10-4-93

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. DEBORAH GORE DEAN	CR 92-181-TFH

GOVERNMENT'S OPPOSITION TO
DEFENDANT DEAN'S MOTION FOR JUDGMENT OF ACQUITTAL

Introduction and Summary of Argument

The United States, by and through the Office of Independent Counsel, files this opposition to defendant Dean's motion for judgment of acquittal.

1. The central premise of defendant's motion is foreclosed by prior decisions of this Circuit and the Supreme Court. Defendant asserts that the evidence of her involvement in the charged conspiracies is entirely circumstantial, and that accordingly she is entitled to a judgment of acquittal. But this Circuit repeatedly has reaffirmed that, in ruling on a motion for a judgment of acquittal, "no legal distinction may be drawn between direct and circumstantial evidence." United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985), cert. denied, 474 U.S. 1064 (1986). More particularly, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose

and plan may be inferred from a 'development and a collocation of circumstances.'" Glasser v. United States, 315 U.S. 60, 80 (1942). Indeed, it follows a fortiori from Treadwell -- a conspiracy case that rejected claims identical to those defendant makes here -- that defendant's motion must be denied.

2. In any event, as to each conspiracy charged in this case, there is more than sufficient evidence that the conspiracy existed and that defendant intentionally joined that conspiracy. Defendant's arguments to the contrary rest on a misreading of the facts in evidence and a misunderstanding of the case law under 18 U.S.C. §371. As to each conspiracy, the evidence shows that defendant agreed to take, and took, official actions in matters in which she and her family had hidden interests, including financial interests; moreover, the evidence also shows that defendant sought to conceal her actions and to mislead the Congress, the public, and non-favored developers as to the manner in which Mod Rehab awards were being made. The federal courts uniformly have approved prosecutions under §371 on facts far less compelling than this. See, e.g., United States v. Gallup, 812 F.2d 1271, 1276 (10th Cir. 1987); United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985), aff'd in part and remanded on other grounds, 483 U.S. 107 (1987).

3. In short, to grant defendant's motion would be to hold that a federal official is free to agree privately that she will help direct federal funds to individuals who are providing financial and other benefits to her family and herself, while at

the same time she is publicly asserting that those funding decisions are being made in accordance with an open and fair process. This obviously is not the law.[1]

ARGUMENT

I. Defendant's Central Argument Is Foreclosed By Decisions of This Circuit and the Supreme Court.

The Court of Appeals for this Circuit repeatedly has made clear that motions for judgment of acquittal must meet an extremely high standard. In this Circuit, a trial court may take the case from the jury "'only when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985), cert. denied, 474 U.S. 1064 (1986)(quoting United States v. Davis, 562 F.2d 681, 683 (D.C. Cir. 1977)). Moreover, in making this determination, "'the trial court must view the evidence in the light most favorable to the Government giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact.'" Treadwell, 760 F.2d at 333 (quoting Davis, 562 F.2d at 683).

Applying this standard here, defendant's motion must be denied. Defendant has not even sought to carry her burden of showing that, viewing the evidence in the light most favorable to

[1] Defendant makes no argument as to why judgment of acquittal should be entered as to the indictment's gratuity count, the perjury counts, or the concealment counts. Therefore, even though her motion is styled a motion for acquittal on all counts of the indictment, defendant's motion should be summarily denied as to the counts for which she has presented no argument.

the government, a reasonable mind could not find guilt beyond a reasonable doubt. Instead, she argues only that the evidence is circumstantial and "presents nothing more than a choice of possibilities." Dean Motion at 3. This, she claims, mandates a judgment of acquittal.

But here again, defendant ignores the law of this Circuit. In Treadwell, the Court of Appeals expressly rejected a similar argument. The defendant in Treadwell was charged with conspiring to defraud the United States by entering into a scheme to enrich herself, her co-conspirators and their other business ventures through "a general pattern of self-dealing, conflicts of interest, and shoddy management practices" in connection with the management of Clifton Terrace, a HUD-owned property; as here, defendant also was charged with conspiring to conceal these activities. 760 F.2d at 334. The Court of Appeals observed that, because of these conflicts of interest, "in every transaction there was a potential for improper favoritism, and as the government's case demonstrated, too often that potential was realized." Id.

Like the defendant here, however, the defendant in Treadwell argued that there was only circumstantial evidence that she had intentionally joined the charged conspiracy and that her actions were susceptible to innocent explanations. But even acknowledging this was so, id. at 333, the Court of Appeals held that defendant's Rule 29 motion had properly been denied by the trial court. The Court reasoned that "[i]n determining whether the government has met its burden of proof ... no legal distinction may be drawn

between direct and circumstantial evidence ... since it is 'the traditional province of the jury to assess the significance of circumstantial evidence, and to determine whether it eliminates all reasonable doubt.'" Id. (quoting United States v. Staten, 581 F.2d 878, 883 (D.C. Cir. 1978)).

Furthermore, Treadwell held that "the government, when using circumstantial evidence, need not negate all possible inferences of innocence that may flow therefrom." 760 F.2d at 333 (citing Holland v. United States, 348 U.S. 121, 139-40 (1954); United States v. Lewis, 626 F.2d 940, 951 (D.C. Cir. 1980)). As further support for its conclusion, Treadwell cited Glasser v. United States, 315 U.S. 60, 80 (1942), wherein the Supreme Court stated that "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" See Treadwell, 760 F.2d at 333.[2]

Thus, even were the evidence here solely circumstantial -- as defendant Dean suggests -- Treadwell makes clear that this case could not be taken away from the jury. In actuality, as we show below, there is far more evidence here than there was in Treadwell of the defendant's participation in the charged conspiracies. It thus follows a fortiori from Treadwell that defendant Dean's motion

[2] It is, of course, also a "universally accepted proposition that the [conspiratorial] agreement need be neither formal nor express"; thus, "the agreement may consist of nothing more than a tacit understanding," and need not be verbal at all. 1 L. Sand et al., Modern Federal Jury Instructions ¶19.01 at 19-18, 19-19 (1993)(citing cases).

for judgment of acquittal should be denied.[3]

II. The Evidence Shows That Dean Participated In the Charged Conspiracies To Defraud the United States.

As to each conspiracy charged in this case, there is more than sufficient evidence -- both direct and circumstantial -- that the conspiracy existed and that defendant intentionally joined that conspiracy. Defendant's arguments to the contrary are supported neither by the facts in evidence nor the uniform case law under 18 U.S.C. §371.

Defendant argues that the facts show "only that she knew and associated" with her alleged co-conspirators. Draft Dean Motion at 3. Thus, she continues, "[t]he fact that she had duties at Housing and Urban Development and knew and socialized with individuals who had dealings with Housing and Urban Development does not show that she had entered into a conspiracy with them for purposes of financial gain to her family or for the purpose of getting a promotion, or to defraud the government." Draft Dean Motion at 3, 5.

But, of course, the facts show far more than this. As we detail at length below, the evidence here demonstrates that

[3] United States v. Zeigler, 994 F.2d 845 (D.C. Cir. 1993) -- the only case from this jurisdiction cited by the defendant -- is not contrary to Treadwell. In Zeigler, a drug possession case, the Court of Appeals held that "the government presented no evidence, circumstantial or direct," that the defendant had ever entered the room where the illegal drugs were stored or had the combination on the locks to that room. Id. at 848 (emphasis added). The decisions from other jurisdictions cited by defendant likewise were cases in which the government failed to establish even circumstantial evidence of guilt.

defendant agreed to, and did, take official actions to aid her co-conspirators in matters in which she and her family had hidden interests. Such evidence establishes classic conspiracies to defraud the United States in violation of 18 U.S.C. §371.[4]

In United States v. Gallup, 812 F.2d 1271, 1276 (10th Cir. 1987), for instance, the defendant, an employee of the Kansas City Public Housing Authority, was convicted of conspiring to defraud the United States by securing HUD financing for a property, thereby ensuring that his brother-in-law would receive a finder's fee for obtaining that financing. The Tenth Circuit held that "the law is settled" that it was irrelevant whether the government had proved that the defendant was to share in that finder's fee, or whether his interest was only "indirect." Id. at 1278 (citing United States v. Shoup, 608 F.2d 950 (3rd Cir. 1979). The court likewise rejected the argument that the proof showed that defendant had engaged only in a "conflict of interest," rather than a crime under 18 U.S.C. §371:

> "There is far more at stake here than a violation of the Housing Authority's conflict of interest policy. There is a fundamental compromise of the Housing Authority's, and consequently of HUD's, interest in having its projects 'administered honestly and efficiently and without corruption and waste.'"

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[4] Defendant's motion fails to address the fact that each of the conspiracies is charged not only as a conspiracy to defraud the United States, but also as a conspiracy to commit offenses against the United States, to wit, to knowingly and willfully falsify, conceal, and cover up material facts, by a trick scheme and device (counts one, two and three) and to demand, seek, receive and accept and agree to accept a thing of value (count three). Thus, even if defendant were correct in arguing that there was no proof here of conspiracy to defraud the United States -- and she clearly is not -- judgment of acquittal on these conspiracy counts would not lie.

Id. at 1276 (citation omitted).

Similarly, United States v. Conover, 772 F.2d 765 (11th Cir. 1985) upheld the conviction under §371 of an employee of a rural electric cooperative who had steered a construction project to a friend in connection with a project guaranteed by the federal government through the Rural Electrification Administration. The evidence showed only that the defendant and his friend had gone on trips together; that the friend had loaned the defendant money to purchase a condominium from a company owned by the friend, which money had been repaid; and that the friend had hired the defendant to do landscaping work. Id. at 768. The court of appeals held that §371 does not require a showing either of financial loss to the United States or of "a knowing violation of an agency's rules, regulations or procedures." Id. at 771 (citations omitted). This is so because "[t]he statute is designed 'to protect the integrity of the United States and its agencies, programs, and policies.'" Id. (citation omitted). Thus,

> "[t]he United States has a fundamental interest in the manner in which projects receiving its aid are conducted. This interest is not limited strictly to accounting for United States Government funds invested in the project, but extends to seeing that the entire project is administered honestly and efficiently and without corruption and waste."

Id. (quoting United States v. Hay, 527 F.2d 990, 998 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976)).

Indeed, the federal courts have uniformly approved §371 prosecutions against public officials or others entrusted with federal funds who have hidden personal interests that are affected

by their official decisions. The basis for such prosecutions is plain: "It is part of [a federal official's] duty to give an honest and unprejudiced judgment; ... [i]t cannot be supposed that such duty could be fully, impartially and honestly discharged by an officer" with a hidden financial (or other personal) interest. Crawford v. United States, 212 U.S. 183, 191 (1909). As Judge Gignoux explained:

> It cannot be believed that under such circumstances [the official] would give an unbiased, honest opinion upon the question .... [S]uch activity, independently of a separate statute, necessarily imports an impairment or obstruction of government function; [it] ... would unavoidably have the effect of influencing official judgment and producing decisions and acts not in accordance with the law; ... such activity comes within the categories of dishonesty and overreaching by those charged with carrying out governmental functions which are proscribed by Hammerschmidt [v. United States, 265 U.S. 182, 188 (1924)].

United States v. Bowles, 183 F. Supp. 237, 247 (D. Me. 1958). Section 371 applies in such circumstances because it was "intended to insure the wholesome administration of the government of the United States and to protect that government against being defrauded of its inherent right to the honest, impartial and efficient services of its employees." Bowles, 183 F. Supp. at 247.

Thus, the foregoing cases, and numerous others, establish that a §371 conspiracy will be made out if a public official agrees with another person to take official actions in matters in which the official has a hidden personal interest, even if that interest is not financial. See, e.g., United States v. Tham, 960 F.2d 1391, 1394 (9th Cir. 1991)(promise to secure job for judge's brother); United States v. Shoup, 608 F.2d 950, 957 (3d Cir. 1979)(benefit to

the defendant is not an element of §371; agreement itself is a punishable evil); United States v. Peltz, 433 F.2d 48, 52 (2d Cir. 1970) cert denied 401 U.S. 955 (1971) (plan whereby government employee would disclose information is punishable "regardless of whether such plan is secured by consideration"); United States v. Mitchell, 372 F. Supp. 1239, 1254 (S.D.N.Y.), app. dismissed, 485 F.2d 1290 (2d Cir. 1973)(cash contribution to political campaign in return for impairment of SEC investigation into Robert Vesco); United States v. Sweig, 316 F. Supp. 1148, 1156 (S.D.N.Y. 1970)(alleged conspiracy in which non-government conspirator would take fees in return for undertaking to exert influence of Speaker of the House; official defendant's stake in the conspiracy "need not have been monetary, or material at all"); see also, e.g., United States v. Silvano, 812 F.2d 754, 760 (1st Cir. 1987)(mail fraud: immaterial whether public official profited; loss of his "good faith services alone establishes the breach").[5]

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[5] In addition, a conspiracy to defraud the United States also will be made out if a public official acts to subvert governmental functions, even absent proof that the official had a hidden personal interest in the decision. The indictment here charges, and the proof establishes that defendant did so seek to interfere with the lawful operations of the Mod Rehab program. The evidence has shown that there were at least two sets of legal constraints on how HUD officials awarded Mod Rehab funds. First, it has been the consistent testimony of the witnesses that, under HUD regulations, HUD could not make project-specific awards, and that PHAs were required to choose projects for Mod Rehab funding on a competitive basis; in turn, Dean herself, in her Senate testimony and elsewhere, described a fair and regularized process by which HUD selected PHAs to receive funding. See, e.g., Tr. 155 (Greer); 166-67 (Hastings). Second, it also has been the consistent testimony of the witnesses that the HUD Standards of Conduct, which were and are embodied in regulations, forbade HUD employees to make funding decisions in violation of those standards. See, e.g., Tr. 155, 119 (Greer); Tr. (Zagame) A conspiracy to subvert such

Applying this uniform case law under §371 here, it is clear that the government has introduced more than sufficient evidence of the charged conspiracies to defraud the United States, and defendant's participation in those conspiracies. As to each of the conspiracies, the government has established that defendant agreed to and did take official actions to advance the interests of her alleged co-conspirators; in each of the conspiracies, the government also has established that defendant had hidden personal interests in those decisions, including the financial interests of herself and her family; and, finally, the government has established that defendant sought to conceal from outsiders -- including the Congress, the public, and non-favored developers -- that these Mod Rehab awards were being made not through the regularized and open process described by defendant in her Senate testimony and other public pronouncements, but in a irregular and closely-held manner designed to benefit her co-conspirators and herself. On its face, this proof is sufficient to make out violations of §371 as to each conspiracy count; indeed, this proof is much stronger than that held sufficient in many of the §371 cases cited above.

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regulatory guidelines -- which is what the evidence shows here -- is directly within the reach of 18 U.S.C. §371. See, e.g., Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)(to conspire to defraud United States "means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest"); Hass v. Henkel, 216 U.S. 462, 478 (1910)(upholding conviction under §371 where information was divulged contrary to "custom, practices, and regulations of the Secretary of Agriculture").

In the remainder of this brief, we address in detail the evidence before the jury with regard to defendant's role in each of the conspiracies. In addition to the citations set forth herein, we respectfully direct the Court's attention to the evidence set out in the summary charts previously filed with the Court.

1. Count One: With regard to Count One, defendant asserts that judgment of acquittal must be entered because "the government claims in its indictment that [defendant] intended to benefit her family and yet the evidence does not show that her family was benefited in any way." Dean Motion at 8. This argument is wide of the mark both legally and factually. As shown above, it is not necessary as a matter of law that the government prove that defendant or her family benefitted personally from any of her decisions; it would be enough to show that she had a hidden personal interest in helping Mitchell, and that she agreed to do so.

But, in any event, as a matter of fact, the proof shows that defendant's family was benefitted -- most obviously because she considered Mitchell to be her stepfather, and thus part of her family. The record is replete with testimony that Mitchell was the companion of defendant's mother, and lived with her. See, e.g., testimony of Brennan and Gauvry; SF 186 contained in G. Ex. 256. There also are exhibits in which defendant -- forwarding HUD documents to Mitchell -- refers to Mitchell as "Daddy" and "Dad." See G. Exs. 17, 18. In addition, there is testimony that Mitchell's financial situation during this time period was poor,

and that defendant attributed her mother's decision not to marry Mitchell to her fears that his financial condition might incumber the family. See Tr. 819 (DeBartolomeis).

Furthermore, there is proof that Dean herself benefitted directly from her relationship with Mitchell. For instance, Mitchell gave her $500 on December 25, 1986. G. Ex. 236. The following year, he paid over $3,300 for a birthday party that was held for defendant at the Georgetown Club. See G. Ex. 238 and stipulation regarding testimony of Norman Larsen. Indeed, defendant cannot have it both ways: if, as her motion now seeks to suggest, she had no "family" relationship with Mitchell that would explain these payments, then they must be seen simply as direct payments to or for her by a HUD consultant.

Likewise, the evidence establishes that Mitchell, whether or not a family member, also sought to advance defendant's career and her political aspirations. See SF 186 in G. Ex. 236; Shelby testimony. As a matter of §371 law, these various benefits are more than sufficient to establish a personal interest on defendant's part in helping Mitchell; her argument that she had in fact no interest in doing so presents only a jury issue, not a basis for a judgment for acquittal. See, e.g., Gallup, supra (upholding §371 conviction of PHA official who benefitted brother-in-law; not necessary that government prove that he directly benefitted), and other cases cited above.

There is likewise extensive evidence that defendant took official actions to advance Mitchell's interests at HUD. Beginning

while she was a Special Assistant to HUD Secretary Pierce, defendant was aware of, and obtained information regarding, projects in which Mitchell was interested. For example, a handwritten notation on G. Ex. 18 -- a memorandum from the Under Secretary of HUD to a HUD Regional Administrator concerning projects being developed by Art Martinez -- indicates that the memorandum was sent to two places -- "Special File" and "Copy for Debbie Dean." Defendant in turn sent this and other documents of interest to Nunn and Martinez. G. Exs. 16, 17, 18.[6]

Shortly thereafter, in late January 1984, Martinez retained Nunn in connection with the Arama project and agreed to pay him $375,000 to obtain 300 mod rehab units. (G. Exs. 20, 21) John

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[6] Defendant's counsel has sought to create the impression that, prior to defendant's becoming Executive Assistant, she had merely a "mailroom" job. In fact, however, the evidence shows that defendant was both a Special Assistant and Director of the Executive Secretariat. Even in the latter position, defendant was concerned with correspondence only at the very highest level, that prepared for the signature of the Secretary or the Under Secretary or "highly sensitive communications." Work Planning and Performance Appraisal dated October 1983 contained in G Ex. 256. This position also required knowledge of HUD "policies, positions, and programs." Id. Moreover, in her statement to the Senate, defendant described her role as a Special Assistant as having substantive responsibilities. See G. Ex. 212.

In any event, it is legally irrelevant whether defendant had ultimate decisionmaking authority, either as a Special Assistant or as Executive Assistant; it is enough that she used what authority she did have to advance the interests of her co-conspirators. See, e.g., United States v. Smith, 496 F.2d 185 (10th Cir.), cert. denied, 419 U.S. 964 (1974)(§371 prosecution of mid-level loan officer in SBA); see also United States v. Heffler, 402 F.2d 924 (3d Cir. 1968) cert denied 394 U.S. 946 (1969)(in bribery prosecution, it was not essential that defendant have authority to make the final decision); United States v. Raff, 161 F. Supp. 276, 280 (M.D. Pa. 1958)(bribery prosecution: government official need not be final authority; "[h]onesty at the top is not enough; it must run through the whole service").

Mitchell was to share in the consulting fees but significantly -- in a pattern that appears in all three of the projects charged in Count I -- Mitchell's role was omitted from the contracts and related materials.[7] Rather, Nunn annotated his consultant agreement: "1/25/84 In event of death or disability 1/2 of above amount belongs to John Mitchell. Louie B. Nunn."

By April 1984, Nunn negotiated a $50,000 increase in the fee, G. Ex. 25, even though in his testimony he admitted that neither he nor Mitchell spent more than a couple of hours on the Arama project. Tr. 1370-71. In June 1984, defendant assumed the position of Executive Assistant to the Secretary. G. Ex. 256. Documents show that while in that position she spoke directly with Mitchell about the Arama project. In her letter to Nunn confirming her recent telephone conversation with General Mitchell concerning Arama's request for "additional Mod-Rehab units," she "assure[d] [Nunn] that all the necessary paperwork for the units will be transmitted by the end of this week and that Arama Partnership will definitely receive these units from HUD." G. Exs. 27, 28.[8] In that letter, defendant further stated that "I hope that the additional units will make the partnership a viable venture." Id. Thereafter, when the Rapid Reply, the internal HUD document which transmitted the funds from HQ to the regional office, was cut, defendant obtained a copy of it and had it hand-delivered at

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[7] See G. Exs.   (Arama); G. Exs.   (S. Fla.); G. Exs.   (Park Towers).

[8] Nunn in turn thereafter assured Martinez that the "Arama project has been approved in the Washington office...." G. Ex. 29.

government expense to Arama at Mitchell's office. G. Ex. 30.

Likewise, with regard to South Florida, Brennan testified that he contacted defendant directly to request Mod Rehab units for Nunn and Martinez, even though he had no knowledge of the Mod Rehab program. Tr. 323. He further testified that he spent just a few minutes with defendant, and that the units were thereafter awarded. Tr. 323. Brennan then called defendant to thank her. Tr. 326. For this, Global Research International -- Mitchell's company -- was paid $109,000. Tr. 326-27; G. Ex. 51. Here again, the evidence is clear that defendant was aware that Brennan worked with Mitchell. Indeed, according to defendant's official personnel file, she worked for Global prior to entering federal service and listed Brennan as her supervisor. See SF 86 and 171 contained in G. Ex. 256.

Frank Gauvry, a long-time social and business friend of Mitchell, and a friend and business associate of Brennan (Tr. 387-88, 389), testified that Brennan subsequently told him that the defendant "just about runs" HUD. Tr. 396. Gauvry further testified that Brennan asked Gauvry to refer development business to Brennan so that Brennan "can be named a consultant." Tr. 396.

Finally, with regard to Park Towers, the evidence also establishes defendant's involvement. Shelby testified that he met with defendant regarding the allocation of units for this project. Tr. 553. The memoranda of the developer -- Martin Fine -- to file also indicated that Shelby met with "his friend at 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 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 and defendant's calendars reflect that defendant, Mitchell, Shelby and defendant were to meet for lunch; and on September 10, 1985, Shelby forwarded information on "the Miami Mod Rehab." G. Ex. 5k, 9g & 76.

In sum, this evidence, and the other evidence set forth on the government's summary charts, demonstrates defendant's direct involvement with her co-conspirator's requests for Mod Rehab units. That evidence also shows that defendant and her co-conspirators, particularly after the Arama project, took pains to avoid referring to Mitchell's or defendant's involvement in these projects in any documents; indeed, as noted above, neither the developer of Park Towers, nor his Florida consultant, even knew that Mitchell was involved.

Finally, at the same time that defendant was secretly acting to further the interests of her co-conspirators with regard to Mod Rehab allocations, she was asserting publicly that "HUD does not allocate Section 8 moderate rehabilitation funds on a project specific basis, (G. Ex. 31a (letter to Government Development Bank of Puerto Rico, 8/15/84)), and that "[f]ederal regulations prohibit

HUD from making project specific allocations," so "[t]herefore, HUD has no direct role in providing Moderate Rehabilitation funds to a specific project" (G. Ex. 31b (letter to Sister Schulte, 1/2/85)). The nature of the conspiracy here is succinctly illustrated by contrasting these letters, and defendant's Senate testimony concerning how the Mod Rehab process was supposed to work, with defendant's July 5, 1984 letter to Nunn, G. Ex. 28, in which she states "[l]et me assure you ... that Arama Partnership will definitely receive these units from HUD." Defendant would have this Court hold that she was free not only to act in matters in which she has a hidden financial interest, but do so in a way that was directly contrary to the manner in which -- by defendant's own testimony -- federal regulations and practices required the Mod Rehab program to function. The very statement of this claim is its own refutation.

2. Count Two: With regard to Count Two, defendant argues that the evidence shows that the benefits flowed from her to Sankin, and not vice versa; thus, she asserts, there could be no conspiracy here. Defendant is, of course, wrong about what the evidence shows, as we demonstrate below; moreover, defendant fails to understand that, at most, the question whether she benefitted Sankin, or he her, would be a jury issue, not one that can be decided on a Rule 29 motion.

In fact, Sankin's testimony conclusively demonstrates that he provided benefits to defendant and her family. Sankin took over the management responsibilities of her family's troubled Stanley

Arms Apartments. Tr. ___. When the operating reserves fell, Sankin dipped into the tenants' security deposits to pay the Stanley Arms bills. Tr. ___. Moreover, he took it upon himself to prepare a lengthy hardship rents petition. Tr. ___. The petition was successful and earned the Dean/Gore family considerable additional rental revenues. Tr. ___. Sankin also attempted to find a buyer for the Stanley Arms and even approached Berel Altman, one of the developers of the Foxglenn and Eastern Avenue projects, to interest him in helping the Dean family. Tr. ___ (Sankin); ___ (Altman).

Sankin testified that his services on the hardship rent petition had substantial value, Tr. ___, and he candidly stated that, when defendant indicated that she was not going to pay him, he did not push the point because at that very time he was successful in obtaining HUD funds through her. Tr. ___. Sankin also recognized the relationship between his work for the Dean family and his mod rehab success in his method of compensating his property management staff. Tr. ___.

Moreover, the Stanley Arms services were not the only benefits accruing to defendant. Sankin, who attended law school, testified that he accompanied her to a real estate closing. Tr. ___. He made a political contribution to the Chavez campaign at defendant's request. Tr. ___. He took defendant to expensive lunches and dinners, G. Exs. ___; sent her flowers, Tr.___; bought her gifts, including an expensive antique cup and saucer, G. Ex. ___, and expensive bottles of port, Tr. ___.

In light of all this, it is, to say the least, surprising to hear defendant argue that the government has not proved that defendant received benefits from Sankin. Defendant's argument boils down to this: as a matter of law, she cannot be prosecuted under §371 for agreeing to act to advance Sankin's interests before HUD at the same time that she was receiving gifts, meals, and other benefits from him, and at the same time that he was conferring benefits on her family. But, as the cases cited above indicate, this is not the law; to the contrary, under such circumstances, "[i]t cannot be supposed that [defendant's] duty could be fully, impartially and honestly discharged." Crawford v. United States, 212 U.S. 183, 191 (1909). As noted above, §371 prosecutions have been upheld even absent any proof that the defendant benefitted from the conspiracy. See, e.g, Conover and other cases cited above. It necessarily follows that the proof of benefit to defendant here is more than sufficient.[9]

The evidence is equally compelling as to the actions defendant agreed to take, and did take, to benefit Sankin. Those actions begin with the Necho Allen hotel, a Mod Rehab project. In late 1984, John Rosenthal, a Philadelphia developer, was seeking exception or increased rents for the Necho Allen Hotel. G. Ex. 101, Tr. ___(Rosenthal). Career staff at both the HUD regional office and HUD HQ disapproved the request. G. Ex. 102, 106.

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[9] Of course, defendant may, if she chooses, argue to the jury that these benefits were de minimis, and did not influence her actions; but, here again, that is a jury issue, not a Rule 29 argument.

Rosenthal turned to defendant's friend, Andrew Sankin, and, on December 17, 1984, agreed to pay him $10,000 if the exception rents were granted. G. Ex. 105.[10]

Five days later, the defendant scheduled a brunch with Sankin on a Saturday in Rehobeth Beach. G. Ex. 5a. A month later, Sankin was again on defendant's calendar, this time for lunch, G. Ex. 5b, and, two days after this, the entire afternoon was blocked off on defendant's calendar for a discussion between Sankin and Dean regarding the Stanley Arms. G. Ex. 31; Tr. ___ (Sankin). The essential nature of this conspiracy is illustrated by the fact that defendant was privately dealing with Sankin with regard to her family's business at the very same time that she agreed to take, and did take, official actions to benefit him. Again, this is precisely the kind of hidden personal interest that §371 forbids.

Within two weeks, by February 12, 1985, Sankin informed Rosenthal that exception rents had been secured, and Rosenthal in turn asked defendant "to provide evidence that exception market rents have been granted" prior to the scheduled closing date of his project. G. Ex. 108. The Regional Administrator, a political appointee (Tr. ___ (Golec)), then requested exception rents. G. Ex. 108a. Once again, HUD HQ career staff drafted a denial. G. Ex. 109a. The evidence shows that before that denial could be sent, however, the defendant had it pulled. See post-it note on G.

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[10] Sankin at this time was very young and had recently graduated from law school. Tr. ___ (Sankin). Rosenthal candidly admitted at trial that he hired Sankin for his access to Dean. Tr. ___.

Ex. 109a. A day later, defendant complied with Rosenthal's request and authorized use of the autopen to place Secretary Pierce's signature on a memo granting exception rents.[11] Rosenthal paid Sankin $10,000, G. Ex. 111, and on that same day Sankin was scheduled on defendant's calendar for lunch. G. Ex. 5d.[12]

This pattern continued with the Regent Street project. Even before he paid Sankin for Necho Allen, Rosenthal sent him material for his next project, which was to obtain Mod Rehab units for Regent Street. G. Ex. 113. Subsequently, Rosenthal asked Sankin to arrange a meeting with "Deborah" regarding 26 additional mod rehab units. G. Exs. 114, 115. Following a lunch meeting, Rosenthal wrote to defendant a few more times, G. Exs. 116, 117, 120, and then asked Sankin to intercede. G. Ex. 121. In mid-July, the defendant informed Rosenthal that Sankin had broached the subject of Mod Rehab for Regent Street on several occasions and she had agreed to discuss it in fiscal year 1986. G. Ex. 122. In late August, defendant scheduled a meeting with Sankin, G. Ex. 5j, and a week later 13 mod rehab units were sent to Philadelphia. G. Exs. 124, 124a, 125.

On September 20, 1985, Rosenthal acknowledged receipt of the 13 mod rehab units in a letter to defendant and stated that he hoped he could count on her for the balance of 13 more units. G.

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[11] Sherrill Nettles-Hawkins described the autopen and identified this particular authorization as being made by Dean. Tr. 1558-59.

[12] Rosenthal later acknowledged and thanked defendant for her assistance on the Necho Allen. G. Ex. 116.

Ex. 126.[13] Early in fiscal year 1986, the balance of 13 units was sent to Philadelphia.[14]

The evidence regarding the Alameda Towers project is equally unequivocal. While he was working for Rosenthal, Sankin learned that an allocation of 600 units previously made to Puerto Rico was being recaptured, and he asked defendant about getting some of these units. Tr. ___. At the defendant's urging, Sankin approached Thomas Broussard, a Los Angeles attorney, and the two men agreed, with defendant's blessing, to work together. Tr. ___ (Broussard); ___ (Sankin).

Moreover, the testimony and correspondence regarding Alameda Towers provides direct and compelling evidence that defendant knew precisely what the consultants she favored were doing. For example, on June 7, 1985, Broussard wrote to her that he

> "spoke to Joe Monticiollo [the Regional Administrator in New York] regarding P.R. and he is putting me in contact with a group in Old San Juan that is working on units through Joe [and] D'Amato. I think Andy S. and I will be better with them than Andy's first contact. I'll speak to you when I return from Europe on June 24." G. Ex. 137.

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[13] Rosenthal and Sankin had a fee dispute regarding Regent St. G. Exs. 131, 132. On the he wrote to thank Dean, Rosenthal paid Sankin $1,000. G. Exs. 127, 128. Later, he told Sankin that Regent Street "could not afford the 'consulting fees' that sometimes are requested by well-connected Washington-based individuals for securing Section 8 Mod Rehab units." G. Ex. . Three years later, however, Sankin was paid a final $10,000 for Regent Street. G. Ex. .

[14] Janet Hale, the General Deputy Assistant Secretary and Acting Assistant Secretary at the time, testified generally that she signed funding documents only at defendant's direction. Tr. Hale at . With regard to G. Ex. 129, she stated that she did not know Sankin or Rosenthal or anything else about this allocation. Tr. Hale at .

In fact, the evidence establishes that defendant assigned Broussard and Sankin a set number of mod rehab units for use in Puerto Rico to peddle to the highest bidder. James Wilson, a developer, testified that Broussard approached him and said that he had 300 units to be used in Puerto Rico. Tr. ___. Similarly, Cleofe Rubi testified that Broussard told him that he had been "assigned" 150 mod rehab units by Dean in Puerto Rico. Tr. ___. After some quibbling over price,[15] Rubi agreed to pay Sankin and Broussard $100,000 each for 150 units.[16]

Thus, the uncontradicted evidence here is that defendant assigned federal funds to two consultants she favored, for them to dispose of at the highest price they could obtain. Even if defendant had no hidden personal interest in this matter -- and she did -- it would be hard to imagine a more serious interference with the lawful operations of the Mod Rehab program that defendant described in her public statements. See Hammerschmidt, supra. It bears emphasis that defendant's motion asks this Court to hold, as a matter of law, that she was free to agree to give consultants the power to assign federal funds to the highest bidder. But again, this cannot be the law.

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[15] Rubi testified that at first Broussard wanted a partnership or joint venture role. Tr. ___. Similarly, Wilson described Broussard's approach as requesting partnership status. Tr. ___.

[16] Rubi testified that the agreements with Broussard and Sankin were drafted to make it appear as though Broussard and Sankin were performing services when in actuality Rubi was simply paying them for their units. Tr. ___. This is further evidence that the conspirators sought to conceal their activity.

The same pattern of conduct is revealed by the evidence as to the Foxglenn and Eastern Avenue projects, with the exception of the fact that as to these projects, Sankin, at defendant's urging, Sankin teamed up with Shelby. Tr. ___. Here again, defendant essentially gave federal funds to her favored consultants. And here again, defendant had a hidden personal interest, not only with regard to the financial benefits Sankin was affording her, but with regard to the political support Shelby could give her.[17]

In sum, the evidence as to this count fully establishes that defendant agreed to help award federal funds to individuals who provided benefits to her family and herself; and, in fact, she gave those individuals control over those funds, thereby completely subverting the lawful operation of the Mod Rehab program. This is more than sufficient to make out a violation of 18 U.S.C. §371.

3. <u>Count Three</u>: Defendant fails to address Count Three. This is hardly surprising, for the proof is uncontradicted that defendant agreed to give Mod Rehab units to Kitchin, and that he thereafter gave her $4,000 at her request. Tr. 1431--47 (Kitchin). On its face, this evidence is sufficient to go to the jury on a §371 count.

The evidence is even more telling in detail. Kitchin testified that defendant was facing financial problems in the spring of 1987, at a time when she was being considered for

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[17] Defendant's motion to the contrary, see Draft Motion at 9, Dean's nomination for the Assistant Secretary slot was contemplated as early as 1986, and she began gathering support at that time -- not in 1987, as she now seeks to suggest. See Tr. ___.

nomination as Assistant Secretary for Community Planning and Development. Tr. 1443-44. He further testified that defendant asked him for money, and that he provided her with $4,000, but marked the check as a loan. Tr. 1444. Kitchin testified that the loan was never fully repaid. Tr. 1445. Jennings, Kitchin's associate, corroborated Kitchin's testimony that he had given defendant $4,000. Tr. 1523 (Jennings). Defendant also asked for, and received, Kitchin's support for her nomination to be Assistant Secretary. Tr. 1447, 1527.

Beginning shortly before this time, in the fall of 1986, Kitchin had approached defendant for Mod Rehab units for use in Atlanta. Tr. 1431.[18] She agreed to give him these units, as she did subsequently when he asked for units for Metro Dade in the spring of 1987. Tr. 1436-37 (Kitchin). In both instances, defendant in essence gave control over federal funds to Kitchin -- as she earlier had to Sankin and his partners -- allowing him to seek out interested bidders for these funds. Jennings also testified that Kitchin had obtained Mod Rehab units through the defendant while she served as Executive Assistant. Tr. Jennings, see also Tr. at 1551 (Nettles-Hawkins). Jennings further stated that the defendant provided Kitchin with HUD funding documents. Tr. 1524-25 (Jennings).

As defendant tacitly concedes, this evidence is unrefuted, and

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[18] Kitchin also obtained defendant's assistance with regard to the Woodcrest Retirement Center and other matters. Tr. 1442 (Kitchin).

clearly should go to the jury. But while it is perhaps more blatant than the conspiracies set out in Counts One and Two, the Kitchin conspiracy is simply another variation on the same theme. In each case, defendant privately agreed to take official actions where she had a personal interest; and in each instance, she acted in a manner that subverted the fair and open process she publicly described. The proof establishes that these are all classic §371 conspiracies, and as such they must go to the jury.

CONCLUSION

For the foregoing reasons, defendant's motion for judgment of acquittal should be denied.

Respectfully submitted,

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