Final

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	CR 92-0181-TFH
DEBORAH GORE DEAN	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT DEBORAH GORE DEAN'S MOTION FOR DISMISSAL OF THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON ALL COUNTS

Deborah Gore Dean respectfully moves this Court for dismissal of the remaining Counts in the Superseding Indictment on the grounds of prosecutorial abuses not known to Defendant's counsel at the time of the Court's earlier ruling on February 14, 1994. These abuses, coupled with those previously identified, establish a pattern of prosecutorial misconduct unparalleled in any reported case. These abuses were pervasive and permeated virtually every aspect of the trial process, thereby denying Ms. Dean a fair trial in this court. The only clear remedy for such abuse is dismissal of the Superseding Indictment. Should the Court find that the abuses do not warrant outright dismissal of the Superseding Indictment, Defendant moves for a new trial based on the cumulative effect of all the abuses, the fact that the Court of Appeals reversed the convictions on four counts and found the evidence to support conviction on approximately 70 percent of the projects in Counts One and Two of the Superseding Indictment insufficient, the testimony of Lance H. Wilson, not

available previously, in which he takes responsibility for the only project remaining in Count One[1] and the availability of other witnesses who were unavailable at the time of trial.[2]

I. INTRODUCTION

On November 30, 1993, Defendant moved for a new trial on the grounds that prosecutorial abuses by Independent Counsel[3] had denied her a fair trial.[4] At a hearing on February 14, 1994, the Court sharply criticized Independent Counsel for denying it had knowledge of any exculpatory material when Independent Counsel was in fact aware of such material; for eliciting the testimony of government witnesses when the Independent Counsel had good reason to know the testimony was false and presenting such testimony as the truth; for failing to confront witnesses with information indicating that their expected testimony was false;

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[1] The Defendant has filed a motion to dismiss Count One on the basis of newly discovered evidence. This motion is based upon the affidavit testimony of Lance H. Wilson stating that he, not Defendant, was responsible for the Arama funding. The motion also addresses other matters related to evidence concerning the Arama funding.

[2] With regard to certain matters discussed below, there may be unresolved factual issues. Unless the Court can dismiss the Superseding Indictment without resolving such issues, the Court should order appropriate discovery or, in some cases, that the Independent Counsel provide a formal representation to the Court concerning the nature of its actions.

[3] Larry D. Thompson, Esq., the current Independent Counsel, was not Independent Counsel at the time the prosecutorial misconduct occurred.

[4] Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant to F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33 (Nov. 30, 1993)

and for failing to bring to the attention of the Court and the defense information indicating that Independent Counsel's evidence might be false. As this Court stated, Independent Counsel's action would not have occurred in a case involving any Assistant United States Attorney who had ever appeared before it and said that the actions of Independent Counsel reflected "at least a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors." Transcript of Hearing 24-27 (Feb. 14, 1994) (hereinafter "Hearing Tr.").

This Court repeatedly observed that it was virtually impossible to quantify the cumulative effect of the then identified prosecutorial abuses on the Defendant's ability to defend herself. In light of what this Court perceived to be all the evidence of the Defendant's guilt, however, the Court concluded that the Defendant had not been denied a fair trial. Id. 27-31.

Defendant moved for reconsideration of that ruling, and sought discovery concerning whether the testimony of a government agent on which Independent Counsel relied in attacking Defendant's credibility was perjured, and whether Independent Counsel had fulfilled its obligation to determine and to reveal to the Court whether that testimony was in fact false.[5] The Court denied Defendant's motion on February 22, 1992.

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[5] Motion of Deborah Gore Dean for Reconsideration of Ruling Denying Her Motion for a New Trial (Feb. 18, 1994)

The denial of the motion for a new trial was affirmed by the Court of Appeals on May 26, 1995 (55 F.3d 640), and a Petition for Certiorari was denied on March 18, 1996 (___ U.S.L.W. ___). The mandate issued on April 17, 1996.

A. Additional Instances of Prosecutorial Abuse Not Previously Considered By This Court Are Significant

Defendant has discovered additional prosecutorial abuses since the Court's earlier ruling.[6] These abuses exceed the scope

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[6] ADDITIONAL ABUSES

The newly-discovered abuses are summarized and listed below:

1. After the Court refused to allow Martinez' testimony that he had been told that Mitchell was related to Dean and that she was an important person at HUD, the Independent Counsel changed its theory and repeatedly argued to this Court and the Court of Appeals that Nunn concealed Mitchell's involvement with Arama from Martinez. Independent Counsel attorneys knew this was false. See infra Part III.A.1.

2. Though intending to rely on a February 1, 1985, memorandum from Defendant to Acting Assistant Secretary for Housing Shirley Wiseman as evidence that Defendant approved all Maurice L. Barksdale's decisions (even at the time of the Arama funding in July 1984), Independent Counsel failed to make a Brady disclosure of Barksdale's statements that Dean was not in the mod rehab loop even as late as October 1984. The Independent Counsel also failed to make a Brady disclosure of Barksdale's statement specifically refuting that the memorandum to Wiseman meant what Independent Counsel would claim that it meant. See infra Part III.A.2.a.

3. Independent Counsel failed to provide the defense with Jencks materials of a March 22, 1993 interview in which Barksdale apparently made statements exculpatory of Defendant. See infra Part III.A.2.b.

4. There existed substantial impeachment material on Barksdale in HUD Inspector General audits, as well as HUD IG and F.B.I. investigations concerning Barksdale's consultant activities in the Loan Management Set-Aside Program and the Title X Loan program. Independent Counsel never provided the HUD IG

audits in discovery or as Giglio on Barksdale. It redacted Barksdale's name from certain reports of Title X investigations provided during discovery and also failed to provide F.B.I. reports concerning further investigations and the subpoenaing of Barksdale's bank records, until long after Barksdale testified. See infra Part III.A.2.C.

5. Independent Counsel had Barksdale testify that he made no project-specific awards, yet Independent Counsel possessed documentary evidence that almost all of Barksdale's allocations to Dade County were project-specific. Barksdale's Executive Assistant, Stuart R. Davis, also told Independent Counsel that he kept a notebook for Barksdale in which he kept the name of the project and the person behind it for each mod rehab request. The Independent Counsel nevertheless elicited testimony from Barksdale that he was not aware that the 293-unit allocation in July 1984 was for a particular project and that he never made project-specific allocations. Independent Counsel never made a Brady disclosure of the documents showing the project-specific nature of Barksdale's awards or of the statements by Stuart Davis about the notebook he kept for Barksdale. See infra Part III.A.2.d.

6. While this case was on appeal, Independent Counsel brought an indictment against James Watt, in which it charged that Watt and Barksdale were involved in a scheme to violate HUD's regulations against project-specific awards and then to cover up the project-specific nature of the allocation project. See infra Part III.A.2.d.

7. In pursuing the position that conspiracy was evidenced by the concealment of Mitchell's role from developers, Independent Counsel elicited the testimony of Eli M. Feinberg that he was unaware of Mitchell's involvement with Park Towers without ever confronting him with Richard Shelby's three statements that he (Feinberg) did know of Mitchell's involvement and was even involved in setting Mitchell's fee. See infra Part III.B.1.

8. Though intending to place great weight on the alleged concealment by Richard Shelby of Mitchell's role in Park Towers from Eli M. Feinberg, and the fact that it was uncontradicted, Independent Counsel made no Brady disclosure of Shelby's three statements that Feinberg was aware of Mitchell's involvement with Park Towers. See infra Part III.B.1.

9. Independent counsel attempted to lead the jury and the courts to believe that Defendant was the person identified as Shelby's "contact at HUD," and that, more generally, Defendant was Shelby's principal contact on Park Towers, notwithstanding Shelby's statements to the contrary. To facilitate this effort,

and later to defend its actions to this Court, Independent Counsel sought to lead the jury and the Court to believe that no documents existed showing Shelby's contacts with DeBartolomeis. In fact, Independent Counsel knew that such documents existed. See infra Part III.B.2.

10. Independent Counsel attempted to lead the jury and the Court to believe that Defendant had been responsible for the post-allocation waiver on Park Towers and had provided a copy of the waiver to Shelby, even though it possessed documents showing that DeBartolomeis had told Shelby that he (DeBartolomeis) would be granting the post-allocation waiver and showing that DeBartolomeis had provided Shelby the copy of the post-allocation waiver. See infra III.B.2, 3, 4.

11. Though intending to lead the jury and the Court to believe the matters described in Items 9 and 10, Independent Counsel never made a Brady disclosure of the documents contradicting these points.

12. Independent Counsel repeatedly argued to the courts that Shelby concealed his contacts with Defendant from Feinberg, though knowing that Shelby had not concealed those contacts. See infra Part III.B.2, 3, 4.

13. Independent Counsel possessed a Harvard Business School application in which Andrew Sankin made a statement directly contrary to his in-court testimony. Independent Counsel failed to make a Brady disclosure of the document or to provide it in the normal course of discovery. Instead Independent Counsel placed the document in its 3700-page preliminary exhibit production within a 572-page group of documents concerning the Stanley Arms. See infra Part IV.C.

14. Independent Counsel knew that Sankin did not contribute to F.O.O.D. for Africa charity at Defendant's request. Nevertheless, Independent Counsel did not correct Sankin's testimony that he did or bring to the attention of the court or defense counsel that it had evidence that Sankin's testimony was false. See infra Part IV.A.2. n. 60.

15. Independent Counsel possessed substantial evidence that Thomas T. Demery had favored Louis Kitchin with regard to mod rehab and other programs. Independent Counsel failed, however, to provide in discovery HUD IG audits of the Title X projects which questioned Demery's actions on behalf of Kitchin's client. When a summary of a joint HUD Inspector General/F.B.I. investigation was provided during discovery, Kitchin's name was redacted from an entry concerning the Cumberland II Title X loan with which Kitchin was involved. When the same document was provided as Giglio on Demery the entire entry regarding Kitchin

of those previously identified in Defendant's earlier filings. Further, in committing the abuses detailed herein, the Independent Counsel not only violated its disclosure obligations, but in doing so, crippled the Defendant's ability to present a defense and effectively cross-examine government witnesses. In numerous instances, Independent Counsel was in possession of evidence that was exculpatory, or which could have been used by the defense at trial to impeach government witnesses. However, Independent Counsel failed or refused to produce such evidence at all, intentionally redacted information that directly pertained to government witnesses, or buried such evidence within thousands of pages of Jencks materials and then produced the evidence only days before a witness was to testify, leaving defense counsel the task of gleaning the information on cross-examination. At times, Independent Counsel even included the evidence within documents pertaining to other witnesses, apparently to diminish the chances that the evidence would be discovered. Requiring defense counsel (particularly where, as here, defense counsel was a sole

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was eliminated. Thus the defense was unable to cross-examine either witness on these matters since it could not identify who and what it pertained to. See infra Part V.B.1, 2.

16. Independent Counsel failed to provide as Jencks materials on government witnesses Kitchin and Jack Jennings. See infra Part V.B.

17. Independent Counsel produced in discovery a HUD IG Hotline Report alleging that Demery accepted gratuities. The portion of the report mentioning Kitchin's name was redacted. See infra Part V.B.3.

practitioner) to search for a needle in a haystack, days before a witness testifies can hardly be viewed as allowing counsel the opportunity to make "effective use of the evidence at trial." United States v. Paxon, 861 F.2d 730 (D.C. Cir. 1988).

The cumulative effect of these additional and apparently intentional abuses, in conjunction with the previously-identified abuses, warrants dismissal of the Superseding Indictment regardless of other considerations.

B. Independent Counsel Presented False Evidence At Trial

Independent Counsel not only had reason to know prior to trial that the testimony he elicited from several key government witnesses was false, Hearing Tr., 25-27, but also, in many instances, made no effort to confront those witnesses with conflicting evidence prior to their testifying or even at trial, presumably, so as not to be aware of the truth. A prosecutor has the duty not to present or use false evidence at trial. Giglio v. United States, 405 U.S. 150 (1972). If the prosecutor learns that false testimony has surfaced at trial, he has an affirmative obligation to step forward and correct the record, United States v. Iverson, 637 F.2d 799, 801 (D.C. Cir. 1980), and may not exploit false testimony by affirmatively urging the truth of the false testimony to the jury. United States v. Sanfilippo, 564 F.2d 176, 178-179 (5th Cir. 1977). As discussed herein, Independent Counsel failed to meet each of these obligations.

Further, because Independent Counsel in numerous instances,

had failed to provide the exculpatory and impeachment evidence to the defense, as required by Brady or Giglio, the defense was not provided the opportunity to refute false testimony by key government witnesses. In a case resting primarily on circumstantial evidence, as this one does, false testimony from key government witnesses with respect to the major counts could not help but impact the jury's verdict. The convictions, therefore, must be set aside. United States v. Agurs, 427 U.S. 97, 103 (1976).

C. Independent Counsel Made Misleading Statements in Defense Against the Earlier Charge of Prosecutorial Misconduct

Independent Counsel made misleading statements to this court in defense of charges of prosecutorial misconduct. Independent Counsel mislead the court regarding its conduct in prosecuting its case against Defendant and the nature of the evidence against the Defendant. This conduct violated Independent Counsel's continuing obligation to truthfully disclose to the court the nature of its actions, and provides additional justification for dismissal of the Indictment or a new trial on all Counts.

D. The Court Must Consider the Cumulative Impact of More Instances of Prosecutorial Abuse Balanced Against Far Less Evidence of the Defendant's Guilt

While affirming seven of the twelve counts in the Superseding Indictment, the Court of Appeals overturned the convictions on Counts 6, 8, 10, 11, and 12, and found that there was insufficient evidence to establish a conspiracy with regard

to three of the four projects that were subjects of the conspiracy charged in Count One and three of the five projects that were subjects of the conspiracy charged in Count Two. These rulings render irrelevant and inadmissible much of the evidence upon which this Court relied in concluding that the strength of the evidence was sufficient to outweigh the cumulative impact of the previously identified abuses.

E. New Material Evidence Has Been Discovered Since Trial That Would Likely Have Resulted in Dean's Acquittal on Count One

With regard to the only remaining project in Count One, the Defendant has discovered new evidence in the form of Lance H. Wilson's testimony, which was not available at the time of trial, but which demonstrates the Defendant's innocence with respect to that project. That evidence establishes the Defendant's innocence as to all allegations that she took improper actions to benefit former Attorney General John N. Mitchell. Given the immense role these allegations played in the case, and particularly in Independent Counsel's efforts to undermine the Defendant's credibility in the eyes of the jury, the evidence establishing Defendant's innocence concerning Count One alone requires a new trial on all matters.

In addition to Lance H. Wilson, who is now available to testify at a retrial, former Secretary of HUD Samuel R. Pierce, Jr., is also available, his case having been resolved by Independent Counsel through a no prosecution agreement.

Although Secretary Pierce had first-hand knowledge of many, if not all, the Counts contained in the Superseding Indictment, he was not available to testify because his testimony was deemed by the court to implicate Fifth Amendment rights against self-incrimination since at the time he was under investigation by Independent Counsel. The fact that Secretary Pierce and others, as discussed below, were not available to testify at trial but are now available is grounds for a new trial.

Now that Secretary's Pierce is available, he could provide testimony not previously available with respect to the following areas, all of which were crucial in the Defendant's conviction:

- His relationship to John Mitchell and any communications between them concerning HUD projects; his knowledge of Mitchell's involvement in HUD Projects and any discussions or lack thereof he had with Dean with respect to that involvement; and his knowledge of action taken by his Executive Assistant, Lance Wilson, on Mitchell's' behalf (Count One);

- His instructions to Lance Wilson on mod rehab funding in general, and, in specific, Arama (Count One);

- His relationship to Louie Nunn and any meetings or discussions they had concerning HUD projects (Count One);

- His directives regarding mod rehab funding, and any instructions to Barksdale, Wiseman, Hale, DeBartolomeis, and Demery regarding participation by the Office of the Secretary in mod rehab funding; his knowledge concerning Defendant's role, if any, in concurring on all mod rehab funding while awaiting appointment of a Federal Housing Commissioner; and specifically, a memorandum from the Defendant to Wisemen, Acting Secretary for Housing, dated February 1, 1985 (Count One);

- His discussions with Dean regarding the role of consultants in HUD projects, specifically Kitchin; his relationship to Demery and Demery's relationship to other consultants to HUD (Counts Three and Four);

- His discussions with Dean concerning the April 29, 1987 meeting at which funding for the Springwood/Cutlerwood projects was discussed, and his instructions to Dean to abstain from any projects in which Kitchin had an interest (Counts Three and Four);

- His role in, or knowledge of, projects in Florida, and specifically, funding for projects involving representative Paula Hawkins (Count One);

- His relationship with DeBartolomeis with respect to mod rehab fundings and DeBartolomeis' relationship to the mod rehab program generally, and specifically, to discredit DeBartolomeis' testimony with respect to Dean's role in funding mod rehab projects (Count Two);

- His review of Dean's Senate testimony and conversations he had with Dean regarding her testimony, and discussions he had with Legislative Director Casey regarding Dean's Senate testimony (Counts Five, Seven and Nine); and

- His instructions to Dean regarding mod rehab funding, specifically his instructions on fundings in Puerto Rico (Alameda Towers) (Count Two); and in Springwood/ Cutlerwood, Atlanta, Georgia, and Woodcrest Retirement Center (Counts Three and Four).

Wilson also was not available to testify at trial. At the time of Dean's trial, Wilson was under indictment and was unwilling to testify on Dean's behalf. It was not until Wilson was granted immunity and his conviction subsequently reversed by the Court of Appeals on June 17, 1994, that he became willing to testify on Dean's behalf. In his affidavit, Wilson admits responsibility for HUD's funding of the Arama project (the only project remaining in Count One) and appears to impeach

Barksdale's testimony.

In addition to the matters set forth in his affidavit, Wilson could provide testimony which was not available at trial concerning:

- What Dean knew and did not know about Arama;
- His relationship with John Mitchell;
- His relationship with Barksdale;
- His relationship with Demery;
- Any instructions he had received from Secretary Pierce; and
- The mod rehab process, in general.

II. OVERALL CONSIDERATIONS

A. Pervasiveness of the Misconduct

The evidence of misconduct presented in this case is more pervasive than any found in any reported opinion. There are numerous instances in which Independent Counsel violated prosecutorial obligations and exhibited a total disregard for the truth. Indeed, in terms of the pervasive and calculated nature of prosecutorial abuses, the conduct that has led courts in recent cases to excoriate government prosecutors does not even begin to rise to the level of the documented misconduct in this case.

The entire record--including the newly-discovered matters, the matters previously brought to the Court's attention, and Independent Counsel's conduct in responding to the earlier allegations of misconduct--conclusively establishes that Independent Counsel engaged in the following broad categories of misconduct:

1. Independent Counsel refused to fulfill its basic obligation as prosecutors to make every effort to ascertain the truth. Instead, Independent Counsel exhibited a total disregard for the truth by failing to confront witnesses with information and documents which would reveal that their expected testimony was false. This conduct was compounded by Independent Counsel's efforts to represent documents to be what they were not and to make misleading statements about those documents.

2. Independent Counsel intentionally failed to correct or advise the Court and defense counsel of testimony it knew was false.

3. Independent Counsel deliberately disregarded its Brady

and Giglio obligations even in the face of a specific order by Judge Gerhard Gesell. Independent Counsel continued to do so even after this court castigated their delinquent disclosure of some exculpatory material.

4. Independent Counsel, in defending its actions, failed to honor its continuing obligations to the courts to investigate and truthfully admit to its actions; instead it glibly and disingenously attempted to diminish and justify those very actions.

In evaluating the evidence as to each allegation of misconduct, it is important that the court recognize that the large number of instances of misconduct is not a valid basis for giving less attention to any individual instance. Both the number and the nature of instances of demonstrable misconduct are reasons why, in any situation where there is doubt as to the precise nature of the prosecutors' conduct or the motivations underlying it, the doubts should be resolved against Independent Counsel.

B. Count One Was the Focal Point for the Entire Prosecution

A substantial number of the identified prosecutorial abuses relate to Count One of the Superseding Indictment, which alleged that Defendant was involved in a conspiracy with former Attorney General John N. Mitchell and others. This Count was the focal point of the prosecution's case, particularly with regard to its effort to undermine the Defendant's credibility and to exploit certain racial tensions. Four of the five Independent Counsel rebuttal witnesses (Supervisory Special Agent Alvin R. Cain, Jr., Special Agent David Bowie, HUD driver Ronald L. Reynolds, and

former HUD employee Pamela Patenaude) gave testimony principally related to Count One or to persons involved with Count One. Furthermore, Independent Counsel spent more than half of his closing argument ridiculing Defendant about the Count One allegations and her testimony concerning them.

The Court of Appeals found, however, that there was insufficient evidence to sustain a verdict as to three of the four projects in that Count. The affidavit of Lance H. Wilson establishes that there was no conspiracy as to the remaining project. Independent Counsel had reason to know of Wilson's responsibility for the funding because of the telephone message slips between Mitchell and Wilson referencing Wilson's contacts with Barksdale on Mitchell's behalf, in addition to other matters, before the Superseding Indictment was returned. However, they chose not to confront Maurice Barksdale (the government's primary witness with respect to the project) with any information that may have resulted in his revealing that it was Wilson, not Dean, who was involved in that matter.

The sheer number of witnesses testifying, with respect to Count One, also affected the jury. Without the Count One allegations the following witnesses would have had no relevant testimony to provide and, therefore, could not have been called to testify: Special Agents Alvin Cain and David Bowie, HUD driver Ronald L. Reynolds, Maurice Barksdale, Aristides Martinez, Jack Brennan, Martin Fine, Eli Feinberg, Pam Patenaude, Marty Mitchell, Melvin Adams, Frank Gauvry, Louie B. Nunn, and Phil

Winn.

Another aspect of Count One dealt with race. Had Count One not been part of the case, Independent Counsel would have been precluded from making many of its most improper statements. In evaluating the significance of many of these points it should be noted that Independent Counsel made a point of the fact that the Defendant was a white person from a prominent family who was being tried before a jury comprised entirely of African-Americans.[7]

The Court noted several times that it perceived Independent

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[7] The trial occurred at a time when the nation's attention was focused upon issues of jury race/defendant race/victim race, as a result of the riots following the trial of four Los Angeles police officers for assaulting Rodney King in 1991, and the trial of the African-American defendants alleged to have criminally assaulted Reginald Denny, a white truck driver, in the course of those riots. The latter trial occurred contemporaneously with the trial of this case, and the jury's deliberations in that case received substantial media attention. Defendant herself would be on the stand for all or part of eight trial days between October 5, and October 18, 1993, days largely coinciding with the jury's deliberations and rendering of the initial verdict (October 18), in the Rodney King case. Closing argument would commence on October 20, 1993, the day the final verdicts were rendered in the Los Angeles case. See e.g., Crosby, Judge Orders Break for Tense Jurors in Denny Beating Trial, The Washington Post, Oct. 10, 1993, at A10, col. 2; El Nasser, Cooled-Off Jury Goes Back to Work, USA Today, Oct. 11, 1993, at A3, col. 6; El Nasser, Juror Furor Rattles Denny Trial, USA Today, Oct. 12, 1993, at C3, col. 2; Hamilton, Judge Dismisses Denny Case Juror, The Washington Post, Oct 12, 1993, at A3, col. 1; Hamilton, Second Denny Trial Juror is Replaced, The Washington Post, Oct. 13, 1993, at A5, col. 1; Edmonds, For Juries, High Anxiety, USA Today, Oct. 14, 1993, at A3, col; Hamilton, Replacement of Two Jurors Brings Out Critics in L.A., The Washington Post, Oct. 14, 1993, at A3, col. 1; El Nasser, Record Reveals Juror Disarray in Denny Trial, USA Today, Oct. 15, 1993, at A1, col. 2; Hamilton, Denny Beating Trial Judge Releases Juror Transcripts, The Washington Post, Oct. 15, 1993, at A2, col. 5; El Nasser, Key Charges Stymie Denny Jury, Oct. 18, 1993, at A3, col. 3.

Counsel's ridiculing of the Defendant while on the stand to be intended to appeal to the racial differences between the Defendant and the jury.[8] Tr. 2594, 2776-77, 2786-87, 2899-902. Indeed, this court in admonishing Independent Counsel at trial stated:

> . . . What I'm impugning is that you're making these ["smart comments"] with a white defendant and a black jury which you wouldn't be doing with a black defendant and a white jury, and I resent that. I think it may be a basis eventually for the bench to take a look at this whole case.

Tr. at 2776.

Further, if Count One had not been part of the case, the following prejudicial conduct implicating race would not have occurred:

- The prosecution would not have called African-American witness Special Agent Alvin R. Cain, Jr. to directly contradict Defendant's emotional testimony about calling Cain in 1989 to ask whether there was proof that John Mitchell had earned HUD consulting fees.[9] As she could not believe it.

- Independent Counsel could not have argued that Dean falsely accused Maurice Barksdale (also African-American) of lying about the Arama funding.

- Independent Counsel would not have called Special Agent

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[8] In fact, the Court will recall the problems with several members of the jury in which jurors were removed and reprimanded at about the time the Defendant testified in her defense.

[9] Independent Counsel had reason to know that Agent Cain's testimony denying receipt of defendant's telephone call was false. This court stated it believed the telephone call may have had occurred.

David Bowie (African-American) to testify that Dean had told him in an interview that Wilson had funded units for Joe Strauss, his friend and former HUD official. Independent Counsel would not have been able to argue ridiculing Defendant that she had "fingered Lance Wilson, her [black] friend" when Defendant truthfully gave information to the FBI about Wilson's activities at HUD. There is no legitimate reason why Independent Counsel would have called Agent Bowie to give the "fingering" testimony other than to incite the jury. Wilson, who had appeared in the courtroom, was identified for the jury by Independent Counsel apparently because of his race so that the "fingering" testimony would have additional impact on the all black jury. In fact, had Wilson appeared as a defense witness it is likely the dynamics of race in the jury's mind would clearly have changed.

• Independent Counsel would not likely have elicited the testimony of Melvin Adams that a local Dade County priority had been "to encourage black developers to get a piece of the pie." Tr. 411.[10] Independent Counsel cited that testimony three times in closing argument in support of the claim that rich and powerful consultants like former Attorney General John Mitchell, [11] former Government Louie Nunn, and Republican political

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[10] Lance Wilson would have been able to dispell this notion.

[11] Whether most members of the jury would initially have known that Mitchell was a convicted felon as a result of matters related to the Watergate break-in, it is clear that Independent Counsel intended that the jury learn that Mitchell was a person they should know something about. On first mentioning Mitchell in opening argument, Independent Counsel interrupted himself to

consultant Richard Shelby had caused local priorities to be ignored. Tr. 3379, 3381, 3522-23.[12].

Further prejudicial misconduct primarily unrelated to race would not have occurred if Count One had not been part of the case:

- Independent Counsel would not have been able to argue at closing argument, that Defendant had lied when she said she did not know that John Mitchell was a consultant.
- Independent Counsel would not have been able to repeatedly and falsely argue that John Mitchell's role was concealed in Arama and Park Towers and such concealment and secrecy was the "hallmark of conspiracy."
- Independent Counsel would not have been able to repeatedly argue that Defendant corruptly transmitted "internal HUD documents" to her alleged co-conspirators.[13]

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say, "and your question is, you already saw a question, he's a former attorney general of the United States." Tr. 43.

[12] It was in further development of this same theme that Independent Counsel made the statement with regard to Counts Three and Four that "[t]hey are funding 203 units to Metro-Dade before Metro-Dade even asks for them." Tr. 3414-15. As previously brought to the Court's attention, Independent Counsel knew this statement was false at the time he made it. See Dean Rule 33 Mem. at 187-91; Dean Rule 33 Reply Mem. at 13-15.

[13] There were three internal HUD documents that, consistent with an allegation in the "Manner and Means" section of the Superseding Indictment, Independent Counsel sought to mislead the jury that Defendant had provided to her alleged co-conspirators. While Defendant sent the Arama rapid reply to Louie B. Nunn, she was unaware of any impropriety in her doing so. Independent Counsel also, through entries in its summary charts, sought to lead the jury to believe that Defendant provided Shelby copies of the Park Towers rapid reply and the Park Towers post-allocation waiver. As discussed infra Independent Counsel knew that

• Independent Counsel would not have been able to describe Richard Shelby, with regard to the Park Towers project as "an influence peddler, a guy who can go to the right place, knock on the right doors, and get the right answers." Tr. 3392. Further, Independent Counsel could not have attempted to impeach Defendant concerning her statements about her relationship with Shelby by arguing that the two had ceased to be friends after Defendant was no longer Executive Assistant. Tr. 3406.[14]

* * *

Although the prosecutorial misconduct falls into one of the four broad categories previously listed, supra p.15, and affected the conduct of the entire trial and the jury's consideration of the evidence, the misconduct is discussed in the context of the Counts in which it arose. By presenting it in this manner we do not mean to suggest that the misconduct discussed affected only

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Defendant had not provided either document to Shelby.

[14] As previously brought to the Court's attention, when making this statement, Independent Counsel had reason to know that Shelby and the Defendant remained close friends for two years after Defendant left HUD, and that they had only ceased to be friends after Defendant learned in April or May 1989 of Shelby's involvement with Mitchell. Dean Rule 33 Mem. 201-03.

that particular Count. To the contrary, the misconduct permeated the entire prosecution and undoubtedly affected the jury's entire verdict.

III. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNT ONE

Count One of the Superseding Indictment alleged that Deborah Gore Dean conspired with former Attorney General John N. Mitchell, who was deceased at the time of the Superseding Indictment, and others to secure mod rehab funding for three projects in Dade County, Florida: Arama (293 units, funded in 1984); Park Towers (143 units, funded in 1985), South Florida I (219 units, funded in 1986) and another project, Marbilt. Former Kentucky governor Louie B. Nunn was named as an unindicted co-conspirator with regard to the Arama and South Florida I projects; the developer of these projects was Aristides (Art) Martinez. Richard Shelby was alleged to be an unindicted co-conspirator with regard to the Park Towers project; the developer of that project was Martin Fine. The Court of Appeals held that there was sufficient evidence with respect to only the Arama project and therefore affirmed the conviction of Count One on that basis alone.

However, the prosecutorial abuses arising out of Count One were significant, as discussed below, and warrant dismissal of the entire case.[15]

[15] Although the Court of Appeals set aside the Count One verdicts as it related to all projects except the Arama project, the misconduct arising out of those projects is discussed since it affected the overall conduct of the trial and the verdict.

A. The Arama Project

The Superseding Indictment alleged that the unindicted co-conspirators in Count One told their developer and their clients that they were associated with John Mitchell, and that Deborah Gore Dean was John Mitchell's stepdaughter. Superseding Indictment, ¶ 6 at 8-9, ¶ 6 at 11. The allegations appear to have been based on a May 15, 1992 interview of Art Martinez during which he stated that, at a meeting in early 1984, Louie Nunn or John Mitchell told him that Mitchell was related to Dean and that she held an important position at HUD. Martinez stated that he interpreted these remarks to mean that Mitchell and Nunn had connections at high levels at HUD. Attachment 1 at 4. [16] Attempting to introduce these statements into evidence, Independent Counsel told the court that this testimony could be crucial in establishing a conspiracy as to Count One. Tr. 230-31, 248.

In order to enhance the chance that the court would allow the testimony, Independent Counsel argued (1) that on January 25, 1984, at the time of reaching agreements with Martinez for a consultant fee of $150,000 and an attorney's fee of $225,000,

[16] Independent Counsel redacted the names of its attorneys and agents who conducted interviews (as well as grand jury questioning) of witnesses. The only reason for having done so was to impede Dean's ability to impeach a witnesses' in-court testimony by prior statements and to call a witness who could so testify to the prior inconsistency. In most cases the witnesses' address and telephone number were also redacted making it virtually impossible to locate those witnesses who might have testimony favorable to Dean.

Nunn wrote on the consultant agreement that one-half the $150,000 consultant fee was to be paid to Mitchell;[17] and (2) that Martinez knew about the annotation, because it was made in his presence, and he possessed a copy of the agreement bearing the annotation.[18]

Notwithstanding Independent Counsel's arguments to gain admission of Martinez testimony about the statement by Nunn or Mitchell concerning Mitchell's relationship to Dean, the court twice refused to allow the testimony.

1. Independent Counsel Falsely Asserted That Mitchell's Role Was Concealed From Martinez

Based upon the preceding arguments made by Independent Counsel to obtain the admission of Martinez' testimony about Mitchell's relationship to Defendant, and both the Independent Counsel interview with Martinez and Nunn's grand jury testimony, it was absolutely clear to Independent Counsel that Martinez knew that Nunn had a business relationship with Mitchell and that Mitchell was assisting with regard to the Arama project. However, immediately after the court twice refused to allow Independent Counsel to elicit Martinez' testimony concerning the conversation about Mitchell's relationship with the Defendant

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[17] The annotation written by Nunn read: "1/25/84: In event of death or disability, one-half of above amount belongs to John Mitchell." Gov. Exh. 21.

[18] There was, however, evidence that the annotations were not placed on the document until after April 3, 1984 when changes to the original agreement were made.

(Tr. 228-35, 245-50), Independent Counsel elicited vague testimony from Martinez that he was not aware that he was hiring anyone other than Nunn or that Nunn was hiring anyone else. Tr. 250-51. The purpose of eliciting this testimony was to support a complete change of theory - the existence of a conspiracy was now to be shown not by the fact that Mitchell's role and his relationship to Dean were emphasized to Martinez, but instead by the supposed concealment of Mitchell's role from Martinez.

Thereafter, Independent Counsel repeatedly cited this testimony to this court and the Court of Appeals in support of a claim that Mitchell's involvement with the Arama project was concealed from Martinez and this concealment was evidence of conspiracy. Gov. Rule 29 Opp. at 19; Gov. App. Br. 5, 24. See also Gov. Supp. Acq. Oppp. at 17 n. 18. At the time Independent Counsel made those arguments, it knew that Mitchell's involvement had not been concealed from Martinez.[19]

2. Abuses by Independent Counsel Relating to the Testimony of Maurice Barksdale

Maurice Barksdale was the HUD Assistant Secretary for Housing who made the decision regarding the Arama funding prior

[19] Before the grand jury, when Independent Counsel was pressing the theory that Mitchell's role was emphasized to Martinez, Independent Counsel elicited testimony specifically about Nunn's discussions with Martinez concerning involving Mitchell with the project. Attachment 61, at 33-36. That testimony was then repeated during the trial. Tr. 1359-62. Nevertheless, Independent Counsel represented to the Court of Appeals that Nunn had omitted all references to Mitchell in his discussions with Martinez. Gov. App. Br. 24.

to the time Dean replaced Lance Wilson as Executive Assistant to HUD Secretary Samuel R. Pierce, Jr. on June 24, 1984. Barksdale signed documents implementing the Arama funding on July 16, 1984 and July 27, 1984.

On January 5, 1984, Arama developer Martinez sent a letter to Nunn at Mitchell's address which enclosed a list of buildings available for mod rehab funding. Gov. Exh. 19. No specific number of units was mentioned in the letter. A telephone message slip Independent Counsel obtained from Mitchell's files revealed a conversation between Mitchell and Lance Wilson, who was Secretary Pierce's Executive Assistant from 1981 to June 1984, and who had a long-standing relationship with Mitchell.[20] Tr. 357-58. During the telephone conversation, Mitchell and Wilson discussed 300 units, and Wilson mentioned that he was talking to Barksdale[21] about the matter.[22] On January 25, 1984, Nunn[23]

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[20] A clear indication of the Wilson, Mitchell, Nunn relationship was the Moore Land Company funding, which apparently occurred at or around the same time as the Arama funding. Dean was in no way involved in that funding. Yet, the cast was the same in Moore Land and Arama. Wilson, of course, was the Executive Assistant who had the relationship with Mitchell and who obviously had been involved with that transaction, the same way he was involved with Arama. Mitchell had previously set up a meeting with Wilson for Nunn with regard to a project for the Moore Land Company, which Wilson had approved. Tr. 1396-98. In fact, Mitchell's files indicated that in June 1984 he wrote to the head of the Moore Land Company and stated that the project "could not have gone forward without my intervention." Attachment 2.

[21] In fact, Barksdale testified before the grand jury that whenever Wilson called him, he assumed he was speaking on behalf of the Secretary. Barksdale G.J. 11.

[22] Mitchell had written on the message slip, which showed that Wilson had returned his call, the following words: "300

reached a tentative agreement with Martinez to secure 300 mod rehab units. Gov. Exhs. 20, 21. A second Mitchell telephone message slip obtained by Independent Counsel indicated that on the following day Wilson contacted Mitchell again and surely returned the telephone call as he had done with the prior message slip. Attachment 4.

As has been previously brought to the Court's attention, Independent Counsel failed to make a Brady disclosure of the Mitchell telephone message slips. Independent Counsel also failed to confront Barksdale with the message slips before calling him to testify about the Arama funding before the grand jury and in court. Gov. Rule 33 Op. at 10-12, 16-17. The only possible reason for the failure to confront Barksdale with the slips is that Independent Counsel feared that Barksdale would reveal the truth - information exculpatory of the Defendant -- that it was Wilson, not Dean, who was responsible for the Arama funding.[24]

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units, Process + Keep Advised. Talking to Barksdale." Attachment 3.

[23] When Nunn testified before the grand jury he was questioned both about his pre-1984 dealing with HUD and about his contacts with Wilson. Parts of his responses on both matters were excluded, for some inexplicable reason, from Nunn's grand jury testimony provided by Independent Counsel as Jencks material on Nunn. Nunn G.J. 25-26, 90-91. Defendant requests the Court to require Independent Counsel to produce the redacted material.

[24] Furthermore, the Martinez April 3, 1984, letter to Nunn, written well before Wilson resigned from HUD, suggested that Martinez had already been told that the Arama project would be funded. At page 2 of the letter, after noting that Nunn should insist that the 293 units not come in two increments, Martinez states: "when will funding for the 293 units take

Barksdale's testimony was crucial to the Court of Appeals' ruling that there existed sufficient evidence to support a conviction on the Arama project. Even though Barksdale testified that he did not recall the Defendant talking to him about the funding and believed that he would remember if she had (Tr. 523), Independent Counsel relied on his testimony concerning the circumstances of the Arama funding and claimed it as evidence that Defendant had caused Barksdale to sign the funding documents.[25] The Court of Appeals, which apparently relied on

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place." Attachment 63.

[25] Independent Counsel seriously mischaracterized Barksdale's testimony. On direct, Barksdale testified that he had no recollection of why the Arama project was funded but that generally he would have signed off on such funding documents because someone in the Secretary's office had asked him to. He said that the persons with whom he had contact from that office were the Secretary, the Undersecretary and the Defendant. He then testified that neither the Secretary nor the Undersecretary asked him to sign off on the documents and that "I do not remember Deborah Dean asking me." Tr. 456-57. On cross-examination Barksdale would later state that he did not remember either the Secretary or the Defendant asking him about the project and believed that he would remember if either of them had. Tr. 535. Arguing before this Court, Independent Counsel relied on Barksdale's testimony during direct, stating that Barksdale testified that "he knew he received an inquiry from someone in [the Secretary's] office"; and that "he knew it wasn't Secretary Pierce, he knew it wasn't the Undersecretary, but he couldn't recall if it was Ms. Dean." Tr. 3327.

This was not even close to an accurate characterization of Barksdale's direct testimony.

In any event, in the Court of Appeals, Independent Counsel again relied solely on the direct testimony, asserting:

> While Assistant Secretary Barksdale testified that he did not 'remember Deborah Dean asking me' to fund Arama, Tr. 457, he did not testify that she did not do so, or that she did not seek to advance Mitchell's interests by making inquiries that would let Barksdale

Independent Counsel's characterization of the evidence, regarded that testimony as consistent with Defendant having caused the funding. See F.3d at 651.

During Barksdale's testimony before the grand jury and during his direct examination in court, Independent Counsel did not question him as to whether Wilson contacted him on the Arama funding. On cross-examination, however, Barksdale testified that he did not remember Wilson contacting him on the Arama funding, and that he believed that he would have remembered if Wilson had. Tr. 535. This is directly contrary to the information on the telephone message slips.

Barksdale also testified that he did not know that the Arama funding was going to a specific project and that he never made project-specific allocations. Tr. 457-58, 465, 467, 482-93. This testimony, which contradicted Defendant's testimony about her discussions with Barksdale, as well as her claims that project-specific allocations were commonplace, was specifically relied upon by the Court of Appeals. 55 F.3d 651.

In addition to the failure to segregate the Mitchell telephone message slips as Brady disclosures, and the failure to confront Barksdale with the information on those slips prior to calling him to testify, Independent Counsel engaged in a number of other acts of misconduct with respect to Barksdale.

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know that she was interested in the project.

Gov. App. Br. at 21 n.7. Barksdale's testimony on cross-examination, however, directly contradicted Independent Counsel's characterization of his testimony.

a. Independent Counsel Failed to Make a Timely Brady Disclosure of Barksdale's Statements That Were Exculpatory of Defendant

In addition to being examined before the grand jury on June 29, 1992, Barksdale was questioned by Independent Counsel or the F.B.I. at least five times between January 23, 1990, and the day he testified. At various times he made statements indicating that the Defendant had not been involved in the Arama funding.

In Independent Counsel's Brady letter of August 20, 1993, Independent Counsel included four paragraphs based on statements by Barksdale in a June 28, 1992 interview. The paragraph that appeared most directly pertinent to the Arama funding indicated that Dean "could have" discussed sending funding to Jacksonville, Florida (the area office to which the Arama units had been sent). Attachment 5 at 2. Omitted from the account of Barksdale's statement, was that in the same interview Barksdale had said that he did not remember the Defendant ever urging him to send units to Jacksonville. Attachment 6 at 1.

More importantly, Independent Counsel failed to include other, more exculpatory statements. In particular, Independent Counsel failed to include a statement given in an interview on January 23, 1990, where Barksdale had told an F.B.I. agent that as late as October 1984, three months after the actual Arama funding--"Deborah Gore Dean was not in the MRP [moderate rehabilitation program] loop and was otherwise not involved in the MRP funding process." Attachment 7 at 1. When Barksdale testified, Independent Counsel did not ask him any questions that

would elicit testimony concerning whether it was necessary that Defendant approve Barksdale's funding decisions in July 1984. This is particularly significant because of Independent Counsel's use of the memorandum written by the Defendant to Acting Assistant Secretary for Housing Shirley A. Wiseman dated February 1, 1985 to lead the jury to believe Dean was responsible for the Arama funding. The memorandum requested a report on the disposition of all mod rehab funds for FY 1985, and stated that "this office will concur on all [mod rehab] funding decisions regarding Mod Rehab funds not previously approved by both Maurice and myself, until a Federal Housing Commissioner is named." Gov. Exh. 147.

Given that the requirement of concurrence of the Secretary's office would apply only until a new Assistant Secretary-Federal Housing Commissioner was named, the reasonable interpretation of this memorandum was that Dean's approval of mod rehab selections was an interim requirement for any projects approved by Barksdale before he left but not yet implemented, and that such approval had not been required while Barksdale was in the position of Assistant Secretary for Housing-Federal Commissioner. Such interpretation was also suggested by the fact that in the memorandum, Dean was requesting a report on Fiscal Year ("FY") 1985 funds allocated so far.[26]

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[26] Dean testified that Secretary Pierce directed that she send the memorandum to Wiseman because Barksdale, without Pierce's knowledge, had expended essentially all the FY 1985 mod rehab funds in the first four months of the Fiscal Year. Trial Tr. 2259-62. Documents possessed by Independent Counsel strongly

Independent Counsel had additional reasons to know that such interpretation was correct. In interview reports, Barksdale stated that Dean was not in the mod rehab loop as late as October 1984. Further, a report of an interview of Barksdale by Independent Counsel on June 28, 1992 stated that:

> Barksdale reviewed a "Personal and Confidential" note from Dean to Shirley Wiseman, dated February 1, 1985. [the Wiseman memorandum] Barksdale said he had never seen anything like it. He didn't recall meeting with Dean to approve mod-rehab funds for FY 1985.

Attachment 6 at 4.

Despite Barksdale's statements unequivocally indicating that Dean did not approve mod rehab decisions during his tenure, the Independent Counsel mislead the jury that Dean's February 1, 1985 memorandum to Wiseman showed that Dean was required to approve all mod rehab decisions while Barksdale was Assistant Secretary, including the July 1984 allocation underlying the Arama project. It did not, however, provide as Brady material either of the two statements by Barksdale contradicting Independent Counsel's interpretation of the memorandum.

When Barksdale testified, Independent Counsel asked him no questions that would elicit testimony concerning whether it was

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suggested this testimony was true. Between October 19, 1984, and January 3, 1985, Barksdale had allocated over 3800 FY 1985 mod rehab units. As discussed in Memorandum at 16-17, Barksdale's last three mod rehab allocations would be subjects of Independent Counsel's indictment of James Watt. On January 30, 1985, Wiseman had signed Form HUD-185s allocating another 325 units. During the remainder of FY 1985, it appears that less than 600 additional mod rehab units were allocated.

necessary that defendant approve Barksdale's funding decisions in July 1984. Thereafter, however, in briefs in this Court and the Court of Appeals, Independent Counsel made clear that it nevertheless had intended that the jury would infer from the February 1, 1984 memorandum that as of July 1984, "Mod Rehab decisions were approved by Barksdale and [Dean]." Gov. Rule 29 Opp. at 18 n.16 (emphasis in original); Gov. App. Br. 21 n.7 (emphasis in original). In making this point, Independent Counsel told neither court that the document was created more than six months after the Arama funding nor that Barksdale had never seen the memorandum.

Thus, Independent Counsel had sought to mislead the jury and the courts to believe that the memorandum showed that Defendant approved Barksdale's fundings even in July 1984 while knowing for a fact that the memorandum showed no such thing, and while failing to make a Brady disclosure of the statements contradicting that interpretation. Dean Rule 33 Mem., Exh. BB at 1.

b. The Failure to Include the Report of Barksdale's Interview of March 22, 1993 as Jencks materials

Apparently, Barksdale made certain statements that were exculpatory of the Defendant in a March 22, 1993 interview.[27] A

[27] This interview took place shortly after Stuart Davis testified to the grand jury that he maintained a notebook for Barksdale recording all the projects funded, the number of units, the consultant and developer involved, and the name of the project. See infra III A.2.d.

report of that interview was never provided to the defense.[28] The defense only learned of the interview when it was mentioned in an August 29, 1993 letter.

[28] In the Government's Opposition to Defendant Dean's Motion for a New Trial at 14 n. 14 (Jan. 15, 1997), Independent Counsel claims that it is unable to determine whether it produced the March 22, 1993 Barksdale interview. When Independent Counsel made its Jencks production, it gave the defense a list of each Barksdale item that Independent Counsel was providing the defense. That list, which is attached to the defense's Omnibus Motion of February 5, 1994, corresponded with the defense's records of the Jencks items it received. However, the list did not include the March 22, 1993 Barksdale interview. Thus, Independent Counsel clearly did not provide it at that time. Independent Counsel asks the Court to believe that any exculpatory information in the interview report was accurately summarized in the August 20, 1993 letter (though it does not state which of the statements attributed to Barksdale in the August 20, 1993 letter is from the March 22, 1993 interview). Whether the representation concerning the August 20, 1993 letter is true, it is not an excuse for the continued failure to provide an interview of a government witness. Other issues aside, the Court should order Independent Counsel immediately to provide a copy of their interview to the defense and an explanation as to why it originally failed to provide the interview.

c. Independent Counsel Failed to Disclose Significant Impeachment Material on Barksdale

Both during Defendant's cross-examination and during closing argument, Independent Counsel attempted to mislead the jury that Defendant had falsely accused Barksdale of lying. Tr. 2986-87. If successful, these efforts likely carried additional weight with the jury because Barksdale was an African-American who had held a high government position. After defense counsel had attempted to impeach Barksdale, Independent Counsel tried to rehabilitate him by vouching for his credibility when it elicited testimony from him that, (1) Independent Counsel, who was responsible for the broad reaching HUD investigation, had never questioned her integrity; and (2) though Barksdale was testifying pursuant to a grant of use immunity, he had not requested the immunity. Tr. 536.

Apart from the fact that the Mitchell telephone message slips appeared to establish that Barksdale lied about his contacts with Wilson (e.g., support of Barksdale and Wilson for Demery's Food for Africa; the benefits Barksdale and Wilson received from Demery's action on Loan Management Set-Aside and Title X awards), the government had substantial reasons to question Barksdale's integrity. In fact, it had repeatedly done so in materials that Independent Counsel never provided to the defense. Among other things, these materials suggested additional reasons why Barksdale failed to acknowledge that Wilson had

talked to him about the Arama funding.[29]

Like Lance Wilson, Barksdale (after he left HUD and became a consultant) had been an active supporter of Assistant Secretary Thomas T. Demery's charity F.O.O.D. for Africa ("F.O.O.D."). He was involved in four fundraisers for the charity. He or his clients were involved in organizing three fundraisers, including one in which Barksdale and Wilson were co-sponsors, and Barksdale's employer, J&B Management Co., for whom Barksdale had secured five questionable Loan Management Set-Aside awards ("LMSA awards"), contributed $7,500 to the charity. Banking Hearings at 1054, 1089, 1132, 1187, 1192, 1196, 1199; Lantos Hearings, Pt. 3, at 767-77. HUD IG even investigated F.O.O.D. and its supporters. All those involved feared that the obvious connection between contributions to F.O.O.D. and successful HUD applications would lead to indictments.

Both Barksdale and Wilson also received substantial benefits as a result of Demery's decisions.[30] In addition to the LMSA

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[29] Barksdale authorized at least one other funding after Wilson left that would be the subject of intensive investigation. This was a 600-unit allocation to Puerto Rico that would be a subject of the indictment of James Watt. This gave Barksdale some reason to be reluctant to mention that Wilson had talked to him about the Arama funding. Further, Wilson had been indicted and convicted of providing an unlawful gratuity to a HUD official named Dubois Gilliam. Barksdale (after he became a consultant) had loaned $2,000 to Gilliam while Barksdale himself had a matter pending before Gilliam. The loan to Gilliam, as well as another questionable action of Barksdale, which also involved Wilson, were subjects of the Lantos Hearing, Pt. 3, at 783-94 and of which Independent Counsel was well aware.

[30] With regard to Wilson, see Banking Hearings at 1005-09, 1017; Lantos Hearings, Pt. 4 at 545-67, 583, Pt. 5, pp. 364-68; House Report, 101-97 at 105.

awards for his employer, Barksdale was involved as a consultant in securing Title X awards on projects called Southcreek, for which he earned $110,000, Autumn Meadows, on which he earned $43,000, and Steeds Crossing, for which he earned $15,000. (The clients on both SouthCreek and Steeds Crossing were F.O.O.D. contributors.)

The LMSA awards were sharply criticized in a HUD IG audit. Audit No. 89-A0-119-0006. Attachment 65. Former Deputy Assistant Secretary for Multi-Family Housing R. Hunter Cushing told Independent Counsel that he objected to the awards but was ordered to approve them by Demery who had stated that the awards were for Barksdale. Attachment 8.[31] The Southcreek, Autumn Meadows, and Steeds Crossing Title X awards were also criticized in HUD IG investigations, as was Barksdale's role influencing the awards cited with regard to Autumn Meadows and Southcreek. See Audit 90-TS-129-0013. Attachment 64. The Southcreek, Steeds Crossing, and Autumn Meadows Title X awards were also all subjects of FBI/IG investigations identifying Demery as the responsible HUD official and Barksdale as a consultant and finding that consultant pressure influenced the awards.

The HUD IG investigation of the LMSA awards was never provided to the defense either in discovery or as Giglio on Barksdale. Neither the HUD IG audit nor the F.B.I.

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[31] The Cushing statement that Demery had said the awards were for Barksdale was included among the thousands of pages of Jencks materials provided on September 13, 1993, three days before Barksdale testified.

investigations of the Title X awards were provided in discovery or as Giglio on Barksdale.

During discovery, a two page-document was provided with one-paragraph summaries of the investigation of the Southcreek, Steeds Crossing, and Autumn Meadows awards. However, Barksdale's name was redacted. [32] There is no valid reason for having redacted Barksdale's name. Attachment 9. The fact that all references to Barksdale initially had been redacted (as had other relevant information) made it impossible to make any use of the material to impeach Barksdale at trial. [33]

When Demery testified two weeks after Barksdale, Independent Counsel provided a one-page document (dated November 2, 1989) discussing an ongoing OIG/FBI investigation of the

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[32] The night before Barksdale testified, it appears that at least part of that two-page document was provided to the defense, with Barksdale's name no longer redacted. There appears to be no valid reason for the redaction gamesmanship. Attachment 10.

[33] When Demery testified two weeks after Barksdale, Independent Counsel again produced that same two-page document summarizing the OIG/FBI investigations of the Southcreek, Steeds Crossing, and Autumn Meadows Title X awards. Attachment 13. In this instance, Independent Counsel no longer redacted Barksdale's name from the summaries on Steeds Crossing and Autumn Meadows (though it erased entirely the summary of the Southcreek investigation). Demery's testimony had nothing to do with Barksdale (though Barksdale was one of numerous F.O.O.D. for Africa contributors who benefited from Demery's decisions). Much more pertinent to the impeachment of Demery was the investigation of a Title X award for a project called Cumberland II, in which Kitchin had been involved. A summary of that investigation had been included just above the summary of the Steeds Crossing investigation in the two-page document produced in discovery (Attachment 9), though Kitchin's name had been redacted from the document. As discussed, when the document was produced as Giglio on Demery, all reference to the Cumberland II investigation had been eliminated.

Southcreek Title X award. Attachment 11. Independent Counsel also provided the single page of another document (dated September 25, 1990), discussing a grand jury investigation of the matter and indicating that Barksdale's bank and phone records were to be subpoenaed as part of the investigation. Id., Attachment 12.

d. Barksdale's Testimony Regarding Project-Specific Awards

During both direct and cross-examination Barksdale testified that he did not know that the 293-unit allocation he authorized for Dade County in July 1984 was intended for a particular project; that HUD had a policy against such awards; and that he made no project-specific awards while in the position of Assistant Secretary for Housing. This testimony would prove crucial to the Court of Appeals' ruling upholding a verdict on Count One.

Independent Counsel had reason to know that the testimony was false. Independent Counsel possessed documents indicating that Barksdale knew that the 293-unit allocation was intended for the Arama project and that each of four other allocations Barksdale made to Dade County in 1984 were intended for particular projects.

Stuart R. Davis was, at all times relevant hereto, Barksdale's Executive Assistant and also signed the Arama Rapid Reply. In an interview conducted by Independent Counsel on February 12, 1993, Davis stated that 90 to 95 percent of mod

rehab allocations were based on political contacts. Attachment 14. Davis also stated that, when Barksdale received requests for mod rehab units, he would advise Davis, who would record the name of the political contact supporting the project, as well as the project's name, location, and number of units in a book. Id. at 3.[34] Davis testified before the grand jury on March 12, 1993, that the bidding process at the PHA level was frequently a sham because senior people at HUD would ensure that specific funding would go to specific projects. Attachment 15. He indicated, for example, that units would be sent out to a housing authority in a certain number, when there would probably be only one project that fit that the description in the area that the authority could fund. Id. at 12-16.[35]

Although Davis indicated in his interview that he kept a book of projects and the political contact supporting each

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[34] The defense's records do not indicate when Davis' interview reports and testimony were provided to the defense. Presumably, the materials were provided on Barksdale the night before he testified.

[35] By letter of August 20, 1993, Independent Counsel disclosed a number of exculpatory statements by Barksdale. Attachment 5, at 2-3. By letter of August 29, 1993, Independent Counsel gave dates for those statements, including March 22, 1993. Attachment 16. Independent Counsel, however, never produced the March 22, 1993 interview as Jencks on Barksdale. This interview occurred shortly after Davis told Independent Counsel that he kept a book for Barksdale and that all allocations were product specific. The March 22nd interview may reveal that Davis' information was raised with Barksdale and what his response was or even that, not withstanding what Davis had testified to in the grand jury, Independent Counsel failed to question Barksdale about it.

project, no such book was ever provided to the defense. The existence of the book, the book itself, any entry in the book mentioning Mitchell, Nunn, Martinez, Wilson or Dean all should have been disclosed. One can assume that there was no entry related to Dean otherwise it would have been used by Independent Counsel. The fact that Dean's name was not mentioned should have been disclosed as Brady.

Independent Counsel had further reason to know Barksdale's testimony was false. In February 1995, the Independent Counsel and the grand jury returned an indictment against James Watt in which Independent Counsel alleged that Watt was involved in a scheme with Barksdale and others to subvert HUD's regulations against project-specific awards. In particular, the indictment alleged as evidence of that scheme that on September 5, 1984, Watt wrote to Barksdale, referencing a conversation the previous evening, and attaching "copies of three different Sec. 8 Mod Rehab projects" --a 68-unit project in New Jersey, a 50-unit project in Massachusetts, and a 128-unit project in the Virgin Islands. In his letter, Watt stated that he had been assured that the projects "are clear [sic] as a whistle," but that the PHA applications themselves were not "project specific," "[j]ust as you like it." Watt also indicated that he would like to have the Form HUD-185s on these allocations as soon as possible. Attachment 17.[36] The indictment alleged that thereafter, the

[36] It is not known when Independent Counsel secured a copy of this letter. No copy was ever provided to the defense in this case.

units were awarded in numbers approximating the amounts requested by Watt. Attachment 18.[37] Therefore, it is impossible for Independent Counsel having knowledge of all of this not to have known that Barksdale's testimony about project specific awards was false. Yet, Independent Counsel presented the false testimony to the jury.

e. Independent Counsel's Representations Concerning the Failure to Make a Brady Disclosure of the Mitchell Message Slips

Previously in this Court, and later in the Court of Appeals, Independent Counsel defended its failure to make a Brady disclosure of the Mitchell message slips on the grounds that Independent Counsel attorneys did not regard them as exculpatory, suggesting that its attorneys in fact regarded the message slips as incriminating by "reinforcing the importance of Dean's role." Gov. Rule 33 Opp. at 11; Gov. App. Br. at 47.

However, the message slips are so clearly exculpatory that Independent Counsel's representations to the contrary are manifestly implausible. Apart from the facial implausibility of the Independent Counsel's contention, Independent Counsel failed to provide an explanation as to why, assuming it regarded the message slips as incriminating, it did not question Barksdale about them in order to develop evidence to prove its case.

[37] These were among the awards that Barksdale made shortly before leaving office in December 1984, that all but exhausted FY 1985 mod rehab funds. It was this occurrence which precipitated the Wiseman memo. See supra III A.2.a.

Further reflective of Independent Counsel's recognition of the exculpatory nature of the message slips is the fact that in closing argument Independent Counsel argued to the jury that: "First of all, we don't know what project they're talking about here. Arama is not mentioned." Tr. 3516. It is safe to say that when Independent Counsel attempted to lead the jury to believe the message slips did not apply to Arama, it knew that they did apply to Arama, though the project had not yet been named. This is but one more instance of Independent Counsel attempting to mislead the jury and the courts concerning something Independent Counsel knew to be false.

f. Failure to Make Brady Disclosures Concerning the Patriots Project

1. Failure to Disclose As Brady or Giglio the Statements of Barksdale

In December 1984, Barksdale allocated 77 mod rehab units to Baltimore, Maryland to be used for the Patriots project, in which a boyfriend of Pierce's Special Assistant Janice Golec had an interest. Barksdale testified that Defendant had talked to him about the project and had indicated to him that a friend of Janice Golec was involved.

Yet on three separate occasions prior to his testimony Barksdale had stated that he had no distinct recollection of Defendant talking to him about the project. On October 24, 1991, Barksdale stated that he did not remember anything significant about the allocation and did not remember whether or not Defendant talked to him about the allocation. Attachment 19, at

6. Later on June 28, 1992, Barksdale stated that he did not recall the Defendant having an interest in the Patriots project. Attachment 6, at 3. Testifying before the grand jury the very next day on June 29, 1992, Barksdale stated that he had not heard of the Patriots project until reviewing documents recently and stated that, prior to reviewing documents, he did not know that Golec's boyfriend was the developer of the Patriots project. He said that had he known that Golec's boyfriend was receiving the units at the time of the funding, he would have brought the matter to the Secretary's attention. Attachment 20, at 27-29. However, none of these statements were disclosed as either Brady or Giglio material.

2. Failure to Disclose As Brady the Statement of James R. Lomenick

Even more egregious than failing to provide as Brady the prior Barksdale interviews was Independent Counsel's failure to provide as Brady material statements made by James R. Lomenick, Golec's boyfriend concerning his efforts to obtain mod rehab funding for the Patriot project. In an interview conducted on June 6, 1991, Lomenick told Independent Counsel that he had met Dean twice; once when he and Golec went to Nathan's and then again when Dean gave a speech at a Sunday morning business meeting held regularly by then Mayor Schaefer of Baltimore. Lomenick said that he never discussed the Patriot project with Dean because of his limited contact with her. However, Lomenick said that he met Barksdale and talked to him on the telephone "on

one or more occasions." Lomenick said he had some recollection that he may have made a telephone call to have Barksdale approve the Patriot project, which he (Barksdale) eventually did. Attachment 62, at 2-3. This information was clearly exculpatory of Defendant's alleged involvement in having the mod rehab funding approved. It is obvious that where he had no contact with Dean on the project, he did with Barksdale. This is another example of Independent Counsel's failure to honor its Brady obligation and lead the jury to believe something as true (i.e., that Dean was responsible for Patriot project funding) when it had reason to know that it was false.

B. Park Towers

The Court of Appeals held that there was insufficient evidence to establish a conspiracy concerning the Park Towers project. The evidence related to this project, however, played a crucial role in the prosecution's case. Park Towers is a 143-unit moderate rehabilitation project in Dade County, Florida that was funded as a result of HUD actions taken in 1985 and 1986. The most important of these actions were the allocation of 266 mod rehab units at the end of November 1986 and the approval of a post-allocation waiver of certain HUD regulations in April 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Fine secured the services of a Miami consultant named Eli Feinberg in order to assist in obtaining HUD funding for Park Towers. Feinberg then secured the services of

Washington consultant Richard Shelby, who in turn retained John Mitchell.

With regard to the Park Towers project, the Independent Counsel intended to mislead the jury with respect to each of the statements below when it had reason to know these statements were probably or certainly false:

(1) that Shelby concealed Mitchell's involvement with Park Towers from Feinberg and Fine;

(2) that Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean;

(3) that a reference in a July 31, 1985 memorandum (Gov. Exh. 72) to "the contact at HUD" with whom Shelby was to meet the following week was a reference to Dean;

(4) that Shelby concealed his contacts with Dean from Feinberg and Fine;

(5) that in a February 3, 1986 memorandum written by Fine (the "Fine Memorandum") (Gov. Exh. 85) which discussed a conversation with Feinberg where Feinberg stated that Shelby had lunch with "his friend at HUD," Dean was referred to as Shelby's "friend at HUD" because Shelby avoided mentioning Dean's name to Feinberg;

(6) that Dean had been responsible for the post-allocation waiver that allowed the Park Towers project to go forward;

(7) that Dean provided Shelby with a copy of the waiver;

(8) that there existed no documents reflecting Shelby's contacts with DeBartolomeis.

Independent Counsel's effort to mislead the jury was facilitated by its failure to make a Brady disclosure of statements or documents contradicting points 1, 2, and 6 through 8, and the delinquent Brady disclosure of statements contradicting points 3 through 5.

1. The Testimony of Eli M. Feinberg That He Was Unaware of Mitchell's Involvement With Park Towers Was False

Independent Counsel attempted to lead the jury and the courts to believe that Richard Shelby had concealed John Mitchell's involvement with the Park Towers project from consultant Eli M. Feinberg and developer Martin Fine even though Independent Counsel had compelling evidence establishing this was false. Since Fine learned most of what he knew about Shelby's activities from Feinberg, the key testimony in this regard would be that of Feinberg, who, on September 17, 1993, testified that he was unaware of John Mitchell's involvement with the Park Towers project. Tr. 637.

Yet, prior to a telephonic interview of Feinberg on May 18, 1992, Shelby, already under a grant of immunity, told Independent Counsel that Feinberg knew about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Fine. Attachment 21, at 2. The second instance in which Shelby informed Independent Counsel that Feinberg was aware of Mitchell's role occurred in an interview on May 18, 1992. Attachment 22, at 8. That same day, Independent Counsel had a telephonic interview with Feinberg in which Feinberg stated that he was not aware of Mitchell's involvement with Park Towers. Feinberg's interview report indicates that at that time he was not advised by Independent Counsel that Shelby had explicitly contradicted his statements. Attachment 23, at 4.

In an interview on May 19, 1992, the day following the

telephonic interview of Feinberg, Shelby was reinterviewed by the same Independent Counsel. In his interview, Shelby was apparently advised that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Nevertheless Shelby, who also provided details of Feinberg's role in setting Mitchell's fee, unequivocally stated that Feinberg was aware of Mitchell's involvement. Attachment 23, at 2,4.

There were obvious motives for Feinberg to falsely deny knowledge of Mitchell's role, including the fact that Feinberg did not want to implicate himself by admitting his knowledge of Mitchell's involvement in the fund; Feinberg did not want to possibly risk losing the funding he had received; and national magazines had suggested that Defendant had improperly sent mod rehab units to Miami to benefit Mitchell. Even though Independent Counsel had reason to know that Feinberg would acknowledge he knew about Mitchell's involvement if he were confronted with Shelby's statements,[38] Independent Counsel chose not to confront Feinberg with Shelby's statements before his testimony at trial. The conclusion appears inescapable that, as with the failure to confront Maurice Barksdale with the Mitchell

[38] The day after Feinberg denied knowledge of Mitchell's involvement with Park Towers, the Independent Counsel reinterviewed Shelby's employer Clarence James, who previously stated that Shelby never told him of Mitchell's involvement, that he was unaware of Mitchell's involvement and that his company paid Mitchell no money. Attachment 24, at 3. Confronted with the fact that he had signed checks for payments to Mitchell, James acknowledged that he must have known of Mitchell's involvement, stating, just as Shelby had stated, that the payments must have been made to fulfill Shelby's prior commitment to Mitchell. Attachment 25, at 4.

telephone message slips, Independent Counsel failed to confront Feinberg with Shelby's statements because of a concern that doing so would cause Feinberg to acknowledge that the testimony Independent Counsel intended to elicit from him was false.[39]

Despite the fact that Shelby's statements contradicted a point on which Independent Counsel intended to place great weight at trial, the Independent Counsel never made a Brady disclosure of Shelby's three statements that Feinberg was aware of Mitchell's involvement. Instead, those statements were included in a voluminous Jencks production pertaining to Shelby, and among several thousand pages pertaining to other witnesses, which were produced on September 13, 1993, the first day of trial. Further, although production of the statements was to occur, by court instruction, at least a week before Shelby testified, the production occurred only three days before.[40]

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[39] In the May 19, 1992, interview of Shelby, he was asked whether he remembered asking Feinberg to call someone as a reference for Mitchell. Attachment 26, at 2. This is an odd question unless Independent Counsel already had reason to believe 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. If such information did exist, it was further evidence that Feinberg was aware of Mitchell's involvement with Park Towers. No such information was ever provided to the defense.

[40] Independent Counsel misled the defense as to the timing of Shelby's testimony. Although Shelby was not scheduled to testify during the first week of trial and apparently not before Feinberg and Fine, he was unexpectedly called on the third day, September 16, 1993. At the close of the preceding day, Independent Counsel told this court and defense counsel that because of the Jewish holidays he was reordering the witnesses for the following day. He said that after Barksdale he would call a custodial type witness and not Feinberg and Fine but "local HUD people..." "to fill in..." "whoever lives here local."

When Shelby testified, Independent Counsel did not ask any questions that would elicit whether Feinberg was aware of Mitchell's involvement. When Shelby nevertheless started to talk about Feinberg's role in setting Mitchell's fee, Independent Counsel changed the subject. Tr. 546.

Immediately after Shelby testified, Independent Counsel called Feinberg and directly elicited his testimony that he was unaware of Mitchell's involvement with Park Towers. Tr. 637. Thereafter, repeatedly in oral argument[41] and in briefs before this court,[42] as well as twice in its brief to the Court of Appeals,[43] Independent Counsel contended that Shelby concealed

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Tr. 424-25. Shelby, who was called immediately after Barksdale, did not fit this description. This facilitated Independent Counsel's effort to lead the jury and the courts to believe that Shelby concealed Mitchell's involvement with Park Towers from Eli Feinberg without contradiction from Shelby, as well as to lead the jury and the courts to believe a number of other things that Shelby would have contradicted or that Independent Counsel otherwise had reason to know were false. It was necessary that Shelby testify ahead of Feinberg and with the defense having as little opportunity (and as little notice) as possible to review Shelby's Jencks material.

[41] Tr. 2029-30 (argument by Associate Independent Counsel); Tr. 3519 (argument by Associate Independent Counsel).

[42] Gov. Acq. Opp. at 17; Gov. Supp. Acq. Opp. at 16-17; Gov. Rule 29 Opp. at 22-23.

[43] Gov. App. Br. 5, 24. In contrast to the claim in this Court, in the Court of Appeals Independent Counsel argued only that Mitchell's role was concealed from developer Fine. Independent Counsel may have been required to alter his position before the Court of Appeals because as a result of documents filed with Defendant's Rule 33 Motion (Attachment 21, at 2; Attachment 22, at 8), the record included two of Shelby's statements contradicting Feinberg's testimony, including one in an interview conducted by the Deputy Independent Counsel, who signed the appellate brief.

Mitchell's involvement from Feinberg and Fine.[44]

Most significant, near the end of the rebuttal portion of the closing argument, Independent Counsel highlighted the testimony that Feinberg and Fine were not aware of John Mitchell's involvement with Park Towers, asserting that the secrecy reflected in the supposed concealment of Mitchell's involvement was "the hallmark of conspiracy." Despite knowing that Shelby would have contradicted Feinberg's testimony, Independent Counsel repeatedly emphasized that the testimony was "absolutely unimpeached." Tr. 3519.

2. The "Contact at HUD"; the Documents Mentioning Shelby's Contacts With DeBartolomeis; and the Post-Allocation Waiver

Independent Counsel also intended to mislead the jury and the courts as to the following: (1) that a reference in the Fine Memorandum dated July 31, 1985 to "the contact at HUD" with whom Shelby was to meet the following week was a reference to Dean; (2) that Dean was Shelby's principal HUD contact on Park Towers; (3) that there were no documents reflecting Shelby's contacts with DeBartolomeis; (4) that Dean was responsible for a post-allocation waiver that allowed the Park Towers project to go

[44] In most instances, Independent Counsel would make this point in the same place in its briefs where it asserted that Nunn concealed Mitchell's involvement with Arama from Martinez and that Shelby concealed his contacts with Dean from Feinberg and Fine. As discussed in Parts __, supra, and Part II.B.5., infra, the Independent Counsel knew that both those points were false.

forward; and (5) that Dean gave Shelby a copy of the post-allocation waiver. Independent Counsel knew these points were not true.

Richard Shelby consistently told the Independent Counsel that his principal contact on Park Towers was Silvio DeBartolomeis, who served as Deputy Assistant Secretary for Multi-Family Housing and Acting Assistant Secretary for Housing during the periods relevant to the Park Towers funding. In an interview on April 8, 1992, Shelby told Independent Counsel that the reference to "the contact at HUD" in the Fine Memorandum, was not a reference to Dean, but to DeBartolomeis, then Deputy Assistant Secretary for Multi-Family Housing. Shelby also stated that, at the time of the Fine Memorandum, he had known Dean for only six weeks. Attachment 21, at 8. Independent Counsel had no reason to disbelieve Shelby's statements. Dean and Shelby met outside DeBartolomeis' office while Shelby was visiting DeBartolomeis concerning Park Towers. As of July 31, 1985, Shelby and Dean had not yet had their first lunch together, which occurred on August 9, 1985, after being rescheduled from August 1. Independent Counsel also possessed a number of documents reflecting Shelby's contacts with DeBartolomeis, particularly with regard to a post-allocation waiver that DeBartolomeis signed in May 1986 that allowed the Park Towers project to go forward. Among these documents were a March 10, 1986 memorandum recording the fact that Shelby stated that he met with DeBartolomeis who told him (Shelby) that he (DeBartolomeis) would be granting the

post-allocation waiver (Attachment 27); an April 15, 1986 memorandum recording the fact that Shelby had been contacted by DeBartolomeis who said there was a letter coming from Washington to the Dade County PHA (Melvin Adams) requesting some additional information (Attachment 28); and a June 5, 1986 letter from Shelby to Feinberg forwarding a copy of the post-allocation waiver and stating that Shelby had received it from DeBartolomeis. Attachment 29.

Independent Counsel did not make a Brady disclosure of Shelby's statement concerning "the contact at HUD" until August 20, 1993. Attachment 5, at 7. Despite the fact that documents existed which contradicted claims that Independent Counsel intended to make, none of the documents were provided in a Brady disclosure.

The evening before Shelby testified, Independent Counsel asked Shelby to review documents in order to refresh his recollection concerning whom he dealt with at HUD on the Park Towers project. But Independent Counsel excluded from the documents that he presented for Shelby's review all of the documents reflecting Shelby's contacts with DeBartolomeis.

The following day, Shelby testified that with regard to Park Towers, he dealt "primarily with Silvio DeBartolomeis, but I also had conversations at one time or another with Miss Dean and Hunter Cushing." Immediately following this testimony, Independent Counsel questioned Shelby concerning his review of documents on the previous evening "trying to refresh [his]

recollection as to who you dealt with at HUD on this project." Shelby responded that his review revealed some documents mentioning Defendant but no documents mentioning DeBartolomeis or Cushing. Tr. 547-48.

Independent Counsel acknowledged that it had intended that the jury would infer from the absence of documents recording Shelby's dealing with DeBartolomeis and Cushing that Shelby was not testifying truthfully when he said that his primary contact was DeBartolomeis and instead the jury should conclude that it was Dean. Independent Counsel also acknowledged that it had sought to mislead the jury that a reference in the Fine Memorandum to "the contact at HUD" was a reference to Dean even though Shelby had told Independent Counsel that the reference was in fact to DeBartolomeis. Gov. Rule 33 Opp. at 9 n.5.[45]

Independent Counsel also included entries in its charts intended to mislead the jury that Dean was responsible for the post-allocation waiver and provided him with a copy which he then provided to Feinberg. Attachment 30, at 2. In closing argument, Independent Counsel told the jury that a meeting between Dean and Shelby on March 23, 1986, and a lunch on April 16, 1986, (both of which occurred after DeBartolomeis told Shelby that he (DeBartolomeis) would be granting the waiver) were "continuing meetings on Park Towers." Tr. 3394. There was no evidence, and

[45] After Shelby testified, Independent Counsel introduced the document into evidence through the testimony of Martin Fine without eliciting from anyone including Shelby, the identity of the referenced "contact at HUD." Tr. 661-62.

the Independent Counsel had absolutely no reason to believe, that either occasion involved discussion of Park Towers. Independent Counsel, however, represented it to the Court and jury as fact.

In Independent Counsel's brief in opposition to Dean's motion for a new trial, and in oral argument on February 14, 1994, Independent Counsel defended its effort to mislead the jury that Dean was Shelby's principal contact at HUD on Park Towers, and that the reference in the Fine Memorandum was a reference to Dean, on the basis that there were no documents showing Shelby's contacts with DeBartolomeis. Gov. Rule 33 Opp. at 9 n.5; Tr. 10-11 (Feb. 14, 1994). At oral argument, Independent Counsel also defended its actions on the ground that Dean had been responsible for the post-allocation waiver. Independent Counsel took these positions in defense of its actions, despite the fact that it had received information and documents that indicated the facts underlying its position were false.

3. The Park Towers Rapid Reply

At the end of November 1985, Richard Shelby obtained a copy of the Park Towers Rapid Reply that initiated the Park Towers funding process. He then faxed the document to Martin Fine, the Park Towers developer.

In an Independent Counsel interview between April 8 and May 6, 1992, Shelby stated that he had received a HUD form relating either to Park Towers or Foxglenn (a project in Count Two), but probably Park Towers, from Hunter Cushing. Attachment 21, at 20.

In another Independent Counsel interview on May 18, 1992, Shelby stated that he believed that he received the copy of the Park Towers rapid reply from DeBartolomeis. Attachment 22, at 6. In the grand jury on June 4, 1992, Shelby testified that he could have received the rapid reply from Dean, Silvio DeBartolomeis, or Hunter Cushing, but that he could not remember at that time. Attachment 31, at 23-24.

The Superseding Indictment pertaining to Park Towers made allegations intended to suggest that Defendant had provided "an internal HUD funding document," dated November 26, 1985, known as a "Rapid Reply Letter," to Shelby, who provided the document to Martin Fine. Superseding Indictment, Count 1, ¶¶ 70-72, at 22.

Despite the fact that Shelby's three statements to Independent Counsel contradicted the Superseding Indictment, none of these statements were provided to the defense in the Brady letter of August 20, 1993,[46] and Shelby was not questioned by the defense with respect to these statements.

In the Park Towers summary chart used in opening argument, Independent Counsel included entries similar to those in the Superseding Indictment suggesting that Dean provided Shelby a copy of the Park Towers rapid reply. Attachment 30, at 1-2. At trial, Independent Counsel questioned Shelby concerning the "rapid reply" and from whom it was received. Shelby testified

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[46] Even though the third statement admitted the possibility that Dean had provided Shelby a copy of the Rapid Reply, the statement constituted Brady material because it suggested that, contrary to the Superseding Indictment, someone other than Dean could have provided Shelby with the document.

that his best recollection was that Hunter Cushing provided him with the document. Tr. 554-55. Later in the direct examination of Shelby, Independent Counsel then had the Park Towers rapid reply marked for identification as Government Exhibit 79 and again questioned Shelby about it. At this time, however, Independent Counsel did not refer to the document as a "rapid reply," and did not ask Shelby who sent it to him. Tr. 574. Independent Counsel then introduced the document into evidence without further questioning. Tr. 574-75.

Thereafter, despite Shelby's testimony to the contrary, Independent Counsel continued to use entries in its charts, and made statements in closing argument, intended to suggest that Dean provided the document to Shelby. In doing so, Independent Counsel argued that Shelby and the developer he represented knew about the funding even before the HUD Regional Office did by stating:

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

Tr. 3393.[47]

When this matter was raised in Dean's motion for a new trial, Independent Counsel defended its actions by incredibly denying that it had sought to mislead the jury that Dean had

[47] These words were very similar to those used moments earlier with regard to the Arama rapid reply, which Defendant admitted she had provided to Louie B. Nunn. Tr. 3385.

provided the document to Shelby. Gov. Rule 33 Opp. at 10.

At the same time that Independent Counsel was preparing its Opposition to Defendant's Rule 33 Motion and denying therein that it had sought to mislead the jury as to whether the Defendant had provided Shelby with a copy of the Park Towers rapid reply, Independent Counsel was telling the probation officer that Dean provided the document to Shelby. Presentence Investigation Report at 6 (Dec. 28, 1993). When Defendant told the probation officer that the record showed that she had not provided the document to Shelby, Independent Counsel told the probation officer that, though Dean had not provided the document to Shelby, she had someone else provide him with a copy of the document. Revised Presentence Investigation Report at 6, 47 (Feb. 7, 1994), Attachment 32, at 6, 47. Not a shred of evidence introduced at trial supported Independent Counsel's claim that Defendant had someone else provide Shelby with a copy of the rapid reply.

4. Shelby's Supposed Concealment of His Contacts With Defendant From Feinberg and Fine

In a telephonic interview on May 18, 1992, Eli M. Feinberg told Independent Counsel attorneys that Richard Shelby had told him that he and Dean were good friends and that Shelby would check with her on the status of how things were going through the bureaucracy regarding Park Towers. Attachment 23 at 2-3. By definition, Feinberg's statements demonstrated that Shelby had

not concealed his contacts with Dean from Feinberg.[48]

When Shelby testified as a witness, Independent Counsel asked him no questions concerning whether he told Feinberg about his contacts with Dean. However, Feinberg, a government witness, testified both on direct and cross-examination that Shelby had indeed told him about his contacts with Dean. Tr. 636-37, 640.

After Feinberg testified, Independent Counsel introduced through the testimony of Martin Fine, Government Exhibit 85, a February 3, 1986 memorandum Fine had written to the file indicating that Shelby had lunch that day with "his friend at HUD." Tr. 664-64.[49]

Since Feinberg's statements in his May 1992 interview that Shelby told him that Dean would check on the status of Park Tower funding contradicted claims that Independent Counsel intended to make at trial, the Independent Counsel was obligated to disclose those statements immediately upon issuance of the Superseding Indictment. The Independent Counsel did not disclose Feinberg's statement until August 20, 1993, when it informed the defense that Feinberg had stated that Shelby had contacts with both

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[48] In the extensive interviews of Shelby, Independent Counsel attorneys never asked Shelby whether he concealed his contacts with Dean from Feinberg. There would have been no purpose in asking Shelby such a question, since Feinberg's statements made clear that Shelby had not concealed such contacts.

[49] Independent Counsel did not elicit testimony from anyone as to why Defendant was not referenced by name. It knew, however, that both Shelby and Feinberg would have testified that the failure to reference Defendant by name, did not reflect that Shelby concealed his contacts with Defendant from Feinberg.

DeBartolomeis and Dean. Attachment 5, at 5-6. By introducing the Fine Memorandum into evidence without eliciting testimony as to why the Defendant was not identified by name, Independent Counsel attempted to mislead the jury and the courts to believe that Dean was "the contact at HUD" and "his friend at HUD," and that her identity had been concealed by Shelby - both of which Independent Counsel knew was false.

Further, despite the Feinberg testimony and interview to the contrary (outlined above), Independent Counsel repeatedly asserted in its briefs in this court and the Court of Appeals that there existed evidence of a conspiracy to supposedly conceal Mitchell's involvement with Park Towers from Fine and Feinberg. As a basis for its claim, Independent Counsel cited the failure of the Fine Memorandum to identify the Defendant by name as evidence that Shelby concealed his contacts with the Defendant from Feinberg and Fine and that such concealment was further evidence of conspiracy. Gov. Acq. Opp. at 17; Gov. Supp. Acq. Opp. at 16 and n. 17; Gov. Rule 29, Opp. at 22 and n. 22; Gov. App. Br. at 24. At no time did the Independent Counsel inform the court that, contrary to their position, Feinberg had indicated in his testimony and at his interview that Shelby had told him about his contacts with Dean. Attachment 23, at 2-3. Instead, Independent counsel maintained its position, knowing its claim was false thereby misleading the jury and the courts.

5. The September 9, 1985 Lunch

Defendant had lunch with Mitchell and Shelby on September 9, 1985. Shelby sent Dean some materials apparently related to Park Towers the following day. However, in Independent Counsel interviews between April 8 and May 6, 1992 (Attachment 21, at 9), May 18, 1992 (Attachment 22, at 9-10), May 29, 1992 (Attachment 33, at 2), and before the grand jury on June 4, 1992 (Attachment 31, at 22-23), Shelby stated that Park Towers was not discussed at the September 9, 1985 lunch. In fact, he stated that he went out of his way to ensure that it was not discussed. Despite these statements by Shelby to the contrary, and apparently with no other basis, the Independent Counsel included entries in the Superseding Indictment suggesting that Park Towers was discussed at the lunch. Superseding Indictment, Count 1, ¶¶ 68-69, at 21.

Independent Counsel knew that the inference that Park Towers was discussed at the lunch would be the only basis it would have for claiming that Defendant ever discussed Park Towers in Mitchell's presence or that Defendant was aware of Mitchell's involvement with Park Towers. Nevertheless, Independent Counsel did not include Shelby's contrary statements in the August 20, 1993, Brady letter. After the Court chastised Independent Counsel for the belated Brady disclosures in the letter, and warned them against any further violations,[50] Independent Counsel continued to fail to disclose such information. Instead, Independent Counsel left such statements to be discovered among

[50] Transcript of Hearing 15 (Aug. 31, 1993).

the thousands of pages provided as Jencks materials on September 13, 1993.

Independent counsel did not question Shelby at all about the lunch during direct examination. After the defense counsel failed to address the matter on cross-examination because he was unaware of Shelby's prior inconsistent statements, on redirect Independent Counsel elicited testimony that formed the basis for the inference that Park Towers was discussed at the lunch. Tr. 603. Independent Counsel relied on that inference in oral argument and in every memorandum it filed in this Court, as well as in its appellate brief, Tr. 2029, 3392-93; Gov. Acq. Opp. at 17 (Oct. 4, 1993); Gov. Supp. Acq. Opp. at 17 (Oct. 29, 1993); Gov. Rule 29 Opp. at 23 (Dec. 21, 1993); Tr. 8-9 (Feb. 14, 1994); Gov. App. Br. at 22.[51]

C. Other Prosecutorial Misconduct Generally Applicable to Count One

This court recognized that Independent Counsel knew that Ronald L. Reynolds, a HUD driver who testified about driving Defendant to lunches where she met with John Mitchell, would not be a truthful witness prior to putting him on the stand (e.g., the government possessed evidence in the form of HUD motor pool logs that were an exhibit to the Defendant's Senate testimony at issue in the Indictment. Tr. 26 (February 14, 1994).

[51] Apparently, the court relied on this inference in denying Defendant's motion for judgment of acquittal at the close of Independent Counsel's case. Tr. 2946-47.

Nevertheless, Independent Counsel utilized Reynolds' testimony to suggest that Defendant lied to the jury about John Mitchell. In closing argument, Independent Counsel devoted a significant amount of time (3 full pages of the trial transcript) to a discussion of Reynolds' testimony in this regard and used the word "lie" or "lied" six times when referring to the Defendant. Tr. 2420-3425.[52] Again, in rebuttal, Independent Counsel devoted additional time (an additional two paragraphs of the trial transcript) to a discussion of Reynolds' testimony, asserting that his testimony had shown that the Defendant had lied, and used the word "lie" or "lied" an additional three times. Tr. 3505-3507. This is incredible when Independent Counsel himself did not dispute that Reynolds "was a weird guy and couldn't be believed." Tr. 3224.

Even though the prosecutor had a strong basis for knowing that in fact it was his own witness Reynolds who was lying, Independent Counsel nevertheless relied on Reynold's testimony as a basis to assert that Defendant had lied.

* * *

The misconduct arising out of Count One was pronounced in every respect. From the overwhelming pattern of intentional

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[52] This testimony was further emphasized when Independent Counsel put a motor pool log on a visual presenter to suggest to the jury that, contrary to Dean's testimony, Reynolds was frequently Dean's driver, noting to the jury that Reynold's name, "as you'll see, runs throughout." Tr. 3424. The exhibit in fact demonstrated only that while Reynolds often drove various HUD personnel in October 1986, he drove Dean on only one occasion. Tr. 943-947.

Brady and Giglio violations, to eliciting testimony (and the implications drawn therefrom) which Independent Counsel had reason to know were false, to the misleading arguments and statements made to the jury and later the courts, Independent Counsel acted with reckless abandon and a total disregard for its obligations as a prosecutor. Independent Counsel was driven to convict Defendant of involvement with John Mitchell's HUD business in any way it could - even when it had reason to know that she was not guilty of the charge.

IV. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNT TWO

Count Two of the Superseding Indictment alleged that Defendant conspired with Andrew Sankin to cause HUD to take certain actions concerning five matters: an exception rents waiver on the Necho Allen Apartments in Pottstown, Pennsylvania in February 1985; mod rehab funding for Regent Street Apartments in Philadelphia, Pennsylvania in 1985; mod rehab funding for Alameda Towers in Puerto Rico in 1985 (also involving Thomas Broussard); mod rehab funding for the Foxglenn Apartments in Prince George's County, Maryland in 1986 (also involving Richard Shelby); and mod rehab funding for Eastern Avenue Apartments in Prince George's County, Maryland in 1987 (also involving Richard Shelby).

The Court of Appeals found that there was sufficient evidence to sustain a conviction only as to the Necho Allen waiver and the Alameda Towers mod rehab funding.

The first area of prosecutorial misconduct with respect to Count Two involves Independent Counsel's efforts to mislead the court and the jury that certain receipts represented evidence of gifts and meals provided by Andrew Sankin to the Defendant as part of the conspiracy to cause HUD to take certain action, see infra, when Independent Counsel had reason to know that the receipts, in fact, did not.[53]

[53] Aspects of this matter were previously raised with the court; but additional information has been discovered making it

The second area of misconduct with respect to Count Two concerns Independent Counsel's failure to meet its Brady disclosure obligations with respect to Sankin's 1988 Harvard Business School application. In the application, Sankin made statements concerning the Foxglenn project that were directly contrary to his in-court testimony. The document was received via facsimile by Independent Counsel in May 1992. However, the document was not provided as Brady material and was not included in the materials produced on Sankin during discovery in the summer of 1992. The document was only produced in December 1992 as part of Independent Counsel's 3700-page preliminary exhibit production, but was buried in a 572-page group of documents pertaining to the Stanley Arms Apartment, and, as a result, was only recently discovered by the defense.

A. The Evidence With Respect to the Necho Allen Waiver and Alameda Towers Is Tenuous

As discussed more fully below, the evidence of the Defendant's involvement in a conspiracy as to the Necho Allen waiver and the Alameda Towers funding is tenuous, particularly given the timing of HUD's actions on Necho Allen and Alameda Towers and the evidence the Court of Appeals relied upon as evidence of conspiracy.

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clear that Independent Counsel made misleading representations in defense of its actions.

1. Timing of HUD Action Does Not Establish Conspiracy

The last HUD action with which Defendant was alleged to have been involved concerning the Necho Allen waiver occurred on March 1, 1985. Superseding Indictment ¶ 34, at 32. The last HUD action with which Defendant was alleged to have been involved concerning Alameda Towers occurred on November 27, 1985. Id. ¶ 63, at 37.[54] Yet, the eight Sankin receipts cited by the Court of Appeals as evidence of conspiracy, partly because some of them referenced the discussion of mod rehab (slip op. 18-19), bore dates beginning in May 1986, well after any of the HUD actions on the Necho Allen waiver or the Alameda Towers' funding in which Defendant was alleged to have been involved.[55] Thus, whether or not the discussion of mod rehab may have taken place, as Sankin's

[54] Compare with Independent Counsel's Alameda Towers chart which gives January 1986 as the last HUD action.

[55] The Court of Appeals apparently relied on Independent Counsel's Exhibits 11f, 11g, 11j, 11k, 11l, 11m, 11u, 11w. These are the receipts that actually identified Defendant by name or position and on which Independent Counsel had based entries in the Superseding Indictment. Even if one included the receipts that did not identify the Defendant, the only receipt admitted into evidence that bore a date at all near the time of the last HUD act on Alameda Towers was Government Exhibit 11c, which mentioned the discussion of mod rehab units with HUD officials in December 1985. But Independent Counsel acknowledged that 11c "clearly did not relate to Defendant" (Gov. Rule 33 Opp. at 13) and that it was "aware [that the receipt] did not involve Ms. Dean." Transcript of Hearing at 8 (Feb. 14, 1994). Government Exhibit 11d mentioned the discussion of mod rehab with HUD officials on January 25, 1986. Government Exhibit 11d, however, is the receipt that Independent Counsel withdrew after the Court indicated that Independent Counsel would have to tie it to the Defendant. See Tr. 1143-1144.

entries on his receipts may suggest, those receipts have no bearing on any project contained in the Indictment, and certainly do not establish evidence of a conspiracy between the Defendant and Sankin.

2. Sankin's Thinking and Actions Does Not Establish A Conspiracy

The Court of Appeals placed considerable weight on Sankin's thinking when he decided not to press a demand to be compensated separately for obtaining the rent increase on the Stanley Arms as evidence of a conspiracy. Sankin claimed that he did so because he feared jeopardizing his relationship with HUD. The Court also considered that after Sankin received lump sum payments from his mod rehab consulting in 1987,[56] Sankin gave bonuses to the day-to-day manager of the Stanley Arms (who was also his assistant in every other transaction or project in which Sankin was involved).[57] However, there simply is no evidence that Dean said or did anything to cause Sankin's actions, and thus Sankin's

[56] The rental increase was not submitted until July 31, 1986. Attachment 34. The rental increase was initially approved on October 22, 1986, with a hearing set for December 3, 1986. Attachment 35. At that hearing, the increase was approved by the Rent Administrator. Attachment 36. Tenants then filed an appeal on December 16, 1986. Attachment 37. The appeal was dismissed without prejudice on May 1, 1987. Attachment 38. By order of June 11, 1987, earlier orders were vacated with a hearing set for August 6, 1987. Attachment 39. Presumably the rental increase went into effect some time after that.

[57] Sankin did not start to manage the Stanley Arms until May 1985. Attachment 40. The Court of Appeals mistakenly believed that Sankin began to manage the apartments in 1984. Slip Op. 18.

thinking is not evidence against Dean.

Even if evidence of Sankin's thinking and actions was also evidence against Dean, which it is not, the timing of the transactions does not establish a conspiracy. Sankin testified that he did not seek extra payment until after the increase was approved. Tr. 1285-1286. It is thus possible that Sankin did not even make his request for extra compensation until after Dean ceased to be Executive Assistant on July 2, 1987. In any case, his decision not to press the issue certainly came more than a year after any action Defendant was believed to have taken on his behalf concerning the Necho Allen waiver or Alameda Towers. Further, as to Alameda Towers, Sankin did not receive the first lump sum payment on the Alameda Towers project until December 1987, approximately two years after the last action Defendant was supposed to have caused HUD to take on that project.

The other actions Sankin was alleged to have taken on Dean's behalf, upon which the Court of Appeals relied -- including an unknown amount of assistance with a dispute over a condominium fee, attendance at a closing, and political and charitable contributions--were much less consequential and do not constitute evidence of a conspiracy. For example, the $2,000 contribution to the Chavez campaign that Sankin stated was solicited by Defendant occurred in October 1986 (Gov. Exhs. 158a, 158b), and the contribution to F.O.O.D. for Africa that Sankin testified Defendant had solicited occurred in May 1987,[58] both

[58] Independent Counsel attorneys knew that Sankin's

well after the Defendant is alleged to have taken any action on Necho Allen and Alameda Towers.

Notwithstanding the Court of Appeals' determination to uphold a conspiracy as to these matters, the weakness of the evidence of conspiracy on the Necho Allen waiver and the Alameda Towers funding must be considered in determining the cumulative effect of all the demonstrated prosecution abuses which occurred in this prosecution.

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testimony was false and that the contribution was in fact solicited by one of the developers of the Eastern Avenue project. On May 28, 1987, Andrew Sankin contributed $250.00 to a charity called F.O.O.D. for Africa, which was supported by HUD Assistant Secretary of Housing Thomas T. Demery. Banking Hearings at 1186, 1193. There had never been any suggestion that Dean had supported F.O.O.D. for Africa. In fact, it had been alleged that she had been responsible for bringing to the attention of the HUD Inspector General the fact that developers and consultants were contributing to the charity at fundraisers attended by Demery. See, e.g., Ostrow and Frantz, HUD Clients Flocked to Favorite Charity, L.A. Times, July 9, 1989, Part I, at 1, col. 3, 24, col. 2.

Further, in an interview on April 23, 1992, Sankin told Independent Counsel that the Altman Brothers told him to contribute to F.O.O.D. Attachment 41 at 12. Independent Counsel also possessed a May 19, 1987 letter from Israel Roizman, an employee of the Altman Brothers, asking Sankin to make a minimum contribution of $250.00 by May 28, 1987. Attachment 42. Thus, Independent Counsel had reason to know with absolute certainty that Sankin's contribution to F.O.O.D. had not been solicited by Dean. Yet, Independent Counsel did not advise either the court or the defense that they knew that the testimony was false. This failure provides yet another example of Independent Counsel's failure to correct the testimony of Government witnesses, which it knew to be false.

B. The Sankin Receipts

1. The Proposed Exhibits

In its opening statement, Independent Counsel described Andrew Sankin as a person who was "wining and dining" Deborah Gore Dean and "buying her gifts." Tr. 58. Independent Counsel planned to introduce into evidence seventeen receipts for the purpose of misleading the jury that the receipts reflected meals or gifts bought by Sankin for Dean as part of a conspiracy to cause HUD to take certain action. There are two categories of such receipts. One category consisting of nine receipts supported separate entries in the Superseding Indictment. These receipts which included eight for entertainment (Gov. Exh. 11f, 11g, 11j, 11k, 11l, 11m, 11u, 11w) and one for a gift (Gov. Exh. 11p), identified Dean by name and/or position, including "Exec. Asst." or "Chief of Staff." Dean's calendars, upon which Independent Counsel had relied in many other instances, contradicted many of these receipts as evidence of meals or gifts provided by Sankin to Dean.[59] Superseding Indictment, Count Two,

[59] In only one case did Dean's calendars make any reference to Sankin on the date in question. For July 23, 1986, Government Exhibit 11k showed Sankin taking Dean to dinner at the 219 Restaurant in Alexandria. Dean's calendars showed her dining with Donald DeFranceaux on that date, though Sankin's name was also penned in. Dean's calendars were also inconsistent with other receipts. With regard to Government Exhibit 11j (July 18, 1986), which showed Sankin entertaining Dean and Hunter Cushing at the Gangplank, Dean's calendars indicated that she took four hours of sick leave and had a 1:00 p.m. meeting, and was to dine at 7:00 with Richard Giegengack and Noury Harold. With regard to Government Exhibit 11l (lunch on August 17, 1986), Dean's calendars indicated that she was ill throughout the month of August 1986. With regard to Government Exhibit 11m (dinner on November 14, 1986), Dean's calendars indicated that she was

¶¶ 75, 79, 80, 84, 88, 90, 100, 105, at 38-42.

A second category, consisting of eight receipts, did not name Dean or her position, but instead identified HUD officials generally or HUD titles, such as "staff assistant" to the Secretary. At HUD, "staff assistant" was the title of a position below "special assistant" to the Secretary (Tr. 1779), which was two levels below Defendant's position of Executive Assistant. Documents and other information available to Independent Counsel made clear that certain of these receipts did not reflect gifts or meals for Dean, but apparently applied to a woman at HUD whom Sankin was dating. None of these receipts were relied upon in the Superseding Indictment, reflecting Independent Counsel's belief that they did not apply to Dean. Independent Counsel nevertheless intended to introduce all of these receipts into evidence, and ultimately did introduce four of them, in a manner intended to mislead the jury that the receipts applied to Dean.

Of the five receipts from a four-week period at the end of 1986, one of the receipts (Gov. Exh. 11p) identified Dean by name and had been relied upon to support an entry in the Superseding Indictment. Four of the receipts dated during this period did not identify Dean by name or position, but in three cases (Gov. Exhs. 11n, 11o, and 11r) referred to "Staff Asst." to the Secretary of HUD, with the fourth (Gov. Exh. 11q) referring to

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scheduled to give a luncheon speech in Carlisle, Pennsylvania, the following day. With regard to Government Exhibit 11u (lunch on May 16, 1987), Dean's calendar indicated that she would be at the Preakness all day.

"HUD Asst to Sec."

11n	11/29/86 (Saturday), $24.00, Hunan in Chinatown, notation: "Dinner/Staff Asst. to Sec. @ HUD, Discussed Mod Rehab"
11o	12/19/86 (Friday), $140.00, Old Anglers Inn in Potomac, notation: "Dinner /Staff Asst. to Sec at HUD, discussed new tax effects"
11p	12/23/86, $300.00, Krupsaw Antiques, for a cup and saucer, notation: "Bus Gift Deb Dean"
11q	12/24/86, $168.44, Georgetown Leather Design, for an unidentified item, notation: "Bus Gift HUD Asst to Sec."
11r	12/26/86 (Friday), $27.00, J. Paul's in Washington, notation: "Lunch w/Staff Asst. to Sec of HUD" (withdrawn)

Government Exhibit 11r was withdrawn. But Independent Counsel acknowledged that it intended to lead the jury to believe that Government Exhibits 11n, 11o, and 11q applied to Dean, arguing to this court and the Court of Appeals that on their face these receipts were "arguably related to" or "appeared to" relate to Dean, and that Independent Counsel had no reason to know that these receipts did not relate to Dean. Gov. Rule 33, Opp. at 13 n. 11; Gov. App. Br. 49; Tr. 8 (Feb. 14, 1994). This statement is incredible when considering the fact that Independent Counsel never asked Sankin whether the receipts related to Dean, even when documents appeared to contradict the conclusion that they did. Before the Supreme Court, Independent Counsel misstated that 11o and 11q in fact "referenced [Dean] by her name or HUD title," which they did not.

Further, the notations on the receipts indicate that the rceipts do not refer to Dean. Anyone with any familiarity with

govermental hierarchy, like Sankin, would not have identified an executive assistant as a staff assistant. Sankin also would not have referred to Dean by name in one receipt, and then by different titles in other receipts.

In addition, none of the staff assistant entries matched entries in Dean's calendars. With regard to Government Exhibit 11o, Dean's calendars showed that she was dining with Silvio DeBartolomeis on the evening of December 19, 1986; and her own receipts, of which Independent Counsel also had copies, showed that she paid a check for $180.00 at The Guards Restaurant on the evening in question. Thus, Independent Counsel had reason to believe that 11o did not apply to Dean.

In order for Exhibit 11q to have been "related to" Dean, Sankin would have had to purchase a $300.00 gift for Dean on December 23, 1986, identifying her on the receipt as "Deb Dean," and the following day purchase another gift for Dean for $168.44, this time identifying her as "HUD Asst to Sec." Because of the substantial likelihood that the gift was a Christmas or holiday present (particularly given the date), for the staff assistant whom Sankin admitted he was seeing and whom he had seen on November 29, 1986, December 19 and 26, 1986, Independent Counsel had reason to believe, again that the receipt did not apply to Dean.[60]

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[60] In an interview, Sankin had told Independent Counsel attorneys that he had given Dean birthday and Christmas gifts every year. He stated that he had given her flowers and bottles of wine costing "in excess of $50 or $100," and a piece of fine china worth several hundred dollars. Sankin mentioned nothing

Independent Counsel could have easily resolved any doubts concerning whether these receipts applied to Dean by merely asking Sankin. Sankin provided the names of at least two women staff assistants from HUD whom he dated[61], one of which had also been a staff assistant and a special assistant to the secretary, but who had left to become a deputy assistant secretary in September 1985. Tr. 1779-80, 1788. Independent Counsel also never asked Sankin whether he ever purchased a cup and saucer for Dean, whether he made such a purchase just before Christmas 1986, or whether he then bought Dean another gift the next day at Georgetown Leather Design. Independent Counsel certainly had the ability to determine conclusively whether the receipts in fact related to Dean. Independent Counsel possessed: (1) Dean's calendars; (2) Dean's receipts and checks; (3) Dean's boyfriend's calendars and receipts (Richard Giegengack), (4) receipts and calendars of Silvio DeBartolomeis and other HUD officials; and, (5) most importantly Andrew Sankin. Yet, despite the fact that Independent Counsel had reason to believe that the receipts did

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about another expensive gift of the type that would have come from Georgetown Leather that he might have given to Dean contemporaneously with the fine china or at any other time. Attachment 41 at 12-13.

[61] In court, Sankin, who did not date Dean, would acknowledge dating two women at HUD, Carter Bell and Janice Golec. In a 1991 interview, Carter Bell had told Independent Counsel that she was a staff assistant to the secretary from October 1986 until March 1987. Attachment 43 at 1.

Sankin testified that he remembered dating Bell during basketball season (Tr. 1193), which could only have been during the October 1986-March 1987 period she was a staff assistant.

not or may not have applied to Dean, and that Sankin could have resolved any doubts, Independent Counsel decided not to even ask Sankin about the receipts, but instead introduced the receipts into evidence in order to mislead the jury that the receipts related to Dean.[62] Such conduct by Independent Counsel exhibits a gross disregard for the truth and its obligations to the Court, to the Defendant and to the public.

Apart from the receipts that Independent Counsel used to lead the jury to believe applied to Dean, Independent Counsel produced in discovery only one other Sankin receipt involving a HUD official[63] - which did not even relate to either of the women Sankin admitted to dating. Given Sankin's acknowledgment that he would claim business expenses if a few sentences of business were discussed when he was out with HUD personnel including the women he dated, Tr. 1189-1193, 1282-3, it is highly unlikely that Sankin provided Independent Counsel with only one receipt other

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[62] On cross-examination, Sankin stated that he did not believe that 11q ("Asst. to Sec.") or 11v ("Asst. Sec. of HUD") applied to Dean because he would not have used such titles to identify Dean. Despite that testimony, Independent Counsel continued to rely on those receipts in its charts. This is even greater reason to expect that Sankin would have disavowed Government Exhibits 11n and 11o, which referenced a "staff assistant" and which Independent Counsel had reason to know from other sources did not apply to Dean.

[63] That receipt, though not legible in the form provided to the defense, identified Pamela Patenaude and involved a meal some time in 1986. Attachment 44. Patenaude had been a staff assistant to the Secretary for at least part of 1986. She testified that she left the position sometime in 1986. Tr. 3247. During cross-examination, she stated that she left the position at the end of 1986. Tr. 3253. Patenaude, however, was not one of the women from HUD whom Sankin dated. Tr. 1282.

than those which Independent Counsel. If there did exist other receipts, Independent Counsel violated its discovery obligations by failing to provide any of them to the defense.

In addition, throughout most of the period covered by the Sankin receipts, Dean was seeing an architect named Richard Giegengack. Giegengack kept fairly complete calendars that often reflected his engagements with Dean. Those calendars and Giegengack's receipts were subpoenaed by Independent Counsel in 1991 or 1992 and were never returned. Thus, it is possible that Giegengack's calendar entries or receipts contradicted some of the Sankin receipts.[64] Any evidence that directly contradicted the Sankin receipts, especially those that named Dean ~~by name or~~ position, would have been particularly important to the defense. If the defense could have shown that Sankin attributed receipts to Dean with regard to events at which she was not actually present, the defense could have used such evidence to call all receipts that identified Dean by name or position into question. Any materials of that nature that existed, however, were never provided in a Brady disclosure nor in discovery.[65] If there are any such materials Independent Counsel, should be directed to produce them.

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[64] As noted, on one occasion when Sankin's receipts indicated that he entertained Dean (July 18, 1986) Dean's calendars showed that she was dining with Giegengack and Noury Harold (a client of Geigengack's).

[65] Any evidence contradicting the receipts that identified Dean by name or position would be particularly important in light of the Court of Appeals' reliance on the receipts in upholding the verdict as to Count Two.

2. Introduction of the Receipts at Trial

At trial, Independent Counsel introduced into evidence Government Exhibit 11c, a $157.97 receipt for Le Pavillon, dated December 23, 1985, bearing the notation "Lunch w/HUD Officials re: mod rehab units". Sankin testified that he did not remember who was present on the occasion reflected on the receipt. Tr. 1142.

Independent Counsel then proceeded to introduce into evidence Government Exhibit 11d, a $70 receipt for Duke Ziebert's on January 25, 1986, where the notation indicated that Sankin discussed mod rehab with HUD Officials. When the defense objected to the introduction of the exhibit without evidence tying it to Dean, the court stated:

> All right. Well, let's see if they can tie it in some way. I'll hold it open to see if it's tied in.

Tr. 1143-44.

Independent Counsel did not then attempt to question Sankin about his recollection of the specific facts concerning the Government Exhibit 11d, but instead went on to other receipts. When the court asked how many receipts were to be introduced, Independent Counsel did not respond directly but indicated that the examination could not conclude that day. Independent Counsel then introduced a large group of receipts en masse, including

Government Exhibits 11n, 11o, 11p, and 11q, listed above, and Government Exhibit 11v,[66] which did not identify Defendant by name or position. Independent Counsel elicited no testimony tying the receipts to the Defendant. At the end of the day, all the receipts had been admitted into evidence without any testimony tying the receipts to the Defendant. The jury was allowed to believe incorrectly that all the receipts applied to the Defendant, otherwise they would not have been admitted by the court. The defense was not permitted to cross-examine Sankin until the next day, see infra, and thus the introduction of all the receipts in this manner had a devastating effect. It established, again incorrectly, in the minds of the jurors overnight that in fact Sankin had been "wining and dining" the Defendant even though there was no testimony tying any of the receipts to the Defendant.

3. Independent Counsel's Misrepresentations to the Courts Concerning the Receipts

The next day, on cross-examination, defense counsel pressed Sankin on the accuracy of his receipts, particularly the receipt relating to the Georgetown Leather purchase that appeared to be for Sankin's girlfriend. When Sankin could not connect the receipts to Dean, defense counsel asked Sankin if Independent Counsel had tried to make the connection with him prior to trial.

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[66] Though Government Exhibit 11v did not necessarily apply to the staff assistant Sankin had been seeing in December, Independent Counsel had ample reason to know that 11v did not relate to the Defendant. See Dean Rule 33 Mem. at 114-15.

Tr. 1190. Sankin said no, and, when pressed, said he had warned Independent Counsel after the previous day's testimony that "many of the charge slips were definitely not related to Deborah Dean." Tr. 1194. Incredibly, Independent Counsel failed to advise the court or defense counsel of the conversation. In fact, it was clear that Independent Counsel never intended to bring this to the attention of either the court or defense counsel.

There ensued a bench conference where Independent Counsel suggested that Sankin had only told him that he "had no specific recollection" as to some of the receipts. Tr. 1196. The court observed that Independent Counsel should have notified the defense and the court as to Sankin's comment at the start of the day's proceedings. Tr. 1199. Independent Counsel curiously remarked that he had "specifically refused" to review the documents with Sankin prior to trial. Tr. 1200. Yet he put them into evidence to suggest that they related to Dean.

Independent Counsel defended his action stating that "[t]he government did not say when [a receipt] was unnamed, it was Miss Dean." Further, Independent Counsel claimed that it was the defense's job to object to receipts that did not relate to her and not his to determine the actual connection between the receipts and Dean. Tr. 1202-04.

When the issue of the Sankin receipts was raised in the Defendant's motion for a new trial before this Court and the Court of Appeals, Independent Counsel represented that its attorneys believed that Government Exhibits 11n, 11o, 11p, 11q,

and 11v all related to the Defendant without ever having asked Sankin pretrial about them.[67] These representations clearly were false since even on the face of the receipts (let alone given Sankin's testimony on cross-examination) there was absolutely no basis for such a statement.

In its brief to the Supreme Court, Independent Counsel again represented that it believed that all of the receipts pertained to the Defendant. It would also explicitly represent that two receipts introduced into evidence that referred to "staff assistant" (Gov. Exh. 11n, 11o) and the Georgetown Leather receipt (Gov. Exh. 11q) had in fact "referenced [Dean] by her name or HUD title." Gov. Opp. Cert. at 14. These representations were also false.

Independent Counsel's action show a callous disregard for the truth both at the trial and appellate levels.

C. Andrew Sankin's Harvard Business School Application

1. Background

Andrew Sankin was a childhood friend of Silvio DeBartolomeis, who served in the position of Deputy Assistant

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[67] In its Opposition in the District Court, Independent Counsel stated that each of these receipts "arguably related to defendant." Gov. Opp. at 12. It also stated that Government Exhibit 11c was the only receipt that "clearly did not relate to defendant," (id. at 13), and that "on its face could not arguably be tied to defendant." Id. at 13 n.11. In oral argument, Independent Counsel described 11c as "the one receipt that the government was aware did not involve Ms. Dean." Transcript of Hearing 8 (Feb. 14, 1994). In the Court of Appeals, Independent Counsel stated that these receipts "appeared to" refer to defendant by name or position. Gov. App. Br. 49.

Secretary for Multi-Family Housing, General Deputy Assistant Secretary for Housing, or Acting Assistant Secretary for Housing throughout the period of the first four matters involved in Count Two (the Necho Allen waiver and the mod rehab fundings for Alameda Towers, Regent Street, and Foxglenn). Documents showed DeBartolomeis to be involved with the Necho Allen waiver and the Foxglenn mod rehab award in a variety of ways.[68]

Sankin discussed HUD matters with DeBartolomeis but became sensitive to the appearance of impropriety in his doing so. In August he wrote to Berel Altman, the developer of the Foxglenn project for which Sankin would later secure funding, apologizing for the indiscretion in his discussing with Altman his (Sankin's) earlier discussion with DeBartolomeis concerning the possible conversion of vouchers to developer contracts. Attachment 45.

The Foxglenn project was funded pursuant to a HUD-Form 185 dated May 22, 1986, signed by Susan Zagame for then-General Deputy Assistant Secretary for Housing Silvio DeBartolomeis, allocating 172 mod rehab units to the Prince George's County Housing Authority. Gov. Exh. 150. DeBartolomeis testified that he did not sign the funding documents on that date because he was not at HUD and may have been out of the country. Tr. 921-22. Though initially saying that he did not remember Richard Shelby's

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[68] DeBartolomeis had been involved with the decision of HUD headquarters not to disapprove the Necho Allen waiver request in December 1984. See Gov. Exh. 106; Tr. 2631-33. DeBartolomeis overruled an office director's recommendation with regard to providing additional funding for the Foxglenn project. Dean Exhs. 269, 272; Tr. 2477-90.

talking to him about Foxglenn, DeBartolomeis later acknowledged that he personally may have visited the Foxglenn project (an extremely unusual act for a high-level HUD official) and that Sankin talked to him about it.[69] He said he told Sankin that he was not the person who would make the final funding decisions. Tr. 932-34.

2. Sankin's Testimony Was Inconsistent With Application

Sankin testified that he had become involved with Shelby concerning the Foxglenn project because he wanted to limit his direct involvement with DeBartolomeis out of concern for the appearance of impropriety. Tr. 1118-20. On direct examination, Sankin indicated that Dean was the only HUD headquarters official with whom he discussed the Foxglenn project. Tr. 1120-21. On cross-examination Sankin also testified that he did not discuss projects directly with DeBartolomeis. Tr. 1260-62.

Yet, in 1988, in an application to Harvard Business School,[70] Sankin responded to a question concerning an ethical dilemma he had dealt with by making the following statements regarding the actions he took with regard to securing the Foxglenn mod rehab units. Noting that a childhood friend (DeBartolomeis) was the HUD official who had authority over the

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[69] Shelby testified that he spoke to DeBartolomeis about Foxglenn. Tr. 559. See also Tr. 595-96

[70] The two-page document in the form it was provided to the defense is attached as Attachment 46. An enlarged version is also attached.

allocation he was seeking, Sankin indicated that, because of that relationship, it was "a fait accompli that my client's request would be approved." (emphasis added)

Sankin then noted that there could be an appearance of impropriety if his friend signed the documents authorizing the allocation. He went on to describe actions he took to involve Dean between himself and DeBartolomeis in order to avoid the appearance of impropriety. In a context where there existed an issue as to whether Dean or DeBartolomeis was responsible for the funding decision, however, there can be no doubt that Sankin's initial statement--that because of DeBartolomeis' position, it was a foregone conclusion that the request would be funded--was patently exculpatory of Dean. How telling it is that Sankin and DeBartolomeis conspired to keep the "fait accompli" secret and how Sankin was concerned about the appearance of his relationship with DeBartolomeis not Dean - with whom Independent Counsel alleged Sankin conspired.

3. Application Was Exculpatory With Respect To Necho Allen Waiver And Other Projects

There was also evidence of DeBartolomeis involvement in HUD's action concerning the Necho Allen waiver. See Tr. 2628-30; Gov. Ehx. 106. Because the application called into question Sankin's general testimony that he did not contact DeBartolomeis regarding any HUD matters, the document was exculpatory as to the

defendant concerning Necho Allen, as well as Regent Street and Alameda Towers, which were funded before DeBartolomeis left HUD.[71]

Thus, Independent Counsel should have provided the application form to the defense as part of a Brady disclosure. Sankin had evidently faxed the application to Independent Counsel on May 29, 1992, five days before he testified before the grand jury. The fact that the document was specifically faxed to Independent Counsel suggests that it received individual attention.[72] However, following issuance of the Superseding Indictment on July 7, 1992, the Independent Counsel not only failed to provide the document in a Brady disclosure, but failed to include the document among the Sankin materials provided to the defense as part of the discovery process in the summer of 1992.

The application was only turned over to the defense in December 1992, when Independent Counsel turned over approximately 3700 pages of materials as its preliminary exhibit production.

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[71] DeBartolomeis was also involved with Thomas Broussard, who was alleged to be a co-conspirator with Sankin with regard to Alameda Towers. In February 1984, Broussard sent DeBartolomeis a check for $1,500 for a table at the American Paralysis Association Dinner, indicating that DeBartolomeis could take whomever he wished. Attachment 47. When making a proffer in an interview on October 1, and 2, 1992, DeBartolomeis told Independent Counsel that he had been told by Lance Wilson to help out Broussard and that Broussard received funding for many projects. He also described a meeting where Broussard told DeBartolomeis to keep a list of persons for whom he did favors. Attachment 48 at 4.

[72] No interviews of Sankin provided to the defense reflect any discussion of the application.

At that time, the two-page document was placed as the 510th and 511th (microfiche nos. CA164 0951-52; stamping machine nos. 002770-71) pages of a 562-page group of materials related to the Stanley Arms,[73] a transaction to which the document was not related, apparently in an attempt to prevent or delay discovery of the document. In further contrast to other documents in the 562-page grouping, all other documents bore a stamping machine number with an "S" prefix presumably indicating that the documents were part of a large group of documents provided by Sankin and stamped upon receipt. The application had no similar marking.

The record strongly suggests that Independent Counsel placed the application among voluminous materials on the Stanley Arms transaction to diminish the chances that the defense would discover it, much as it had done with the Mitchell-Wilson message slips.

* * *

The failure to question Sankin about the receipts and introducing them into evidence without any basis for knowing that they applied to Dean was an egregious violation of Independent Counsel's obligation as a proescutor to ensure that the evidence being presented to the jury and the implications to be drawn from such evidence was true. Independent Counsel's misconduct

[73] The microfiche numbers included all numbers between CA163 0005 and CA163 0516 (stamping machine nos. 002251-002762) and various numbers between CA164 0492 and CA164 1359 (stamping machine nos. 002763-002812). The defense's records indicate that this material was not previously provided.

improperly shifted the burden to Defendant to show that the receipts did not apply to her, when Independent Counsel knew they did not and certainly would have been able to determine that they did not by simply questioning Sankin pretrial about them. Independent Counsel purposely refused to do so. As with the failure to honor its Brady obligations by its handling of Sankin's Harvard Business School application, Independent Counsel exhibited a gross disregard for the truth. Independent Counsel further compounded these violations by making misrepresentations concerning its conduct and the nature of the evidence (or lack thereof) against the Defendant to this court, the Court of Appeals and the Supreme Court.

V. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNTS THREE AND FOUR

Counts Three and Four of the Superseding Indictment alleged that the Defendant conspired with Atlanta political consultant Louis F. Kitchin to defraud the government with respect to HUD actions concerning three matters: (1) a 203-unit mod rehab allocation to Dade County, Florida, Springwood/Cutlerwood, as a result of a mod rehab selection committee meeting in early April 1987; (2) a 200-unit mod rehab allocation to Atlanta, Georgia at the end of October 1986;[74] and (3) an application for mortgage insurance for the Woodcrest Retirement Center in early 1987.[75] The Court of Appeals upheld the conviction on both Counts.

A brief summary of the evidence on the Counts is given with some attention to the Court of Appeals opinion, in order to evaluate the strength of the government's case and the effect misconduct played on these convictions.

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[74] The 200-unit allocation to Atlanta at the end of October 1986 occurred at a time when defendant hardly knew Kitchin and well before the $4,000 check.

[75] With regard to the Woodcrest Retirement Center, which involved actions taken by Dean around the time of the $4,000 check, the Court of Appeals was simply mistaken when it said the project involved mod rehab funding of a project-specific nature which involved a violation of 24 C.F.R. § 882.503-882.504. 55 F.3d at 657. The request for mortgage insurance was by its nature project-specific. This mistake by the Court of Appeals and its reliance on the possible CFR violation as affecting criminality certainly is a factor to be considered in evaluating the overall strength of the evidence and the effect misconduct played in the conviction.

A. BACKGROUND

In April 1987, HUD allocated funds to the Springwood/Cutlerwood projects. The funding for the Springwood/Cutlerwood projects occurred near to the time (April 29, 1987) Kitchin gave Dean a check for $4,000. Kitchin had marked "loan" on the check.

With regard to the Springwood/Cutlerwood project, the Court of Appeals relied principally on the handwritten list created by Defendant in early April 1987, noting: "Next to Metro Dade is the notation 'letter' and the figure '203,' broken down as '153--1BR, 48--BR, 2--0BR.'" After citing HUD regulations against project-specific awards, the Court observed that "Dean's handwritten note recording precisely the number of units for which Kitchin's client wanted funding suggests that she and Kitchin conspired to violate these provisions." 55 F.3d at 656. The Court of Appeals apparently was not aware or failed to take into account that Dade County had itself requested that precise number of units and configuration for the project by letter dated February 13, 1987 ("Dade County Letter"), which was the "letter" referred to in Dean's handwritten note. The fact that Dade County itself specified the number of units and the configuration undercuts the significance of the handwritten list, As a result, the list should not serve as a basis for the court's finding that a conspiracy existed

Further, testimony and evidence further refutes the existence of a conspiracy. Dean testified that Thomas T. Demery,

Assistant Secretary for Housing was responsible for the funding when he brought the matter to her attention in April 1987 and told her that Kitchin was behind the project. Dean also testified that she advised Secretary Pierce of her relationship with Kitchin (decorating his planned apartment), and that the Secretary had told her to abstain during the meeting. Tr. 2572-78. It was undisputed that Demery is the person who spoke on behalf of the project. HUD General Counsel J. Michael Dorsey testified that Demery even argued on behalf of the allocation when Dorsey raised a concern about it. Tr. 3176-77.

In addition, the Dade County Letter, which was introduced into evidence by the Independent Counsel as Government Exhibit 198, was from Demery's files. [76] Attachment 49. The letter, a request for 203 units, bore the word "Funded," in Demery's handwriting, and also bore the words "Lou + file" near the top.

Given the evidence presented above and Dean's testimony that it was Demery who had recommended the funding, Demery's credibility was crucial to the Independent Counsel's case concerning the Springwood/Cutlerwood funding. It is in this context that the following areas of prosecutorial misconduct described below occurred.

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[76] When the Letter was produced as one of Independent Counsel's exhibits on the initial indictment, (Govt. Exh. 518), the document bore the microfiche prefix CA119, a prefix that appeared on documents from Demery's files.

B. Demery's Testimony and Independent Counsel's Representations That Independent Counsel Did Not Believe Demery's Repeated Denials That He Had Ever Lied to Congress

1. Testimony of Demery

Independent Counsel closed its case with the redirect examination of Demery. Demery testified that while he had spoken on behalf of the 203-unit request from Dade County at the selection committee meeting in April 1987, it was Dean who had initially brought the request to his attention.

Independent Counsel had considerable reason to believe that Demery's testimony was false. The proposal of the developer represented by Kitchin had been submitted to the Dade County housing authority at 10:00 a.m. on January 27, 1987. Attachment 50. On January 28, 1987, Kitchin's office called Demery asking if Kitchin could meet with Demery the following day. Attachment 51. Demery's calendar indicated that the meeting, described as a "courtesy call," took place on January 29, 1987.[77] Attachment 52. In addition, Kitchin, who testified that he had talked to Dean about the request, also testified that he would have talked to whomever was in Demery's position (Assistant Secretary for Housing) about the matter. Tr. 1437-38.

It was clear that at some point during 1987, Demery was assisting Kitchin with regard to a variety of HUD matters including mod rehab allocations:

[77] Kitchin also met with Dean as a courtesy call that same day.

(1) Demery had matched Kitchin's name with a 52-unit Mobile, Alabama mod rehab allocation selected in November 1987, Attachment 53;

(2) Demery had matched Kitchin's name with two mod rehab requests pending in November 1987. Attachment 54;

(3) Kitchin, listed as "Lou," with his office telephone number, was on Demery's wallet-sized listing of frequently called numbers, along with others who had benefited from Demery's decisions on mod rehab and other HUD programs. Attachment 55; and

(4) Demery testified that he had funded mod rehab requests for Kitchin whose support he had sought in an effort to be appointed Secretary of HUD. Tr. 1911-12.

There was also considerable evidence that Demery had improperly assisted Kitchin with regard to certain Title X loans, including a loan on a project called Cumberland II. For example, in August 1988, a HUD Inspector General's Hotline complaint alleged that it was common knowledge that Demery accepted gratuities and specifically mentioned Kitchin's name.[78]

Independent Counsel never brought to Demery's attention Kitchin's testimony that he would have talked to Demery about the request or the documentary evidence that Kitchin had met with

[78] As discussed in Section B infra, Independent Counsel failed to produce in discovery or as Giglio materials relating to the investigations of these matters and redacted Kitchin's name or entire entries related to Kitchin from materials produced in discovery as Giglio material on Demery.

Demery on January 29, 1987, the day after the Springwood/ Cutlerwood proposal was submitted to Dade County.[79]

In any case, since Demery's testimony would have been entirely inconsistent with Dean's -- which incidentially was also supported by Dorsey's testimony that Demery spoke on behalf of the request, Independent Counsel had reason to question Demery's credibility.

Demery's credibility was far from unimpeachable. Independent Counsel indicted Demery for two counts of perjury before Congress with regard to two statements -- his denials before two Congressional subcommittees that he knew that Philip Winn ("Winn")and Philip Abrams were involved in the mod rehab program.[80] Demery eventually pled guilty. However, his plea agreement did not include a perjury charge, because, in all likelihood, Independent Counsel did not want Demery subjected to impeachment based on such a charge. Demery admitted, however, during an interview with Independent Counsel and FBI agents that his statements underlying the charges were false and that many other statements to Congress were false as well. Attachment 56.[81]

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[79] This is reflected by the fact that, during his cross-examination, Demery stated that he did not meet Kitchin until the Spring of 1987. Tr. 1925-26.

[80] Demery had made numerous false statements to Congress in three hearings before two Congressional Subcommittees in 1989 and 1990. Independent Counsel had sufficient evidence to establish that Demery committed perjury in addition to those for which he was indicted.

[81] In an interview on June 11, 1993, Demery had made clear that, based on a conversation he had with Winn in September 1987, he knew that Winn was involved with the mod rehab program when he

Nevertheless, during cross-examination, Demery repeatedly and unequivocally denied having ever lied to Congress. Tr. 1915-19. The failure to provide as Brady and Giglio material Demery's interview impeded the defense's ability to properly cross-examine Demery based on the admissions contained in that interview.

Defense counsel further questioned Demery as to whether he had lied when he testified before Congress concerning meetings with former HUD employees, and meetings with consultants and developers. Demery insisted that all of his answers before Congress were true. Tr. 1920-35. Demery's responses to Congress concerning each of these matters had, in fact, been false.

It is clear from these facts that Demery testified falsely when he repeatedly denied having lied to Congress. Nevertheless, Independent Counsel did nothing to correct Demery's testimony that he had never lied to Congress or to bring to the attention of the court or the defense that the testimony was false. Instead, on redirect, Independent Counsel closed its case-in-chief by eliciting Demery's most crucial (yet false) testimony--that Dean had brought the Dade County request to his attention.

(Demery) made decisions concerning the allocation of mod rehab units to Richland, Washington, and Victoria, Texas. In the interview, Demery also stated that Abrams had contacted him about a mod rehab request for the Colorado Housing Finance Agency. Demery also explained the circumstances involving the free use of Winn's condominium and the creation of the false receipt for that use. He also explained that when he testified before Congress he falsely denied that he knew that Winn and Abrams were involved in HUD-subsidized projects to deflect the questioning away from the discussion of the condominium Winn had allowed him to use without charge. Attachment 56 at 3-8.

Tr. 1936-40.

Having had the information it did about Demery's perjury before Congress and the admissions in his interview, Independent Counsel was clearly under an obligation to correct that testimony and advise both the court and defense counsel as to its falsity. Independent Counsel, however, let the testimony stand -- utterly failing in its obligation to the court, Defendant and the public.[82]

The court rejected out of hand Independent Counsel's contentions at the hearing on the prior motion, on February 14, 1994, finding that Demery had not testified truthfully and that Independent Counsel must have been aware of that fact.[83]

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[82] Independent Counsel also claimed that Demery's testimony "was largely corroborated by other testimony as well, including testimony by defendant's own witness, Mr. Dorsey." Hearing Tr. 14 (February 14, 1994). Yet, with regard to the crucial piece of testimony with which Independent Counsel chose to close its case -- that Dean had called the Dade County funding request to Demery's attention--Independent Counsel's claim was manifestly false. No witness corroborated that testimony. Indeed, Kitchin's testimony, supported by documents showing that Kitchin met with Demery two days after the Springwood and Cutlerwood proposals were submitted to Dade County housing authority directly contradicted Demery's testimony that it was Dean who had brought the Dade County request to his attention. Further, Dorsey testified that Demery had argued on behalf of the Dade County request and that he (Dorsey) did not remember Dean saying anything about it. Tr. 3176-77. It is obvious, therefore, that Demery went out of his way to speak out for Kitchin's client.

[83] Independent Counsel's cavalier attitude about its obligation regarding this matter is evidenced further by the position it took before the Court of Appeals and the Supreme Court. When this matter was raised in the Court of Appeals, Independent Counsel stated that the charge "that the government had reason to believe that Thomas Demery ... had testified falsely" "is not true, as the government demonstrated at length below." Gov. App. Br. 51 n. 23. Independent Counsel went on to

Independent Counsel further violated its obligations to the Court with respect to Demery's sentencing. Demery's plea agreement provided for a minimum sentence of 12 months, unless the Independent Counsel sought a downward departure for substantial assistance. On February 27, 1996, Independent Counsel filed a motion seeking such a downward departure.

The motion noted that pursuant to the plea agreement Demery had "agreed to cooperate completely, candidly, and truthfully ....." and that this cooperation included "testifying completely and truthfully before any federal grand jury, or in any trial proceeding." Independent Counsel stated that Demery had "testified before the grand jury and for the government in its successful prosecution of Deborah Gore Dean." Independent Counsel then requested that the court, the Honorable Stanley S. Harris, consider a downward departure.

Nowhere in the seven-paragraph motion did Independent Counsel inform Judge Harris that this court had, at the February 14, 1994 hearing, found that Demery had not testified truthfully and that Independent Counsel must have been aware of that fact.

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argue that the government had not sought to conceal that Demery had been charged with perjury. Whatever the merit of that argument, however, the representation that it was not true that Independent Counsel had reason to believe that Thomas Demery had testified falsely was patently untrue -- since Demery had admitted he had lied during the FBI interview after his plea.

In its brief to the Supreme Court, Independent Counsel maintained that it was "apparent from the record" that "the question as to which petitioner now claims that Demery perjured himself was ambiguous." Op. Cert. at 13. In this instance, Independent Counsel misled the Court to believe that there was only one question that Dean claimed Demery answered falsely.

Judge Harris, relying on the representations in Independent Counsel's motion, granted a downward departure and sentenced Demery to two year's probation.

C. Independent Counsel's Failure to Make Brady Disclosures of, and Withholding from Discovery Materials Concerning Investigations of Actions Demery Took to Benefit Kitchin and the Redaction of Kitchin's Name or the Elimination of Entries Relating to Kitchin From Material Produced During Discovery or as Giglio on Demery; The Failure to Produce as Jencks Material on Kitchin or Jack Jennings the HUD Interview the HUD Inspector General Conducted During the Investigation of Demery's Manipulation of the Section 8 Certificate Program

Because Demery supported and spoke on behalf of Kitchin's Springwood/Cutlerwood project allocation at the April 7, 1987 mod rehab selection committee meeting, information showing a relationship between Kitchin and Demery would be relevant impeachment material on both, particularly if there was a suggestion that Demery did anything improper for Kitchin. There were a variety of materials of such nature. But with regard to most such materials, Independent Counsel either failed to produce the relevant documents as discovery or as Brady or Giglio material or redacted the relevant information from the documents produced. Independent Counsel also failed to provide as Jencks material an interview in which Kitchin apparently gave false information concerning his contacts with Demery's office.

1. The Investigation of the Cumberland II Title X Loan

HUD Audit Case No. 90-TS-129-0014 (Apr. 30, 1990) questioned the propriety of a Title X loan for a project called Cumberland

II in Houston, Texas, concluding that "it appeared that HUD approved the project because of an intent to favor the owner's interest over those of HUD." Attachment 57, at 23. The audit identified the mortgagor as Caltex, Ltd., of which Marc D. Kovens was the general partner. Audit No. 90TS-129-0014 at iii-iv, 17-25 Attachment 57. Kitchin, who met with Demery concerning the project on May 16, 1988, was a consultant on the project. The matter would also be the subject of a suit, Caltex, Ltd. v. Thomas D. Moore, as Substitute Trustee, and the Department of Housing and Urban Development, in which Demery provided an affidavit and was deposed. See Demery Jencks, TD-10, TD-14. Independent Counsel never provided a copy of this audit or Demery's affidavit to the defense.

A two-page document provided during discovery bearing microfiche numbers FA08 0005-06 referenced a joint HUD Inspector General/F.B.I. investigation concerning the Title X loan for Cumberland II (Case No. FHO-5857). Kitchin's name was redacted from entries related to the Cumberland II investigation. Attachment 9.[84]

Neither the document just identified nor any other material related to the investigation of the Cumberland II Title X loan were provided to the defense as Giglio material on Kitchin, who testified on September 28, 1993.

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[84] As discussed, supra, Part III A.2.C. in investigations of three other Title X loans are referenced on the document, with Maurice Barksdale's name redacted.

The two-page document described above was provided as Giglio material on Demery, who testified on September 30, 1993, (Attachment 13), but the reference to the Cumberland II investigation was entirely eliminated.

Thus, these documents were of no use to the defense in cross examination of Kitchin or Demery.

2. The Investigation of the Hidden Woods Title X Loan

HUD Audit Case No. 90-TS-129-0013 (Apr. 27, 1990) questioned the propriety of a Title X loan for a project called Hidden Woods in Memphis, Tennessee, on which Kitchin was a consultant. The audit concluded that the loan clearly should not have been approved and that there were indications of consultant influence with HUD's decision. Kitchin, who had contacts with HUD Headquarters personnel concerning the project, shared in a fee of $73,350. The audit found that $43,350 of the consultant fee was wrongly treated as a financing fee, causing the mortgage to be excessive. Audit No. 90-TS-129-0013 at i, iii, 7, Appendix C6 (Attachment 64). Independent Counsel never provided a copy of this audit to the defense.

Independent Counsel did provide to the defense an F.B.I. memorandum dated October 1, 1991, discussing certain matters relating to the consulting fees and indicating that the U.S. Attorney was declining prosecution on the matter. Attachment 58.[85] This document, however, did not reference Kitchin's

[85] The defense's records do not make clear when this

contacts with HUD Headquarters personnel.

3. The Hotline Complaint Record

On August 30, 1988, the HUD Inspector General's Office received a Hotline Complaint concerning Demery. The Hotline Complaint Record contained the complainant's statement that "it is becoming common knowledge that the Assistant Secretary for Housing accepts gratuities." Attachment 59. The one-page document also contained a reference to Kitchin.

Independent Counsel did not provide the record to the defense during discovery or as Giglio on Kitchin. Independent Counsel did provide the record as Giglio on Demery. But, at that time, the 15 to 20 lines of the record following the statement that Demery accepted gratuities were redacted. An extremely close examination of the document recently revealed that Kitchin's name was part of the redacted material.

No material was provided to the defense concerning the investigation of this complaint.

Because of redactions by Independent Counsel, the information could not be used by the defense for cross-examination of either Kitchin or Demery.

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document was provided. It may have been provided as Giglio material on Kitchin.

4. The Interview of Kitchin or Jack Jennings During the Investigation of Demery's Manipulation of the Section 8 Certificate Program

As part of the HUD Inspector General's Investigation of HUD Headquarters Reserve Fund FY 88/89 Section 8 Certificate Program, HM 01-1064, a representative of the HUD Inspector General's Office interviewed Kitchin on November 1, 1989 concerning his contact with HUD officials. Government witness Jack Jennings also provided information during the interview. Both were placed under oath. HM01-1064 at 431-32, Attachment 60.

During the interview, Kitchin stated the following regarding his efforts to secure Section 8 Project Based Assistance for the developer he represented (as recorded by the interviewer):

> KITCHIN may have contacted someone in HUD Headquarters, Washington, D.C., but could not recall contacting anyone in HUD Headquarters regarding [East Point Housing Authority]. If Kitchin did contact anyone in HUD Headquarters, he would have just called the appropriate HUD office and spoke to who ever answered the telephone. Kitchin did not contact any one particular person in HUD Headquarters on a regular basis.

HM01-1064 at 431, Attachment 60.

Yet, in addition to his contacts with Demery, Kitchin was in frequent contact with Demery's Executive Assistant, Christine Oliver, with whom Kitchin would acknowledge that he had a personal relationship. Tr. 1455-56. Oliver had a large role in steering Project-Based Assistance to particular areas. Attachment 60.

Since the interview report apparently showed Kitchin and Jennings to be giving false information under oath in order to avoid revealing their contacts with Demery's office, it would have provided significant impeachment material on both Kitchin and Jennings. In any event, it should have been provided as Jencks material on both witnesses. The interview report, however, was not provided to the defense at all.

C. Statements Before Metro Dade Housing Authority

Among the matters previously brought to the court's attention was that during the rebuttal portion of Independent Counsel's closing argument, the prosecutor stated that the Dade County allocation was made before the Metro Dade housing authority had even made a request for the units and that defense witness J. Michael Dorsey had stated the Defendant had spoken on behalf of that request at the selection committee meeting. Both statements were patently false. See Dean Rule 33 Mem. at 187-91; Gov. Rule 33 Reply at 44-47; Dean Rule 33 Reply at 13-15.

The statement regarding the absence of a Dade County request was a particularly improper one, which was made in support of the theme, previously discussed, that consultant influence had impeded the ability of Dade County to promote the involvement of black developers. The prosecutor stated:

> In her own handwriting she had the bedroom configurations and the number of bedrooms, and then it says "letter.["] They are funding 203 units to Metro-Dade before Metro-Dade even asks for them.[ ] Is that the way the program was supposed to operate? Is that the way it's supposed to run?

Tr. 3514-15.

Both of these false characterizations of the record are part of the cumulative misconduct that the court should consider in this case.

VI. CONCLUSION

The Defendant is clearly entitled to a dismissal of the Superseding Indictment based on the pattern of prosecutorial abuses detailed at length above which when coupled with those previously identified for the court, appear to be unprecedented. In this case, prosecutorial misconduct was pronounced, persistent and involved numerous and serious violations of generally recognized standards of prosecutorial behavior. These actions included knowingly eliciting and presenting testimony with reason to believe it was false, failing to correct testimony it knew was false, intentionally disregarding disclosure obligations under Brady and Giglio even in the face of a specific court order, and misrepresenting these actions and evidence to the court. Further, Independent Counsel introduced irrelevant and improper bias into the record in order to obtain a conviction. By these actions, Independent Counsel demonstrated a gross disregard of the truth and its obligations to the court, the Defendant, and the public and an intention to interfere with or impede the Defendant's ability to mount a defense. The misconduct was not isolated to a single count or a single witness, but rather was pervasive and permeated virtually every aspect of Defendant's trial, thereby denying Dean a fair trial on all Counts. The only remedy for such prosecutorial abuse is a dismissal of the Superseding Indictment. In the event that the court finds that

abuses do not warrant a dismissal of the Superseding Indictment, Ms. Dean is entitled to a new trial.

Respectfully submitted,

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Dated: February 4, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was served via hand delivery this 4th day of February, 1997 to:

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Joseph J. Aronica

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