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John C. Keeney, Esq. **CONFIDENTIAL**
Acting Assistant Attorney General
Criminal Division
United States Department of Justice
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Conduct of Bruce C. Swartz and Robert E. O'Neill in the Office of Independent Counsel's Prosecution of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.)

Dear Mr. Keeney:

Enclosed find three letters I recently sent to Independent Counsel Larry D. Thompson pertaining to prosecutorial misconduct issues I raised in my letter to you dated November 30, 1995, as well as in materials I had previously provided to the Department of Justice. Attached to two of the letters to Mr. Thompson are additional addenda to those materials.

In light of the recent development of additional information, I thought it would be useful to set out in one place a full description of the known facts regarding the Office of Independent Counsel's (OIC's) use of the sworn testimony of Eli M. Feinberg. Feinberg is the witness OIC attorneys called to the stand to testify under oath that he was unaware of John Mitchell's involvement in a Dade County, Florida project called Park Towers, notwithstanding that the OIC's immunized witness Richard Shelby had three times told OIC attorneys that Feinberg was aware of Mitchell's involvement. It appears that Feinberg was never confronted with these statements before OIC attorneys elicited his testimony in court. The OIC then would place great weight on this testimony and the fact that it was not impeached in arguing that Richard Shelby, John Mitchell, and Deborah Gore Dean were involved in a conspiracy concerning the funding of the Park Towers project. This is a matter given considerable attention in my earlier letter to you and other letters to Department of Justice officials. It and related matters are discussed in much greater detail in the Introduction and Summary to the materials provided the Attorney General and the Narrative Appendix to those materials styled "Park Towers: 'The Contact at

HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony."

One of the reasons for setting out this material in a letter at this time is that, assuming my description of events is accurate, the conduct of Bruce C. Swartz and Robert E. O'Neill relating to the Feinberg testimony is alone enough to show them to be unfit to serve as attorneys for the federal government. Thus, while you should certainly review and consider the implications of the entire volume of material I have provided, particularly with regard to those matters where federal crimes may be involved, there is no reason to delay initiating action against Bruce Swartz and Robert O'Neill.

As I was first writing this letter, I received a letter, dated January 30, 1996, from Michael E. Shaheen, Jr., of the Office of Professional Responsibility, indicating that my correspondence to you had been forwarded to that office for review and response. In his letter, Mr. Shaheen indicated, among other things, that the Office of Professional Responsibility disagreed with my view that the prosecutorial misconduct I detailed in the materials I had provided was of an exceptional nature. Mr. Shaheen also indicated that the Department of Justice considered the matter raised in my letter to you to be closed at this time.

The assessment of the Office of Professional Responsibility is pertinent to your consideration of the issues raised in my letter of November 30, 1995, in the following respects. Had the Office of Professional Responsibility concurred in my view that the actions of Bruce Swartz and Robert O'Neill in the Dean case indicated that they are unfit to serve as attorneys in the federal government, it would seem difficult for you to justify failing to seek their removal even if you did not share that view. In a situation where the Office of Professional Responsibility has reached a contrary conclusion, however, that determination cannot resolve that matter as far as your own responsibilities are concerned.

In fulfilling your individual responsibilities as a federal attorney overseeing the conduct of Bruce Swartz and Robert O'Neill, it is appropriate that you accord significant deference to views of the principal arbiter of professional ethics in the Department of Justice if such views appear to be well-reasoned and based on a thorough understanding of the issues raised. As my enclosed response to Mr. Shaheen indicates, however, Mr. Shaheen's letter demonstrates remarkably little understanding of the issues raised even in my letter to you of November 30, 1995. In such circumstances, I suggest that the Office of Professional

Responsibility's views ought to be given little weight as you exercise your own responsibilities in this matter.

That you review these issues yourself is particularly appropriate with regard to your continued supervision of Bruce Swartz and Robert O'Neill in the event that they are permitted to continue to serve in the federal government. In the case of Bruce Swartz, who holds a high position on your own staff, any assignment involving the oversight of the ethics of federal prosecutors ought not to be made without his superiors' having a full understanding of the nature of his conduct in the Dean case.

According to The Tampa Tribune, Robert O'Neill works on the Organized Crime and Drug Enforcement Task Force in the Middle District of Florida, and is involved in the increasing numbers of prosecutions on money laundering charges that carry very substantial penalties.[1] Mr. O'Neill's continued service as an Assistant United States Attorney carries with it a danger that individuals will be charged or convicted on the basis of false evidence, as well as a danger that otherwise legitimate prosecutions will be compromised by the use of deceitful tactics like those Mr. O'Neill repeatedly employed in the Dean case.

At a minimum, in the event that in ongoing or future prosecution issues are raised about Mr. O'Neill's conduct, his superiors ought not to be able to claim that they had no basis for anticipating such conduct. Ideally, however, if Mr. O'Neill continues to serve as an Assistant United States Attorney, his actions will be monitored closely enough that no legitimate complaints concerning those actions will arise.

The apparent casualness of the Office of Professional Responsibility's recent review, as well as the seeming dilatoriness in the Department of Justice's earlier review, provide additional cause for expedition in your own consideration of the matter. The materials concerning the prosecutorial misconduct in the Dean case were provided to the Department on December 1, 1994, in support of a request to have the Department of Justice initiate an investigation of the Office of Independent

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[1] Sommer, Money Laundering Convictions Soar, Tampa Tribune, Sep. 6, 1994, at p. 1.

(OIC) Arlin M. Adams. Those materials made clear that the district court, though concluding that a new trial was not warranted, had sharply criticized Independent Counsel attorneys on a number of issues, including the use of government witnesses when OIC attorneys possessed evidence suggesting or demonstrating that the witnesses' testimony was false. The court specifically noted that the conduct of those attorneys did not conform to Department of Justice standards of conduct.

Shortly thereafter, I provided Associate Deputy Attorney General David Margolis copies of the court of appeals briefs, which made clear that few of the issues addressed in the materials had been raised in the court of appeals. The matter of the OIC's use of the testimony of Eli M. Feinberg had not even been treated in the district court, a circumstance that undoubtedly occurred in large part because the same tactics that allowed the OIC to elicit Feinberg's testimony concerning Mitchell without contradiction caused the nature of the OIC's action to go undiscovered by Dean's counsel.

In early February 1995, I raised the same issues with White House Counsel Abner J. Mikva, suggesting that he recommend the removal of Assistant Attorney General Jo Ann Harris because of her involvement in the misconduct in the Dean case. Judge Mikva then referred the materials to the Department of Justice ensuring me that the Department would give the issues careful consideration.

These events would occur in the months following my providing these materials to the Department. On May 15, 1995, Arlin M. Adams announced his intention to resign as Independent Counsel, effective July 3, 1995. At approximately the same time (exact date not known), Ms. Harris announced her intention to leave the Department of Justice at the end of the summer. On May 26, 1995, the court of appeals ruled on the Dean appeal, predictably giving no attention to the issues addressed in the materials but not raised in the appeal. At some point during this period, Bruce Swartz joined the staff of the Assistant Attorney General for the Criminal Division as a Special Assistant, apparently with its being the Department's intention that he would remain in that position after Jo Ann Harris left the Department.

On June 25, 1995, almost seven months after I provided the materials to the Department, the Office of Professional Responsibility advised me that the Department had decided to take no action. In doing so, the Office of Professional

Responsibility would note that "virtually all the misconduct issues [I raised] were the subject of extensive motions filed with the District Court and the misconduct issues that were addressed by the District Court and the Court of Appeals were of a type suitable for judicial resolution" and that neither court found a due process violation. This reliance would occur notwithstanding the Office of Professional Responsibility's knowledge that most of the issues I had raised were not addressed in the court of appeals and that a number of the more serious matters, including the OIC's use of the Feinberg testimony, had not even been raised in the district court. The Office of Professional Responsibility would also rely on the fact that "the principal Associate Independent Counsel about whom [I] complained are no longer employed by the Office of Independent Counsel." It would do so notwithstanding that Bruce Swartz, who the materials indicated was one of the principal actors in the misconduct, had apparently been allowed to move from the OIC to the staff of the Assistant Attorney General while the materials were being considered.

Mr. Shaheen's most recent letter, in addition to the continued failure to indicate whether the Office of Professional Responsibility secured the underlying documents or interviewed any of the individuals whose testimony could substantiate the most serious allegations, suggests an unfamiliarity even with the issues summarized in my November 30, 1995 letter you and my August 18, 1995 letter to Mr. Shaheen himself.

Thus, I urge you to expeditiously make an independent assessment of the allegations concerning the conduct of Bruce Swartz and Robert O'Neill and to take initiate actions against them without awaiting a determination of the merits of all the allegations in the materials I provided. I also urge you not to defer addressing these issues until the appointment of a permanent Assistant Attorney General. Robert Litt, the presumptive nominee for that position, would likely have to recuse himself from the matter in any event, given that, according to Legal Times, former Attorney General Jo Ann Harris was the principal proponent of Mr. Litt's appointment. As discussed in various places, Ms. Harris was involved in many of the abuses in which Mr. Swartz and Mr. O'Neill were involved, and presumably Ms. Harris was responsible for the appointment of Mr. Swartz to the position of Special Assistant in the Office of the Assistant Attorney General for the Criminal Division.

There is also reason for expedition in the simple fact that Mr. Swartz and Mr. O'Neill continue to carry out their duties

over matters having important consequences for numerous individuals.

Set out below is a more detailed account of the facts relating to the OIC's use of the testimony of Eli M. Feinberg than provided in my previous letters. The account also is somewhat more succinct than that contained in the Park Towers Appendix and presents some additional information not known at the time the Park Towers Appendix was prepared. Though I urge you to expeditiously consider this matter without awaiting determination of the merits of the numerous other issues addressed in the materials I provided the Department, I nevertheless think it appropriate to reiterate here that the undisputed conduct of the Bruce Swartz and Robert O'Neill with regard to other witnesses casts additional light on the conduct concerning Eli Feinberg. In particular, the OIC's repeated use of government witnesses who were probably or certainly testifying falsely, without confronting them with information that might cause them to tell the truth, had a large role in prompting the district court to observe that the conduct of OIC attorneys did not comport with Department of Justice standards for federal prosecutors.

I also suggest that you give some attention to the discussion at pages 5-9 of the enclosed letter to Mr. Shaheen, which addresses the possibility that part of the reason for the Office of Professional Responsibility's decision in this matter may involve a belief that, though Deborah Gore Dean did in fact call Special Alvin R. Cain, Jr. in April 1989, Agent Cain's testimony was literally correct. If such belief does underlie the Office of Professional Responsibility's decision, I suggest that you would do well to make your independent assessment of whether that satisfactorily resolves the issues raised in the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

A. Background

One of the projects the Superseding Indictment alleged Deborah Gore Dean caused to be funded for the benefit of John Mitchell was Park Towers, a 143-unit moderate rehabilitation project in Dade County, Florida, that was funded as a result of HUD actions in 1985 and 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Martin Fine secured the services of a Miami consultant named Eli M. Feinberg in order to assist in securing HUD funding for Park Towers. Feinberg then secured the services of Washington political consultant Richard Shelby, who then retained John Mitchell. Though Shelby at times communicated directly with Fine, for the most part it was Feinberg who kept Fine apprised of Shelby's progress in securing funding for the project as well as in securing a later waiver of certain HUD regulations. The initial fee was $150,000, but after Shelby joined The Keefe Company in May 1985, the fee was increased to $225,000. Fine ultimately paid $225,000 to The Keefe Company, which paid Mitchell a total of $50,000 in connection with the Park Towers project.

Some of Associate Independent Counsel Robert E. O'Neill's more inflammatory remarks both in opening and closing argument would be related to Park Towers. The court of appeals, however, would ultimately hold that there was insufficient evidence to establish a conspiracy concerning that project.

There were many undeniable instances of prosecutorial misconduct with regard to Park Towers. The central premise underlying the charge concerning the project was that Shelby secured Mitchell's services because of Mitchell's relationship to Dean. Yet prior to issuance of the Superseding Indictment, Shelby, already under a grant of immunity, had told OIC attorneys that he did not know of Mitchell's relationship to Dean until after he had secured Mitchell's services, and, after learning of the relationship, ceased to seek material assistance from Mitchell. Shelby also had told OIC attorneys that he did not believe Dean was aware of Mitchell's involvement in the project and that he (Shelby) had sought to conceal Mitchell's involvement from Dean.

The Superseding Indictment was intended to create inferences that a reference in a Martin Fine memorandum to "the contact at HUD" with whom Shelby was to meet was a reference to Dean, and that Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean. Yet, prior to the

issuance of the Superseding Indictment, Shelby had told OIC attorneys that the reference to "the contact at HUD" was not a reference to Dean and that Park Towers had not been discussed at the September 9, 1985 lunch. These and other statements of Shelby specifically contradicting inferences in the Superseding Indictment either would never be produced as Brady material or would be withheld from the defense for more than a year while the OIC explicitly represented to the court that it was aware of no exculpatory material.

At trial, aided by its Brady violations, the OIC would attempt to lead the jury to believe that the reference to "the contact at HUD" was in fact a reference to Dean and that Park Towers was in fact discussed at the September 9, 1985 lunch, as well as a number of other things related to the Park Towers project that OIC attorneys had reason to believe, or knew with absolute certainty, were false. One of these was that Shelby had concealed Mitchell's involvement with Park Towers from Feinberg and Fine.

The Superseding Indictment had alleged that the co-conspirators involved in Count 1 would tell their developer/clients that Mitchell was Dean's stepfather. Ultimately, however, the OIC would instead argue that Shelby had concealed Mitchell's involvement from Feinberg and Fine, and that argument would play a significant role in the OIC's attempt to show that Shelby, Mitchell, and Dean were involved in a conspiratorial relationship.[2]

The key testimony in this regard would be that of Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Feinberg on May

[2] As shown in the Narrative Appendix styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee," the OIC would also contend that Mitchell's involvement with the Arama project was concealed from the developer of that project, Art Martinez, though OIC attorneys knew with absolute certainty that Mitchell's involvement was not concealed from Martinez.

18, 1992, Shelby, already under a grant of immunity, had told representatives of the OIC that he had told Feinberg about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Martin Fine.

The second instance in which Shelby informed the OIC that Feinberg was aware of Mitchell's role occurred in an interview, conducted by Deputy Independent Counsel Bruce C. Swartz and Associate Independent Counsel Robert E. O'Neill on May 18, 1992. That same day, Swartz and O'Neill conducted the telephonic interview of Feinberg in which Feinberg stated that he was not aware of Mitchell's involvement in Park Towers. Feinberg's interview report indicates that he was not at that time advised by Swartz or O'Neill that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, the day following the telephonic interview of Feinberg, Shelby was interviewed again by Swartz and O'Neill. The following is a description of the relevant parts of the Interview Report (which may be found as Attachment 5b to the Park Towers Narrative Appendix.)

In the interview Shelby was apparently advised that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of Feinberg's role in determining Mitchell's fee. The pertinent portions of the Interview Report are described below.

Early in the interview, and apparently before being advised that, on the day before, Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers, Shelby provided this information (in the words of the transcriber):

> Shelby recalled that before he went with TKC [Shelby's employer, The Keefe Company], Feinberg was accommodating in coming to an agreement on this project. Shelby, Mitchell, and Feinberg reached an agreement on the fee. Shelby recalled that he was to get the lion's share of the fee; possibly he would get $80,000, and Mitchell and Feinberg would split the rest with each receiving $35,000. Shelby did not recall saying that Mitchell's money should come out of Feinberg's share.

> In summary, initially Shelby and Feinberg talked about Park Towers, and possibly agreed to a 50/50 split on the fee of $150,000, which seemed excellent. Then, Shelby called Mitchell. Shelby then called Feinberg, who was accommodating and willing to include Mitchell. Feinberg said that Shelby should get the largest portion of the fee because he would be doing the most work. This led to a breakdown of $80,000/$35,000/ $35,000.

Interview Report at 2.

After several paragraphs concerning Shelby's discussions with his employers regarding Dean and Mitchell, the Interview Report states:

> It was pointed out to Shelby that [his employer Clarence] James' June 7, 1985 memo to him (Shelby) regarding the fee mentioned a 50/50 split between TKC and Feinberg, and did not mention Mitchell receiving any fee. Shelby stated that the only explanation he had for this was that possibly it was drafted earlier, sat around on someone's desk, and was not typed until June 7. However, this was purely speculation. Shelby pointed out that he had mentioned earlier that the announcement card dated May 1, 1985 reflecting his association with TKC did not go out until maybe as late as August because of lack of secretarial help.
>
> Shelby could not recall what he told TKC as far as the percentage or dollar amount of the fee that was to go to Mitchell. He recalled that based on a conversation at some point with TKC, $50,000 came up as the "operative number" for the fee for Mitchell. He recalled Feinberg saying that Mitchell should be happy with this because of the potential for future deals.

> Out of the $225,000 fee that was negotiated [after TKC became involved], Shelby's recollection was that $100,000 was to go to TKC; $80,000 was to go to Feinberg, and that $45,000 was to go to Mitchell. Shelby believed that the bookkeeper made a mistake in paying Mitchell $50,000 rather than $45,000, which left TKC with only $95,000, rather than $100,000.

Id. at 2.

Three paragraphs later, after Shelby near the end of the interview was advised in some manner that Feinberg had or might have denied knowledge of Mitchell's involvement with Park Towers, Shelby provided this response (in the words of the transcriber):

> Shelby knew of no reason that Feinberg would not want to mention that he knew of Mitchell's involvement. If Feinberg said that Mitchell was not involved, he was mistaken.

Id. at 4.[3]

On May 19, 1992, Swartz and O'Neill also reinterviewed Clarence James, the President of The Keefe Company, which had employed Shelby while he was attempting to secure funding for Park Towers. James had previously been interviewed on February 6, 1992, and, like Feinberg, had denied any knowledge of Mitchell's involvement with Park Towers. At the time of James's first interview, Shelby, who was no longer with The Keefe Company,[4] had not yet been interviewed by the OIC. In the first

[3] On page 2 of the Interview Report for the interview of May 19, 1992, the following sentence appears: "Also, Shelby did not remember asking Feinberg to call someone as a reference for Mitchell." This sentence seems to suggest that Swartz or O'Neill asked Shelby whether he had asked Feinberg to call someone as a reference for Mitchell. That would seem an odd question unless Swartz or O'Neill had been in some manner led to believe either that Shelby had asked Feinberg to call someone as a reference for Mitchell or that Feinberg had in fact called someone as a reference for Mitchell. In either case, whatever information led Swartz or O'Neill to have such a belief would seem significant further evidence that Feinberg was in fact aware of Mitchell's involvement with Park Towers.

[4] Shelby left The Keefe Company in 1988. The Keefe Company had brought a civil action against him in 1990.

interview James had told representatives of the OIC that he did not think The Keefe Company had paid Mitchell any money in connection with Park Towers and that Shelby had never told him that Mitchell had anything to do with Park Towers. Interview Report at 3. Subsequent to that interview, however, Shelby had made clear that James was aware of Mitchell's involvement. For example, in Shelby's May 18, 1992 interview, Shelby had described discussions with James about Mitchell's role. Shelby also stated that The Keefe Company had agreed to pay Mitchell because of Shelby's prior commitment to Mitchell, though The Keefe Company had not been pleased in doing so. Exhibit DD to Dean's Rule 33 Memorandum at 9-10.

In the May 19, 1992 interview, while still vague about his recollection of Mitchell's having a role in Park Towers, James acknowledged that he had been the person who authorized payments totalling $50,000 to Mitchell and that there would have had to have been some discussion of the payments. James suggested that a possible scenario was that he had agreed to honor a prior obligation to Mitchell by Shelby. Interview Report at 4.

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

The May 19, 1992 interviews of James and O'Connell do not indicate that either of them was asked whether he knew whether Feinberg had been aware of Mitchell's involvement with Park Towers.

During the sixteen months between the time that the OIC's immunized witness Shelby had reaffirmed in detail that Feinberg was aware of Mitchell's involvement with Park Towers and the time that the OIC elicited from Feinberg the sworn testimony that he was unaware of that involvement, the OIC apparently did not confront Feinberg with Shelby's statements that Feinberg was

aware of Mitchell's role. At any rate, if the OIC did confront Feinberg with Shelby's statements, no record of the matter would be provided to the defense.

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

If indeed Feinberg had not told the truth when he first denied knowing of Mitchell's involvement, any thoughtful questioning by counsel for the OIC ought to have revealed that. Among other things, given the detail with which Shelby had accounted for the fee split, it would seem difficult for Feinberg to construct an alternative rationale for a fee split among two persons instead of three. There would be reason to expect, however, that confronted with Shelby's statement, Feinberg would simply have acknowledged that in fact he had been aware of Mitchell's involvement, if such was the case, just as Clarence James had essentially done when confronted with the fact that his firm had paid Mitchell $50,000.[5]

Although the OIC apparently intended to call Feinberg to testify that he was unaware that Mitchell was involved in Park Towers, and to argue that the concealment of Mitchell's role from Feinberg and Fine was compelling evidence of the conspiratorial relationship between Dean, Mitchell, and Shelby, none of Shelby's statements that Feinberg was aware of Mitchell's involvement would ever be produced as Brady material.

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[5] Notwithstanding Shelby's statement that he did not know why Feinberg would not want to mention his knowledge of Mitchell's involvement, it is understandable that Feinberg, like James, would be reluctant to acknowledge involvement with a person of Mitchell's notoriety. Further, Feinberg might understandably have been concerned about the implications of the connection between Dean and Mitchell, which had received considerable publicity. For example, in the August 7, 1989 issue of Newsweek, a feature article focusing on HUD Secretary Samuel R. Pierce, Jr. and Dean would note that a Miami developer had paid Mitchell $75,000 to lobby at HUD and that Mitchell was a close companion to Dean's mother. At the end of 1989, People Magazine had profiled Dean as one of "The 25 Most Intriguing People of the Year." The magazine concluded its profile with a discussion of Dean's relationship to Mitchell, observing: "So here's a mystery for a rainy night: how Dean, with Mitchell's notorious example before her, fell into the same sink--and even cut Mitchell in for $75,000 in consulting fees."

B. The Trial

The trial commenced on September 13, 1993. About a week before trial (exact date not known), the OIC produced Jencks files (a total of 35 items) for nine persons described as the first week's witnesses. On September 9, 1993, the OIC produced Jencks files (a total of 28 items) for seven more persons, including Feinberg and Fine. On September 9, 1993, the OIC produced Jencks files (a total of 42 items) for five more witnesses.

On September 13, 1993, the day of opening argument, the OIC produced Jencks files (a total of 284 items) for another 36 persons, including Shelby. The entire Jencks production was sufficient to fill over 15 large 3-ring binders. Shelby's Jencks material was comprised of ten items including grand jury testimony and interview reports running as long as 27 single-spaced pages. Of the 57 persons for whom the OIC produced Jencks files, 20 (138 items) were not called in the OIC's case-in-chief. At the time this material was produced, Dean was represented by a single attorney.

Though Shelby was not scheduled to testify during the first week of trial, and not before Feinberg and Fine, he in fact would testify on the third day of trial, September 16, 1993, and ahead of both Feinberg and Fine. He would be examined by Associate Independent Counsel Robert E. O'Neill. That Shelby testify ahead of Feinberg and Fine, and with the defense's having as little opportunity as possible (and as little notice as possible) to review the Shelby Jencks materials, was important to O'Neill's effort to lead the jury to believe a number of things that O'Neill knew Shelby, if asked, would contradict and that O'Neill otherwise had reason know were not true.

For example, Government Exhibit 72 was a July 31, 1985 memorandum Martin Fine had written to the file referencing a conversation with Feinberg where Feinberg had stated that Shelby would be meeting with "the contact at HUD." The OIC knew that, if asked, Shelby would state that the reference to "the contact at HUD" was not a reference to Dean, but a reference to a HUD official named Silvio DeBartolomeis, which is what Shelby had informed the OIC in an interview conducted on April 8, 1992. During his examination of Shelby, O'Neill did not ask him about the meeting. Instead, after Shelby testified, O'Neill introduced the document into evidence through the testimony of Martin Fine, without eliciting testimony from Fine or Feinberg as to the

identity of the person referred to as "the contact at HUD." The OIC would then include entries in its charts that it acknowledged were intended to lead the jury to believe that the reference was to Dean.

The OIC would base the claim that Dean, Mitchell, and Shelby had discussed Park Towers together solely on the fact that the three had lunch together on September 9, 1985, and the following day Shelby sent Dean what Shelby's transmittal letter described as "the information concerning the Section Eight Moderate Rehab Program in Miami." O'Neill would bring these facts out during his redirect examination of Shelby. He would not ask Shelby, however, whether Park Towers was discussed at the lunch. O'Neill knew that had he asked that question, Shelby would have said that Park Towers was not discussed at the lunch, because in an interview conducted between April 8 and May 6, 1992, Shelby stated that to the best of his recollection Park Towers had not been discussed, and that he (Shelby) had gone out of his way in order to see that Park Towers was not discussed. Shelby had also testified before the grand jury that Park Towers had not been discussed at the lunch. Neither these statements nor two other Shelby statements that Park Towers was not discussed at the lunch had been provided as Brady material, and the defense failed to elicit testimony on the matter. The OIC then would rely on the fact that Shelby sent Dean materials relating to Park Towers on the day after the lunch as its only evidence that Mitchell, Dean, and Shelby ever had a discussion concerning Park Towers, as well as its only evidence that Dean knew that Mitchell was involved with the project.

Government Exhibit 85 was a February 3, 1986 memorandum that Fine wrote to the file, in which he recorded a conversation with Feinberg, who had recounted a conversation he had had with Shelby. Fine had written: "Rick said that he had lunch with his friend at HUD and that she indicated that [the prior subsidy] matter could be dealt with in a favorable manner..." The reference to Shelby's "friend" presumably was a reference to Dean with whom records showed Shelby had had lunch that day. The OIC knew with absolute certainty that the reference to Dean as Shelby's "friend," rather than by name, did not reflect the fact that Shelby avoided mentioning Dean's name to Feinberg. In the May 18, 1992 telephonic interview of Feinberg conducted by Swartz and O'Neill, Feinberg stated that he was aware that Shelby and Dean were good friends and that Shelby would check with Dean on the status of how things were going through the bureaucracy regarding Park Towers.

When Shelby testified, O'Neill asked him no questions about whether he advised Feinberg of his contacts with Dean. When Feinberg testified, Associate Independent Counsel Paula A. Sweeney asked him no questions about whether Shelby advised him (Feinberg) of Shelby's contacts with Dean.[6] O'Neill then introduced Government Exhibit 85 through the testimony of Fine, without eliciting any testimony as to the reason for Dean's having been referred to as Shelby's "friend," rather than by name. Then, despite the fact that the OIC knew with complete certainty that Shelby did not conceal his contacts with Dean from Feinberg--and despite Feinberg's in-court testimony contradicting such a notion--the OIC would rely on the fact that Dean was not mentioned by name in Government Exhibit 85 as evidence that Shelby concealed his contacts with Dean from Feinberg and Fine.

Government Exhibit 90 contained a May 29, 1986 letter from Shelby to Martin Fine by which Shelby provided Fine a copy of a post-allocation waiver on the Park Towers project that had been signed by Silvio DeBartolomeis on May 28, 1986. Shelby's letter to Fine did not state how he had secured a copy of the waiver. The OIC, however, knew that Shelby had received a copy of the document from DeBartolomeis, because it possessed a June 5, 1986 letter by which Shelby transmitted the same document to Eli Feinberg. In the letter to Feinberg, Shelby stated that he had received the copy of the waiver from DeBartolomeis. O'Neill did not ask Shelby about how he secured a copy of the document. Instead, he introduced the waiver and Shelby's transmittal to Fine through the testimony of Fine, without eliciting testimony as to how Shelby secured a copy of the document from either Feinberg or Fine. The OIC would then include entries in its charts intended to lead the jury to believe that Shelby had received the document from Dean.

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[6] On cross-examination, however, Feinberg testified that Shelby had told him that "he was having meetings with Ms. Dean," and that he got the impression she would look into something. Tr. 640.

Most pertinent to the principal issue treated here, however, is that having Shelby testify ahead of Feinberg and Fine would facilitate the OIC's eliciting Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers, without the danger that the testimony would be contradicted by Shelby. The following is how Shelby would happen to be called to the stand on September 16, 1993, three days after his Jencks materials had been provided along with thousands of pages of Jencks materials for other witnesses, and with as little notice to the defense as possible.[7]

At the close of the day on September 15, 1995, the court asked O'Neill what witnesses he had planned for the following day. After O'Neill had stated that he would call Maurice Barksdale and a person named Norman Larsen, "who is a custodial type witness out of the Georgetown Club," this colloquy occurred:

> MR. O'NEILL: Right. And then with the Jewish holiday, we had Eli Feinberg, Martin Fine and Eli Feinberg, but we had to push those back. We're trying to get local HUD people we will call in to fill in, but we will have --
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> THE COURT: That's Thursday.
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> MR. WEHNER [defense counsel): Local Washington HUD people?
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> MR. O'NEILL: Yeah, whoever lives here local.
>
> MR. WEHNER: Can you be any more specific? Bob, I'd appreciate it. If I call you later, I'd appreciate it.

[7] The Park Towers Narrative Appendix (at 25-26 and n.16), though initially noting that Shelby testified on September 16, 1993, then three times refers to September 13, 1993, as the date of testimony. The latter three references are in error.

MR. O'NEILL: Yeah.

Tr. 424-25.

O'Neill's description of the types of people that he planned to call the following day in addition to Barksdale and Larsen did not encompass Shelby. Yet, Shelby would appear as the second witness on September 16, 1993, immediately after Barksdale. It is not known when O'Neill told defense counsel Wehner that he was having Shelby testify on September 16. It would be revealed during Shelby's testimony, however, that Shelby met with O'Neill on the evening of September 15, 1993, shortly after O'Neill had led the court and the defense to believe that Shelby would not be among the witnesses called on the following day. Shelby presumably can provide information on when he was told that he would testify on September 16, 1993.

When questioning Shelby, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, O'Neill avoided any questions that might elicit a statement on the matter. O'Neill first elicited testimony about Shelby's initial contacts with Feinberg and the initial contacts with Mitchell that followed. O'Neill did not, however, ask Shelby about whether he had advised or consulted with Feinberg regarding Mitchell's involvement. O'Neill then asked this question:

> Q. And how much was he [Mitchell] to receive, did you know at that point?
>
> A. I can't recall at this point whether I had had the conversation with Mr. Feinberg in which a fee was specifically discussed or whether that was subsequent to my first conversation with Mr. Mitchell. I believe that the discussion relative to a fee may have occurred subsequent to that conversation, but I can't be certain.

Tr. 546.

O'Neill did not then inquire as to the nature of the discussion with Feinberg to which Shelby referred or as to whether, as Shelby seemed to suggest and as Shelby had stated in the May 19, 1992 interview to O'Neill and Swartz, Feinberg had a role in determining Mitchell's fee. Rather, O'Neill dropped the subject of what fee Mitchell was supposed to receive and simply asked whether the agreement was in writing, which it was not.

Tr. 546. That the agreement concerning Mitchell was not in writing would then be a factor that the OIC would cite as further evidence of the concealment of Mitchell's role.

Shortly after Shelby finished his second day of testimony, the OIC called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Associate Independent Counsel Sweeney directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers. The OIC subsequently elicited sworn testimony to the same effect from Martin Fine.

Dean moved for a judgment of acquittal at the close of the OIC's case. In opposing that motion, the OIC noted that "neither Fine nor Feinberg were [sic] aware that Mitchell was involved in the Park Towers project, even though, through Shelby's company, Fine paid Mitchell $50,000." Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal at 17 (Oct. 4, 1993). That statement would be immediately preceded by a statement that the reference to "his friend" in Government Exhibit 85 indicated that "Shelby avoided identifying 'his friend' in his dealings with Fine and Feinberg" (id. at 16-17), a statement that the authors of the brief knew with absolute certainty to be false. Id. at 16-17. And it would be immediately followed by a claim that Shelby's forwarding materials to Dean following the September 9, 1985 lunch attended by Dean, Mitchell, and Shelby indicated that the three had discussed Park Towers at lunch (id. at 17), though Shelby had

stated in an interview and before the grand jury that Park Towers was not discussed at the lunch and he had gone out of his way to ensure that it was not discussed.[8]

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[8] The entire passage read:

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

Two sentences later, the OIC would again assert:

> That evidence also shows that defendant and her co-conspirators, particularly after the Arama project, took pains to avoid referring to Mitchell's or defendant's involvement in these projects in any documents; indeed, as noted above, neither the developer of Park Towers, nor his Florida consultant, even knew that Mitchell was involved.

Id.

In oral argument on the motion, Associate Independent Counsel Sweeney would also state:

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

Tr. 2029-30.

In closing argument, in addition to seeking to cause the jury to draw various false inferences and otherwise seeking to lead the jury to believe things that OIC attorneys believed to be false (as documented throughout the materials),[9] O'Neill would give special attention to the testimony that Eli Feinberg and Martin Fine were not aware of John Mitchell's involvement with Park Towers, asserting that secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Shelby would have contradicted Feinberg's testimony, O'Neill would make a special point of the fact that the testimony was unimpeached.

[9] Also documented is that O'Neill more than 50 times stated that Dean had lied, often in circumstances where O'Neill had strong reason to believe, or knew for a fact, that Dean had not lied.

Specifically, O'Neill stated:

> [Dean's counsel] mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?
>
> Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid $225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

Following the verdict, the OIC would again make the same points about concealment in the Government's Supplemental Opposition to Defendant Dean's Motion for Judgment of Acquittal at 16-17, 23 (Oct. 23, 1993).[10]

C. Post-Trial Matters

Following the jury's finding her guilty on all twelve counts in the Superseding Indictment, Dean again moved for judgment of acquittal. She also moved for a new trial on the basis of prosecutorial misconduct, citing, among other things, various matters concerning Park Towers and the OIC's failure to make Brady disclosures, as well as the OIC's efforts to lead the jury to believe things that OIC attorneys knew or believed to be

[10] The earlier document was signed by Associate Independent Counsel Sweeney with O'Neill also on the signature block. In the latter document, which was also signed by Sweeney, Swartz had replaced O'Neill on the signature block.

false. Because of their bearing on those matters, Dean did include the two interview reports containing Shelby's first and second statements that Feinberg was aware of Mitchell's involvement with Park towers. Still unaware that Shelby had in three separate interviews contradicted Feinberg's statement that he was unaware of Mitchell's involvement with Park Towers, however, Dean's counsel did not raise this issue in support of the motion for a new trial.

In its opposition to Dean's motion for judgment of acquittal following the verdict, which was signed by Swartz, the OIC continued to make the same arguments about the concealment of Mitchell's relationship from Feinberg and Fine. Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(c) and (d) at 22-23, 25 (Dec. 21, 1993). In the court of appeals brief, also signed by Swartz, possibly because of the recognition that two documents in the record contained statements by Shelby that Feinberg was aware of Mitchell's involvement with Park Towers, the OIC would no longer make any reference to the concealment of Mitchell's role from Feinberg. Instead, the brief would cite only Fine's unawareness of Mitchell's involvement with Park Towers as evidence of conspiracy. Brief of the United States of America as Appellee, United States v. Deborah Gore Dean, No. 94-3021 at 5, 24 (D.C. Cir., Sep. 16, 1994).

As a final note, let me add that, notwithstanding the district court's view that the OIC's use of witnesses who OIC attorneys had reason to believe were not telling the truth did not comport with Department of Justice standards of conduct, I have so far been unable to determine that the Department actually has any meaningful standards in this area. Whether or not the Department of Justice has such standards, however, it remains fundamental to legitimate government that prosecutors do not put government witnesses on the stand believing that there is a substantial likelihood that they will testify falsely and without confronting them with evidence that would be expected to cause them to tell the truth and, more generally, do not attempt to lead courts and juries to believe things that those prosecutors know not to be true. Conduct departing from these norms is not merely a breach of ethics, it is lawlessness. Views of the Office of Professional Responsibility notwithstanding, reasonable observers can only conclude that such lawlessness was rampant in the actions of Bruce Swartz and Robert O'Neill in their prosecution of the Dean case. Whether or not you consider this conduct to disqualify these individuals from serving as attorneys

in the federal government, it is your responsibility to ensure that no similar conduct occurs under your supervision.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

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Attorney General

David Margolis, Esq.
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Enclosures

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