UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Criminal No. 92-181-01
vs.	Washington, D.C.
DEBORAH GORE DEAN,	February 14, 1994
Defendant.	9:00 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

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(Pages 1 - 32)

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7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

P R O C E E D I N G S

MR. WEHNER: Good morning, Your Honor.

THE COURT: Good morning, counsel.

THE CLERK: Criminal No. 92-181, United States of America v. Deborah Gore Dean. Mr. Bruce Swartz and Claudia Flynn for the plaintiff, Mr. Stephen Wehner for the defendant.

THE COURT: All right, I asked the parties to come in today, there have been pending motions for a new trial under Federal Rule of Criminal Procedure 33 and a motion for judgment of acquittal as well under Rule 29(c) and (d), to discuss those briefly with counsel and make a ruling on those motions. The Court has had an opportunity to review the massive filings that have come in and has questions about a couple of others and is prepared to rule on these matters. I had some concerns regarding certain evidentiary issues and procedures, but let me go to the issues.

All right, what I'm going to do is take up, I'm going to make some rulings from the bench as to certain of these matters, and I have some questions about others. First, as to the motion for judgment of acquittal, the defendant raised the issue about the statute of limitations, that counts 1 through 4 would be barred by the statute of limitations.

The Court is going to overrule that motion for judgment of acquittal on the basis the statute of limitations bar this on two grounds. Not only is it the timeliness issue,

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

that they've been waived by failure to properly challenge these, but the counts were brought within the time frame of the statute of limitations; that is, as to counts 1 and 2, overt acts done by the defendant or the co-conspirators, it seems to the Court it's timely.

The only difficulty I have with the government's theory is I do not accept the theory that the conspiracy is ongoing because their rehab funds continued to be paid out on a monthly basis to projects that received awards as a result of the conspiracy. I think that theory would lend itself to bringing prosecutions 15 or 20 years later in this type of situation. I don't believe that that's in accordance with the case law.

However, excepting that from the consideration, there still are other acts committed by the co-conspirators or the defendant within the limitations period, including defendant's testimony before the Senate Banking Committee, which could certainly be considered, if the jury accepted the government's position as they did, that her testimony was meant to further conceal the funding apparatus that was in effect during the defendant's tenure at the department.

The same is true for count 2 as to other activities that occurred as there were in count 1 of codefendants' payments made to other co-conspirators as a result of the funding awards that continued over a period of time. Mr. Nunn is an example

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

the government uses, and there are others. And I find no affirmative evidence that defendant withdrew from any such conspiracy even if she was no longer at the agency at the time frame in question for the consideration of the statute of limitations.

Count 2, as I said, follows on the same parameters. I would not agree with the government, as I said, I do not agree that the funds being awarded for a 15-year period, being continued to be paid out, that the statute of limitations would be extended during that entire 15-year period, but excepting that, there were other acts taken by the co-conspirators or the defendant that would bring count 2 within the limitations period.

Not only was there Senate testimony; there were meetings with Mr. Sankin and Mr. Shelby, payments to the alleged co-conspirators Sankin and Broussard, all paid in a time frame that would bring this within the statute of limitations.

Counts 3 and 4 are likewise not barred by the statute of limitations. That had been already considered. I see no difference than I previously had considered if the Kitchin check was deposited May 5, 1987, and in any event, the defendant also, the testimony that she gave concerning these matters and Kitchin's receipt of the monies put it within the statute of limitations.

Again, there is also a question now of raising this

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

issue untimely. It had been raised previously, but there was a new ground added at this juncture that I think is late.

The other areas of the motion for judgment of acquittal, as to the sufficiency of the evidence to permit the jury to find the defendant guilty of the conspiracy counts or the perjury and concealment counts, and the Court's original decision in that I reviewed at length, I've gone through the materials submitted, over several hundred pages of materials and references to the record, and as I had remarked, I believe, when the case was originally before me on the motions for judgment of acquittal, while not enamored of the government's theories of this conspiracy and some of the perjury counts, I believe that there was sufficient evidence, viewing it in the light most favorable to the government and giving the full play to the jury to determine the issues of credibility, it's not for the Court.

Weighing the evidence and drawing a justifiable inference of fact, the standard is met here that there was sufficient evidence to permit a reasonable jury to conclude the defendant was guilty as charged in the conspiracies and committed the perjury and concealment when questioned by the Senate about her actions. It is evident to me that looking at the evidence independently, not just from one viewpoint, that the jury could have drawn the conclusions it did, and I could not say that no juror could not have possibly concluded that defendant was responsible for these actions she took.

7/93

PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

The government had its concerns originally and had voiced them previously, but viewing again the evidence, as I said I must, I cannot find a reasonable jury must necessarily retain a reasonable doubt on the evidence presented. So for those reasons, the Court is going to deny the motion of the defendant for judgment of acquittal.

As to the charges for the three separate conspiracies based upon the assessment of the evidence, despite defendant's views and testimony, I think that the jury could make its own conclusions, as it did, based upon the evidence presented, and the same is true as to the perjury and concealment of gratuity counts. Again, I think the evidence was for the jury to consider. So the judgment of acquittal motions are denied in full.

As to the new trial motion, I did have a couple of questions on that I'd like to ask the Independent Counsel. I know that trial counsel are no longer available, which would have been a help perhaps, a couple of questions on a couple of issues on that. Mr. Swartz is going to handle it?

MR. SWARTZ: Yes, Your Honor.

THE COURT: All right, thank you. I'm not going to go through some of the matters that have been raised, because many issues have been raised. I was concerned on a couple of areas. One was on the Sankin receipts. Let me look at your, I think it's your opposition.

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

As I understand it, that the receipts were never reviewed with Mr. Sankin prior to putting him on the stand, because the government felt he was hostile, so that the government put on a witness it had not interviewed as to these receipts and indicated through its questioning the receipts were tied to the defendant while actually not knowing that. Is that true?

MR. SWARTZ: Well, Your Honor, I think that the government's position was that the receipts on their face, certainly the majority of the receipts were tied to the defendant by their, by their description. It was also the government's position that Sankin as a hostile witness was likely to, as he in fact did say, that he didn't remember whether all the receipts related.

Nonetheless, it was the government's position that given the receipts, it was proper to introduce them through Mr. Sankin, particularly because as --

THE COURT: Well, can you justify as a prosecutor at any time putting a witness on a stand and introducing documents that are put in for the purpose of identifying the defendant's involvement with some operation, illegal operation, without ever having asked the witness if they do or not or if they represent that or not?

MR. SWARTZ: Well, Your Honor, I think Mr. Sankin's, I think Mr. Sankin's position was that he could not recall all of

the, the particular events of the, the receipts in question, and I believe that it was in terms of his -- for instance, on the one receipt that the government was aware did not involve Ms. Dean, the government did, in fact, I mean, when introducing the document, the receipt, put before the jury that the receipt did not involve Ms. Dean, and it was only after that time, because of the amount of time consumed, that the government entered the documents en masse. But I think it was, it was clear from the face of the majority of the receipts that they were identified as defendant Dean's.

And beyond that, of course, the defendant was free to cross-examine him as to whether or not these particular receipts related to her. It was defendant's position, of course, that they did not, that she could establish they did not from her calendars or other, other purposes.

But particularly in light of the Court's options that were given to Ms. Dean in terms of having the evidence stricken or being permitted to cross-examine on the receipts, it's the government's position that the receipts were properly before the jury. She elected to cross-examine on those receipts and did so. In fact, we believe that if the receipts were as damaging to the government's case as Ms. Dean suggests, then she did take the proper election.

THE COURT: It shouldn't be for the Court, and that's one of the problems I have in this new trial motion going

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

through it, it constantly goes back to the fact, well, the Court corrected the error. I think there's numerous occasions where that had to be done, and I wonder about the cumulative effect of saying, "Well, the Judge took care of it, he told the jury to disregard it, or he told the defendant he had his option to do this or that to try to cure this problem that arose because we put on a witness whom we hadn't talked to and didn't know if these receipts really tied into the defendant or not but still put them all in as if they did, and then later when he said he wasn't sure what they meant, we told the Court, 'Well, you can do something to cure that.'" That's concerning to me, particularly the cumulative effect of it all.

Let me move to the next issue then, the issue as to Mr. Shelby's testimony and whether because he was a government witness, that it was then fair to say he shouldn't be believed as to her statements that he made when you had called him. This concerns Mitchell's involvements or not and the contact that HUD referred to in a memorandum and whether it was the defendant who fax'd him the rapid reply letter or whether it was DeBartolomeis or Hunter Cushing and that there was in the government's files evidence of what was said or that was at least elicited by the government that was not accurate and that was then left up to defendant to try to straighten that out.

MR. SWARTZ: Well, Your Honor, I think that the, the evidence there with regard to Mr. Shelby's involvement with

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

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 and Cushing, as opposed to the defendant on this particular project.

Finally, I think that it's also clear from the, the very letter that he sent to the defendant in September the day after he met with the defendant and with the, John Mitchell that the Park Towers project had been discussed with the defendant.

We believe that that certainly was enough to permit the jury to draw the conclusion that Dean was the contact that Mr. Shelby had with regard to this particular project. The government was not -- of course, does not vouch for Mr. Shelby just by calling him as, as its witness, and on this particular matter, we believe that there was more than sufficient evidence to permit the jury to conclude that he had had contact with the defendant about the project.

In fact, we -- in terms of the, the letter to her about the Miami Mod Rehab project, we think that it's basically an inescapable conclusion that that's what took place in this particular instance. But at a minimum, it was for the jury to

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

decide.

The contacts with DeBartolomeis and Cushing, particularly when the post-allocation waiver came into context, were matters to be argued to the jury, and indeed the defendant did argue them to the, to the jury.

THE COURT: What about the Russell Cartwright expense record that defendant raised and the accessibility to that?

MR. SWARTZ: Well, again, this is a situation in which a pattern exists of, in the particular case, Mr. Cartwright's receipt that indicates that he did entertain Deborah Gore Dean. Much as in the Sankin receipts or the Wilson receipts, defendant took the position that this was not an accurate reflection of what actually happened.

We believe that the government was entitled to put these documents -- or excuse me, that document was not put into evidence -- to cross-examine the defendant on this matter in light of her testimony regarding her statements to the Senate and her testimony about never ever taking meals. Defendant was free to argue, as she did, of course, that consistently across the board, individuals had falsely represented on their expense receipts that she was the recipient of these meals. We believe that the jury was appropriately allowed to decide whether or not that was a plausible explanation or not.

THE COURT: All right. Finally, let me ask you, the other concern I had was Mr. Demery and whether or not there were

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

really concerns as to Mr. Demery's testimony, when the government had the evidence they indicted him for perjury and had believed he had obviously committed perjury, like it believed Ms. Dean had, and then through a plea bargain, that wasn't pled to, but then he was allowed to testify and testified that he had never committed perjury, and there was apparently no bringing to the Court's attention that that was the situation, that he had this perjury indictment and had apparently discussed that with the prosecution.

MR. SWARTZ: Well, Your Honor, indeed Mr. Demery had been indicted for, for perjury. The defendant was aware not only of that fact and aware of it long before the trial but had been provided with the information that she now claims establishes that, in fact, there was perjury by Demery in connection with the Lantos hearings.

At the time of the trial, at the time that the questioning went forward, as we've argued in our papers, certainly there was no attempt by defendant to link up his testimony, that is, his particular testimony in the Senate that she now claims is perjurious, with the questioning of Demery.

We've suggested in our, in our papers any number of reasons why the defendant, having broached the issue, may not have decided to pursue it further, but in a number of strategic considerations why that may have been from her point of view the best approach to take, but the fact of the matter is that the

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

evidence that she now claims, that she now asserts establishes the perjury was produced by the government and was in her possession to cross-examine.

In fact, in her reply brief on this matter, the defendant suggests that she did, as far as the defendant was concerned, they had cross-examined him about his, his credibility. They said they made their best attempt to do that.

But the government had no interest in hiding nor did it hide any indication of what Mr. Demery's testimony had been or what his subsequent statements to the Office of Independent Counsel were. To the contrary, those materials had been presented.

This is simply not a case where it can be said that the government wanted to protect its witness. We, in fact, introduced the fact that he had obstructed justice and had been, had pled guilty and been convicted of obstructing justice by submitting a false document to the grand jury.

Again, the fact that those matters were not pursued, neither his past record nor the particulars of the matters that the defendant now claims constitute the perjury, we believe casts serious doubt on either the importance it played or defendant's own perception of what was being asked of the defendant -- excuse me, of Demery at that time. Indeed, as you know, this motion, this particular issue was not raised until the post-trial Rule 29 motions, and there's been no explanation

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

by defendant as to why if this was a critical issue, it was not raised before that time.

In short, we believe the defendant had ample opportunity to cross-examine Demery, did cross-examine Demery, and had all the materials had she wished to pursue that particular matter, but for any number of reasons, as we've suggested, we believe that the defendant may have felt it better not to press this particular issue with Demery.

THE COURT: I was concerned about Mr. Demery in that I think his credibility was an issue in the case and concerned about documents which were available in the government's possession and knowledge they had that they as prosecutors didn't bring at least to the Court's attention. I'll find out from the defendant what he knew about it.

MR. SWARTZ: Your Honor, if I may add one point on Mr. Demery's testimony, it was testimony that was largely corroborated by other testimony as well, including testimony by defendant's own witness, Mr. Dorsy. We believe that given the testimony that was, that came in about how the Mod Rehab program was being administered during this time period, given Kitchin's testimony and Mr. Jennings' testimony and Sherrill Nettles-Hawkins' testimony about defendant's contacts particularly with Lou Kitchin, that in any event, the testimony that's now portrayed by defendant as critical was, as the very time that was allocated to it indicates, not critical in terms of the

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

overall context of the trial.

THE COURT: All right, thank you, Mr. Swartz.

MR. SWARTZ: Thank you.

THE COURT: Mr. Wehner, let me ask you a couple of questions on these areas, on this new trial motion. Explain to me the Russell Cartwright receipt concern that you have as to what difference that would make or not about anything of this one receipt.

MR. WEHNER: Here's the difference, Judge: The trial that went on in front of the Court for over -- or approximately two months should have been a search for the truth as to what happened with Ms. Dean's involvement at HUD, and if you take each of these incidents where we were forced to defend against facts that the Independent Counsel knew had no basis and you add them together and you take the cumulative effect, Ms. Dean was denied the fair opportunity to present to the jury her defense, frankly, without the color of the garbage that was thrown in by the Independent Counsel, because these Sankin receipts were garbage. An additional Cartwright receipt is garbage.

The evidence that they put on that we had to dispute because they failed in their duty to inquire of their witnesses to not put on perjured testimony is what turned the trial into not a search for the truth, but a name-calling contest, where the Independent Counsel had to resort to name calling in their closing and in their rebuttal over objection because they

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

couldn't respond to the facts.

Your Honor recognized during the trial that some of these witnesses that the Independent Counsel put on were incredible, and now we're in the position now of trying to go back through the record and show Your Honor not only did we prove that they were incredible at the time and show the jury that they were incredible, but secondly, that each -- that there are additional instances where the Independent Counsel had the evidence that led them to know that their witnesses weren't credible but did not disclose it either under the terms of Brady or Giglio and did not take their obligation to the Court or to the jury seriously enough to correct the testimony that came out of their witness's mouth that they knew was incorrect.

And I point the Court back to, for example, Mr. Sankin. This -- we could sit here today and not know that Mr. Sankin had lied about those receipts on his direct but for the fact that he said on cross that he had told the Independent Counsel that those receipts did not apply to Ms. Dean. The Independent Counsel didn't tell you that. And frankly, Judge, it was fortuitous, as opposed to any great cross examination, that he said that on the witness stand.

That's not a situation of a witness being hostile. That's a situation of the Independent Counsel knowingly putting forth evidence that has "D.G.D." on a receipt and throwing the

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

garbage up against the wall and seeing what sticks.

And we had to try the case on their terms and on the facts that they wished were true or that they hoped were true, and that's not effective advocacy, Judge, on the part of the government. Their obligation is more than that. At least their obligation is to try it on facts that exist, that they can in good faith state exist, that they can in good faith take a position exist, as opposed to forcing us to fight a battle against evidence that had no place being in the courtroom in the first place.

I don't think you can take the Russell -- it's a problem that exists in a lot of cases, Judge, but it exists more so in a case where the parameters of a conspiracy to defraud are so broadly defined that when you start throwing in evidence that can, that can unfairly prejudice the jury and yet has no factual basis, that when you're dealing with the amorphous conspiracy to defraud theory, it is possible -- and I submit it is not only possible, but it's what happened in this case -- that you can take a lunch that is innocent and you can take a governmental contract award and you put the two together, and then you say, well, there were a lot more lunches, and then you say, well, and look how the limousine was misused, which it wasn't and which the evidence showed it wasn't and which Mr. O'Neill argued that there were many, many instances of it and there weren't, and then you called the defendant's testimony attempting to explain

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

what she did and when she did it and you call it garbage, you can come up with a conspiracy to defraud based upon no facts, and that was the problem in this case in terms of being forced to defend it.

It's one thing to defend against a $300 teacup, Judge. Now I'll accept that. It's another thing to defend against a series of lunches and dinners that never took place and a $300 teacup That's a problem for the defense, and it's a problem that is brought on not by ineptitude; it's a problem that's brought object on intentionally.

Time after time after time, from the day we walked in to Judge Gesell in this case in the arraignment, we said, "Judge Gesell, we would like to see the Brady material," and the Independent Counsel stood there, and there's a transcript of the record in which Joann Harris stood in front of Judge Gesell and said, "I don't know of any. I don't know of any."

And Judge Gesell looks at us and says, "What do you want me to do? They don't know of any."

And then we get in the middle of a trial, and it's even worse than a Brady problem. They don't recognize it when the trial is ongoing. And we point out in our moving papers exactly what they had and when they knew it. And yet time after time, Judge Gesell, who said, "Well, they don't have any," and Your Honor said, "I'm troubled by this, I'm troubled by this, I'm troubled by this."

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

Yes, Judge, I submit you should be troubled by this, because there is a pattern and there is a practice of intentionally putting evidence on the stand that the Independent Counsel knew wasn't true. There's a pattern and practice of attempting to conceal from the defense items that are relevant to the defense.

And, Judge, do you know what the problem is? The problem is that after you win a case, you can come in here and you can say, "It doesn't matter, it doesn't matter, it doesn't matter, it doesn't matter, it doesn't matter. The jury would have returned the same verdict anyway. There's other evidence. They clearly didn't disbelieve that -- they clearly didn't believe the defendant. Taken in the light most favorable to the government, it all adds up against the defense."

Well, Judge, that's really true, but that presupposes all those -- that presupposes that the government complied with their obligations during the trial. It presupposes that Brady was complied with and Giglio was complied with and the government didn't put on testimony that they had every reason to believe and, in fact, did know was wrong.

It presupposes that the process was fair, as the courts have ruled before, before you get to the harmless error analysis. And even the Supreme Court, in terms of the way they have remade the criminal justice system in terms of constitutional testimony, recognizes that.

7/93

PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

We don't want a perfect trial, Judge, but would have liked to have had a fair one. And frankly, Judge, having to respond to evidence that shouldn't have been put on the stand in the first place made this case, given the amorphous nature of the conspiracy to defraud, much more difficult to defend than if the case would have, A, been limited and the government's evidence would have been limited to facts they had reason to believe were true, and B, they would have made -- I'm sorry, Judge, I'll say it one more time: If they would have given us the Brady material when Judge Gesell wanted them to give us the Brady material, that cross -- the cross examination of those witnesses would have been ten times as effective, because we would have had time. Your Honor knows we were getting Brady information the night before the witness testified.

Now you can play Jencks by the rules, Judge. The rules say you're not entitled to Jencks until after the witness testifies, and that's what the law is, and I'll accept that. That's not what the law says as to Brady and Giglio. The law says when you know about it, you have to turn it over.

And Your Honor has the letter in the record that tells them, that tells the Court on the record when they knew this Brady information existed. It's years ago. They knew it when they told Judge Gesell they didn't know of any. It's wrong.

And if you want to talk about garbage, Judge, and you want to throw those terms around, that prosecution's conduct was

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

garbage in that regard. I wouldn't get away with that as a defense attorney: "Judge, I don't know of any," and then walking in and turning it over during the trial? You expect more from individual attorneys in your court and certainly more from an independent counsel, and it's professionally wrong.

In a case like this, where you have an amorphous indictment and you have perjury charges and you have statements like "garbage" in a closing and you have the incompatible with truth-finding conduct by the Independent Counsel and you have a jury, frankly, that's invited, invited and asked to return a verdict on grounds not properly in front of them, I think that the interests of justice, as the rules provide, demand a new trial.

THE COURT: All right, thank you, Mr. Wehner.

Mr. Swartz, do you want to respond briefly?

MR. SWARTZ: At the outset, let me state that in the strongest possible terms, although without the use of rhetoric, the government strongly disagrees with the suggestion that there was any pattern here or any intentional conduct by the government either to conceal evidence or to put on evidence that it knew was false.

To the contrary, we believe that the practice of the government in this particular case in terms of the extensive discovery provided defendant, in terms of the early Jencks production, as Your Honor knows, far before the time required

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

under the statute, in terms of the early Giglio production, that the government's conduct here was well beyond that certainly required and, as the Court recognized at one point in the trial, it was a trial that was being conducted in exemplary manner. The repeated accusations, which we believe to be unfounded, against the ethical standards of the prosecutors in this case, we think, have no basis in fact.

Putting that to one side, I think that all of defendant's arguments, all of the arguments they've forwarded in the rule 33 motion and again here today are really arguments that go to the margins of what was proved in this lengthy case. The jury had before it numerous witnesses, it had numerous transactions, and it had extensive evidence regarding those transactions.

Even as to the particular matters that have been the focus of today's argument and the rule 33 motion, there was more than sufficient evidence even from those particular witnesses that would justify the jury in concluding the defendant was guilty beyond a reasonable doubt.

For instance, with regard to Sankin, much has been made of the receipts, but in fact, the receipts were a relatively minor part of what Sankin did for the Dean and Gore family. As his testimony makes clear, he was, as the defendant herself put it, on the family payroll, and the thrust of the government's case always was that the impropriety in particular

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

and the illegality arose from that fact, that he was, in essence, their family employee.

He was managing their apartment. He engaged in obtaining the rent waiver for them for the Stanley Arms transaction that was worth a tremendous amount of money to the Dean family, and he provided other services to the defendant. The receipts were minor. If the government had been interested in making a case against defendant for the illegal receipt of meals from various consultants or others that she did business with, this would have been a far different case.

Similarly, the testimony about Shelby -- or the testimony of Shelby, the issue about whether the defendant was the contact of this particular project is again at the margin of what Mr. Shelby's testimony was. It is clear from his testimony as well as all of the other evidence that defendant took steps to aid Mr. Shelby's receipt of HUD funds. That's made clear not only from his testimony but from Pam Patenaude's testimony and from the testimony of Sankin and others.

Again, the notion that on this particular project, the Park Towers project, that it's not clear whether defendant was his contact and that it would have made a difference to the, to the defense to be able to elicit that, although in fact they did elicit that, when all the evidence even on that particular account, on that particular project was that notwithstanding Shelby's ambiguity on this matter, that he had contact with

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

Dean, that his contact at HUD was a, was a women, and that, of course, Mitchell was paid on the project.

But all of these matters, no matter how the rhetoric is directed towards them today, are not the matters that were at the heart of this trial. The defendant has not addressed the numerous witnesses who testified in basically consistent fashion about the defendant's own actions with regard to these particular projects and with regard to the benefits that she received.

We believe that the charges are unwarranted of professional or prosecutorial misconduct, but in any event, we believe there could be no showing here of the kind of prejudice that would warrant a new trial.

THE COURT: All right, thank you.

MR. SWARTZ: Thank you.

THE COURT: The Court is going to do as follows in this matter: The Court does have its concerns, as it's voiced them previously, over some of the conduct of the Independent Counsel in the case and continually made rulings during the trial, recognizing it was a long, multiple-week trial, so there's obviously many witnesses that testified, but did have to make rulings during the trial at times concerning the failure of the Independent Counsel to be forthcoming as to its evidence in its files either that would fall under Brady or would be Giglio material, and being produced shortly before a witness

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

testified, after having asked for it two years or so earlier, is really not a complete answer. As everyone recognizes, the defendant is entitled to due process in the trial.

There was a witness we haven't discussed except by reference at one point, I think, by defense counsel, Mr. Reynolds testified, who originally was not going to testify and then was called eventually concerning the limousine trafficking, and again perhaps it's for the jury, but I think the government as well as the defendant would agree that they all felt Mr. Reynolds was not a believable witness, and that was my impression why he originally was not going to be called as to his claims of transportation of Ms. Dean around, and I think the calendars and other evidence in the government's possession would suggest that his recollection was not correct, but he was put forward as having a recollection that was argued as to his testimony on limousine use by the defendant.

Mr. Sankin was put on the stand by the government, who has admitted that they did not interview him as to the accuracies of the receipts and his knowledge about them and his memory of them at the time he testified. That was not brought out during the testimony but only volunteered by Mr. Sankin later the next day, or when he finished his direct and was on cross, and he indicated at that time he had already told the government the night before that he couldn't recall anything about those documents, and that was not brought to the Court's

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

attention as it should have by the independent prosecutor.

Mr. Demery obviously had substantial issues as to his credibility and his perjury and what the government knew about that and believed they knew about it, and again, I do not think that that was timely at least brought out for the defendant's benefit. What, there's hundreds of thousands of documents, and to say that that's sufficient I do not think answers the requirements upon the independent prosecutor.

Mr. Shelby, I think, is somewhat of a collateral matter as to that one document we're discussing, but again standing alone is a concern that that was not further reviewed with the Court at least as well as the counsel for the defendant as to his deliverance or acceptance of the receipt of this document and who his contact was at HUD.

And the receipt by Mr. Cartwright, again, concerns the Court, because what we're talking about, I think, is this overall impression one gets of Ms. Dean that the prosecutor sought to convey as a person of untruthfulness and of doubtful character, who would engage in these kind of activities which may not have been directly related to the charges against her in some instances or that the government had information or could have had the information had they asked the questions of the witnesses beforehand that the documents, whatever they were using, were actually not accurate that they wished to use against her and did at times, and I don't understand that

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

approach.

I think if it had been an assistant United States attorney who had done that before the Court in an everyday case, had put a witness on the stand and asked him to identify this group of documents, they all related to meetings with the defendant, and then had been told later by the witness that that was not accurate, I would expect every assistant I've ever had here would have brought that immediately to my attention and the defense's attention, and that was not done, and again, I don't understand that.

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

There is a report recently of an Independent Counsel

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

before Judge Gesell in the North case, where he had to hold a hearing and put the counsel on the stand because of certain matters that had been represented that were not accurate, and after a hearing, he did not take any further steps except to criticize the Independent Counsel for their actions.

The real issue for the Court is whether or not the cumulative effect of multiple concerns and multiple corrections the Court gave the jury leads to an unfair trial for the defendant. It was a multiple-week trial. There were many, many witnesses and immense documentary evidence.

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

The jury was selected, the Court's recollection is, with very few strikes exercised by the Independent Counsel. The panel was called they were satisfied with. The defendant had a jury selection expert consulting as well as herself and her counsel, obviously, and exercised all their strikes. So the jury was one that there had been a fairly close review of by defense counsel. I believe the government only exercised a couple of strikes, as I recall, in the selection of the jury.

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

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

On the other hand, there were multiple other witnesses that testified as to defendant's involvement, and the defendant herself testified at length as to her noninvolvement in these matters in a criminal sense, and the jury concluded against her.

There was one other issue I didn't discuss with counsel, but I'd just note for the record that another instance where the evidence was challenged by the defendant was Agent Cain's testimony. The defendant had raised the issue that Mr. Cain couldn't have been where he said he was, etc., and that's been briefed by both sides, and defendant was going to submit a supplemental affidavit that's never been filed, so I take it her recollection then was mistaken as to Agent Cain as to the situation in Los Angeles at this party and that what she said originally was not accurate.

The Court is going to do as follows in this matter: Recognizing its obligations to ensure the defendant has a fair

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

trial and is not prejudiced by any lapses by the prosecution in their handling of the case, the Court is going to deny the motion for a new trial. While it had concerns it's expressed and recognizes the difficulty defendant had in defending an amorphous case that was not helped by the approach of the prosecution particularly -- I don't think I've ever seen the prosecution put on a witness whom they didn't interview as to particular documents they want to tie with a defendant because they say the witness may be hostile. Then you don't put the witness on, or you interview the witness before you put him on as to what these documents mean and what his recollection is. That's compounded by the witness telling the prosecution after he testifies he really doesn't remember anything about those documents, and that's not revealed.

That gives great concern to the Court, but I don't think that that tells the whole story, that either alone or in conjunction with other claims of Brady violations or failure to be forthcoming to the Court, because of the way the Court handled the matters, giving the defendant the option how they wished to go through that, how it instructed the jury at times, as it had to, I believe that any prejudice was met adequately by the Court's instructions and accommodations to counsel for the defendant to appropriately rebut evidence that may have been produced by the government without a full exploration as to its accuracy.

7/93
PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A

The Court is going to deny the motions for a new trial both upon the government's alleged, on grounds advanced by the defendant, failures of proof or abuses by the government. Many of the witnesses the government was required to call were adverse witnesses. They were either unindicted co-conspirators or individuals who had been given immunity and required to testify or were less than cooperating witnesses, and they had to use the witnesses they had, which is typical, and they have to then rely upon the jury in seeing who they're going to believe in the case.

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

It's apparent to the Court there was sufficient evidence, as I said before, on the counts to go to the jury, and I do not believe there was any overwhelming failure by the government in its zealous efforts in this case that resulted in such prejudice to the defendant as would require a new trial. So the Court is going to deny the motions for the new trial as well as the motion for judgment of acquittal, as I've previously

7/93
PENGAD CO. BAYONNE, NJ 07002 - LASER BOND-A

ruled.

All right, we changed the dates on the sentencing because of the request of the defendant of a brief continuance due to late filing of the presentence report, I believe, and at least some slippage in time. There's also been a lot of slippage because of the weather. The new dates I take it you've gotten notice of, and you're ready to go on those?

MR. WEHNER: Yes. We received those by fax from your office.

THE COURT: All right. You've got those, too?

MR. SWARTZ: Yes, Your Honor.

THE COURT: All right. I'll stand in recess on this matter.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

Anneliese J. Thomson

7/93

PENGAD CO., BAYONNE, NJ 07002 - LASER BOND-A