IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 92-181 (TFH)
DEBORAH GORE DEAN	)	

DEBORAH GORE DEAN'S REPLY TO
GOVERNMENT'S OPPOSITION TO HER MOTION FOR JUDGMENT OF
ACQUITTAL, OR IN THE ALTERNATIVE, A NEW TRIAL

A. Introduction

In support of a Motion for a Judgment of Acquittal, or in the Alternative, a New Trial, Defendant catalogued numerous failures of proof and abuses by the government, including what Defendant asserted were patent efforts to cause the jury to believe things that not only were not supported by the record, but that the government knew to be untrue. The most notable feature of the government's Opposition is its acknowledgment that indeed it was seeking to lead the jury to believe the things Defendant asserted the government had. Yet, despite its admissions, the government does not offer plausible justification of its actions. Thus, the government's Opposition, which reflects an utter failure to recognize the government's obligations with respect to the truth, makes Defendant's case for a new trial or dismissal of the indictment even more compelling than it had previously appeared.

Moreover, the government does not, because it cannot, satisfy the legal standards required to prove any of the conspiracy counts, the perjury and false statement counts, nor the gratuity count.

The government's responses in two areas warrant particular note. First, Defendant's Memorandum (at 100-03) had detailed how, notwithstanding Richard Shelby's statement that he believed that Silvio DeBartolomeis, not Defendant, was "the contact at HUD,"and had further, after introducing the document without this testimony as to the identity of the contact, sought to cause the jury to believe that the reference was to the defendant. The government admits that, indeed, such was the government's intent. Opp. at 9 n.5.

After somewhat mischaracterizing the Defendant's argument,[1] the government merely argues that its action was permissible because the jury could have reasonably concluded on the basis of the record "that defendant was, in fact, 'the contact at HUD.'" The point, however, is that the United States government had no basis for believing it,[2] but nevertheless placed this conspiratorial reference on its chart, and by talking at length

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[1] The government's states that Defendant's argument is based on "Shelby's unequivocal testimony regarding his other contacts at HUD." Id. In fact, the argument was based on the explicit statement that Shelby believed that the contact referenced in the Fine Memorandum was DeBartolomeis, not Defendant.

[2] Among other misleading points, the government asserts that the jury could have discredited Shelby's testimony on the basis of circumstantial evidence. Yet, the government, which itself had no basis for disbelieving Shelby, chose not to question either Shelby (or its immunized witness DeBartolomeis) on the matter. There was no Shelby testimony to discredit.

about the adjacent entries relating to Defendant, sought to lead the jury to believe what the United States Government itself did not believe.

Significantly, the government would never explicitly argue for this inference in its various briefs on the merits, though, as with the jury, the summary charts would be used in arguments before the Court.

In the face of the government's failure in its Opposition to mention the similar use of the entry on the September 9, 1985, luncheon attended by Shelby, Mitchell, and Defendant, despite Shelby's statements that Park Towers was not discussed at the luncheon (see Def. Mem. at 98-100, 102-03), it is reasonable to conclude as well that the government intended to cause the jury to infer that Park Towers was discussed at the meeting.[3]

Second, Defendant's Memorandum (at 184-86) explained how the record provided no basis for inferring the crucial fact that Louis Kitchin had brought the Atlanta mod rehab request to Washington at the end of October, 1986 (though considerable basis for concluding he did not), but that government counsel nevertheless stated to the jury that Kitchin had brought the letter to Washington. The government does not assert that the statement was the result of a

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[3] With regard to the faxed rapid reply, the government points out that it did not argue to the jury that Defendant had faxed the document. Opp. at 10. Yet, the document was used in the chart in exactly the same manner that the government used the reference from the Fine Memorandum, which the government acknowledges was intended to lead the jury to believe that Defendant was "the contact at HUD." Only if the jury should remember Shelby's statement a month before that Hunter Cushing had faxed the document would one expect a different result.

slip of the tongue or a failure of recollection. Rather, it asserts that counsel was arguing that the jury should draw an appropriate inference from the evidence presented. Opp. at 43.

The argument that the inference was an appropriate one is wholly unfounded and the authority cited to support it involves facts about as far removed from those at issue here as can be imagined. Notably, as with inference about "the contact at HUD," the government has not seen fit to argue for the reasonableness of such an inference in its briefs submitted to the Court on the merits.

Just as important, however, government counsel, in fact, did not attempt to persuade the jury that the testimony presented three weeks earlier supported this inference; rather, counsel stated outright: "Kitchin brings it up with him." Tr. 3410-11. It is more than reasonable to conclude that counsel intended simply that the jury would accept his statements as the government's summation of the facts presented.

Moreover, the government ignores entirely Defendant's arguments (Def. Mem. at 186-87) as to why there is reason to believe that the government knew for a fact that Kitchin had not traveled to Washington at the end of October, 1986, both at the time the government failed to allege that matter in the Superseding Indictment and at the time the government decided not to question Kitchin about the matter on the stand.[4]

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[4] There is an additional fact worth noting with regard to this issue. The government chose to present as evidence an undated typed copy of the note that Defendant transmitted to Thomas Demery

More generally, as shown further below, the government's efforts to defend its actions reflect a pervasive disingenuousness that only lends additional credence to the Defendant's arguments. And, though several times pointing out the need to judge the case in its entirety, the government seeks to isolate each issue, arguing separately the lack of prejudice as to each instance, even where Defendant has claimed no prejudice from the particular act. Defendant fully agrees that the government's actions must be viewed in the context of the entire case, and submits that there exists in this case a pervasive pattern of governmental abuse that grossly tainted the fairness of this proceeding.

Defendant's reply to particular arguments of the government are set out under three headings below.

B. Background Issues

Brady Violations. With regard to Brady violations, the government argues that because "it remains the government's position that the statements at issue constituted Giglio materials," "there was no intentional disregard of Brady by the government." Opp. at 6-7. That point would be valid, however, only if the

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at the end of 1986 with instructions to implement the Atlanta and other fundings. Gov. Exh. 180. Presumably, however, the government was aware that another copy of that document was provided by Mr. Demery to the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance, and Urban Affairs, and reproduced at page 371 in that subcommittee's volume of hearings. That document has a handwritten date of October 29, 1986, and next to the Atlanta allocation has the notation "letter S.Z." in handwriting other than Defendant's. Presumably the notation means that Susan Zagame had, or would secure, the letter request. There would have been no reason for that notation if Defendant had received the letter from Kitchin.

government's position was sufficiently reasonable that the government might have merely misinterpreted its obligation. That position was reasonable with regard to little, if any, material, and certainly not with regard to all of it. For example, it certainly was not reasonable with regard to the Shelby statements regarding "the contact at HUD" or his knowledge of Defendant's knowledge of Mitchell, nor with regard to the statements about that September 9, 1985 luncheon that were never provided under Brady. The government's delinquent disclosure and/or failure to disclose these statement and many others was manifestly intentional.[5]

With regard to the Mitchell telephone messages, the government does not deny that it was aware of the messages, but inexplicably maintains that the messages were "as consistent with guilt as with innocence." Opp. at 11. To the extent that this statement constitutes a representation that such, in fact, was the government's reason for failing to provide the messages as Brady material, it must be deemed a false representation.

Sankin Receipts. The government apparently acknowledges that it intended that the jury should infer that every receipt was

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[5] The government's argument that the delinquent disclosure of Brady material did not deprive the Defendant of the opportunity to effectively cross-examine Shelby on the matter of his knowledge of Defendant's lack of awareness of Mitchell's role (Opp. at 9) did not apply to the Shelby statements about the September 9, 1985, luncheon that were never provided as Brady material, and which Defendant was not able to effectively use at trial. More generally, the government's argument that Jenks disclosures vitiated the harm of Brady violations ignores the difficulty faced by a defendant with limited resources in dealing with a massive Jenks production at the beginning of trial. The periodic provision of Giglio materials exacerbates those difficulties.

related to Defendant (Opp. at 12-16). While acknowledging that the Georgetown Leather receipt relied on in the Foxglenn Chart had been discredited, the government also acknowledges that it intentionally stated the plural "gifts" in that chart (id. at 16 n.13). Its argument that it was permissible to do so because of other gifts is not only ~~in~~ absurd, but contrary to the government's representations made to the court as to the nature of the summary charts. See Tr. 1954, 2919, 2959.

The government also represents that its basis for not previewing the receipts with Sankin was "the witness's hostility to the government's case against ~~the~~ defendant." Opp. at 13. Though the government does not explain its reasoning, the only obvious relevance of such hostility is that it might cause the witness to try harder to remember which of the receipts the government intended to use against the Defendant did not in fact relate to her. A more likely reason for Sankin's hostility is the government's hostility towards a witness who is not telling the truth as they concieve it to be.

Failure to Confront Barksdale With Information on the Mitchell Messages. Though characterizing the matter merely as a failure "to show Barksdale the Mitchell telephone message form referencing Barksdale's name," the government acknowledges that it did not confront him with the facts suggested by that message, noting that the government does not have an obligation "to seek out all potentially material evidence conceivably related to the defense." Opp. at 16-17; original emphasis. The fact remains, however, that

anyone interested in--or recognizing an obligation to learn--the truth about the Arama funding would have brought those facts to Barksdale's attention in circumstances where he could carefully reflect on them. Contrary to the government's assertion that Barksdale's failure to recall anything when shown a just legible scrap of paper on the stand, does not belie the possibility that in other circumstances, confronted with all the facts related to the message, Barksdale might have recalled a great deal. Nor does it have anything to do with the government's intentions in deciding not to confront Mr. Barksdale with the information when it questioned him more than a year earlier.

Prosecutor's Comments During Defendant's Testimony. After mischaracterizing Defendant's argument about government counsel's comment during Defendant's testimony (Opp. at 17), ~~Defendant~~ the government argues that a remark was justified by "accumulated impatience" (Opp. at 18), ~~The Government~~ suggests that a joke is permissible when Defendant has used the same word to deny wrongdoing as many as "ten times" (Opp. at 14; original emphasis), and offers a view as to why the jury thought a remark was funny. Opp. at 20 n.15. It also fatuously asserts the relevance of the number of lines of inappropriate comments compared with the total pages or lines of Defendant's testimony (Opp. at 23), arguing that there is no basis for saying that the prosecutor's motives were improper. Opp. at 24.

Defendant relies on the Court's expressed interpretation of the intent underlying these remarks, including the Court's view

that certain remarks would not have been made in a different racial setting, and maintains that those remarks are reflective of a broader pattern of abuse carried out by the prosecution and are particularly relevant to appraising the government's actions in closing argument. As to the government's reliance on United States v. Young, 470 U.S. 1, 11 (1985) to the effect that improper prosecutorial remarks must be judged in the context of the trial, Defendant agrees. It is when the remarks are evaluated in the context of the entire trial that their full significance emerges though they remain but small parts of a much larger picture.

Baiting the Defendant. After misleadingly characterizing the issues as one of whether the Court "abuse[d] its discretion in failing to cut off the prosecutor's unobjected to cross-examination" (Opp. at 25), the government attempts to explain why it questioned Defendant on various issues relating to the credibility of others, but offers no basis for disbelieving Defendant's responses or later representing to the jury that Defendant lied when she gave those response.

With regard to the Russell Cartwright receipt,[6] the government asserts that it had a good faith basis for questioning Defendant

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[6] The government's point that Defendant still was a consultant at HUD in October 1987 (Opp. at 27) ignores the Defendant's actual point that, given the timing of the meal and certain other factors, Defendant would have little reason to falsely deny that she was present. Def. Mem. at 128-29. It is also noteworthy, however, that meal took place well after the August, 1987, testimony about past lunches and dinners that the government maintains, in part, constituted the reason for its inquiries about receipts. Opp. at 27.

about it, notwithstanding the Wiest grand jury testimony.[7] The government, however, is silent as to the results of any inquiry it may have made of Russell Cartwright on the matter. As the record now, stands, it suggests that, in point of fact, the government confronted Defendant with the receipt precisely because the government knew the receipt was false, and resolution of that issue is itself an appropriate subject of a Hearing with Court-ordered discovery as to what the government had learned from Mr. Cartwright when it used the receipt.

The government's claim that "[a]ll Russell Cartwright's receipts are lies" "properly characterized the thrust of defendant's statement[]" (Opp. at 29) would be absurd in any case, but is particularly so in light of the succeeding statement in the closing, ignored in the government's Opposition, that Defendant's calendars show that Defendant was "meeting with them for lunch all the time." Tr. 3408. The government apparently does not contest Defendant's claim (Def. Mem. at 194) that Russell Cartwright never appears in her calendars at all.

It must be remembered, moreover, that in making these statements, the government was representing to the jury that

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[7] We read the government's statements to mean that the receipt used in Defendant's cross-examination was, in fact, the October 27, 1987 receipt that Ms. Wiest testified about and that counsel apparently misread the receipt as October 22, 1987, when he questioned Defendant.

Defendant was lying, though the evidence in its possession showed that she was telling the truth.[8]

C. Closing Argument

1. Representations That Defendant Had Lied.

Despite its emphasis on the number of lines of government counsel's inappropriate comments, the government fails entirely to address the pervasiveness or virulence of government counsel's representations that Defendant had lied. The fact that here the remarks were both excessive and inflammatory, however, is but one of the factors that distinguishes this case from those relied on by the government and renders this case more egregious than those the government seeks to distinguish. See Opp. at 35-38. The government's remarks must also be regarded in the context of the entire pattern of improper conduct prior to and during the trial. And they must be regarded in light of the fact that, far from being statements of inferences compelled by the evidence,[9] the

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[8] Even if the government's argument as to why the receipts are not admissible is correct (Opp. at 30 n.19), it was still wrong for the government to reference the Cartwright receipts in closing. The government cannot argue on the basis of inadmissible evidence and Defendant's testimony provided no independent basis for establishing that Russell Cartwright had one or more receipts related to Defendant.

[9] The government argues that the statements that Defendant had lied were not an expression of opinion. Opp. at 39. Yet the jury would perceive them as such, if not indeed as a statement of fact, as the Court recognized in its effort to provide curative instructions. Tr. 3593-94. Moreover, by concluding his argument with the statement that "[i]n the Government's view the government has proven its case beyond all reasonable doubt, beyond any and all doubt" (~~Tr. 180~~), counsel reinforced the view that all similarly definitive statements earlier were expression of the honest opinion of the government's representatives that the jury would assume to be well-founded. See Stewart v. United States, 247 F.2d 42, 46-47

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government's representation that Defendant had lied involved severe mischaracterizations of testimony as well as situations where the government had every reason to know for a fact that Defendant was telling the truth.

In claiming the fact that Defendant was charged with perjury "necessarily entitled [government counsel] to say that she had lied to Congress" (Opp. at 31) not only overlooks the distinction between true argument and statement that a Defendant had lied as if they are facts, but also overlooks how few of those statements were related to the perjury counts. The argument that the statements were invited by defense counsel's opening, by Defendant's testimony, or even by remarks in defense counsel's closing that occurred after most of the remarks they were supposed to have invited (Opp. at 31-40) is unfounded and the reliance on United States v. Young, 470 U.S. 1, 11 (1985) (Opp. at 39), is obviously misplaced.[10]

While citing defense counsel's statement to the effect that he did not object to the improper argument (Opp. at 41), the government fails to note that defense counsel did object and government counsel proceeded to continue its attacks with at least equal fervor. See Def. Mem. at 177-78. While the government argues that the words "lie" and "lying" were used by both sides

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(D.C. Cir. 1957).

[10] In Young, the prosecutor's statement that he believed that Defendant had committed a fraud was found to be invited by a statement by defense counsel that no member of the prosecution team believed Defendant was guilty.

often enough to dull any prejudicial effect (Opp. at 41), it fails to note that at no time did defense counsel baldly state that any government witness had lied.[11] It was the government that was at fault in this matter and, even if defense counsel had not objected at all, that fault rises to the level of plain error.

2. Characterization of Testimony

In defending counsel's characterization of evidence in closing argument (Opp. at 42), the government argues that "in each example cited by Defendant, however, the prosecutor properly summarized the evidence and argued an appropriate inference to be drawn therefrom." It has already been shown above that argument is indefensible, and the fact that the government even makes it shows that the government is unrepentant of its representative's actions. This is shown further below with respect to issues not already addressed.[12]

Michael Dorsey's Testimony. Despite the sandwiching of the word "project" between discussions of the Metro-Dade funding, the government argues that "the jury would have understood ~~that~~ the prosecutor's meaning to be that Dorsey testified that Defendant

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[11] Even then, however, the situations would not be comparable. See Stewart v. United States, 247 F.2d at 46-47.

[12] In its treatment of various points raised by Defendant regarding the characterization of testimony, the government argues that "a new trial is warranted only if any such misstatement so substantially prejudiced the Defendant as to have undermined the fundamental fairness of the trial and contributed to a miscarriage of justice." Opp. at 42 (emphasis added). The government then proceeds to treat each issue separately with regard to potential prejudice. It is, however, the cumulative effect of the prosecutor's statements and other conduct detailed by Defendant that must be judged for their prejudicial effect.

stated who was behind various projects, not who was behind specifically the Metro Dade project." Opp. at 45-46. Defendant submits that it is manifestly disingenuous to assert that either the jury would have so understood or that the prosecutor expected it to. The use of Donnelly v. Cristofor, 416 U.S. 637, 646-47 (1974), to suggest that the juxtaposition of the sentences about the Dade funding and use of the singular "project" were the result of lack of careful construction of the government's closing argument is inapt in the extreme in this case, where so many other aspects of government counsel's arguments of a similarly misleading nature ~~have~~ had obviously been crafted with exceptional care.

The Dade Letter. Defendant's Memorandum (at 190-91) showed that government counsel made the patently false statement that when, in the Spring of 1987, Defendant handwrote the list with the Metro-Dade bedroom configuration and referenced a letter, "[t]hey are funding 203 units to Metro-Dade even before Metro-Dade asks for them." In its Opposition (at 46-47), rather than address that allegation, the government mischaracterizes Defendant's argument. Leaving out the critical first sentence from its quotation of the paragraph relied on by Defendant, the government asserts that Defendant had merely questioned the government's argument that Metro-Dade was informally selected even before the February 13, 1987 letter request, and asserts that there was a basis for that argument. Opp. at 46-47. Defendant was not questioning such an argument, which the government, in fact, did not make in the material that had been quoted by Defendant. In Defendant's

Memorandum, it was abundantly clear that Defendant was questioning the false statement that there was no letter request when Defendant handwrote the list in the Spring of 1987.

Defendant's Testimony Regarding Ronald Reynolds. The government asserts that government's counsel's representation in its closing that Defendant stated "I don't know who Ron is" was to recall to the jury Defendant's so-called "feigned lack of recollection of Reynolds's first name." Opp. at 48. Even if that were the true reason for government counsel to make the statement, it still would be a mischaracterization of Defendant's testimony in order to detract attention from Mr. Reynolds' demonstrably false statements as to the frequency with which he drove Defendant.[13]

Notably, however, the government had followed with the statement that "Pam Patenaude had no trouble remembering that she took trips [with Defendant] when Ron was driving," not that Ms. Patenaude had no trouble recalling that Mr. Reynolds' first name was Ron. The government does not even address the dishonest manner in which it used the motor pool log, much less explain how its

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[13] The sentence the government relies on to the effect that Defendant was feigning a recollection of Mr. Reynolds' last name occurred two pages after government counsel had read and showed to Defendant a stipulation signed by Defendant referring to "Ronald L. Reynolds" (Tr. 3055) and four pages after Defendant had been asked about a "stipulation from Ronald L. Reynold" (Tr. 3053), and immediately after Defendant herself suggested that the "Ron" entries related to Mr. Reynolds. When Defendant tagged "Is his name Ron Reynolds?" at the end of her effort at clarification, government counsel neither answered her question nor questioned her as to how she would not know that, but rather asked whether she knew of other Rons. Tr. 3058-59. In these circumstances, the suggestion of significance in Defendant's question is but further disingenuousness on the government's part.

emphasis of frequency with which "Ron" appeared in that log bears on Defendant's supposedly feigned failure to recollect his name.

Most significant, however, in a footnote, the government makes the remarkable assertion that "the prosecutor's rebuttal summation that the Defendant denied Reynolds ever drove her to lunch was a fair characterization of her testimony." Opp. at 48 n.22. It was not a fair characterization; it was a bald misstatement. It was, moreover, a bald misstatement that would play a key role in repeated assertion that Defendant had lied in order to escape her so-called "trick bag." And it was a bald misstatement made for the purpose of further contrasting Defendant's testimony with a government witness that the government had to believe had lied.[14]

Sankin's Consulting. In asserting as an example of one of Defendant's lies that she had "[d]enied knowing that Sankin was a consultant," the government noted that to believe Defendant one had to disbelieve five persons, including three who had nothing to do with the Alameda Towers. Tr. 3246. See Def. Mem. at 201. The government defends its obviously untrue statement by citing testimony solely related to Alameda Towers. Even as to Alameda Towers, however, the government had no basis whatever for asserting that Defendant had lied by denying knowledge that Sankin was a consultant on that project. The government's willingness to find "ample basis" for its statement in closing (Opp. at 49) epitomizes

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[14] As shown infra, the government defends its use of Mr. Reynolds' testimony on the basis of a claim that credibility questions are entirely for the jury, without even addressing the reasons why the government had to know its witness was lying.

how in this case the government believes it can find ample basis for asserting anything it pleases.

Defendant's Friendship with Shelby. Responding to Defendant's argument (Def. Mem. at 203) that government counsel had stated falsely in closing that Defendant and Richard Shelby were "only friends while she's Executive Assistant," the government first states, quite incorrectly, that "the record establishes that Shelby and Dean had lunch together every two or three weeks while she was Executive Assistant and also corresponded frequently during the same period." Opp. at 49.[15] Then, having decided, with full knowledge that Shelby and Defendant remained friends after Defendant left HUD, not to question Shelby or Dean about their relationship after Defendant left HUD, the government argues that because the trial record contained "little if any evidence of contact between Shelby and defendant after she left her position at HUD," "it was entirely proper to argue that defendant's position at HUD drove their relationship." Id. In these circumstances, the absence of information on the post-HUD relationship cannot form the basis

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[15] Relying on Defendant's varying estimates that she and Shelby had lunch with Shelby "once a month, once every two months" (Tr. 3009) or "every two to three weeks (Tr. 3102)," the government relies solely on the latter as to what "the record established." It ignores entirely the substantial evidence that Defendant's most accurate estimate was "once every two months," as reflected by the fact that in the Government's Summary Charts for Park Towers, Foxglenn and Eastern Avenue, the government is able to show only 14 lunches even to have been scheduled between Defendant and Shelby between their first lunch on August 1, 1985 and Defendant's resignation from the position of Executive Assistant 23 months later. The same charts indicate that about four items of correspondence comprise the basis for the statement that Dean and Shelby corresponded frequently.

even for such an argument, much less for what government counsel actually did, which was make the bald assertion, known to be false, that Defendant and Shelby were only friends while she was Executive Assistant.

John Mitchell. With regard to Defendant's statements concerning her relationship with John Mitchell and her knowledge that he acted as a consultant, the government merely asserts that it was pointing out inconsistencies and arguing their bearing on Defendant's credibility. In fact, it was taking statements out of context, twisting their meaning, and rather than arguing implications, was baldly stating that Defendant had lied to the jury.

Defendant's Consulting. In justifying its statements that Defendant had lied by denying that she was a consultant, the government ignores Defendant's earlier explicit acknowledgment that she had done HUD consulting work (see Def. Mem. at 210-211), but that she was not a "1000 dollar a unit consultant,"[16] and argues that it had impeached her statement that she had not been a

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[16] Defendant's Memorandum (at 210) omitted from the quotation reflecting the initial questioning about Defendant's post HUD employment the question and answer that followed Defendant's statement that she was not a consultant "as in mod rehab units" (Tr. 2887):

> Q. As we've been speaking, you worked on HUD related matters when you left, did you not?
>
> A. I worked on an audit finding for a company and I worked on other matters. I did not go out and become a $1000 a unit consultant.

Thus, from the very first questioning on the subject, Defendant acknowledged doing HUD work that many would term "consulting," often under a "consulting agreement," while maintaining that she did not become a "consultant" like the ones she had criticized in conversations with Secretary Pierce.

consultant with two "Consulting Agreements." Opp. at 51-52. Then, citing the fact that Defendant's counsel had advised the Court that Defendant had made considerable sums of money in the consulting business, the government argues that it was, therefore, appropriate "to argue that when defendant left HUD, she too became a consultant and did what she complained everyone else was doing." Opp. at 52.

Given the context of Defendant's statements, neither the record nor the extra record statement of defense counsel (nor the questioning on fee arrangements that the Court prohibited) can justify counsel's statement to the jury that Defendant had done what she had criticized others for doing. Nor can anything justify counsel's representations to the jury that Defendant's statement regarding whether she was a "consultant" were further instances of Defendant's lying to the jury.

Racial Issues. In asserting that there is no merit to Defendant's arguments that the government had discussed Secretary Pierce and Lance Wilson in terms intended to engender racial hostility toward Defendant (see Def. Mem. at 214-19), the government makes no mention of those terms or of why its counsel would otherwise have chosen them. Opp. at 54-55. Suggesting that government counsel discussed Lance Wilson merely as an example of how Defendant invariably would blame her own wrongdoing on others, the government does not offer an explanation as to why it would even mention the Defendant's having "fingered" Lance Wilson for a matter that she had never been accused of having any involvement with.

D. Perjury

In responding to Defendant's arguments regarding the government's use of perjured testimony, the government seeks to diminish the importance of this issue on the basis that "virtually every instance of 'perjured' testimony involved a collateral attack on the witness' credibility." Opp. at 59. That statement certainly is inapt as to statements of Ronald Reynolds and Alvin Cain that were heavily relied on to undermine Defendant's credibility. As to Thomas Demery, notwithstanding the government's ludicrous contention that Demery's testimony was only 22 pages in length and focused on only a small part of the period in the Indictment (Opp at 66, n.28), Demery's statement that Defendant had brought the Metro-Dade request to his attention made him a key witness, and made his credibility a critical issue.

1. Thomas Demery

Defending its failure to make known to the jury that government witness Thomas Demery perjured himself in denying he had lied to Congress, the government principally contends (1) that Defendant strategically chose not to reveal the perjury of Mr. Demery (Opp. at 61-63), and (2) that, given that the Inspector General's allegations had "focused on Demery's relationship with and knowledge regarding contributions to Food [sic] for Africa,"[17] because defense counsel had referenced the Inspector

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[17] The government also states that the Inspector General's report had focused on "Demery's relationship with Defendant and Secretary Pierce in the Moderate Rehabilitation funding process." Opp. at 63-64. In fact the Inspector General was criticized for giving limited attention to that relationship. As to the

General's allegations in his questioning of Demery, the line of questioning would not have alerted Demery or the government that defendant was seeking to elicit Demery's prior testimony about Winn and Abram." Id. at 64-65.

These arguments reflect a deliberate effort to misfocus the issue. Defendant did seek to make known to the jury that Mr. Demery had committed perjury multiple times when he testified before Congress for the obvious purpose of showing that his statements under the same oath in court could not be believed. Tr. 1915. When Mr. Demery denied having done so, Defendant sought to prove, as graphically as possible, that Mr. Demery had lied to Congress, focusing on three areas as example. These included statements regarding his lack of contacts with former HUD employees (Tr. 1920), his lack of knowledge of the identity of consultants (Tr. 1931-32), and whether the best projects were always selected (Tr. 1935). By implication, such proof would also demonstrate that Mr. Demery had lied in this court when he denied lying to Congress.

Whether or not that question persuaded the jury that Mr. Demery had lied to Congress on these matters,[18] the government was

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statements that the Inspector General focused on "Demery's relationship with and knowledge regarding contributions to" F.O.O.D. (an acronym for Federal Organization of Distribution), but "touched on Demery's relationship with and knowledge regarding Winn and Abrams only peripherally," the two statements are contradictory. As the Inspector General's Report documents, Winn Group members were major F.O.O.D. fund raisers and contributors.

[18] By its arguments here, the government suggests a view that defense counsel failed effectively to demonstrate to the jury that Demery had lied. Thus, the government cannot claim that it failed to address that matter because Defendant already showed that Demery committed perjury in his direct examination. Given defense

possessed of materials such as those contained in Exhibits RR and UU to Defendant's Memorandum to know that Demery had lied on these matters. It also was possessed of materials showing Demery had lied about not knowing who had contributed to F.O.O.D., since it had evidence that individuals, including Winn Group members, had handed checks to him. And, as already shown, it knew that he had lied to Congress in denying knowledge of Winn Group involvement in the mod rehab program.

Thus, having reserved for redirect the most important part of Demery's testimony--the statement that Defendant had brought the Dade County request to his attention (Tr. 1939)--the government was faced with the difficulty that its witness had just committed perjury on a matter going directly to his credibility. Rather than fulfill ~~that~~ the obligation to reveal that perjury, however, the government proceeded to elicit the testimony it wanted, while giving to the jury the impression that there was nothing in Demery's cross-examination suggesting that he had lied. That impression was further strengthened when, in closing argument, government counsel would argue that Defendant had falsely accused Demery of lying, and

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counsel's efforts, however, there is no basis for the government's contentions (Opp. at 58) that Defendant was "sandbagging" the Court. Nor is there merit to the government's claims that the "Defendant was in as good a position as the government to recognize and correct that alleged falsehood in the testimony" (Opp. at 66) or that "defendant was as well apprised as the government regarding the allegedly false testimony of by Demery." Id. at 67. Defendant had been provided with massive Jenks material on Demery two weeks before he testified, along with massive materials on other witnesses who would testify before and after Demery, as well as innumerable Giglio statements just before Demery testified; the government had been investigating Demery for over three years.

represent to the jury that, in fact, Defendant was "the only one we know who definitively did lie." See Def. Mem. at 141.

Defendant's Memorandum merely cited the instance of the government's knowledge of Demery's perjury that the government would have the greatest difficult denying--a matter that the government had indicted ~~him~~ Demery on and as to which he had subsequently confessed. Thus, the government seeks to mislead the court by suggesting that defense counsel was trying to elicit testimony from Mr. Demery about his denial of his knowledge of Winn Group involvement in mod rehab (Opp. at 65) or by its claim that "defendant chose not to confront Demery on the issue she now claims to be critical." Opp. at 57. The government knows that Defendant's interest was simply in eliciting an acknowledgment (or otherwise in showing) that Demery had repeatedly lied to Congress. The government also misleads the Court by suggesting that, because Defendant's questioning did not focus on Demery's relationship with Winn and Abrams, Demery may not have lied when he denied lying to Congress or its representatives did not know Demery lied when he denied having lied to Congress. Opp. at 66-67 Id.[19]

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[19] The government argues that Demery's "testimony was not only collateral the issue on trial, but subsumed in his plea to having obstructed justice," and that the government itself elicited testimony about a false receipt that "obviously put the issue of Demery's honesty directly before the jury." Opp. at 61. However, it is not the substance of the testimony about Winn and Abrams that was significant, as the government well knows. It also well knows that a plea to providing a false receipt would not be expected to have the same effect of a jury as an admission that a witness has repeatedly lied after having given the same oath given in this Court. Having made a conscious decision to dismiss the perjury charge when it negotiated an agreement whereby Demery would cooperate as a government witness, there can be no doubt that in

Because there is here abundant reason to believe that the government knew about Demery's prior perjury with regard to Winn and Abrams and many other matters as well, the government's reliance on United States v. Poindexter, 1990 U.S. Dist. Lexis 6173 (D.D.C. 1990) is sorely misplaced. As the government itself notes, in that case, "there was no indication that the government knew any such testimony was false..." Opp. at 67. That is a much different situation from the one in this case.[20]

2. Ronald Reynolds

The Government maintains that it had no basis for disbelieving even Ronald Reynolds' statements that he drove Defendant on an average of ten times a week or that he drove her to luncheon meetings two or three times a week. Opp. at 70. Yet even without regard to the many demonstrably false statements in Mr. Reynolds interview, materials possessed by the government made it impossible for a reasonable person to believe the above statements were true. Read in light of what the interview demonstrated about Mr. Reynolds' veracity, one had to conclude that all of the statements Mr. Reynolds made in court about driving Defendant were false.

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this case the government knew Demery had previously perjured himself and that the denial of such perjury was further perjury.

[20] With respect to Demery's perjury on direct examination, the government erroneously [redacted] asserts that Defendant maintains that the government failed to correct a "supposed ambiguity." Opp. at 68 n.29. There was not an ambiguity, supposed of otherwise. In testimony that Demery had been presumably prepared for by government counsel familiar with his indictment, Demery simply misstated what he had done with the October, 1986, listing, and by that misstatement avoided a host of issues that would bear on his credibility. See Def. mem. at 141-43.

The government dismisses the relevance of the demonstrably false statement in the interviews, arguing that "a similar objection was made to the testimony of Oliver North in the Poindexter case," and citing that decision to the effect that courts cannot bar all testimony of government witnesses "who may be unsavory with respect to credibility and otherwise...'" Opp. at 71-72. That decision does not, however, support an argument that the government can ignore significant information reflecting on a witness's credibility when fulfilling its obligation to ensure that it does not use perjured testimony.

The government ignores entirely discussion of the fact that any reasonable person with the information possessed by the government certainly would have known that any statement Mr. Reynolds made that he picked up Defendant at the Fairfax Hotel when she told him she had lunched with her mother and John Mitchell was a false statement, but that in its effort to rehabilitate Mr. Reynolds the government purposely elicited such testimony. See Def. Mem. at 155-56.

Finally, the government Defendant dismisses the significance of perjury by Mr. Reynolds (or Pamela Patenaude) arguing that the truthfulness of these witnesses could not have been determinative of guilt or innocence. Opp. at 72 n.30. That argument ignores the emphasis the government gave to this testimony in representing to the jury a Defendant whose "entire case rests on her credibility, her believability" (Tr. 3413) had repeatedly lied to the jury.

3. Alvin Cain

With regard to the testimony of Alvin R. Cain, the government has produced evidence indicating that Defendant was mistaken regarding the presence of Mr. Cain at certain events in California. ~~vit of Deborah Gore Dean~~.Hence, arguments made as to the relevance of Mr. Cain's testimony about his recollection of those events to the truthfulness of Mr. Cain's testimony about Defendant's telephone call to him in which she questioned the information about John Mitchell in the Inspector General's Report (Def. Mem. at 167-68) no longer obtain.[21] But that detracts very little from Defendant's argument that Mr. Cain did lie about not remembering that call, and does not greatly detract from Defendant's argument that the government should have known Mr. Cain was lying.[22]

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[21] Defendant's point (Mem. at 169) that it was improper vouching for counsel to state in the closing argument that "you could see he had no idea of what they were talking about" remains apt. However, the suggestion that the vouching occurred despite government counsel's knowledge that Mr. Cain did ~~no~~ what the receipt was about is no longer viable.

[22] The government's several assertions that Defendant intentionally misrepresented that Mr. Cain had been present at the events at the Beverly Wilshire hotel (Op. at 75-77) are exceedingly disingenuous. It is not reasonable to believe that Defendant intentionally misrepresented these events simply because it is so contrary to her interest to make false statements that could so easily be refuted. Nor was there any reason for Defendant even to mention a note from "Joe" unless she believed that her recalled account of the event was accurate. The government's disingenuousness of this score is further demonstrated by its effort to suggest that the credit card receipt was false, noting, as if it is significant, that Defendant erroneously placed the event in 1986 (the date of the receipt) rather than 1985, and that the receipt is signed "Mary Gore Dean" rather than "Deborah Gore Dean." Opp. at 77-79. The government is possessed of many documents indicating that the handwriting was Defendant's and not her mother's, and indicating that Defendant commonly used her mother's credit card. It is also possessed of the monthly summary showing that the credit card expenditure did occur in 1985. ~~Attachments to the Supplemental Affidavit of Deborah Gore Dean.~~

With regard those issues, the government treats the matter merely as a conflict between two witnesses, dismissing with the word "irrespective" certain issues as to the improbability of Defendant's having falsely testified in the circumstances that existed here, and not addressing the implications of those improbabilities. Opp. at 74. Notably, the government fails to list the improbability of Defendant's being also ready to fabricate what Mr. Cain had stated to her.

Also notably, the government omits all reference to Defendant's claim that Mr. Cain told her the check was maintained

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Thus, the government knows with virtual certainty that Defendant paid for the party at Hernando's Hideaway in May, 1985, and it suggests otherwise solely to mislead the Court.

The government's treatment of the Castle Square matter also reflects an effort to mislead the Court. The reasonable inference from Defendant's statement in her affidavit (Para. 13) is that she contacted Mr. Cain prior to or at the same time that she talked to the Deputy Assistant Secretary for Multifamily Housing (Hunter Cushing) or the Undersecretary (Carl Covitz), which would have been in late 1988. Very likely Defendant's statement to Mr. Cain is what led to Thomas Demery's responding, on December 2, 1988, to a HUD IG inquiry about Castle Square), ~~which contains the relevant part of is a draft version of an HUD IG audit of the Section 8 Certificate program that was made available to the defendant in discovery by the Independent Counsel~~). The documents pertinent to that inquiry might well provide revealing information with regard to the truthfulness of Mr. Cain's testimony as to Castle Square. Though it had ample opportunity to examine the circumstances leading to that inquiry, the government merely asserts that Defendant was referring to a May 1, 1989 interview, which the government provides as Exhibit F to its Opposition. Moreover, contrary to the government's claim, nothing in the report of the later interview is in conflict with defendant's assertion she sought to have the funding cancelled when she learned of its irregular nature. Given their earlier exchange, there would have been no reason for Defendant necessarily to recall that matter to Mr. Cain nor for him necessarily to record it if she did when he reported the interview 18 days after it occurred. ~~See Supplemental Affidavit of Deborah Gore Dean.~~

in a field office. And it offers no information as to whether the check was maintained in the field office or, if it was, how Defendant might have learned of that fact other than from Mr. Cain at any time prior to signing her Affidavit, much less prior to time in the Spring of 1989 when, according to the Affidavit of James P. Scanlan, Defendant advised him that Mr. Cain had told her the check was in the field. The government's failure to be forthcoming on these issues, like its failure to respond to inquiries related to its knowledge of the Russell Cartwright receipt, is itself suggestive of an willingness to rely on false evidence.

The government dismisses the statements of James Scanlan for "his obvious bias" and because he relies solely on what Defendant had told him. Opp. at 75 n.31. The influence of Mr. Scanlan's relationship to Defendant is obviously a legitimate issue that can be explored in a Hearing on the matter, but does not provide a basis for ignoring his affidavit. The argument that he relies solely on what Defendant told him ignores the fact that, given the circumstances in which she told him of the conversation in 1989, it is virtually inconceivable that Mr. Scanlan and Mr. Cain are both telling the truth. See Def. Mem. at 171-72.

Given the role the government chose to give to its agent's testimony in undermining Defendant's credibility, if, in fact, Mr. Cain did lie, then something quite evil occurred in Defendant's trial. Defendant submits that she is entitled to a Hearing to resolve that matter.

Finally, the government correctly points out that allegations of perjury and prosecutorial complicity therein should not be lightly made. Opp. at 73. They have not been lightly made here. The mistaken allegations of perjury by Mr. Cain regarding the Beverly Wilshire party are regrettable, but the error was unintentional and the allegations would not have been made at all but for what Defendant maintains is Mr. Cain's demonstrable perjury regarding the phone call in 1989. Moreover, it must be remembered here that these allegations are made in a context where the United States Government has again and again represented to a jury that a criminal defendant has lied to that jury in circumstances where the government had to understand that in all probability Defendant had not lied and where, in fact, the government would represent to the jury that Defendant is the only one who definitively did lie notwithstanding its firm basis for knowing that others had lied. And they occur in a context where, as the government has acknowledged, the government sought to cause a jury to draw factual inferences that the government had to know were not true. Thus, Defendant submits, her allegations are fully justified here.

For the above reasons, as well as those stated below, Ms. Dean is further entitled to a Judgement of Acquittal.

Ms. Dean has argued persuasively that the evidence introduced against her at trial fails to rise to the level of proof necessary to sustain the conviction. The Independent Counsel has responded with its standard litany that the Court has already ruled and that Ms. Dean is only repeating arguments already rejected. The

government would have this Court ignore the clear precedent in this circuit, particularly United States v. Zeigler, 994 F.2d 845 (D.C. Cir. 1993) and United States v. Treadwell, 760 F.2d 327 (D.C. Cir. 1985).

In Treadwell this Circuit upheld a conspiracy conviction and, by calling the case "troubling," apparently reached the outer contours of the sufficiency of the evidence required to sustain a conviction for defrauding the United States. There, the Court relied primarily upon the "sheer magnitude" of abuses at a project controlled by the defendant Treadwell. Treadwell, supra, at 327, 333. Moreover, the Court relied upon the fact that Treadwell violated her duty to the tenants of the relevant project.

Here, Deborah Gore Dean -- in neither Counts One nor Two has been proven to have done anything to further her interests over those of the individuals the programs were designed to serve. In fact, as this Court correctly points out, every project involved in this case was a legitimate, proper and lawful project. Not one penny of taxpayer's dollars were lost. Not one penny of project funds were lost. And, finally, all of the dollars were used for their proper purpose -- furnishing subsidized housing. These facts alone completely distinguish Treadwell, supra, and clearly demonstrates that the proof in this case falls short of the Treadwell standard.

In United States v. Ziegler, this Circuit held specifically that this Court has not only the right but the duty to correct a

faulty judgment of conviction, notwithstanding "demeanor" evidence resulting from the Defendant's testimony.

Additionally, the conduct of the government in this case, referring to Ms. Dean's testimony as garbage, calling the daughter of former Attorney General John Mitchell to the stand for no purpose other than to prejudice Ms. Dean, ridiculing Ms. Dean as she testified...all of these instances of misconduct lend credence to Ms. Dean's argument that the Government could not prevail in this matter fairly. Because the facts do not support the conviction, prosecutorial misconduct must have supported the conviction. Taken in tandem with the pretrial conduct of the government with particular emphasis on the Brady failures, Ms. Dean only requests that the Independent Counsel be held to the same standard as any other prosecution in the Court's history. Without knowing, counsel for Ms. Dean doubts if other prosecutors in this Court have called a defendant's testimony "garbage" when perjury is charged. Counsel for Ms. Dean further doubts that, again without knowing, if this Court has in previous cases been advised by the government that no Brady information exists repeatedly, and then on the eve of trial, clearly exculpatory evidence in the possession of the government is released that had been in their possession for months. Such conduct should not be countenanced by the Court, especially given the possibilities recognized at trial by the Court of Ms. Dean receiving a fair trial in front of the jury by necessity selected from the pool available.