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September 18, 1995

CONFIDENTIAL

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HAND DELIVERED

Re: Misconduct by Attorneys of the Office of Independent Counsel in United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.)

Dear Mr. Thompson:

This letter and the materials provided with it are to bring to your attention certain act of misconduct by attorneys of the Office of Independent Counsel (OIC) in the prosecution of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.). As explained below, these matters have already been brought to the attention of the Department of Justice.

Four binders of materials are enclosed in a box provided with this letter. The one-inch binder marked "Correspondence with Department of Justice and White House" contains correspondence concerning my efforts to persuade Attorney General Janet Reno to investigate acts of prosecutorial misconduct by OIC attorneys and my efforts to persuade White House Counsel Abner J. Mikva to recommend the removal of Assistant Attorney General Jo Ann Harris because acts of prosecutorial misconduct in which Ms. Harris participated while serving as an Associate Independent Counsel indicated that she is not fit to serve in a position overseeing the conduct of federal prosecutors. My August 15, 1995 letter to Michael E. Shaheen, Jr., of the Office of Professional Responsibility, which is the first item in the binder, provides a summary of the actions I took and certain of the issues I raised in bringing these matters to the attention of the Attorney General and Judge Mikva. The remainder of the pertinent correspondence may be found as attachments to my letter to Mr. Shaheen.

The remaining three binders contain the materials I provided to the Department of Justice on December 1, 1994, and January 17, 1995, and to Judge Mikva on February 9, 1995. The one-inch binder marked "Binder 1: Introduction and Summary" contains a 55-page document styled "Introduction and Summary," which

introduces the materials and summarizes various matters addressed in greater detail in ten documents termed Narrative Appendixes that were provided to the Attorney General along with the Introduction and Summary on December 1, 1994. That binder also contains individual summaries of each of the ten Narrative Appendixes and of an eleventh Narrative Appendix that was provided to the Department of Justice at a later date. The four-inch binder marked "Binder 2: Narrative Appendixes" contains the initial ten Narrative Appendixes, which range in size from eight to 84 pages. The two-inch binder marked "Binder 3: Supplement I" contains the eleventh Narrative Appendix, which was provided to the Department of Justice on January 17, 1995. Because of the sensitive nature of the issues addressed in the materials, I have avoided the use of any label on the binders that would be more revealing of the subject matter.

As you will learn from the materials, various of these matters have previously been brought to the attention of the OIC in support of the defendant's motion for a new trial. Other of the matters, however, though known to the OIC attorneys involved, have not to my knowledge been brought to the attention of the OIC. Some paragraphs below, I summarize certain issues addressed in these materials. First, however, several introductory points are in order.

You will note that the Office of Professional Responsibility determined that the evidence contained in the materials provided the Attorney General did not warrant action by the Department of Justice at this time. (Mr. Shaheen's June 28, 1995 letter communicating that decision to me may be found as Attachment 11 to my August 15, 1995 letter to Mr. Shaheen.) That determination apparently was to some degree influenced by a concern that the Department of Justice should not lightly interfere with an Independent Counsel's conduct of his authorized activities. For reasons discussed in my letter to Mr. Shaheen, few people fully informed of the facts would find the Office of Professional Responsibility's reasoning in this regard to be persuasive, and I believe the Department of Justice's decision to ignore these matters, as well as the Administration's apparent decision to allow Ms. Harris to continue in her position, ultimately will be deemed ill-considered ones that are destined only to diminish further the public's flagging confidence in the integrity of federal law enforcement officials.

I will not presume in this letter to tell you of the ways your responsibilities in this matter differ from those of the Department of Justice with regard either to ensuring the disciplining or prosecution of culpable OIC attorneys or to bringing to the attention of the courts any matters where OIC attorneys presented evidence or made representations that those attorneys believed to be false. I will say, however, that with respect to most of the issues addressed in the materials the obligations of the government's attorneys prosecuting the case ought to be evident.

With regard to the perspective from which I have taken certain action to bring these matters to the attention of the Attorney General and the White House Counsel, and now to your attention, and from which I may take such other actions concerning these matters as seem appropriate in the future, the following should be noted. First, because of the knowledge reflected in an affidavit I filed in the case, I know with virtual certainty that the OIC relied on the false testimony of a government agent to secure a conviction in this case, and did so in circumstances that I expect most observers to regard as unalloyed race-mongering. Further, every action the OIC took concerning that matter after pertinent facts were brought to the attention of the highest levels of the OIC not only served to confirm my initial belief, but demonstrated that OIC attorneys would go to considerable lengths to conceal the nature of their conduct. There is, moreover, considerable reason to believe that the actions taken to effect that concealment constituted a criminal conspiracy that continues to this day. Second, without regard to my personal knowledge, or the matter to which that knowledge pertained, there is no doubt that prosecutorial abuses occurred in this case that would shock the average citizen and that, whether or not such abuses in fact constituted crimes, most people would believe ought to be crimes.

To take as examples things that are in no manner open to question, the enclosed materials show that attorneys in the OIC crafted an indictment creating inferences that the OIC's immunized witness had specifically contradicted; that those attorneys wrongfully withheld statements indicating that the inferences were false while explicitly representing to the court that they were aware of no exculpatory material; that those attorneys contrived to cause the jury to believe that a conspiratorial reference in a document to "the contact at HUD" was a reference to the defendant even though an immunized witness had told them--and other evidence indicated--that the reference was not to the defendant; and that those attorneys sought to lead the jury or the courts to believe that the defendant had provided certain internal government documents to a consultant though they knew that the defendant had not provided the documents. Also not open to dispute is that OIC attorneys relied on government witnesses whose testimony those attorneys had compelling reason to believe was false, without confronting the witnesses with information that might be expected to lead them to tell the truth, and failed to correct testimony that OIC attorneys knew to be false.

Various of these matters that were called to the attention of the district court in support of a motion for a new trial led the court to repeatedly criticize the behavior of the OIC, specifically recognizing that the OIC had directly elicited, or allowed to go uncorrected, testimony of government witnesses that OIC attorneys had strong reason, including documentary evidence, to believe was false, and that OIC attorneys had made false representations to the court. After observing that the lead

trial counsel, Associate Independent Counsel Robert E. O'Neill, had acted in a manner the court would not expect from any Assistant United States Attorney who had appeared before it, the court made this statement:

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

In this context, I have no doubts whatever about the appropriateness of taking all reasonable measures to ensure that these issues are addressed and that there eventually be public disclosure of the nature of the conduct of the involved attorneys. Though the defendant in this case is a close friend of mine, I would feel an obligation to take these same actions in a case where the defendant was a stranger to me.

Finally, I note here, as I have noted in correspondence to the Department of Justice and to Judge Mikva, in no manner do I represent the defendant Deborah Gore Dean. The actions I have taken to bring these matters to the attention of appropriate authorities have been taken without consultation with Deborah Gore Dean or her counsel.

Set out in the sections below are summaries of certain matters addressed in the materials. Though these include what appear to be some of the most serious abuses, by no means do they comprise the totality of identified serious abuses. Further, as I have pointed out from time to time in the materials and the correspondence, there is no reason to believe that the matters addressed in the materials are the only, or the most serious, instances of prosecutorial abuse that occurred in this case.

A. Testimony of Supervisory Special Agent Alvin R. Cain, Jr.

Count One of the Superseding Indictment alleged that Deborah Gore Dean had caused certain decisions to be made by the Department of Housing and Urban Development (HUD) in order to benefit former Attorney General John N. Mitchell, whom Dean regarded as a stepfather. A critical issue in the case was whether Dean was aware that Mitchell earned HUD consulting fees. One immunized witness who retained Mitchell on a HUD matter testified that he deliberately concealed Mitchell's role from Dean. Mitchell's partner, Colonel Jack Brennan, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he or she knew or thought that Dean was aware of Mitchell's HUD consulting.

Dean denied knowing that Mitchell earned HUD consulting fees before she read the HUD Inspector General's Report when it was issued in April 1989. The report had stated that Louie B. Nunn paid Mitchell $75,000 for assistance in securing funding in 1984 for a Dade County, Florida project called Arama. Dean gave emotional testimony about calling HUD investigator Alvin R. Cain, Jr., who had prepared the report, to express her anger about statements in the report that Mitchell earned the $75,000 consulting fee and to demand to know if there was a check proving that Mitchell earned that fee. Specifically, Dean described how she had sent Mitchell's daughter, Marti Mitchell, to pick up a copy of the report from Agent Cain. She stated that she opened the report and saw the discussion of Mitchell's consulting in the report. Dean then testified as follows:

Q. Okay. After you learned -- was that the first time you knew that John Mitchell was receiving dollars based on consulting with HUD?

A. Yes.

Q. This was in May -- or, I'm sorry, April of 1989.

A. Yes, the day the report came out.

Q. Was John Mitchell alive, or had he passed away by then?

A. He had died the previous November.

Q. Did you place any telephone calls after you heard that in the report -- after you discovered that information.

A. Yes.

Q. Who did you call.

A. I called Al Cain.

Q. What did you say to Mr. Cain?

A. I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, that John would never have done that, and that he better be prepared, because I was really mad, and I wanted to see the check, and if there had been a check written to John Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in any way had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.

And Al said, Al told me that he --

Tr. 2617-18.

Dean started to testify as to what Cain had told her when she called him. A prosecution objection to that testimony would be sustained, however, so Dean would not be allowed to testify as to what Cain had told her. Dean went on to testify about then calling Jack Brennan who led her to understand that Mitchell had also been involved with Richard Shelby. Tr. 2619.

It would have been an extraordinary thing for Dean to testify about this call to Agent Cain if she had not in fact called him. That she had called Agent Cain in April 1989 hardly corroborated Dean's statement that she had been previously unaware of Mitchell's HUD consulting, particularly since she could have called Agent Cain simply to divert suspicion. And whatever the probative value of her statements about calling either Cain or Brennan, the testimony about calling Cain added little to the testimony about calling Brennan, which was entirely consistent with Brennan's own testimony. More significant, Dean was aware that at the time she testified Agent Cain was assigned to the OIC and was therefore readily available to contradict her testimony if it was not true. Further, if Dean fabricated the story about calling Agent Cain, she was apparently ready also to fabricate a story of what Cain had told her notwithstanding that Cain was available to contradict her. Moreover, since Agent Cain was an African-American and Dean was being tried before an entirely African-American jury, she would have reason to expect that for Cain to contradict her would have a devastating impact on her credibility.

Apart from the implausibility of Dean's making up a story about the call if it did not occur, I knew that Dean had called Cain to ask about a check because she had told me about it immediately after she made the call. She also had told me that Cain had told her that there was a check but that it was maintained in a HUD field office.

Though Dean would remain on the stand for all or part of three more days, Associate Independent Counsel Robert E. O'Neill would not cross-examine her at all about the call to Agent Cain. The OIC then called Agent Cain as its second rebuttal witness.

Questioned by O'Neill, Agent Cain first testified, in details essentially consistent with Dean's testimony, about providing Dean a copy of the HUD Inspector General's Report. O'Neill then elicited the following testimony from Agent Cain:

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

A. No, I do not.

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

A. No, I do not.

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

A. Absolutely not.

Tr. 3198-99.

Though Agent Cain merely testified that he did not recall Dean's mentioning these things, that testimony, following Cain's detailed recounting of his providing a copy of the report to Dean, was delivered in a manner clearly to suggest he would have remembered the call if it had occurred.

In closing argument, after asserting that Dean's defense rested entirely on her credibility, O'Neill repeatedly asserted that she had lied to the jury. The pervasiveness of O'Neill's assertions that Dean had lied is not paralleled in reported federal cases. A fairly comprehensive summary of the remarks is set out in Attachment 1a to the Cain Narrative Appendix. A sampling of the statements follows: Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her..she lies about that.. if she's going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("I told you during closing argument that Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a

lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it.").

In attacking Dean's credibility, O'Neill relied heavily on two witnesses. One of these was HUD driver Ronald L. Reynolds. The court would later find that the OIC had information indicating that Reynolds' testimony was not true. The other witness on whose testimony the OIC relied heavily in attacking Dean's credibility was Agent Cain.

Three quarters of the way through the first day of the OIC's closing, O'Neill pressed the attack on Dean's credibility with particular acerbity, stating:

> Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees and Agent Cain's contradiction of Dean's testimony about calling him to question the treatment of Mitchell in the HUD Inspector General's Report. O'Neill stated the following:

> Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave. That's exactly what she told you.

> So we had to call in Special Agent Alvin Cain for two minutes' of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that.

Tr. 3419-20.

During rebuttal the following day, while continuing the attack on Dean's credibility, O'Neill again turned to Cain, asserting:

> Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never ever happened.

Tr. 3506.

In support of a motion for a new trial, Dean argued that Agent Cain was one of at least three government witnesses who had lied and who the Independent Counsel attorneys knew or should have known had lied. (The others are Thomas T. Demery and Ronald L. Reynolds, who, as noted, is another witness on whose testimony O'Neill placed great weight in closing argument in asserting that Dean had lied about her knowledge of Mitchell's HUD consulting.) Dean provided an affidavit stating that when she asked Agent Cain about the check from Nunn to Mitchell, Cain said it was maintained in the HUD regional office.

In her affidavit Dean also stated that, after talking to Agent Cain, she told me, whom she had been dating at the time, about her call to Cain, including what Cain had told her. At the time of Dean's motion, I was an Assistant General Counsel with the Equal Employment Opportunity Commission, then with more than twenty years of service as an attorney for the federal government. I provided an affidavit describing my background and stating that in April 1989 Dean had told me about the call to Agent Cain and had said that Cain had told her the check was in a field office. I also stated that Dean had also told me about her call to Mitchell's partner, who had informed her that Mitchell's HUD consulting was more extensive than that reflected in the report. I provided reasons why I remembered these matters very well. In her memorandum, Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.

When Dean's motion was filed, the principal trial counsel in the case, Robert E. O'Neill and Paula A. Sweeney, were no longer with the OIC. Deputy Independent Counsel Bruce C. Swartz assumed the role of lead counsel in the case. Associate Independent

Counsel Robert J. Meyer signed the OIC's opposition to Dean's motion.

In its opposition to Dean's motion, the OIC said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. The OIC dismissed my affidavit in a footnote, observing:

> The affidavit of James Scanlan adds nothing in this regard, for Mr. Scanlan -- aside from his obvious bias -- has no firsthand knowledge of defendant's purported conversation with Agent Cain. Rather, he relies solely on what defendant told him.

During the three-week period between the filing of the Dean's motion on November 30, 1993, and the filing of its opposition on December 21, 1993, the OIC did not interview me to attempt to determine whether I was telling the truth about my conversation with Dean in 1989, nor would the OIC seek to interview me during the ensuing period when the OIC continued to rely on Cain's testimony.

In a reply, Dean noted that the OIC's failure to discuss the check suggested that the check was in fact maintained in a field office in April 1989 and the OIC did not have a plausible theory as to how she could have learned that other than through her call to Agent Cain. With regard to my affidavit, Dean noted that my relationship to Dean was a legitimate issue to be explored in a hearing, but was not a basis for ignoring the affidavit entirely. With regard to the fact that I had only recounted what Dean had told me, Dean argued that, given the circumstances in which she told me of the conversation with Cain in 1989, it was virtually inconceivable that Cain and I were both telling the truth.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the probation officer, Independent Counsel Arlin M. Adams relied on Cain's testimony in arguing that Dean committed perjury during her trial and should therefore have her sentence increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the probation officer agreed, recommending a two-level upward adjustment that would increase Dean's minimum sentence by six months.

On February 14, 1994, the court denied Dean's motion for a new trial. The court essentially agreed with Dean's claims that Ronald Reynolds and Thomas Demery lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Agent Cain and the OIC's heavy reliance on Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the OIC's failure to respond regarding the whereabouts of the check in April 1989 is probative that OIC attorneys knew that Cain lied. Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the OIC's argument that Cain's testimony contradicting Dean about the call showed that she lied during the

trial. Dean also argued that, whatever may have been the OIC's knowledge regarding the truth of Cain's testimony at the time of trial, the OIC had continued to rely on the testimony having the additional information provided in the Dean and Scanlan affidavits as well as the opportunity to investigate such matters as the whereabouts of the check in April 1989.

Dean requested the court to defer final ruling on her motion for a new trial and on sentencing until the matter of the whereabouts of the check was resolved. Dean argued that, if the check was maintained in a field office in April 1989, there should be discovery as to whether the OIC knew or should have known that Cain committed perjury and whether such perjury should be imputed to the OIC.

At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. Arguing for the OIC, Deputy Independent Counsel Bruce C. Swartz still refused to state what the OIC knew about the whereabouts of the check in 1989, but argued that Dean could have surmised that the check was maintained in a field office through a statement in an interview report in the HUD Inspector General's Report. The statement to which Swartz referred, however, could not reasonably have provided a basis for Dean's knowledge. Nor does it seem remotely possible that the OIC could in fact have believed that the statement formed the basis for Dean's statements regarding the whereabouts of the check. Indeed, the context of the interview report suggested that it was very unlikely that the regional office would have gone to the trouble even to secure a copy of the check by April 1989, much less that it would have secured a check and then failed to forward it to Washington along with the interview report. Swartz did not state whether the OIC maintained that Dean had surmised that the check was maintained in a field office from the interview report when in April 1989 she informed me that Cain had said the check was maintained in the field, or that the surmise was recent and that I had falsely stated in my affidavit that in April 1989 Dean had told me that Cain had told her the check was maintained in the field.

The court denied Dean's motion without indicating what it believed regarding how Dean came to claim that Agent Cain told her that the check was maintained in a field office and without specifically indicating whether it believed Cain or Dean was telling the truth about the call. The court merely stated that the evidence put forward "doesn't mean of necessity that the government is putting on information they knew was false."

Later in the hearing, however, without taking argument on the issue, the court refused to accept the probation officer's recommendation to increase Dean's sentencing level on the basis of Agent Cain's contradiction of Dean's statement about her call to him. The court stated that it believed that Dean may have in fact called Cain. But the court did initially accept the probation officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement Dean had

made that she was not very close to John Mitchell until after she left HUD. The court would later reverse that ruling after concluding that the statement on which the OIC had relied to persuade the probation officer to recommend the upward adjustment had been taken out of context. In its initial ruling, however, the court relied on Dean's testimony about her call to Agent Cain as evidence of the closeness of her relationship to Mitchell. That reliance would only have made sense if the court accepted that Dean in fact had told the truth about the call to Cain.

Dean did not press this issue further on appeal. In its appellate brief, however, the OIC continued to rely on Cain's testimony about the call to contradict Dean.

The treatment of the Cain matter in the district court was complicated by the fact that Dean had raised other issues regarding Agent Cain's credibility based on his responses to certain questions on cross-examination. In support of a claim that certain responses were evasive or false, Dean described in her affidavit a party attended by Cain that she had paid for and her efforts to cause Cain and others to investigate a particular project. The OIC produced material showing, apparently conclusively, that Cain was not at the party described by Dean and raising an issue regarding Dean's account of initiating an investigation of the project. That Cain was not at the party described by Dean may have influenced the district court in its treatment of the matter. Yet, the totality of materials does not support a contention that Dean intentionally misstated any facts in her affidavit. Moreover, the OIC's efforts to focus attention on that matter, and away from the issue of the whereabouts of the check, further reflect the OIC's dishonesty in addressing the Cain matter. For example, in an effort to cast doubt on Dean's credibility, the OIC raised an issue about the legitimacy of a receipt that bore an erroneous date and Dean's mother's name rather than Dean's own name, though no reasonable person could possibly believe the receipt was other than what it was represented to be. In any case, however, the facts presented in the Cain Appendix would lead most observers to believe that Cain had in fact lied and that, at least at some point in time, OIC attorneys came to believe that he had lied, or that, at a minimum, whether Cain had lied and whether OIC attorneys knew he had lied is a matter the government could readily determine.

Any effort to interpret the OIC's actions with regard to Agent Cain's testimony must take into account the OIC's demonstrated misconduct elsewhere, particularly its actions with regard to the use of witnesses where the OIC had strong reason to believe the testimony was false, as in the cases of Thomas T. Demery and Ronald L. Reynolds mentioned above, as well as the cases of Eli M. Feinberg and Maurice C. Barksdale discussed below. It must also take into account the importance of the testimony of an African-American government agent in directly contradicting the testimony of a white defendant before an entirely African-American jury, in a context where the court several times chastised the prosecutor for treating the defendant

in a manner he would not have done but for the racial difference between the jury and the defendant.

As discussed in the Addendum to the Cain Appendix, as well as in a number of the letters, at a meeting during the week of December 12, 1994, Associate Deputy Attorney General David Margolis raised the issue of whether assuming that Dean had in fact called Agent Cain, it necessarily followed that Cain had testified falsely. I understood Mr. Margolis' question to go to whether it was possible that Dean did not accurately recount the specifics of her call to Cain or that, though Cain did remember that Dean called him, his responses to O'Neill's questions did reflect his best recollection of the specifics of the call. In response to Mr. Margolis' question, I pointed out that it seemed that, assuming Dean had called Cain, it did not seem possible that Cain responded truthfully to O'Neill's question of whether Dean had mentioned that the report indicated Mitchell earned money as a consultant.

Yet, any possibility that Cain's testimony was literally true, though affecting Cain's culpability for perjury, makes the OIC's conduct in the matter no less heinous. Presumably, if the OIC fulfilled its obligation to investigate the issues raised in Dean's motion, OIC attorneys did know shortly after Dean filed her motion (if they did not know it earlier) that Dean had called Cain and had learned from him that the check was maintained in a HUD field office. Thus, one is still left with the situation that, on January 18, 1994, though knowing that Dean had made the call to Cain, Independent Counsel Arlin M. Adams wrote the U.S. Probation Officer arguing to have Dean's sentence increased because she had lied in testifying that she made the call. One is also left with the situation that, at the hearing on February 22, 1994, though knowing that Dean had learned that the check was maintained in a HUD field office from her call to Cain, Deputy Independent Counsel Bruce C. Swartz argued to the court that Dean in fact had surmised that the check was maintained in a field office from an entry in the HUD IG report and therefore should have her sentence increased for falsely stating that she learned this from a call to Cain. Indeed, that the OIC believed that it had a rationale by which Cain's statements were literally true is most significant in that it would seem to render it all the more likely that both when O'Neill elicited from Cain testimony aimed at leading the jury to believe that Dean had not called Cain at all and when he later engaged in inflammatory argument aimed also at leading the jury to believe that Dean had not called Cain at all, O'Neill knew for a fact that Dean had called Cain.

As discussed in various places, there exist crucial questions regarding what OIC attorneys said to Agent Cain before eliciting his testimony in court and after receiving Dean's motion raising the issue of the whereabouts of the check. I suspect that you will find that, whether or not trial counsel mentioned the fact that Dean had testified that she had asked Cain about a check before having him testify, at no time subsequent to the OIC's receiving Dean's motion with the

materials claiming that Dean had asked Cain about a check and that Cain had said it was maintained in a field office did OIC attorneys ask Cain about any conversation with Dean about the check. What would be particularly damning to the OIC is that subsequent to receiving Dean's motion, the OIC did not interview Cain at all to attempt to determine whether he had told the truth in court. Yet, there is ample reason to suspect that in fact no such interview has yet been conducted.

Finally, in the event that you have any doubts about the truthfulness of my affidavit, I, of course, am available to speak to you at any time.

B. Testimony of Eli M. Feinberg

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony," which may be found under Tab 4 of the binder of Narrative Appendixes. The matter has not been addressed in documents filed with the court.

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

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

memorandum was not a reference to Dean. Yet, these and other statements of Shelby specifically contradicting inferences in the Superseding Indictment would be withheld from the defense for more than a year while the OIC explicitly represented to the court that it was aware of no exculpatory material. During trial, the OIC would attempt to cause the jury to believe, among other things OIC attorneys knew or believed to be false, that the reference to "the contact at HUD" was in fact a reference to Dean and that Dean had provided Shelby with copies of two internal HUD documents.

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

The key testimony in this regard would be that of Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Feinberg on May 18, 1992, Shelby, already under a grant of immunity, had twice told representatives of the OIC that he had told Feinberg about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Martin Fine. In the telephonic interview of May 18, 1992, Feinberg then stated that he was not aware of Mitchell's involvement in Park Towers. Feinberg's interview report indicates that he was not at that time advised by the OIC that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, the day following the OIC's telephonic interview of Feinberg, Shelby was apparently advised by OIC attorneys that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of Feinberg's role in determining Mitchell's fee. Even though there were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement with the Park Towers project, so far as Feinberg's Jencks materials reveal, between the time of Feinberg's May 18, 1992 telephonic interview and his being called to testify under oath, on September 17, 1993, that he was unaware of Mitchell's involvement, OIC attorneys never confronted Feinberg with Shelby's statements.

At trial, without advance notice, the OIC would put Shelby on the stand out of order and ahead of Feinberg. This would occur just three days after the OIC turned over to the defense Shelby's Jencks materials that contained the three statements by Shelby that Feinberg was aware of Mitchell's involvement with Park Towers. Those statements appeared at various places among ten items of Shelby materials then being provided, including

interview reports running as long as 27 single-spaced pages. The Shelby materials were provided along with voluminous Jencks material for 35 other witnesses.

Then, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, Associate Independent Counsel O'Neill would avoid any questions that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, O'Neill changed the subject. Shortly after Shelby finished his second day of testimony, the OIC then called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Associate Independent Counsel Paula A. Sweeney directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers. The OIC subsequently elicited sworn testimony to the same effect from Martin Fine.

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

Specifically, O'Neill stated:

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

Tr. 3519.

The supposed concealment by Shelby of Mitchell's involvement with Park Towers also would be an important feature of the OIC's brief in the court of appeals.

As with the testimony of Agent Cain, the OIC's actions with regard to the testimony of Eli Feinberg must be appraised in the context of demonstrated OIC actions with regard to other witnesses who OIC attorneys had strong reason to believe were testifying falsely.

C. The John Mitchell Messages and the Testimony of Maurice C. Barksdale

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale," which may be found under Tab 3 of the binder of Narrative Appendixes.

Count One of the Superseding Indictment alleged that Dean had caused 293 units of moderate rehabilitation subsidy to be allocated to Dade County, Florida in order to benefit Mitchell. The units would go to the Arama project of developer Aristides Martinez, who had retained former Kentucky governor Louie B. Nunn to assist in securing moderate rehabilitation funding. Nunn paid Mitchell $75,000 for his assistance on the matter. The funding occurred as a result of documents signed in mid-July 1984 by Maurice C. Barksdale who was then Assistant Secretary for Housing. This occurred several weeks after Dean assumed the position of Executive Assistant.

Mitchell had died in November 1988. Mitchell's files, which were secured by the OIC in May of 1992, contained telephone message forms indicating that in January 1984, at the same time Nunn was working out a consultant agreement to secure 300 moderate rehabilitation units for Martinez, Mitchell was talking to Dean's predecessor, Lance H. Wilson, about securing 300 units, and that Wilson had told Mitchell he was talking to Barksdale (then Acting Assistant Secretary for Housing) about the units. Though the Superseding Indictment alleged that Dean had caused the Arama funding in order to benefit Mitchell, the OIC would not turn the Mitchell messages over under Brady, a failure the court of appeals later would find to be deplorable.

More to the point here, as the OIC would eventually acknowledge, it brought Barksdale before the grand jury and called him to testify in court for the purpose of tying Dean to the Arama funding without ever confronting Barksdale with the information contained in the Mitchell message indicating that Wilson had been talking to him (Barksdale) about the matter. It did so notwithstanding the existence of a number of factors that would give Barksdale reason not to admit that he had made funding decisions at the behest of Wilson. In eliciting Barksdale's testimony in court, O'Neill focused the inquiry solely on the period after Wilson had left HUD, and asked no questions about the messages or about Wilson. On cross-examination, Barksdale testified that he did not recall that Wilson had talked to him

about the matter and that he believes that he would remember it if Wilson had. Though the Mitchell message gave OIC counsel reason to believe with virtual certainty that this testimony was false, the OIC made no effort to correct that testimony.

In order for the OIC to fulfill its obligation to determine whether Barksdale's testimony was false, it now does not have to rely solely on reinterviewing of Barksdale. It is my understanding that Lance H. Wilson has been granted immunity and has answered questions of OIC attorneys. It seems doubtful, however, that the OIC elicited from Wilson whether he had contacted Barksdale to secure the funding of Arama for Mitchell. The only reason for such failure is the fear that Wilson would state that he had caused Barksdale to fund Arama for Mitchell and that Dean had nothing to do with it.

This matter is of particular importance in light of the fact that, with regard to Count One, the court of appeals would hold that the Arama project is the only project as to which there was sufficient evidence to sustain a conviction.

D. Testimony of Thomas T. Demery

The following matter is addressed in greater detail in the Introduction and Summary and the Narrative Appendix styled "Testimony of Thomas T. Demery," which may be found under Tab 5 of the binder of Narrative Appendixes.

Anyone with the least familiarity with the record regarding Thomas T. Demery's testimony before Congress knows that Demery repeatedly lied under oath during that testimony. Further, he was indicated for perjury with regard to two false statements under oath, and during the course of the negotiation of a plea agreement that did not include a perjury count, Demery acknowledged that the statements for which he had been charged with perjury were false.

During his cross-examination, Demery several times specifically denied having lied when he testified before Congress. After Demery lied under oath during his cross-examination, the OIC did not fulfill the government's obligation to reveal the perjury of its witness. Instead, on redirect, OIC counsel proceeded to elicit the most important part of Demery's testimony. Later, in closing argument, OIC counsel would accuse Dean of falsely accusing Demery of having lied, adding that Dean "is the only we know who definitively did lie."

When Dean raised this issue in support of her motion for a new trial, the OIC argued that its counsel did not have a basis for recognizing that Demery had lied. In the court of appeals, the OIC stated that "it is not true" that the OIC had reason to believe that Demery testified falsely.

By making the arguments it did with regard to Demery, the OIC impliedly represented that it was the view of the OIC that O'Neill did not realize that Demery had committed perjury. Whether or not OIC counsel handling the post-trial matter inquired of O'Neill whether he recognized that Demery had committed perjury, it is impossible to believe that O'Neill did not recognize that Demery had committed perjury. It is a also impossible to believe that the OIC counsel making the representations in the district court and the court of appeals did not believe that O'Neill knew that Demery had lied.

With regard to Demery there is an issue beyond the OIC's failure to correct his false testimony and its subsequent representations to the courts that OIC counsel did not know that Demery committed perjury. OIC counsel must have recognized that during cross-examination Demery would be vigorously questioned about having previously lied to Congress. Thus, one would expect that in advance of putting Demery on the stand, OIC counsel discussed with him the fact that there would be such questioning. This raises the possibility that Demery falsely denied having previously lied to Congress as a result of his prior discussions with O'Neill or other members of the OIC staff.

Demery remains in a position where he must cooperate with any governmental investigation into these matters. He thus is available to be required to disclose the nature of his pre-testimonial discussions with the OIC.

E. Louis Kitchin's Delivery of the Atlanta Request

The following matter is addressed in greater detail in the Narrative Appendix styled "Kitchin's Delivery of the Atlanta Request," which may be found under Tab 8 of the binder of Narrative Appendixes.

Concerning Counts 3 and 4 of the Superseding Indictment, the OIC presented provocative testimony by two witnesses that consultant Louis Kitchin needed a letter from an Atlanta housing authority in order that he could deliver it to Deborah Gore Dean during a brief period at the end of October 1986. The OIC, however, had not alleged in the indictment that Kitchin had brought the letter to Dean; and during Kitchin's direct testimony, the OIC failed to question him about it. On cross-examination Kitchin testified that he probably was in Atlanta during the period in question. Documentary evidence possessed by the OIC also indicated Kitchin and Dean did not meet during this period.

In closing argument, however, O'Neill explicitly stated to the jury that Kitchin had brought the letter to Dean in Washington. In support of her motion for a new trial, Dean argued that, in light of the record, it was improper for the prosecutor to tell the jury that Kitchin brought the letter to Washington. Dean argued further that there was reason to believe

that the OIC knew for a fact that Kitchin had not brought the letter to Washington. In its opposition, the OIC acknowledged that O'Neill had intended to state to the jury that Kitchin had brought the letter with him, asserting that O'Neill was making a reasonable argument to the jury regarding what should be inferred from the evidence of record. The OIC failed to address any of Dean's contentions as to why the record did not support the statement or as to why there was reason to believe that the OIC knew for a fact that Kitchin had not brought the letter to Washington when O'Neill told the jury that Kitchin had brought the letter.

Apart from the impropriety of O'Neill's' statement in light of the record, the question remains whether O'Neill and/or other OIC attorneys in fact knew that Kitchin had not brought the letter to Washington. If the OIC was aware that Kitchin did not deliver the letter to Washington, O'Neill's statement that Kitchin had delivered the letter was much more serious. Further, by arguing that it was reasonable for O'Neill to make the statement, the OIC was impliedly representing to the court that it did not know that the statement was false.

F. Louie Nunn's Annotation Regarding Mitchell

The following matter is addressed in greater detail in the Narrative Appendix styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee," which may be found in the binder marked "Supplement I." The matter has not been addressed in documents filed with the court.

The Superseding Indictment alleged that the co-conspirators involved in Count One would tell their developer/clients of their association with John Mitchell, who was Deborah Gore Dean's stepfather. Consistent with that theme, the OIC included allegations in the Superseding Indictment indicating that on January 25, 1984, the day that Louie B. Nunn entered into a consultant agreement with developer Aristides Martinez to secure moderate rehabilitation funding for the Arama project, Nunn wrote on the agreement that Mitchell was to be paid half of the consultant fee. All actions the OIC took with regard to this matter -- including the words chosen in the Superseding Indictment and the presentation in the OIC's summary charts, as well as the actions the OIC took in selecting, introducing, and calling attention to the various copies of agreements between Nunn and Martinez introduced into evidence -- were calculated to support the interpretation that Nunn had annotated the consultant agreement on January 25, 1984, and that, consistent with Nunn's annotating the agreement at the time it was originally executed, Martinez possessed a copy of the agreement bearing Nunn's annotation. In particular, the OIC introduced into evidence, through the testimony of Martinez, Government Exhibit 25, which is an April 3, 1984 letter from Martinez to Nunn transmitting, among other things, a copy of the consultant agreement bearing Nunn's annotation regarding Mitchell's entitlement to half the

fee. Since Martinez sent to Nunn a copy of the agreement bearing the annotation, it would necessarily follow that Martinez possessed a copy of the agreement bearing the annotation.

Yet, Nunn did not made that annotation until the original agreement had been modified in several respects, including the addition of a guarantee by the three general partners of Arama Limited, and Nunn would not have a copy of the agreement bearing that guarantee until subsequent to April 3, 1984. There is no reason to think that Martinez ever saw a copy of the annotated agreement. The OIC thus introduced documents into evidence representing them to be things other than what the OIC knew them to be.

The court prevented the OIC from eliciting from Martinez that he had been told by Nunn or Mitchell that Mitchell was Dean's stepfather, as the OIC had alleged in the Superseding Indictment. Possibly because of being denied the opportunity to elicit that testimony, the OIC eventually would change its approach. Instead of arguing that Nunn had emphasized Mitchell's involvement with the Arama project to Martinez, the OIC argued that Nunn had concealed Mitchell's involvement from Martinez. The OIC would make that argument despite knowing with absolute certainty that Nunn had not concealed Mitchell's involvement with Arama from Martinez and despite in-court testimony from Nunn as to his discussions with Martinez about involving Mitchell. In making this argument, the OIC simply ignored the fact that exhibits it had placed in evidence demonstrated, though falsely, that Martinez possessed a copy of the consultant agreement bearing the annotation indicating that Mitchell was to receive half the consultant fee.

I have already noted that I am available to talk to you about the statements in my affidavit. I am available as well to talk to you about any other matter addressed in the materials as to which you have questions.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Enclosures