at the time you were talking to Mr. Kitchen about the apartment, what did you know about his dealings in terms of the Mod Rehab program?

A. Nothing. I never discussed his having anything to do with mod rehab with him ever. I mean, he never said to me, "I'm involved in this." He never said anything.

The -- we had discussions about politics, and we had discussions about HUD monies going in the South, where he was working. I mean, we had those discussions, but never a discussion about, "I'm interested in doing something myself. I have some personal interest." Never had a conversation like that with him ever.

Q. Never?

A. Never.

Q. Not to this day?

A. Never.

[Prosecutor]: I didn't hear the answer, Your Honor.

[D. Counsel]: Never.

[Prosecutor]: Thank you.

The Court: All right, I'll sustain the objection to counsel's remarks, once again on the government's side. It was an unnecessary comment.

[Prosecutor]: I apologize.

The Court: The case is not here to be made fun of but to be tried. I don't like that conduct.

Tr. 2761-62 (emphasis added).[14] Again, the Court took corrective action and admonished government counsel before the jury.[15]

A short while later, after the jury had been excused for the day, the Court admonished counsel further for his remarks:

> The Court: Mr. O'Neill, let me ask you if that had been a black defendant on the stand with a white jury, would you be making the same kind of smart comments you've been making with a white defendant and a black jury?
>
> [Prosecutor]: Do you think I'm making those racially?
>
> The Court: No, what I'm impugning is that you're making these comments with a white defendant and a black jury which you wouldn't be doing with a black defendant and a white jury, and I resent that. I think it may be a basis eventually for the bench to take a look at this case.

Tr. 2776. At the start of the next day, the government sought to clarify the Court's comments for the record:

> [Prosecutor]: Judge, just briefly. Yesterday you put something on the record. I apologized for my remark before the jury and it was an unfortunate remark. However, I didn't understand what you said at the end and I just want to put that on the record. There was no intention, and I don't think the record supports anything that we ever played race here. It's an all black

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[14] As the underscoring in the transcript excerpt shows, the defendant had essentially answered "never" to the question, "did you know about Mr. Kitchen's mod rehab involvement," ten times before the prosecutor interrupted.

[15] During the course of the trial, defense counsel had repeatedly stated that he "didn't hear the answer" at moments when it appeared he wished to have a favorable answer repeated to impress it upon the jury. See, e.g., Tr. 324, 1039, 1440. The government submits that this, rather than any improper bias, was what caused the jury to laugh when the government adopted the same phrase.

jury, but we exercised no peremptory challenges on any white people.

The Court: I didn't say you did. I think the import of the actions -- as I said, I think if it had been a well known prominent black person as the defendant in this case, a good prosecutor, and you are a very good one, and you've been very careful not to show any disrespect --

[Prosecutor]: I understand.

The Court: I was a little concerned with this jury.

Tr. 2786-87. Finally, later that day, the Court sought to further clarify the record so as not to leave an unfair impression as to the conduct of government counsel:

The Court: . . . I just wanted to make it clear yesterday and I don't want to rehash this again because it's over, it's water over the dam, but I'm not sure the record reflected what my concern was adequately and I don't want to leave an unfair impression to Independent Counsel. Miss Dean had been answering a question, had raised her voice and spoken very loudly and repeated a couple of times she never meant to do something. That's the general context, that's not totally accurate, but said never, never it very loudly several times. The remark of counsel for the prosecution was I'm sorry, I didn't hear you, and holding your hand to your ear which caused the jury to laugh and snicker. I'm not sure that would appear in the record.

The prosecutor did not use all its strikes in choosing jury and I have no question that that's a problem with choosing jury at all. My concern was that there was an insensitivity at least and maybe something much more. These remarks are to influence the jury. We're here to give the defendant a fair trial and that's what we're all here to do.

Tr. 2900-01.

The third comment complained of was made during cross-examination of defendant, when defendant answered one of the prosecutor's questions, "Yes, that is the truth," to which the prosecutor remarked, "That's for the jury to decide, right, Ma'am?" Tr. 2897. The Court immediately stated, "All right, I'll sustain [the objection to] the remark of the counsel again as being improper." Id. The prosecutor subsequently apologized for the remark. Tr. 2899-2900.[16]

As demonstrated by the record, these remarks by government counsel amounted to nothing more than three isolated comments over the course of eight days of testimony by defendant. The Supreme Court has cautioned that "a criminal conviction is not to be lightly overturned on the basis of such comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985). The issue is one of prejudice:

> Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, . . . the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly.

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[16] Defendant cannot contend that she suffered any prejudice from this remark inasmuch as the remark was consistent with her own theme as expressed in her opening statement and testimony. See, e.g., Tr. 3170 ("And that's why I wanted to come here today. I've waited all these years to get someplace where you can tell the whole story and let normal people decide.") (emphasis added). See Section II.C.1., infra.

Id. at 11-12. A new trial is warranted under such circumstances only if the challenged remarks caused "substantial prejudice to defendant, in light of the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the improper remarks." United States v. Perholtz, 842 F.2d 343, 360-61 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988).

In her motion for a new trial, defendant grossly exaggerates the significance of the three comments at issue. The prosecutor's comments and the Court's responses amounted to no more than thirty lines of transcript out of a total of 891 pages (or 22,275 lines) of testimony by defendant. These circumstances suggest that the jury could not have been unduly influenced by the prosecutor's comments in evaluating defendant's testimony, where the comments could have left but a fleeting impression on the jury compared to the substance and credibility of defendant's testimony as developed over eight days. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 640, 645 (1974) (two remarks by the prosecutor during the course of a rather lengthy closing argument to the jury simply could not have rendered respondent's trial "so fundamentally unfair as to deny him due process").

Moreover, for each comment made by the prosecutor, the Court gave a prompt instruction to the jury, thereby ameliorating whatever prejudice might otherwise have resulted. The Supreme Court has noted that such curative instructions should be considered in determining the extent to which the fairness of a trial has been affected by an improper comment. See id. at 644.

This Circuit, too, has also often emphasized the curative power of a trial court's instructions. See Perholtz, supra, 842 F.2d at 361; United States v. Kim, 595 F.2d 755, 768 (D.C. Cir. 1979). Here, the curative instructions given by the Court not only eliminated any prejudice to defendant, but communicated to the jury the Court's disapproval of government counsel's conduct.[17] In the end, the prosecutor's remarks are more likely to have injured the government in the eyes of the jury than to have prejudiced defendant.

Finally, as is borne out by a reading of the entire record as reproduced here, the challenged remarks were not the product of an improper motive on counsel's part to prejudice defendant in the eyes of the jury. See Perholtz, supra, 842 F.2d at 361. To the contrary, these remarks were asides made during the heat of trial. There is simply no basis for saying that the prosecutor's motivations in his objections and cross-examination were improper ones.

In her Memorandum, defendant mischaracterizes the Court's subsequent comments to the prosecutor as "question[ing] government counsel's motives," suggesting that the Court believed that counsel's comments were the product of an improper motive to prejudice the jury against defendant on account of her race.

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[17] See Tr. 2594-95: "ladies and gentlemen, once again, we'll ignore inappropriate comments of counsel." Tr. 2761-62: "I'll sustain the objection to counsel's remarks, once again, on the government's side. It was an unnecessary comment. . . . The case is not here to be made fun of but to be tried. I don't like that conduct." Tr. 2897: All right, I'll sustain [the objection to] the remark of the counsel as being improper."

Defendant's Memorandum, at 125. As demonstrated by the excerpts from the transcript above, however, the Court itself rejected the notion that the prosecutor's remarks were the product of an improper racial motive. Tr. 2776. Instead, the Court expressed concern that the prosecutor was being "insensitiv[e]" or "disrespectful" (Tr. 2786-87, 2900-01), in a manner that he might have avoided in other circumstances, such as a prominent black defendant, in the example chosen by the Court, or for that matter any prominent or sympathetic defendant. We respectfully submit that there is nothing in this case to warrant the conclusion that the government injected racial issues into any stage of the trial.

In sum, viewed in context and considering the record as a whole, it cannot be said that defendant suffered any prejudice, let alone substantial prejudice, as a result of the prosecutor's comments. The prosecutor's comments consisted of minor, isolated remarks over the course of eight days of testimony by defendant, and in each case the Court gave a curative instruction. On such a record, the prosecutor's statements could not be said to have so undermined the fairness of the trial as to have contributed to a miscarriage of justice. See Young, supra, 470 U.S. at 16.

B. The Court Did Not Abuse Its Discretion in Failing to Cut Off the Prosecutor's Unobjected to Cross-Examination of the Defendant and the Prosecutor's Subsequent Use of That Examination in Closing Argument Was Entirely Proper.

Defendant asserts that the prosecutor's cross-examination demonstrating that she habitually explained away her own wrongdoing by accusing others was improper and that she was unfairly prejudiced by the prosecutor's misuse of her answers in closing

argument. Defendant's Memorandum, at 127-33, 191-94 & 217-19. None of the questions or argument complained of was objected to at trial. Accordingly, defendant's two-fold burden is a heavy one: to show, first, that the questions and argument were improper, and second, that they so substantially prejudiced defendant as to have "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice." Young, supra, 470 U.S. at 16.

In each case, the challenged cross-examination was directly responsive to defendant's direct testimony. In the case of the complained of cross-examination regarding Brennan (Defendant's Memorandum, at 127-28), the prosecutor's questions were directly related to the implication in defendant's direct testimony that Brennan never told her of Brennan's interest in the Arama project and misled her into believing he was simply a disinterested messenger of documents. Tr. 2624-27. In light of that direct testimony, the government was entitled to ask defendant whether Brennan (an unindicted coconspirator) had misled her.

With regard to the cross-examination involving the various receipts and expense records suggesting that defendant had improperly accepted meals from HUD consultants, the government was properly responding to defendant's direct testimony that she was as truthful as possible in answering the questions posed to her by Senator Proxmire and his committee as part of the Senate confirmation process. Tr. 2815-16. The government confronted defendant with her own written statement to Senator Proxmire that

"[a]t no time have I ever accepted a meal, cocktail, or expense to be paid by anyone but myself or the government when appropriate." Tr. 2843. The government proceeded to cross-examine defendant regarding her acceptance of meals from Shelby (Tr. 2844, 2846-47), Sankin (Tr. 2845-46), Winn (Tr. 2847), Wilson (Tr. 2848-53), Murphy (Tr. 2853-62), and the consulting firm of Black, Manafort, Stone & Kelly, including Russell Cartwright (Tr. 2862-65). This cross-examination was also directly related to defendant's suggestion in her direct testimony that she did nothing wrong in accepting these meals because of a rough parity between the meals she accepted (albeit wrongly) and those for which she paid out of her own pocket. Tr. 2435-40.

With regard specifically to the Russell Cartwright expense record, defendant implies in her Memorandum that cross-examination over that meal was improper because, among other reasons, it occurred "several months after defendant resigned her position as Executive Assistant." Defendant's Memorandum, at 129. Although this statement is literally true regarding defendant's position as Executive Assistant to the Secretary, defendant fails to acknowledge that at the time of the Cartwright meal she was still employed at HUD as a consultant to Secretary Pierce while awaiting confirmation as Assistant Secretary for Community Planning and Development.

Defendant also suggests that the government lacked a good faith basis to confront her with the Cartwright expense record because Abbie Weist (the other alleged participant in the dinner)

recollected in the grand jury that defendant was not (contrary to Cartwright's expense record) at the dinner in question. But that conflict alone -- which defendant was aware of from the government's disclosures -- would not render the government's use of the receipt improper, as the prosecutor's questions would nevertheless have been based on a "well reasoned suspicion" raised both by the receipt and defendant's practice. United States v. Pugh, 436 F.2d 222, 225 (D.C. Cir. 1970). Inasmuch as defendant implied in her testimony that the receipt was false, Tr. 2864-65, the government was entitled to confront the defendant with it and ask her that question directly. Tr. 2871.

A trial court has broad discretion in regulating cross-examination. Perholtz, supra, 842 F.2d at 360. On this record, it cannot be said that that discretion was abused. First, the prosecutor's cross-examination directly related to matters raised in defendant's direct testimony. See Pugh, supra, 436 F.2d at 224. But even if defendant had not expressly stated on direct that she was always truthful with Senator Proxmire and his committee, she had nevertheless placed her credibility in issue by taking the witness stand. The government was accordingly entitled under Fed. R. Evid. 608(b) to confront defendant with the receipts and her statement to Senator Proxmire as a specific instance of the defendant's conduct probative of her character for untruthfulness.

Turning to the prosecutor's use of defendant's cross-examination in closing argument, defendant contends that the prosecutor misstated her testimony in arguing that she had

testified that Sankin's receipts were "all lies," that "all the Lance Wilson receipts are lies," "[a]ll of Linda Murphy's receipts are lies," and "[a]ll of Russell Cartwright's receipts are lies." This closing argument, however, properly characterized the thrust of defendant's statements and constituted proper argument regarding defendant's position in explaining away the receipts.

First, the prosecutor's argument that defendant characterized all of Sankin's lunch and dinner receipts as lies is squarely supported by the record. When defendant was asked on direct examination whether she had ever had lunch or dinner with Sankin, she admitted that she had, but none of the events she recounted corresponded to the Sankin lunch and dinner receipts placed into evidence. Tr. 2701-03.[18] Moreover, during her direct testimony defendant explicitly challenged a number of Sankin's receipts as false, Tr. 2706-08, 2722-23, 2728-29, and stated to the prosecutor on cross-examination in reference to Sankin's lunch and dinner receipts that "none of your credit cards that you put through, I think, are accurate . . . ." Tr. 2845 (emphasis added).

With respect to the Lance Wilson receipts, defendant admitted having had lunch with Wilson several times as reflected in Wilson's receipts. But she also denied several lunches and dinners and testified that "his [receipts] are very inaccurate," "Mr. Wilson has admitted openly that his expense accounts were not accurate,"

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[18] The only Sankin receipt the defendant conceded was accurate was the gift receipt for the cup and saucer. Tr. 2704. The government's argument regarding the Sankin receipts was expressly limited to lunch and dinner receipts. Tr. 3408.

and "he [admitted] that a lot of the things that were written off to Deborah Dean were not Deborah Dean expenses." Tr. 2850. Regarding these receipts, defendant testified "yes," they are false. Tr. 2871. Similarly, defendant testified that Murphy's receipts do not "truly reflect what had to do with me," that "yes, people falsify their records," and that "all right" she is testifying that Murphy's receipts were false, Tr. 2870-71; defendant said the same about the Cartwright expense record. Tr. 2871.

Based on this record, the prosecutor's unobjected to closing argument could not possibly have been prejudicial to the defendant, much less so gross an error as to have undermined the fairness of the trial and contributed to a miscarriage of justice. See Young, supra, 470 U.S. at 16.[19]

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[19] The defendant also characterizes the very reference in closing argument to the defendant's testimony regarding the Wilson, Murphy, and Cartwright receipts as improper, because the receipts themselves were not in evidence. Defendant's Memorandum, at 192-93. Under the defendant's theory, any reference to the defendant's testimony regarding the receipts was improper absent the government's introduction of those the receipts into evidence as part of its rebuttal case. Id. The defendant argues that the government had the right to put the Wilson, Murphy, and Cartwright receipts into evidence. Id. at 192. However, rule 608(b) of the Federal Rules of Evidence expressly prohibits extrinsic proof of specific instances of conduct of a witness for the purpose of attacking the witness's credibility. But the Rule nevertheless expressly permits inquiry on cross-examination into such specific instances of conduct probative of the witness's character for truthfulness or untruthfulness. To suggest, as the defendant apparently does, that the Rule allows the inquiry but no reference to it in closing argument has no support in caselaw or logic.

C. The Prosecutor's Closing Argument Was Entirely Proper.

Defendant raises several objections to the government's closing argument, none of which was raised during the trial. None of the challenged remarks warrants a new trial. See Young, supra, 470 U.S. at 16; Perholtz, supra, 842 F.2d at 361.

1. The prosecutor's argument that the defendant had lied was entirely proper.

Defendant argues she is entitled to a new trial based on the prosecutor's repeated assertions to the jury that defendant had lied. Defendant's Memorandum, at 174-82. In so arguing, defendant overlooks the critical fact that she was charged with perjury, and that therefore the government was necessarily entitled to say that she had lied to Congress. Moreover, as to the government's statements that defendant lied at trial, defendant both misstates the law as prohibiting a prosecutor from characterizing a defendant's testimony as lies (or a defendant as a liar) and fails to acknowledge that the prosecutor's comments were "invited" by defendant's own opening statement and direct and redirect testimony.

In opening statement, government counsel made no references to lies or lying, apart from characterizing the perjury and concealment counts of the indictment as essentially charging defendant with lying. Tr. 20, 48, 70-71, 73. Defense counsel not only did not object to the prosecutor's wholly proper characterization of the perjury and concealment charges, he expressly agreed with it. After summarizing the first four charges

against his client, defense counsel himself stated: "and the rest of the counts basically charge lying. I think the Independent Counsel agree[s] that those are lying counts, that she lied." Tr. 79.

Defense counsel also went much further. During the course of his very brief opening statement, defense counsel made six additional references to defendant and "lie" or "lying," including three flat statements that "she didn't lie."[20] More important, the defense immediately focused the case almost exclusively on defendant's credibility. For example, at the very start of his opening statement, defense counsel referred to defendant's position as Secretary Pierce's assistant and stated:

> For three years, she was his assistant. She was loyal to him, she was honest with him, she was honest with others, and she did her job as best as she possibly could.

Tr. 76 (emphasis added). Defense counsel's opening statement revolved around the theme that defendant sought the opportunity to tell her side of the story:

> For the first time since the FBI, [the prosecutors], and all the lawyers at the Office of Independent Counsel has been investigating her and for the first time in ten years since she took on that job as the assistant to Mr. Pierce, she's counting on you to give her the chance to explain to you for the first time what she did, what she knew, who she did it with, and how she did it.

Tr. 78 (emphasis added). And then, squarely placing defendant's credibility at this trial in issue, defense counsel stated:

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[20] See Tr. 77: "she didn't lie"; Tr. 78: "she didn't lie"; Tr. 78: "they say that she lied"; Tr. 80: "she didn't lie"; Tr. 81: "the Independent Counsel claims were lies"; Tr. 83: "she has been accused of lying."

. . . and to show you how honest, how honest Ms. Dean's defense will be, we're going to tell you what she did and who she did it for and why she did it. And based upon those honest, true facts, we'll ask you to find that in everything she did, she didn't lie, she didn't cheat, and she didn't steal.

Tr. 80 (emphasis added).

This theme that defendant never lied to anyone, including this jury, was emphasized at the end of defendant's redirect testimony:

Q. Now in connection with these three missions of HUD during the entire time period you were at HUD from 1982 through the end of 1987, did you answer -- how many questions did you answer concerning all of these areas?

A. When?

Q. For the entire time period.

A. The whole time I was at HUD?

Q. Yes.

A. A million.

Q. And they were questions from the Inspector General?

A. Yes.

Q. From the Federal Bureau of Investigation.

A. Oh, you mean investigative questions?

Q. No, questions.

A. Yes. I've been asked questions by everybody, yes.

Q. People --

A. Senators, congressman, interest groups, mayors, governors, people that just would come in the office and have a question, citizens groups.

Q. Consultants?

A. Consultants, lawyers, lawyer/consultants -- I can't even tell the difference anymore -- consultants who actually know something to consult about and

consultants who don't know anything. Yes. I mean, just lots and lots and lots and lots of questions all the time.

Q. You've given testimony under oath about certain programs at HUD, correct?

A. Yes.

Q. To the Senate?

A. Yes.

Q. To the House?

A. Yes -- no, not to the House.

Q. I'm sorry. To the Senate?

A. Yes. To the press. To --

Q. And when you've been asked those questions, as well as the questions here, have you tried to answer the questions as honestly as you can?

A. Yes. I, the one thing that is the saddest part and the worst part of this whole mess is that people from the very beginning just didn't tell the truth. If people had just gotten up and said what they did and take responsibility for it and tell the truth of exactly what was going on and exactly who was in charge of what and who was making the decisions and how everything was being run, none of this stuff would have happened.

So when people started getting up and lying in front of Congress and lying to the press and trying to blame everything on everybody else is when all of this happened.

And that's why I wanted to come here today. I've waited all these years to get someplace where you can tell the whole story and let normal people decide, not congressmen and journalists and independent counsels.

Q. I have nothing further, Your Honor.

Tr. 3169-71 (emphasis added).

In the first day of its summation, the defense itself characterized the jury's task as "figur[ing] out who's lying and who's telling big lies and who's lying on purpose and who's mistaken . . . ." Tr. 3435-36. Defense counsel subsequently used the words "lie" or "lying" seven times in the following four pages of summation. Tr. 3436-39. Moreover, defense counsel twice characterized the government's case as "the big lie." Tr. 3436, 3439.

Defendant's contention to the contrary notwithstanding, "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." United States v. Peterson, 808 F.2d 969, 977 (2d Cir. 1987). In Peterson, the government in summation attacked the credibility of defendant and her husband, both of whom testified at trial. Several times the prosecutor called the husband a liar in attacking his testimony based on the record. The prosecutor also characterized certain aspects of defendant's testimony as a "lie," again based on evidence in the record. Id. at 976-77. Such statements, the Second Circuit held, were perfectly appropriate where tied to pertinent evidence in the record and plainly directed toward the credibility of the witnesses. Id. at 977; see also Bradford v. Whitley, 953 F.2d 1008, 1013 (5th Cir.) (prosecutor's characterization of defendant as a "liar" did not so infect the trial with unfairness as to deny defendant due process), cert. denied, 113 S. Ct. 91 (1992); United States v. Holt, 817 F.2d 1264,

1276 n.10 (7th Cir. 1987) (prosecutor may properly refer to testimony as "lies" and witnesses as "liars"); United States v. Birges, 723 F.2d 666, 671-72 (9th Cir.) (prosecutor's comments that defendant's testimony contained numerous "lies" and was replete with "fabricat[ion]" and "imagination" not misconduct, "it [being] neither unusual nor improper for a prosecutor to voice doubt about the veracity of a defendant who has taken the stand"), cert. denied, 466 U.S. 943 (1984); Irick v. United States, 565 A.2d 26, 35-36 (D.C. 1989) (prosecutor's characterization of defendant as a "liar" -- principally by referring to him sarcastically as Irick "the truthteller" -- not improper where prosecutor is commenting on the evidence and not simply expressing a personal opinion).

The law in this Circuit is not to the contrary. Defendant cites Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968), for the proposition that a prosecutor "may not represent to the jury that a defendant has lied." Defendant's Memorandum, at 175. But the transgression cited in Harris did not involve the use of the word "lie" per se in describing a defendant's testimony, but with the fact that that characterization of the testimony was an expression of the prosecutor's personal opinion and not an evaluation of the evidence. Id. at 657-58; see also United States v. Jones, 482 F.2d 747, 754 (D.C. Cir. 1973) (prosecutor's statement that he personally disbelieved defendant an obvious transgression of the rule prohibiting expressions of opinion by counsel); United States v. Dews, 417 F.2d 753, 755 (D.C. Cir. 1969) (holding that under the particular circumstances of the case

prosecutor's reference to defendant's prevarication was improper argument as an expression of personal opinion).

This Circuit has recognized the distinction between a prosecutor's expression of his personal opinion as to a witness's veracity and his argument based on the evidence that a witness's testimony is a lie. See Stewart v. United States, 247 F.2d 42, 45-46 (D.C. Cir. 1957). In Stewart, the prosecutor in summation referred to a defense witness's testimony as "statements which I believe constitute perjury" and a "complete fabrication." Id. at 45. No witness at trial, however, had contradicted the testimony of the witness labeled a perjurer and fabricator. Id. at 46. Since the prosecutor's statements were accordingly not based on the evidence, they were forbidden by the rule prohibiting expressions of opinion by counsel. Id.

The issue of the excessiveness of the prosecutor's remarks must also be viewed in the context of the entire trial. See Young, supra, 470 U.S. at 11; Bradford, supra, 953 F.2d at 1013. Here, it was the defense who in opening statement initially focused the trial on defendant's credibility. In addition, defendant subsequently testified for the greater part of eight days, out of a total of twenty-two days of testimony for the entire trial. Defendant's testimony was probably the most important event that occurred during the course of the trial and indeed consumed over one-third of the time spent at trial. On such a record, it can hardly be argued that the prosecutor's focus on defendant's

testimony in closing argument and characterization of that testimony as a lie was excessive.

This case sits in sharp contrast to Floyd v. Meachum, 907 F.2d 347 (2d Cir. 1990), in which the Second Circuit expressly found a prosecutor's use of the terms "lie" and "liar" to be excessive and inflammatory. The Court of Appeals acknowledged that use of the words lie and liar is not ordinarily improper. Id. at 354. The Court found three faults with the prosecutor's use of those terms. First, since the defendant did not even testify at the trial (the prosecutor's references related to the defendant's pretrial statement to the police), the prosecutor's argument could not be justified as a "characteriz[ation] [of] disputed testimony when the witness's credibility is clearly in issue . . . ." Peterson, supra, 808 F.2d at 977, quoted in Floyd, supra, 907 F.2d at 354. Second, the Court held that the prosecutor also improperly asked the jury to pass on her own personal integrity in assessing the defendant's credibility. But finally, and most important in the Court's view, the prosecutor's improper remarks took on a constitutional dimension in improperly equating the defendant's pretrial lies with proof beyond a reasonable doubt and in using that argument as a springboard to comment implicitly on the defendant's failure to testify. Floyd, supra, 907 F.2d at 353-54.

Here, of course, defendant did testify, and contradicted other witnesses, such that the prosecutor's subsequent characterization of defendant's testimony as lies was properly related to defendant's disputed credibility. Moreover, the prosecutor's

references to defendant's testimony as a lie was made in the context of a discussion of the evidence. At no point did the prosecutor violate the injunction against expressing his personal opinion regarding defendant's credibility. The prosecutor's summation was accordingly in all respects entirely proper.

In any event, it could not be said on this record that defendant was thereby unfairly prejudiced. The determination whether a prosecutor's conduct has affected the fairness of a trial must include consideration of the "invited response" or "invited reply" rule. Young, supra, 470 U.S. at 11. In evaluating the effect of a prosecutor's remarks on a jury's ability to judge the evidence fairly, a court "must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." Id. at 12. The thrust of the rule is not whether the prosecutor had license to make otherwise improper remarks, but whether the prosecutor's invited response, viewed in context, unfairly prejudiced defendant. Id. The upshot of the rule is that "if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." Id. at 12-13.

Here, the prosecutor's comments, viewed in context, were invited by defendant's own opening statement and testimony. It was defense counsel who initially focused the case in opening statement on defendant's credibility. He specifically emphasized (and vouched for) defendant's credibility:

> . . . and to show you how honest, how honest Ms. Dean's defense will be, we're going to tell you what she did and who she did it for and why she did it. And based upon those honest, true facts, we'll ask you to find that in everything she did, she didn't lie, she didn't cheat, and she didn't steal.

Tr. 80 (emphasis added). Defense counsel himself used the words "lie" or "lying" nine times over the course of his eight page opening statement. Subsequently, at trial, defense counsel sponsored the following colloquy during defendant's redirect testimony:

> Q. And when you've been asked those questions, as well as the questions here, have you tried to answer the questions as honestly as you can?
>
> A. Yes. I, the one thing that is the saddest part and the worst part of this whole mess is that people from the very beginning just didn't tell the truth. If people had just gotten up and said what they did and take responsibility for it and tell the truth of exactly what was going on and exactly who was in charge of what and who was making the decisions and how everything was being run, none of this stuff would have happened.
>
> So when people started getting up and lying in front of Congress and lying to the press and trying to blame everything on everybody else is when all of this happened.
>
> And that's why I wanted to come here today. I've waited all these years to get someplace where you can tell the whole story and let normal people decide, not congressmen and journalists and independent counsels.

Tr. 3169-71.

As this context shows, the prosecutor's comments could not, and did not, affect the fairness of defendant's trial, because they were made in response to defense counsel's own remarks in opening statement and defendant's testimony. Indeed, it is significant

that defendant did not object to the prosecutor's use of the term "lie" as improper argument. Tr. 3592. The words lie and lying were so often used by both parties during the course of this trial that the jury must surely "have been dulled to any prejudicial sting that these remarks may [otherwise] have inflicted." United States v. Manos, 848 F.2d 1427, 1436 (7th Cir. 1988). Finally, any prejudice in the prosecutor's argument would also have been ameliorated by the prosecutor's and the Court's repeated reminders to the jury that they are the exclusive judges of the evidence and the credibility of the witnesses. Tr. 3374-75, 3413-14, 3531, 3535-37. Indeed, on this very point, the Court specifically instructed the jury as follows:

> All right, Ladies and Gentlemen, first as to the arguments you heard yesterday and the day before, I take it, but particularly as to yesterday and the day before, the closing arguments, there were comments made as to using the word "lies" or "lying" and the like, and it is, obviously, the issue is for you as the jury to make a decision keeping in mind the evidence in the case, and it is not the opinion of counsel, that is, whatever their personal belief is, that is appropriate, so that an argument to you that someone is lying is really an expression of personal opinion by the attorney, as opposed to pointing you to the evidence and saying it's for you to make up your mind whether or not someone is telling the truth. I want you to keep that in mind.
>
> It's the evidence you have to focus on and not the statements of counsel, which I informed you previously are not evidence in the case.

Tr. 3593-94.

2. The prosecutor did not misstate the evidence in his closing argument, but rather properly argued the inferences supported by that evidence.

Defendant alleges that in several respects the prosecutor intentionally misstated the evidence in his closing argument, thereby misleading the jury and unfairly prejudicing defendant. Defendant's Memorandum, at 182-214. In each example cited by defendant, however, the prosecutor properly summarized the testimony and exhibits in evidence or argued an appropriate inference to be drawn therefrom. While "[i]t is elementary . . . that counsel may not premise arguments on evidence which has not been admitted," Johnson v. United States, 347 F.2d 803, 805 (D.C. Cir. 1965), counsel may of course urge upon the jury such reasonable inferences as the evidence rationally supports. United States v. Dixon, 469 F.2d 940, 942 n.4 (D.C. Cir. 1972); Criminal Jury Instructions for the District of Columbia No. 2.04 (3d ed.). That is all that government counsel did here. Significantly, defendant did not object to any of the purported misstatements now complained of; accordingly, even if error were committed, a new trial would be warranted only if any such misstatement so substantially prejudiced defendant as to have undermined the fundamental fairness of the trial and contributed to a miscarriage of justice. Young, supra, 470 U.S. at 16; Perholtz, supra, 842 F.2d at 361. Defendant cannot possibly meet that high standard here.

a. Kitchen delivery of the Atlanta request. Defendant contends that the evidence adduced at trial was insufficient to support the inference, as argued by the government in summation, that Lou Kitchen personally delivered to defendant the City of Atlanta's written request for 200 Moderate Rehabilitation units. Defendant's Memorandum, at 184-87. At trial, Nicholas Bazan testified that Kitchen had indicated to Bazan that Kitchen could secure Moderate Rehabilitation units through defendant and instructed Bazan to secure a written request for units addressed to HUD from the Atlanta PHA, for Kitchen to bring to Washington for a scheduled luncheon with defendant. Tr. 1311, 1313-14. Bazan did in fact obtain such a letter, provided it to Kitchen, and less than one week later the units were awarded to the City of Atlanta. Tr. 1314. The letter was actually delivered to Kitchen by David Westcott. Tr. 1326-27.

On this record, it was perfectly appropriate for the jury to infer -- and for the prosecutor to argue to the jury -- that Kitchen in fact did that which he said he was going to do, namely, deliver the request to defendant. There is no dispute on the record that the letter was in fact delivered and there is no dispute that it must have been delivered shortly after it was written. (See Defendant's Memorandum, at 185.) The inference that Kitchen delivered the letter was accordingly a legitimate one. Cf. United States v. Agurs, 427 U.S. 97, 99 (1976) (in defendant's murder trial, where evidence showed that victim and defendant registered in motel as husband and wife, that two hours earlier

victim had $360 in cash on his person, that victim and defendant had completed an act of intercourse and that victim had left to use bathroom and a fight ensued upon his return, and that the contents of victim's pockets were found in disarray but no money was found, jury could have reasonably inferred that defendant took victim's money and that the fight started when the victim reentered the room and saw what defendant was doing).

b. Dorsey testimony on Dade selection. Defendant contends that the prosecutor improperly argued that Michael Dorsey had testified that defendant had indicated during a Spring, 1987, meeting who was behind the Metro Dade project. Defendant's Memorandum, at 187-90. The full context of the prosecutor's argument shows instead, however, that what the prosecutor was recounting for the jury was Dorsey's testimony that at that Spring, 1987, meeting, defendant was indicating as a general matter who was behind which projects. As the prosecutor argued:

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

> Well, you remember Michael Dorsey's testimony, a witness testifying for the defense. He said that Ms. Dean did speak during that meeting and was saying who was behind the project.
>
> In her own handwriting she has the bedroom configuration and the number of bedrooms, and then it says "letter." They are funding 203 units to Metro-Dade before Metro-Dade even asks for them. Is that the way this program was supposed to operate? Is that the way it's supposed to run?

Tr. 3514-15. Hence, the prosecutor's argument was responding directly to defense counsel's argument that the Spring, 1987, funding round was based "solely on information provided by [the Assistant] Secretary for Housing," Thomas Demery. To rebut that argument, the prosecutor referred to defendant's handwritten list of projects to be funded and to Dorsey's testimony that at the meeting defendant was saying who was associated with which project.[21] In the context of the argument, the jury would have understood the prosecutor's meaning to be that Dorsey testified that defendant stated who was behind the various projects, not who

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[21] Dorsey's testimony was as follows:

> Q. Is it fair to say that during the Mod Rehab meeting the defendant identified people behind the Mod Rehab projects?
>
> A. No, I think what she did was identify people who had contacted her about specific projects.
>
> Q. So as the list was read she identified a number of individuals associated with particular projects, is that right?
>
> A. Yes.

Tr. 3182.

was behind specifically the Metro-Dade project. In this regard, the Supreme Court has cautioned:

> [Closing arguments] are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly, supra, 416 U.S. at 646-47.

c. The Dade letter. The defendant contends that the prosecutor also improperly argued in connection with the Metro Dade allocation that the funding preceded any request from the PHA. The prosecutor's argument was as follows:

> They are funding 203 units to Metro-Dade before Metro-Dade even asks for them. Is that the way this program was supposed to operate? Is that the way it's supposed to run?

Tr. 3515. The evidence adduced at trial showed that in late 1986 or early 1987, Lou Kitchen advised a Florida real estate developer that Kitchen could obtain moderate rehabilitation units for the developer in Dade County, Florida. Tr. 1332-33. This occurred six months before the developer actually retained Kitchen, Tr. 1333; the retainer agreement was signed May 28, 1987. Gov't Ex. 207. The evidence further showed that Kitchen had gotten the units from defendant. Tr. 1437-38; 1524-25. This evidence supports the inference that defendant had promised the units for Metro Dade to Kitchen prior to the PHA's letter request dated February 13, 1987, giving the prosecutor a proper foundation on which to argue that

the funding decision (albeit not formally) was made before Metro Dade asked for the units.

d. Ronald Reynolds. Defendant contends that the prosecutor improperly argued that defendant denied knowing Ronald Reynolds. Defendant's Memorandum, at 194-201. The prosecutor's argument was as follows:

> That's why she doesn't want to admit that Mr. Reynolds took her -- and I neglected -- this is in evidence, you'll get a chance to look at it. Let me show you something on the visual presenter for a second. There are several pages in the middle of various, various HUD drivers and the name Ron, as you'll see runs, throughout. There's a number of different pages. There are approximately, I don't know, several pages. Look through it. See how many times Ron's name comes up.
>
> But she told us when I cross-examined her about it that there are many drivers. I don't know who Ron is. Well, Pam Patenaude had no problem remembering that she took trips with her when Ron was driving. But you she [sic] she didn't want to admit to it, ladies and gentlemen, because she was in a trick bag here. Either it's personal, and she lied to Senator Proxmire, or its business, and she lied to you. Either way it's a lie. It can't be anything else.

Tr. 3423-24. This argument accurately recounts defendant's testimony at trial:

> Q. Did Mr. Reynolds drive you to lunch with John Mitchell?
>
> A. Not that I recall. I don't recall any place Mr. Reynolds drove me.
>
> Q. You don't recall any place Mr. Reynolds drove you?
>
> A. Not in specifics. I can -- I can recall that Mr. Reynolds was a driver and --
>
> Q. Let me show you Government's Exhibit 212 already in evidence, Miss Dean, and ask you to look through that and see if that refreshes your recollection as to whether Mr. Reynolds drove you anywhere?

A. Well, I didn't say that I don't recall he was a HUD driver, but we had ten HUD drivers and all of them drove me different places. I just don't remember a specific of Mr. Reynolds driving me anywhere, but I will look through it, just as you asked me to, and see if I can find something.

Is Ron Mr. Reynolds? I don't see anything here that says Reynolds. It says Ron. Is his name Ron Reynolds?

Tr. 3057. The thrust of defendant's testimony here is that she did not know who the HUD driver named "Ron" was, or whether that was Mr. Reynolds. In argument, the prosecutor was merely recalling for the jury defendant's testimony. Indeed, if one were to put quotation marks around the name Ron in the prosecutor's statement, "I don't know who 'Ron' is," it is abundantly clear that the prosecutor was merely recalling to the jurors' minds defendant's apparently feigned lack of recollection of Reynolds's first name.[22]

e. Andrew Sankin's consulting. In cross-examination, the following colloquy took place:

Q. Now, is it fair to say that you knew both Mr. Sankin and Mr. Broussard were going to be paid on Alameda Towers as consultants?

A. I assumed that they were going to make some money, yes.

Q. Well, they're acting as consultants, were they not?

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[22] Defendant also contends that in summation the prosecutor improperly attributed the defendant's testimony that Reynolds was "a weird guy" to his long hair. Defendant's Memorandum, at 199-200. The prosecutor's invited response to defendant's "weird guy" testimony could not have unfairly prejudiced the defendant. See Young, supra, 470 U.S. at 11-12. Moreover, the prosecutor's rebuttal summation that the defendant denied Reynolds ever drove her to lunch was a fair characterization of her testimony. Tr. 3054-58.

A. I frankly don't know how they were going to go about doing what they were going to do or how much they would have made.

Tr. 3096-97 (emphasis added). This testimony provided ample basis for the prosecutor to argue in summation that defendant denied knowing that Sankin was a consultant.

f. Defendant's friendship with Richard Shelby. Defendant contends that there was no evidence in the record that defendant and Shelby ceased to be friends any earlier than April, 1989, twenty-one months after defendant resigned as Executive Assistant to the Secretary, so that it was accordingly improper for the prosecutor to argue that "[t]hey're only friends when she's Executive Assistant" and to imply that since it appeared that they were only friends because of her position, they must have discussed mod rehab business when they met. The evidence at trial established that Shelby and Dean had lunch together every two or three weeks while she was Executive Assistant and also corresponded frequently during that same period. Tr. 3006-13, 3102. Further, there was little if any evidence of contact between Shelby and defendant 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.

g. Alvin Cain's testimony. Defendant contends that it was improper for the government to argue that Agent Cain testified that defendant never made any mention of Mitchell in their telephone conversation after the release of the Inspector General's report. Cain's testimony was as follows:

Q. At or about that date, do you recall any conversation with the defendant Deborah Gore Dean in which she was quite upset with you about the contents of the report?

A. No, I do not.

Q. Do you recall her mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report?

A. No, I do not.

Q. Do you recall her telling you that she was going to hold a press conference to denounce what was in the report?

A. Absolutely not.

Tr. 3198-99. A reasonable inference to be drawn from this testimony is that if the conversation had occurred, Agent Cain would have remembered it; hence, the import of his testimony was that the conversation did not occur (as the prosecutor argued in summation). Defendant concedes as much in a different part of her Memorandum.[23] See Defendant's Memorandum, at 166 & n.122.

h. Defendant's relationship with John Mitchell. At various times during the course of her testimony, defendant admitted (Tr. 2608-11; 2595; 2960) and denied (Tr. 3019) being close to John Mitchell during the years she was a HUD employee. Under such circumstances, it was entirely appropriate for the prosecutor to point out this inconsistency in summation and argue its bearing on defendant's credibility. See Criminal Jury Instructions for the District of Columbia No. 2.11 (3rd ed.).

[23] We address below defendant's false claim that Special Agent Cain perjured himself.

i. John Mitchell's consulting. During cross-examination, defendant specifically denied knowing that John Mitchell was acting as a consultant vis-a-vis the HUD-related Marbilt and Arama projects. In pressing defendant further on those denials, the prosecutor specifically asked defendant whether she knew that John Mitchell was a consultant aside from HUD matters. Defendant answered that she "never knew anything like that." Tr. 2984. The government then impeached defendant's testimony with her prior inconsistent statement in a September, 1982, White House qualification statement, where she described Mitchell as an "international consultant." Tr. 2992-93. Under these facts, it was perfectly appropriate for the prosecutor to point out the inconsistency in summation and argue its relevance as to defendant's credibility. See Criminal Jury Instructions for the District of Columbia Nos. 2.11 & 2.28 (3rd ed.).

j. Defendant's consulting. In cross-examination, defendant testified as follows:

> Well, what I told Secretary Pierce was that I thought that it looked very bad for a former Special Assistant of his to be making that kind of money off of HUD programs, and he agreed, and we had a conversation about what consultants were paid and he told me about what consultants used to be paid in a substantial rehabilitation program and we had a conversation about it and we had a conversation about what his understanding was about what HUD could do about people getting consulting fees and, yes, we did, we did agree that it looked very bad. It looked bad for -- I mean no one likes the idea of selling any sort of influence in a Government program. Of course it looks terrible.

Tr. 2883. Subsequently, the following colloquy took place:

> Q. Now, Ms. Dean, do you recall testifying on cross examination that I don't approve of special assistants of the secretary of HUD leaving HUD and cashing in on their former positions?
>
> A. Yes, and I believe that.
>
> Q. Do you recall testifying on cross examination that you did not become a consultant after leaving HUD?
>
> A. I became a lobbyist, not a consultant, and I never called Secretary Pierce for anything, and I never did anything that was influence peddling.

Tr. 3130. Defendant's testimony was subsequently impeached by two written "Consulting Agreements" under which she had agreed to provide HUD-related consulting services for a fee. Tr. 3145-46. (Defendant's own counsel admitted that defendant made considerable sums of money in the consulting business after she left HUD. Tr. 3130.) In light of this record, it was perfectly appropriate for government counsel to argue in summation that when defendant left HUD, she too became a consultant and did what she complained everyone else was doing.

k. Secretary Pierce.[24] Regarding the Necho Allen Hotel rent waiver, the government argued in summation:

> So what happens? Andy Sankin gets John Rosenthal in to see Deborah Dean. Bang. Exception rents. They'll say Secretary Pierce signed off on them. The autopen was used. Again, you only have her word that Secretary Pierce authorized the signature. It was not his signature. It's an autopen.

Tr. 3399. This argument properly reminded the jury that Secretary Pierce's signature on the waiver did not necessarily mean that he

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[24] We separately respond (in subsection 4, below) to the defendant's allegations that the government's summation regarding the defendant's relationship with Secretary Pierce was calculated to appeal to racial feelings.

approved of the action, since the evidence showed that the autopen was used to sign the waiver and that the use of the autopen was authorized by defendant. Tr.3035-36.

3. The prosecutor's remark about James Wilson was not improper, and in any event could not have been so substantially prejudicial as to warrant a new trial.

Defendant contends that the prosecutor's statement in closing argument describing James Wilson as "probably the most honest person that's testified at this trial" constituted an improper expression of the prosecutor's personal opinion regarding the witness's credibility. Defendant's Memorandum, at 214. But this is a misreading of the prosecutor's statement. At trial, Wilson had testified about a conversation he had had with Thomas Broussard, an unindicted coconspirator, regarding Broussard's search for a partner to develop 300 Moderate Rehabilitation units that Broussard claimed he had access to in Puerto Rico. Tr. 1076-80. The relevance of the conversation was that it bolstered the government's theory that defendant had improperly promised those units to Broussard, and also demonstrated the secrecy surrounding defendant's actions. Tr. 1070-71, 1073. Wilson testified that Broussard sought to develop those units as a partner with Wilson, but Wilson had sufficient doubts about the legitimacy of the allocation not to go forward, particularly because Broussard would not disclose how he got the units. Tr. 1079. Defense counsel's cross-examination was limited to establishing that Wilson never met and had no conversations with defendant. Tr. 1082-83.

On this record, it is clear that the prosecutor did not intend -- and the jury would not have taken -- the prosecutor's comment in summation as to Wilson's honesty to be a remark about the witness's believability, which was not even arguably in dispute. Instead, the prosecutor was obviously commenting on the fact that Wilson was one of the few persons testifying who paused during the actual events and questioned the propriety of what was occurring. The record thus negates defendant's suggestion that the prosecutor's motive was an improper one.

In any event, even if improper, the comment would not warrant a new trial, because it cannot reasonably be suggested that defendant was prejudiced by the remark. Any evaluation of prejudice must always include "the centrality of the issue affected by the error . . . ." Gaither v. United States, 413 F.2d 1061, 1079 (D.C. Cir. 1969). Where, as here, the issue affected by the improper remark was in effect not contested, the remark cannot be said to have seriously swayed what the jury must already have believed. Id. at 1079-80. Moreover, a new trial on this basis would be particularly inappropriate, since no objection was made at the time.

4. Defendant's contention that the prosecutor sought to infuse a racial element into the jury's judgment is groundless.

Defendant contends that the government improperly argued that defendant in part laid the blame for her wrongdoing upon Secretary Pierce and Lance Wilson, thereby inviting the all-black jury, Tr. 2786, to side with Pierce and Wilson (who are black) against

defendant (who is white). Defendant's Memorandum, at 214-19. Defendant's claim is meritless.

Use of race as a factor in closing argument would have been improper, see United States v. Doe, 903 F.2d 16, 26 (D.C. Cir. 1990), but defendant's claim that race was used here is entirely groundless. The government's argument was not limited to defendant's having blamed Pierce and Wilson for what was in actuality her own wrongdoing; the government's argument was that defendant -- whenever confronted with otherwise unexplainable evidence or a contradiction in her own story -- would always lay the blame on someone else, anyone else. Tr. 3430-31. Race had nothing to do with it. Hence, regarding the receipts and expense records used in cross-examining defendant, the government in summation not only pointed out defendant's testimony that "the Lance Wilson receipts are lies," but also defendant's testimony that the Murphy, Sankin, and Cartwright receipts were lies as well. Tr. 3408. With respect to different aspects of the case, the government showed in summation that defendant laid blame not only on Secretary Pierce (Tr. 3427), but on Demery (Tr. 3412), Shelby (Tr. 3393, 3431), Brennan (Tr. 3003, 3386-87, 3431), Mitchell (Tr. 2989-90, 3419, 3431), and Sankin (Tr. 3426, 3431), all of whom were white. The record simply provides no support for defendant's contention that race was improperly employed by the prosecutor in his summation or played any role as a factor in the jury's judgment.

5. The prosecutor's closing argument would not reasonably have been understood by the jury to be making an improper appeal to the jury's passions or prejudices.

Defendant contends that the prosecutor's summation also constituted an improper appeal to the jury to make a statement about good government unrelated to the facts or issues in the case. Defendant's Memorandum, at 219-20.

"It is well established that a prosecutor may not make statements calculated to arouse the passions or prejudices of the jury." United States v. Monaghan, 741 F.2d 1434, 1440 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). Thus, "[a] prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." Id. at 1441. Nevertheless, a prosecutor may properly strike "hard blows" and ask a jury to "condemn" an accused for engaging in the charged criminal conduct. Id. at 1440, 1442.

In the context of this case, none of the prosecutor's remarks in summation can reasonably be interpreted as an improper appeal to the passions or prejudices of the jury. Each of the three conspiracy charges in the Indictment charged defendant with, among other things, conspiring to defraud the United States and an agency of the United States by depriving HUD and the citizens of the United States (a) of their right to the conscientious, loyal, faithful, disinterested, and unbiased services of a public servant, and (b) of their right to have HUD's business and affairs conducted in an honest and impartial way, free from deception, fraud, and

improper and undue influence. Each of the complained of remarks by the prosecutor was directly related to these allegations in the Indictment. Defendant argues that the prosecutor improperly argued:

> It is your Government. It's all our Government. Not for a select few, not for certain insiders who have access to high ranking public official's like Mr. Shelby . . . .

But defendant fails to acknowledge that this argument is directly related to the Indictment's allegations that defendant failed to give the citizens of the United States her loyal and disinterested services and failed to conduct HUD's business and affairs in an impartial manner, free from improper and undue influence.

In light of the allegations of the case, virtually any reference in summation to the manner by which defendant conspired to defraud the United States could be interpreted as an appeal to the jury to make a statement about good government; after all, the core of the case was about defendant's abuse of her position as a government official to benefit herself and her family and friends, rather than the public as a whole. Even if any of the prosecutor's remarks had been ambiguous, although none was, there would be no basis on this record to infer that the prosecutor improperly intended his remarks to arouse the jury's passions or prejudices, as opposed simply to refer to the allegations of the indictment. See Donnelly, supra, 416 U.S. at 646-47 (quoted in Section II.C.2.b., above). Indeed, here again the lack of objection demonstrates both the propriety of this argument and undercuts defendant's belated claim of prejudice.

III. Defendant's contention that her conviction rests on perjured testimony is groundless.

Defendant also argues that she is entitled to a new trial on the ground that the government deliberately elicited false testimony from Thomas Demery, Ronald Reynolds, Pam Patenaude, and Special Agent Alvin Cain, and then "sought to preclude revelation of the false testimony" and "to cover it up." Defendant's Memorandum, at 134 & 141. Defendant's claims here are reckless -- and groundless -- attacks on the integrity of the prosecution.

Far from engaging in a "cover up," it was the prosecution that supplied defendant with the facts that she now claims show that perjury by Demery, Reynolds, and Patenaude occurred. Moreover, defendant was in possession of those facts well before each witness testified. Indeed, in the case of Reynolds and Patenaude, defendant used those facts in her cross-examination, after the Court rejected the same arguments she renews here. In contrast, in the case of Demery, defendant chose not to confront Demery on the issues she now claims to be critical -- and only after trial has asserted this claim of perjury and "cover up." Such sandbagging of the Court and the government is impermissible.

In any event, even if defendant's claims were well-founded, no new trial would be appropriate here. A conviction may not rest upon the knowing use of false testimony if there is a reasonable likelihood that the false testimony would have affected the jury's verdict. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth

Amendment"); United States v. Cole, 755 F.2d 748, 763 (11th Cir. 1985). A new trial would be warranted where "(1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is any likelihood that the false testimony could have affected the judgment of the jury." United States v. Douglas, 874 F.2d 1145, 1159 (7th Cir. 1989). Defendant's contentions fall far short of meeting this standard in any respect.

None of the purportedly false testimony cited by defendant -- even if it had been perjury -- could reasonably be deemed to have affected the jury's verdict to any significant degree. Virtually every instance of "perjured" testimony cited by defendant involved a collateral attack on the witness's credibility. To be sure, the principle that the government may not knowingly use false testimony "does not cease to apply merely because the false testimony goes only to the credibility of the witness." Napue, supra, 360 U.S. at 269. But in such a case, where the issue concerns false testimony going to a witness's credibility, a new trial will be warranted only when "[t]he jury's estimate of the truthfulness and reliability of [that witness] may well be determinative of guilt or innocence." Id. In light of the relatively minor roles in the government's case played by each of the witnesses attacked by defendant in her motion, defendant could not meet her heavy burden here, even if her arguments of perjury were well-founded.

A. Thomas Demery.

Defendant contends that Thomas Demery lied in cross-examination when he denied ever having lied or perjured himself during the two occasions he testified before Congress. Defendant supports her claim by citing two instances in which Demery testified before Congress that he was not aware while he was at HUD that Philip Winn and Phil Abrams were involved with Moderate Rehabilitation projects -- a statement that later became, in part, the basis of the 1992 perjury indictment against Demery that was not only a matter of public record, but was provided to defendant as part of Demery's Jencks production on the first day of trial.[25]

As proof that Demery's congressional testimony was false in that respect, defendant cites Demery's admission to the Office of Independent Counsel as part of his plea agreement -- as recounted in an OIC interview report that was also provided to defendant as part of the government's Jencks production[26] -- that in approximately March, 1987, Demery came to understand that Abrams and Winn were in the mod rehab business. Defendant argues that the government's failure to correct Demery's testimony was a "cover up" that amounted to a violation of due process entitling her to a new trial.

As the foregoing facts suggest, defendant's claim of "cover up" is completely groundless. Defense counsel had, more than two weeks prior to Demery's testimony, the Jencks material needed to

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[25] See 3500-TD-42 and defendant's Ex. TT.

[26] See 3500-TD-6, reproduced as defendant's Ex. UU.

exploit this alleged inconsistency to its fullest. See Douglas, supra, 874 F.2d at 1160; Brown, supra, 634 F.2d at 826. Upon Demery's testimony that he did not lie to Congress, defense counsel could have asked Demery whether he recalled telling Congress that he was unaware that Winn and Abrams were involved with Moderate Rehabilitation projects. After Demery acknowledged that he had (or had his recollection refreshed), defense counsel could then have pressed him further and asked whether that testimony to Congress was incorrect or false. If Demery then denied it was false, defense counsel could have completed the impeachment with Demery's statement to the Office of Independent Counsel.

There were, however, several strategic considerations that suggest why defendant did not pursue this line of cross-examination. The first is that Demery's testimony regarding Winn and Abrams was not only collateral to the issues on trial, but subsumed in his plea to having obstructed justice. The government, after all, had itself already elicited not only that Demery had pled guilty to having produced a false document in response to a grand jury subpoena, but that the document was a receipt falsely acknowledging that Demery had paid for the use of Winn's condominium in Vail, Colorado. Tr. 1891. This testimony, without more, obviously put the issue of Demery's honesty directly before the jury, as well as his connection with Winn. But more than that, the fact that the government elicited this testimony makes it all the more outrageous for the defendant to suggest that the government would thereafter seek to "cover up" perjury.

The second strategic consideration was that defendant had a preview of how Demery might seek to reconcile his congressional testimony and his statement to the government. Demery testified:

> A. . . . I know a lot more than I did before the Lantos committee. I've had an opportunity to look at documents and spend a lot more time on issues than I did when I testified in front of Chairman Lantos.
>
> Q. Okay. So you may have made some mistakes in front of the Lantos committee, but they certainly wouldn't have been intentional, is that what you're saying?
>
> A. Yes.
>
> Q. Okay. No intentional perjury, no lies, just mistakes, okay.

Tr. 1916-17. This preview -- and the possibility that the defense would be drawn into a debate with the witness over whether he deliberately lied or was mistaken -- suggests another reason why defendant avoided further pursuing this topic. Indeed, defendant may well have perceived that this debate would be particularly counterproductive in light of the fact that the government already had informed the jury of Demery's obstruction of justice.

The third strategic consideration was that Demery was not only a relatively minor witness, but one whose direct testimony was not entirely unfavorable to defendant. Importantly for defendant, Demery testified that he had met with Secretary Pierce to raise the issue of defendant's involvement in the Mod Rehab program; but that, as a result of that meeting, defendant still remained involved in the Mod Rehab program. Demery testified that "[a]s a result of the meeting, a new procedure was established whereby Ms.

Dean, myself, and either the under secretary of HUD or the general counsel of HUD would form a mod rehab selection committee to make future mod rehab selections." Tr. 1897. This testimony potentially served two purposes for defendant: it would allow her to argue that Pierce knew of, and approved, her role in the Mod Rehab program; and it would allow her to argue that there was a Mod Rehab committee, as she had testified to Congress (even if Demery's description of how the Committee operated did not coincide with hers in all respects). Thus, defendant might have had good reason not to impeach Demery to the fullest extent possible.

Finally, there may have been an impermissible strategic consideration -- the thought that if defendant did not raise this issue on cross-examination, it might provide the basis for a motion for new trial. Such sandbagging of the Court and the government would, of course, be improper. In this regard, it is significant that defendant did not raise this issue until <u>after</u> the jury verdict. It was not mentioned in defendant's Rule 29 motion at the close of the government's case, nor in her Rule 29 motion at the close of all the evidence; and it was not raised in any other form. If, then, this argument was not always intended as an ambush, at a minimum it clearly was a post-trial afterthought; and, if it was the latter -- which is the very best light in which it can be cast for defendant -- then this only reinforces the conclusion that this was not an issue that defendant considered important at the time of trial.

Indeed, the ambiguous and incomplete nature of this questioning precludes the finding of "cover up" and failure to correct that defendant would now have this Court make. Defense counsel's opening question regarding Demery's congressional testimony was addressed specifically to Demery's testimony before Congress "regarding certain of the inspector general allegations at HUD." Tr. 1915. That question was followed by:

> Q. And did you tell the truth?
>
> A. Yes, I did.
>
> Q. You told the utter and complete truth in front of those -- on those hearings?
>
> A. Yes, I did.
>
> Q. Okay. You haven't been -- you didn't plead guilty to perjury, did you?
>
> A. No, I did not.
>
> Q. Okay. Is that because you've never committed perjury?
>
> A. Of course.
>
> Q. Okay. And you told the truth in front of the Lantos committee in the same fashion as you're telling the truth today, correct?
>
> A. Correct.

Tr. 1916. At best, the focus of defense counsel's inquiry here was ambiguous. The "Inspector General's allegations" vis-a-vis Demery touched on Demery's relationship with or knowledge regarding Winn and Abrams only peripherally; rather, they focused on Demery's relationship with and knowledge regarding contributions to the charity Food for Africa and Demery's relationship with defendant and Secretary Pierce in the Moderate Rehabilitation funding

process. Defendant herself characterized the Inspector General's report as relating "basically [to] an investigation of developers' ties to a charity that Mr. Demery had been sponsoring and whether or not that had any influence on decisions that were made . . . ." Tr. 2615. Thus, the predicate for this line of questioning was not designed to alert either Demery or the government that defendant was seeking to elicit Demery's prior testimony about Winn and Abrams.

Moreover, even absent the specific reference to the Inspector General's allegations, the reasonable interpretation of this line of questioning was whether Demery lied to Congress regarding what he said about defendant and Secretary Pierce. Demery was, after all, summoned as a witness to testify about the Moderate Rehabilitation funding process and defendant's role in it as Executive Assistant to the Secretary, which were the subjects of his direct testimony. Tr. 1888-1910. There was nothing to suggest -- in the context in which the question was asked -- the Winn/Abrams "spin" defendant is now placing upon the question.[27]

Defendant's argument here is premised on the notion that defense counsel's question was clear enough that both Demery and the government should have understood it to be directed to Demery's Winn/Abrams congressional testimony. But if that were so, defendant fails to explain why she herself did not impeach Demery's testimony -- although we have suggested several reasons why she

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[27] For the same reasons, defendant cannot now attack the government's reference to Demery in closing argument on this ground.

might have chosen not to do so. Defendant had the Demery Jencks material that would have enabled her to fully impeach Demery's testimony. Defendant was in as good a position as the government to recognize and correct the alleged falsehood in the testimony.

In this regard, this case stands on a completely different footing than Napue and its progeny. In Napue, the government's chief witness falsely testified that no promises were made by the government in exchange for his testimony against defendant. Napue, supra, 360 U.S. at 267. Defendant did not learn that promises had in fact been made until after trial. The Court accordingly reversed the conviction on grounds that it was secured by the state's knowing use of false testimony. Similarly in Giglio v. United States, 405 U.S. 150 (1972), the petitioner's conviction was reversed on grounds that it rested upon the government's use of false testimony. There, the witness had testified that he received no promises of prosecutorial leniency, which the government repeated in summation. Id. at 151-52. It was only after the trial that defendant learned that the government had in fact promised the witness he would not be indicted. Id. at 152. That fact, coupled with the fact that the government's case depended almost entirely upon that witness's testimony and credibility, made it appropriate that the defendant be given a new trial.[28]

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[28] There is a further reason why a new trial could not be granted here under Napue. Demery's direct testimony was only 22 pages in length, and focused on only a small portion of the period covered by the indictment, i.e., late 1986 and early 1987. Furthermore, his testimony was corroborated in major respects by other witnesses, including Dorsey, defendant's own witness. Finally, far from being a critical government witness, the

By contrast to Napue and Giglio, here defendant was as well apprised as the government respecting the allegedly false testimony by Demery. Under these circumstances, defendant is actually proposing a remarkable proposition: that any omission or misstatement by a government witness, left unimpeached by defense counsel despite defense counsel's awareness of and access to documentary or other evidence tending to impeach the omission or misstatement, is tantamount to the government's use of perjured testimony to secure a conviction. As Judge Greene recognized in the context of a similar attack upon the Poindexter conviction, the government is under no obligation to do defense counsel's lawyering for him. United States v. Poindexter, 1990 U.S. Dist. Lexis 6173 (D.D.C. 1990).

In Poindexter, defendant sought a new trial on grounds that the government elicited false testimony from Oliver North. The court held, however, that the defendant's proof of falsity of the contested testimony (inconsistency with the testimony of other witnesses and/or the defendant's interpretation of the evidence) fell far short of establishing falsity of the sort that would justify a new trial. Id. at 53. Moreover, there was no indication the government knew any such testimony was false and the allegedly false statements were either fully explored at trial or easily

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government obviously had intended to try defendant without Demery, since both were under indictment at the same time. Thus, even if there were merit to defendant's claim -- and we have shown there is not -- no new trial could be granted here, since such relief is warranted only if "[t]he jury's estimate of the truthfulness and reliability of [that witness] may well be determinative of guilt or innocence." Napue, supra, 360 U.S. at 269.

could have been. Id. In words equally applicable to the case at bar, the court in Poindexter summarized the defendant's tactic as follows:

> unable to impeach the verdict directly because of the obstacle presented by the doctrine that it is the jury's responsibility to determine credibility, [the defendant] seeks to overturn the jury's credibility determinations by the convoluted method of claiming that [the witness] lied, that the prosecution knew or should have known that he would give false testimony, and that its failure to stop or correct him amounted to a denial of due process. As the government correctly points out, if a defendant could gain a new trial every time a prosecution witness contradicted himself in a manner that might be, or actually was, contradicted by defense evidence, or every time a prosecution witness failed to put the 'spin' on the known facts that defendant would prefer, then criminal convictions would truly be an endangered species.

Id. at 55.

As in Poindexter, defendant here had a full and fair opportunity to cross-examine the witness, to attack his credibility, and to present to the jury any motive he may have had to lie. To perform that task, defendant had complete access to Demery's indictment, his plea agreement, and his prior statements. Due process requires no more. See id. at 56.[29]

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[29] The defendant also contends that the government was under an obligation to correct a supposed ambiguity in Demery's testimony regarding a funding round that took place in late October/early November, 1986. Regarding this funding, Demery had testified:

> I had a conversation with Ms. Dean, I believe it was in her office, where there were approximately nine PHAs that were to receive funding. She gave me the nine PHAs that were to receive funding, and I then initiated the funding process.

Tr. 1892. The defendant contends that this testimony was ambiguous to the extent that before initiating the funding, Demery substituted one PHA of his choice for one of the PHAs on the list,

B. Ronald Reynolds and Pamela Patenaude

As part of its case-in-chief, the government intended to call Ronald Reynolds, a HUD motorpool driver, to testify to having driven defendant on several occasions to meet John Mitchell for lunch. Tr. 1775. The Court overruled defendant's objection that the testimony was merely cumulative and more prejudicial than probative, Tr. 1776-77, but the government nevertheless expressed a willingness to stipulate to Reynolds's testimony. Tr. 1777. That stipulation read as follows:

> It is hereby stipulated and agreed by and between the United States and the defendant that:
>
> 1. If Ronald L. Reynolds was called to testify, he would testify that from 1980 to 1989 he was a driver for the HUD motorpool.
>
> 2. During that period of time, he drove Deborah Gore Dean to lunch on several occasions when she said that she was meeting John Mitchell for lunch.

Gov't Ex. 545 (Appendix tab H); Tr. 3055. Regarding this stipulation, defendant testified:

> If I signed that stipulation it should not have been where I told Mr. Reynolds I was having lunch with Mr. Mitchell or with anybody else. I normally would not discuss that with a driver. I know he signed a stipulation where he said he had driven me to restaurants. That's all I recall.

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a fact that in the defendant's view "would have been material to the appraisal of a range of issues concerning the relative roles of defendant and Mr. Demery." Defendant's Memorandum at 143. Putting aside the fact that the defendant is grossly exaggerating the significance of the omission, here again, the defendant's complaint amounts to nothing more than reconsideration of her trial strategy. At trial, the defendant possessed the documentary evidence necessary to establish that there was an intermediate step between "[s]he gave me the nine PHAs," and "I then initiated the funding process." That opportunity suffices to satisfy due process here.

. . .

> That's what the stipulation says, and that man's testimony also says that he said he was driving me to lunch with Mr. Mitchell and my mother and I never had lunch with Mr. Mitchell and my mother, and it says all sorts of things in there, and you and my lawyer both agreed that that man wasn't quite normal and instead of having him on the stand we agreed to sign a stipulation.
>
> . . .
>
> It says that if Mr. Reynolds would testify he would testify that he had driven me to lunch on several occasions when I said to him I was meeting Mr. Mitchell for lunch, and I don't believe I would have ever had that conversation with this man, nor can I remember any time of how I got to lunch with Mr. Mitchell, and I only recall having lunch with him twice.
>
> . . .
>
> . . . that [stipulation] would be his testimony, not the truth, just his testimony.

Tr. 3054-56. In light of these statements, the court ruled the government could call Reynolds as a rebuttal witness. Tr. 3223-24.

The Court's decision was correct. Defendant contends that four statements made by Reynolds in his rebuttal testimony were palpably false and that the government's failure to correct them amounted to a denial of due process. Defendant's Memorandum, at 152-53. Those four statements were: (1) that Reynolds drove defendant on two of every five trips she took in a HUD car; (2) that he drove defendant in a HUD car on average ten times per week; (3) that he drove her to luncheon meetings two or three times per week; and (4) that he drove her a minimum of twice to luncheon meetings with John Mitchell. The falsity of these statements is demonstrated, defendant contends, (1) by defendant's own calendars showing she could not have taken as many trips as Reynolds

suggested, (2) by the HUD motorpool log for the month of October, 1986, which, if representative of her entire tenure at HUD, would suggest that Reynolds exaggerated the number of car trips she took, and (3) by Reynolds other allegedly false statements in interviews with the Office of Independent Counsel.

Defendant fails to make any credible showing that Reynolds testified falsely or that the government knew or should have known it. The proof of "falsity" here, as in Poindexter, consists of nothing more than the "defendant's own interpretation of what is true and what is false." Poindexter, supra, 1990 U.S. Dist. Lexis 6173, at 53. Any inconsistencies between Reynolds's testimony and the other evidence in the case was for the jury to decide. See United States v. Bortnovsky, 879 F.2d 30, 33 (2d Cir. 1989) (conflicts between witness's testimony and that previously given would not alone amount to perjury); United States v. Miranne, 688 F.2d 980, 989 (5th Cir. 1982) (differing testimony of two government witnesses presented at most a credibility question for the jury), cert. denied, 459 U.S. 1109 (1983).

Indeed, defendant had, and fully cross-examined Reynolds on, the information that she claims proves the falsity of his testimony. It is therefore absurd for defendant to suggest that the government "sought to preclude revelation of the false testimony." Defendant's Memorandum, at 134.

Moreover, it is equally irrelevant whether other statements made by Reynolds but not elicited by the government in testimony were false. A similar objection was made to the testimony of

Oliver North in the Poindexter case. As the court there correctly noted, "the prosecution is not precluded from calling as a witness an individual solely on the ground that he has previously made false statements on matters with respect to which he will not be asked to testify at the forthcoming trial," for a contrary rule "would bar the testimony of many individuals who were members of organized crime, of drug conspiracies, or of other criminal groups or combinations . . . [who testify] almost daily as witnesses for the government who may be unsavory with respect to credibility and otherwise, but who are nevertheless not precluded from testifying . . . ." Id. at 52.

The defects in defendant's argument regarding the testimony of Ronald Reynolds apply equally to defendant's suggestion that Pamela Patenaude testified falsely. Here again defendant relies on nothing more than purported inconsistencies in the evidence or the "improbability" of the testimony based on defendant's own interpretation of the evidence -- all of which defendant was free to cross-examine on. In addition, defendant's insinuation that Reynolds and Patenaude colluded in their testimony is no more than reckless and unsupported. See Defendant's Memorandum, at 157. At bottom, defendant's argument that Patenaude's testimony was false stands on no firmer ground than her argument regarding Ronald Reynolds and should be rejected for all the same reasons.[30]

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[30] Moreover, as to this witness as well, it could not be said that "[t]he jury's estimate of the truthfulness and reliability of [the witness] may well be determinative of guilt or innocence." Napue, supra, 360 U.S. at 269.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1993, I caused a true and correct copy of the foregoing Government's Opposition to Defendant Dean's Motion for a New Trial Pursuant to Fed. R. Crim. P. 33 and Appendix to be hand-delivered to the following:

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