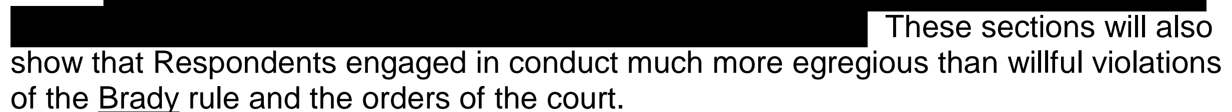
[The document that follows is part of the complaint to the DC Office of Bar Counsel on February 6, 1996, as discussed in Section B.11a of the material on the main Prosecutorial Misconduct page of jpscanlan.com. The redactions are in accordance with the discussion in that section. Some irregularities are the results of conversion from WordPerfect. The document has been reformatted to reduce the size.]

PART I

EXCULPATORY MATERIALS BELATEDLY OR
NEVER PROVIDED IN A BRADY DISCLOSURE

A. Introduction

This Part sets out in context information concerning the Respondents' failure to produce certain Brady materials in a timely manner and the failure ever to produce as Brady material statements and documents that were plainly exculpatory. Section B explains the nature of certain crucial withheld statements and the way Respondents' failure to make timely Brady disclosures was part of a calculated effort to lead the jury or the courts to believe things that Respondents knew or believed to be false. Section C explains the history of the positions Respondents took with regard to their decisions to withhold the crucial information, notwithstanding Judge Gerhard A. Gesell's order to turn over such material as soon as it was discovered.[1]


These sections will also show that Respondents engaged in conduct much more egregious than willful violations of the Brady rule and the orders of the court.

[1] An understanding of the nature of information as to which Respondents failed to make timely Brady disclosures, and of Respondents' efforts then to lead the jury and the court to believe things contrary to that information, is necessary to evaluate Respondents' conduct and the good faith of positions Respondents took during the pre-trial period. Accordingly, the summary of the pertinent pre-trial proceedings is presented after the discussion of the withheld information and the relevance of that information to Respondents' actions during and following the trial.

Yet, when an inquiry was made regarding an important statement by Richard Shelby, an alleged co-conspirator with regard to both Count 1 and Count 2, it would be revealed that none of the Respondents was involved in the review of Shelby's statements for purposes of identifying statements go in the Brady letter.As shown below, Shelby was a crucial witness and between April 8, 1992, and June 4, 1992, made a number of statements that were highly exculpatory and that in fact specifically contradicted allegations and inferences the OIC would include in the Superseding Indictment in July 1992 and points the OIC would seek to prove at trial in September 1993. The main statements were made in an interview conducted by Respondent Sweeney between April 8, and May 6, 1992, and in interviews conducted by Respondents O'Neill and Swartz on May 18, and May 19, 1992, as well as in an interview on May 29, 1992, probably conducted by Respondents O'Neill and Swartz, and in grand jury testimony on June 4, 1993, where Shelby was examined by Respondent O'Neill.[2] As pointed out earlier, even in the abstract, the failure of any of these three Respondents to participate in the review of Shelby's interview reports and testimony for purposes of identifying statements for the Brady letter is bad faith per se.

But this matter warrants closer examination as well. An issue given particular attention below concerns the OIC's eliciting from a witness named Eli M. Feinberg the sworn testimony that he was unaware that John Mitchell was involved with a project in Count 1 called Park Towers. Feinberg's testimony in court was consistent with a statement he made in a telephonic interview to Respondents O'Neill and Swartz on May 18, 1992. The testimony would underlie a point given great emphasis by Respondents in a number of places, including at the end of the rebuttal portion of Respondent O'Neill's closing argument, where he would argue that Shelby's keeping Mitchell's role secret was "the hallmark of conspiracy." Respondent O'Neill would then repeatedly emphasize that Feinberg's statement was unimpeached.

In the April-May 1992 interview conducted by Respondent Sweeney and in the May 18, 1992 interview conducted by Respondents O'Neill and Swartz, however,

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[2] Respondents failed to provide in that letter the dates of the interviews in which the various statements were made. After a request from defense counsel, Respondents provided those dates in a letter dated August 29, 1993. For the Shelby statements described in the earlier letter (see discussion infra) the latter letter gave dates of April 8, 1992 (the first day of the extended interview conducted by Respondent Sweeney) and June 4, 1992, the grand jury testimony. Dean Rule 33 Mem., Exh. BB, at 3. No information was provided from the interviews conducted by Respondents throughout the month of May 1992.

Shelby had stated that Feinberg was aware of Mitchell's involvement with the Park Towers project. In the interview conducted by Respondents O'Neill and Swartz on May 19, 1992, the day after Feinberg had told them that he was unaware of Mitchell's involvement with Park Towers, Shelby reaffirmed that Feinberg was aware of Mitchell's involvement and even provided details of how he (Shelby) and Feinberg had agreed upon Mitchell's fee. (Feinberg would never be confronted with Shelby's statements prior to Respondent Sweeney's eliciting Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers.)

There was no hint in the Superseding Indictment that the OIC intended to prove that Shelby had concealed Mitchell's role in the Park Towers project from Feinberg. Indeed, the Superseding Indictment suggested that the alleged co-conspirators would emphasize Mitchell's relationship with Dean to their developer/clients. Thus, when some as-yet-unidentified persons in the OIC reviewed Shelby's interviews to identify information useful to the defense, unless such persons knew that Respondents intended to rely on Feinberg's statement that he was unaware of Mitchell's role as evidence of conspiracy, it would be impossible for such persons to identify the three Shelby statements as exculpatory

Further, the obligations of Respondents did not cease simply because others had reviewed the Shelby statements. In preparing the letter itself, a matter in which Respondents certainly had a role, Respondents could not but recognize that there had been more exculpatory information in the Shelby material than those conducting the review had discovered. Moreover, as shown in Section C, infra, at the hearing of August 30, 1993, the court rejected out of hand Respondent Sweeney's explanations for the failure to produce the material in the letter until August 30, 1993, and cautioned Respondents O'Neill and Sweeney against further violations of the court's orders. Even so, Respondents did not consider whether there might be important exculpatory information in the interviews they had conducted of Shelby and that it might be more in keeping with the court's instruction to disclose such information two weeks before trial, rather to leave it to be perhaps discovered by defense counsel among the thousands of pages of material that Respondents would provide three days before Shelby testified.

Each of the above points, however, is largely academic. For, as shown in Section B, infra, both the delinquent disclosures of certain Brady material and the failure to make any Brady disclosure of other material were parts of a calculated effort to enable the Respondents to lead the jury and the courts to believe things Respondents had reason to know were false.

Second, Respondents, who listened to Shelby's statements from April 1992 until the beginning of June 1992, would fail to understand immediately upon the issuance of the Superseding Indictment on July 6, 1992, that the statements contradicting inferences in the Superseding Indictment had

immediately to be disclosed.[3] In the hearing of June 3, 1992, [redacted] Judge Gesell ordered that "exculpatory material of any kind" must be turned over to the defense "right away, as soon as you know it." Respondents, who were then drafting an indictment containing statements and inferences that Shelby had specifically contradicted, certainly immediately appreciated that under Judge Gesell's order the statements contradicting the indictment would have to be provided as soon as the indictment was issued. The appreciation would have been pointedly reinforced the following day when Shelby testified before the grand jury and reaffirmed his statements that contradicted the indictment then being drafted.

[redacted]

[redacted] As shown below, much more of the material in the letter would have been significant information if the Respondents had included in it everything they should have. Apart from that, however, that the significant items so belatedly produced were buried among a conglomeration of more innocuous material does nothing to suggest that the significant items were not intentionally withheld. If in the August 20, 1993 letter, Respondents had produced solely the Shelby statements discussed below (or even solely the Shelby statements that they did include in the letter), the fact that the failure to produce that information for more than a year was a conscious flouting of the court's order would have been even clearer.

[redacted]

[3] But see Section C, infra, concerning whether Respondents now take the position that regardless of how exculpatory information may be, if such information is contained in witness statements, a standard Jencks production satisfies the government's Brady obligations. Such position is contrary to the law. Brady material is subject to immediate disclosure regardless of its form and whether it must also be disclosed at some later time because of Jencks obligations. Obviously if the OIC had decided not to call Shelby as a witness and therefore was under no Jencks obligation concerning his statements, the OIC still would have had its independent Brady obligation to reveal the material immediately.

Shelby's statements concerning the steering of conversations away from Park Towers, however, in fact provides a very useful illustration of the bankruptcy of Respondents' point concerning the extensiveness of disclosures (though other examples of withheld Shelby statements would serve as well). As shown in Section B.2.b., infra, ultimately the OIC would rely on the inference that Shelby, Dean, and Mitchell must have discussed Park Towers at a lunch on September 9, 1985, as the only evidence of any sort that Dean knew of Mitchell's involvement with Park Towers. Shelby's statements in interviews and before the grand jury that Park Towers was not discussed at the lunch and that he in fact made every effort to ensure that it was not discussed therefore was the type of evidence deserving to be called "smoking gun" evidence, if anything does. It is no defense to the failure to disclose crucial evidence that a party made extensive disclosures of other, mostly innocuous evidence. Rather, the extensiveness of the other disclosures is but further evidence of the deliberateness of the violation.

[redacted] As shown in Section B, Respondents calculatedly undertook to deny the defendant information that might prevent the Respondents from leading the courts and the jury to believe things Respondents knew or had reason to know were false. Whether or not the Respondents were successful in that undertaking is not germane to an inquiry of this nature, which is concerned with what Respondents attempted to do. Nevertheless, it will be shown that in fact Respondents were extremely successful in that undertaking.

B. The Role of the Respondents' Failures to Timely Disclose Exculpatory Material in Their Efforts to Lead the Jury and the Courts to Believe Things Respondents Knew or Had Reason to Know Were False

1. Background

This Section treats specific instances of the Respondents' withholding of Brady material.[4] It also treats related issues concerning Respondents' efforts to lead the jury and the courts to believe things that Respondents knew or had reason to know were false, efforts in which the Brady violations played a large role, and concerning the credibility and good faith of representations and arguments Respondents made in defense of their actions. [redacted]

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[4] Though also involving a Brady violation, as well as an effort to lead the jury to believe things Respondents knew or believed to be false, the matter of the Mitchell telephone message slips is treated in Part II.

The discussion that follows focuses on material related to immunized witness Richard Shelby, a Washington consultant, who was an unindicted co-conspirator with regard to both Counts 1 and 2. Shelby was a crucial witness with regard to both counts, and it would be with regard to Shelby that Respondent O'Neill would make some of his most inflammatory arguments both in opening and in closing argument.[5] Ultimately, the court of appeals would find that there was insufficient evidence to support a conviction with regard to any of the matters with which Shelby was involved.

The discussion will focus on a number of statements by Shelby and documents relating to Shelby as to which Respondents either were delinquent in making Brady disclosures or failed ever to make Brady disclosures. They all involve a project called Park Towers, concerning which Count 1 of the Superseding Indictment alleged a conspiracy to defraud the government among Shelby, former Attorney John N. Mitchell, and the defendant, Deborah Gore Dean.

Park Towers was one of four projects in Count 1 concerning which Dean was alleged to have caused HUD to take some action to benefit Mitchell, whom she regarded as a stepfather. Dean would testify that she did not do anything to benefit Mitchell and that she did not know that he earned a HUD consulting fee until she read about it in a HUD Inspector General's Report at the end of April 1989. No witness testified that he or she knew or believed that Dean was aware that Mitchell earned a HUD consulting fee. Mitchell's partner, Colonel Jack Brennan, who was involved in one of the projects in Count 1, testified that Mitchell had refused to do anything concerning that project because of Dean's position at HUD. Tr. 319-22. Brennan also testified that Dean's reaction when he later told her of Mitchell's HUD consulting was one of "shock and aghast." Tr. 369. The court of appeals ultimately would find that there was insufficient evidence to sustain a conviction as to any of the four projects in Count 1, except for the Arama project, which is discussed in Part II.

Park Towers is a 143-unit moderate rehabilitation project in Dade County, Florida that was funded as a result of HUD actions in 1985 and 1986. The most important of these actions were the allocation of 266 moderate rehabilitation units to Dade County at the end of November 1985 and the approval of a post-allocation waiver of certain HUD regulations in April 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Fine secured the services of a Miami consultant named Eli Feinberg in order to assist in securing HUD funding for Park Towers. Feinberg then secured the services of Shelby, who then retained Mitchell. Martin Fine wrote many memoranda to his file recording Shelby's progress on the Park Towers project. Usually, these memoranda would record what Feinberg had told Fine about that progress.

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[5] Set out in Appendix I-A are Respondent O'Neill's statements in opening and closing argument about Richard Shelby and the Park Towers project, with annotations concerning those statements that Respondent O'Neill knew or had reason to know were false or unsupported by the record.

Certain of the matters addressed below were not addressed in the courts, a circumstance that undoubtedly occurred in large part because the same tactics that, for example, allowed the OIC to elicit Feinberg's testimony concerning Mitchell without contradiction by Shelby caused the nature of the OIC's action to go undiscovered by Dean's counsel. They nevertheless reflect some of the Respondents' more serious abuses [

The discussion below is an abbreviated version of the detailed account provided in the Park Towers Appendix. That Appendix demonstrates how, through the failure to make timely Brady disclosures and other deceitful actions, Respondents endeavored to lead the jury or the courts to believe numerous incriminating things that the Respondents knew or had reason to know were false. Among them were:

- That Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean.

- That a reference to "the contact at HUD" in a Feinberg memorandum was a reference to Dean and that Dean was in fact Shelby's principal HUD contact on the Park Towers project.

- That Shelby concealed Mitchell's involvement with Park Towers from Feinberg and Fine.

- That Dean provided Shelby a copy of an internal HUD document called a rapid reply.

- That Dean had been responsible for the post-allocation waiver of HUD regulations that allowed the Park Towers project to go forward.

- That Dean had provided Shelby a copy of the post-allocation waiver.

- That Shelby concealed his contacts with Dean from Feinberg and Fine.

In order for Respondents to succeed in this endeavor, apart from entirely disregarding the government's Brady obligations, it would be necessary for the OIC to have Shelby testify ahead of Feinberg and Fine and with the defense's having as little opportunity as possible (with as little notice as possible) to review the Shelby Jencks materials containing statements contradicting most of the above propositions. This would diminish the chances that Shelby would be asked questions that would elicit Responses directly contradictory to testimony the Respondents intended to elicit from Feinberg (see subsection B.2.d, infra), and directly contrary to inferences that Respondents intended to be drawn from documents introduced through Fine (see subsections B.2.c and B.2.f-g., infra).

The trial commenced on September 13, 1993. About a week before trial (exact date not known), the OIC produced Jencks files (a total of 35 items) for nine persons described as the first week's witnesses. On September 9, 1993, the OIC produced Jencks files (a total of 28 items) for seven more persons, including Feinberg and Fine. On September 9, 1993, the OIC produced Jencks files (a total of 42 items) for five more witnesses. Park Towers Appendix, Att. 5.

On September 13, 1993, the day of opening argument, the OIC produced Jencks files (a total of 284 items) for another 36 persons, including Shelby. Id. Dean's counsel in the district court represented that the entire Jencks production was sufficient to fill over 15 large 3-ring binders, which would suggest that at least several thousand pages of material were provided on September 13, 1993. Shelby's Jencks material was comprised of ten items including grand jury testimony and interview reports running as long as 27 single-spaced pages. Of the 57 persons for whom the OIC produced Jencks files, 20 (138 items) were not called in the OIC's case-in-chief.[6] At the time this material was produced, Dean was represented by a single attorney.[7]

Though Shelby was not scheduled to testify during the first week of trial, and not before Feinberg and Fine, he in fact would testify on the third day of trial, September 16, 1993, and ahead of both Feinberg and Fine. At the close of the day on September 15, 1993, the court asked Respondent O'Neill what witnesses he had planned for the following day. After Respondent O'Neill stated that he would call Maurice Barksdale and a person named Norman Larsen, "who is a custodial type witness out of the Georgetown Club," this colloquy ensued:

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

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[6] The OIC did attempt to call Ronald L. Reynolds (one item of Jencks material) in its case-in-chief.

[7] Dean's counsel was assisted by another attorney in the preparation of briefs and motions, but not in the review of Jencks material or trial preparation.

MR. O'NEILL: Yeah.

Tr. 424-25.
The description of "local HUD people" clearly did not include Shelby, who was not a HUD employee. Nor was he the type of witness one typically would call to "fill in."[8]

It is not known when O'Neill told defense counsel Wehner that he was having Shelby testify on September 16.[9] It would be revealed during Shelby's testimony, however, that Shelby met with Respondent O'Neill on the evening of September 15, 1993, shortly after Respondent O'Neill had led the court and the defense to believe that Shelby would not be among the witnesses called on the following day. Shelby presumably can provide information on when he was told that he would testify on September 16, 1993.

Also relevant to the issues treated in Section B.2., infra, is the following information concerning the nature of the interview of Shelby on September 15, 1993. Shelby had consistently told the OIC that his principal contact on the Park Towers project was a Deputy Assistant Secretary named Silvio DeBartolomeis, though he also talked to Dean and Hunter Cushing about Park Towers on a number of occasions.

The Respondents had no reason to disbelieve this. They had a number of documents reflecting Shelby's contacts with DeBartolomeis, particularly with regard to the post-allocation waiver. See Park Towers Appendix, Atts. 2 and 5d. Shelby only met Dean on leaving DeBartolomeis' office following a meeting with DeBartolomeis on the project. See Dean Rule 33 Mem., Exh. CC, at 5-6. DeBartolomeis was an immunized government witness who was not asked to contradict any of Shelby's testimony concerning his contacts with DeBartolomeis.

It would be revealed during Shelby's testimony in court that on the evening of September 15, 1993, he was shown a number of documents by Respondent O'Neill supposedly "to refresh [his] recollection as to who [sic] he dealt with at HUD" on the Park Towers project. Shelby's answers revealed that he had been shown all documents referencing his contacts with Dean, but had not been shown the various documents referencing his contacts with DeBartolomeis and specifically relating to Park Towers. Tr. 547-48. Shelby's testimony that he had only seen documents referencing his contacts with Dean, but none referencing his contacts with DeBartolomeis, would

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[8] While Shelby was not a local HUD person, he did live in Washington. To the extent that Respondent O'Neill's second statement--"Yeah, whoever lives here local"--was intended to subtly qualify "local HUD people," it but confirms that Respondent O'Neill's first statement was intended to mislead the court and the defense concerning the intention to call Shelby the following day.

[9] Stephen V. Wehner advises that he does not recall when Respondent O'Neill informed him that Shelby would testify on September 16, 1993.

follow his testimony that his principal contacts were with DeBartolomeis. It would later form the basis for the OIC to defend its efforts to lead the jury to believe that a reference in a memorandum to "the contact at HUD" was a reference to Dean and, more generally, that Dean was Shelby's principal HUD contact on Park Towers, notwithstanding that Shelby had specifically contradicted both points.

2. Statements and Documents Contradicting Matters Respondents Sought to Prove at Trial

The statements and the document concerning these and related matters are described under the seven subheadings below. While the discussion in the subsections below concerns the withholding of material involving quite significant points that Respondents intended to make regarding the Park Towers project, it is nevertheless useful to make a point here concerning the nature of the OIC's proof of conspiracy that should be borne in mind at all times, though particularly when considering the issues addressed in Part III.

As Respondents themselves would note, the evidence concerning the conspiracies was circumstantial. Tr. 247. Indeed, in large part the evidence consisted of scores of innuendoes based on such things as scheduled lunches that sometimes never occurred; receipts that may or may not reflect a meeting with, or entertainment of, the defendant; or the supposed concealment reflected by the fact that a document did not refer to a person by name. The verdict, and whether a guilty verdict could be upheld, thus would turn on whether those innuendoes reached some sort of critical mass in the view of the jurors and the courts. In such a context, evidence contradicting any one of the innuendoes is Brady material. This should be kept in mind even in evaluating the issues discussed immediately below, though it will be more germane to matters considered later on.

a. The Central Premise of the Park Towers Charge

The central premise of the Park Towers charge in the Superseding Indictment was that Shelby had secured the services of Mitchell because of Mitchell's relationship to Dean and that Dean had then caused the project to be funded to benefit Mitchell, whom she regarded as a stepfather. At various times prior to the issuance of the Superseding Indictment, however, Shelby, already under a grant of immunity, had told Respondents a variety of things that directly contradicted that premise.

In the interview conducted by Respondent Sweeney between April 8 and May 6, 1992, Shelby stated that he was unaware of Mitchell's relationship with Dean until he joined The Keefe Company shortly after his initial contacts with Mitchell on Park Towers. He stated he was advised of the relationship by his employers who sensed the possibility of an appearance of impropriety. Shelby indicated that he felt bound to honor the fee arrangement with Mitchell, but did not seek further material assistance from Mitchell on the project. Dean Rule 33 Mem., Ex. CC, at 3. Shelby also stated that

to the best of his knowledge Dean was not aware of Mitchell's involvement with Park Towers, also indicating that he would have been very surprised if Mitchell had told Dean about it. Id. at 7.

In the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, Shelby again stated that he had initially secured the services of Mitchell prior to his becoming aware of the relationship between Mitchell and Dean. Shelby again stated that his employers who informed him of the relationship also advised him that Mitchell ought not to work on the Park Towers project because of an appearance of impropriety, and he described a meeting on the matter that he remembered as occurring in the office of one of the principals of his firm who had raised the issue. Shelby stated that, thereafter, he did not seek further assistance from Mitchell other than to seek Mitchell's advice on how an agreement should be extended. Shelby stated that his employer paid Mitchell solely because of a commitment Shelby had made prior to Shelby's learning of Mitchell's relationship to Dean. Dean Rule 33 Mem., Exh. DD, at 9-10.

Questioned by Respondent O'Neill before the grand jury on June 4, 1993, Shelby stated that, to the best of his knowledge, John Mitchell did not utilize Deborah Gore Dean to secure the Park Towers funding. Dean Rule 33 Mem., Exh. EE, at 24.

Notwithstanding that it contradicted the central premise of the Park Towers charge in the Superseding Indictment, Respondents provided none of this information to the defense prior to the Brady letter of August 20, 1993. In that letter, Respondents O'Neill and Sweeney informed the defense only of Shelby's statement that to his knowledge Dean was unaware of Mitchell's involvement in Park Towers. None of the other information just described would be provided at that time.

During Respondent O'Neill's direct examination of Shelby, he would ask Shelby no questions concerning why he secured Mitchell's services,[10] about Dean's knowledge of Mitchell's involvement in the project, or about his knowledge of Mitchell's utilizing Dean to secure funding for that project. Only on cross-examination would it be revealed that to the best of Shelby's knowledge Dean did not know that Mitchell received a fee on Park Towers (Tr. 587) and that he (Shelby) had intentionally kept information about Mitchell's involvement from Dean. Tr. 603.

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[10] Respondent O'Neill did ask one question concerning whether, at the time of Shelby's initial contacts with Mitchell on Park Towers, Shelby "[knew] anything about [Mitchell's] family situation." Shelby responded that he did not have any specific knowledge. Tr. 543-44.

b. The September 9, 1985 Lunch Attended by Shelby, Dean, and Mitchell

Count 1 of the Superseding Indictment contained the following allegations relating to the Park Towers project:

> 67. On or about September 9, 1985, the defendant **DEBORAH GORE DEAN** met with [John Mitchell] and [Richard Shelby].
>
> 68. On or about September 10, 1985, [Richard Shelby] sent a letter to the defendant **DEBORAH GORE DEAN** enclosing information regarding the Park Towers project.

Superseding Indictment at 21.

The letter referenced in Paragraph 68 had stated: "Enclosed please find the information concerning the Section 8 Moderate Rehab Program in Miami, and the contract for cable television service for the Marathon Housing Project in Marathon, Florida." Gov. Exh. 76. Presumably, it contained some materials related to the Park Towers project.[11] Use of the word "the" modifying "information" would seem to indicate some prior discussion. After stating that the materials were self-explanatory, Shelby stated: "As always thank you for the time and effort which you must increasingly expend on my behalf. I appreciate your friendship."[12]

As of that point in time, the following are Shelby's documented contacts with Dean following his meeting her outside DeBartolomeis' office in June 1985. Shelby and Dean had lunch at the 209-1/2 restaurant on August 9, 1985, that lunch apparently being a rescheduling of one originally planned for August 1, 1985. On August 15, 1985, Shelby wrote Dean thanking her for taking time to have lunch and stating: "I especially appreciated your advice and counsel relative to certain areas that we should focus our attention on over the next few months. In fact, at your convenience, I would like to take advantage of your kind offer to sit down with certain of your technical people in order to

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[11] The materials were never found. Dean had forwarded the letter, and presumably one or both of the attached items, to Dave Turner, with the note: "See me on this." Dean testified that she had no idea what Shelby was referring to and that Dave Turner was a special assistant for public housing. Tr. 3111-12. As discussed infra, Shelby did not know what the materials were but assumed that they related to Park Towers.

[12] In discussing this issue, the OIC would invariably quote only the words "the Miami Mod [sic] Rehab," suggesting that the materials related to a project rather than a program. At times, the OIC would emphasize the word "the" in that phrase, for purposes of indicating that there must have been prior discussion. That emphasis may enhance somewhat the suggestion of specificity as well. But it is actually the word "the" placed in front of "information" that shows prior discussion.

learn more about the co-insurance program." He stated that he would call her late in the following week. Gov. Exh. 74. On September 4, 1985, Dean would write Shelby enclosing an extensive package of materials on HUD loan programs, including the co-insurance program. In the letter, she offered to schedule a briefing for him after he had reviewed the material. Gov. Exh. 75.

On September 9, 1985, Dean, Shelby, and Mitchell had lunch together at The Grand Hotel.[13] The next day Shelby sent Dean the materials referenced in Government Exhibit 76.

As will be shown below, the proximity of the lunch and Shelby's sending the materials to Dean, along with the fact that Shelby's transmittal letter suggested some prior discussion, would be the sole evidence on which the OIC would rely to prove that Shelby, Mitchell, and Dean discussed the Park Towers project together or that Dean was aware of Mitchell's involvement in that project.

Yet, in the interview conducted by Respondent Sweeney between April 8 and May 6, 1992, Shelby stated that he did not believe that Mitchell's interest in Park Towers had come up at the lunch and that he (Shelby) had gone out of his way to ensure that Park Towers was not discussed.[14] With regard to the materials he had sent on September, 10, 1985, Shelby "guessed" that he was referring to the Park Towers project, but he did not recall what was sent. He also stated that to the best of his knowledge, the subject of Park Towers never came up in conversations with Dean and

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[13] Shelby had met Mitchell in 1980 and had been having lunch with him two or three times a year ever since. Tr. 543; Dean Rule 33 Mem., Exh. CC, at 2. Dean testified that when she met Shelby outside DeBartolomeis' office, Shelby mentioned that he knew Mitchell and would like to see him sometime. Dean then suggested that the three have lunch and later arranged the lunch. Tr. 2686-87.

[14] The interview report stated:

> Shelby did not believe that the subject of Mitchell's interest in the Park Towers project was mentioned during the lunch he had with Mitchell and Dean on September 9, 1985. Shelby had no knowledge that Dean was aware of Mitchell's interest in the project. Shelby tried to go out of his way in conversations with Mitchell and Dean to stay as "far afield" of everything related to that as he could. If conversations drifted in that direction, Shelby tried to change the course of the conversation. To the best of Shelby's recollection, the subject of Park Towers never came up in conversations with Mitchell and Dean.

Dean Rule 33 Mem., Exh. CC, at 9.

Mitchell. Dean Rule 33 Mem., Exh. CC, at 9. Earlier in the interview, after stating that he talked to Dean "on at least one if not two occasions about Park Towers," Shelby stated that at the lunch at 209-1/2 he was sure they discussed HUD business and Park Towers may well have come up. Id. at 8.

In the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, Shelby was again shown the September 10, 1985 letter. With regard to the information in the letter,[15] Shelby stated that he had previously discussed the Park Towers project with Dean at a lunch at 209-1/2 or La Colline, and "did not recall the project being discussed the day before the letter during the lunch with Dean and Mitchell." Id. at 5. Respondents presumably knew that lunch at 209-1/2 or La Colline was the August 9, 1985 lunch at 209-1/2 attended only by Shelby and Dean. See OIC Park Towers Chart (Dean Rule 33 Mem., Exh. FF); Gov. Exh. 11b (Shelby's receipt for lunch on August 9, 1985, at 209-1/2). Later in the interview, Shelby stated that he always tried to steer conversations away from business when he was with Mitchell and Dean, though he and Dean might discuss HUD matters after they left Mitchell, such as in cars returning to work, but not while they were with Mitchell. Dean Mem., Exh. DD, at 9-10.[16]

In an interview May 29, 1992, presumably conducted by one or more of the Respondents, Shelby again stated that he did not discuss the particulars of HUD projects when he was with Dean and Mitchell. He stated that at the time when he had lunch with Dean and Mitchell in September 1985, he had been calling Dean on a regular basis, "and visiting her with regard to the whole matrix of HUD issues he was involved with" and that Dean had alerted him to coinsurance. Shelby was advised that the letter to Dean of September 10, 1985, the day after he had lunch with Dean and Mitchell, suggested that they had discussed Park Towers. In Response, according to the report: "Shelby advised that they may have discussed it, but he did not remember that they did." Dean Rule 33 Mem., Exh. ZZ at 2.

Examined by Respondent O'Neill before the grand jury on June 4, 1993, Shelby again stated that to the best of his knowledge, Park Towers was not discussed at the lunch. Dean Rule 33 Mem., Exh. EE, at 22-23.

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[15] On this occasion Shelby suggested that it was possible that he sent Dean a copy of the Park Towers application. Dean Rule 33 Mem., Exh. DD, at 5.

[16] To correct any false impression as to the frequency of lunches among Shelby, Mitchell, and Dean, it is noted here that, in addition to September 9, 1985, calendar entries indicate that, while Dean was Executive Assistant, Shelby, Mitchell, and Dean were also scheduled to meet for lunch on January 28, 1987, and April 17, 1987. A line drawn through the April 17, 1987 entry and the fact that Dean had lunch with Shelby and another person on April 16, 1987, suggests that the April 17, 1987 lunch was cancelled. Thus, it appears that Dean had lunch with Mitchell and Shelby together twice while she was Executive Assistant, once in 1985 and once in 1987.

Nevertheless, thereafter the Superseding Indictment was crafted in a manner to suggest that Park Towers was discussed at the lunch.

Shelby's repeated statements that Park Towers was not discussed at the lunch and that he had in fact gone out of his way to ensure that it was not discussed were never disclosed as Brady material. Despite the fact that the OIC would rely on the suggestion of prior discussion in Shelby's transmittal of the materials on September 9, 1985, as evidence of prior discussion at the lunch among Dean, Mitchell, and Shelby, Shelby's statement that the project had been discussed at a different lunch attended only by Dean and Shelby was never disclosed as Brady material.

The OIC then included entries in its Park Towers chart to suggest that Park Towers was discussed at the September 9, 1985 lunch. Respondent O'Neill did not mention the lunch at all during his direct examination of Shelby. On cross-examination, though Shelby testified that to his knowledge Dean was not aware that Mitchell was involved in Park Towers (Tr. 587) and that he intentionally kept that information from her (Tr. 603), he was not asked any questions about the lunch. Then, during Shelby's redirect examination, Respondent O'Neill elicited from Shelby that the lunch took place and that on the following day Shelby sent Dean certain materials related to the Park Towers project. Tr. 603.[17]

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[17] The following was the questioning:

Q. Mr. Shelby, do you recall whether you had lunch with Deborah Gore Dean and John Mitchell on September 9, 1985?

A. Yes.

Q. And you're absolutely certain about that?

A. I believe based upon a review of the documents that that is correct, yes.

Q. I now show you what's been previously marked as Government's Exhibit 76 for identification, and you looked at that yesterday?

A. Yes, I did.

Q. On September 10, 1985, a day after you had lunch with John Mitchell and Deborah Dean, did you send information to Deborah Dean about Park Towers?

A. Yes, I did.

Tr. 603.

In the OIC's briefs and oral argument in the district court and the court of appeals, the OIC would cite the fact that Shelby sent materials the day after the lunch as the only evidence that Dean had ever discussed Park Towers with Mitchell. The first instance would occur on October 4, 1993, in the OIC's memorandum opposing Dean's motion for judgment of acquittal at the close of the OIC's case-in-chief, where the OIC would argue:

> Finally, although Shelby denied discussing this project with Mitchell and Dean at the same time, on September 9, 1985, Mitchell's and defendant's calendars reflect that defendant, Mitchell, Shelby, and defendant [sic] were to meet for lunch; and on September 10, 1985, Shelby forwarded information on "the Miami Mod Rehab." G. Ex. 5k, 9g & 76.

Gov. Acq. Opp. at 17.

This document was obviously hurriedly prepared and initially submitted without transcript cites. Tr. 2030. Thus, the fact that it states that Shelby denied discussing the project with Dean and Mitchell together either reflects the authors' characterization of Shelby's statements that Dean did not know Mitchell earned a fee on the project or reflects the fact that the authors were actually remembering Shelby's various statements that he never discussed the project with Dean and Mitchell together that he had made in the presence of each of Respondents O'Neill, Swartz, and Sweeney, but which Shelby actually never said in court. In any event, the paragraph would be revised three times, as Respondents sought the right words to create the inference that Park Towers was discussed at the lunch while avoiding to the extent possible explicitly arguing a point they had such overwhelming reason to believe was false. In the final version, Respondent Swartz would ultimately eliminate the phrase "although Shelby denied discussing this project with Mitchell and Dean at the same time." See Appendix I-B.[18]

On that same day, in the course of responding to the court's question of whether the OIC contended that Dean agreed with Mitchell to enter into a conspiracy to defraud the United States, Respondent Sweeney stated:

> Yes, Your Honor: In that particular circumstance, the evidence shows that Mr. Shelby first contacted Mr. Mitchell and then contacted the defendant and that over the -- at the same time this project was going forward and Mr. Shelby was working on it, that he met on several occasions with Ms. Dean, on several occasions with Mr. Mitchell, and on a couple of occasions with them at the same time including one lunch on a day prior to a letter where he forwarded Ms. Dean material on what he calls the Miami mod rehab.

Tr. 2029.

Apparently, the court drew the desired inference, stating in the course of denying Dean's motion following the argument:

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[18] Appendix I-B, which sets out the various formulations of the OIC's arguments regarding the evidence that Park Towers was discussed among Dean, Mitchell, and Shelby at the September 9, 1985 lunch, shows Respondents' evolving approaches to leading the jury and the courts to draw a certain inference while attempting to avoid explicitly arguing a point that an immunized witness had repeatedly contradicted and that Respondents had strong reason to believe was in fact false. Since the document also touches on other matters treated infra, it might be more usefully reviewed after reading the remainder of Section B.2.

The meetings occurred obviously between Mr. Shelby and Miss Dean, the meetings were scheduled. It's inferred that they met, Miss Dean, Mr. Shelby and Mr. Mitchell. Mr. Shelby sent information to Miss Dean about the project and the rapid replies were issued for the units to be sent to Dade and those documents forwarded to Mr. Shelby and forwarded to his employer.

Tr. 2946-47.

During closing argument, in the course of making numerous statements that had no basis in the record and that Shelby's interviews would have led Respondent O'Neill to believe were false, Respondent O'Neill argued the issue to the jury in a manner to lead the jury to believe that Park Towers was discussed at the lunch. Tr. 3392-93. Respondent O'Neill would do so in the discussion of the following entries in the OIC's Park Towers chart (Exhibit I-A):

June 20, 1985: **DEAN** congratulates **SHELBY** on new job (Government Exhibit 69)

July 31, 1985: **FEINBERG** tells **FINE** "our friend" is meeting with the "contact at HUD this coming week." (Government Exhibit 72)

August 1, 1985: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 5H)

August 9, 1985: **DEAN** and **SHELBY** meet for lunch (Government Exhibits 5I, 11B, 73, 74).

September 9, 1985: **DEAN** schedules lunch w/**SHELBY** and **MITCHELL.** (Government Exhibits 5k, 9G)

September 10, 1985: **SHELBY** sends **DEAN** information on Miami Mod Rehab and thanks her for her time and effort on his behalf. (Government Exhibit 76).

Exhibit I-A at 1.

While discussing these entries, Respondent O'Neill would state:

What do we see during this time? We have the defendant congratulating Shelby on his new job. We have her scheduling lunch with Shelby, actually meeting him for lunch because sometimes there was a lot of talk about whether it was actually meeting for lunch or not.

> Well, the calendars can only tell you what was going to happen. We have the backup documentation such as on this one, where it's an expense account with her name on it. Then we show she actually met for lunch. Who meets for lunch this time? The three of them are now meeting.
>
> The very next day, he sends her information on Park Towers. It's in evidence. Again, it's in black and white. It can't be disputed. The defendant is saying, "I didn't know he was working on these projects. He didn't ask me for anything." It's in black and white. This is back in 1984 [sic], way before she says he spoke to her.

Tr. 3392-93.

As discussed in the next subsection, Shelby had told the OIC that the reference to "the contact at HUD" was a reference to Silvio DeBartolomeis, not a reference to Dean. The protracted discussion of the immediately succeeding entries may well reflect Respondent O'Neill's effort to cause the jury to view the entries long enough to infer that the "contact at HUD" reference was a reference to Dean, without his having to explicitly argue a point that his immunized witness had said was not true. See Section B.2.c., infra. Even with regard to the point concerning "the very next day," Respondent O'Neill avoids explicitly stating that this demonstrates that the three had discussed the project. The correspondence of August and September are omitted from the chart, since they would only reflect a developing relationship that allowed other opportunities for prior discussion of Park Towers and show other reasons for Shelby to be thanking Dean for her efforts on his behalf.

Following the verdict, the OIC would make this argument three more times in briefs in the district court and the court of appeals. See Appendix I-B. There, as earlier, it would be the only evidence that the OIC could cite to suggest that Dean was aware of Mitchell's involvement with the project.

[REDACTED] In support of her Rule 33 Motion, Dean repeatedly noted the OIC's failure to provide Shelby's statements on the lunch, the OIC's effort to lead the jury and the court to believe that Park Towers was discussed at the lunch, and the court's apparent drawing of the inference that Park Towers was discussed at the lunch in denying Dean's motion for judgment of acquittal. Dean Rule 33 Mem. at 98-103. In responding to Dean's Rule 33 Motion, however, the OIC omitted Shelby's statement about the lunch from its list of Shelby's statements that Dean said should have been provided, and thereafter discussed neither the withholding of the statement nor the attempt to lead the jury or the court to believe Park Towers was discussed at the lunch. See Gov. Rule 33 Opp. at 8-10.

On the same day, however, in opposing Dean's Rule 29 Motion, the OIC would continue to suggest that Park Towers had been discussed at the lunch (Gov. Rule 29 Mem. at 23), slightly modifying its most recent formulation to make the suggestion stronger. See Appendix I-B, items 5 and 6.

c. "The Contact at HUD"

In a memorandum to the file dated July 31, 1985, Martin Fine recorded a conversations with Eli Feinberg in which Feinberg had told Fine that "our friend is meeting with the contact at HUD this coming week." In interviews conducted by Respondent Sweeney between April 8 and May 6, 1992, Shelby had been shown the July 31, 1985 Fine memorandum. Shelby stated that "our friend" did refer to him Shelby, but stated that "the contact at HUD" did not refer to Dean but to Silvio DeBartolomeis, then Deputy Assistant Secretary for Multi-Family Housing, and that at that point in time most of his contacts on Park Towers had been with DeBartolomeis and with DeBartolomeis alone. Dean Rule 33 Mem., Exh. CC, at 8.[19] The OIC had no reason to disbelieve this statement, particularly since Dean and Shelby had not yet even had their first lunch together, which would occur on August 9, 1985, after being rescheduled from August 1. Nevertheless, the OIC included allegations in the Superseding Indictment creating the inference that the conspiratorial reference to "the contact at HUD" was a reference to Dean.[20]

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[19] The interview report read:

Shelby believed that 'the contact at HUD' meant DeBartolomeis rather than Dean, because as of August, 1985, most of his contacts at HUD regarding Park Towers had been with DeBartolomeis, and usually with DeBartolomeis alone, though not behind closed doors. Shelby recalled that [Hunter] Cushing came in the office one time when Shelby was meeting with DeBartolomeis. By that time he had known Dean at most six

Shelby's statements that the reference was to DeBartolomeis rather than to Dean and that most of his contacts had been with DeBartolomeis were included in the August 20, 1993 Brady letter. Thereafter, however, when Shelby testified, Respondent O'Neill would not ask him about the reference. Instead, after Shelby left the stand, Respondent O'Neill would introduce the July 31, 1985 Fine memorandum (Gov. Exh. 78) into evidence through the testimony of Fine, and without the OIC's eliciting from anyone the identity of the referenced "contact at HUD."

The OIC would acknowledge that it would then, through entries in its charts,[21] seek to cause the jury to believe that the reference was to Dean. In the OIC's opposition to Dean's motion for a new trial (Gov. Rule 33 Opp. at 9 n.5), and in Respondent Swartz's oral argument on that motion (Transcript of Hearing 10-11 (Feb. 14, 1994)), the OIC would defend this action on the basis that there was no documentation of Shelby's contacts with DeBartolomeis. See Gov. Rule 33 Opp. at 9 n.5.[22] At all relevant times, however, Respondents knew that in fact there were documents indicating that Shelby had contacts with DeBartolomeis, but those documents had not been shown to Shelby when he was asked to review records "to refresh [his] recollection as to who [sic] he dealt with at HUD" on the Park Towers project.[23]

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weeks.

[20] Count 1 of the Superseding Indictment (at 21) read:

> 64. On or about July 31, 1985, Martin Fine had a conversation with Eli Feinberg, in which Feinberg said that "our friend is meeting with the contact at HUD this coming week."
>
> 65. On or about August 1, 1985, Co-conspirator Three was scheduled to meet with the defendant **DEBORAH GORE DEAN**.
>
> 66. On or about August 9, 1985, Co-conspirator Three met with the Defendant **DEBORAH GORE DEAN**.

[21] See discussion supra at 29-30.

[22] The OIC would never assert in defense of its actions that Shelby had subsequently qualified his statement. See note 38, infra. Rather, the OIC indicated that it was attempting to lead the jury to disbelieve Shelby because there was no documentation of his contacts with DeBartolomeis.

[23] When Respondent Swartz argued this matter in the hearing on February 14, 1994, he would state:

d. The Evidence of Conspiracy in the Supposed Concealment of Mitchell's Role from Feinberg and Fine

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> Well, Your Honor, I think that the, the evidence there with regard to Mr. Shelby's involvement with Ms. Dean is evidenced by a number of different means, not only his statements, which were somewhat ambiguous about who his contacts were with regard to this particular project, but beyond that, the documents that were in evidence. Those documents showed, among other things, that when he referred to his contact, particularly in regard to the post-allocation waiver, that it was a she, not a he. The evidence also showed that there was no indication of contacts with DeBartolomeis, as opposed to the defendant on this particular project.

Transcript of Hearing 9-10 (emphasis added).

Respondent Swartz's statements concerning documents that were in evidence avoided discussion of the documents that were not in evidence, that were not shown to Shelby to "refresh his recollection," and that were never provided as Brady material. These included, among others, a Fine memorandum indicating that DeBartolomeis had told Shelby he would be granting the post-allocation waiver and a letter from Shelby to Feinberg in which he transmitted a copy of that waiver, indicating that he had received it from DeBartolomeis. See Section B.2.f., infra.

The Superseding Indictment would allege that the co-conspirators involved in Count One would tell their developer/clients that Mitchell was Dean's stepfather. Superseding Indictment, § 16, at 11. Ultimately, however, the OIC would instead argue that Shelby had concealed Mitchell's involvement from Feinberg and Fine, and that argument would play a large role in the OIC's attempt to show that Shelby, Mitchell, and Dean were involved in a conspiratorial relationship.[24]

Since Fine learned most of what he knew about Shelby's activities on the project from Feinberg, the key testimony in this regard would be that of Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project.

Yet, in the interview conducted by Respondent Sweeney between April 8 and May 6, 1992, Shelby stated that Feinberg knew about Mitchell's involvement and that he (Shelby) assumed that Feinberg had told Fine. Dean Rule 33 Mem., Exh. CC, at 4. In the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, Shelby again stated that Feinberg knew of Mitchell's involvement with Park Towers. Dean Rule 33 Mem., Exh. DD, at 8.

That same day, Respondents O'Neill and Swartz conducted a telephonic interview of Feinberg, in which Feinberg stated that he was not aware of Mitchell's involvement in Park Towers. Park Towers Appendix, Att. 5a, at 4. Feinberg's interview report indicates that he was not at that time advised by Respondent Swartz or Respondent O'Neill that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, the day following the telephonic interview of Feinberg, Shelby was interviewed again by Respondent Swartz and Respondent O'Neill. In the interview Shelby again stated that Feinberg was aware of Mitchell's involvement with Park Towers, providing details of Feinberg's role in setting Mitchell's fee and noting a remark Feinberg made about Mitchell's fee. Park Towers Appendix, Att. 5b, at 2. Late in the interview, when apparently advised that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers, Shelby firmly stated that Feinberg did in fact know of Mitchell's involvement. Park Towers Appendix, Att. 5b, at 2.

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[24] As discussed in the Nunn Appendix, consistent with the theme that Mitchell's connection to Dean was emphasized to the developers in Count 1, the OIC would introduce two documents into evidence indicating that Aristides Martinez, the developer of the Arama project, was made aware that John Mitchell was to receive a fee on that project. Both documents were false, however. When the OIC would be denied the opportunity to elicit testimony that Martinez had been told of Mitchell's relationship to Dean, the OIC changed its theory, arguing that Mitchell's involvement in Arama was concealed from Martinez, though Respondents knew with absolute certainty that Mitchell's involvement had not been concealed from Martinez.

That day, Respondent's Swartz and O'Neill reinterviewed, Clarence James, Shelby's employer, who had previously stated that he was unaware of Mitchell's involvement with Park Towers. In the May 19, 1992 interview, confronted with information indicating that he had approved payments to Mitchell, James acknowledged that he must have been aware of Mitchell's involvement.[25]

There were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement with the Park Towers project, including the fact that national magazines had suggested that Dean improperly made decisions to benefit Mitchell. There was also reason to expect that confronted with Shelby's statements, Feinberg, like James, would acknowledge that he had been aware of Mitchell's involvement. Nevertheless, so far as Feinberg's Jencks materials reveal, between the time of Feinberg's May 18, 1992 telephonic interview and his being called to testify under oath, on September 17, 1993, that he was unaware of Mitchell's involvement, Respondents never confronted Feinberg with Shelby's statements.

Feinberg had a partner named Marie Petit, who received half of Feinberg's $80,000 fee. Park Towers Appendix, Att. 5, at 4. If the OIC ever contacted Petit to inquire whether she knew of Mitchell's involvement with Park Towers (or of Feinberg's knowledge of that involvement), no record of that contact would be provided to the defense.

Despite the Respondents' intention to make a point of the fact that Feinberg and Fine were unaware of Mitchell's involvement with Park Towers, Shelby's three statements that Feinberg was aware of Mitchell's involvement were never provided as Brady material.

As noted above, Shelby would be put on the stand out of order and ahead of Feinberg, three days after the defense received several thousand pages of material that included Shelby's three statements concerning Feinberg's knowledge of Mitchell. Then, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, Respondent O'Neill would avoid any questions of Shelby that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, Respondent O'Neill changed the subject. Tr. 546.

[25] That day the OIC also reinterviewed Terrence M. O'Connell, II, Executive Vice President of The Keefe Company. O'Connell reaffirmed his earlier statements that he was aware of Mitchell's involvement with Park Towers.

Shortly after Shelby finished his second day of testimony, the OIC then called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Respondent Sweeney directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers. Tr. 637.[26] Respondent O'Neill subsequently elicited sworn testimony to the same effect from Martin Fine. Tr. 657-58.

The OIC would first argue that there was evidence of conspiracy in the supposed concealment of Mitchell's involvement with Park Towers in responding to Dean's motion for acquittal at the close of the OIC's case-in-chief. In the Government's Opposition to Defendant Dean's Motion for Judgment of Acquittal (Oct. 4, 1993), authored by Respondents O'Neill and Sweeney, the OIC stated:

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

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[26] The following was the questioning:

> Q. To your knowledge, was an individual named John Mitchell working as a consultant on this project?
>
> A. Not to my knowledge.
>
> Q. To your knowledge, was Mr. Mitchell was [sic] going to receive any consulting fees on this project.
>
> A. Not to my knowledge.

Tr. 637.

Id. at 17 (emphasis added).[27]

The underscored sentence is not the only one in this paragraph that Respondents had reason to know was in all probability false, or that, in any event, the government's immunized witness would have contradicted. As shown in subsection B.2.b, supra, Respondents also knew that the inference that Park Towers was discussed at the September 9, 1985 lunch was almost certainly false and that Shelby would have specifically contradicted it. As shown in subsection B.2.g, infra, Respondents knew with absolute certainty that Shelby did not avoid identifying Dean in his dealings with Fine and Feinberg.

In oral argument on October 4, 1993, the court asked Respondent Sweeney whether the OIC contended that Dean agreed with Mitchell to enter into a conspiracy to defraud the United States regarding Park Towers. In Response, after suggesting to the court that Park Towers was discussed among Shelby, Mitchell, and Dean at the September 9, 1985 lunch, Respondent Sweeney also stated:

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

Tr. 2029-30.

In closing argument, Respondent O'Neill would give special attention to the testimony that Eli Feinberg and Martin Fine were not aware of John Mitchell's involvement with Park Towers, asserting that secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Shelby would have contradicted Feinberg's testimony, Respondent O'Neill would make a special point of the fact that the testimony was unimpeached.

Specifically, near the end of the rebuttal part of his highly inflammatory closing argument, Respondent 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?

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[27] In the following paragraph, the brief would add: "That evidence also shows that defendant and her co-conspirators took pains to avoid referring to Mitchell's or defendant's involvement in these projects in any documents; indeed, as noted above, neither the developer of Park Towers, nor his Florida consultant, even knew that Mitchell was involved." Id.

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.

These remarks would be geared toward the jury instruction that Respondent O'Neill knew the court would be giving following the end of closing argument, and in which the court would begin its instructions of the conspiracy charges by noting that "ordinarily a conspiracy is characterized by secrecy both in its origin and execution." Tr. 3550.

The supposed concealment by Shelby of Mitchell's involvement with Park Towers would twice more be noted in post-trial briefs in the district court authored one or more of the Respondents, using words essentially identical to those in the earlier document. See Gov. Supp. Acq. Opp. at 16-17, 18; Gov. Rule 29 Mem. at 22-23, 25; Appendix I-B.[28]

This issue was not raised Dean's Rule 33 Motion because it was not then recognized that Shelby had repeatedly contradicted the Feinberg testimony on which the OIC had placed such weight. Nevertheless, because of their relevance to issues Dean did raise, Dean submitted as Exhibits CC and DD to her motion two of the interviews where Shelby had stated Feinberg was aware of Mitchell's involvement with Park Towers. In the court of appeals, the OIC would continue to argue that there was evidence of conspiracy in the concealment in Mitchell's role. However, possibly in appreciation of the fact that the record now contained two explicit statements of an immunized witness that Feinberg was aware of Mitchell's involvement, the OIC no longer mentioned concealment of Mitchell's role from Feinberg. The brief, signed by Respondent Swartz, who had participated in one of those interviews now part of the record, would twice make a point of the concealment of Mitchell's role; but it would argue only that the role was concealed from Fine. Gov. App. Br. at 5, 24.

With regard to the role of the Brady violations in enabling Respondents to use the Feinberg testimony in the manner they did, the following considerations warrant

[28] The initial brief on this matter did not include transcript references. When transcript citations were added in the latter documents, the OIC would cite only Fine's testimony in support of the claim that neither Feinberg nor Fine was aware of Mitchell's involvement. There is no compelling reason to believe that Fine's testimony was not true, though there is no evidence that the OIC ever confronted Fine with the evidence that Feinberg was aware of Mitchell's involvement with Park Towers.

mention. It seems clear from the activities of Respondents O'Neill and Swartz immediately following Feinberg's May 18, 1992 statement that he was unaware of Mitchell's involvement with Park Towers that, even prior to the issuance of the Superseding Indictment, Respondents intended to make what they could of Feinberg's supposed unawareness of Mitchell's involvement as evidence of conspiracy. Thus, on issuance of the Superseding Indictment--or at such point in time thereafter that Respondents decided to claim, circumstances permitting, that Feinberg's supposed unawareness of Mitchell's involvement with Park Towers was evidence of conspiracy--they had an obligation immediately to disclose Shelby's statements.

But good faith compliance with Judge Gesell's order would require even more than the disclosure of Shelby's statements. Given that the Superseding Indictment did not indicate that the OIC intended to claim that Mitchell's role was concealed from Feinberg--indeed, the Superseding Indictment implied just the opposite--good faith would require that Respondents also advise the defense that the OIC intended to prove that Feinberg was unaware of Mitchell's involvement with Park Towers, so that the defense could understand the implications of the disclosure in time to make effective use of it.

Whether or not this would have enabled the defense to preclude the OIC from ever eliciting Feinberg's testimony--possibly by confronting Feinberg with Shelby's statements before Feinberg ever testified--it certainly would have enabled the defense to prevent Feinberg's testimony from going unimpeached.

e. <u>The Park Towers Rapid Reply</u>

In the "Manner and Means" Section of Count 1 of the Superseding Indictment, it was alleged that Dean would provide copies of internal HUD documents to her co-conspirators who would then pass those documents on to the developers they represented. Superseding Indictment, ¶¶ 18-19, at 11-12. At the end of November 1985 Shelby secured a copy of a HUD internal memorandum known as a "rapid reply," or "rapid reply letter," which was the document initiating the funding process concerning the Park Towers project. He then faxed that document to Martin Fine, the Park Towers developer.

In the interview conducted by Respondent Sweeney between April 8 and May 6, 1992, Shelby had stated that he believed that he had received a HUD form relating either to Park Towers or Foxglenn (a project in Count 2), but probably Park Towers, from Hunter Cushing. Dean Rule 33 Mem., Exh. CC, at 20. In the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, Shelby stated that he believed that he got the copy of the Park Towers rapid reply from DeBartolomeis. Dean Rule 33 Mem., Exh. DD, at 6. Examined by Respondent O'Neill before the grand jury on June 4, 1992, Shelby stated that he could have gotten the document from Deborah Dean,

Silvio DeBartolomeis, or Hunter Cushing, but that he could not remember at the moment. Dean Rule 33 Mem., Exh. EE at 23-24.[29]

Consistent with the general allegation that Dean had provided providing "internal HUD documents" to her co-conspirators who would then provide them to their developer/clients, the OIC included entries in Superseding Indictment intended to suggest that Dean had provided the rapid reply to Shelby, who had then provided a copy to Fine. Superseding Indictment, ¶¶ 71-72, at 22.[30] None of the three statements listed above was ever provided as Brady material.

At trial, Respondent O'Neill questioned Shelby concerning the "rapid reply" and whom Shelby had received it from. Shelby testified that his best recollection was that Hunter Cushing had provided him with the document. Tr. 554-55. Some time later in the direct examination of Shelby, Respondent O'Neill then had the Park Towers rapid reply marked for identification as Government Exhibit 79 and again questioned Shelby about it. At this time, however, Respondent O'Neill would not refer to the document as a "rapid reply," and would not ask Shelby who sent it to him. Tr. 574. Respondent O'Neill then introduced the document into evidence without further comment. Tr. 574-75.

Thereafter, the OIC continued to use entries in its charts, and Respondent O'Neill made statements in closing argument, intended to suggest that the Dean had provided the document to Shelby. In doing so, Respondent O'Neill would make a special point of the fact that Shelby and the developer he represented knew about the funding even before the HUD Regional Office new about it, stating:

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[29] In conducting that questioning, Respondent O'Neill first elicited the testimony that a rapid reply was "an internal HUD document." Id. at 23.

[30] The entries read:

> 71. On or about November 27, 1985, Co-conspirator Three [Richard Shelby] obtained an internal HUD funding document, dated November 26, 1985, known as a "Rapid Reply Letter," indicating that Mod Rehab units had been awarded to the PHA for Metro-Dade, Florida.
>
> 72. On or about November 27, 1985, Co-conspirator Three caused his employer to fax a copy of the "Rapid Reply Letter," dated November 26, 1985, to Martin Fine in Florida.

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

Tr. 3393

The words Respondent O'Neill chose to convey the impression that Dean had provided the Park Towers rapid reply letter to Shelby were very like those he had used moments earlier with regard to the rapid reply concerning the Arama project that Dean in fact had provided to Louie Nunn, a consultant on that project. See Part II. At that point, after describing Dean's providing a copy of the rapid reply to Nunn, Respondent O'Neill had stated:

> Look at this: The HUD Atlanta office on the 27th of July is notified that 293 units are going to Metro Dade. That's over 20 days after Deborah Dean personally notifies Louie Nunn that they will get the units. Is that the way our government is supposed to operate, Ladies and Gentlemen?

Tr. 3385.

When the matter was raised in Dean's motion for a new trial, the OIC denied that it had sought to lead the jury to believe that Dean had provided the document to Shelby. Gov. Rule 33 Opp. at 10.

At the same that the OIC was preparing its Opposition to Dean's Rule 33 Motion, it (presumably in the person of Respondent Swartz) was in some manner leading the probation officer to believe that Dean had provided the document to Shelby. Presentence Investigation Report at 6 (Dec. 28, 1993) (Exhibit I-B). When Dean pointed out to the probation officer that the record showed she had not provided the document, the OIC told the probation officer that, though Dean had not provided the document, she had had it provided to Shelby by another person. Revised Presentence Investigation Report at 47 (Feb. 7, 1994) (Exhibit I-C). There was not a shred of evidence to support the claim that Dean had had someone provide Shelby a copy of the rapid reply, and it is not believed that any person ever told the OIC anything to that effect.

f. The Post-Allocation Waiver

In order for the Park Towers project to go forward, it was necessary that HUD issue a waiver of a HUD regulation prohibiting the use of moderate rehabilitation funds on a project that is, or recently had been, subsidized. Shelby apparently discussed the waiver with Dean in a lunch on February 3, 1984, where she had told him that the matter could be dealt with in a favorable matter and Shelby or his employer sent Dean some materials on the matter. Gov. Exhs. 84b, 85. In the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, Shelby stated that if he had sent the materials to Dean, he probably would have sent the same materials to DeBartolomeis and Cushing. Dean Rule 33 Mem., Exh. DD, at 7. Thereafter, Shelby had a number of meetings with people at HUD, none of which appeared to have been with Dean, and in early March 1986, DeBartolomeis advised Shelby that he would approve the waiver. Shelby so advised Feinberg, who then advised Fine, who recorded these matters in a memorandum to the file date March 10, 1986. DeBartolomeis would sign the waiver on May 28, 1986, and then provide a copy of the waiver to Shelby. See Park Towers Appendix, Att. 2.

Shelby then sent a copy of the waiver to Fine. Gov. Exh. 90. By letter dated June 5, 1986, Shelby also sent a copy of the waiver to Feinberg, noting in the letter that he (Shelby) had received the document from DeBartolomeis. Park Towers Appendix, Att. 5d.

Respondent O'Neill asked Shelby no questions about how he secured the copy of the waiver. Questioning Feinberg, Respondent Sweeney asked him no questions about his knowledge of how Shelby secured a copy of the document. Respondent O'Neill then introduced the copy of the waiver, along with Shelby's transmittal letter to Fine and Fine's own retransmission to another party, as Government Exhibit 90, through the testimony of Fine, without asking any questions about Fine's knowledge of how Shelby secured a copy of the document. Tr. 665-66.

Notwithstanding knowing with absolute certainty that the waiver had been provided to Shelby by DeBartolomeis, through entries in the OIC's charts, Respondents attempted to lead the jury and the court to believe that the waiver was one of the "internal HUD documents" that Dean provided to her co-conspirators, which they then provided to their clients. See Exhibit I-A at 2.[31]

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[31] The pertinent entries are also found in note 33, infra.

Further, the granting of the waiver was not discussed in the Superseding Indictment. Respondent O'Neill never questioned Shelby about whom he talked to in order to secure the waiver. DeBartolomeis appeared as a government witness but was never asked whether Dean had any role in causing him to sign the waiver.[32] Yet, the Park Towers chart was crafted in a way to suggest that Dean had been responsible for the waiver and Respondent O'Neill conducted his oral argument in a manner to lead the jury to believe that Dean was responsible for the waiver.

In particular, after discussing an entry showing a payment to Mitchell on February 4, 1985, Respondent O'Neill would refer to entries concerning a March 21, 1986 meeting between Shelby and Dean and an April 7, 1986 lunch, as "continuing meetings on Park Towers." Tr. 3394.[33] The two entries that then followed concerned

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[32] Respondent O'Neill questioned Dean about Fine's February 3, 1986 memorandum where Fine stated that Feinberg had said "Rick said he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner." After having Dean read the memorandum aloud, O'Neill asked: "Ms. Dean, to your knowledge, are you Mr. Shelby's friend at HUD?" Dean responded that she could very well be the person referred to in the letter, particularly since they were having lunch around that time. She answered succeeding questions by stating that she assumed that Shelby discussed some issue that he thought could be resolved, but "I have no idea what that issue was." She stated that Shelby often asked her questions and she answered them the best she could. Asked whether she knew that Shelby was a paid consultant on Park Towers, Dean stated that she assumed he was being paid for whatever information he was asking her about, but that she did not remember him talking about a project called Park Towers. Tr. 3012, 3022-23.

Respondent O'Neill did not ask Dean whether Shelby might have been asking her about a post-allocation waiver or show her the materials that Government Exhibit 84B indicated Shelby had sent her that day or otherwise attempt to refresh her recollection about the possible subject of the discussion. Nor did Respondent O'Neill question Dean about the subjects of the various meeting and lunch in March and April that O'Neill would later describe as "[c]ontinuing meetings on the Park Towers project." Tr. 3394. As had been done when the Respondents questioned Shelby, Feinberg, and Fine, Respondent O'Neill avoided any use of the word "waiver."

[33] The pertinent portions of the Park Towers chart read:

February 3, 1986: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 7B); **SHELBY** sends **DEAN** Fine's letter about a problem with eligibility in light of past federal subsidies. (Government Exhibit 84B); **FINE** memo to file: "Rick said that he had lunch with his friend at HUD and that she indicated that this matter could be dealt with in a favorable manner..." (Government Exhibit 85).

the granting of the Park Towers waiver on May 28, 1986, and Shelby's sending a copy to Fine on the following day. There was, however, no evidence whatever in the record, nor anything in Shelby's statements, to suggest that these meetings concerned Park Towers. Both meetings, in fact, were subsequent to Shelby's advising Feinberg that DeBartolomeis had said he would be approving the waiver.

At a hearing on Dean's motion for a new trial, Respondent Swartz suggested as one of the reasons why it was permissible to lead the jury to believe that the reference to "the contact at HUD" was a reference to Dean was that she was responsible for the post-allocation waiver. See Sections B.2.b.-c., supra; Appendix I-B, item 7.

None of the documents reflecting DeBartolomeis' role in the granting of the waiver or demonstrating that DeBartolomeis had provided the copy of the waiver to Shelby was ever provided in a Brady disclosure.

g. The Evidence of Conspiracy in the Supposed Concealment of Shelby's Contacts with Dean from Feinberg and Fine

In the May 18, 1992 telephonic interview of Feinberg conducted by Respondents O'Neill and Swartz, Feinberg stated that Shelby had indicated that he knew some people at HUD who could take a look at the Park Towers project. Feinberg stated that the name of Silvio DeBartolomeis came up either during his first telephone conversations with Shelby or in a later conversation. Feinberg stated that Deborah Gore Dean's name also came up as one of the persons Shelby knew at HUD, but he was not sure during what conversation that occurred. Park Towers Appendix, Att. 5a, at 2.

Feinberg then stated the following (in the words of the interview report):

February 4, 1986: **SHELBY**'s employer pays $10,000 to **MITCHELL**. (Government Exhibit 87)

March 21, 1986: **DEAN** schedules meeting w/**SHELBY**. (Government Exhibit 7D)

April 7, 1986: **DEAN** schedules meeting w/**SHELBY**. (Government Exhibits 7F, 88)

May 28, 1986: Park Towers waiver. (Government Exhibit 90)

May 29, 1986: **SHELBY** sends a copy to **FINE**. (Government Exhibit 90)

Exhibit I-A at 2.

> Feinberg recalled conversations during which Shelby said he had made telephone calls and had visited people in connection with seeking the Mod Rehab for Park Towers. DeBartolomeis was one of the people with whom Shelby spoke. Feinberg also became aware the Shelby and Dean were good friends, and that Shelby would check with her on the status of how things were going through the bureaucracy regarding Park Towers.

Id. at 3.

In the August 20, 1993 Brady letter, the OIC would essentially quote the above paragraph (Dean Rule 33 Mem., Att, AA, at 5-6), and would subsequently state that this information was provided in an interview of May 18, 1992. Id., Att. BB, at 2.

When this statement was provided in the August 20, 1993 letter, it would seem to have been provided because it documented Shelby's contacts with DeBartolomeis. The statement, however, also demonstrated that Shelby advised Feinberg of his contacts with Dean concerning the project and that, when he did so, Shelby would refer to Dean by her name.

For reasons explained below, Respondents were not interested in developing evidence of Shelby's communications with Feinberg concerning Dean. Thus, when Respondent Sweeney cross-examined Feinberg, she asked him no questions about Shelby's communications to him concerning his contacts with Dean. On cross-examination, however, Feinberg testified that Shelby had told him that "he was having meetings with Ms. Dean," and that he got the impression she would look into something. He said he got the same impression as to DeBartolomeis. Tr. 640.

The failure of Respondent Sweeney to question Feinberg about Shelby's communications concerning his contacts with Dean apparently had to do with the OIC's intended use of Government Exhibit 85, which was a February 3, 1986 memorandum that Fine wrote to the file, in which he recorded a conversation with Feinberg. Fine had written: "Rick said that he had lunch with his friend at HUD and that she indicated that this [the prior subsidy] matter could be dealt with in a favorable manner..." The reference was presumably to Dean who did have lunch with Shelby that day.

Government Exhibit 85 was one of two Fine memoranda the OIC introduced into evidence that recorded conversations about Shelby's contacts with HUD officials. The other was the July 31, 1985 memorandum, already discussed, with the reference to "the contact at HUD" that Shelby had said pertained to DeBartolomeis but that the OIC would seek to lead the jury to believe pertained to Dean. Neither of these memoranda referring to a person at HUD happened to refer to a person by name.

As with Government Exhibits 72 and 90, Government Exhibit 85 would be introduced through the testimony of Fine, without either Feinberg or Shelby being asked whether the failure to name Dean reflected the fact that Shelby concealed Dean's name

when he talked to Feinberg. As a result of the interview conducted by Respondents O'Neill and Swartz on May 18, 1992, however, the OIC knew with absolute certainty that there was no such concealment.[34] Further, on cross-examination, Feinberg confirmed that Shelby had told him that he had had certain contacts with Dean.

Nevertheless, in briefs authored by Respondents O'Neill, Sweeney, and Swartz in the district court, at the same juncture where the OIC would argue that Shelby had concealed Mitchell's involvement from Feinberg and Fine, the OIC cited Government Exhibit 85 and asserted that there was evidence of conspiracy in the fact that "Shelby avoided identifying 'his friend' in his dealings with Fine and Feinberg" and that this was evidence "that Dean's involvement was deliberately kept secret to the extent possible." Gov. Acq. Opp at 17; Gov. Supp. Acq. Opp at 16 and n.17; Gov. Rule 29 Opp. at 22 and n.22.

In its appellate brief, the OIC would also cite Government Exhibit 85 along with Fine's testimony about his knowledge of Shelby's contacts with DeBartolomeis as evidence "that Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others. Tr. 678-87 [Fine]; GX 85." Gov. App. Br. at 24. There would be no citation to the page where Feinberg testified that Shelby had told him about his contacts with DeBartolomeis (Tr. 640), which is the same page at which Feinberg testified that Shelby had told him about his contacts with Dean.

Thus, in defending the effort to lead the jury to believe that the conspiratorial reference to "the contact at HUD" was a reference to Dean, notwithstanding that its immunized witness had said that the reference was to DeBartolomeis, the OIC would rely on the supposed absence of documentation of Shelby's contacts with DeBartolomeis, though knowing that in fact there was such documentation. At the same time, the OIC would refer to the documented contacts with DeBartolomeis when it argued that Shelby had concealed his contacts with Dean from Feinberg and Fine, though knowing that in fact there had been no such concealment.

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[34] Feinberg's statement that Shelby told him about his contacts with Dean is about as conclusive proof as one might imagine that Shelby did not conceal his contacts with Dean from Feinberg (even if it is not logically impossible that Feinberg could learn of Shelby's contacts with Dean from other sources and make up a story that Shelby told him about them).

The fact that the Superseding Indictment quotes only from the Martin Fine memoranda that refer to HUD officials other than by name suggests that, at the time of the crafting of the indictment, Respondents intended to claim that the failure to mention Dean by name in Government Exhibit 85 indicated that Shelby concealed his contacts with Dean from Feinberg and Fine. Thus, upon issuance of the Superseding Indictment, Respondents were obligated to advise the defense that Feinberg had stated that Shelby told him about his (Shelby's) contacts with Dean.

Further, as discussed in subsection B.2.d., supra, good faith would also require that, at the same time the OIC advised the defense of Feinberg's statements, the OIC advise the defense of the fact that, notwithstanding Feinberg's statement, the OIC intended to contend that Shelby concealed his contacts with Dean from Feinberg and Fine. Had Respondents done so the time of the issuance of the Superseding Indictment--or had they made their intentions clear even when they so belatedly revealed Feinberg's statements in the August 20, 1993 letter--apart from subjecting themselves to such sanctions as the court or the bar might impose for the acknowledged intent to lead the court and jury to believe things that could not be true, Respondents would have eliminated any chance of achieving that end.

C. History of Pre-Trial Matters Concerning the OIC's Brady Obligations

[redacted] [36]

Yet, the Respondents would already for some time have had to recognize that immediately upon issuance of the Superseding Indictment, Judge Gesell would expect them to provide the defense with statements that contradicted inferences in that indictment. Even prior to the June hearing, Judge Gesell had made clear that he expected the government to expansively interpret its Brady obligations. In a hearing on May 6, 1992, Judge Gesell stated:

> ... we ought to have an understanding that, without any question, that the Brady material that's in the -- a generous interpretation of existing rules -- ought to be turned over because the prosecutor has an obligation to lean backwards on Brady, not lean forward.

Transcript of Hearing at 26.

Associate Independent Counsel Jo Ann Harris expressed complete agreement with Judge Gesell's views: "Absolutely agreed, Judge." Id.

Thus, whatever part of the statements that Shelby had already made to Respondent Sweeney as of the May 6, 1992 hearing--such as that Shelby did not believe Dean was aware of Mitchell's involvement with Park Towers; that Dean was not "the contact at HUD" referred to in the Fine memorandum; or that Park Towers was not discussed at the lunch of September 9, 1985--would at some point have to be provided as Brady material if the OIC drafted an indictment creating inferences contrary to Shelby's statements. Similarly, while conducting the interviews of Shelby throughout the month of May, Respondents O'Neill and Swartz had to recognize that Shelby was saying many things that specifically contradicted inferences they were then planning to state in the Superseding Indictment or to prove at trial.

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[36] The statement would not seem true with regard to at least two matters, however. Among the materials that the OIC would eventually provide as Brady material fourteen months later were at least two statements taken prior to June 3, 1992, that directly related to issues in the first indictment. That indictment involved allegations that Dean had accepted a gratuity from Atlanta consultant Louis Kitchin for official acts in late 1986 and early 1987. The first Brady statement directly relating to those allegations was an April 13, 1992 statement by Kitchin that Dean had done no favors for him at HUD and that he had not given Dean money in return for any official acts. The second statement was a May 15, 1992 statement by Florida Developer Claude Dorsy that at some point in time Kitchin indicated that he was working with Thomas Demery. See Dean Mem. at 97 n.70; see generally Demery Appendix and Dade Appendix.

Yet, immediately after the May 6, 1992 hearing, the OIC was already suggesting that it had no intention of providing Brady material prior to trial. On May 11, 1992, Ms. Harris wrote to defense counsel, stating:

> You have asked me if I will provide a "Brady package" separate from the other discovery. As we talked, this through, it seems that you are asking about traditional "Brady/Giglio" material, such as immunity orders and criminal records and other impeaching material as it relates to witnesses. You asked if I intended to turn this type of material over as part of the 3500 material. It is the practices, in my experience, for this type of material to be produced with 3500 material relating to the witnesses in question. Indeed, as you know, most prosecutors go so far as to designate a 3500 number for this type of material.
>
> We intend to follow this practice, although as I said on the phone, if there is material in our judgment would cause a delay in the trial if turned over with the 3500 material, we will turn the material over earlier. I believe that this is all the law requires with respect to the timing of Brady material.

Letter from Associate Independent Counsel Jo Ann Harris to Stephen V. Wehner, Esq. at 2 (May 11, 1992).

Though Ms. Harris avoided discussion of what she would later term "exculpatory Brady material separate and apart from the traditional Giglio materials," her concluding statement that Brady requires nothing to be turned over prior to trial seems unequivocal at least with regard to Brady material contained within the statements of witnesses who would testify at trial.

At the June 3, 1992 hearing [REDACTED] following Ms. Harris' stating that she was prepared to provide all Brady material relating to each witness prior to each witness's testifying, Judge Gesell, stated:

> I was mislead [sic] by the papers, and it's my fault I realize, when you said that you were prepared to give all the Brady material relating to each witness prior to the witness testifying. I could understand to be a position that you would take with respect to Jencks material, the grand jury testimony and whatever arrangement[s] were made about the witness' immunity or otherwise but in the large if you know of any Brady material you have an obligation to turn that over immediately. Other than that, do you see what I'm talking about, other then Jencks material, if you have some exculpatory material of any kind that really relates to the kind of information that the defendant is entitled to in order to frame its own defense in part, as I understand Brady, you've got any obligation to turn that over right away, as soon as you know it.

Transcript of Hearing at 8 (June 3, 1992) (emphasis added).

Ms. Harris then responded:

> I'm glad to make the sort of distinction between the Giglio sort of information which are the immunity orders and prior statements of witnesses and those kinds of matters which I have said we will make as 3500 material and hand it over with the 3500 material which I intend to do in enough time that we will not delay the trial. I do want to recognize what you honor has started talking about which is the exculpatory material separate and apart from the kind of traditional Giglio materials and I do want to recognize our obligation should we come across anything like that to turn it over when we find it.

Id. at 9.

After then responding, somewhat evasively, to Judge Gesell's inquiry as to when the OIC would turn over 3500 material, Ms. Harris stated:

> I do want to recognize what you honor has started talking about which is the exculpatory Brady material separate and apart from the kind of traditional Giglio materials and I do want to recognize our obligation should we come across anything like that to turn it over when we find it.

Id. (emphasis added).

This colloquy ensued:

JUDGE GESELL: Well, do you have any of it that you know of? Now?.

MS HARRIS: Not to my knowledge, Your Honor.

JUDGE GESELL: So at the present time the Brady material is just the traditional type of material that is disclosed whenever a witness takes the stand with prior statement and any kind of promises and so forth, arrangements that have been made.

MS. HARRIS: Yes.

Id. at 9-10.

It was by this exchange that the OIC would seem to interpret Judge Gesell's instruction that "exculpatory material of any kind that really relates to the kind of information that the defendant is entitled to in order frame its own defense" be "turn[ed] over right away, as soon as you know it" to apply only to exculpatory material not

contained in witness statements. Thus, for example, a statement by a government witness that he had committed a crime rather than the defendant--or, as here, Shelby's statements to Respondent O'Neill before the grand jury, the day after the June 3 hearing, that he did not believe Dean was aware that Mitchell was involved with Park Towers or that Park Towers was not discussed at the September 9, 1985 lunch--did not have to be produced until the OIC made its Jencks production.

During the course of the month between the June 3, 1992 hearing and the issuance of the Superseding Indictment on July 7, 1992, whether or not Respondents ever wondered about the ethics or morality of issuing an indictment containing inferences that their principal witness had specifically contradicted and that they otherwise knew to be false, Respondents must have been pointedly aware that, but for interpreting Judge Gesell's order in a manner he could not possibly have intended, the Shelby statements would have to be provided contemporaneously with the issuance of the Superseding Indictment.

By letter dated March 4, 1993, from Respondents O'Neill and Sweeney to defense counsel Wehner (at second unnumbered page), Respondents would again suggest that they recognized no obligation to make immediate disclosures of exculpatory material contained in witness statements, stating "we agreed to turn over whatever Brady/Giglio material, that may be in existence, prior to trial." During the course of the fourteen months between the July 7, 1992 issuance of the Superseding Indictment and the trial, however, the OIC would not articulate that position to the court. One year after the June 3, 1992 hearing, the OIC would merely state that "the government is not aware of any exculpatory evidence or information, but it will certainly make such information known to the defense in the event that it discovers such evidence." Government's Supplement Response at 39 n.27 (June 8, 1993).

Nor was any such position even hinted in the August 20, 1993 letter; rather, after citing the OIC's obligations pursuant to Brady, Respondents O'Neill and Sweeney merely stated: "Although we believe that most of the following material is not exculpatory of defendant Dean, nonetheless, in an abundance of caution, the Government provides the following information." Dean Rule 33 Mem., Exh. AA, at 1.

It should be recognized at this point that over the preceding fourteen months, Respondents had reason to hope that Dean, believing, for example, that there existed a document referring to her as "the contact at HUD," would agree to plead guilty. If that occurred, no one outside the OIC would ever know if there were exculpatory materials that were never produced.

In any case, at the hearing of August 31, 1993, when Respondent Sweeney defended the failure to disclose this material earlier, she would not argue that the OIC had no obligation to provide exculpatory material contained in witness statements prior to trial. Respondent Sweeney first stated that the material that had been provided was in the nature of Giglio material, which would become clear when the Jencks productions were made. When the court then asked Respondent Sweeney if she meant that the witnesses "said different things at different times," Respondent Sweeney responded: "That's correct, Your Honor." Transcript of Status Call at 12. Pressed further by the court, Respondent Sweeney stated: "Your Honor, as time progressed, these witnesses admitted that they had not been candid and had not been forthright, and these stories developed over time, and that -- really -- the witnesses will testify consistently with the indictment..." Id. at 12-13.

As with a number of [statements in the OIC's briefs advanced in Response to Dean's Rule 33 motion, it is important to recognize that Respondent Sweeney was not merely making an argument as to what the record would reflect. Rather, she was representing that the true reason that the OIC had not earlier produced the material was that the witnesses admitted that they had not told the truth and changed their testimonies over time.[37]

[37] Respondent Sweeney's claim that "the witnesses admitted that they had not been candid and had not been forthright" was elaborated more fully in the OIC's brief responding to Dean's Brady Motion, which Respondent Sweeny signed. It stated:

> As defendant Dean will realize once she is provided with the rest of the impeachment material in this case, many of the witnesses made a series of statements the the Government over a period of time; these statements were not consistent. As a result, in certain instances, a witness who presented one version of events at an early point in time thereafter acknowledged, in essence, the inaccuracy of his earlier statements and provided a different rendition of the facts. In such cases, the Government's position is that the information provided by such a witness provides impeachment material for that witness.

Government's Memorandum in Opposition to Defendant Dean's Motion to Dismiss or to Prohibit the Introduction of Evidence and Request for a Hearing at 3 n.3 (Aug. 30, 1993) (emphasis added).

With regard to the truthfulness of that representation, it is to be noted that the OIC never identified a situation concerning the statements in the letter where a witness had admitted that he had not been candid and then went on to testify consistent with the indictment.[38] With regard to the two Shelby statements identified in the letter--as well as the other Shelby statements contradicting the Superseding Indictment but never provided under Brady--Shelby did not testify consistent with the Superseding Indictment or with other theories underlying the Park Towers claim but not reflected in the Superseding Indictment. In fact, Respondent O'Neill never asked him any questions that would elicit such testimony.

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[38] It does appear that there were efforts following the May 6, 1992 hearing before Judge Gesell to cause Shelby to qualify his earlier statements. For example, in the interview conducted by Respondents O'Neill and Swartz on May 19, 1992, Shelby for the third time described how his employers at The Keefe Company (TKC) told him of the relationship between Mitchell and Dean, with Shelby noting that when they had asked him if he knew of the relationship, he had replied that he did not know who Dean was. Park Towers Appendix, Att. 5b, at 2-3. The interview report then states:

> Shelby was asked if it was possible that he conveyed the Dean/Mitchell relationship to TKC. Shelby replied that he never said that it was not a possibility.

Id. at 3.

A statement in the interview report of the May 29, 1992 interview concerning the discussion of Park Towers at the September 9, 1985 lunch that "Shelby advised that they may have discussed it but he did not remember that they did" is also suggestive of a last-ditch effort to develop a conflict with Shelby's earlier statements on that point. Dean Rule 33 Mem., Exh. ZZ, at 2. Shelby, however, was clear enough on this issue testifying before the grand jury one week later. Id., Exh. EE, at 22-23.

Shelby's grand jury testimony that he could have received the Park Towers rapid reply from Dean, Debartolomeis, or Cushing, but could not remember at the moment, may in some sense have qualified the earlier statements that he received it from DeBartolomeis or Cushing. But the very fact that it would have been any one of the three was exculpatory inasmuch as the Superseding Indictment implied that it was Dean. That applies as well to a statement attributed to Shelby in the May 18, 1992 interview concerning the referenced "the contact at HUD" in the Fine memorandum of July 31, 1985, that "[i]t was not inconceivable to him that they were talking about DeBartolomeis but they could have been referring to Dean." Dean Rule 33 Mem., Exh. DD, at 5.

Indeed, examining Shelby, Respondent O'Neill never asked him: why he secured Mitchell's services; whether the reference to "the contact at HUD" was a reference to Dean; whether he believed Dean was aware of Mitchell's involvement in Park Towers; whether he concealed his contacts with Dean from Feinberg and Fine; whether he concealed Mitchell's involvement from Feinberg and Fine; and whether Dean provided Shelby the copy of the post-allocation waiver that he then sent to Fine.[39] Rather, it would be through the use of exhibits, introduced without questioning as to their true meaning, and the eliciting of testimony that was in all probability false and that Shelby certainly would have contradicted, that Respondents would attempt to lead the jury to believe things that Shelby had specifically stated were false or that Respondents otherwise knew to be false.

From the day the Superseding Indictment was issued, Respondents knew that the fact of Shelby's sending materials to Dean on the day following the lunch would be their only evidence of Dean's knowledge of Mitchell's involvement with the project. They also knew that Shelby's testimony that he had gone out of his way to ensure that the subject was not discussed at that lunch would be persuasive, if the defense was in a position to elicit it. Nevertheless, Respondents failed to consider that statement to be something that either the Brady rule or Judge Gesell's order required them to produce. Nor did Respondents regard that statement, or Shelby's repeated statements that Feinberg was aware of Mitchell's involvement in Park Towers, as appropriate subjects of their effort to go beyond what was required of them by law and actually to point out anything that "might be especially useful to the defense."

There is no conclusion possible other than that the Respondents withheld this and other information precisely because they thought it might be useful to the defense, in particular, that it might enable the defense to prevent Respondents from leading the jury to believe things that Respondents knew to be false.