

TESTIMONY OF THOMAS T. DEMERY

Summary: Appearing pursuant to a cooperation agreement with the Office of Independent Counsel, former Assistant Secretary for Housing Thomas T. Demery explicitly and repeatedly testified on cross-examination that he had not lied when he previously testified under oath before Congress. The OIC knew that Demery was committing perjury when he denied having lied to Congress. The OIC had previously indicted Demery for lying to Congress when he denied knowing that certain developers were involved with the moderate rehabilitation program. The OIC and Demery reached a plea agreement that did not involve a perjury charge, but in the course of negotiating that agreement, Demery had admitted that he had known that the developers were involved in the moderate rehabilitation program.

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

Dean raised this issue in her motion for a new trial. In defending its failure to reveal Demery's perjury, the OIC OIC made a number of evasive arguments, while never acknowledging that it knew Demery had lied during his testimony.

In ruling on Dean's motion for a new trial, the court accepted that the OIC knew that Demery had previously lied to Congress, but treated the matter as if it were a Brady issue, and did not address the implications of Demery's further perjury in this case.

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Addendum (January 1995)

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Attachments:

1. Demery's November 1987 list of pending moderate rehabilitation requests matched with names of persons supporting the requests
2. Demery's wallet-sized phone listing
3. Dade County Proposal Status Fact Sheet
4. February 13, 1987 letter from Alvin D. Moore, Director, Metropolitan Dade County Department of Housing and Urban Development, to Samuel R. Pierce, Jr.
5. June 26, 1987 memorandum from Abbie Wiest, Special Assistant to the Deputy Assistant Secretary for Multifamily Housing, to Thomas T. Demery, Assistant Secretary for Housing
6. July 16, 1987 memorandum from Alvin D. Moore to Mario Marti
7. Handwritten list of moderate rehabilitation selections prepared by Dean at meeting with Demery prior to April 7, 1987 selection committee meeting

Principal References

1. Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F. R. Crim. P. 29(c) and (d) and Motion for New Trial Pursuant to F. R. Crim. P. 33 at 134-44 (Nov. 30, 1993) ("Dean Mem.")
2. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 at 60-69 (Dec. 21, 1993) ("Gov. Opp.")
3. Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial at 60-69 (Jan. 7, 1994) ("Dean Reply")
4. Transcript of Hearing at 11-15, 26 (Feb. 14, 1994)
5. Abuses, Favoritism, and Mismanagement in HUD Programs, Hearings Before the Employment and Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong., 1st Sess. ("Lantos Hearings")

6. HUD Investigation, Hearings Before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, 101st Cong., 1st Sess. ("Banking Hearings")
7. Abuse and Mismanagement of at HUD, Twenty-Fourth Report by the Committee on Government Operations (House Report 101-977), 101st Cong., 2d Sess. ("Lantos Final Report").

A. Background

Thomas T. Demery was HUD's Assistant Secretary for Housing-Federal Housing Commissioner from October 1986 until January 1989. The HUD Inspector General's report that originally led to the Congressional investigation of HUD's moderate rehabilitation program bore Demery's name in the title, and was principally focused on charges that Demery allowed his moderate rehabilitation funding decisions to be influenced by contributions to a charity that he supported called F.O.O.D. for Africa. Demery appeared voluntarily before two subcommittees insisting that he did not know who had contributed to F.O.O.D. or the amount of their contributions and that he did not know the identity of developers and consultants who were benefiting from his decisions. Lantos Hearings, Pt. 1, at 55-56, 61-62, 65-66; Banking Hearings at 88. With regard to a group of Colorado developers/consultants called the Winn Group, which had been particularly successful in securing moderate rehabilitation funding and which also had been responsible for large contributions to F.O.O.D. for Africa, Demery maintained that he did not even know that the group, and its principals Philip Winn and Philip Abrams, were involved in the moderate rehabilitation program. Lantos Hearings, Pt. 5, at 338-43; Banking Hearings at 99.¹

Demery maintained that he had actually been responsible for reforming the moderate rehabilitation selection process, which he was able to do only after Dean had departed HUD, writing to one congressman, "by the fall of 1987, after Ms. Dean had left HUD, true reform to the selection process could begin and did so." Banking Hearings at 1256. Demery was able to shift the focus on the congressional investigation to Dean and Pierce, and when the Lantos subcommittee issued a report of its investigation, though faulting Demery for apparent instances of favoritism, the report credited Demery with improving the selection process and noted that he had been unfairly singled out in the HUD Inspector General's Report. Lantos Final Report at 4-5, 88.

Yet, it turned out that much of what Demery had told Congress was not true. For example, not only was Demery aware of the identity of developers and consultants who were benefiting from his decisions, he kept lists that matched moderate rehabilitation requests from particular housing authorities with the names of developers and consultants who were promoting the requests. Also, it was clear that Demery knew that

¹ Demery also stated that none of the former HUD officials identified in the Inspector General's report as developers and consultants had talked to him about moderate rehabilitation. Lantos Hearings, Pt. 1, at 53. Winn and Abrams were two of the former HUD officials identified in the report.

members of the Winn Group were involved with the moderate rehabilitation program, for their names had been matched with moderate rehabilitation funding requests on these lists.

On a list of pending requests apparently created at the beginning of November 1987, Philip Winn's name was matched with a 158-unit request for Richland, Washington, and a 150-unit request for Victoria, Texas. Lance Wilson, another Winn Group member, would be matched with a 150-unit request for "Wyoming PHA."²

The placement of Winn's name on the November 1987 list was the result of a breakfast meeting between Demery and Winn on September 20, 1987, where Winn requested that Demery fund the projects for Silvio DeBartolomeis. DeBartolomeis, who had been acting Assistant Secretary for Housing at the time of Demery's appointment and had stayed on to work with Demery until December 1986, had then gone to work for Winn.³ When Demery would falsely state to investigators of the HUD Inspector General's office that he had paid DeBartolomeis \$500 in cash for the use of Philip Winn's condominium over the 1987 Christmas holidays, DeBartolomeis would support that story. Banking Hearings at 1044, 941.⁴ When Demery testified before Congress that as Acting Assistant Secretary for Housing, DeBartolomeis had been so disturbed by the way the moderate rehabilitation program was being managed that he left town rather than sign funding documents (Lantos Hearings, Pt. 1, at 122-23; Banking

² The list came to light when, in late October 1989, HUD released copies of the documents on Demery's wordprocessing diskettes. The list, which was reproduced in Lantos Hearings, Pt. 5, at 339-40, is appended hereto as Attachment 1.

³ Demery had also denied that he knew that DeBartolomeis was in the moderate rehabilitation program. Lantos Hearings, Pt. 1, at 122-23.

⁴ Ultimately, Demery, DeBartolomeis, and Winn would all plead guilty to crimes related to Winn's providing the condominium to Demery for free and to the making of false statements and the creating a false receipt to conceal the fact that Demery had not paid for use of the condominium.

Hearings at 61), DeBartolomeis would support that story as well. Lantos Hearings at 417-18.

The day after his breakfast meeting with Demery, Winn, who had submitted a moderate rehabilitation proposal to the Richland Housing Authority on September 18, 1987, would enter into a purchase agreement for two apartment building totaling 158 units, and in early 1988, Demery would send 158 units to the Richland Housing Authority. Id. at 968. The Richland funding would receive considerable attention in the HUD Inspector General's report (id. at 576, 963-72, 1044), though Demery would tell IG investigators that the funding had nothing to do with the Winn Group. Id. at 1044.

Victoria, Texas would be funded in the summer of 1988, with the units going to a Winn Group project owned by Raymond T. Baker.

In February 1988, pursuant to Demery's direction, HUD headquarters would allocate 145 units of moderate rehabilitation subsidy to HUD's Denver Regional Office for use in Casper, Wyoming. The Casper funding received great attention in the HUD Inspector General's Report,⁵ in The Washington Post,⁶ and in the Lantos Hearings,⁷ due to apparent irregularities in HUD headquarter's initial selection of Casper to receive the funds and to questions raised concerning the decision of the Denver Regional Office to release the funds to Casper in May 1988, despite strong objections from HUD staffers in the Denver Office. It was during the period when the HUD Regional economist was strongly objecting to the funding that Winn Group member J. Michael Queenan would sponsor a F.O.O.D. fundraiser in Denver in April 28, 1988, which would be attended by Demery, as well as Winn Group members Wilson, Winn, Abrams, DeBartolomeis, Ronnie Mahon, and Raymond Baker, and the Executive Director of the Casper Housing Authority. Banking Hearings at 580, 942, 1006-07, 1142-43, 1150, 1079-80.

⁵ Banking Hearings at 1006-08, 1017, 1149-50.

⁶ Anderson, J. W., "Developers Contributed to HUD Official's Charity," The Washington Post, July 9, 1989, at A1.

⁷ Lantos Hearings, Pt. 4, at 544-73, Pt. 5, at 363-67; Lantos Final Report at 96-98.

Queenan himself, in addition to paying over \$1400 in expenses, contributed \$35,000 in connection with the fundraiser. Banking Hearings at 1142, 1188, 1197. Despite Demery's claims under oath that he was unaware of who contributed to F.O.O.D. or the amounts of the contributions, he would later acknowledge that Queenan's check had been shown to him in a hotel room the evening of the Denver fundraiser.⁸ A week later, and three days after, Demery denied to HUD IG investigators that he knew the Winn Group was involved in the moderate rehabilitation program (Banking Hearings at 1043), Demery would write to Queenan, stating "I want to thank you from the bottom of my heart for including me in your dinner last week in Denver," and adding that "I hope you would think to include me in future opportunities."⁹

When the units were ultimately released to Casper, 128 of them would go to a Winn Group project in which Wilson would receive a 50 percent equity interest. Testifying before the Lantos subcommittee on October 13, 1989, Queenan would acknowledge that Wilson received the 50 percent interest because he (Wilson) had secured the units from HUD. Queenan would also testify that, while he (Queenan) did not know whom Wilson contacted to secure the units, Winn had told him that Wilson had contacted Dean. Queenan also testified that he assumed that what Winn had told him was true. Lantos Hearings, Pt. 4, at 571-73.

Yet, all events related to the Casper funding occurred beginning in the fall of 1987, months after Dean had resigned her position as Executive Assistant in July 1987. Though Dean remained at HUD as a consultant while awaiting consideration of her nomination to an Assistant Secretary position, even Demery acknowledged that she no longer had a role in the moderate rehabilitation program. As noted above, he had written to one Congressman that "by the fall of 1987, after Ms. Dean had left HUD, true reform to the selection process could begin and did so." In any event, a week after Queenan testified that Winn had told him that Wilson contacted Dean to secure the Casper funding, HUD released the contents of Demery's wordprocessing diskettes

⁸ Interview of Thomas T. Demery dated June 17, 1993, at 2 (Exhibit C to Deborah Gore Dean's Omnibus Motion (Feb. 8, 1994)).

⁹ Letter from Demery to Queenan found on fourth Demery diskette, Index page 4, Document 3.

showing that Demery had matched Wilson's name with the Wyoming request. When later confronted with the list, Demery would twice acknowledge that Wilson had contacted him about the request. Lantos Hearings, Pt. 5, at 364, 400.¹⁰

Demery was originally indicted on June 9, 1992, with the Indictment containing nine counts, none of which related to the Winn Group. On December 4, 1992, the Office of Independent Counsel ("OIC") secured a Superseding Indictment against Demery charging him with a total of 24 felony counts. Four of those counts related to false statements by Demery that he did not know that the Winn Group was involved in the moderate rehabilitation program. Two of those counts concerned statements made, not under oath, to investigators of the HUD Inspector General's office and representatives of the OIC. Two counts involved perjury as a result of the two statements made under oath before the Lantos subcommittee and the House Banking Committee. Dean Mem., Exh. TT.

Demery would eventually reach a plea agreement, executed on June 16, 1993, in which he pled guilty to one count of receiving an unlawful gratuity and one count of obstruction of justice. The false statement counts and the perjury counts relating to the denials of knowledge that Winn Group members were involved in the moderate rehabilitation program were among those counts dropped pursuant to the plea agreement.

¹⁰ The Lantos Subcommittee's Final Report would nevertheless state merely that "[i]n an interview with subcommittee staff on November 15, 1989, Demery stated that Wilson never discussed the project with him." Lantos Final Report at 98.

Apart from the documentary evidence of the falseness of those denials, however, on June 11, 1993, five days before Demery's counsel signed a formal plea agreement, and presumably following tentative agreement, Demery admitted to representatives of the OIC that he had known that principal members of the Winn Group (Philip Winn and Philip Abrams) were involved in the moderate rehabilitation business during the periods relevant to his statements.¹¹

B. Demery's Denial that He Had Lied to Congress

Demery was called as the government's last witness. His most significant testimony was to be that, in April 1987, Deborah Dean had brought to his attention a Dade County moderate rehabilitation request that would be an important element in Counts Three and Four of Dean's Superseding Indictment. At an April 7, 1987 meeting of the moderate rehabilitation selection committee composed of Dean, Demery, and HUD General Counsel J. Michael Dorsey, Dade County was selected to receive 203 moderate rehabilitation units. Those units would then go to two projects called Springwood and Cutlerwood, the developers of which (Jim Mitchell and Claude Dorsy) had retained the services of an Atlanta political consultant named Louis Kitchin. Kitchin received \$203,000 as a result of the funding. Count Three alleged that Dean had conspired with Kitchin to further the interests of persons Kitchin represented on several HUD matters, including the Dade County moderate rehabilitation funding in the Spring of 1987. Count Four alleged that Dean received a \$4,000 gratuity from Kitchin for official acts including those made in connection with the moderate rehabilitation program.

¹¹ Interview of Thomas T. Demery dated June 11, 1993, at 3, 5 (Dean Mem., Exh. UU).

There was documentary evidence that Demery was involved in promoting moderate rehabilitation requests for the benefit of Kitchin at least as early as the fall of 1987,¹² which Demery admitting to doing during cross-examination. Tr. 1911. Kitchin's telephone number appeared on a wallet-sized phone listing that contained numbers for Demery's 20 closest associates (Attachment 2¹³), though this particular phone listing had evidently been created at a later point in time.¹⁴ Kitchin also had acknowledged an intimate relationship with Demery's Executive Assistant, though that may have developed some time later. Tr. 1455-59. Claude Dorsy, one of the developers of the Springwood/Cutlerwood projects, testified that at some point in time, Kitchin indicated that he had been dealing with Demery. Tr. 1335-36.¹⁵ Dorsy also testified that Kitchin never mentioned Dean to him. Tr. 1337.

¹² Kitchin was matched with two pending moderate rehabilitation requests on a November 1987 list of 21 pending requests. See Attachment 1. The same month, Kitchin was matched with a selection of 52 units for Mobile, Alabama. OIC Microfiche No. GA75 2224 L.

¹³ Others on the list who were in various ways involved with questionable funding decisions by Demery included DeBartolomeis and Queenan, as well as Joseph A. Strauss, Maurice L. Barksdale, David M. Barrett, Alan S. Bird, Martin L. Artiano, Philip D. McCafferty, and Judith E. Siegel.

¹⁴ For example, Demery did not know Queenan in April 1987.

¹⁵ In late May 1986, Dorsy's firm entered into a consulting agreement whereby Kitchin would receive a \$10,000 per month retained to be offset against a fee of \$1,000

per unit for moderate rehabilitation funding Kitchin could secure for the firm. Gov. Exh. 207. At the time the agreement was executed, Kitchin led Dorsy to believe that he could secure 400 or 440 units in the next fiscal year. Tr. 1335. This agreement was entered into subsequent to the period when Dean had a role in the moderate rehabilitation selection process.

Demery's calendars showed the Kitchin visited Demery on January 29, 1987, two days after the developers of Springwood and Cutlerwood had submitted their proposal to the Dade County housing authority¹⁶ (though Kitchin also called on Dean that day). Kitchin testified that he probably discussed the Dade County units with Demery. Tr. 1460.¹⁷ Two weeks later, Dade County would send a letter request to Secretary Pierce, requesting 203 moderate rehabilitation units in the bedroom configuration matching the Springwood/Cutlerwood projects. The copy of the letter request that would be introduced at trial (Gov. Exh. 198, Attachment 4 hereto) contained the words "MOD REHAB file" at the top, then "Lou and file," and then, in Demery's handwriting, the word "Funded." Tr. 1922-23.¹⁸

Former HUD General Counsel J. Michael Dorsey, who had testified before Congress about Demery's promoting Dade County moderate rehabilitation requests,¹⁹ was expected to testify, and in fact later would testify (Tr. 3176-77), that Demery pushed the Dade County request at the April 1987 meeting. Dorsey would also testify that he did not recall Dean's saying anything about the Dade County request at the meeting.²⁰ Demery himself had volunteered before two Congressional subcommittees that he had found South Florida or Dade County to be a place with a great need for low-income housing. Lantos Hearings, Pt. 1, at 58, Pt. 5, at 335; Banking Hearings at 82, 92.²¹ Documents also indicated that subsequent to the sending of the units to Dade County, Demery had been asked to determine whether the units should go to the project supported by Kitchin.²²

¹⁶ The Dade County Proposal Status Fact Sheet is attached at Attachment 3.

¹⁷ Kitchin also stated that he was sure he discussed the funding with Dean, indicating that "I think she would have said, I believe she said she'd do what she could to help." Tr. 1437-38.

¹⁸ See Narrative Appendix styled "Testimony of Thomas T. Demery."

¹⁹ Lantos Hearings, Pt. 1, at 312. Dorsey had said the same thing when interviewed by investigators of the HUD Inspector General's Office. See Banking Hearings at 1047.

²⁰ See Narrative Appendix styled "Closing Argument Characterization of the Dade County Selection."

²¹ The April 1987 selections, however, were not the only instance where Demery was involved in sending moderate rehabilitation units to Dade County. Demery had a role in sending a total of 1350 moderate rehabilitation units to Dade County during his tenure and another 200 to Miami. A substantial number of these would then go to a developer represented by Joseph A. Strauss.

²² Attachment 5 is a June 26, 1987 memorandum to Demery from Abbie Wiest, a special assistant to the Deputy Assistant Secretary for Multi-Family Housing, in which Wiest indicated that the Jacksonville Area Manager had questions about the allocation

of four sets of Dade County units to various developers, and that Dean had refused to be involved in the matter. The memo matches a 203-unit allocation with Lou Kitchin. (This document was provided as Government Exhibit 520 during the preparation for trial on Dean's first indictment, but the OIC did not use it in the trial on the Superseding Indictment.) Demery's phone logs indicate that, on June 29, 1987, Wiest called Demery about the matter. Attachment 6 is a memorandum from Alvin D. Moore, director of the Dade County housing authority, to Mario Marti, Director of Dade County's Housing Development and Financing Division, advising that the 203 units were to go to Jim Mitchell, the developer represented by Kitchin, and such award was "as specified by the HUD area office."

Dean would testify that Demery had said he wanted the request funded, noting that it was for Kitchin. She said that she brought the matter to Secretary Pierce's attention because of her involvement with decorating Kitchin's apartment, and Pierce had approved the funding. Dean stated that she then did not comment on the request at the meeting. Tr. 2575-77, 2579-80.²³

Although Demery's testimony that Dean had brought the Dade County request to his attention would be the most important testimony elicited in the OIC's examination of Demery, the OIC chose not to elicit this testimony until redirect. When Demery was cross-examined, Dean's counsel, Stephen V. Wehner, sought to impeach him by causing him to admit that he had lied under oath when testifying before Congress. During the questioning set out below, however, Demery denied having lied before Congress:

²³ On a handwritten list of proposed moderate rehabilitation allocations that Dean had prepared in a meeting with Demery prior to meeting that included Dorsey (Gov. Exh. 202, Attachment 7), the Dade County allocation was one of four that Dean had drawn squares around. Dean testified that she had squared these four because she felt she needed to discuss them with Secretary Pierce. The other three were Prince George's County, Michigan, and Wisconsin. Dean testified that she squared Prince George's County because Richard Shelby had approached her about it and because it was in her home state of Maryland. Tr. 2576-77. She stated that she squared Michigan because it was Demery's home state. Tr. 2578. She stated that she squared Wisconsin because Demery had said Senator Proxmire (then head of the Senate Banking Committee) had contacted Demery about it and she thought the Secretary should know that Proxmire was contacting Demery directly. Id.

Q. Okay. Now you have testified -- you testified publicly on television, as a matter of fact, regarding certain of the inspector general's allegations at HUD; isn't that right?

A. Yes.

Q. And those were on C-Span, were they not?

A. Yes, they were.

Q. And you were put under oath --

A. Yes, I was.

Q. -- during those hearings?

A. Yes, I was.

Q. And did you swear to tell the truth?

A. Yes, I did.

Q. And did you tell the truth?

A. Yes, I did.

Q. You told the utter and complete truth in front of those -- on those hearings?

A. Yes, I did.

Q. Okay. You haven't been -- you didn't plead guilty to perjury, did you?

A. No, I did not.

Q. Okay. Is that because you've never committed perjury?

A. Of course.

Q. Okay. And you told the truth in front of the Lantos committee in the same fashion as you're telling the truth today, correct?

A. Correct.

Q. I mean, you've been put under oath today, correct?

A. Yes.

Q. And you had the same obligation you have today as when you were in front of the Lantos committee? You recognize that?

A. Yes, I do. I know a lot more than I did before the Lantos committee. I've had an opportunity to look at documents and spend a lot of time on issues than I did when I testified in front of chairman Lantos.

Q. Okay. So you may have made some mistakes in front of the Lantos committee, but they certainly wouldn't have been intentional; is that what you're saying?

A. Yes.

Tr. 1915-17.

Following this testimony, Wehner attempted to show that Demery had lied in testimony before Congress with regard to several subjects, including his contacts with former HUD employees (Tr. 1930-31), his knowledge of the identity of consultants (Tr. 1931-33), and whether the projects Demery selected were always the best projects. Tr. 1935.

On redirect, Associate Independent Counsel Robert E. O'Neill asked Demery who brought the Dade request to his attention. Demery answered: "It was brought to my attention by Ms. Dean." Tr. 1939. That response would conclude the OIC's case-in-chief.

C. O'Neill's Reference to Demery in Closing

In closing argument, in the litany by which O'Neill sought to convey to the jury that Dean had falsely accused numerous persons of lying, O'Neill would include Demery, observing, "... Thomas Demery, lied..." Immediately afterwards, O'Neill would assert to the jury: "But she's the only one we know who definitively did lie." Tr. 3431.

D. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean argued that the OIC had failed to fulfill its obligation of revealing the perjury of a government witness. She argued that, whether or not the jury or the prosecution had been persuaded that Demery had lied to Congress with respect to the matters her counsel had cross-examined him about, the OIC's lawyers knew beyond any shadow of a doubt that Demery had lied to Congress under oath when he had told two subcommittees that he did not know that the Winn Group was involved in the moderate rehabilitation business. Dean pointed out that the OIC had indicted Demery on that charge and that, as the plea agreement was being finalized, Demery had confessed.²⁴ That the OIC had not required that Demery plead guilty to the charge, Dean argued, simply reflected the plea bargaining process, as well as the OIC's preference that persons whom it will later use as witnesses not have been convicted of perjury. Thus, Dean argued, the OIC also knew beyond any doubt that Demery had lied when, in his testimony in her case, Demery denied having lied to Congress. Instead of revealing Demery's perjury, however, the OIC proceeded to elicit the most important part of Demery's contemplated testimony in a manner giving the jury no suggestion that the prosecution believed that its witness had lied in denying that he had previously lied to Congress. Dean Mem. at 134-41.

Dean also argued that Demery lied on direct examination with regard to his initiating funding instructions from Dean in October 1986. Dean showed that the listing Dean provided to Demery had been altered to send units to Lansing, Michigan. The funneling of moderate rehabilitation units through the housing authority in Lansing, Michigan to persons who had purchased Demery's business had also formed part of Demery's Superseding Indictment, but, as with the perjury allegations, the matter had not been included in his plea. Dean Mem. at 141-44.

Dean also pointed to O'Neill's remarks in closing, noting that, despite knowing that Demery, one of the OIC's key witnesses, had lied, O'Neill had asserted that Dean had falsely accused Demery of lying. While denying that O'Neill had any basis for asserting that she had lied, Dean argued that, in any event, O'Neill's statement that Dean was "the only one we know who definitively did lie" was known by O'Neill to be false when he made it.

²⁴ Dean provided as Exhibits TT and UU to her Memorandum the relevant portions of Demery's Superseding Indictment and a copy of Demery's June 11, 1993 interview report in which Demery acknowledged that he had known about Winn's and Abrams' involvement in the moderate rehabilitation program.

E. OIC's Opposition

In its Opposition, the OIC argued first that, for strategic reasons, Dean had chosen not to question Demery about his statements regarding Winn and Abrams. Gov. Opp. at 60-64. It also argued that Wehner's questioning of Demery "was not designed to alert either Demery or the government that defendant was seeking to elicit Demery's prior testimony about Winn and Abrams," and that Dean's argument "is premised on the notion that defense counsel's question was clear enough that both Demery and the government should have understood it to be directed to Demery's Winn/Abrams congressional testimony." The OIC also asserted that "Defendant was in as good a position as the government to recognize and correct the alleged falsehood in the testimony." Gov. Opp. at 65-66.

With regard to Demery's statement in his direct examination about initiating the October 1986 fundings, the OIC characterized Dean's argument as one involving a "supposed ambiguity in Demery's testimony," and argued that Dean, though having the documents to do so, had, for strategic reasons, failed to address the matter while Demery was on the stand. Gov. Opp. at 68 n.29.

The OIC contrasted the case with Napue v. Illinois, by arguing the relative unimportance of Demery's testimony and noting that Napue had involved a situation where defendant learned of the perjury only after the trial. The OIC also relied on United States v. Poindexter, where another D. C. District court had refused to offer a new trial where "there was no indication that the government knew any such testimony was false." Gov. Opp. at 66-67.

While refusing to acknowledge that its attorneys recognized that Demery had lied in denying having previously lied to Congress, however, the OIC did not contest that Demery had previously lied to Congress or that its attorneys knew that he had lied to Congress. Nor did the government dispute the allegations that Demery had altered the funding instruction of October 1986 or that the government knew that he had.

The OIC provided no affidavits or other evidence regarding what its attorneys who were present at trial actually believed about whether Demery had committed perjury by denying he had previously lied to congress.

F. Dean's Reply

In her Reply, Dean argued that the OIC well knew that her counsel was not attempting to elicit testimony about Demery's denial of his knowledge of Winn Group involvement in the moderate rehabilitation program, but had merely sought either to make Demery admit, or to demonstrate, that Demery had committed perjury numerous times after taking the same oath he had taken in court. Dean stated that, in discussing the OIC's knowledge that Demery had lied when he denied knowing that the Winn Group was involved with the moderate rehabilitation program, she was merely citing the instance where the OIC would have the greatest difficulty denying knowledge of Demery's perjury, since it had indicted Demery on the matter (and he had confessed).²⁵ Thus, Dean maintained, the OIC was seeking to mislead the court by pretending that the issue involved whether Demery and OIC counsel understood that Dean's counsel was seeking to elicit testimony about Winn and Abrams. Dean Reply at 20-24.

With regard to Demery's statement on direct examination, Dean argued that in fact there was no ambiguity. She noted that, with regard to a matter on which Demery had presumably been prepared by OIC counsel, Demery had misstated a fact in order to avoid a host of issues that would bear on his credibility. Id. at 24 n.20.

G. Hearing of February 14, 1994

At the hearing on February 14, 1994, the court questioned Deputy Independent Counsel Bruce C. Swartz about the Demery perjury issue in these terms:

²⁵ Dean noted that the OIC knew that Demery had also lied in denying knowledge of F.O.O.D. contributions, since the OIC had evidence that individuals, including Winn Group members, had handed checks to Demery. Dean Reply at 22. Dean subsequently provided the court interview reports substantiating that contention as Exhibit C to Deborah Gore Dean's Omnibus Motion (Feb. 8, 1994) (Interview of Thomas T. Demery dated June 17, 1993, and Interview of Ed Siegel dated May 22, 1992).

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

Tr. 11-12.

Swartz responded at some length much in the manner of the OIC's Opposition, and without admitting or denying that the OIC knew that Demery had committed perjury. Tr. 12-14.

After the court again expressed its concern, Swartz added that "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. Dors[e]y." Tr. 14.

In the course of expressing its concerns about the OIC's conduct before ultimately concluding that the court would nevertheless deny Dean's motion for a new trial, the court observed:

Mr. Demery obviously had substantial issues as to his credibility and his perjury and what that government knew about that and believed they knew about it, and again, I did 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.

Tr. 26.

H. Comments

A notable aspect of the OIC's Opposition is that it said nothing about whether Demery had committed perjury before Congress, whether OIC counsel knew that he had, and whether OIC counsel knew that the explicit denial of having lied to Congress was false. Apart from shifting the focus to a false issue of whether Wehner had been trying to elicit testimony about Demery's knowledge of the involvement of Winn and Abrams in the moderate rehabilitation program, the OIC made a misleading argument about what its counsel might have been expected to believe without stating anything (by affidavit or otherwise) about what its counsel did in fact believe. A fair interpretation of events is that OIC counsel well knew that Demery had lied in denying his prior perjury,

but hoping that Wehner had not adequately demonstrated that to the jury, went on to elicit the key testimony.²⁶

Swartz's argument at the February 14, 1994 hearing is equally misleading, and similarly avoids the issue of whether the OIC knew that Demery had lied during his cross-examination. The statement that Demery's testimony was largely corroborated by others may be true with regard to various parts of his testimony, but was absolutely untrue with regard to the key testimony on redirect that Dean had brought the Dade request to Demery's attention. Dorsey's testimony certainly did not corroborate that statement, and, in fact, was entirely inconsistent with that statement. See Narrative Appendix styled "Closing Argument Characterization of the Dade Selection"; Dean Mem. at 187-191; Gov. Opp. at 44-47; Dean Reply at 13-15.

Regardless of how one appraises the totality of the evidence as to whether Dean had told Demery she wanted Dade County funded (as Demery testified) or Demery told Dean that he wanted Dade County funded (as Dean testified), it is hard to dispute that the credibility of Demery's statement on cross-examination could have substantial bearing on how a jury would resolve the matter. If during his cross-examination, Demery acknowledged that he had lied before Congress having taken the same oath that he had taken in court, that might have somewhat undermined his credibility with regard to his testimony on redirect. Far more damaging to his credibility in that regard, however, would have been the eliciting by O'Neill that, not only had Demery lied under oath when he previously testified before Congress, but he had lied under oath minutes before when he testified that he had never lied to Congress.

²⁶ Actually, OIC counsel had to know that Demery had committed perjury on each of the matters discussed by Wehner in his attempt at impeaching Demery, as well as a number of other matters apart from the denial of knowledge of Winn and Abrams. Very likely, O'Neill was merely hoping that Wehner had failed to persuade the jury that Demery had previously lied to Congress with regard to the matters Wehner questioned Demery about, and the farthest thing from O'Neill's mind was some obligation to correct his witness' perjury either as to the matters addressed by Wehner or as to anything else.

In discussing this matter in the course of its ruling, the court seemed to see the issue solely in terms of the OIC's failure to have at some point made clear to the court and the defendant that Demery had previously lied to Congress. The court overlooked the larger issue of the OIC's watching Demery commit perjury on cross-examination, and then, without fulfilling an obligation to correct that perjury, proceeding to elicit key testimony. The court should have been applying the standard whereby a new trial is ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

There is an interesting issue in what the OIC states (or has already stated) to the court and the U. S. Probation Officer with regard to Demery's fulfillment of his cooperation agreement. Very likely, the OIC will make no mention of Demery's perjury in the Dean trial because the OIC does not wish to acknowledge the perjury. The OIC may also be motivated by the fact that in lying about his prior perjury, Demery was doing what he believed the OIC wanted him to do.

In this regard, it is to be noted that in her Rule 33 Motion, while Dean suggested that Demery had been prepared by OIC counsel with regard to his response on direct examination regarding the implementation of the funding instructions from Dean in October 1986, she did not argue that there was reason to believe that the OIC had instructed Demery to testify that he had not committed perjury before Congress. Yet, it is hard to believe that the OIC would present a key witness whom it had previously charged with perjury without discussing with that witness how he should respond to a question about whether he had previously committed perjury. Perhaps, the OIC provided Demery a rationale by which he could conscientiously testify that he had never lied before Congress while feeling that he was testifying truthfully, though it is difficult to imagine what that rationale could have been.²⁷

In any case, Thomas T. Demery remains available to the government to describe the nature of his discussions with OIC counsel prior to his taking the stand and making statements under oath that most reasonable people would maintain were demonstrably false.

²⁷ In its appellate brief, the OIC does seem to say that OIC counsel did not have reason to believe that Demery had testified falsely. Brief of the United States of America as Appellee, United States v. Deborah Gore Dean, No. 94-3021 (D.C. Cir.) at 51 n.23 (Sep. 16, 1994). The OIC did not elaborate that point, however.

ADDENDUM TO NARRATIVE APPENDIX STYLED
"TESTIMONY OF THOMAS T. DEMERY"
(January 1995)

At page 8, it is noted that "Demery admitted to representatives of the OIC that he had known that principal members of the Winn Group (Philip Winn and Philip Abrams) were involved in the moderate rehabilitation business during the periods relevant to his statements." Note 11 provides a reference for that statement, specifically an Interview of Thomas T. Demery dated June 11, 1993, at 3, 5 (Dean Mem., Exh. UU). In the same interview, at 7-8, Demery also explained to representatives of the Office of Independent Counsel that the reason he stated that he did not know Winn and Abrams were developers of subsidized housing was that he wished to deflect attention from the issue of the condominium that Winn had allowed Demery to use without charge, and for which use false receipts had been prepared.