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INTRODUCTION AND SUMMARY

INTRODUCTION

This introduction and the summary that follows concerning actions of attorneys of the Office of Independent Counsel ("OIC") in the case of United States of America v. Deborah Gore Dean, Criminal. No. 92-181-TFH (D.D.C.), are intended to provide background for an appraisal of prosecutorial misconduct issues that are discussed in detail in the ten attached Narrative Appendixes. The summary of necessity presents a much simplified description of complex issues and events. The summary ought nevertheless to facilitate substantially a review of matters more comprehensively presented in the Narrative Appendixes.

The Narrative Appendixes have been created to enable readers to draw their own conclusions from an objective record. Thus, for the most part, the Narrative Appendixes merely describe undisputed facts and positions the parties took concerning those facts, with the author's views largely relegated to a comments section at the end of each appendix. Each Narrative Appendix provides comprehensive references to the underlying documents and attaches documents that are of particular relevance.

The chronological format employed in the Narrative Appendixes was chosen principally in order to afford the reader as complete a picture as possible of the OIC's actions and its justifications for those actions with regard to the subject addressed in each appendix. That format, however, is a particularly useful one for presenting the prosecutorial misconduct issues in this case, since some of the more inculpatory evidence of unethical and dishonest behavior on the part of attorneys for the OIC may be found in the manner of the OIC's response to allegations made in support of Deborah Gore Dean's request for a new trial. This is especially so with regard to the matter where there may exist the strongest evidence of criminal conduct on the part of OIC attorneys.

That matter, which is discussed in detail in the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.," receives special attention in the pages below. In broad outline, the Cain Narrative Appendix raises issues concerning the OIC's use at trial of sworn testimony of a government agent that there is strong reason to believe was false; the OIC's attempt to conceal that the evidence was false after being confronted with information that would lead its attorneys to believe, if they did not already believe, that the evidence was in fact false; and the continued reliance on the testimony the OIC's attorneys believed to false in arguments made to the district court, to the probation officer, and finally to the court of appeals. The following are the most pertinent facts.

Count 1 of the Superseding Indictment alleged that Deborah Gore Dean, while employed as Executive Assistant to the Secretary of the Department of Housing and Urban Development ("HUD"), had facilitated certain funding decisions in order to benefit former Attorney General John N. Mitchell, whom Dean considered to be her stepfather.

Yet, no witness testified that he or she knew or believed that, while Dean was employed at HUD, she was aware that Mitchell had earned HUD consulting fees. Two immunized government witnesses gave testimony suggesting that Dean did not know Mitchell earned such fees. Dean denied knowing that Mitchell earned HUD consulting fees until she read a HUD Inspector General's Report on the moderate rehabilitation program when it was issued in April 1989. The report indicated that Mitchell had been paid $75,000 by former Kentucky Governor Louie B. Nunn for consulting services related to a Florida moderate rehabilitation project called Arama.

During her direct examination, Dean gave emotional testimony that after she read the information concerning Mitchell in the report, she called Alvin R. Cain, Jr., the investigator from the HUD Inspector General's Office who had prepared the report. Dean testified that in her call to Cain, she had expressed her anger about the treatment of Mitchell in the report, had asserted to Cain that she did not believe that Mitchell could have earned a HUD consulting fee, and had demanded to know if there was a check proving that Mitchell earned such a fee. In particular, Dean testified: "I was really mad and, 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 ..."

Dean then attempted to state what Cain's response had been, but she was interrupted by a hearsay objection. The objection was sustained, and Dean did not testify as to what Cain had told her about whether there existed a check showing that Mitchell had earned a HUD consulting fee or whether Cain had a copy of it.

Though Associate Independent Counsel Robert E. O'Neill subsequently cross-examined Dean for all or part of three days, he did not question her about the call to Cain. The OIC then called Cain as its second rebuttal witness. Cain, a supervisory special agent who had been detailed to the OIC for the preceding three years, firmly testified that he had no recollection of the call from Dean, and so testified in a manner to give a strong impression that he would have remembered the call if it occurred. In eliciting this testimony, O'Neill asked Cain three separate questions, each time describing Dean's call to Cain in a somewhat different manner. Though the most emphasized element of Dean's description of her call to Cain had been her insistence on knowing whether there existed a check, in none of O'Neill's descriptions of Dean's call did he mention a check.

In closing argument, O'Neill argued that the case rested entirely on Dean's credibility and repeatedly stated that Dean had lied to the jury. The pervasiveness of O'Neill's statements that Dean lied are unparalleled in any reported federal case. Such statements were especially directed to Dean's testimony that she was unaware that Mitchell had earned a HUD consulting fee. In that regard, O'Neill relied heavily on Cain's testimony contradicting Dean's statement about the telephone call in April 1989, as well as on the testimony of another rebuttal witness, a HUD driver named Ronald L. Reynolds. O'Neill would refer to Cain's testimony both during the initial part of his closing argument and during rebuttal on the following day. In the former instance, O'Neill went into some detail in recalling Dean's testimony about the call to Cain to the

jury. Neither in his initial discussion of Dean's testimony nor during his rebuttal, however, did O'Neill mention anything about Dean's demand to know if there existed a check. In any case, given that Cain was an African-American, and Dean was being tried before a jury that was entirely African-American, Cain's testimony, and O'Neill's heavy reliance upon it, could have been expected to have considerable impact on the jury's appraisal of Dean's credibility.

After deliberating for part of three days, the jury found Dean guilty on all twelve counts with which she was charged.

Dean filed a motion for a new trial asserting that the OIC had engaged in numerous instances of prosecutorial misconduct. In support of her motion, Dean argued that Cain was one of at least three OIC witnesses who lied and who the OIC knew or should have known had lied. The others were Thomas T. Demery, the OIC's final witness during its case-in-chief, and Ronald L. Reynolds, the other rebuttal witness on whose testimony (like Cain's) O'Neill had heavily relied in asserting that Dean had lied about her knowledge of Mitchell's HUD consulting.

Dean provided an affidavit stating that when she asked Cain about the check, Cain said that a check existed but that he did not have a copy, since it was maintained in a HUD regional office. Dean also stated that, after talking to Cain, she told James P. Scanlan, whom she was dating at the time, what Cain had told her, including what Cain had told her about the check. Scanlan, a career government attorney, filed an affidavit stating that in April 1989, Dean told him about the call to Cain and told him that Cain had told her the check was in a field office. Dean argued that, if the check was in fact maintained in a field office in April 1989, it would tend to corroborate her account of her call to Cain. Dean requested a hearing on the matter.

In her affidavit Dean also made statements suggesting that Cain had responded evasively during cross-examination on two peripheral matters. Dean argued that these responses, among other things, should have alerted OIC counsel to the fact that Cain was not testifying truthfully about the call.

In its Opposition, the OIC responded evasively, focusing principally on the two peripheral issues and asserting that Dean had lied in her affidavit. The OIC, however, said nothing whatever about the whereabouts of the check or about Dean's arguments regarding the whereabouts of the check. The OIC did not mention the check at all.

In her Reply, Dean argued that the OIC's failure to discuss the check suggested that the check was in fact maintained in a HUD field office in 1989, and that the OIC did not have a plausible theory as to how she could have learned that other than through her call to Cain.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the U.S. 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 sentencing level increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the U.S. Probation Officer accepted Adams' argument, and recommended that Dean's sentencing level be increased because of her testimony about calling Cain.

On February 14, 1994, after a short hearing, the court denied Dean's motion for a new trial. The court, however, criticized the conduct of the OIC at length, among other reasons, for withholding exculpatory material until the eve of trial while misrepresenting to the court that its attorneys were aware of no exculpatory material, for failing to ensure that its witnesses were testifying truthfully, and for generally acting in a manner "not worthy of prosecutors in the federal government." The court essentially agreed with many claims of prosecutorial misconduct asserted by Dean, including her contentions that OIC witnesses Ronald L. Reynolds and Thomas T. Demery had lied and that the OIC knew that they had lied. Yet, the court did not discuss Dean's arguments that Cain also had lied or her arguments about the OIC's heavy reliance on Cain's testimony in attacking her credibility 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 was probative that the OIC knew that Cain lied. Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the Independent Counsel's argument that Cain's testimony contradicting Dean showed that she lied during her 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 Cain's testimony despite 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. Dean requested the court to defer final ruling on her motion for new trial and sentencing until the matter of the whereabouts of the check could be 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 February 22, 1994 hearing, the OIC for the first time discussed the issue of the whereabouts of the check. 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 from a statement in the HUD Inspector General's Report at the end of a report of an interview of Louie B. Nunn on December 12, 1988. The statement, which Swartz provided in the midst of his argument, indicated that certain materials pertaining to Nunn's relationship with the developer of Arama that had been shown to Nunn during the interview had been obtained from a HUD Inspector General's audit file in Atlanta, Georgia.

The statement, however, in no manner suggested that the investigator had sought to secure a copy of the check showing the payment from Nunn to Mitchell. Nor did the statement give any basis for inferring that, if the investigator had secured a copy

of the check, no copy would have been transmitted to Washington by the time the HUD Inspector General's Report was issued at HUD Headquarters four months later. The statement could not have provided a reasonable basis for Dean's statement about what Cain had told her regarding the whereabouts, in April 1989, of the check reflecting Nunn's payment to Mitchell. Nor could the OIC reasonably have believed that the statement had formed the basis for either Dean's or Scanlan's affidavit on that matter.

The court denied Dean's motion without specifically indicating what it believed about who was telling the truth about the call, but merely stating that the information presented "doesn't mean of necessity the government is putting on information they knew was false before the jury." The court did not state whether it believed that Cain or Dean had testified truthfully about the call. And it expressed no view regarding Dean's arguments that, whatever the OIC believed about the truthfulness of Cain's testimony when it presented that testimony in court, the OIC had additional reason to believe that Cain had perjured himself when, following the filing of Dean's motion for a new trial, the OIC continued to rely on Cain's testimony in arguing to the court and the Probation Officer that Dean's sentencing level should be increased for obstruction of justice.

Later that day, the court would refuse to increase Dean's sentencing level on the basis of Cain's contradiction of Dean's statement about calling him, with the court stating that it believed that Dean may in fact have called Cain. In a subsequent ruling the court then relied on Dean's testimony about her call to Cain with regard to another sentencing ruling. The OIC had persuaded the Probation Officer that Dean had testified falsely during her cross-examination when she stated that she was not very close to John Mitchell until after she left HUD. In initially agreeing with the Probation Officer's determination, the court cited Dean's testimony about her call to Cain as evidence that in fact Dean had a close relationship with Mitchell. The court's ruling involved circumstances in which it would have made no sense for the court to rely on Dean's testimony about the call unless the court accepted that Dean had told the truth about the call.[1]

As shown more fully in the Narrative Appendix regarding Agent Cain, there is much reason to believe that OIC trial counsel elicited Cain's testimony about the call and relied on it in closing argument knowing that it was probably if not certainly false. There is an even stronger case that, whatever trial counsel knew when initially relying on Cain's testimony, at least subsequent to the filing of Dean's motion for a new trial, attorneys at higher levels of the OIC came to believe that Cain had committed perjury. Yet, those attorneys not only obstructed defense efforts to show that Cain had

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[1] Though initially increasing Dean's sentencing level on the basis of her testimony about not being close to Mitchell, the court would later reverse itself on the matter, finding that the testimony cited by the OIC appeared to be misleading only when taken out of context. See Narrative Appendix styled "Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD."

committed perjury, but continued to rely on testimony they believed was false in seeking to increase Dean's sentence.

Those appraisals would hold even if there were available for examination only the OIC's actions that pertain directly to Cain. But an appraisal of the actions of the OIC with regard to Cain, and with regard to any other allegations of prosecutorial abuse about which reviewers of these materials might harbor doubts if evaluated in isolation, must take into account the demonstrable abuses described in all ten Narrative Appendixes, as well as in Dean's memorandum supporting her request for a new trial. Among them are actions that, whether they involve prosecutable crimes or not, involve moral and ethical breaches of comparable gravity to a federal prosecutor's concealment of the perjury of a government agent.

For example, as shown in the lengthy 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," the following are not open to question: 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 no exculpatory material existed; 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 Dean even though an immunized witness had told them -- and other evidence indicated -- that the reference was not to Dean; and that those attorneys sought to lead the jury or the courts to believe that Dean had provided certain internal documents to a consultant though they knew that the documents had not been provided by Dean.

The Park Towers appendix will also show the following with regard to the testimony of an OIC witness named Eli Feinberg. Count 1 of the Superseding Indictment alleged that the co-conspirators would tell their developer clients that Dean was Mitchell's stepdaughter. Ultimately, however, the OIC instead would seek to prove that the co-conspirators concealed Mitchell's involvement from each of the developers involved in Count 1, and would then repeatedly stress that this concealment reflected the conspiratorial nature of Mitchell's role. Feinberg's testimony that he was not aware that John Mitchell was involved with the Park Towers project would be a crucial element in the OIC's pursuit of that theme.

Prior to May 18, 1992, however, the OIC's immunized witness Richard Shelby had twice told the representatives of the OIC that he had told Feinberg of Mitchell's involvement with Park Towers. On May 18, 1992, the OIC conducted a telephonic interview of Feinberg. Without advising Feinberg that Shelby had stated he had informed Feinberg of Mitchell's role, the OIC asked Feinberg if he knew that Mitchell was involved with Park Towers. Feinberg said that he did not. The following day, the OIC again questioned Shelby and advised him of Feinberg's statement. Shelby assured the OIC that he had told Feinberg about Mitchell's involvement and even described Feinberg's role in determining Mitchell's fee.

More than a year later, apparently without ever having confronted Feinberg with the contrary statements of the OIC's immunized witness, the OIC would call Feinberg to the stand to elicit from him the sworn testimony that he was unaware of Mitchell's involvement. The OIC had called Shelby to testify out of order, and ahead of Feinberg, and asked Shelby no questions about his communications with Feinberg regarding Mitchell's role. When Shelby started to testify about his discussions with Feinberg about determining Mitchell's fee, Associate Independent Counsel O'Neill changed the subject.

Then, in closing argument, in asserting to the jury that secrecy was the "hallmark of conspiracy," O'Neill would rely on Feinberg's testimony that he was unaware of Mitchell's role, emphasizing to the jury that the testimony was unimpeached and that no one contended that Feinberg did know of Mitchell's involvement. In the court of appeals, the OIC would continue to place great emphasis on the concealment of Mitchell's role as evidencing the conspiratorial nature of the relationships involved in Count 1.

The Park Towers and the other Narrative Appendixes will show numerous instances where there is no room for doubt that OIC attorneys refused to confront government witnesses with information that there was reason to believe would lead the witnesses to recall exculpatory information; that those attorneys repeatedly sought to cause the jury to believe things that the attorneys believed were probably or certainly false; and that those attorneys refused to correct testimony of government witnesses that the attorneys knew to be false and continued to rely on that perjured testimony. It also will not be open to dispute that in closing argument, the prosecutor repeatedly asserted to the jury that a criminal defendant had lied even though the prosecutor believed with certainty or near certainty that the defendant had not lied.

When the actions of attorneys for the OIC regarding Special Agent Cain are evaluated with that context in mind, it is far easier to accept that attorneys representing the United States Government were willing, not only to ignore a duty to investigate the possible perjury of a government agent, but to take affirmative steps to conceal that perjury. In any event, however, the truth of these matters is something that the government can itself readily determine.

As noted at the outset, there are ten Narrative Appendixes. They range in length from 8 to 83 pages. Each Narrative Appendix begins with a summary of the discussion that follows in that document. These summaries range from one paragraph to six pages. The ten individual summaries are also collected together behind the general summary that follows immediately below.

SUMMARY

I. PRETRIAL

A. The Charges

On April 28, 1992, Independent Counsel Arlin M. Adams secured an Indictment against Deborah Gore Dean. The Indictment alleged that in her position as Executive Assistant to HUD Secretary Samuel R. Pierce, Jr., which she held from June 1984 until July 1987, Dean had "facilitated and caused to be facilitated" HUD's decisions to send 200 moderate rehabilitation units to Atlanta, Georgia, at the end of October 1986, and 203 moderate rehabilitation units to Dade County, Florida, in April 1987, in order to benefit an Atlanta political consultant named Louis F. Kitchin. The Indictment also alleged that Kitchin had delivered a $4,000 check to Dean in April 1987 in return for Dean's role in the two aforementioned funding decisions and other official actions on Kitchin's behalf.

On July 6, 1992, the OIC secured a Superseding Indictment broader than the initial Indictment. The matters alleged in the original Indictment became the subjects of Count 3 (conspiracy) and Count 4 (illegal gratuity) in the Superseding Indictment. The Superseding Indictment also added two additional conspiracy counts. Count 1 involved three moderate rehabilitation allocations for Dade County, Florida that would be used to support the following projects: Arama (293 units, 1984); Park Towers (143 units, 1985), and South Florida I (219 units, 1986). The Superseding Indictment alleged that Dean had "facilitated and caused to be facilitated" these funding decisions in order to benefit John N. Mitchell whom Dean considered to be her stepfather. Louie B. Nunn was alleged to be an unindicted co-conspirator with regard to the Arama and South Florida I projects. Richard Shelby was alleged to be an unindicted co-conspirator with regard to the Park Towers project.

Count 2 alleged that Dean had facilitated HUD actions involving five projects for the benefit of Andrew C. Sankin and Richard Shelby in return for various favors.

Count 5 alleged that in June 1987 when filling out a "Statement for Completion by Presidential Nominee" for the Senate Banking Committee for purposes of the Committee's consideration of Dean's nomination to the position of Assistant Secretary of HUD for Community Planning and Development, Dean falsely stated that she had no potential conflicts of interest relating to that position. Counts 6 though 13 alleged that on August 6, 1987, when testifying before the Senate Banking Committee regarding the nomination to the Assistant Secretary position, Dean had four times committed perjury and had four times engaged in schemes to falsify, conceal, and cover up facts she had a duty to disclose. The original Count 5 would be dropped before trial, with Counts 6 through 13 renumbered as 5 through 12.

Upon learning of that the Superseding Indictment would allege a conspiracy involving John Mitchell, Dean sought to have Independent Counsel Arlin M. Adams recused from the case. Citing an April 11, 1990 USA Today article in which Adams had been quoted as observing that he might have been on the Supreme Court had he not offended John Mitchell, Dean wrote to Attorney General Richard Thornburgh and to Adams himself, requesting that Adams be recused or recuse himself from any further role relating to matters involving John Mitchell. Thornburgh and Adams both summarily denied Dean's request.

B. Withheld Brady Material

In June 1992, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Judge Gerhard A. Gesell ordered the OIC to turn over all exculpatory material to the defendant as soon as any such material was discovered. Associate Independent Counsel Jo Ann Harris, then lead trial counsel on the case, assured Judge Gesell that the OIC would comply with the order, although she indicated that no exculpatory material had so far been discovered. For more than a year the OIC continued to deny that it was aware of any such material.

On August 20, 1993, less than two weeks before jury selection, the Office of Independent Counsel provided an eight-page listing of statements by 23 persons. Certain of the statements in the letter flatly contradicted inferences in the Superseding Indictment, particularly inferences related to the Park Towers project and Dean's knowledge of John Mitchell's involvement with that project. For example, central to the allegations regarding Park Towers was the inference that Dean had promoted the funding in order to benefit Mitchell, whom Shelby had retained to help secure moderate rehabilitation units from HUD. The Superseding Indictment also suggested that Shelby had retained Mitchell because of Mitchell's relationship to Dean. Yet, the August 20, 1993 letter (at 7) indicated that Shelby had told representatives of the Office of Independent Counsel that, "to his knowledge, Deborah Dean was not aware that John Mitchell was involved in the Park Towers project."

Further, the Superseding Indictment was intended to create the inference that in a July 31, 1985 memorandum relating to the Park Towers project, a conspiratorial reference to "the contact at HUD" with whom Shelby was supposed to be meeting was a reference to Dean. Yet, the August 20, 1993 letter indicated that Shelby had informed the OIC that the reference to "the contact at HUD" was not a reference to Dean. Rather, the reference was to a Deputy Assistant Secretary named Silvio DeBartolomeis, who was the HUD official that Shelby principally dealt with regarding Park Towers.

When pressed to provide the dates of the statements in its August 20, 1993 letter, the OIC would acknowledge that the vast majority of the statements described in the letter pre-dated the issuance of the Superseding Indictment as well as one or more explicit representations to the court that the OIC was aware of no Brady material. In particular, the above-described statements of Richard Shelby were made prior to the

issuance of the Superseding Indictment that created the inferences that Shelby's statement contradicted.

Dean moved the court to dismiss the Superseding Indictment or bar the admission of evidence because of the Independent Counsel's failure to provide exculpatory material in a timely manner as ordered by Judge Gesell.[2] At a hearing on August 31, 1993, in defending the failure to provide the material earlier, Associate Independent Counsel Paula A. Sweeney represented to the court that the OIC's reason for failing to provide the material earlier was that the witnesses had qualified their statements over time. The court rejected out of hand the argument that the fact that witnesses later qualified their statements provided a basis for withholding the material. The court nevertheless denied Dean's motion, but warned the OIC that the court would look more seriously at any further failures of the OIC to fulfill its obligations under Brady.

No inquiry was made as to whether Sweeney's representation actually pertained to all, or any, of the withheld statements. The representations, however, did not apply to the statements by Shelby mentioned above. Sweeney's representations also did not apply to other statements Shelby had made prior to the issuance of the Superseding Indictment that also contradicted inferences in that indictment, but which the OIC continued to withhold until immediately before Shelby testified. For example, the Superseding Indictment had implied that Shelby had retained Mitchell because of Mitchell's relationship with Dean. Yet, still undisclosed by the OIC at the time that Sweeney defended the failure to comply with Judge Gesell's order was that, prior to issuance of the Superseding Indictment, Shelby had stated that he had retained Mitchell prior to learning of Mitchell's relationship to Dean, and after learning of that relationship, ceased to seek material assistance from Mitchell.

The Superseding Indictment also implied that Park Towers had been discussed among Mitchell, Shelby, and Dean when the three met for lunch on September 9, 1985. Ultimately, the implication that the three discussed Park Towers on that date would be the principal basis for the OIC's assertion that Dean was aware of Mitchell's involvement with Park Towers. Nevertheless, despite the court's warning at the hearing on August 31, 1993, the OIC still did not disclose Shelby's statements, made in interviews and before the grand jury, that he believed that Park Towers was not discussed at the September 9, 1985 lunch and that he had made special efforts to ensure that it was not discussed.

Those statements would only be provided at the beginning of trial when Shelby's Jencks material was turned over among a massive collection of Jencks material sufficient to fill over 15 large 3-ring binders. Shelby's material, which would be provided on September 13, 1993, the day of opening arguments and three days before Shelby

[2] Following the death of the Honorable Gerhard A. Gesell, the case was reassigned to the Honorable Thomas F. Hogan.

testified as the OIC's twelfth witness, was comprised of ten items, including grand jury testimony and interview reports running as long as 27 single-space pages. The same day that it provide Shelby's Jencks material, the OIC provided Jencks material for 35 other witnesses. Along with material provided for 21 witnesses several days earlier, there would be Jencks material produced for 57 OIC witnesses, including 20 witnesses who would not testify in the OIC's case-in-chief.

Shelby never withdrew from or qualified in any respect these or other statements that contradicted inferences in the Superseding Indictment. It is not evident that Sweeney's representation applied to a single statement in the August 20, 1993 letter.[3]

[3] See 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."

II. TRIAL

The case would be tried to a jury between September 13, 1993, and October 21, 1993. With regard to Count 1, which plays a large role in the discussion of prosecutorial misconduct that follows, no government witness testified that he or she knew or believed that Dean was aware that John Mitchell had received a fee for HUD consulting. Immunized OIC witness Richard Shelby, who had retained Mitchell to work on Park Towers, testified that he (Shelby) had intentionally concealed knowledge of Mitchell's involvement with that project from Dean. Tr. 603. Immunized witness Jack Brennan, a partner of Mitchell's, testified that Mitchell had refused to do any work on the South Florida I project because of Dean's position at HUD. Tr. 319-22. Brennan also testified that when he later told Dean of Mitchell's HUD involvement, her reaction was "shock and aghast." Tr. 369.

Other aspects of the trial that are particularly germane to the prosecutorial issues are summarized below.

A. The OIC's Case-in-Chief

1. Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony

Miami lawyer Martin Fine was the developer of Park Towers. Fine had first retained a Miami consultant named Eli Feinberg, who then approached Shelby. Shelby then approached Mitchell. Fine kept extensive notes, usually recording his conversations with Feinberg, in which Feinberg would inform Fine of Shelby's progress. The OIC relied on two of these memoranda to support entries in the Superseding Indictment. The first was a July 31, 1985 Fine memorandum to file recording a conversation with Feinberg who had told Fine that Shelby was meeting with "the contact at HUD" the following week. As noted, Shelby had informed the OIC that the reference was to DeBartolomeis, not to Dean. Another Fine memorandum, dated February 3, 1986, recorded a conversation in which Feinberg had informed Fine that Shelby had had lunch that day with "his friend at HUD" and had discussed a matter relating to Park Towers. This reference apparently was to Dean.

Shelby was not scheduled to testify until the second week of trial, with both Feinberg and Fine being scheduled to testify ahead of him. At the end of the second day of testimony, Wednesday, September 15, Associate Independent Counsel Robert E. O'Neill advised the court and defense counsel that on the following day, apart from two witnesses whom O'Neill named, witnesses would be HUD people from Washington. Tr. 424-255. On the next day, however, Shelby would be called as the OIC's second witness of that day.

Shelby would testify, consistent with his prior statements to the OIC, that his principal contacts at HUD concerning the Park Towers project were with Deputy Assistant Secretary Silvio DeBartolomeis, though he (Shelby) had also spoken to Dean and a Special Assistant named Hunter Cushing. O'Neill then asked Shelby the following question: "Now, did you review any records, trying to refresh your recollection as to who you dealt with at HUD on this project?" Tr. 547 (emphasis added). When Shelby indicated that he had reviewed documents the night before in O'Neill's presence, O'Neill elicited the testimony that the documents Shelby reviewed mentioned Dean, but did not mention DeBartolomeis or Cushing. Tr. 547-48.

Yet, in addition to the July 31, 1985 memorandum referencing "the contact at HUD," the OIC possessed a number of Fine memoranda referencing Shelby's contacts with DeBartolomeis, particularly with regard to a post-allocation waiver that DeBartolomeis had signed on May 28, 1986. DeBartolomeis had provided a copy of the waiver to Shelby who had then faxed it to Fine the following day and sent it to Feinberg several days later. The OIC also possessed Shelby's note sending the copy of the waiver to Feinberg and indicating that he (Shelby) had received the waiver from DeBartolomeis. Apparently, Shelby had been shown none of the materials when reviewing documents the evening before.

O'Neill did not question Shelby about the July 31, 1985 document referencing "the contact at HUD." O'Neill would later introduce that document through the testimony of Martin Fine, though without eliciting from Fine the identity of the referenced "contact at HUD." Tr. 664-65. In closing argument the OIC would rely on charts containing entries largely identical to those in the Superseding Indictment that created inferences that its immunized witness Shelby had contradicted, including the inference that the reference to "the contact at HUD" was a reference to Dean. The OIC would eventually acknowledge that it had sought to cause the jury to believe that the reference to "the contact at HUD" was a reference to Dean. Defending those actions, the OIC cited Shelby's testimony regarding the documents he reviewed to "refresh his recollection as to who [he] dealt with at HUD on this project." Relying on that testimony, the OIC asserted that, notwithstanding Shelby's testimony, it was appropriate for the prosecutor to attempt to cause the jury believe that the reference to "the contact at HUD" was a reference to Dean because of what the OIC would term the "absence of corroboration of the contacts with DeBartolomeis and Cushing."[4]

O'Neill also would not question Shelby about any of the following matters that would be highly relevant to contentions that the OIC would make in support of a claim that Mitchell, Shelby and Dean were involved in a conspiracy related to Park Towers:

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[4] See 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."

(1) whether he knew of Mitchell's relationship with Dean when he first retained Mitchell;

(2) whether Dean was aware of Mitchell's involvement with Park Towers;

(3) whether Park Towers was discussed at the September 9, 1985 lunch with Mitchell and Dean;

(4) whether he concealed his contacts with Dean from Feinberg and Fine;

(5) whether Dean had been responsible for the post-allocation waiver regarding Park Towers;

(6) whether Dean had provided him with a copy of the post allocation waiver;

(7) whether he concealed Mitchell's involvement with Park Towers from Feinberg and Fine.

The OIC's case with respect to Park Towers rested on the supposition that each one of these propositions was true. Yet, at the time that O'Neill declined to ask his immunized witness whether the propositions were true, O'Neill knew that Shelby would have testified that the propositions were false and/or that there was other evidence indicating that they were false.

As already indicated, the first three propositions were contradicted by Shelby's consistent Jencks testimony.

With regard to No. 4, Shelby's Jencks material do not indicate that Shelby was even asked whether he concealed his contacts with Dean from Feinberg and Fine. Yet, the OIC knew from Feinberg's Jencks material that Shelby had freely communicated his contacts with Dean to Feinberg. Nevertheless, as with the memorandum referencing the contact at HUD, the OIC would introduce the February 3, 1986 memorandum that referred to Shelby's friend at HUD through the testimony of Martin Fine, without asking Fine about its contents and without asking Shelby whether he had merely referred to his "friend at HUD" when he told Feinberg about the lunch because he was concealing Dean's name from Feinberg. The OIC would then rely on the reference as evidence that "Shelby avoided identifying 'his friend' in his contacts with Feinberg and Fine."

With regard to No. 5, O'Neill knew that Dean was not responsible for the post-allocation waiver because the OIC possessed Martin Fine's memoranda documenting Shelby's contacts with DeBartolomeis and indicating that DeBartolomeis had stated that he would grant the waiver. With regard to No. 6, O'Neill knew that Shelby had received a copy of the waiver from DeBartolomeis, because Shelby had written to Feinberg telling him that DeBartolomeis had provided the copy.

Nevertheless, the OIC would ask neither Shelby, Feinberg, nor Fine anything about the waiver. Rather, the OIC would introduce a copy of the waiver that Shelby had sent to Fine, without eliciting testimony from anyone as to how Shelby persuaded HUD to grant the waiver or how Shelby secured a copy of the waiver. The OIC would then place the waiver in its Park Towers chart and refer to adjacent entries showing lunches between Dean and Shelby and, in closing argument, O'Neill would assert to the jury that the lunches were "continuing meetings on Park Towers" in a manner to suggest that Dean had been responsible for the waiver. In post-trial argument Deputy Independent Counsel Bruce C. Swartz would also argue that it was reasonable for the government to lead the jury to believe that Dean was "the contact at HUD," not only because of the absence of documentation of the contacts with DeBartolomeis, but because Dean was responsible for the post-allocation waiver.[5]

With regard to No. 7, O'Neill knew that Shelby would testify that he did not conceal Mitchell's involvement from Feinberg and Fine because Shelby had three times told representatives of the OIC that such was not the case. As noted in the Introduction, on two occasions prior to May 18, 1992, Shelby had stated that he had told Feinberg and assumed that Feinberg had told Fine. On May 18, 1992, representatives of the OIC conducted a telephonic interview of Feinberg. Without advising Feinberg that Shelby had told them that he had informed Feinberg of Mitchell's role, representatives of the OIC asked Feinberg if he knew that Mitchell was involved in Park Towers. Feinberg said that he did not. The following day, the OIC again questioned Shelby and advised him of Feinberg's statement. Shelby assured the OIC that he had told Feinberg about Mitchell's involvement and even described Feinberg's role in determining Mitchell's fee.

O'Neill, however, did not ask Shelby whether he discussed Mitchell's role with Feinberg. And when Shelby started to testify about his discussions with Feinberg about determining Mitchell's fee, O'Neill changed the subject. Tr. 546.

After Shelby left the stand without having testified about his communications with Feinberg concerning Mitchell's role, the OIC called Feinberg to the stand. Without apparently ever having confronted Feinberg with the contrary statements of the OIC's immunized witness Shelby during the sixteen months since the telephonic interview, Associate Independent Counsel Paula A. Sweeney elicited from Feinberg the sworn testimony that he was unaware of Mitchell's involvement.

Although the Superseding Indictment had alleged with regard to Count 1 that the co-conspirators would tell their developer/clients that Dean was Mitchell's stepdaughter, ultimately in arguments in the district court and in the court of appeals, the OIC would heavily rely on evidence that the OIC maintained showed that Mitchell's involvement was concealed from the developers. In closing argument, in asserting to the jury that

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[5] The OIC also called Silvio DeBartolomeis as an immunized witness. DeBartolomeis was asked no questions about Park Towers.

secrecy was the "hallmark of conspiracy," O'Neill would rely on Feinberg's testimony that he was unaware of Mitchell's role. In doing so, O'Neill would place great emphasis on the fact that the testimony was unimpeached.

2. Arama: The John Mitchell Telephone Messages and Maurice Barksdale

With regard to the Arama project, telephone messages that the OIC had secured from John Mitchell's files prior to the issuance of the Superseding Indictment indicated that Mitchell was in contact with Lance H. Wilson, Dean's predecessor as Executive Assistant, about securing funding for the project in January 1984, months before Dean was promoted to that position. One message indicated that Wilson had told Mitchell that he had been talking to then Acting Assistant Secretary for Housing-Federal Housing Commissioner Maurice C. Barksdale about the funding. The funding eventually would take place in July 1984, shortly after Wilson left HUD, on the basis of funding documents signed by Barksdale.

The Mitchell messages were never provided to Dean as Brady material, but were merely made available among more than 200,000 pages of documentary material provided during discovery. Though the OIC had secured the messages prior to bringing Barksdale before the grand jury at the end of June 1992, it would neither at that time nor at any other time advise Barksdale that it had reason to believe that Wilson had been talking to him about the funding in January 1984. At trial, O'Neill would question Barksdale about his contacts with the Secretary's office about moderate rehabilitation fundings solely with regard to the July 1984 period when Barksdale actually signed the funding documents pertaining to Arama, and which was after Wilson left HUD. Tr. 456-57. Barksdale still testified that he did not remember Dean asking him to fund the project and that he would likely remember if she had. Tr. 457, 535.[6]

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[6] See Narrative Appendix styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale."

3. The Andrew Sankin Receipts

Andrew C. Sankin, who was named as an unindicted co-conspirator in Count 2, testified as an immunized government witness. Sankin, whom O'Neill had described in opening argument as someone who "was wining and dining [Dean]" and who was "buying her gifts," testified about a large number of receipts for meals or gifts. Some of the receipts named Dean or her position and some listed HUD officials in general or indicated positions different from Dean's, but which might be mistaken for Dean's. As to both categories of receipts, the OIC possessed evidence indicating that they probably or certainly did not relate to Dean. The OIC had declined to base indictment entries on the receipts that did not name Dean or her position, presumably reflecting the fact that the OIC believed that they did not apply to Dean. O'Neill refused to allow Sankin to review the receipts before testifying, with the OIC later asserting that O'Neill had done so because of Sankin's hostility to the government's case. O'Neill nevertheless sought to introduce all the receipts through Sankin, even those that clearly did not involve Dean, in a manner to cause the jury to believe that they all did involve Dean.

After leaving the stand on his first day of testimony, Sankin, apparently recognizing that a false impression was being created, informed O'Neill that not all of the receipts related to Dean. O'Neill did not reveal this statement to the court or the defense when trial resumed the following day. Rather, when Sankin again took the stand, O'Neill elicited further testimony about one of the few receipts that definitely did involve Dean, thereby reinforcing the false impression created the day before. Sankin's off-the-stand statement to O'Neill was only revealed during Sankin's cross-examination. The court indicated that it had believed the receipts were being offered because they related to Dean and chastised O'Neill both for introducing receipts in a manner to suggest that they applied to Dean when they could not actually be tied to Dean and for failing to reveal Sankin's off-the-stand statement. Tr. 1203-05.

Nevertheless, in closing argument, O'Neill would continue to rely on all receipts that were introduced into evidence, including receipts that documentary evidence indicated did not apply to Dean as well as receipts that Sankin had testified did not apply to Dean.[7]

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[7] See Narrative Appendix styled "The Andrew Sankin Receipts."

4. The Atlanta Letter

With regard to the October 1986 Atlanta funding that was a subject of Counts 3 and 4, the OIC presented provocative testimony from two witnesses about hurriedly securing a letter request from the Atlanta housing authority on October 27, 1986, because Louis Kitchin stated that he needed to deliver the letter immediately to Dean with whom he was having lunch on that day or the next. Tr. 1313-14, 1326-37. Yet, Dean's records showed no meeting with Kitchin during the two-day period when Kitchin was supposed to be delivering the letter. The OIC had not alleged in the Superseding Indictment that Kitchin had delivered the letter to Dean, presumably reflecting the fact that the OIC did not believe that Kitchin had delivered the letter, and when Kitchin testified as an immunized OIC witness, the OIC did not ask him whether he had delivered the letter. On cross-examination, confronted with his phone records for the period, Kitchin indicated that he was probably in Atlanta. Tr. 1504-06.

Nevertheless, in closing argument, O'Neill would explicitly state to the jury that Kitchin had brought the letter to Washington. The OIC would acknowledge that O'Neill had purposely made that statement, asserting that O'Neill was merely arguing to the jury what the record showed.[8]

5. Thomas T. Demery

The OIC also called Thomas T. Demery as an immunized witness to testify with regard to Counts 3 and 4. Demery had been the Assistant Secretary for Housing-Federal Housing Commissioner at the time of the Dade County funding in the Spring of 1987 that was a subject of Counts 3 and 4 and had been a participant in the selection committee meeting that decided upon that funding. Demery himself had extensive contacts with Kitchin. Kitchin called on Demery the day after the developer of the Dade County units had applied for moderate rehabilitation funding from the Dade County housing authority, and Kitchin acknowledged that he had spoken to Demery as well as Dean about securing funding. Though Demery had testified before two congressional committees that he did not know the identity of developers or consultants benefiting from his moderate rehabilitation decisions, documents later surfaced showing that he maintained lists of moderate rehabilitation requests matched with the names of developers and consultants. In several cases, Kitchin's name was matched with a request on Demery's lists (though all such documents that surfaced related to periods subsequent to April 1987). HUD General Counsel Dorsey, who along with Dean and Demery had participated in the selection committee meeting that approved the Dade County funding, had testified before Congress (as he would later testify in court) that he recalled Demery pushing the funding of Dade at a Spring 1987 selection committee meeting. In his own testimony before Congress, Demery had cited Dade County as a location where he had perceived a strong need for subsidized housing.

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[8] See Narrative Appendix styled "Kitchin's Delivery of the Atlanta Request."

Demery's most important testimony was to be that Dean had called the Dade County request to his attention for funding in the April 1987 selection round. The OIC did not, however, elicit testimony about the Dade County selection during Demery's direct examination. On cross-examination, defense counsel attempted to show that Demery had lied under oath when testifying before Congress. Demery, however, explicitly and repeatedly denied that he had lied under oath when testifying before Congress.

Counsel for the OIC had to know that Demery's denial was false. The OIC had indicted Demery for perjury as a result of his testimony before Congress, and, during the course of reaching a plea agreement that did not involve a perjury charge, Demery has admitted that the statements forming the subject of his perjury charges were false. Instead of correcting Demery's false statement that he had not previously lied under oath when testifying before Congress, however, on redirect O'Neill proceeded to elicit from Demery the testimony that Dean had brought the Dade County request to his (Demery's) attention. That statement would conclude the OIC's case-in-chief.[9]

B. The Defense

1. Dean's Testimony

Dean testified for all or part of eight days, including three days of cross-examination. In addition to denying any wrongdoing with regard to any count, Dean specifically denied any knowledge that Mitchell had earned a HUD consulting fee until she read the HUD Inspector General's Report on the moderate rehabilitation program when it was released in April 1989. The report had included an interview of former Kentucky Governor Louie B. Nunn, in which Nunn stated that he had paid Mitchell $75,000 as a consulting fee on the Arama project.

Dean testified about how she had secured a copy of the Inspector General's Report from an agent in HUD's Inspector General's Office named Al Cain, who had been in charge of preparing the report, including that she had sent Mitchell's daughter, Marti Mitchell, to pick up the report at Cain's office. Tr. 2615-16. Dean then testified as follows regarding a call to Cain that she made after she had read in the report that Mitchell had earned a HUD consulting fee:

> 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

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[9] See Narrative Appendix styled "Testimony of Thomas T. Demery."

> 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.

Because of a hearsay objection by O'Neill, Dean was not permitted to say what Cain had told her. Tr. 2618. She then went on to testify about calling Mitchell's partner, Jack Brennan, who told her that Mitchell's involvement in HUD consulting was even more extensive than indicated in the Inspector General's Report. Tr. 2618-19.

With regard to the $4,000 check from Kitchin, Dean testified that she had agreed to furnish an apartment that she was helping Kitchin buy in Washington, and that the check was an advance for items purchased and to be purchased. Tr. 2736-43. Dean called three witnesses who also testified that Kitchin had indicated an interest in buying an apartment in Washington in early 1987, that Kitchin indicated a strong enough interest in Dean's brother's apartment to have a contract sent to him on the apartment, and that Dean was going to decorate the apartment. Tr. 2071 (Whitington), 2074-80 (Whitman), and 2301-02 (Gordon Dean).[10]

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[10] Government witness Jack Jennings, an employee of Kitchin's, had testified that Kitchin had been seeking to buy an apartment in Washington and that when Kitchin told him he was giving Dean $4,000, Kitchin had said it was for furniture (Tr. 1520-21), though Jennings stated that he (Jennings) had not regarded the two matters to be connected. Tr. 1537. On direct, Kitchin testified that he had looked for an apartment in Washington, that Dean had assisted him, and that he had looked at Dean's brother's apartment, but that no contract was ever signed. Tr. 1446. On cross-examination, while testifying that the check represented a loan, Kitchin acknowledged it might also be related to Dean's agreement to assist him in securing and furnishing an apartment. Tr. 1484-85. Dean testified that when Kitchin told her he was not going to buy the apartment in June 1987, she wrote him a check returning the $4,000 plus $250 in interest. She produced a check stub that she stated she had made out at the time, noting that on the back she had done some figuring relating to certain prints she had purchased for Kitchin. Though Dean's bank records indicated that she did not have sufficient funds to cover the check on the day that she testified that she wrote the check to Kitchin, the following day she applied for a $10,000 loan. (Though the check stub had been provided to the government long before trial, the Independent Counsel did not challenge Dean's statements that the writing on the check stub had been done in June 1987.) Dean testified that after Kitchin failed to cash the check, she paid part of the money back in cash. Tr. 2750-51. Though in interviews and in testimony before the grand jury Kitchin had testified that Dean paid part of the money back, during his direct examination he testified flatly that, "to the best of [his] knowledge," Dean had paid no part of the money back. Tr. 1445. On cross-examination, Kitchin indicated that he had believed that Dean had paid part of the money back when he had previously testified to that effect, but after being asked to prove that Dean had paid part of the money back

With regard to the Atlanta funding, Dean testified that she had been instructed to fund the units by Secretary Pierce, who had sent her a note referencing Matt Mattingly, the Georgia Senator who was in a close Senate race at the time. Dean noted that the President was in Georgia campaigning for Mattingly just as the units were going out. Tr. 2560-61, 3154-55.[11]

With regard to the Dade County selection in April 1987, Dean testified that it was recommended by Demery who told her that Kitchin was promoting the project; that she had brought the matter to Pierce's attention advising him of her agreement to decorate Kitchin's apartment; and that, in accordance with Pierce's instructions, she had not voted on the project.[12]

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and being unable to do so, he had become unwilling to testify under oath that Dean had paid him any of the money back. Tr. 1453-54, 1477-83.

[11] Dean would not be allowed to introduce an October 30, 1986 New York Times article showing that on October 29, 1986, President Reagan was in Atlanta campaigning for Mattingly. The article stated that Wyche Fowler, who had trailed Mattingly by 10-15 points in the polls earlier in the fall, had pulled to within 3 points.

[12] With regard to the Dade County funding, the government relied principally on two documents. The first was a February 13, 1987 letter request from the Metro Dade Housing Authority, addressed to Secretary Pierce, seeking 203 units in the following configuration: 153 one-bedroom, 48 two-bedroom, and 2 zero-bedroom. The copy of that document introduced into the record (Gov. Exh. 198) contained in the upper right-hand corner the words "MOD REHAB file" and "Lou and file," and then the word "Funded" somewhat lower down. The second document (Gov. Exh. 202) was a handwritten list prepared by Dean at a meeting between Dean and Demery prior to the formal selection committee meeting. The handwritten listing started with the total number of available units and subtracted the number of units from each contemplated award. Next to the 203 units listed for Metro Dade was the word "letter" and a specific bedroom configuration (153 one-bedroom, 48 two-bedroom, and 2 zero-bedroom).

Dean testified that the funding was among those recommended by Demery for selection at the April 7, 1987 meeting among Dean, Demery and Dorsey. She testified that she had made out the handwritten list as Demery read to her the PHAs he was interested in funding, and that she had shown the list to Secretary Pierce before the selection committee meeting with Demery and Dorsey. Tr. 2573. Dean pointed out that four of the selections had squares around them, including the one for Dade County. She testified that these four were ones she felt that she had to specifically discuss with Secretary Pierce: Metro Dade because of her involvement decorating Lou Kitchin's apartment; Prince George's County because of her friendship with Shelby who was promoting the project and because it involved her home state; Michigan because it was Demery's home state; and Wisconsin because Demery had said that Senator William Proxmire (head of the Senate Banking Committee) had called regarding the request. Tr.

Former HUD general counsel Dorsey appeared as a defense witness and testified that Demery had pushed the Dade County funding. He stated that when he (Dorsey) had questioned the funding, Demery had defended it, stating that the housing authority was able and that there was a great need because of refugees from Cuba and other parts of Latin America. Dorsey also stated that he had no recollection of Dean's saying anything about the funding. Tr. 3176-77.

2. O'Neill's Treatment of Dean

During Dean's direct examination Associate Independent Counsel twice stood up to make what the court would term "smart comments," and during her cross-examination O'Neill would make remarks after Dean answered. The court admonished O'Neill for this behavior, twice indicating that it did not believe O'Neill would be acting in that manner but for the fact that Dean was a prominent white person being tried before an all black jury. Tr. 2776-77, 2786-87, 2899-902.[13]

Part of O'Neill's cross-examination involved confronting Dean with receipts for meals and, when Dean denied that she was present at the event recorded on the receipt, baiting Dean to cause her to state that the receipt was false and the person who created it had committed a crime. O'Neill pressed this approach especially vigorously with regard to an October 1987 receipt of consultant Russell Cartwright indicating that Cartwright had bought dinner for Dean and a HUD employee named Abbie Wiest. In closing argument, O'Neill would then assert that Dean had testified that all of Cartwright's receipts were lies and that Dean had lied when she had so testified. Wiest, however, had previously testified before the grand jury that she was certain that Dean was not at the event in question.[14]

2572-78. Dean said that after explaining the situation to Pierce, "My understanding was that I was not to say a word about it, not to vote on it." Tr. 2576.

Dean also testified that the handwriting in the upper right-hand corner of Government Exhibit 198 was not hers and that the document had not come from her files. She indicated that she recognized the word "funded" to be in Demery's handwriting and that she recognized the handwriting of the phrase "mod rehab" in the upper right-hand corner to be on all Demery's correspondence about mod rehab. Tr. 3153-54.

[13] These transcript pages are included in Attachment 1.

[14] See Narrative Appendix styled "The Russell Cartwright Receipt."

C. The OIC's Rebuttal Witnesses

The OIC called five rebuttal witnesses, two of whose testimonies would have a significant role in the OIC's closing argument.

1. Supervisory Special Agent Alvin R. Cain, Jr.

Though O'Neill cross-examined Dean at some length about whether she had known that Mitchell had earned HUD consulting fees, he did not probe her about her testimony that she had called Agent Cain to demand to know whether there was a check proving that Mitchell had earned a HUD fee. The OIC, however, called Cain as its second rebuttal witness.

Cain, a Supervisory Special Agent of the HUD Inspector General's Office, had been detailed to the OIC since June of 1990. He had originally been listed as a witness by Dean, but she had declined to call him after O'Neill indicated that Cain refused to be interviewed. O'Neill questioned Cain first about Dean's securing a copy of the HUD Inspector General's Report from him, with Cain responding in details essentially identical to those given by Dean, including the fact that Marti Mitchell had picked up a copy of the report at Cain's office. Tr. 3196-98.

O'Neill then questioned Cain about whether, after Cain had provided Dean a copy of the report, Dean had called him complaining about the treatment of Mitchell and threatening to call a press conference. In describing her call to Cain, Dean had emphasized that she had insisted on knowing whether there was a check showing that Mitchell had received a HUD consulting fee and whether Cain had a copy of it. Yet, though O'Neill would characterize Dean's call to Cain in three different ways, in none of them did he mention Dean's demand to know whether there was a check. In each instance, Cain firmly responded that he had no recollection of any such call. The exact questioning follows (Tr. 3198-99):

> 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.

Given the detail with which Cain recounted providing Dean a copy of the report, the strong impression conveyed by his statements that he did not recall the subsequent conversation was that it did not occur. Since Cain is an African-American, his testimony would have been expected to be especially damaging to Dean given the makeup of the jury. Thus, if Cain was telling the truth, Dean had to have been behaving almost insanely in making up the story about her call to him (and being also willing to make up what he had said to her), while knowing that Cain was readily available in the offices of the Independent Counsel to contradict her.

2. Ronald L. Reynolds

The OIC also called as a rebuttal witness a HUD driver named Ronald L. Reynolds. Reynolds had made some exceedingly improbable statements in an interview given to representatives of the OIC in March 1993. He had stated, for example, that he had driven Dean to lunch with John Mitchell about once a month and that he overheard conversations of Dean and other officials talking about moderate rehabilitation units on the HUD car phone. Records showed, however, that during the three years Dean had served as Executive Assistant she had gone to lunch with Mitchell between one and six times. Also, there were no telephones in the HUD cars in which Reynolds drove Dean.

Dean sought to preclude the OIC from calling Reynolds as a witness during the OIC's case-in-chief because of his evident unreliability. Though O'Neill did not dispute Dean's counsel's assertions that portions of Reynolds' statement were demonstrably false, O'Neill argued to be allowed to use Reynolds, with the intention to "tailor his testimony to questions to those areas I've just told you basically that he took her to a number of various lunches," that he had waited for Dean for two or three hours "on one specific occasion only," and that Dean "had told him on a number of occasions that she was meeting with John Mitchell for lunch and her mother." Tr. 1776. After the court ruled that the OIC could present Reynolds to testify as to what he knew about Dean's contacts with Mitchell, the parties agreed to a stipulation that, if Reynolds were to testify, he would testify that while employed at HUD between 1980 and 1989, "he drove Deborah Gore Dean to lunch on several occasions when she said that she was meeting John Mitchell for lunch." Gov. Exh. 545.

When Dean was cross-examined, she stated that she believed she might have had as many as three lunches with Mitchell while she was at HUD. She stated that she had no recollection of how she got to those lunches, but stated that it would have been inappropriate to take a HUD car. When questioned about Reynolds' stipulation, she stated that she would ordinarily not tell a HUD driver the name of the person with whom she was having lunch. Referring to Reynolds' interview, Dean noted that Reynolds had also stated that he had driven her to lunch with her mother and Mitchell when in fact she had never had lunch with her mother and Mitchell. Dean also stated to O'Neill that "you and my lawyer both agreed that that man was not quite normal and instead of

having him on the stand we agreed to sign a stipulation." Dean further stated that she did not acknowledge that Reynolds' testimony would be true. Tr. 3054-56.

Dean also testified that she did not recall Reynolds' driving her to lunch with Mitchell and generally did not recall where he would have driven her, explaining that Reynolds was one of ten HUD drivers, all of whom took her various places, but that he was not a special driver for her. Tr. 3057-58.

When the OIC sought to call Reynolds as a rebuttal witness, Dean again objected on the grounds that Reynolds was not a reliable witness, citing the fact that he had made many statements in an interview that were demonstrably false. Though the court would describe Reynolds as someone both parties agreed no one would believe (a characterization to which O'Neill would not object), it nevertheless ruled that Reynolds could testify.

During both direct and cross-examination, Reynolds made statements about the frequency of his driving Dean that were demonstrably false. On redirect examination, O'Neill attempted to rehabilitate Reynolds, eliciting from him testimony that other documentary and testimonial evidence indicated was false as well.

Dean sought to present surrebuttal as to both Cain and Reynolds, but in the face of the OIC's "strenuously object[ing], Dean's request to present surrebuttal was denied.[15]

D. The OIC's Closing Argument

Closing argument commenced on October 20, 1993. Arguing for the OIC, O'Neill argued that Dean's defense rested entirely on her credibility. Tr. 3377-78, 3413, 3502. O'Neill then repeatedly stated to the jury that Dean had lied on the stand. Tr. 3415-32, 3501-18. During the initial part of his closing argument, O'Neill stated inter alia:

> Based on her lies, you should throw out her entire testimony. Her six days 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.

O'Neill pursued the theme with equal vehemence during the rebuttal part of his argument on the following day, stating, inter alia:

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[15] See Narrative Appendixes styled "Testimony of Special Agent Alvin R. Cain, Jr." and "Testimony of Ronald L. Reynolds."

> 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 because someone --

Tr. 3501.[16]

In asserting that Dean had repeatedly lied, O'Neill also accused her of falsely accusing others of lying, citing Demery as one such person, and adding: "But she's the only one we know who definitively did lie." Tr. 3231. As earlier noted, in pursuing this line of argument, O'Neill stated that Dean had testified that "All of Russell Cartwright's receipts are lies." In asserting that Dean had lied in so testifying, O'Neill asked the jury to examine Dean's calendars, which he said would show that Cartwright was one of several persons whom Dean was meeting for lunch "all the time." Tr. 3408. In fact, however, Dean's calendars showed no meeting with Cartwright of any sort, and few as to the others.[17]

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[16] 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 2 hereto. A sampling of the statements is set out immediately below: 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 ("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.").

[17] See Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33 at 127-33, 191-94 (Nov. 30, 1993)

None of the statements that Dean lied related to testimony underlying the perjury and concealment charges. On the contrary, after briefly discussing the first perjury count, O'Neill pointed out that there were four counts of perjury and four counts of concealment, adding:

> There is no sense going into all of them because the Government contends that each of those was a lie and a misstatement in much the manner as you've seen during the course of this trial.

Tr. 3515-16.

The statements that Dean had lied were especially focused on Dean's representations that she did not know that Mitchell had earned HUD consulting fees. In pressing that point, O'Neill gave particular attention to the testimony of the OIC's rebuttal witnesses Cain and Reynolds, whose testimony O'Neill asserted contradicted certain statements Dean had made regarding Mitchell and her lack of knowledge of his HUD consulting.

O'Neill's initial argument regarding Reynolds encompassed just under three pages of transcript. Tr. 3421-24. Those pages, which are included in Attachment 1, and should be read with an understanding that the court would conclude that the OIC possessed documentary evidence indicating that Reynolds was not telling the truth. The remarks regarding Reynolds were additionally protracted by O'Neill's pausing to place an exhibit on the visual presenter, which he then discussed in a manner to suggest that Reynolds drove Dean frequently and that this showed that Dean had lied in her testimony about Reynolds. The document, however, would show that in the month of October 1986, Dean had taken 15 trips by HUD drivers and Reynolds had driven her once.

During his rebuttal argument, O'Neill again discussed Reynolds in the context of asserting that Dean had lied. O'Neill stated that Dean had denied that Reynolds ever drove her to lunch, but that the records showed that he did. Nothing in Dean's testimony, however, could reasonably be characterized as denying that Reynolds ever drove her to lunch. Tr. 3506 (Attachment 1).[18]

Just after O'Neill had made the above-quoted remark that Dean's testimony should be thrown "out the window into a garbage pail," he turned to a discussion of Cain's contradiction of Dean's testimony about calling him to question the treatment of Mitchell in the HUD Inspector General's Report. Once more, while seeking to recall Dean's testimony to the jury in some detail, O'Neill would fail to mention Dean's statement about the check. O'Neill stated the following:

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[18] See Narrative Appendix styled "Testimony of Ronald L. Reynolds."

> 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 discussing the alleged conspiracies, O'Neill relied on charts that in many respects tracked the allegations in the indictment, including allegations creating the inferences that Shelby had specifically contradicted. The Park Towers charts contained the same conspiratorial reference to "the contact at HUD" that had been in the Superseding Indictment, but which Shelby had told the OIC Counsel was not a reference to Dean. O'Neill had introduced the document itself through the testimony of its author without eliciting testimony as to the identity of "the contact at HUD." O'Neill then spoke at length about the adjacent entries in a manner that the OIC would later acknowledge was intended to lead the jury to believe that Dean was the person described as "the contact at HUD." Tr. 3391-93.

Though HUD's granting of the post-allocation waiver in May 1986 had not been mentioned in the Superseding Indictment, the Park Towers chart contained entries reflecting the granting of the waiver and Shelby's sending a copy of it to Fine. The entries were inserted after entries describing lunches between Dean and Shelby. There had been no testimony or any reason to believe that the lunches related to Park

Towers. Nevertheless, O'Neill would describe the entries to the jury as "continuing meetings on Park Towers." Tr. 3394.[19]

O'Neill also relied on all Sankin receipts that had been admitted into evidence, including receipts that Sankin had specifically testified he believed did not pertain to Dean.[20]

During his rebuttal argument, O'Neill would emphasize, as reflecting the conspiratorial nature of John Mitchell's involvement in Park Towers, the fact that Feinberg and Fine had each testified that he was unaware of that Mitchell was involved with the project. O'Neill stated:

> Mr. Wehner 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 jury received instructions on the afternoon following the concluding day of the closing argument and began deliberations on the following morning. That morning, after expressing concerns about the prosecutor's closing argument in light of the D.C. Circuit's decision in Harris v. United States, 402 F.2d 656 (1968), the court gave brief cautionary instructions to the jury about the prosecutor's "using the word 'liar' or 'lying' and the like." The court instructed the jury that it was for the jury to determine the truth and an attorney's argument "it is not the opinion of counsel, that is, whatever their personal belief is, that is appropriate, so that an argument to you that someone is lying is really an expression of personal opinion by the attorney..." Tr. 3593-94.

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[19] See Narrative Appendixes styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony."

[20] See Narrative Appendix styled "The Andrew Sankin Receipts."

On the third day of deliberations, the jury returned a verdict finding Dean guilty of all twelve Counts.

III. POST-TRIAL MATTERS

A. Dean's Motion for a New Trial

1. Dean's Rule 33 Motion

Dean filed a lengthy motion for judgment of acquittal or a new trial. In addition to challenging the sufficiency of the evidence as to each count, Dean maintained that the OIC had engaged in pervasive misconduct that had denied her a fair trial. In Part A of the Memorandum in support of her Rule 33 Motion,[21] Dean argued that the OIC had intentionally withheld Brady material until the eve of trial having for more than a year falsely represented to the court that no such material existed (Dean Mem. at 96-99); had failed ever to provide under Brady certain other material that was clearly exculpatory (id. at 98-110); had intentionally sought to cause the jury to believe incriminating things that the OIC knew were not true (id. at 98-118); had failed to review documentary evidence with OIC witnesses where such review was likely to cause the OIC witness to recall facts that were exculpatory (id. at 111-21); had ridiculed her on the stand notwithstanding the court's admonishment that such actions were motivated by the fact that the defendant was white and the jury was entirely African American (id. at 121-27); had baited her with receipts known by the OIC to be false in order that she would deny that such receipts pertained to her and the OIC could than assert to the jury that her denials were lies. Id. at 121-26.

In Part B, Dean argued that the OIC had introduced the testimony of at least three witnesses -- Thomas T. Demery, Ronald L. Reynolds, and Alvin R. Cain, Jr. -- that the OIC knew or had reason to know was false, had failed to fulfill its obligation to correct that testimony, and had then relied on such testimony in order to assert that Dean had lied when the OIC actually believed that Dean had told the truth and that its own witnesses had lied. Id. at 134-71.

In Part C, Dean made a number of arguments about the impropriety of O'Neill's closing argument. She argued that apart from the general impropriety of a prosecutor's repeatedly asserting that a criminal defendant had lied, O'Neill had made such statements in circumstances where the OIC knew or had strong reason to believe that the defendant had not lied (id. at 178-81; 191-213). Dean also argued that O'Neill had intentionally misstated the record to the jury on numerous important issues (Tr. 182-207). For example, Dean argued that O'Neill had intentionally mischaracterized her

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

testimony about Reynolds in order to assert that the record showed she had lied. Id. at 194-201. She argued that O'Neill intentionally stated that Kitchin had brought the Atlanta letter to Washington, even though the record provided no support for that statement and even though there was reason to believe that the OIC knew for a fact that Kitchin had not brought the letter. Id. at 184-87. Dean argued that O'Neill had intentionally stated to the jury that Dorsey testified that Dean had spoken on behalf of the Dade County funding at the Spring 1987 meeting, when in fact Dorsey stated that Demery had spoken on behalf of the funding and he (Dorsey) did not recall Dean's saying anything about the funding. Id. at 187-90. She argued that, in order to pursue a provocative theme that the public housing authorities were not involved in the process, and otherwise to suggest criminality in the Dade County selection, O'Neill had stated that Dade County was selected before the housing authority had requested the units, even though the OIC knew that the Dade County housing authority had requested the units months before the selection. Id. at 190-91. Dean argued that O'Neill had intentionally misstated the record with regard to her relationship with Shelby and had misstated her testimony regarding her knowledge of Sankin's consulting. Id. at 201-03. And she argued that O'Neill had repeatedly mischaracterized or taken out of context her statements about her own consulting activities or her relationship to Mitchell in order to assert that her statements were lies. Id. at 204-14.[22]

Finally, Dean argued that in his closing argument, O'Neill had attempted to appeal to the racial feelings of the jury and to cause the jury to base its decision on matters that it read in the popular press and otherwise to inflame the emotions of the jury. Id. at 214-20.

With regard to the Russell Cartwright receipt, Dean produced the Wiest grand jury testimony in which Wiest firmly stated that Dean was not present at the October 1987 dinner. Dean Mem., Exh. OO. Dean argued that the OIC knew that she had not been at the October 1987 dinner reflected in the Cartwright receipt and had cross-examined her specifically to elicit a denial that the receipt was valid in order that the OIC could then assert that she had lied. Dean Mem. at 128-31. Dean noted that she had requested from the OIC all interview notes and grand jury testimony of Russell Cartwright with respect to any expense record relating to her. Id. at 129 n.96.

With regard to Demery, Dean provided a copy of his Superseding Indictment in which he had been charged with two counts of perjury for falsely testifying that he did not know that Philip Winn and Philip Abrams were involved with the moderate rehabilitation program. Dean Mem., Exh. TT. She also provided a copy of an interview indicating that during the negotiation of Demery's plea agreement he had admitted that he had known that Winn and Abrams were involved in the moderate rehabilitation

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[22] See Narrative Appendixes styled "Kitchin's Delivery of the Atlanta Request," "Dean's Statement That She Was Not That Close to Mitchell Until After She Left HUD," and "Closing Argument Characterization of the Dade Selection."

program during the period in question. Dean Mem. Exh. UU. Dean argued that whether or not the OIC knew that Demery had committed perjury in denying having lied to Congress regarding the matters raised in his cross-examination, OIC counsel had to know that Demery had lied about the matter on which for he had been indicted and as to which he had confessed. Yet, without fulfilling the government's obligation to reveal the perjury of its witnesses, the OIC had proceeded to elicit Demery's most important testimony. Further, Dean argued, in closing argument, though knowing that Demery had lied on the stand, the prosecutor had asserted to the jury that Dean had falsely accused Demery of lying and had asserted as well that Dean was "the only one who we know definitively did lie." Dean Mem. at 134-40.

With regard to Reynolds, Dean pointed out that, apart from Reynolds' unreliability reflected in the demonstrably false statements in his interview, the OIC possessed Dean's calendars and other documentary evidence indicating that statements Reynolds made during his direct examination, his cross-examination, and his redirect examination were false. She argued that, not only had the OIC failed to reveal Reynolds' perjury, it had intentionally elicited statements that OIC counsel believed to be false, had relied on Reynolds testimony known to be false in order to assert that Dean had lied, and had mischaracterized the record in order to assert that Reynolds' testimony showed that Dean had lied. Dean Mem. at 144-60, 194-201.

With regard to Cain, Dean provided an affidavit in which she stated that when she called Cain, he had told her that there was a check showing the payment from Nunn to Mitchell, but that he did not have a copy because it was then maintained in the HUD Regional Inspector General's Office. In her affidavit, Dean also stated that after talking to Cain, she had told what Cain had said to her to James P. Scanlan, whom she was dating at the time.

Scanlan, a career government attorney with over twenty years of federal service, also provided a affidavit. He stated that in 1989, immediately after calling Cain, Dean had told him about the call including that Cain had told her the check was maintained in a field office. Scanlan also stated that Dean had told him about the call to Colonel Brennan that Dean also testified about in court.

Dean argued that the absurdity of her making up the call to Cain, and also being willing to make up what Cain had said to her, while Cain was readily available to contradict was one of several factors that should have alerted prosecutors that Cain's testimony was false.

Dean also argued that records should exist indicating whether the check was maintained in a HUD field office in April 1989, and that such information would be relevant to the issue of whether Cain had committed perjury. Dean noted that, with regard to the prosecutors' knowledge of whether Cain was telling the truth, it might prove to be significant that, while giving a detailed account of her call to Cain when

recounting the testimony to the jury, O'Neill had omitted any reference to the check. Id. at 160-71.[23]

Dean requested a hearing on whether Cain had committed perjury and whether OIC counsel knew he had committed perjury. Id. at 172.

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[23] In support of her motion for new trial, Dean also argued that Cain had responded evasively during cross examination when questioned about an expensive party paid for by Dean and about Dean's suggesting that he investigate a project in Boston. She contended that Cain's evasiveness on the matters should have given OIC attorneys additional reason to suspect that he was not telling the truth about the call. In her affidavit Dean described a party at the Beverly Wilshire Hotel in Los Angeles in on May 28, 1986, naming three persons apart from Cain who she said were present and attaching a May 28, 1986 credit card receipt reflecting payment for the party. Dean also stated that she had told Cain, as well as the Undersecretary of HUD and HUD's Deputy Assistant Secretary for Multi-family Housing, that a HUD funding of Boston project named Castle Square should be stopped.

In its Opposition, the OIC provided witness statements and documents showing, apparently conclusively, that Cain was not at the party Dean described, although the three other persons named by Dean were present, and that the party actually occurred on May 29, 1985. The OIC argued that Dean intentionally fabricated the story about the party and suggested that the receipt Dean had provided was false. The OIC also provided documents that it maintained showed that Dean had not tried to stop the Boston project but in fact had promoted it, though the OIC did not provide statements by Cain or either of the other two officials whom Dean said she had contacted to discuss the project. In her Reply, Dean acknowledged that she must have been mistaken about Cain's presence at the party and that this vitiated her arguments that Cain's ostensible evasiveness on the matter should have caused the prosecutors to suspect his other testimony. She disputed the OIC's claim that she had not attempted to stop the Boston project. The OIC continued to assert that Dean had lied in her affidavit both in arguments to the Probation Office and orally at the hearing on February 22, 1994.

This matter, which is treated fully in the Cain Narrative Appendix, may have influenced the court's reaction to Dean's claim concerning Cain's testimony about the call. It is argued in the comments section of that appendix, however, that the OIC's use of the matter to divert the court's attention from issues of the plausibility of Cain's testimony about the call and the relevance of the check is additional evidence that the OIC sought to conceal what it believed to be the perjury of a federal agent.

2. OIC's Rule 33 Opposition

In the OIC Opposition to Dean's Motion,[24] as previously indicated, the OIC acknowledged that it had sought to cause the jury to believe that Dean was the person referred to as "the contact at HUD." In this regard, the OIC cited Shelby's testimony regarding his review of documents to "refresh [his] recollection as to who [he] dealt with at HUD on [Park Towers]," and defended its actions because of "the lack of any corroboration of the contacts with DeBartolomeis and Cushing." Gov. Opp. at 9 n.5.

The OIC represented that it had not provided the Mitchell telephone messages pursuant to Brady because it considered such messages "to be as consistent with guilt as with innocence." Gov. Opp. at 11. The OIC also acknowledged that it had never confronted Barksdale with the information on the message indicating that Wilson had been talking to him about securing the Arama units for Mitchell. Defending that action, the OIC argued that the government does not have an obligation "to seek out all potentially material evidence conceivably related to the defense." Gov. Opp. at 16-17 (original emphasis).

In defending the failure to review receipts with Sankin prior to calling him to testify, the OIC asserted that it had done so because of Sankin's "hostility to the government's case against the defendant." Id. at 13. The OIC acknowledged that it had sought to cause the jury to infer that even the receipts that did not name Dean or her position in fact related to Dean. Id. at 13. The OIC argued that there was nothing improper in relying on Sankin's receipts that were inconsistent with Dean's calendars or with trial testimony, asserting that "[i]t is precisely this sort of conflict in evidence that it is the jury's duty to resolve..." Id. at 15 n.12.

The OIC made various arguments concerning Dean's contentions that O'Neill had mischaracterized the record in closing argument. With regard to Dean's claim that O'Neill's statement that Kitchin had brought the Atlanta letter to Washington at the end of October 1986, the OIC acknowledged that O'Neill had intentionally made the statement "Kitchin brings it [the letter] up with him," maintaining that O'Neill was merely making an argument to the jury as to what the evidence showed. Id. at 43. The OIC said nothing, however, in response to Dean's claim that the OIC knew for a fact that Kitchin had not delivered the letter.

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[24] Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 (Dec. 21, 1993) ("Gov. Opp."). Associate Independent Counsels Robert E. O'Neill and Paula A. Sweeney were no longer with the Office of Independent Counsel when it submitted its Opposition to Dean's Motion. That Opposition would be signed by Associate Independent Counsel Robert J. Meyer, bearing also the names of Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce C. Swartz.

In discussing the prosecutor's use of the Russell Cartwright receipt, the OIC said nothing about what Cartwright had said to the OIC about the receipt or about Dean's discussion of the potential relevance of the Cartwright testimony. Id. 25-28.

In its Opposition, the OIC neither affirmed nor denied that Demery had committed perjury or that OIC counsel knew it, but argued that defense counsel's questioning of Demery "was not designed to alert either Demery or the government that defendant was seeking to elicit Demery's prior testimony about Winn and Abrams," and that Dean's argument "is premised on the notion that defense counsel's question was clear enough that both Demery and the government should have understood it to be directed to Demery's Winn/Abrams congressional testimony." Gov. Opp. at 65-66.

With regard to Reynolds, the OIC argued that Dean had "fail[ed] to make any credible showing that Reynolds testified falsely or that the government knew or should have known it," and that "any inconsistencies between Reynolds testimony and the other evidence in the case was for the jury to decide." Gov. Opp. at 71.

With regard to Cain's testimony, the OIC's Opposition was largely devoted to asserting that Dean had provided a false affidavit regarding the issues raised in Cain's cross-examination. With regard to whether Cain had testified truthfully regarding the call, the OIC dismissed with the word "irrespective" the improbability of Dean's having made up the story about the call to Cain, though without suggesting why she would have made up such a story or mentioning her apparent willingness also to make up a story as to what Cain had told her. The OIC then argued that there was merely a credibility issue, with Dean's argument resting entirely on her own word and that, "if nothing else, the jury verdict in this case stands for the proposition that [Dean] should not be believed." Id. at 75.

The OIC dismissed the Scanlan affidavit in a footnote, arguing that the affidavit added nothing to Dean's statements, since "apart from [Scanlan's] obvious bias," Scanlan merely relied on what Dean had told him. Gov. Opp. at 75 n.31.

Though the three weeks between the filing of the two motions should have afforded the OIC sufficient time to determine the whereabouts of the check in April 1989, the OIC stated nothing about the whereabouts of the check in April 1989 or about Dean's argument as to the relevance of such information. The OIC did not mention the check at all. Id. at 73-78.

During this period, the OIC had also failed to respond to defense counsel's requests for such information.

3. Dean's Rule 33 Reply

Dean filed a lengthy Reply,[25] responding to most points made by the OIC in its Opposition. With regard to Demery, Dean argued that the OIC well knew that her counsel was not attempting to elicit testimony about Demery's denial of his knowledge of Winn Group involvement in the moderate rehabilitation program, but had merely sought either to make Demery admit, or to demonstrate, that Demery had committed perjury numerous times after taking the same oath he had taken in court. Dean stated that in focusing on the Winn Group in her motion, she was merely citing the instance where the OIC would have the greatest difficulty denying knowledge of prior Demery's perjury, since it had indicted Demery on the matter (and he had confessed). She also pointed out that the OIC knew that Demery had previously lied to Congress on other matters apart from his knowledge of the Winn Group. Thus, Dean maintained, the OIC was seeking to mislead the court by pretending that the issue involved whether Demery and OIC counsel understood that Dean's counsel was seeking to elicit testimony about Winn and Abrams. Dean Reply at 20-24.

Dean also argued that the failure of the OIC to address her contentions about the check that she had said Cain had told her was in a HUD field office in 1989, or to respond to inquiries regarding the OIC's knowledge of the Cartwright receipt, supported her claims that the OIC had intentionally relied on false evidence. Dean Reply at 27-28.

B. The OIC's January 18, 1994 Letter to the Probation Officer

During this period, despite having the Dean and Scanlan affidavits and the opportunity to determine the whereabouts in 1989 of the check reflecting the payment from Nunn to Mitchell or otherwise to investigate whether Cain had told the truth, the OIC continued to rely on Cain's testimony in an effort to increase Dean's sentence. In a January 18, 1994 letter from Independent Counsel Arlin M. Adams to the U.S. Probation Officer, Adams relied on Cain's contradiction of Dean's testimony about the call in arguing that Dean had committed perjury during the trial and therefore should have her sentencing level increased for obstruction of justice. In a revised Presentence Investigative Report issued on February 7, 1994, the Probation Officer accepted the Independent Counsel's arguments and recommended that the court increase Dean's sentencing level for obstruction of justice based in part on Cain's contradiction of Dean's testimony about her call to him.

[25] Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial (Jan. 7, 1994) ("Dean Reply").

C. The Court's Ruling on Dean's Motion for a New Trial

At a hearing on February 14, 1994, the court expressed specific agreement with many of Dean's contentions, including contentions that the OIC had reason to know that certain of its witnesses had lied and allowed that matter to go uncorrected. In no instance did the court express specific disagreement with the factual basis asserted by Dean in support of her contentions or with Dean's characterization of the OIC's conduct.

The court recognized that the OIC's statements to the court that no Brady materials existed were not accurate statements and that the OIC had not been forthcoming as to exculpatory material in a variety of ways. Transcript of Hearing at 23-27 (Feb. 14, 1994). The court recognized that the OIC had reason to believe (including documentary evidence) that at least two of its witnesses (Ronald Reynolds and Thomas Demery) had not testified truthfully or accurately -- including one witness (Reynolds) on whose testimony the OIC heavily relied in its assertions that Dean had lied about her relationship with John Mitchell. Id. at 25-26.

The court specifically faulted the OIC for failing to review documents with witnesses when such review could have resulted in revealing information that would be exculpatory of the defendant. Id. With regard to Andrew Sankin and the OIC's assertion in its Opposition that it refused to review the receipts with him because of his hostility to the government's case, the court indicated that the OIC's justification for failing to review the receipts with Sankin was wholly unacceptable (id. at 27), later observing: "I don't think I've ever seen the prosecution put on a witness whom they didn't interview as to particular documents they want to tie with a defendant because they say the witness may be hostile." Id. at 30.

After earlier referencing Sankin's off-the-stand statement to O'Neill, the court had observed:

> ... I expect that every assistant United States Attorney I've ever had here would have brought that immediately to my attention and the defense's attention, and that was not done, and again, I don't understand that.

> 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 stand, it evidences to me 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 is not the first time I've seen it in Independent Counsel cases.

Id. at 27.

Turning to the potential harm to the defendant from the cumulative effect of the OIC's actions and the court's efforts to correct those actions, the court observed:

> I think parsing it out one witness at a time makes it very difficult for the defendant to meet her burden, as this would not have affected the jury overly and this would not cause the jury to find the defendant not guilty, etc. What is amorphous and hard to quantify is the cumulative effect of these matters and what can be said how it could have overall affected the jury's perception of this case.

Id. at 28.

After then observing that the court had not perceived a problem in the selection of the jury, the court went on state:

> But the concern for the Court is after that, as to the cumulative effect of these activities that I have reviewed on all these pleadings, and again, I'm concerned about how that impacted upon the jury. As I said, it's almost impossible to quantify the total impact of various areas the Court has identified as it believes that the Independent Counsel should have been much more forthcoming and candid on its use of these witnesses and the production of these documents in a more timely fashion to the defendant to be able to meet the challenges.

Id. at 29.

Despite its observations about the near impossibility of quantifying the total impact of the OIC's conduct, the court, without exploring how a particular witness such as Reynolds had been used to undermine Dean's credibility, stated simply:

> On the other hand, there were multiple other witnesses that testified as to defendant's involvement, and the defendant herself testified at length

> as to her noninvolvement in these matters in a criminal sense, and the jury concluded against her.

Id.

After noting that Dean had acknowledged an error in her affidavit with regard to Cain, the court stated that it was going to deny Dean's motion for a new trial. After again noting its concerns about the OIC's conduct, the court concluded that:

> ... because of the way the Court handled the matters, giving the defendant the option how they wished to go through that, how it instructed the jury at times, as it had to, I believe that any prejudice was met adequately by the Court's instructions and accommodations to counsel for the defendant to appropriately rebut evidence that may have been produced by the government without a full exploration as to its accuracy.

Id at 30.

Again noting that it was denying the motion, the court observed that the OIC had to rely on many adverse witnesses including unindicted co-conspirators and that therefore "they have to use the witnesses they have, which is typical, and they have to then rely upon the jury in seeing who they're going to believe or not." Id. at 31.

The court then rejected Dean's claim that she had been unduly prejudiced by the prosecutor's repeated statement, in closing argument, that Dean had lied. The court stated:

> The abuses by the government, it is also accused of improper closing argument, I think the Court took care of that appropriate [sic] with its own sua sponte instructions it gave after consulting with counsel about it that this case was, it had to be recognized, a perjury case, and it's very hard to argue a case of perjury unless you are allowed to refer to the defendant's testimony and have the jury consider what it's worth and taking all that into account.

Id. at 31.

Finally, noting that there was sufficient evidence for the counts to go to the jury, the court denied Dean's motion stating that "I do not believe that was any overwhelming failure by the government in its zealous efforts in this case that resulted in such prejudice to the defendant as would require a new trial." Id.

Although the court had agreed with Dean's argument that the Independent Counsel knew that government witnesses Demery and Reynolds had testified falsely, the court did not indicate a view regarding Dean's argument that Cain also had testified falsely.

D. Dean's Motion for Reconsideration

On February 18, 1994, Dean filed a Motion for Reconsideration of the ruling denying her request for a new trial.[26] In that Motion, Dean raised issues related to the testimony of Cain and to the Russell Cartwright receipt.

Regarding Cain, Dean argued that the court had failed to address whether Cain had testified falsely about the call, pointing out that said testimony had played a crucial role in the prosecutor's undermining of her credibility in closing argument. Dean Motion for Reconsideration at 1-3. Dean argued, as she had in her Reply, that the OIC's failure to be forthcoming regarding the whereabouts of the check suggested that the check was maintained in the field and the OIC had no plausible argument as to how she could have learned of that fact other than from her conversation with Cain. Id. at 1-5.

Dean noted that the issue had taken on additional importance in light of fact that the Probation Officer had accepted the OIC's argument that Dean should receive a two-level increase for obstruction of justice, in part, because Cain's testimony showed that Dean had lied when she testified that she had called him to question the discussion of John Mitchell in the HUD Inspector General's Report.

Dean argued that the court should not finally rule on either the motion for new trial or the obstruction of justice issue without requiring the OIC to disclose what it knows about the whereabouts of the Nunn to Mitchell check in April 1989.

With regard to Russell Cartwright, Dean argued that the OIC's failure to provide Cartwright's grand jury testimony or make any reference to it supported her claim that the OIC knew that the receipt was false and had cross-examined her with it precisely in order to elicit a statement that the receipt was false, which the OIC could then assert to the jury was a lie. Dean argued that the court should not rule on her motion until it resolved the factual issue regarding what statements Cartwright made to the OIC and requested the court to order the OIC to produce all materials reflecting Cartwright's statements about the receipt. Id. at 7-8.

At a hearing on February 22, 1994, the court treated Dean's Motion for Reconsideration. At the hearing, Deputy Independent Counsel Bruce C. Swartz argued for the OIC, which for the first time either acknowledged or addressed Dean's contentions about the check. Swartz still declined to state whether the check was in the field in April 1989, but argued that Dean had surmised that it was in the field because of a statement in the HUD Inspector General's Report.

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

During his argument, Swartz produced copies of a three-page interview report from the HUD Inspector General's Report reflecting an interview of Louie B. Nunn regarding his involvement with the Arama project. It was in this interview that Nunn had told HUD investigators that he had paid John Mitchell $75,000 for his assistance in securing the Arama funding. After producing the copies, Swartz stated:

> If Your Honor will turn to the third page of this interview report, which again was in defendant's possession by her own testimony, you'll note that the final statement in the report is, "Agent's note: All the contract agreements shown to Nunn were obtained from HUD OIG audit file in Atlanta, Georgia."
>
> So, Your Honor, the report itself suggests that the materials shown to Nunn that involved General -- excuse me, former Attorney General Mitchell were maintained in the field. There's simply no basis for her suggestion that she could have only learned such a fact from Agent Cain. Even if it were true, the report itself on its face would have provided her with information that suggested to her that materials were being maintained in the field.

Id. at 8-9.

Carefully examining the interview report, however, no reasonable person could conclude that it formed the basis for Dean to surmise that the check was maintained in the field in April 1989. To begin with, though not noted by Swartz when describing the document to the court, it was dated December 12, 1988, over four months before the Inspector General's Report was issued in Washington, D.C. Thus, even if it had mentioned a check reflecting Nunn's payment to Mitchell, it did not give Dean a basis for determining that any check that IG investigators had acquired would still have been in a field office in April 1989, without the field office's even having transmitted a copy to HUD headquarters by the time HUD headquarters issued the Inspector General's Report.

More important, however, the statement in the interview report gives no basis for surmising that HUD had even secured a copy of the check by April 1989. The interview report discusses two checks that the investigator had shown to Nunn (these being checks reflecting payments to Nunn pertaining to the South Florida I project from Art Martinez, the developer of both Arama and South Florida I) and makes it absolutely clear that the investigator then possessed no check from Nunn to Mitchell regarding Arama. But the report makes no reference whatever to Nunn's even being asked to provide the check to the investigator, much less that he did so. In fact, the report stated that "NUNN also stated that he does not know where any of the contracts/agreements between him and MARTINEZ are."

With regard to the Russell Cartwright receipt, Swartz produced portions of Russell Cartwright's grand jury testimony, but solely for the court's examination.[27] Swartz asserted that though Cartwright had acknowledged fabricating some receipts, the grand jury testimony still provided the OIC a basis for believing Dean was at the October 1987 dinner. Swartz also argued that contrary to Dean's testimony, grand jury testimony indicated that Dean had dined with Cartwright on several occasions, and argued that Dean's Motion for Reconsideration was further basis for a two-level enhancement for making false statements. Id. at 11-14.

Dean's counsel argued that the statement Swartz cited from the report of the Nunn interview could not reasonably have been the basis for Dean to conclude that the check was maintained in the HUD field office. He also requested that Cain, Wiest, and Cartwright be called as witnesses. Id. at 16-19.

The court denied Dean's request to call Cain and denied the motion for reconsideration without indicating a view either as to the plausibility of Swartz's argument about how Dean might have surmised that the check was maintained in the field or as to the implications of the whereabouts of the check. The court merely indicated that it was of the view that the information presented "doesn't mean of necessity the government is putting on information they knew was false before the jury." Id. at 21. The court expressed no view regarding Dean's arguments that, whatever the OIC believed about the truthfulness of Cain's testimony when it presented that testimony in court, the OIC had additional reason to believe that Cain had perjured himself when, following the filing of Dean's motion for a new trial, the OIC continued to rely on Cain's testimony in arguing to the court and the U.S. Probation Officer that Dean's sentencing level should be increased for obstruction of justice.

The court also indicated that its review of the Cartwright grand jury testimony "does not change the court's opinion that the government, while zealous and aggressive, misrepresented to the jury the issue as to the Cartwright receipt or not..." Id. at 21. Ultimately, the court would conclude that it "will not find that [Dean's Motion] raises any substantial issues that more likely or [sic] not would result in a different jury verdict." Id. at 21-22. The court then stated that it therefore would not require testimony of Cartwright, Wiest, or Cain. Id.

E. The Court's Obstruction of Justice Rulings

That afternoon the court again considered the matter of Cain's testimony with regard to the Probation Officer's recommendation of an upward adjustment in Dean's sentencing level based on Dean's statement about the call to Cain, which the probation officer had found to be perjurious.

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[27] The court denied defense counsel's request to examine the testimony. Id. at 12.

The court found that an adjustment was not warranted on the basis of Dean's statement because the court believed that Dean may in fact have been telling the truth. The court stated the following:

> I am not convinced that the defendant was lying about a telephone conversation with Mr. Cain. I think it could have occurred. I'm not convinced that the jury found that she was lying about that, and I'm going to construe that in the light most favorable to the defendant, and I'm not going to raise the level by two points for any testimony she gave about consideration of speaking to Mr. Cain or not.

Tr. 25.

The court went on, however, to again consider Dean's testimony about her call to Cain in the context of the probation officer's recommendation of a two-level enhancement based on a statement by Dean that she did not know Mitchell very well while she was at HUD. Dean had made such a statement during cross-examination in the context of explaining that she had never had lunch with just Mitchell during the time she worked at HUD. In closing argument O'Neill had told the jury that Dean had lied when she made the statement. In her motion for a new trial, Dean had cited O'Neill's calling the statement a lie as an instance of his taking a statement out of context and improperly asserting that it showed that a criminal defendant had lied. Dean Mem. at 204-07.[28] The Probation Officer, however, had been persuaded by the Independent Counsel that the statement was false and that it provided a basis for a two-level enhancement for obstruction of justice. The court initially was persuaded as well, and at the February 22, 1994 Hearing, held that the testimony provided a basis for a two-level enhancement.

In so holding, the court found Dean's testimony about the call to Cain to be additional evidence that, contrary to her statement about not knowing Mitchell well until after she left HUD, Dean was in fact close to Mitchell. The court noted that, inter alia, "even her recounting the telephone call with Mr. Cain about how upset she was about Mr. Mitchell being named, she didn't believe it, etc, reflects her, I think, relationship with Mr. Mitchell." Id. at 55.

Since the court at this point was finding that Dean had falsely attempted to diminish her relationship to Mitchell by stating that she did not know him very well until after she left HUD, the court's reliance on her testimony about the call to Cain would only have made sense if the court believed that Dean's testimony about the call was true.

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[28] See also Narrative Appendix styled "Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD."

The following day, however, after Dean had filed a motion for reconsideration arguing that the OIC had taken out of context her statement about not knowing Mitchell well until after she left HUD, the court eliminated the two-level enhancement based on that statement about Mitchell. The court found that Dean's statement was only misleading when "taken out of context." Id. at 96-97.

On February 25, 1994, after accepting the Independent Counsel's argument that Dean should receive an eight-level increase in her sentencing level because her conduct was of a nature to decrease the public's confidence in its government (Tr. at 7-8), the court sentenced Dean to 21 months in prison. Tr. 25-26.

IV. DEAN'S APPEAL

Dean's appeal is now before the D. C. Circuit. The OIC's brief in that appeal is treated with regard to several issues in 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." There are several aspects of the brief that warrant attention here, in part because they bear on various of the misconduct issues, and in part because they offer insight into the candor and honesty with which the OIC would address itself to the court of appeals.

A. Developers' Knowledge of Mitchell

In the Superseding Indictment, the OIC asserted with regard to Count 1:

> It was further part of the conspiracy that the Co-conspirators would tell developer/clients that the defendant Deborah Gore Dean was Co-conspirator one's stepdaughter.

Superseding Indictment at 11, ¶ 16.

Ultimately, however, the OIC would attempt to show that in fact Mitchell's involvement was entirely concealed from both developers involved in Count One: Martin Fine, the developer of Park Towers, and Art Martinez, the developer of Arama and South Florida I.

The role of Feinberg's testimony in this regard with respect to Park Towers has already been discussed at some length above. In the district court, the OIC would repeatedly assert that both Feinberg and Fine were unaware of Mitchell's involvement. Feinberg's testimony on this matter tends to be crucial since Fine learned most of what he knew from Feinberg. In the district court, Dean did not raise the issue of whether the OIC knew that Feinberg had not testified truthfully. Yet, the portions of Shelby's Jencks materials that Dean made part of the record for other purposes concerning her Rule 33 Motion contained two instances where Shelby told representatives of the OIC that he had told Feinberg of Mitchell's involvement. Possibly for this reason, in the OIC's appellate brief, it would no longer make any reference to Feinberg's lack of knowledge of Mitchell's involvement. In pressing the theme that Shelby's concealment of Mitchell's role demonstrated the conspiratorial nature of Shelby's relationship with Mitchell and Dean, however, the OIC would still twice assert that Fine was unaware of Mitchell's involvement.[29] Gov. App. Br. at 5, 24.

With regard to Arama, after being prevented by an evidentiary ruling from eliciting from Martinez that he had been told by Nunn or Mitchell that Dean was

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[29] Brief of the United States of America as Appellee, United States v. Deborah Gore Dean, No. 94-3021 (D.C. Cir., Sep. 16, 1994) at 5, 24 ("Gov. App. Br.").

Mitchell's stepdaughter, O'Neill proceeded to elicit from Martinez a cryptic statement that he did not know that he was hiring anyone other than Nunn to secure the Arama funding. Tr. 250-51. Taken out of context, the statement could be read to suggest that Martinez was unaware of Mitchell's involvement with Arama. Yet, in his interview Martinez had made clear that he understood Nunn to be affiliated with Mitchell's company and that he knew Mitchell was helping Nunn on Arama. Further, Nunn, appearing as an OIC immunized witness, made it clear that he had discussed Mitchell's role with Martinez. O'Neill directly elicited the testimony to that effect, and in doing so, did not question it, but simply sought to elicit that Nunn had told Martinez that Mitchell should be involved because of his (Mitchell's) Washington contacts. Tr. 1359-62.

The OIC therefore knew with that Nunn had not concealed Mitchell's involvement with Arama from Martinez. In its appellate brief, however, the OIC would rely on the testimony O'Neill elicited from Martinez to twice assert that Martinez, as well as Fine was unaware of Mitchell's involvement with his projects. Gov. App. Br. at 5, 24.

B. Shelby's "Friend at HUD"

Despite the OIC's contention in the district court that it had been reasonable to attempt to lead the jury to believe that the reference to "the contact at HUD" in Fine's July 31, 1985 memorandum was a reference to Dean, the OIC did not attempt to persuade the court of appeals that the reference was to Dean.[30] Even in its arguments on the merits in the district court, the OIC had never stated that the reference was to Dean. Rather, the OIC had merely placed the document in evidence and on its Park Towers chart and by discussing adjacent entries attempted to cause the jury to believe that the reference was to Dean.

Both in the district court and the court of appeals, however, the OIC would assert that the fact that Fine's February 3, 1986 memorandum (Gov. Exh. 85) referred to Shelby's "friend at HUD," rather than to Dean by name, showed that Shelby was concealing his contacts with Dean.[31] Yet, the OIC clearly knew that Shelby had not concealed whatever contacts he had with Dean from Feinberg. The OIC knew this not only from Feinberg's Jencks material, but from Feinberg's testimony in court, where he stated that Shelby had talked to him about his contacts with Dean. Tr. 636-37, 640. Since Fine's February 3, 1986 memorandum that referred to Shelby's "friend at HUD" merely recorded what Feinberg had told Fine that day, given that Shelby did not conceal his contacts with Dean from Feinberg, the OIC had no reasonable basis for

[30] Though Dean's appellate brief asserted that the OIC had used false evidence in the district court, the brief did not cite the use of "the contact at HUD" entry as an example.

[31] As in the case of Mitchell, the theme that Dean's identity was concealed from developers was directly contrary to the Superseding Indictment's claim that the co-conspirators had told developers of Mitchell's relationship to Dean.

concluding that the reference to Shelby's "friend at HUD" indicated that Shelby was concealing Dean's identity in his dealing with Feinberg or Fine.

Despite the fact that Feinberg acknowledged that Shelby had told him about meetings with Dean, and the fact that the Fine memorandum of February 3, 1986 (Gov. Exh. 85) merely recorded what Feinberg had told Fine, in opposing Dean's motions in the district court, the OIC still would cite that document as evidence that "Shelby avoided identifying 'his friend' in his dealings with Fine and Feinberg."[32] In the court of appeals, however, the OIC apparently recognized that, in light of Feinberg's testimony, it could not explicitly assert that Shelby concealed his contacts with Dean from Feinberg. The OIC would nevertheless continue to rely on the Fine memorandum of February 3, 1986, which merely recorded what Feinberg had told Fine, as evidence that Shelby "was careful not to identify [Dean] by name to the developer who hired him. GX 85; 3021." (Gov. App. Brief at 22), and that "Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others. Tr. 678-87 [Fine]; GX 85." Gov. App. Brief at 24.

C. Barksdale's Testimony on Arama

As discussed in the Narrative Appendix styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale," Maurice Barksdale testified during his direct examination that he did not remember Dean asking him to sign the documents authorizing the funding for Arama. Tr. 456-57. On cross-examination, however, Barksdale would also testify that he would likely remember it if Dean had even asked him about the project. Tr. 535.

In its brief in the court of appeals, however, the OIC would cite only the former 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 know that she was interested in the project.

Gov. App. Br. at 21 n.7.

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[32] Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal at 16-17 (Oct. 4, 1993); Government's Supplemental Opposition to Defendant Dean's Motion for Judgment of Acquittal at 16 (Oct. 29, 1993); Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29(c) and (d) at 22 (Dec. 21, 1993).

D. O'Neill's Statements that Dean Lied

Another matter regarding the OIC's appellate brief involves the OIC's arguments concerning O'Neill's statements in closing argument that Dean had lied. This is a matter different both from the OIC's use of false evidence discussed in the earlier part of this summary and the OIC's effort to mislead the court of appeals discussed in the sections immediately above. Yet, there are still certain points concerning the approach the OIC has taken in defense of this critical aspect of its trial counsel's tactics that warrant discussion in this summary.

First, in its appellate brief, the OIC quoted the district court's observation that the case was "it had to be recognized, a perjury case, and it's very hard to argue a case of perjury unless you are allowed to refer to the defendant's testimony and have the jury consider what it's worth and taking all that into account." Gov. App. Br. at 54. The OIC did not, however, point to any of O'Neill's statements that Dean lied and argue that the statement related to testimony that was the subject of the perjury counts. Nor could it, for not one of O'Neill's statements that Dean lied related to such testimony.

Second, in its brief the OIC twice emphasized the distinction between "personal opinion" and argument. Citing Stewart v. United States, 247 F.2d 42, 45-46 (D.C. Cir. 1957), Harris v. United States, 402 F.2d 656 (D.C. Cir. 1957), the OIC stated: "This Circuit has long recognized the distinction between a prosecutor's expression of his personal opinion as to a witness's veracity and his argument based on the evidence that a witness's testimony is a lie." Gov. App. Br. at 53 n.25. The OIC also stated that "[a]t no point did the prosecutor violate the injunction against expressing his personal opinion regarding Dean's credibility." Id. at 53-54.

Whether or not it correctly characterized the way O'Neill's comments would be perceived by the jury, the OIC accurately identified the absolute prohibition of a prosecutor's expression of what would be perceived as a personal opinion because of the weight such opinion would be expected to carry with a jury. In Harris v. United States, the D.C. Circuit makes four references to the prohibition of expressions of "personal opinions," "personal belief," or "personal evaluation." In United States v. Young, the Supreme Court quotes the ABA standard prohibiting expression of a prosecutor's "personal belief or opinion as to the truth or falsity of any testimony or evidence." 470 U.S. at 8. In the text and notes on 470 U.S. at 8-9, there are three other references to prohibited expressions of "personal beliefs," or "personal opinion."

Yet, when the OIC then went on argue that, in any event, the district court's curative instructions had satisfactorily addressed the matter, the OIC would describe those instructions as follows:

> [T]he court specifically instructed the jury that while the words "lie" and "lying" had been used in the closing arguments, the "issue is for you as the jury to make a decision depending on the evidence in the case," since "[i]t's the evidence you have to focus on and not the statements of counsel, which I informed you previously are not evidence in the case." Tr. 3593-94.

Gov. App. Br. at 58.

The following are the words that the OIC elided from its quotation of the district court's instructions:

> ... and it is not the opinion of counsel, that is, whatever their personal belief is, that is appropriate, so that an argument to you that someone is lying is really an expression of personal opinion by the attorney, as opposed to pointing you to the evidence and saying it's for you to make up your mind whether or not someone is telling the truth.

Tr. 3594.

Thus, in describing for the court of appeals the curative instructions that the OIC maintained had corrected any problem, the OIC carefully excluded those parts of the instruction in which the district court specifically informed the jury that the statements that Dean had lied reflected the "personal opinion" of the prosecutor.

E. Other OIC Credibility Issues

The following matters arising in the court of appeals are also relevant to the issue of whether, assuming that the OIC had concluded that Cain had testified falsely with or without the knowledge of trial counsel, it is a matter that the OIC would bring to the attention of the courts, as would appear to be its duty. In that regard, it is noteworthy that neither in the district court nor in the court of appeals would the OIC acknowledge a single instance of impropriety in its prosecution of the case.

With regard to both Demery and Reynolds, it was evident to the district court, not only that both had testified falsely, but that the OIC possessed documentary evidence showing that they had testified falsely. The OIC never made a colorable argument to the contrary.[33] Yet, in the court of appeals, responding to Dean's contention that the OIC "had reason to know" that Demery and Reynolds testified falsely, the OIC stated: "But the charge is not true, as the government demonstrated at length below." The OIC then shifted the discussion of Demery to a denial that the OIC had "sought to conceal that Demery had been charged with perjury," while avoiding discussion of the fact that its attorneys watched Demery make statements that those attorneys knew with absolute

[33] See Narrative Appendixes styled "Testimony of Thomas T. Demery" and "Testimony of Ronald L. Reynolds."

certainty were false, and allowed those statement to go uncorrected. The OIC then stated: "As to Reynolds, Dean failed to make any credible showing that his testimony was false..." Gov. App. Br. at 51 n.23. In other words, the OIC continues to assert that Reynolds' testimony was true.

The OIC's continued position with regard to Reynolds and Demery offer some insight as to whether it would undertake a good faith effort to determine whether Cain had testified truthfully, and would reveal that Cain had not testified truthfully if such a determination should be the result of that effort. In any case, in the court of appeals, the OIC continues to rely upon Cain's testimony, asserting, with regard to Dean's statement that she had called Cain to express her disbelief and anger concerning the discussion of Mitchell in the HUD Inspector General's Report, that: "Agent Cain testified that to his recollection this conversation never occurred." Gov. App. Br. at 25.

As with the false testimony of Reynolds and Demery, the district court had also recognized that the OIC had wrongfully withheld exculpatory material and had falsely represented to the court that no such material existed. Yet, the OIC never acknowledged that it had intentionally done so, and instead offered facially implausible excuses for its conduct. Sweeney's representations at the August 31, 1993 hearing on Dean's motion to dismiss, as well as the assertion in the OIC's Opposition to Dean's Rule 33 Motion, as to the basis for withholding the Shelby statements and other Brady material -- offered, as they were, as the actual reasons for the OIC's past conduct -- must be regarded as false representations as well.

In its brief in the court of appeals, seemingly reluctant to make again such implausible representations as to what its attorneys' true motivations had been, the OIC would merely state that "the government had argued below that the items of evidence cited by Dean either were not exculpatory or were more accurately described as Giglio material." Gov. App. Br. at 45. In oral argument on November 15, 1994, however, Judge Laurence Silberman would press Swartz as to the actual reason for the OIC's withholding the material. Swartz's rather evasive response is difficult to characterize.[34] But it seems fair to say that ultimately he responded that there had been no intentional violation of the OIC's Brady obligation. Rather, Swartz would represent to Judge Silberman, trial counsel may simply have too narrowly interpreted the OIC's Brady obligation. Swartz would also represent that it was pre-trial reexamination of the materials that led the OIC to make the August 20, 1993 disclosure. Thus, Swartz would represent to the court of appeals that, in truth, the OIC had withheld such material as Shelby's statements that, to his knowledge, Dean was unaware of Mitchell's involvement with Park Tower, as well as other Shelby statements specifically contradicting inferences in the Superseding Indictment, because OIC counsel had merely failed to perceive that the statements fell under Brady.

[34] A transcript is not available as of this writing.

This, too, tells something about whether the OIC can be relied upon to acknowledge improper conduct of its attorneys.

ADDENDUM TO INTRODUCTION AND SUMMARY
(January 1995)

At page 49 of the Introduction and Summary, a point is made of the fact that the OIC contended in the court of appeals that the Arama developer, Aristides Martinez, was unaware of John Mitchell's involvement with that project, even though OIC attorneys knew with absolute certainty that Martinez was aware of Mitchell's involvement. That matter is treated at greater length in Supplement I, which is a Narrative Appendix styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee." Supplement I also shows that when initially planning to emphasize Martinez' knowledge of Mitchell's involvement, the OIC made representations in the Superseding Indictment known to be false and introduced documents into evidence while representing them to be things that they were not.