II. MOTION FOR A NEW TRIAL PURSUANT TO F.R.CRIM.P. 33

A. Introduction

Set out in Sections B and C below are descriptions of prosecutorial misconduct that defendant maintains are of sufficient gravity to require a setting aside of the verdict in this case. Section B addresses the Government's failure to correct the testimony of government witnesses that the Government knew, or should have known, was perjurious, as well the Government's apparent intentional use of perjured testimony. Section C addresses various forms of misconduct in the Government's closing argument, including repeated statements that the defendant had lied, repeated and calculated mischaracterizations of the record, statements that government counsel knew to be false or misleading, and inflammatory statements intended to stir racial hostility. Section C discusses the reasons why, under applicable authorities, the Government's conduct warrants a judgment of acquittal or the ordering of a new trial.

Set out immediately below is a description of the Government's conduct prior to and during trial that gives context to those arguments both by further demonstrating the egregiousness of the Government's approach throughout its prosecution of this case, and by giving additional reason to believe that the improprieties discussed in Sections B and C were willful. Though this description is presented principally for purposes of background, defendant maintains that certain of the described matters, including the knowing use of false evidence during cross-

examination, are themselves sufficiently egregious to warrant relief from the Court.

1. Brady Violations

Defendant has previously brought to the Court's attention that the Government had violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by failing to timely provide defendant with exculpatory material.[67] In summary, on June 3, 1992, the Honorable Gerhard A. Gesell instructed the Office of Independent Counsel that it had an obligation to turn over Brady material "right away, as soon as you know it." When questioned by Judge Gesell as to the existence of such material, government counsel denied knowledge of any such material.

Just over a year later, on June 8, 1993, the Office of Independent Counsel advised this Court that:

> "the government is not aware of any exculpatory evidence or information, but it will certainly make such information known to the defendant in the event it discovers such evidence."

The Government did not provide Brady material to the defendant until August 20, 1993.[68] The only excuse the Government offered for withholding the material was that "as time progressed, these

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[67] See Deborah Gore Dean's Motion to Dismiss or, in the Alternative, to Prohibit the Introduction of Evidence Pursuant to Rule 16, F.R.Crim.P. and Brady and Request for a Hearing (Aug. 26, 1993).

[68] The original August 20, 1993 letter from government counsel (Exhibit AA) did not indicate when the exculpatory statements had been made. By letter of August 29, 1993 (Exhibit BB), the Government responded to defendant's request for information as to when the statements were made. The Government's response made clear that much of the material (including most that was related to the Louis Kitchin issues involved in the first indictment before the Court at the time of counsel's statements to Judge Gesell on June 3, 1992) had been in existence at the time that government counsel denied knowledge of any such material.

witnesses admitted that they had not been candid and had not been forthright, and these stories developed over time, and that -- really --the witnesses will testify consistently with the indictment..." Transcript of Status Call at 12-13 (Aug. 31, 1993).

The court rejected that argument out of hand at least with respect to exculpatory statements in the Government's hands prior to the changing of testimony. Id. at 13. The Court indicated, however, that it would neither dismiss the indictment nor bar the admission of evidence, noting that though defendant had been prejudiced with respect to the expenditure of time and money, she had not been prejudiced in the sense of a violation of her rights.[69]

Because of the immediate ruling, there was no inquiry into the extent to which governments counsel's representations applied to the entire mass of Brady material identified in counsel's letter of August 20, 1993. With regard to the great majority of that material, defendant submits, governments counsel's representation applied not at all. There was no subsequent modification of testimony, and even when it became clear that there would be no modification of the exculpatory materials the Government continued to withhold it.[70]

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[69] The Court indicated, however, that it would consider appropriate action if there were further instances of this type of delay. Id.

[70] Based solely on the Court's knowledge of materials that were in some manner used in this case, the Court should be able to readily perceive from Exhibits AA and BB that government counsel's explanations for withholding the material applied, at best, to a very small portion of it. Much of the material is germane solely to the Superseding Indictment, which was issued after government counsel's initial statement to Judge Gesell. Yet materials germane to the original Indictment also were in existence at the time of that statement. And in the case of such statements

a. Richard Shelby's Statements

i. Defendant's Unawareness of Mitchell's Involvement in Park Towers.

Certain particularly egregious examples of the Government's Brady violations, which also illustrate other aspects of the Government's improper conduct of this case including misleading the jury in closing argument, involve statements of the Government's immunized witness Richard Shelby, who was listed as an unindicted co-conspirator in Counts One and Three of the Superseding Indictment. Mr. Shelby is the person who retained John Mitchell to assist in securing HUD approval of the Park Towers project. The Park Towers allegation in Count One rests on the inference that Mr. Shelby secured the services of Mr. Mitchell because of Mr. Mitchell's connection with the defendant. Among the more provocative overt acts alleged in the Superseding Indictment are that Mr. Mitchell, Mr. Shelby and defendant met together on September 9, 1985, and that on the following day Mr. Shelby would send defendant materials pertaining to the Park Towers project (at 21, Paras. 66, 67).

Yet, in interviews on April 8, and 16, and May 6, Mr. Shelby had advised the representatives of the Office of Independent Counsel of the following regarding both his knowledge of defendant's understanding of Mr. Mitchell's involvement with the Park Towers project and of the September 9, 1985 meeting, which actually was a lunch:

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as Claude Dorsy's statement that at some point in time, Lou Kitchin indicated that he was working with Thomas Demery (Exhibit AA at 6), the statement appears never to have been qualified.

"Shelby did not believe that the subject of Mitchell's interest in the Park Towers project was mentioned during the lunch he had with Mitchell and Dean on September 9, 1985. Shelby had no knowledge that Dean was aware of Mitchell's interest in the project. Shelby tried to go out of his way in conversations with Mitchell and Dean to stay as 'far afield' of everything related to that as he could. If conversations drifted in that direction, Shelby tried to change the course of the conversation. To the best of Shelby's recollection, the subject of Park Towers never came up in conversations with Mitchell and Dean."[71]

In an interview on May 18, 1992, Mr. Shelby further advised representatives of the Office of Independent Counsel that he had initially secured the services of Mr. Mitchell prior to his becoming aware of the relationship between Mr. Mitchell and defendant; that his employers who advised him of the relationship advised that Mr. Mitchell ought not to work on the Park Towers project because of a perceptual problem; that thereafter he did not seek further assistance from Mitchell other than seeking his advice on how an agreement should be extended; and that his employer paid Mitchell solely because of a commitment made prior to Shelby's learning of Mr. Mitchell's relationship to defendant. Interview Report at 8-10 (Exhibit DD).

Before the Grand Jury on June 4, 1992, Mr. Shelby would state that to the best of his knowledge, defendant was not aware that Mr. Mitchell was involved in the Park Towers project. He also stated that to the best of his knowledge, the Park Towers project was not discussed at the luncheon with Mr. Mitchell and defendant on March 9, 1985. Grand Jury Testimony at 22-23 (Exhibit EE).

When the Superseding Indictment, containing the Park Towers allegation, was issued on July 7, 1992, the above statements

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[71] Interview Report at 9. Portions of that Interview Report relevant to this and other matters discussed herein are attached as Exhibit CC.

should have been immediately turned over in accordance with Judge Gesell's order. Instead, all such information was withheld for more than fourteen months, with counsel even denying knowledge of any Brady material to this Court in June of 1993. Even when Brady material was provided relating to the issue of defendant's knowledge of Mr. Mitchell's involvement with Park Towers, it was limited to the statement that Mr. Shelby had "said that, to his knowledge, Deborah Dean was not aware of that John Mitchell was involved in the Park Towers project." Exhibit AA at 7. There was no mention of Mr. Shelby's efforts to keep that information from defendant and no mention of the decision to limit the involvement of Mr. Mitchell after the relationship of Mr. Mitchell and defendant became known. And even though the Indictment would make a point of the fact that Mr. Shelby sent defendant materials on Park Towers the day after the September 9, 1985 luncheon (see infra), there was no mention of Mr. Shelby's statements that Park Towers was not discussed at the September 9, 1985 lunch.

Yet, Mr. Shelby, an immunized witness, never withdrew from any of these statements, and would later in court himself acknowledge that he had intentionally concealed Mr. Mitchell's involvement from the defendant. Tr. 603.

ii. "The contact at HUD."

The second Shelby statement involves a July 31, 1985 "memo to file" by Martin Fine, the developer of the Park Towers project, which also pertained to the that project. The memo, which the Government would introduce at trial as Government Exhibit 72 (Tr. 662), states, in pertinent part, that "our friend is meeting with the contact at HUD this coming week."

Confronted with the Fine memo in interviews with the Office of Independent Counsel conducted on April 8 and 16, 1992, and May 6, 1992, Mr. Shelby "acknowledged that 'our friend' referred to him (Shelby)" and stated that he (Interview Report at 8):

> "believed that 'the contact at HUD' meant DeBartolomeis rather than Dean, because as of August, 1985, most of his contacts at HUD regarding Park Towers had been with DeBartolomeis and usually alone with DeBartolomeis. By that time he had known Dean at most six weeks."

When the Superseding Indictment was issued on July 7, 1992 alleging a conspiracy among defendant, Mr. Shelby (identified in that document as Co-conspirator Three), Mr. Mitchell (identified as Co-conspirator One), and others with regard to the Park Towers project, it stated (at 21; emphasis added):

> 64. On or about July 31, 1985, Martin Fine had a conversation with Eli Feinberg, in which Feinberg said that "our friend is meeting with the contact at HUD this coming week."
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> 65. On or about August 1, 1985, Co-conspirator Three was scheduled to meet with the defendant DEBORAH GORE DEAN.
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> 66. On or about August 9, 1985, Co-conspirator Three met with the Defendant DEBORAH GORE DEAN.
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> 67. On or about September 9, 1985, the defendant DEBORAH GORE DEAN met with Co-conspirator One and Co-Conspirator Three.
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> 68. On or about September 10, 1985, Co-conspirator Three sent a letter to the defendant DEBORAH GORE DEAN enclosing information regarding the Park Towers project.

Because of the clear suggestion in the Superseding Indictment that defendant was the "contact at HUD," upon issuance of that indictment, Shelby's statement immediately became obvious, and immensely important, Brady material, since it patently contradicted that suggestion. Certainly this was known to the Independent Counsel at the time of the issuance of the Superseding Indictment. Nevertheless, as with other Shelby statements, the Independent Counsel withheld this statement from defendant for more than a

year. Yet, no Jenks material provided by the Independent Counsel indicates that Mr. Shelby ever withdrew from or qualified that statement, nor did government counsel examine Mr. Shelby about it on the stand.

In fact, the Government did not mention that matter at all when Mr. Shelby testified. Rather, when Martin Fine testified the day after Mr. Shelby, the Government simply had Mr. Fine identify the document, which it then introduced into evidence without eliciting comment from Mr. Fine. Tr. 661-62.

Then, despite the Government's awareness that the conspiratorial reference to "the contact at HUD" was a reference to Silvio DeBartolomeis rather than defendant, the Government relied on the document in its Park Towers Summary Chart, in the following manner (Exhibit FF):

> June 20, 1985: **DEAN** congratulates **SHELBY** on new job (Government Exhibit 69)
>
> July 31, 1985: **FEINBERG** tells **FINE** "our friend" is meeting with the "contact at HUD this coming week." (Government Exhibit 72)
>
> August 1, 1985: **DEAN** schedules lunch w/**SHELBY**. (Government Exhibit 5H)
>
> August 9, 1985: **DEAN** and **SHELBY** meet for lunch (Government Exhibits 5l, 11B, 73, 74).
>
> September 9, 1985: **DEAN** schedules lunch w/**SHELBY** and **MITCHELL**. (Government Exhibits 5k, 9G)
>
> September 10, 1985: **SHELBY** sends **DEAN** information on Miami Mod Rehab and thanks her for her time and effort on his behalf. (Government Exhibit 76).

In closing argument, while the above entries are displayed, Government Counsel would state the following (Tr. 3392-93):

> "What do we see during this time? We have the defendant congratulating Shelby on his new job. We have her scheduling

lunch with Shelby, actually meeting him for lunch because sometimes there was a lot of talk about whether it was actually meeting for lunch or not.

"Well, the calendars can only tell you what was going to happen. We have the backup documentation such as on this one, where it's an expense account with her name on it. Then we show she actually met for lunch. Who meets for lunch this time? The three of them are now meeting.

"The very next day, he sends her information on Park Towers. It's in evidence. Again, it's in black and white. It can't be disputed. The defendant is saying, "I didn't know he was working on these projects. He didn't ask me for anything." It's in black and white. This is back in 1984 [sic], way before she says he spoke to her."

Thus, while the reference to "the contact at HUD" is displayed amid the entries that government counsel specifically discusses, counsel gives the jury ample time to focus on that highly prejudicial reference, even though counsel knows that the reference is not to the defendant. It should be noted, as well, that counsel goes on to suggest the conspiratorial implications of Shelby's sending the Park Towers material "the very next day" after Shelby has lunch with Mr. Mitchell and the defendant, though counsel knows that its immunized witness has said that, to the best of his knowledge, Park Towers was not discussed at the lunch.

These are patent efforts to mislead the jury to believe things that government counsel himself knew not to be true, and such tactics will be treated more fully infra. At this point, it suffices to note that the Brady violations underlying these efforts are themselves severe prosecutorial misconduct.

iii. The Faxed Rapid Reply.

A further serious Brady violation with regard to Park Towers involves other statements by Richard Shelby that were never turned over as Brady material, but were provided among an enormous volume of Jenks material delivered to defendant just before Mr. Shelby testified.

The Superseding Indictment would contain the following allegations of overt acts regarding the Park Towers project (at 22):

> 70. On or about November 26, 1985, the defendant DEBORAH GORE DEAN facilitated and caused to be facilitated the award of 143 Mod Rehab units to the Metro-Dade PHA, with a yearly contract authority of approximately $935,000, and an overall budget authority of approximately $14,000,000.[72]
>
> 71. On or about November 27, 1985, Co-conspirator Three obtained an internal HUD funding document, dated November 26, 1985, known as a "Rapid Reply Letter," indicating that Mod Rehab units had been awarded to the PHA for Metro-Dade, Florida.
>
> 72. On or about November 27, 1985, Co-conspirator Three caused his employer to fax a copy of the "Rapid Reply Letter," dated November 26, 1985, to Martin Fine in Florida.
>
> 73. On or about November 27, 1985, Co-conspirator Three's employer sent a bill for $45,000 to the developer of Park Towers Apartment, per a July 18, 1985 agreement requiring the payment of $45,000 if an allocation of Mod Rehab units specifically for Park Towers Apartments was obtained before December 31, 1985.

The inference suggested by these paragraphs was that it was the defendant who had supplied the internal HUD funding document referenced in Paragraph 71, particularly in light of quite similar allegations in the "Manner and Means..." section of the Indictment.[73]

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[72] The reference to 143 units is itself intentionally misleading. The actual award was for 266 units. Government Exhibits 78 and 81. However, in the "Manner and Means..." section of the Superseding Indictment (at 29, Para. 19), it was alleged that defendant "would facilitate awards of Mod Rehab units in the amounts sought by her Co-conspirators." The developers of Park Towers were seeking 143 units.

[73] That section of Count One of the Superseding Indictment contained these paragraphs (at 11-12):

> 17. It was further part of the conspiracy that the defendant DEBORAH GORE DEAN would facilitate the awards of Mod Rehab units in the amounts sought by her Co-conspirators.

In an interview conducted on April 8 and 16, and May 6, 1992, however, Shelby had told representatives of the Office of Independent Counsel that he believed that he had received a form relating either to Park Towers or Foxglen from Hunter Cushing. Interview Report at 20 (Exhibit CC). In an interview on May 18, 1992, Shelby stated that "he believed that he got the copy of the Rapid Reply letter from DeBartolomeis, and that he asked for it to be faxed to him." Interview Report at 6 (Exhibit DD).

Both statements obviously were Brady material. As noted, however, they were never provided as such, but only turned over among voluminous Jenks materials provided shortly before Mr. Shelby testified.[74]

When Mr. Shelby did testify, he was questioned by government counsel about the Rapid Reply, which would become Government Exhibit 79, and would state that his best recollection was that the document was faxed to him by Hunter Cushing. Tr. 555, 574.

That document would go on to support an entry in the Government's Summary Chart for Park Towers, which would be another of many entries similar to allegations in the Indictment, though

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18. It was further part of the conspiracy that the defendant DEBORAH GORE DEAN would provide internal HUD documents and information to her Co-conspirators.

19. It was a further part of the conspiracy that the Co-conspirators would provide their developer/clients with the internal HUD documents and information provided by the defendant DEBORAH GORE DEAN.

[74] Before the Grand Jury on June 4, 1992, Mr. Shelby stated that the document could have come from defendant, Silvio DeBartolomeis, or Hunter Cushing, but that he could not remember at the moment. Grand Jury Testimony at 23 (Exhibit EE). That statement did not render the other statements less subject to Brady.

augmented by information from defendant's calendars. The pertinent entries are as follows:

October 15, 1985:	DEAN schedules briefing for SHELBY.
November 22, 1985:	DEAN schedules meeting w/SHELBY.
November 26, 1985:	HUD Rapid Reply for 266 Mod Rehab units to Dade.
November 27, 1985:	SHELBY's Employer faxes Rapid Reply to FINE. SHELBY's employer bills FINE for $45,000.
December 2, 1985:	HUD Atlanta is notified of 266 Mod rehab units for Dade County.
December 9, 1985:	DEAN schedules lunch w/SHELBY.
January 16, 1986:	FINE's partner pays SHELBY'S employer $45,000.

In closing argument, government counsel would describe the above entries in the following manner (Tr. 3393):

> "And it goes on. Dean schedules a briefing with Shelby. Dean schedules a meeting with Shelby. She's constantly meeting with him.
>
> "And you'll see a HUD rapid reply for 266 units. You might remember that gets fax'd almost immediately to Mr. Fine down in Miami. Why? Because the contract called for a $45,000 payment to go out. That's what this case is about -- money, Ladies and Gentlemen, and what people will do with money.
>
> "HUD Atlanta is notified 266 units. This is after Rick Shelby knows. This is after Martin Fine has found out. The HUD people don't learn until days later. That's how the system has been perverted by these individuals, prominent people in this little circle.
>
> "Again we see another luncheon and another payment of $45,000."

Government counsel, it is true, never actually stated that the rapid reply had been provided to Mr. Shelby by defendant in order that it could then be faxed to Mr. Fine. Government counsel can be expected to know, however, that members of the jury would in all likelihood be led to believe that defendant was responsible for

providing the document, just as readers of the Superseding Indictment would have been led to so believe.

The total impact of the Government's actions with regard to the above matters, however, can perhaps be evaluated by examining the earlier impact on the Court. The same approach had been taken by the Government in opposing defendant's Rule 29 motion at the close of the Government's case. At that time government counsel had argued (Tr. 2029):

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

The Court, then, would specifically refer to these matters when discussing the Government's evidence regarding Park Towers in denying defendant's motion (Tr. 2046-47):

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

b. John Mitchell Notes

Another example of a serious Brady violation concerns telephone messages of John N. Mitchell, who is listed as Co-conspirator One in Count One of the Superseding Indictment and whose relationship to the defendant forms the entire basis for that count. The first moderate rehabilitation funding involved in Count One concerns the sending of 293 units to Dade County Florida in 1984, which units went to the Arama project of developer Art Martinez. The first three overt acts listed in the Superseding

Indictment relating specifically to that funding, involve (1) a contact made by Mr. Martinez to Louie Nunn (listed as Co-conspirator Two) at Mr. Mitchell's office on January 5, 1984; (2) an agreement reached on January 25, 1984, between Mr. Nunn and Mr. Martinez whereby Mr. Martinez would pay Mr. Nunn a total of $375,000 for his services in securing up to 300 mod rehab units for the Arama project, including $225,000 in legal fees and $150,000 in consulting fees; and (3) a statement written on the agreement by Mr. Nunn on January 25, 1984, indicating that one-half of the $150,000 in consulting fees was to be paid to Mr. Mitchell. Superseding Indictment at 13-14, Para. 27-29.

As of January 25, 1984, Lance Wilson was the Executive Assistant to Secretary Pierce. Mr. Wilson had worked for the same law firm as Mr. Mitchell and knew Mr. Mitchell. Tr. 357-58. Also at that time, Maurice Barksdale was in the position of Assistant Secretary for Housing, having received a recess appointment in November 1983 and awaiting confirmation, which occurred on February 10, 1984. Tr. 453. Defendant was a Special Assistant/Director of the Executive Secretariat. At this point in time there was no indication that defendant would become Executive Assistant later that year.

Among the materials that investigators working for the Office of Independent Counsel secured from Mr. Mitchell's files during an inspection of those files in May 1992 (see Tr. 370-71) were two telephone message forms. The first reflects a telephone call to "Mr. M." indicating that Lance Wilson had returned Mr. Mitchell's

call on "1-12."[75] On that message form, in Mitchell's handwriting, are the words "300 units, Process + Keep Advised. Talking to Barksdale." It is to be noted that January 12, 1984 (which undoubtedly is the date to which "1-12" refers) is a date between the January 5, 1984 contact by Mr. Martinez to Mr. Nunn at Mr. Mitchell's office and the agreement reached between Mr. Nunn and Mr. Martinez on January 25, 1984.

The second document is a message form indicating that Lance Wilson called Mr. Mitchell on "1-26," which undoubtedly references January 26, 1984.[76] This is the day following Mr. Nunn's reaching the agreement with Mr. Martinez and Mr. Nunn's indicating on that agreement that one half of the $150,000 designated as consulting fees was to go to Mr. Mitchell.

The inferences compelled by these documents are that Mr. Mitchell was dealing with Lance Wilson with regard to securing up to 300 units of mod rehab for Mr. Martinez's Arama project; that Mr. Wilson was talking to Mr. Barksdale about the matter prior to the January 25, 1984 agreement; and that immediately after the execution of that agreement, Mr. Mitchell called Lance Wilson again.[77] The documents are thus strongly exculpatory as to defendant.

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[75] A copy of the document, which was introduced into evidence as Dean Exhibit is appended at Exhibit GG hereto.

[76] A copy of the document, which was introduced into evidence as Dean Exhibit is appended at Exhibit HH hereto.

[77] Presumably, Wilson was returning a call to Mr. Mitchell, though the copy of the document provided in discovery is not sufficiently legible to show this.

There can be no doubt that the Office of Independent Counsel was aware of these documents at the time of the drafting of the Superseding Indictment. The documents bear markings indicating that they are from Microfiche Sheet No. CA 159, Document Numbers 2049 FL and 2065 FL. The first overt act listed in the Superseding Indictment (at 13, para. 24), under the heading "Arama Project," which concerns a February 6, 1983 note on a project called Marbilt, is based on Document No. 2066 FL from the same microfiche sheet. The overt act referenced on page 15 of the Superseding Indictment (para. 35), which involves defendant's sending materials to Mr. Mitchell's address on July 18, 1984, is based on Document No. 2044 FL of that sheet.[78] Moreover, the F.B.I. agent who secured these documents from Mr. Mitchell's files remembered both messages. Tr. 377-82.

Pursuant to Judge Gesell's instruction of June 3, 1992, these materials should have been provided to defendant immediately after the Superseding Indictment was issued the following month. In fact, they were never provided to defendant as Brady material. Rather, they were merely included among what the government itself describes as over 600,000 pages of documents, that were serially made available for the defendant's review. In sum, despite the Supreme Court's ruling in Brady and Judge Gesell's explicit instruction, what were probably the most critical documents in the case with regard to the defense of Count One were available to defendant only if defendant had the perseverance to find them after weeks of reviewing box upon box of documents.

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[78] These documents are attached as Exhibits II and JJ hereto.

2. Sankin Exhibits and Pre-trial Interviews of Barksdale

The second introductory matter involves the Government's use of the credit card receipts of Andrew Sankin and the Governments' pre-trial interviews of Maurice Barksdale.

a. Andrew Sankin Receipts.

During the direct examination of Mr. Sankin, the Government introduced a number of credit card receipts into evidence in a manner that would lead the reasonable observer to believe each receipt was associated with the defendant. The Court itself indicated the view that the exhibits were being introduced because they related to the defendant, pointing out that it had refused to admit exhibits where there appeared not to be such a connection. Tr. 1203-04. The Court's action in refusing to admit those exhibits would naturally fortify in the minds of the jury the view that the exhibits were being introduced because of their connection to the defendant. It would also make clear to government counsel that, if there was no such connection, the Court, as well as the jury, were being misled.

The witness, Mr. Sankin, was apparently aware of the impression created by the manner of introduction of these exhibits, for he felt it necessary after leaving the stand to advise government counsel that he could not say which of the receipts were related to defendant. Despite having been so advised by Mr. Sankin, and having, by the Court's ruling, been given additional reason to recognize the false impression being created, government counsel did nothing to correct that impression on the following day. On the contrary, when Mr. Sankin resumed the stand on the following day, government counsel requested Mr. Sankin to further

discuss one of the few receipts that was unequivocally related to Ms. Dean. Tr. 1182-83. That discussion but further enhanced the false impression created the day before.

Only on cross-examination was Mr. Sankin's off-the-stand statement to government counsel brought out in court, with Mr. Sankin stating, "I told the Independent Counsel yesterday that many of the charge slips were definitely not related to Deborah Dean." Tr. 1194. Government counsel disputed Mr. Sankin's account of what Mr. Sankin had stated but did not really dispute the substance of those remarks--namely, that Mr. Sankin could not remember which receipts were related to defendant and which were not, and that certainly anyone who was led to believe that all or most of them were related to defendant was being misled. Tr. 1195. The Court explained to government counsel that, at a minimum, it was a violation of Brady to fail to disclose Mr. Sankin's statements about the receipts, and that it was improper for a prosecutor to use documents to create a false impression regardless of whether there was an objection. Tr. 1202-04.

Most significant, however, is that what emerged from government counsel's colloquy with the court, as well as the cross-examination of Mr. Sankin, is that the Government in this case was operating with a prosecutorial philosophy that has no place in a just society. The philosophy that was abundantly evident in action taken with regard to Mr. Sankin and elsewhere is that a prosecutor may present evidence to a jury that would lead a jury to draw inferences adverse to a criminal defendant even though the prosecutor knows that those inferences are or may be false, and that the prosecution has no obligation to expend the least effort

to determine whether the evidence in fact justifies those inferences or to correct false impressions created by that evidence.[79]

It is clear that the prosecution refused to make any effort to determine which of Mr. Sankin's receipt were actually related to the defendant.[80] One obvious reason for that approach is that

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[79] As shown by the Government's actions discussed elsewhere in this memorandum, however, the Government's misconduct in this case went far beyond any sort of merely passive reliance on false evidence or any mere failure to ensure that the jury did not draw false inferences from the evidence presented.

[80] The following portions of Mr. Sankin's cross-examination are revealing:

At 1190-91: ✓

Q Did the Independent Counsel go through these credit card receipts with you and ask you if they were accurate?
A I don't recall, sir. I think we went through them.
Q And did you tell them that they accurately reflected what occurred?
A I think they reflected that I had lunch at a certain date or dinner at a certain date.
Q No. I'm sorry, Mr. Sankin, did you tell them that they accurately reflected what occurred?
A. I don't recall being asked that specific question, so I'll have to answer no, sir.
Q Then you tell me what question they asked you about these credit card receipts.
A I think we went through many papers, and they asked me to the extent I could to explain them. Many of them I wasn't asked about.

At 1194: ✓

Q Did you tell the Independent Counsel you gave [the Georgetown Leather Gift] to Deborah Gore Dean?
A No, sir.
Q Did they ask?
A Sir, I told the Independent Counsel yesterday the many of the charge slips were definitely not related to Deborah Dean.

At 1232: ✓

Q Mr. Sankin, do you generally have a recollection in all your dealings with the Office of Independent Counsel that you told them that your records accurately reflected what happened?
A I don't think they ever asked me that, sir.

such an inquiry is certain to render it impossible to use all of the potentially incriminating exhibits. It should be kept in mind, however, that the government appeared willing to use a receipt here even when it had overwhelming reason to believe that the receipts were not related to Ms. Dean.

Two receipts related to May 16, 1987, are illustrative. Government Exhibit 11U is a receipt for Tia Queta in Bethesda, which states: "Lunch with D. Dean, assistant secretary at HUD. Discussed mod rehab." Tr. 1149. Government Exhibit 11V is another restaurant receipt for that day, in this case with the notation: "Dinner with Assistant Secretary of HUD/Mod Rehab." Tr. 1216.

Let me clarify that. It was my impression that they were going to draw their own inferences from my records.

Statements by government counsel ~~statements~~ are equally revealing.

At 1200: ✓

MR. O'NEILL: ... so the record is clear, I did not show Mr. Sankin any of these documents in the government's case at all prior to his testimony. They were shown to him, I believe, in the Office of Independent Counsel several months ago, but I have refused to show him any documents -- "
***
MR. O'NEILL: "No, your honor, I specifically refused to allow him to see documents."

At 1228-29: ✓

THE COURT: Trial counsel today did not review these receipts with him before he testified.
MR. O'NEILL: Absolutely, that's correct, purposely.
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MR. O'NEILL: Judge, I will say the amount of Jenks on this individual is so massive an undertaking that I have never even seen such agents take such ridiculously exact notes. The typical interview would be 20 or 30 pages. I've skimmed through it.
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MR. O'NEILL: Oh, notes were definitely taken, but about what, only the agent could tell us.

The Government had reason to suspect that Ms. Dean was not at either of these events, since her calendar, long in the possession of the Government, does not list them, and, moreover, shows that she was at The Preakness race in Baltimore, Maryland that day. Government Exhibit 8. Defendant's calendar also shows that Kelly Joyce, whom the Government had reason to know Mr. Sankin was dating at the time, was graduating that morning, suggesting that the lunch was more likely with Ms. Joyce than with Ms. Dean.

Putting the lunch aside, however, the Government had additional reason to believe that Ms. Dean had not been present with Mr. Sankin at dinner that day, since the notation on the receipt describes an entirely different position, "Assistant Secretary at HUD."[81] Thus, even without inquiry of Mr. Sankin, the government had compelling reason to believe that it was very unlikely that the receipt involved the defendant, and it was therefore manifestly improper to use it in the manner that it did.

The fact that the government had defendant's calendars is pertinent to another receipts as well. The Government had ample reason to know of Mr. Sankin's involvement with other persons at HUD. Thus, in any instance where (1) Mr. Sankin's receipt did not specifically reference the defendant, and (2) defendant's calendars did not reference a lunch or dinner with Mr. Sankin, a reasonable prosecutor would have had to conclude that, in all probability, the

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[81] That is by no means to say that a jury would be expected necessarily to distinguish between a passing reference to an "assistant secretary" and an "assistant (or executive assistant) to the secretary," particularly when the only reason to present the exhibit would be that it involved the defendant.

receipts did not involve defendant.[82] Nevertheless, the government would introduce Exhibit 11C, which is a December 23, 1985 receipt for $157.97 at La Pavilion that states "...HUD officials Re: Mod Rehab units," in a manner to cause the jury to infer that it probably did involve defendant. It would also use the exhibit to support entries on Government's Summary Charts for Regent Street (Exhibit KK) and Foxglen (Exhibit LL).[83]

Similarly, a November 29, 1986, receipt referencing a "Staff Asst to Sec @ HUD Discussed Mod Rehab" (Gov. Exh. 11n) would be introduced even though it does not describe the defendant's position and defendant's calendars show no engagement with Mr. Sankin for that date. The entry would also be placed on the Foxglenn Chart.

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[82] This is not to concede the propriety of relying on Sankin's receipts that did specifically mention defendant in cases where there is no mention of the meeting in her calendars or other reasons to believe that defendant was not present. This is especially so in cases where defendant's calendars indicated that she was with other persons on the occasion that Mr. Sankin's receipts indicate that he paid for a lunch or dinner when defendant was present. One ought to be able to expect one's Government to inquire of those persons before it automatically relied on the accuracy of Mr. Sankin's receipts in a criminal trial.

[83] In the redirect examination of Mr. Sankin, government counsel would make a point of the fact that he had originally asked Mr. Sankin if he recalled whom the dinner had been with, and Mr. Sankin had stated that he did not. Tr. 1279. The suggestion that it was nevertheless proper to put the receipt in, however, ignores the fact that the introduction of all the receipts immediately followed testimony that Mr. Sankin bought meals for the defendant (Tr. 1140); that, in the minds of a reasonable jury, there would have been no purpose in using the receipts unless it was more likely than not related to the defendant; and that defendant's calendars gave the government strong reason to believe that the receipt did not involve defendant. Further, at no time ~~did~~ on direct examination did the Government elicit from Mr. Sankin the simple fact that definitely some of the receipts did not relate to defendant.

Further, in the case of the two gifts just before Christmas 1986, the fact that on December 23, 1986, Mr. Sankin would buy a cup and saucer listed as a "Bus. Gift for Deb. Dean," (Government Exhibit 11P) must have alerted the government that an item purchased from Georgetown Leather on December 24, 1986, listed as a "Gift HUD Asst. to Sec." (Government Exhibit 11Q) was very unlikely to be also for Deborah Dean.[84] This is perhaps why the government listed only the former gift in the Superseding Indictment (at 40, Para. 90). But recognizing that a jury might not distinguish between an "Executive Assistant" and an "Assistant," especially in a context where it would only make sense to present the receipt if it involved the defendant, the Government introduced the receipt into evidence notwithstanding that it had strong reasons to believe that it did not pertain to the defendant.

Based on the foregoing, it was improper for the Government even to attempt to introduce many of the Sankin receipts. The Government's misconduct related to those receipts went further, however, for it continued to rely on certain those receipts even after it had overwhelming reason to believe that they did not relate to defendant. With regard to the receipts for May 16, 1987, defendant would testify to the fact that she was in fact at The Preakness that day, and provide the names of a people she was with, allowing the Government the opportunity to verify her statements. Tr. 2707. Further, with regard to the receipt for the dinner of that date, Mr. Sankin had testified that the receipt more likely

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[84] In the discussion of the propriety of the government's manner of using the Sankin receipts, the Court expressed the erroneous view that "the Georgetown Leather Gift [ ] had DD on it." Tr. 1204. Government counsel did nothing to correct the Court's misunderstanding.

referred to Silvio DeBartolomeis. Tr. 1218. Nevertheless, in its Summary Charts for Eastern Avenue (Exhibit MM) the Government would rely on both receipts for May 16, 1987.[85]

With regard to the Georgetown Leather receipt, on cross-examination, Mr. Sankin would testify that "I see nothing on here that would indicate I gave this to Deborah Dean," (Tr. 1222) and that "I don't think [I gave it to her]." Tr. 1223. Defendant also, while acknowledging the cup and saucer, would state that she never received the Georgetown Leather gift. Tr. 2704. Nevertheless in the Summary Charts that the government sought to place into evidence and relied on in closing argument, the Government would cite both receipts and state: "SANKIN buys gifts for DEAN." Foxglenn Chart at 3 (emphasis added.)

b. Maurice Barksdale

The Government's refusal to take any actions that would have led its attorneys to evidence that Mr. Sankin's receipts did not involve defendant is also relevant with regard the Government's conduct involving another important government witness, former Assistant Secretary for Housing-Federal Housing Commissioner Maurice Barksdale. Mr. Barksdale was interviewed by agents of the Office of Independent Counsel on one occasion following the government's securing John Mitchell's files in May 1992, that interview occurring on June 28, 1992. He also testified before the Grand Jury on June 29, 1989, one week before issuance of the

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[85] Since Mr. DeBartolomeis had left HUD and moved to Colorado several months earlier, Mr. Sankin may have been mistaken that the receipt related to Mr. DeBartolomeis. That mistake, if it was a mistake, does not, however, bear on the impropriety of the use of the exhibit in the first place, nor on the propriety of the Government's continued use of the exhibit in its Summary Chart.

Superseding Indictment, which, as noted, relied on several documents from the Mitchell files for allegations relating to the Arama funding. A prosecutor interested in securing the truth about the funding of Arama in 1984 certainly would have confronted Mr. Barksdale with the information contained in the Mitchell telephone message of January 12, 1984, indicating that at that point in time Mr. Wilson or Mr. Mitchell was talking to Mr. Barksdale about 300 units.

This in fact is exactly what was done in the case of the previously discussed Martin Fine memorandum of July 31, 1985, that referenced Richard Shelby's upcoming meeting with "the contact at HUD." The difference, however, is that the latter document was shown to Mr. Shelby at a time when there was reason to hope that he would identify the "contact" as the defendant. There was no similar hope that, as a result of confronting Mr. Barksdale with the Mitchell note, Mr. Barksdale would recall something incriminating of defendant; all likely recollections that the note would have elicited would have been exculpatory of the defendant.

Thus, Jenks materials give no indication that Mr. Barksdale was ever confronted with the information in the Mitchell note. Notably, in his direct examination, Mr. Barksdale was carefully focused on the period of the July 1984 signing of the rapid reply on the Arama funding, when he was asked whom he was in contact with from the Secretary's office "[d]uring that period of time." Tr. 456. Lance Wilson was no longer at HUD at that time. When confronted with the Mitchell note on cross-examination, Mr. Barksdale gave no indication of ever seeing it before or of ever having been advised of the information in it. All other actions of

the prosecution in this case, particularly those revealed in the examination of Mr. Sankin, indicate that Mr. Barksdale was not confronted with the information in the note solely because of the danger that it might cause him to recall something exculpatory of the defendant.

3. Prosecution's Overall Approach to the Defendant

The third preliminary matter involves the prosecution's overall approach to the defendant, including its use of unethical and underhanded tactics to alienate defendant from the jury and undermine her credibility through extraneous issues that had trivial actual bearing either on defendant's credibility or on any other matter involving her guilt or innocence. This matter is highly germane to the issue of the Government's misconduct in its closing argument, since it illustrates the calculated nature of that conduct. However, it also is germane to the issue of the government's failure to correct the perjured testimony of its witnesses, since acknowledging that perjury would have greatly undermined the approach the government was seeking to implement.

a. Ridiculing of the Defendant

The government's approach must be evaluated in the context of this trial, where a prominent white person, from a family whose wealth had often been a subject of media attention, was being tried before what would be an all black jury. It occurred at a time when the nation's attention was focused upon issues of jury race/defendant race/victim race, as a result of the riots following the trial of four Los Angeles police officers for assaulting a black man in 1991, and the trial of the black defendants alleged to have criminally assaulted a white man in the course of those riots. The latter trial was occurring contemporaneously with the trial of this case and the deliberations of the jury in that case received substantial media attention.

The case also involved allegations relating to former Attorney General John N. Mitchell, a figure who frequently has been an

object of notoriety during the two decades of recurring attention to events following the Watergate break-in. This created the danger, recognized by Judge Gesell, that the jury might find the defendant guilty simply by association with Mr. Mitchell.

There was further reason for prosecutorial restraint in the fact that several years earlier defendant had received immense publicity in the principal local newspaper and the national popular press, frequently with suggestions that she had taken actions without the knowledge of Secretary Pierce. For example, in the December 25-January 1, 1990 issue of People Magazine, defendant had been featured as one of "The 25 Most Intriguing People of the Year." That issue contained a picture of defendant surrounded by African American demonstrators[86] opposite an article ~~that~~ describing her as someone who had filled a power vacuum created by Pierce, whom the article described as "a Cabinet-level hologram," who spent most of his time watching television. Defendant was described at the person who "controlled the paper flow and knew how to use [Secretary Pierce's] autopen."

The article would conclude with a discussion of defendant's relationship to John Mitchell and the $75,000 payment he had received for the Arama Project that would become the first issue of Count One:

> Deborah Dean's mother, Mary, lived with convicted Watergate conspirator John Mitchell after he got out of jail. Deborah came to refer to him as her stepfather, or sometimes "Dad." So here's a mystery for a rainy night: how Dean, with Mitchell's notorious example before her, fell into the same

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[86] The picture was taken from the front page of The Washington Post, which covered an incident where a group of protesters gathered outside defendant's home. Spolar, "Face-Off on a Georgetown Doorstep," Aug. 19, 1989, at A1.

sink--and even cut Mitchell in for $75,000 in consulting fees.[87]

The suggestion in the above piece that defendant had used the Secretary's autopen without authority was a common theme in these accounts, as were suggestions that defendant was actually running the Department, that she had deceived Secretary Pierce about her activities, and that Secretary blamed her for improprieties in the mod rehab program as well as other problems at HUD.[88] The nature

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[87] The article is appended as Exhibit NN hereto.

[88] See, e.g., Ifil, "Ex-Secretary Pierce says HUD Aides Deceived Him: Subsidy Awards 'Automatically Approved," The Washington Post, May 27, 1989, at A1 (The article reported that Secretary Pierce "said that he delegated the actual decisions to his aides, including then-executive assistant Deborah Gore Dean .... " and that he "'automatically approved' every project selection made by the panel!" Secretary Pierce was also quoted as observing, "'there was some lying going on, no doubt in my mind.'" Id. at A17);

Martz, "Poking Into HUD's Swamp," Newsweek, June 26, 1989, at 19 (A picture of defendant before the Lantos subcommittee would bear that caption: "**Taking the fifth:** Pierce blamed his longtime aide Dean, but she wouldn't talk.");

Traver, "The Housing Hustle," Time, June 26, 1989, at 18 (The article stated: "Pierce stood idly by as his executive assistant Deborah Gore Dean, 35, turned over contracts to firms that enlisted Washington insiders as consultants. They included Dean's close friend former Attorney General John Mitchell and former Interior Secretary James Watt." This caption appeared under pictures of Secretary Pierce and defendant: "But sources at HUD say it was controlled by Deborah Gore Dean, who was Pierce's Executive Assistant. When consultants, developers, or consultants wanted HUD money, they turned to Dean, who approved the funding requests without turning them over to Pierce for review." Id. at 19);

Waldman, "The HUD Ripoff," Newsweek, Aug. 7, 1989 at 16, 18 (With large pictures of Secretary Pierce and defendant on facing pages, the article described defendant as the "de Facto CEO of HUD," and noted: "She operated his autopen and according to a 1986 document obtained by Newsweek explicitly instructed HUD's housing commissioner that she would have final say on all moderate rehabilitation awards.");

Traver, "Sam Pierce's 'Turkey Farm,'" Time, Sept. 18, 1989, at 20 (Opposite a full-length picture of Secretary Pierce against the

of that coverage, with the suggestion that a strong white woman had manipulated a weak black man,[89] not only heightened the racially sensitive nature of the trial, but created an obvious danger that jurors' decisions would be based, not on the evidence presented in court, but on something that had been read in the press.

For all these reasons, the case presented a sensitive setting in which government counsel interested in ensuring a fair trial would be expected to display appropriate sensitivity and restraint.[90]

Nevertheless, when defendant on the stand would first commence to discuss the relationship of Mr. Mitchell to herself and her mother--an issue the Court would recognize to involve a "crucial

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Reflecting Pool and Washington Monument, was a smaller picture of defendant with the caption, "' I should have checked on her more.'" The article observed: "Although Pierce pronounces himself shocked by revelations about Dean, he gave her plenty of opportunity to do his job for him. In 1986 Pierce traveled to Des Moines and was embarrassed and angered by questions about a $225,000 HUD grant that the city was to receive--without his knowledge. Dean had used the secretary's autopen to approve the grant." Id. at 22).

[89] The racial implications did not go unnoticed at the time. As one African American observer noted, "Am I crazy to think that there's racism and sexism coloring the portrait of Deborah Gore Dean and Samuel Pierce, as a strong white woman controlling a weak black man." Edley, "HUD Crud, Sleaze Fees, and the Law's Limits," Legal Times, Aug. 21, 1989, at 22.

[90] Particular sensitivity would be expected to be shown as to matters touching upon John Mitchell in light of the Independent Counsel's statement to the press upon receiving his appointment that the fact that he had offended John Mitchell may have kept him from being appointed to the Supreme Court.
Discussing his belief that he might have been appointed to the Supreme Court in 1971 had he not angered the Nixon Administration, Arlin Adams was quoted as observing: "I never felt that I deserved it. And I had offended John Mitchell." Howlett, "HUD prober not an 'activist.'" USA Today, Apr. 11, 1990, at 2A. Prosecutors should seek to avoid any appearance of a conflict of interest interfering with their official duties. Monroe Freedman, Understanding Lawyers' Ethics 223-24 (1992)

allegation in the case" (Tr. 2594)--counsel for the government interrupted to make a snide comment. Tr. 2592. Though the Court admonished counsel for his behavior, the following day, when the defendant was making a vigorous defense of her conduct, government counsel again interrupted with another inappropriate comment. Tr. 2671. Following this interruption, in a bench conference, the Court questioned government counsel's motives (Tr. 2776):

> THE COURT: Mr. O'Neill, let me ask you if that had been a black defendant on the stand with a white jury, would you be making the same kind of smart comments you've been making with a white defendant and a black jury?
>
> MR. O'NEILL: Do you think I'm making those racially?
>
> THE COURT: No, what I'm impugning is that you're making these comments with a white defendant and a black jury which you wouldn't be doing with a black defendant and a white jury, and I resent that. I think it may be a basis eventually for the bench to take a look at this case.

The following day, the Court elaborated its concerns, when government counsel questioned the remarks set out above (Tr. 2786-87):

> MR. O'NEILL: ... There was no intention, and I don't think the record supports a anything that we ever played race here. It's an all black jury, but we exercised no peremptory challenges on any white people.
>
> THE COURT: I didn't say you did. I think the import of the actions -- as I said, I think if it had been a well known prominent black person as the defendant in this case, as a good prosecutor, and you are a very good one, you'd have been[91] careful not to show any disrespect --
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> MR. O'NEILL: I understand.

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[91] The words "you'd have been" reflect defense counsel's recollection of what was said. The transcript reads "and ~~you have~~ been," which defense counsel believes is a mistranscription of what the Court stated.

THE COURT: I was a little concerned with this jury. All right.[92]

During cross-examination of defendant, the Court again found it necessary to admonish counsel for making comments after defendant answered a question, noting that the only purpose of such comments was to improperly influence the jury. Tr. 2899-2900. At that time the Court thought it necessary to again state its concerns about disrespect government counsel had shown to the defendant. The Court stated (Tr. 2900-01):

> "I just wanted to make it clear yesterday and I don't want to rehash this again because it's over, it's water over the dam, but I'm not sure the record reflected what my concern was adequately and I don't want to leave an unfair impression to Independent Counsel. Miss Dean had been answering a question, had raised her voice and spoken very loudly and repeated a couple times she never meant to do something. That's the

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[92] It should be noted that there exists an additional basis for the Court's concern about the jury as a result of events occurring during and after the defendant had called two African American witnesses. As a result of the jury's inappropriate behavior during that testimony, the Court chastised the jury just before defendant took the stand. Responding to defense counsel's expressions of concerns about the behavior of Juror Number 7, the Court noted that her behavior had been a principal reason for chastising the jury, and that she had not taken the reprimand well. Tr. 2269. The following day Juror Number 7 was late, and arrived with excuses for Juror Number 5, who did not show up at all. Tr. 2277-79. Juror Number 7 also explained that Juror Number 5 had borrowed money from her. Tr. 2293. When the decision was made to strike Juror Number 5, defense counsel requested that Juror Number 7 also be stricken both because of her behavior and her involvement with Juror Number 5. Tr. 2295-96. Counsel for the Government opposed striking Juror Number 7, noting that the only time that she was laughing was during the testimony of a defense character witness, adding that he (government counsel) had been laughing during part of that testimony as well. Tr. 2296. Though the Court acknowledged the inappropriate behavior of Juror Number 7, including that fact that the day before she had refused to look at anyone, it declined to strike her at that time. Tr. 2296-98. The following day, defense counsel again moved to strike Juror Number 7 noting that she had been asleep and was seen passing a pill. Government counsel stated that he did not notice the pill or anything else unusual about Juror Number 7. While observing that it did have some concerns about Juror Number 7's behavior, the Court indicated that it did not find her behavior sufficiently unusual to warrant striking her. Tr. 2411-12.

general context, that's not totally accurate, but she said never, never it very loudly several times. The remark of counsel for the prosecution was I'm sorry, I didn't here you, and holding your hand to your ear which caused the jury to laugh and snicker. I'm not sure that would appear in the record.

The prosecutor did not use all its strikes in choosing jury and I have no question that that's a problem with choosing jury at all. My concern there was an insensitivity and maybe something much more. These remarks are to influence the jury. We're here to give the defendant a fair trial and that's what we're all here to do."

Notwithstanding the Court's admonitions regarding the sensitivity of the situation, as shown in Section B below, government counsel adopted a approach in closing argument of repeatedly calling the defendant an liar, an approach that was not only inflammatory, but specifically condemned by the Courts.[93]

b. Baiting the Defendant

In order to lay the groundwork for that approach, after failing in the cross-examination of the defendant to show that anything in her account of the events at issue was implausible, government counsel repeatedly baited defendant over trivial side issues in an effort to force the defendant into a position of questioning the integrity of others. The Government's conduct in doing so was both underhanded and unethical.

One example, which would form the basis for one of the government's accusations in closing, involved Colonel Jack Brennan, regarding whom the following colloquy took place (Tr. 3003):

Q. Did he tell you that he was being paid as a consultant on South Florida I.

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[93] Also shown in that section is that counsel's approach in closing argument was improper for many other reasons, including, inter alia, repeated, and plainly calculated, misrepresentations of testimony and statement as facts of matters that government counsel knew not to be true.

A. No. And when I confronted him later about John's being paid, he didn't tell me either.

Q. So he lied to you, ma'am?

A. He did not tell me.

Q. So he deliberately withheld that information from you, ma'am?

A. He did not tell me.

There is nothing in any testimony in this case, including Colonel Brennan's immunized testimony, suggesting that Colonel Brennan told defendant he had been paid for South Florida I at any time. In light of Colonel Brennan's description of defendant's reaction to his informing her of Mr. Mitchell's role,[94] it is extremely unlikely that he would have then volunteered the information to defendant that he too was being paid for HUD business. In short, the Government had no basis for questioning defendant's account of what Mr. Brennan had told her, and pressed her on whether "he lied" solely in order to later disparage defendant's testimony in the following words: "Jack Brennan lied to her." Tr. 3431. In doing so, it must further be noted, government counsel was actually asserting to the jury that defendant had falsely accused Colonel Brennan of lying. Yet, the Government had no basis for believing that defendant's account of her exchanges with Colonel Brennan was false, and in fact, in all likelihood knew that it was true.

In the case of Russell Cartwright, defendant was questioned about an expense record of Mr. Cartwright's indicating payment for

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[94] Colonel Brennan stated that when he informed defendant that Mr. Mitchell had earned HUD consulting fees, "Her reaction was shock and aghast." Tr. 369

a dinner with defendant and a HUD employee named Abbie Wiest in October 1987, a time several months after defendant resigned her position as Executive Assistant. Defendant responded that the receipt could not have applied to her since she had never eaten with Mr. Cartwright. Tr. 2864-65.[95]

Defendant had negligible interest in falsely denying that the record involved her, much less in falsely denying that she had ever had dinner with Russell Cartwright, since both statements, if false, easily could be disproved. At the time of the questioning, moreover, Abbie Wiest was listed as a defense witness. Thus, government counsel had little reason to doubt defendant's statement that she could not have been at the dinner referenced in the expense account entry. In addition, however, before the Grand Jury, Abbie Wiest had forcefully, and with clear recollection of the time frame, denied the possibility that defendant could have been involved in such a dinner.[96] Thus, there is every reason to

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[95] That exact questioning was as follows:

> Q. How about Russell Cartwright? Did you ever have meals with Russell Cartwright.
> A. No, I've never eaten with Russell Cartwright.
> Q. Do you recall going out to dinner with Mr. Cartwright, Abbie Wiest and yourself on October 22, 1987.
> A. I've never eaten with Russell Cartwright.

[96] The relevant portions of Ms. Weist's Grand Jury testimony are attached as Exhibit OO. According to Ms. Weist, she dined with Ms. Dean and members of Mr. Cartwright's firm on two occasions, neither of which included Mr. Cartwright. In addition, confronted with the representation that the questioner had information that Mr. Cartwright, Ms. Weist, and defendant had dined at the Mayflower Hotel on October 27, 1987, Ms. Weist specifically denied that Ms. Dean was there. She further observed:

> "October 28th is my birthday, and Russell and I were out having drinks. It was just me and Russell. I remember specifically that night."

believe that government counsel knew for a fact that the entry in question was false, and that the Government would not be able to put that expense record into evidence without securing the perjured testimony of Mr. Cartwright or otherwise perpetrating a fraud on the Court.

Nevertheless, government counsel badgered defendant about the entry in order to force her to say Mr. Cartwrights's receipt was false and to accuse Mr. Cartwright of illegal activity. Tr. 2871.[97] The sole purpose in baiting defendant over this single

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In the cross-examination of defendant government counsel mentioned a dinner on October 22, 1987, rather than October 27, 1987. Ms. Wiest's testimony suggest that counsel simply misread the entry in the questioning of defendant. In any event, defendant's records, which were in the possession of the Independent Counsel, showed that defendant paid a check for her share of a St. Thomas More Society Dinner on October 22, 1987. See Affidavit of Deborah Gore Dean. To clarify this matter, however, defendant has requested from the Independent Counsel a copy of the document used in the cross-examination of defendant. Defendant has also requested from defendant all interview notes or Grand Jury testimony reflecting the questioning of Russell Cartwright with respect to any expense record relating to defendant.

[97] After being questioned as to whether receipts that showed defendant was present at meals where defendant said she was not present were false and defendant agreed, this questioning ensued:

> Q. How about Black, Manafort & Stone, the same thing?
> A. I didn't look at any from Black, Manafort & Stone, I don't remember looking at any.
> Q. The Russell Cartwright entry?
> A. I didn't see it. I didn't allow you to show it to me, I'm sorry.
> Q. Let me show you --
> A. Wedgewood, Wadsworth, Wiest. I don't have any recollection of being with Miss Wiest and Mr. Cartwright.
> Q. So this would be false as well, correct?
> A. He may have been with Ms. Wiest.
> Q. I believe you just testified that he was not with you?
> A. He was not with me.
> Q. So this is false?
> A. All right.
> Q. Now you understand that to file false statements like that would be illegal, correct, ma'am.?
> A. Yes, I believe it is. Yes.
> Q. So each of these individuals has committed a crime?

receipt was in order that government counsel might later state in closing argument--though falsely, and without putting a single Russell Cartwright receipt into evidence--that defendant had testified that "All Russell Cartwright's receipts are lies." (Tr. 3408). Counsel would do so in the context of representing to the jury that defendant had lied when she so testified.

In the case of Lynda Murphy, defendant had testified that with regard to paying for things such as meals, "it was very equal between Ms. Murphy and her husband and her husband's best friend, which was my boyfriend at the time, and myself." Tr. 2854. That testimony suggests that undoubtedly Ms. Murphy and her husband paid for meals on many occasions when defendant was present, and that receipts would exist for such occasions. Defendant thus would have no interest in falsely denying an expense record for drinks at place in Vail, Colorado called "The Saloon Across the Street," particularly when defendant stood ready to show that he had reciprocated essentially contemporaneously. Tr. 2855-56.

Yet, after questioning about such a receipt and having every reason to believe that defendant was giving her best recollection as the truth as to this matter,[98] government counsel then sought to

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At this point, the Court sustained a defense objection.

[98] It appears that government counsel sought purposely to confuse that recollection. In cross-examining defendant, counsel asked defendant the following question: "Do you recall while you were out there Lynda Murphy buying drinks at a place called "The Saloon Across the Street?" Defendant responded that that would have been impossible since Ms. Murphy had broken her leg and was in the hospital. Tr. 2855. Government counsel knew that this was true since Ms. Murphy had so stated in an Interview with the Office of Independent Counsel on September 23, 1992 (at p. 8). Exhibit PP. Government counsel then showed defendant Murphy's expense record for the trip, which contained an entry for "Saloon" (Exhibit _ to Dean Affidavit) asking if that refreshed defendant's

suggest that defendant was accusing Ms. Murphy of wrongfully deducting the expense. Tr. 2854. Yet, counsel knew from the interview of Ms. Murphy, that the bill for The Saloon, along with the entire trip to Vail, had been treated as a business expense because Murphy was giving a speech at a conference, not because of anything to do with the defendant. Murphy Interview at 8 (Exhibit PP).

According to the Murphy interview, Murphy was not questioned concerning any of the other expense items about which government counsel questioned defendant. The questioning of defendant occurred solely in order that government counsel might state in closing argument--again falsely, and again without introducing any of the records into evidence--that defendant had testified that "all Linda Murphy's receipts are lies" (Tr. 3408) and to assert to the jury that such testimony was itself a lie.

In the case of Lance Wilson, defendant relied on her calendars, acknowledging lunches that the calendars indicated took place and denying those that the calendars indicated did not take place. Tr. 2849-53. She also presented a plausible account of how she had not hosted a July 17, 1986 birthday party paid for by Mr. Wilson, an account which, if false, numerous persons could have refuted. Tr. 2850-51. In sum, the government had no reason to

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recollection. Defendant again insisted that Murphy could not have been in "any saloon" with defendant. Tr. 2856. Counsel then asked whether Mr. Boisclair could have bought the drinks, and defendant responded that she did remember a place called "The Saloon," and could not imagine how she could have been in more than one restaurant, on which occasion defendant herself paid the bill. Tr. 2856. Though possessed of a receipt showing that Jon Boisclair had paid a bill for $87.55 at a place called "The Saloon Across the Street," and which referenced defendant on the back (Exhibit QQ), government counsel did not seek to use it to refresh the defendant's recollection.

question defendant's testimony here. Once more, however, the same type of baiting would form the basis for an assertion in closing argument--again, a false assertion--that defendant had stated that ''all of his receipts are lies, all the Lance Wilson receipts are lies." Tr. 3408.

Finally, it must be recognized how much the government's closing argument, and its attack on defendant's credibility in particular, would focus of defendant's rebuttal witnesses, who would contradict defendant on small points, in circumstances where, in the face of the government's "strenuous[] object[ion]," surrebuttal would be denied precisely because the rebuttal pertained to such small points. The government's improper use of these witnesses--including both the failure to correct the perjurious statements of its witnesses and the intentional use of testimony that the Government knew or should have known to be perjurious--is the subject of a number of the points raised in the sections that follow.

It is in this above context, however, that all of the points in the sections below must be evaluated.

B. PERJURED TESTIMONY OF GOVERNMENT WITNESSES

The government has an obligation to refrain from using perjured testimony and to correct the perjury of any of its witnesses whom the government has reason to know have committed perjury. Napue v. Illinois, 360 U.S. 264, 270 (1959); United States v. Cole, 755 F.2d 748, 763 (D.C. Cir. 1985); United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991); United States v. Rivera-Pedin, 861 F.2d 1522 (11th Cir. 1988). In this case, however, the Government failed in its obligation to correct the testimony of important witnesses whose testimony the Government had to know was false. The Government also proceeded to elicit testimony that its representatives had overwhelming reason to believe was false. In both situations, the government not only sought to preclude the revelation of the false testimony, but relied on portions of that testimony in closing argument. Further, whether known to government counsel or not, there is sufficient evidence that a critical government witness, who is also an agent of the Office of the Independent Counsel, committed perjury in his testimony to warrant a hearing and discovery on that matter.

1. Thomas T. Demery

Former Assistant Secretary for Housing-Federal Housing Commissioner Thomas T. Demery was a key government witness in this case, particularly with respect to his testimony that a 203-unit Dade County, Florida request for moderate rehabilitation funding had been brought to his attention by defendant. Tr. 1939. As shown below, in both direct and cross-examination, Mr. Demery made statements that government counsel knew to be perjurious. Not only

did the government allow that perjury to go uncorrected, but, in closing argument, though knowing Mr. Demery had in fact lied under oath in this Court, in attacking defendant's credibility, the government specifically cited Mr. Demery as someone defendant had falsely accused of lying.

The perjury in Mr. Demery's direct examination involves a statement regarding the implementation of a funding instruction provided to Mr. Demery by the defendant in late October 1986. The perjury in Mr. Demery's cross-examination involves statements that Mr. Demery had not lied under oath when testifying before Congress. Because the more obvious instance of Mr. Demery's making statements known by the government to be perjurious involves the statements in cross-examination, that matter is treated first below.

a. Demery Cross-Examination

During Congressional investigations into HUD's moderate rehabilitation program, Thomas T. Demery lied under oath to Congress on a minimum of two occasions by denying that he knew that members of the so-called Winn Group were involved in the moderate rehabilitation program. When Mr. Demery appeared before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs, on May 11, 1989, the following questioning occurred:

> CONGRESSWOMAN OAKAR: Were you aware of Philip Winn, Philip Abrams, Michael Queenan and Silvio DeBartolomeis were all sort of in a partnership with each other? Were you aware of their applications? I am not saying it is wrong if you were.
>
> MR. DEMERY: No. Let me explain my understanding of that relationship. I thought Silvio was the management agent for the multifamily holdings of Winn and Abrams. Queenan was an employee of theirs, but did some -- Queenan was never a player in my understanding as to who he was or what he did. I met him, as I stated earlier, for the first time in February 1988.

Obviously, I knew Phil Winn and Phil Abrams. But when I asked Abrams what it was he was doing, he explained to me that he was developing industrial buildings.

CONGRESSWOMAN OAKAR: On what occasion did you ask him?

MR. DEMERY: Shortly after I got to HUD. Or maybe shortly before. Because he would, from time to time, be in Washington. I would ask him what brought him there, and he would say his industrial buildings out by Dulles Airport. I thought he was in the industrial development business.

Hearings before the Subcommittee on Housing and Development of the Committee on Banking, Finance and Urban Affairs, House of Representatives at 99 (Exhibit RR) (Emphasis added).

More than a year later, on May 23, 1990, Mr. Demery appeared before the Subcommittee on Employment and Housing of the House Committee on Government Operations. On this occasion, Mr. Demery was confronted with a two-page document secured from his wordprocessing diskettes styled "MOD REHAB REQUESTS as of November 1, 1987," which, along with the matching of names of other individuals with pending moderate rehabilitation requests, matched the name "Winn" with pending requests for Richland, Washington, and Victoria, Texas. When asked by Subcommittee Chairman Lantos how this document squared with Mr. Demery's prior statements that he had not known whether consulting arrangements existed with regard to moderate rehabilitation allocations he had made, Mr. Demery responded as follows:

> MR. DEMERY: Mr. Chairman, as I said in my testimony before this subcommittee as well as in the [Subcommittee on Housing and Community Development] with respect to Phil Winn, I thought Phil Winn and Phil Abrams were developers, commercial developers, of office buildings and so on in the Washington, D.C. area. I did not know that they were developers of mod rehab or they had interests in mod rehab programs.

Hearings Before the Employment and Housing Subcommittee of the Committee on Government Operations, House of Representatives at 338-43 (Exhibit SS).

On December 4, 1992, the Office of Independent Counsel secured an indictment against Mr. Demery alleging that in making the underscored statements in the two passages set out above while under oath, Mr. Demery "did willfully and contrary to such oath testify to a material matter that he did not believe to be true and did knowingly make false material declarations" in violation of Title 18, United States Codes, Section 6121. Superseding Indictment in United States of America v. Thomas T. Demery and Phillip McCafferty[99] at 64-66 (Counts Twenty-Two and Twenty-Three).[100]

On June 11, 1993, five days before Mr. Demery's counsel signed a formal plea agreement,[101] and presumably following tentative agreement, Mr. Demery admitted to representatives of the Office of Independent Counsel that he had known Mr. Winn and Mr. Abrams were

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[99] The portions of that Indictment relevant to points made herein are attached as Exhibit TT hereto.

[100] The Superseding Indictment also charged that on May 2, 1988, Mr. Demery had knowingly and willfully made a false statement to representatives of the HUD Office of Inspector General, by representing that "he did not know the Winn Group to be involved in Moderate Rehabilitation program projects" (at 63, Count Twenty-One); and that on or about August 20, 1990, Mr. Demery had knowingly and willfully made a false statement to representatives of the Office of the Independent Counsel by representing "that he did not know Philip D. Winn of the Winn Group and other members of the Winn Group who had been employed by HUD were involved with the Moderate Rehabilitation Funding Program after leaving HUD, and that it was, instead, his understanding that Philip D. Winn and another representative of the Winn Group were involved with industrial development in the vicinity of Dulles Airport." Id. at 66, Count Twenty-Four.

[101] Mr. Demery's plea agreement is a matter of public record.

in the moderate rehabilitation business during the periods relevant to his statements. At page 3 of the interview report (Exhibit UU), it is reported that Mr. Demery stated that "[i]t was at approximately [March, 1987] that Demery came to understand that Abrams and Winn were in the mod rehab business." At page 5 of the interview report, it is reported that Mr. Demery described a breakfast meeting with Mr. Winn in September 1987, when Mr. Winn requested approval of moderate rehabilitation funding for Richland, Washington, and Victoria, Texas, and that Mr. Demery admitted that there "was no doubt in [his] mind following the September, 1987 meeting that after Winn requested specifically for mod rehab funding that Winn and the Winn Group were directly involved (financially) in mod rehab projects."

Mr. Demery's plea agreement did not include the charges of making false statements before Congress. That is irrelevant, however, to whether there is a basis for believing that the Office of Independent Counsel knew Mr. Demery had lied to Congress and hence knew that he lied in this Court when he denied lying to Congress. Countless factors enter into the plea bargaining process, including the government's consideration of how a plea to a perjury charge will affect a witness's credibility in subsequent proceedings where the individual testifies on behalf of the government in fulfillment of the plea agreement. Regardless of the absence of a plea to a perjury count, at least as early as June 11, 1993, the Office of Independent Counsel knew beyond a shadow of a doubt that the allegations in the Superseding Indictment that Mr. Demery had lied to Congress were true.

During Mr. Demery's cross-examination in this case, the following questioning occurred (Tr. 1915):

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're 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.

Following this testimony by Mr. Demery, counsel for defendant proceeded to cross-examine Mr. Demery on a number of subjects related to his testimony before Congress, including his contacts with former HUD employees (Tr. 1920), his knowledge of the identity of consultants (Tr. 1931-32), and whether the projects Mr. Demery selected were always the best projects. Tr. 1935.

It does not matter here whether such cross-examination would have been expected to persuade the jury that Mr. Demery had lied to Congress on these issues and hence that his statement on the stand that he had not lied to Congress was false. And for instant purposes, it can be assumed, arguendo, that this cross-examination had failed to convince government counsel that Mr. Demery had in fact lied to Congress with respect to the matters that were the subject of the cross-examination.

The fact remains that government counsel knew beyond any shadow of a doubt that Mr. Demery had lied under oath to Congress with regard to his denial of knowledge of the activities of the Winn Group, and hence knew beyond any shadow of a doubt that Mr. Demery lied under oath in this Court when he denied lying to Congress. Government counsel then had a duty to correct the perjury of its witness.

In redirect examination, however, the Government made no mention of Mr. Demery's perjury on cross-examination. Instead,

government counsel elicited from Mr. Demery testimony that the government believed highly relevant to its case. This included testimony that Mr. Demery received the October 1986 list from defendant and that Mr. Demery had no conversations about the list with Secretary Pierce (Tr. 1937)[102], testimony that the government evidently believed was important to its case. It also included testimony that the 203-unit Dade County request selected in the Spring of 1987 had been brought to Mr. Demery's attention by defendant, which, if believed, defendant acknowledges would be important to the government's case. Tr. 1939.

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

Defendant maintains that the statement that "we know [defendant] definitively did lie" was not only improper vouching, but was untrue. The point here, however, is that government counsel knew that a key witness for the government, Thomas T. Demery, "definitively did lie," and instead of fulfilling its duty to make that fact known, sought to cover it up.

b. Demery Direct Examination

Mr. Demery also made a statement that the Government knew to be false during his direct examination. In that examination, Mr.

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[102] That government counsel knew that Mr. Demery had made a false statement about that list in his direct examination is treated in the subsection below.

Demery stated that in "late October/early November" of 1986, the following occurred (Tr. 1892):

> "I had a conversation with Ms. Dean, I believe it was in her office, where there were approximately nine PHAs that were to receive funding. She gave me the nine PHAs that were to receive funding, and I then initiated the funding process."

Documents known to the Independent Counsel, however, indicated that Mr. Demery's statement that he "then initiated the funding process" was not true in the following significant respect. The list that defendant gave to Mr. Demery, and which would receive considerable emphasis in the government's closing argument (Tr. 3411), is list of allocations to nine PHAs or areas, and among them is a 44-unit allocation for Texas. A typed version of it [redacted] contains an instruction from defendant to Mr. Demery to let defendant know when the funding is in action.[103]

Exhibit XX is another handwritten list. That list is similar to the list given to Mr. Demery by defendant, except that in place of the 44-unit allocation for Texas, there is 44-unit allocation for the "Lansing Housing Commission (Ingram County, Mich.)." It is the funding of the latter list that the Office of Housing actually would implement, through a process commenced on October 29, 1986. See Government Exhibits ~~182~~ 181, ~~183~~ 182, 183.[104]

The replacement of Texas with Lansing could not have been unknown to the Office of Independent Counsel. The assignment of 44 units of moderate rehabilitation to the Lansing Housing Authority and the subsequent manipulations for the benefit of a group that

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[103] Exhibit VV, a Government Exhibit, is the handwritten list created by defendant.

[104] That Lansing Michigan had not been on the list approved by Secretary Pierce was also brought out in the testimony of defendant. Tr. 2545.

had bought Mr. Demery's business were a subject of a conspiracy charge in Mr. Demery's Superseding Indictment (at 36-39) (Exhibit TT). Again, however, the matter was not part of Mr. Demery's plea agreement.

Whether Mr. Demery had merely implemented instructions given to him by Ms. Dean or had modified those instructions for the benefit of persons with whom Mr. Demery had financial involvement would have been material to the appraisal of a range of issues concerning the relative roles of defendant and Mr. Demery. Thus, the Government had a duty to correct Mr. Demery's false statement. However, after this area was not broached in cross-examination, in redirect, as noted above, the government returned to the issue of the October 1986 list given Mr. Demery by defendant, eliciting further testimony about Ms. Dean's role regarding the list. Neither that testimony nor the subsequently elicited testimony regarding the Dade County allocation in the Spring of 1987 would have been as persuasive had the government fulfilled its obligation to correct Mr. Demery's false testimony.[105]

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[105] The false statement during direct examination stands on a somewhat different footing from the false statement during cross-examination. The latter statement was a response to a question propounded by defense counsel, which Mr. Demery might not have discussed with government counsel in preparing his testimony. Preparation for Mr. Demery's direct testimony, however, presumably would have involved a discussion of the planned testimony about the October 1986 listing. It also would presumably have involved a discussion of whether Mr. Demery would state that he initiated the funding instruction contained on the list, or that, as in fact occurred, he implemented a modified version of that instruction.

2. Ronald Reynolds and Pamela Patenaude

As discussed more fully in Section C, in closing argument government counsel would maintain that the determinative issue in the case was defendant's credibility and then would proceed to devote his argument principally to an attack on that credibility. The testimony of the government's rebuttal witness Ronald Reynolds, though involving a seemingly trivial matter, played a large role in that attack. It was cited by government counsel at great length in the first day of the government's closing, and referenced again the following day, in each instance to form the basis for government counsel's representations to the jury that defendant had lied on the stand. The Government's mischaracterization of the way Mr. Reynold's testimony related to defendant's testimony on each occasion is treated in Section C.2., infra, and the points made there would apply even if Mr. Reynolds' testimony were entirely credible and even if the Government had no basis for questioning Mr. Reynolds' testimony.

The separate issue treated here involves the facts (1) that the Government had compelling reason to believe that Mr. Reynolds would lie if called to testify and behaved improperly in calling him in the first place; and (2) that the Government had compelling reason to believe that the testimony that Mr. Reynolds did give both in direct examination and in cross-examination was false, invoking an obligation for the government to correct that testimony.

The government did not fulfill that obligation, however. Instead, it sought to rehabilitate Mr. Reynolds in redirect examination by eliciting further testimony that the government had

reason to know was false. The government then resisted defense efforts to impeach Mr. Reynolds through additional cross-examination and surrebuttal, and, in closing argument, while relying heavily on Mr. Reynolds' testimony, the government used misleading arguments in a further effort to rehabilitate him.

a. The Reynold's Interview

On March 26, 1993, HUD driver Ronald Reynolds was interviewed by representatives of the Office of Independent Counsel. Much of what he stated in the interview reflected things that had been written about defendant in the press, but were described by Mr. Reynolds as things that she told him while he drove her. For example, he stated that she had bragged about using the Secretary's autopen, or bragged that her family had once owned the Fairfax Hotel, or descibed the relationship between Mr. Mitchell and her mother (Interview at 2 (Exhibit YY)), all matters frequently reported in the popular press. Mr. Reynolds stated that he in fact knew defendant from when she had worked in restaurants where the press had reported that she in fact worked, as well as from the City Newspaper (id.), where defendant had never worked, though it was sometimes reported that she had once published a magazine called City Life. See, e.g., McClellan, "Deborah Gore Dean," Washingtonian, Oct. 1992, at 75, 164.[106]

[106] Among the other of Mr. Reynolds' statements that appear to be based on newspaper accounts of defendant's background, in some cases colored by things Mr. Reynolds might have heard about the defendant, are the following. Mr. Reynolds gives a detailed account of driving defendant and other officials to "power lunches" at a restaurant on the south side of M street that was either called the "Green Door" or had a green door. Interview at 5. There is no restaurant that fits that description. Yet, many people at HUD knew that, at the time of Mr. Reynolds interview on March 30, 1993, defendant was engaged to marry a man who had worked for some years at The Guards' Restaurant on the North Side of M

Mr. Reynolds also told investigators certain things about his driving the defendant that government counsel had to know could not possibly have been true. Among them were: (1) that during the period that defendant was Executive Assistant, Mr. Reynolds took defendant to lunch with John Mitchell on average about once a month; (2) that he overheard conversations of defendant and other HUD officials discussing mod rehab on the telephone in the HUD car.

Government counsel had compelling reason to believe these statements were false. The Government had calendars of defendant and Mr. Mitchell that, along with other evidence available to the Government, indicated that during the time that defendant was Executive Assistant, she had no more than six lunches with Mr. Mitchell, and possibly as few as one.[107] The Government also had

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Street, and according to a Washington Post item dated March 5, 1993 (Exhibit AAA), then worked as a counsellor for mental rehabilitation center called "the Green Door." See Affidavit of Deborah Gore Dean.

[107] Defendant's calendars and other materials possessed by the Office of the Independent Counsel indicate the following lunches were scheduled with Mr. Mitchell while defendant was Executive Assistant:

1. Defendant's calendars show that a lunch with "Mr. Mitchell and Tom Evans" was scheduled for March 8, 1985 (Gov. Exh. 5Q). There is no indication in defendant's records of where or whether the lunch took place.

2. Defendant's calendars show that a lunch was scheduled with Mr. Mitchell and Richard Shelby on September 9, 1985. This lunch took place, and occurred at the Grand Hotel.

3. Defendant's calendars show that a lunch with "Rick and John" was scheduled for January 28, 1987. There is no indication in defendant's records as to whether or where the lunch took place. No information has been provided by the Government from the files of Mr. Mitchell or Mr. Shelby in support of the entry related to this lunch in its summary chart on Park Towers indicating where or whether the lunch took place.

access to defendant's secretary who certainly would have been in a position to inform the government of the likely frequency of lunches between defendant and Mr. Mitchell. Moreover, since Mr. Reynolds was only one of a large number of HUD drivers, his statement that he drove defendant to lunch with Mr. Mitchell approximately once a month would mean that defendant actually lunched with Mr. Mitchell at least several times per month.

In addition, if government counsel did not already know it, in a bench conference at a time when the government was intending to call Mr. Reynolds in its case in chief, defense counsel informed government counsel that there were not phones in the cars at HUD at

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4. A lunch was scheduled with Mr. Mitchell and Mr. Shelby at the Grand Hotel on April 17, 1987. No information provided by the Government from the files of Mr. Mitchell or Mr. Shelby in support of the entry related to this lunch in the Government's Park Towers chart indicating where or whether the lunch took place. However, there is a line through the entry on defendant's calendar, and defendant scheduled lunch with Mr. Shelby and another person on April 16, 1987. Gov. Exh. 8. This suggests that the lunch with Mr. Shelby and Mr. Mitchell was likely cancelled.

5. Mr. Mitchell's calendar show the scheduling of a lunch with defendant at HUD on September 26, 1986 (Gov. Exh. 10B). this lunch and her records do indicate where or if it took place. No information has been provided by the Government from Mr. Mitchell's files in support of the entry on the South Florida I chart indicating where or whether the lunch took place. Defendant's calendar shows a birthday lunch with Silvio DeBartolomeis scheduled for that day. Gov. Exhx. 6 and 7.

In addition, Philip Winn testified that he had lunch with Mr. Mitchell and defendant at a place in Georgetown at an unknown point in time. Tr. 1706-07. Records also indicate that defendant scheduled lunch with Mr. Mitchell, Mr. Shelby and Al Moran at the Grand Hotel for December 17, 1987, after defendant was no longer Executive Assistant. Gov. Exh. 8HH.

the time in question, and also informed government counsel of other implausibilities in Mr. Reynolds statement. Tr. 1774-75.[108]

Mr. Reynolds also made certain statements about the defendant and Mr. Mitchell that, while arguably not absurd on their face, were exceedingly improbable. Specifically, immediately after observing that defendant met with Mr. Mitchell once a month while she was Executive Assistant, Mr. Reynolds gave the following testimony (Interview at 4):

> Reynolds never met Mitchell. Dean would have Reynolds drive her to the Ritz Carlton or Hay Adams and tell him that she was meeting Mitchell for lunch. Dean's mother met with them sometimes also.

If these statement were not facially absurd, however, there was nevertheless strong reason to believe that they were false. First, they were provided in an interview that was replete with demonstrably false statements, including the sentence immediately preceding the quoted material. Second, all evidence possessed by the Government indicating the places where defendant did meet or was scheduled to meet Mr. Mitchell for lunch indicated that those lunches were to take place at the Grand Hotel or in Georgetown; Mr. Shelby specifically told the Indendent Counsel that all his lunches with defendant and Mr. Mitchell were at the Grand Hotel or at The

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[108] Among other statements of Mr. Reynolds that common sense would suggest are manifestly implausible: that defendant had sat on Lance Wilson's lap in the front seat of the HUD car (Interview at 4); that defendant asked Mr. Reynolds to accompany her into her condominium to stand in the door while she looked for a check (id. at 5). Mr. Reynolds also discussed the relationship of Ms. Lynda Murphy and defendant while they both worked at HUD (Interview at 4), though Ms. Murphy and defendant never worked at HUD at the same time. See Dean Affidavit. Reynolds also stated that Murphy often invited him to her horse farm in Manassas, Virginia (Interview at 4), though Murphy had no such farm. See Dean Aff.

Guards, which is in Georgetown.[109] Third, while defendant's calendars showed a total of seven lunches at the Ritz Carlton and one at the Hay Adams, none are shown to be with Mr. Mitchell.[110] This suggests that Mr. Reynolds may have recalled real trips that he drove on or heard of but was embellishing them with fabricated recollections of defendant's statements about meeting Mr. Mitchell. Finally, defendant's calendars showed not a single lunch with her mother and Mr. Mitchell, and in fact not a single lunch with her mother at all. The fact that defendant never lunched with her mother while at HUD is a matter that easily could have been verified with defendant's secretary. Moreover, defendant's mother had been called before the Grand Jury.[111]

At the bench conference on September 30, 1993, when defense counsel sought to bar the testimony of Mr. Reynolds because of the evident unreliability of his testimony, government counsel did not

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[109] See Interview Report of May 29, 1992 at 2 (Exhibit YY). As indicated in the Affidavit of Deborah Gore Dean, Mr. Mitchell always dined with her at either the Grand Hotel or The Guards in Georgetown, and ~~that~~ it was her understanding that he rarely ate anywhere else. The government was also in a position to learn the same information on Mr. Mitchell's habits from goverment witnesses Jack Brennan, Louis Nunn, and Frank Gauvry, as well as from Mr. Mitchell's credit card receipts. .

[110] Jockey Club (Ritz Carlton) entries involving persons other than Mr. Mitchell are January 31, 1986, September 25, 1985, October 11, 1985, February 12, 1986, July 7, 1986; a Jockey Club entry for March 25, 1987, indicates that the lunch followed appropriations hearings; a June 12, 1984 entry has no person or event indicated. The single Hay Adams entry (October 28, 1985) involves a person other than Mr. Mitchell.

[111] There is no suggestion anywhere in the record that defendant sought to conceal the extent of her contacts with Mr. Mitchell, whom she openly referred to as her stepfather. Moreover, it would make no sense for a person to avoid recording a surreptitious meeting on her calendar, then to disclose such meeting to a HUD driver, particularly when the use of the car would have been a violation of HUD regulations.

dispute defense counsel's assertions that portions of Mr. Reynolds' statement were demonstrably false. Government Counsel nevertheless argued to be allowed to use Mr. Reynolds, with the intention to "tailor his testimony to questions ~~about~~ to those areas I've just told you basically that he took her to a number of various lunches," that he had waited for defendant for two or three hours "on one specific occasion only," and that defendant "had told him on a number of occasions that she was meeting with John Mitchell for lunch and ~~with~~ her mother." Tr. 1776.

Even at this stage in the proceedings the government showed itself willing to use a witness who had made demonstrably false statements if it could "tailor" the witness's statements to matters that were not demonstrably false, even where the substantial preponderance of the evidence indicated that those statements were false as well.

In any event, following this bench conference, the parties agreed to a stipulation that, if Mr. Reynolds were to testify he would testify that while employed at HUD between 1980 and 1989, "he drove Deborah Gore Dean to lunch on several occasions when she said that she was meeting John Mitchell for lunch." Gov. Exh. 545.

b. Defendant's Testimony

On October 15, 1993, when defendant was cross-examined as to her meeting Mr. Mitchell for lunch while at HUD, she indicated that she knew that she had lunch with Mr. Mitchell and Mr. Shelby while she was at HUD and believed that a lunch with Mr. Mitchell and Mr. Winn took place while she was at HUD. Tr. 3019. While she stated that she did not know how she got to those lunches she agreed that it would not have been proper to use a HUD vehicle. Tr. 3020. It

was also brought out at the time that defendant had disciplined a HUD employee for using a HUD car for a personal reason. Tr. 3021-22.

In later questioning, defendant acknowledged that she might in fact have had two lunches with Mr. Mitchell and Mr. Shelby if that is what was indicated on her calendars. Tr. 3054. After again stating that she had "absolutely no recollection" as to whether she had used a HUD driver when going to lunch with Mr. Mitchell, defendant was questioned about Mr. Reynolds' stipulation. She stated that she would normally not tell a driver the name of the persons with whom she was having lunch. Tr. 3054. In further questioning about the stipulation, defendant pointed out, referring to Mr. Reynolds' interview, that Mr. Reynolds had also stated that he had driven her to lunch with her mother and Mr. Mitchell when in fact she had never had lunch with her mother and Mr. Mitchell. She also stated to government counsel that "you and my lawyer agreed that that man was not quite normal and instead of having him on the stand we agreed to sign a stipulation," and further stated that she did not acknowledge that Mr. Reynolds testimony would be true. Tr. 3054-56.

Defendant also testified that she did not recall Mr. Reynolds' driving her to lunch with Mr. Mitchell and generally did not recall where he would have driven her, explaining that Mr. Reynolds was one of ten HUD drivers, all of whom took her various places, but that he was not a special driver for her. Tr. 3057-58.[112] During this questioning government counsel showed to defendant the motor

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[112] Defendant's testimony is set out in greater detail in Section C.2., where the prosecution's mischaracterization of that testimony is discussed.

pool logs contained in defendant's Senate Testimony indicating that in October 1986, defendant took 15 trips and Mr. Reynolds drove her on one of those trips. Presumably, government counsel examined those logs at the same time, if he had not done so earlier.

Defendant was not questioned about her statement that she never had lunch with Mr. Mitchell and her mother or confronted with any evidence suggesting that she had.

Defendant's testimony only gave the government additional reason to be assured that Mr. Reynolds had made false statements in his interview and would make false statements if he was called as a witness. The government nevertheless decided to call Mr. Reynolds as a rebuttal witness, and was permitted to do so over further objections of defense counsel. Tr. 3223-25.

c. Ronald Reynolds' Testimony

Defendant maintains that given the obviously false statements in Mr. Reynold's earlier interview, it was irresponsible for the government to put Mr. Reynolds on the stand because of the likelihood both (1) that the statements the government intended to elicit, even if not demonstrably false, were in all probability false, and (2) that, either in direct or cross-examination, Mr. Reynolds would say other things that were false.

In his direct testimony, Mr. Reynolds first testified that he had driven defendant on "two out of three trips." Tr. 3228. Seconds later, Mr. Reynolds revised his estimate of the frequency with which he drove defendant, stating now that it was "two out of every three -- two out of ~~every~~ five, sorry" trips. Tr. 3239.

Immediately, thereafter, Mr. Reynolds testified that he would

drive defendant "about ten times a week," and that he would take her to luncheon meetings "two, three times a week." Id.

At this point, whatever had been the content of the Government's preparation of Mr. Reynolds for his testimony, government counsel had to know that Mr. Reynolds was not telling the truth. Defendant's calendars, long in the possession of the Office of Independent Counsel, belied any suggestion that defendant could have taken ten trips per week with Mr. Reynolds, particularly if he only drove her two out of every five trips. But, as indicated, the government also had more than ample reason to believe that the statement that Mr. Reynolds drove defendant as frequently as two out of every five trips was false. The same applies to Mr. Reynolds statement that he drove defendant to lunch "two, three times a week."

Moreover, as already noted, motor pool logs showed that during the month of October, 1986, defendant used HUD vehicles a total of 15 times,[113] rather than the 100 times suggested by Mr. Reynolds' testimony. Those logs also showed that defendant took a HUD car to a luncheon meeting 3 times in that month rather than the 20 plus times suggested by Mr. Reynolds' testimony.[114]

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[113] The materials in Government Exhibit 212 indicate that HUD employees, including defendant, were driven from HUD more often than they were picked up at other locations to be returned to HUD. Presumably, this reflects the fact that it is much easier to schedule a departure from HUD than to quickly secure a vehicle when concluding a meeting elsewhere. Thus, the 15 times defendant was driven during the month of October 1986 involved only 11 meetings. This is noted merely to avoid any confusion as to the meaning of the word "trips" that was used by Mr. Reynolds.

[114] If Mr. Reynolds drove defendant two out of five of her trips, which seems to be his firmer estimate, the fact that he drove her ten times a week suggests that she would have taken 25 trips each week or 100 during a four-week period. That, while driving defendant only two of five of her trips, Mr. Reynolds drove

Further, the motor pool logs show that Mr. Reynolds drove defendant only one time during a month long period rather than the 40 times suggested by Mr. Reynolds' testimony. That fact, as well as the other indications of Mr. Reynolds' lack of credibility must have persuaded government counsel that Mr. Reynolds' statements about being some sort of special driver to defendant were also total fabrications.

At this point, government counsel should have attempted to correct Mr. Reynolds' undoubtedly false statements. Instead, however, notwithstanding that counsel had just been confronted with additional evidence of Mr. Reynolds' lack of credibility, counsel proceeded to elicit from Mr. Reynolds' further testimony that government counsel had also to believe was, if not undoubtedly false, at least very probably false--namely, that when Mr. Reynolds drove defendant "at least about two or three occasions, at least, a minimum, of two," when defendant told him that she had had lunch with Mr. Mitchell. Tr. 3240.

Notably, government counsel did not question Mr. Reynolds about whether he had driven defendant to lunch with Mr. Mitchell and her mother, presumably because counsel knew that such a statement not only was absolutely false, but could be refuted by both defendant as well as her mother.

In cross-examination, confronted with a miscalculation by defense counsel suggesting that defendant had taken 50 trips a

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defendant to luncheon meetings two or three times a week suggests that she was driven to luncheon meetings approximately every day.

week, or ten a day,[115] Mr. Reynolds expressed the view that it was "possible." Pressed further as to whether defendant traveled by HUD car ten times a day for three years, Mr. Reynolds essentially acknowledged that travel of such frequency commonly occurred. This obviously was untrue.[116]

Mr. Reynolds was further cross-examined regarding his earlier statements that he had taken defendant to lunch with Mr. Mitchell about once a month, with defense counsel bringing out the fact that this would mean Mr. Reynolds alone would have driven Ms. Dean to lunch with Mr. Mitchell about 72 times while she was at HUD. Tr. 3248. In cross-examination, Mr. Reynolds also acknowledged that he had told the investigators that defendant's mother had also joined Ms. Dean and Mr. Mitchell for lunch, but indicated he could not point out defendant's mother in the courtroom. Tr. 3241.[117]

The cross-examination gave government counsel additional reason and additional time to recognize that Mr. Reynolds had made false statements both in his direct and cross-examination. Rather than then attempting to correct these statements, however, in

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[115] As indicated in the preceding note, the fact that Mr. Reynolds drove defendant ten times a week, and drove her two out of five times, actually translates into 25 trips a week, or five a day.

[116] The transcript shows Mr. Reynolds responding to the question "So she traveled ten times a day for three years," by saying "I wouldn't say on a weekly, weekly basis." Tr. 3240. The context suggests, however, that Mr. Reynolds was responding affirmatively to the question, though pointing out that it was merely an average, and he may in fact have said "would" rather than "wouldn't." In any case, it is clear that Mr. Reynolds was asserting that defendant took many times the number of trips that there is any basis for believing that she did.

[117] Mr. Reynolds was also cross-examined about the statement in his interview that Lynda Murphy had invited him to her horse farm in Manassas, Virginia.

redirect examination government counsel asked questions aimed solely at rehabilitating Mr. Reynolds. Tr. 3243-44. In doing so, moreover, counsel specifically elicited from Mr. Reynolds the basis for his prior statement that he had driven defendant to lunch with Mr. Mitchell and her mother, even though counsel had overwhelming reason to believe that such statement was false. Responding to counsel's question, Mr. Reynolds stated that when defendant came out from lunch at the Fairfax Hotel, she told him she had met with her mother and Mr. Mitchell. Tr. 3243. Even assuming that counsel had not been entirely sure that Mr. Reynolds never drove defendant to lunch with her mother and Mr. Mitchell, the fact that Mr. Reynolds gave a specific recollection of an incident at the Fairfax Hotel gave counsel further reason to doubt Mr. Reynolds, since all available evidence indicated that defendant had never even met Mr. Mitchell for lunch at the Fairfax Hotel (which since 1978 has been called the Ritz Carlton). Government counsel, however, did nothing to correct any of the false testimony.

Defense counsel sought to ask an additional question related to the fact that the Fairfax Hotel had changed its name to the Ritz Carlton, but in the face of the government's objection, the question was not allowed. Tr. 3245.

Mr. Reynolds was immediately followed to the stand by government rebuttal witness Pamela Patenaude. Government counsel had previously advised the Court that Ms. Patenaude would testify, inter alia, that Mr. Reynolds "drove both Ms. Dean and Ms. Patenaude when they were together on numerous occasions." Tr. 3226.

It is to be noted that Ms. Patenaude and Mr. Reynolds had been observed greeting each other outside the courthouse at approximately 9:00 a.m., where, after hugging, they entered the building together. Dean Affidavit. Presumably, they then reported to government counsel together and then spent some time in a witness room until witnesses were actually called at approximately 11:00 a.m. Tr. 3235.

Ms. Patenaude gave the following testimony about her use of HUD vehicles with defendant: (Tr. 3249-50)

Q. Did you ever have occasion to use the motor pool with the defendant in this case?

A. Yes, I did.

Q. Do you recall any of the drivers who drove you when you and she used the motor pool together?

A. Most of the time, Ron was the driver.

Q. And when you say Ron --

A. Ron Reynolds

Q. Did you happen to see him earlier as he was leaving the courtroom?

A. Yes, I did.

Q. And did you recognize him as the individual who had driven you?

A. Yes.

Thus, even though Mr. Reynolds had ultimately testified to driving defendant only 40 percent of the time--an estimate itself utterly refuted by Government Exhibit 212--Ms. Patenaude would testify that Mr. Reynolds drove "most of the time" when Ms.

Patenaude rode with defendant. The Government, however, did nothing to correct this statement.[118]

On cross-examination, Ms. Patenaude testified to a career progression that strongly suggested that she had been demoted, though she denied that she had been demoted. Tr. 3251-57. Though Government counsel had good reason to believe that Ms. Patenaude's denial that she had been demoted was false, on redirect examination government counsel merely sought to rehabilitate her, with the following questioning (Tr. 3257):

> Q. .... Was there a reason why you left the Secretary's office?
>
> A. I was tired of putting up with threats and demands, and there was unethical behavior in the secretary's office, and my husband encouraged me to resign from the position.
>
> Q. Now you referred to threats and demand, Who, made the threats and demands?

In a bench conference that followed an objection, government counsel indicated that, notwithstanding the prejudicial nature of this line of questioning, she had "only intend[ed] to elicit that it was Ms. Dean who made the threats and demands and stop at that point." Tr. 3260. Though the response was stricken, the effect on the jury could be expected to remain unless defendant had an opportunity to respond.

Ms. Patenaude was then asked to recall instances where she had used the motor pool with the defendant, and she was able to recall only three: (1) a lunch at the Guards; (2) a political function at

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[118] It is also worthy of note here that the questions "Did you happen to see him earlier as he was leaving the courtroom?" and "And did you recognize him as the individual who had driven you?" were evidently calculated to give the false impression that Ms. Patenaude had not in fact also seen Mr. Reynolds at some length that morning prior to seeing him leave the courtroom.

the Shoreham; and (3) a trip to Baltimore for a political function. That testimony suggested that all trips might be inappropriate uses of a HUD vehicle, a suggestion that would be prejudicial to defendant, particularly given the emphasis on the inappropriate use of HUD vehicles in the closing argument scheduled for the following day. Apart from the improbability of all three trips being non-business, in an October 25, 1990 interview, Ms. Patenaude was questioned about defendant's travel to Baltimore in circumstances where any political trip on which defendant was accompanied by Ms. Patenaude certainly would have been mentioned. Yet, the only specific trip by defendant to Baltimore that Ms. Patenaude recalled in that interview involved a HUD project called the Lord Baltimore. Interview at 12 (Exhibit BBB). This gave government counsel additional reason to believe that Ms. Patenaude had lied about her trips with defendant.

Immediately after the testimony of Ms. Patenaude,[119] which closed the Government's rebuttal case, defendant would attempt to present surrebuttal evidence both as to Mr. Reynolds and Ms. Patenaude, proffering that she would testify that Mr. Reynolds had not been her regular driver, that she had never met Mr. Mitchell at that Fairfax Hotel, and that Ms. Patenaude had been forced to take a demotion. Tr. 3270. Though this proffer gave the Government further reason to believe that its rebuttal witnesses had lied, it merely would "strenuously object[]" to further testimony by the

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[119] There was brief recross examination and redirect examination regarding her communications to the Senate Committee considering defendant's nomination to the position of Assistant Secretary for Community Planning and Development. Tr. 3261-64.

defendant. In the face of the Government's objection, surrebuttal would not be allowed. Tr. 3270-71.[120]

As shown in Section 3.B., infra, in closing argument, government counsel would engage in further misconduct both in its use of Mr. Reynolds' testimony to attack defendant's credibility and in its attempts to divert attention from Mr. Reynolds' perjury.

3. Alvin R. Cain, Jr.

Alvin R. Cain, Jr. is a Supervisory Special Agent employed by the Office of the Inspector General of the Department of Housing and Urban Development. Since October June of 1990 he had been assigned to the Office of the Independent Counsel. Tr. 3196. Mr. Cain's testimony as a government rebuttal witness formed a crucial element in the government's attack on defendant's credibility in closing argument, with government counsel citing Mr. Cain's testimony, both on the first day and in rebuttal on the following day, as directly contradicting one of defendant's most personal statements concerning her lack of knowledge that John Mitchell had earned HUD consulting fees while defendant was employed at HUD. The role of Mr. Cain's testimony is shown in some detail below. Also shown below are reasons that the government knew or should have known that Mr. Cain's testimony was perjured in several respects. Finally, it is shown why, regardless of what the record so far developed indicates may have been known to the government at the time of trial, there is sufficient evidence that an agent of the Office of Independent Counsel lied with respect to a critical aspect of his testimony to warrant a hearing and discovery into the

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[120] As discussed in the next section, defendant had also sought to present surrebuttal as to a third Government rebuttal witness.

issues both of (1) whether Mr. Cain committed perjury and (2) whether government counsel knew or should have known that Mr. Cain committed perjury.

In the direct examination of defendant, the following testimony was elicited with regard to defendant's first learning that John Mitchell received consulting fees for HUD-related work (Tr. 2615-19): emphasis added.

> Q. When was the very first time that you learned that Mr. Mitchell was being paid for consulting work he was doing in relationship to HUD.
>
> A. The -- I learned about it the day that the HUD Inspector General report came out on the Mod Rehab Program after -- well, it was in 1989, I believe. And it was a, big report, a long report. Everybody had been waiting for it to come out.
>
> And it was basically an investigation of developers' ties to a charity that Mr. Demery had been sponsoring and whether or not that had any influence on decisions that were made, and it was of great interest. And I remember calling the Inspector General's Office, to the man who was running the report -- who wrote the report, the head of the investigation unit, his name was Al Cain, and I called him , and I said, "How do I get a copy of the report?"
>
> And I remember it was, sixty-some dollars was the fee to get it, and I remember sending Marti Mitchell at that time down with it, a check to pick up the report and the report came back, and I opened it up, and about the second or third page, it said --
>
> MR. O'NEILL: Objection.
>
> THE COURT: I'll sustain it. I think the question was what did the issue of any payments to Mr Mitchell
>
> THE WITNESS: I learned about it when I opened up the report.
>
> THE COURT: All right.
>
> Q. Did you read the report?
>
> A. I, around the second or third page of the report, as I remember, there was a listing of consultants who had earned fees in the Mod Rehab Program and had said John Mitchell --
>
> MR. O'NEILL: Objection, Your Honor.

THE COURT: I'll sustain the objection to the report unless you have some grounds to offer it. She can testify that's how she learned of it.

THE WITNESS: That's how I learned about it, and it had an amount of money.

Q. Okay. After you learned -- was that the first time you knew that John Mitchell was receiving dollars based on consulting with HUD?

A. Yes.

Q. This was in May -- or, I'm sorry, April of 1989.

A. Yes, the day the report came out.

Q. Was John Mitchell alive, or had he passed away by then?

A. He had died the previous November.

Q. Did you place any telephone calls after you heard that in the report -- after you discovered that information.

A. Yes.

Q. Who did you call.

A. I called Al Cain.

Q. What did you say to Mr. Cain?

A. I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, because I was really mad, and I wanted to see the check, and if there had been a check written to Mr. Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in way had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.

And Al said, Al told me that he --

THE COURT: I'll sustain the objection. Don't get into what he said.

Q. Did you have any further conversation with anyone else other than Mr. Cain shortly after you discovered that information?

A. Yes. I called Jack Brennan and told Jack Brennan that I wanted him to come to my office with all of John's papers so that I could prove that John hadn't done any business with HUD and hadn't gotten any money.

Q. Did you learn during that conversation that Mitchell had received money?

A. Yes. He told me that --

MR. O'NEILL: Objection once again, Your Honor.

THE COURT: All right.

Q. Based on your conversation with Mr. Brennan, did you reach an understanding as to what Mr. Mitchell's role was in the mod rehab process?

MR. O'NEILL: It's hearsay, Your Honor.

THE COURT: Yes, it's hearsay. I think she can say what actions she took and what she learned of things.

Q. Did you speak to Mr. Shelby at that point?

A. No. I understood from Mr. Brennan that Mr. Shelby might be involved, and I have never spoken to Mr. Shelby since that day, and I didn't call him. I didn't understand how it could have happened.

It was presumably shortly after defendant gave the foregoing testimony that government counsel discussed with its agent Mr. Cain the telephone conversation described by defendant where she had insisted upon verification of the Mitchell payment. Assuming that Mr. Cain informed government counsel that no such conversation took place or that Mr. Cain, in any event, had no recollection of it, government counsel had still to consider the improbability that defendant would have testified about calling Mr. Cain if she had not done so.

The statement added little to defendant's testimony about calling Colonel Brennan. The latter testimony had been entirely consistent with the testimony of Colonel Brennan, a government immunized witness, who had stated that when he informed defendant of Mr. Mitchell's HUD work, "Her reaction was shock and aghast." Tr. 369. Government counsel knew that defendant knew that Mr. Cain had been detailed to the Office of Independent Counsel and had in

fact originally been listed as a government witness, as well as a possible defense witness. Thus, government counsel knew that defendant knew that her statement certainly would be refuted if it was not true.

Moreover, it must be remembered that defendant was only prevented by an objection from telling what Mr. Cain said to her. Thus, to believe that defendant fabricated the story about calling Mr. Cain is to believe that she was also intending to fabricate a story about what Mr. Cain had said to her, all the while with Mr. Cain available at the Office of Independent Counsel to immediately refute it.

Government counsel had also to know that defendant knew that Mr. Cain was an African American, and, given the racial make-up of the jury, how devastating to her credibility such a refutation was likely to be.

These factors gave government counsel much reason to question even a strong statement by Mr. Cain contrary to the statement defendant had made on the stand.[121] And given the fact that Mr. Cain was an agent of the Office of Independent Counsel, as well as the potential consequences of his testimony, the government would be expected to exercise more than usual caution in ensuring that it

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[121] If Mr. Cain merely assured government counsel that he could not remember the telephone call but had no strong belief that it did not take place, government counsel would have had to conclude that the call did occur. Hence, it would have been improper to put Mr. Cain on the stand and by having him recall other details of the period give the impression that his failure to recollect the call reflected the fact that it did not occur. It also would have been improper later to characterize Mr. Cain's testimony in closing argument as statements that: "And you heard Mr. Cain. It didn't happen. It didn't happen like that" (Tr. 3240); "Al Cain told you that conversation never happened." As discussed infra, those characterizations were improper in any event.

did not use perjured testimony. What the Government did with respect to ensuring the truthfulness of Mr. Cain at this point is itself an appropriate subject of inquiry, and in said inquiry, the evidence previously discussed with regard to the government's practice in verifying the receipts of Mr. Sankin would be highly relevant.

In any event, one avenue available to the government was to probe defendant on the matter in cross-examination, which commenced the day after her testimony about Mr. Cain. During the three days the government cross-examined defendant, however, the government failed to avail itself of that opportunity.

Instead, the government called Mr. Cain as its second rebuttal witness. Mr. Cain gave the following testimony (Tr. 3197-99):

> Q. At or about the time [the HUD IG report] was published, do you recall having a conversation with the defendant Deborah Gore Dean?
>
> A. A telephone conversation.
>
> Q. And can you recount for the ladies and gentlemen of the jury what if anything was said during that telephone conversation?
>
> A. As I recall, Miss Dean telephoned me with an inquiry relative to how she could obtain a copy of the investigative report. I related to her that the report was available under the provisions of the Freedom of Information Act. I also explained to her the cost that was associated with obtaining a copy of the report.
>
> Basically, we had two versions that were being sold under FOIA. The report itself totalled 50 some dollars and the report plus the audit report was 60 some dollars.
>
> Q. Did she express an interest in either report?
>
> A. Yes, she did. Miss Dean indicated that she would like to have a copy. I explained to her that she could send in a written request which we would honor and process or she could come to my office, pay for the report and sign a receipt for the same, and that would be the quickest way to obtain it.
>
> Q. And, Agent Cain, what if anything did she say to you?

A. What if anything did --

Q. Did she say to you.

A. She told me that she would send Marty over with the check.

Q. Did you know who Marty was at that time?

A. I was not entirely clear. I assume Marty was a reference to Marty Mitchell.

Q. Did there come a point in time when Marty Mitchell came to pay you for the copy of the report?

A. As I recall, it was the same day.

Q. What if anything happened?

A. Marty came into the office. I had placed a copy of the report with a receipt to be signed with my secretary just in case if I was away from the office. Ms. Mitchell came in, gave the check, signed the receipt, took the receipt and left.

Q. At or about the date, do you recall any conversation with the defendant Deborah Gore Dean in which she was upset with you about the contents of the report?

A. No, I do not.

Q. Do you recall her mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report?

A. No, I do not.

Q. Do you recall her telling you that she was going to hold a press conference to denounce what was in the report?

A. Absolutely not.

Given the detail with which Mr. Cain recalled to the jury the events related to defendant's securing from him a copy of the inspector General's report, the impression conveyed by Mr. Cain's testimony with regard to the failure to recall the telephone call from Ms. Dean regarding Mr. Mitchell was that it did not happen.[122]

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[122] Given the detail provided by Mr. Cain with regard to surrounding events, the inference is compelling that if Ms. Dean in fact called Mr. Cain, he would have remembered it. As a matter of common sense, moreover, a call such as that described by Ms. Dean, from a former Executive Assistant to the Secretary, is not

Thus, within an hour after leaving the stand after eight days of testimony, defendant had been contradicted on a critical feature of her testimony by an agent of the United States Government, who happened also to be an African American.

Yet, whatever may have been the government's concerns about the truthfulness of Mr. Cain's testimony, based solely in the absurdity of defendant's falsely testifying that she had called him about the Mitchell payment (with the intention of also falsely testifying as to what he said to her), Mr. Cain's cross-examination gave the government additional reason to be concerned whether its agent was telling the truth. During that cross-examination, defense questioned Mr. Cain as to whether defendant had come to him to advise him that certain HUD subsidies were being misused. Mr. Cain avoided directly answering that question, instead merely saying that he did not recall whether he interviewed defendant in his office or in her office. Tr. 3201.

Mr. Cain was also cross-examined about whether he recalled attending a party at the Beverly Wilshire celebrating awards to Mr. Cain and his partner that was paid for by defendant. Mr. Cain stated that he did not recall attending such a party. Tr. 3201-02.

That cross-examination may or may not have had an impact on the jury. What is pertinent here is that government counsel, which already had reason to be concerned about the veracity of its agent's crucial testimony, was now given further cause for concern and reason to inquire of its agent. And if such inquiry led the government to believe Mr. Cain had lied on the issues in cross-

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something one is likely to forget entirely, particularly given Mr. Cain's continuing involvement in the investigation of the mod rehab program.

examination, there would be substantial reason to inquire further to determine whether he had lied with regard to the main point of his direct examination.

The following day, defendant requested an opportunity to present surrebuttal testimony, with counsel noting an intention to present evidence on the fact that defendant and Secretary Pierce had paid an extensive bill for Mr. Cain at the Beverly Wilshire Hotel, as well as an intent to present evidence about the Castle Square project. Tr. 3270. The proffer with regard to the Wilshire Hotel bill, in light of the receipt for that bill in the government's possession, along with the unlikelihood that Mr. Cain would forget that matter, gave the government further reason to believe that its agent had lied. The government strenuously objected to surrebuttal, however, and the Court denied defendant's request. Tr. 3271.

In closing argument, the government relied heavily on Mr. Cain's testimony on both days. On the first day, government counsel would refer to Mr. Cain's testimony in the following context, referencing defendant's claim that she had not known that John Mitchell had made money at HUD (Tr. 3419-20):

> Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And that day the I.G. Report came out she called Special Agent Al Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave.
>
> So we had to call in Special Agent Alvin Cain for two minutes of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what

they were talking about. We had to bring him in just to show that she lied about that. (Emphasis added.)

In rebuttal on the following day, again in the context of an attack on defendant's credibility, government counsel would make the following further reference to Mr. Cain (Tr. 3506):

> Shocked that Mitchell made any money. Al Cain, told you that conversation never happened.

The impropriety of the several statements whereby government counsel asserts that Mr. Cain said the conversation with defendant never took place is a matter treated in Section C.2.H, infra. At this point, however, it is important to note that by stating that Mr. Cain specifically denied Ms. Dean's account of her call to him government counsel has elevated the significance of that statement. Also, by noting the details that Mr. Cain was able to recall, government counsel has suggested that Mr. Cain would have remembered the matter if it occurred. Finally, it is important to recognize, that, in light of the description of defendants' testimony regarding her call to Mr. Cain, counsel's descriptions of Mr. Cain's testimony constitute a potentially devastating indictment of defendant's sincerity on the stand.

Government counsel's statement about the cross-examination with regard to the Beverly Wilshire also warrants consideration at this point. For it reflects the fact that government counsel had not merely ignored these remarks, but had endeavored to rehabilitate its witness with regard to whatever effect the cross-examination regarding the Beverly Wilshire may have had. For reasons discussed infra, "you could see he had no idea of what they were talking about," would, in any case, be improper vouching. It is improper vouching, moreover, where the cross-examination gave

the jury reason to believe that there existed something outside the record that might substantiate the question. Thus, in government counsel's observation about Mr. Cain's demeanor there was an element of the Government's assuring the jury that there existed nothing outside the record to call into question Mr. Cain's response about the Beverely Wilshire party. That assurance would have been improper even if government counsel knew ~~its~~ the assurance to be well-founded. But, if government counsel, based on his knowledge of matters outside the record, had reason to believe that Mr. Cain in fact did have an idea of what defense was talking about, government counsel's statement was a particularly serious breach of prosecutorial ethics. See United States v. Kojayan, No. 91-50875 (9th Cir., Aug. 8, 1993).

In any event, because of the potential cruciality of the Mr. Cain's testimony given the manner in which it was employed in the government's closing argument, defendant submits that a hearing would be appropriate if there is a reasonable basis for believing that the government's agent committed perjury and/or the government knew or should have known of that perjury. This applies both with regard to Mr. Cain's statements on direct with regard to the call from defendant, and to the two matters raised in cross-examination, since perjury and the government's actions toward it with regard to the latter matters bear heavily on the issue of perjury and the government's actions toward it with regard to the former matter.

Defendant submits that, even without consideration of the government's actions with regard to the Brady material, the Sankin receipts, and the evident perjury of Mr. Demery and Mr. Reynolds, as outlined above, there would be more than ample cause for a

hearing on all three matters involving Mr. Cain. The Affidavit of Deborah Gore Dean provides a detailed account of the events at the Beverly Wilshire hotel and the initiation of the Castle Square investigation, an account that suggests Mr. Cain could not possibly have forgotten these matters. Defendant submits that an inquiry into the substance of that affidavit, which contains the facts that the Office of Independent Counsel could readily have learned had it made any effort to verify Mr. Cain's testimony, will reveal that Mr. Cain lied in his testimony. Further inquiry will reveal whether the government knew or should have known of that perjury.

The affidavit of Deborah Gore Dean also provides Ms. Dean's statement. ~~Dean's statement~~ as to what Mr. Cain told her when she called him in April of 1989. Specifically, defendant states that Mr. Cain told her that there was a check and that it was maintained in the field.[123] There should be records reflecting whether the check was in fact retained in the field office at the time defendant states that she called Mr. Cain. That information would be highly relevant to a determination of whether Mr. Cain committed perjury.

In addition, the Affidavit of James P. Scanlan contains the sworn statement of a career government attorney that after calling Mr. Cain, defendant reported that conversation to Mr. Scanlan, advising him that Mr. Cain had told defendant that the check was maintained in the field. Mr. Scanlan also presents reasons why he

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[123] Though giving an otherwise quite detailed account of defendant's testimony regarding her call to Mr. Cain, government counsel omitted any defendant's remarks regarding a check. Though that omission may prove to be entirely insignificant, it also is possible that the reference was in order not to call attention to an important avenue for resolving the conflicting testimony.

would retain a firm recollection of these events, including that he has been writing a book about them. Mr. Scanlan also states that defendant also told him about her conversation with Mr. Brennan immediately after that took place. It is not logically impossible that defendant could have told Mr. Scanlan she had called Mr. Cain even though she had not. Yet the likelihood that anyone in defendant's position would actually call Mr. Brennan, but make up a story about calling Mr. Cain, including making up a story about where Mr. Cain had told her the check was maintained, is too remote even to warrant consideration. Thus, there exists a compelling inference that, if Mr. Scanlan's statement is true, defendant did call Mr. Cain, as she stated. Further, if Mr. Cain, an agent of the Office of Independent Counsel, did lie on this matter, there is strong reason to believe that the Government not only knew that Mr. Cain lied, but had a role in causing Mr. Cain to lie.

For all of these reasons, a hearing is warranted to determine whether Mr. Cain lied and whether government counsel knew or should have known that he lied.

C. GOVERNMENT CONDUCT IN CLOSING ARGUMENT

At the close of the government's case, the Court expressed concerns about the sufficiency of the Government's evidence. Tr. 2041. When the Court did allow the case to go forward, defendant put on the following significant exculpatory evidence. evidence: 1) the testimony of several persons supporting the contention that defendant was involved in securing and furnishing an apartment for Louis Kitchin and that the $4,000 check he gave defendant was related to that undertaking; 2) the testimony of former General Counsel J. Michael Dorsey that former Assistant

Secretary for Housing Thomas T. Demery had promoted the Dade County mod rehab request funded in the Spring of 1987 that is a central issue in Count Three; 3) very favorable character testimony, some of which was imported from another context in the form of tapes of Senate Hearings and which was for that reason even more credible; and 4) the lengthy testimony of defendant.

In some instances, the defendant's testimony was directly supported by documentary material, as in the case of the four squares on the handwritten list of projects to be funded at the April 7, 1987 meeting (Tr. 2572-80), and in the case of the Foxglenn funding. Tr. 2477-84. Defendant also gave detailed accounts of her actions throughout her tenure, which, if believed, would have exonerated her from the charges in this case. Nothing in the cross-examination of defendant revealed anything implausible in these accounts. Thus, on the basis of the evidence, given the beyond a reasonable doubt standard, defendant should have been acquitted.

The Government, however, had previously been laying the groundwork for undermining defendant's credibility. This included the ridiculing of defendant during her direct testimony and the efforts, through manifestly improper tactics, to cause defendant to appear to habitually accuse others of dishonesty. It also involved the presentation of rebuttal testimony attacking defendant's credibility by witnesses whom the Government had strong reason to believe were lying, but which would be expected to have substantial impact on the jury if the defendant did not have the opportunity to respond. Then, in closing argument, while heavily relying on rebuttal witnesses, government counsel would focus the case

entirely on defendant's credibility: "... Everything she's told you rests on her word, on what she says" (Tr. 3378); "Her entire case rests on her credibility, her believability" (Tr. 3413); "... and that's what her whole case hinges upon, her veracity, her honesty, her credibility." Tr. 3402.

And, in the face of clear precedent as to its impropriety, government counsel adopted an approach of repeatedly representing to the jury that defendant had lied. It was an approach of rarely paralleled virulence, and one which, one can say with virtual certainty, would not have been adopted had the defendant shared the same race or background as the jury. The use of that approach, which is detailed in Section 1 below, would alone be a basis for a new trial. As shown in Section 2, however, the Government's misconduct in closing argument went far beyond the improper representations to the jury that defendant had lied. Rather, in the course of supporting those representations, government counsel engaged in the repeated and calculated mischaracterization of the record; used misleading arguments to conceal the fact that certain government witnesses had lied; made statements that not only were unsupported by the record, but that counsel knew in fact to be untrue; and engaged in other inappropriate and inflammatory conduct designed to deny defendant an impartial appraisal of the evidence from a jury of her peers. For these reasons, in the context of the government's inappropriate actions prior to closing argument, defendant submits that a judgment of acquittal is an appropriate sanction in this case.

1. The Government's Repeated Assertions that Defendant had Lied

Prosecutors may not represent to the jury that a defendant has lied. Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968); see also United States v. Young, 470 U.S. 1 (1985). Prosecutors are also prohibited from making statements intended to arouse the passions or prejudices of the jury. United States v. North, 9910 F.2d 843 (D.C. Cir. 1990); United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984).

The Government's representations that defendant had lied in this case were sufficiently virulent and pervasive to violate both of these injunctions. Those representations go sufficiently beyond those at issue in the cases dealing with such matters that the representations warrant being set out in their entirety.[124]

Government Closing - First Day

Tr. 3375: "The defendant's story just doesn't make sense. It is not credible. It is not believable. It is what you often see about admitting what you can't deny, denying what you can't admit."

Tr. 3377-8: "... Everything she's told you rests on her word, on what she says.

"The problem with that is her story is like a house of cards with a very rotten foundation, because as we will show, she lied to you, and if she lied to you, how can you believe the rest of what she said. That is the problem, ladies and gentlemen. How do you believe it?

Tr. 3415: "She lied to you ladies and gentlemen. She lied in this court before you. Having done that, does anything else make sense? Can you see her as being a credible witness?"

[124] While courts of appeals have been reluctant to overturn convictions where the prosecution stated that the defendant lied, the cases discussing the issue are remarkable contrasts to the instant case. See, e.g., United States v. Jungles, 903 F.2d 468, 479 (7th Cir. 1987) (prosecutor called defendant a liar three times within eight lines of a 28-page closing; deemed not excessive); Bradford v. Whitley, 953 F.2d 1008 (6th Cir. 1991) (statements were "neither persistent nor pronounced").

Tr. 3416: "Why not, ladies and gentlemen? Because it would have blown that whole theory out of the water. It was a lie. It didn't make sense."

Tr. 3417: "It was a lie, ladies and gentlemen, out and out, right in front of you. She needed that $4000 because she was in financial trouble."

Tr. 3418: "Based on her lies, you should throw out her entire testimony. Her six day's worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you...
..Because it was filtered with lies..."

Tr. 3419: "So therefore, Miss Hawkins is telling the truth on that. Then Miss Dean lied."

Tr. 3420: "So we had to call in Special Agent Alvin Cain for two minutes of testimony And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that."

Tr. 3421: "It may seem a small point, ladies and gentlemen, but she denies it on the stand. She lies when it benefits her. When its a benefit. When she can say I didn't know John Mitchell was a paid consultant, she lies about that. We have to show if she's going to lie ~~about~~ that will she lie on anything else.

"I mentioned earlier, not close to John Mitchell until after she left HUD. All the letters were written Dear Daddy. Five years earlier. Come on ladies and gentlemen. Does that square with common sense? Does that make any sense at all? She's trying to talk her way out of it."

Tr. 3422: "Why would she lie about a HUD driver not taking her there? Well, the reason is very clear, ladies and gentlemen. The reason it's so clear why she would lie that Mr. Reynolds did not drive her to lunch with John Mitchell....

Tr. 3424: "But she told us when I cross-examined her about it that there are many drivers. I don't know who Ron is. Well, Pam Patenaude had no problem remembering that she took trips with her when Ron was driving. But she didn't want to admit to it ladies and gentlemen, because she was in a trick bag. Either it's personal, and she lied to Senator Proxmire, or its business, and she lied to you.."

Tr. 3425: "And her answer was, well yes, I shouldn't have done it but, you know, John Mitchell said I could. Well, that's false. That's a lie. She wasn't the director of

public relations at Global Research any more than I was. She lied about that."

Tr. 3425: "... She admitted on the stand that she shouldn't have said that [she knew Shelby five years]. It was just another lie."

Tr. 3426: "What we have, ladies and gentlemen, is a person who lied to you on the 4000 and continued to lie to you.

"You might wonder why we took so long to cross-examine. As I said earlier, after the initial lie you should be able to say that's it. But we wanted to show you that that wasn't the only time. Her entire testimony is fraught with lies and deception. It cannot be believed."

Tr. 3427: "And probably the biggest lie of all is what she says about Secretary Pierce..."

Tr. 3429: "Just as she's deceived you or attempted to do so, ladies and gentlemen, though a series of lies and deception, she misled Samuel Pierce and didn't tell him of her hidden interest because if this man who she said is such a fine man and prominent attorney, would he have allowed her to do this....

Tr. 3430: "... but there's no question that the best defense is a good offense. You take the offensive. And that's what she did.

"She came in and told you a story. It doesn't matter that it wasn't true, but she told you a story...

Tr. 3431: "She has taken the initiative from the get-go. She has lied to this court, to this jury. Do not believe what she say's. It's always someone else's fault."

Tr. 3431: "But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It doesn't square with common sense. It is lies piled upon lies. It crumbles to pieces the minute you look at it."

Tr. 3432: "I'd ask you when Mr. Wehner gives his closing argument to be as attentive to him as you were to me and I will have an opportunity to talk to you again, but throughout that listen and wonder why she lied to you throughout her testimony.

Government Rebuttal:

Tr. 3501: "But the problem is desperate times call for desperate measures. When your back is against the wall, when it's obvious the Government has put forth all this evidence, the only thing you can do is lie. And when that doesn't work,

when the lies are shown to the jury, it becomes a personal attack. And that's what it is, nothing more, nothing less."

Tr. 3501: "I told you during closing argument that Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs because someone --

[Defense objection to continued characterization is overruled.]

Tr. 3502: "Since Mr. Wehner kept saying that it was not garbage, that I should not have said that, I'm saying that's where it belongs, in the garbage, Because it was a lie, ladies and gentlemen.

"And then you must -- as I said earlier, there are two, two conflicting stories. One or the other is correct. You must base it on what all the witnesses said on one hand or Miss Dean's credibility on the other, and that's what her whole case hinges upon, her veracity, her honesty, her credibility. But she lied to you."

Tr. 3506: "And then I went over series of things the other day, yesterday, you might recall. A series of additional mistruths that she told on the witness stand about no mod rehab dealings with Kitchin. Never had it. Sherrill Nettles-Hawkins said they did have."

"No idea that Mitchell was a consultant. But that was his occupation.

"Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never happened.

"She denies that Lance Wilson sent the 600 ~~units~~ to Joe Strauss in Puerto Rico. Special Agent Bowie had to come in here and say that's exactly what she told me.

"Not close to Mitchell until after she left HUD. In fact, the record shows she was calling him Daddy five years earlier.

"Denied the HUD driver ever drove her to lunch. The records show that he did.

" Again, the reason she would lie about that, she was in a trick bag. Either she lied to the Senate about using it for personal reasons or she lied to you about Mitchell doing business with her.

"She said she didn't know Nunn until she left HUD. Yet she told other people she knew him as a young girl.

"Only work at Global to run a party when in fact she wrote Director of Public Relations.

Tr. 3507: "Only knew Shelby for five years -- excuse me, stated she didn't know Shelby until her time at HUD when in fact she had said she had known him for five years.

"It goes on ladies and gentlemen. One after the other --

[Defense objection to mischaracterization of defendant's testimony is overruled.]

Tr. 3507: "They were lies ladies and gentlemen. Lies, blatant attempts to cover up what had occurred, to sway you."

Tr. 3508: "... we all misstate. I misstate quite often when I go to speak and maybe speak too fast and the words come out wrong, that's one thing, but when someone purposely misstates what they're saying, such as my brother is antsy on June 15th when there is no more apartment, and all the other misstatements that I've just gone through, if those are purposeful, you will hear you can just disregard her entire testimony based on what His Honor reads you on the law. That is the state of the law. If you find a witness incredible you do not have to believe a single thing that witness ~~said~~ says.

"So you as the jury can throw her testimony in the garbage. That is up to you. It's what you decide. You again are the judges of the facts.

"You've heard ~~all~~ the evidence. The evidence that the Government produced through all the witnesses, through all the documents, and on the other side you have a series of misstatements, of falsehoods, of lies. They don't balance up. They're not even close, ladies and gentlemen. They can't be."

Tr. 3511: "Mr. Wehner also began with yesterday saying there's not one piece of evidence, not one document to show Miss Dean did not tell the truth, that she lied, ~~like~~ the Government said. You'll have the opportunity, like with all the other documents, look at those closing papers. Look at the dates on them. They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..

Tr. 3511: ...it's his client by telling you falsehoods you're in a position where you can't believe a word she said. And that prevents you from listening to them, and as His honor will instruct you the law is clear on that, if you don't believe them you can discount that testimony..

Tr. 3518: "She misused the public trust in her time at HUD and then when it was discovered, she lied about it. That is what's at issue here.

The prohibition against the prosecutor's stating that the defendant has lied is akin to the prohibition on the prosecutors' expression of belief in the guilt or innocence of a party. That

prohibition is founded on a concern for the inordinate weight a jury may attribute to an expression of the views of a representative of the Government. See Young v. United States, 470 U.S. 1, 8 and 25 (Brennan, concurring in part and dissenting in part)(1985); Harris v. United States. It is in that light that the following statement of Government Counsel must be evaluated:.

> Tr. 3509: "...it's the Government must prove the defendant guilty beyond a reasonable doubt and in this case, ladies and gentlemen, the Government has proved it beyond all doubt.
>
> Tr. 3521: "Ladies and Gentlemen, in the name of the United States of America, I will be asking you to find the defendant guilty as to each and every charge in the indictment. All 12 of them.
>
> "In the Government's view the Government has proven its case beyond all reasonable doubt, beyond any and all doubt. There could be no doubt that the defendant conspired with the people in counts one, two and three, accepted that illlegal gratuity or loan in count four, and then lied and covered up and concealed what she had done so she wouldn't be known for what she had done. ...

As should be clear from the content of the above statements, and as will be further clarified from the discussion in the next section, this is not a case where the Government's assertions that a defendant had lied might be regarded as fair comment, even if such comment were permissible. Much of the time the Government's statements are based on semantic quibbles or matters of interpretation that reasonable people would never call lies other than in order to be purposefully inflammatory. In other cases, the defendant's statement can only be called a lie because government counsel had either misrepresented it or misstated the statement with which it is contrasted. And in other cases, what the government asserts to be a lie is something that it has every reason to believe is true.

In that regard it is important to consider the Government's approach to the defendant's testimony in situations where even government counsel had to find that defendant's testimony was more persuasive than contrary evidence. This is a matter that bears both on the reliability of the Government's evidence and on the Government's approach in closing argument. Regardless of how much the Government may desire to show that defendant has lied, it still must take into account plausible statements by defendant in fulfilling its obligation to ensure that its own witnesses are not commiting perjury. For example, as previously discussed, defendant's statements that she never lunched with her mother and Mr. Mitchell are sufficiently credible (as compared to the testimony of Mr. Reynolds) to put the government in the position of inquiring further before it accepted Mr. Reynolds' version. It could have inquired of defendant's secretary and her associates, many of whom were government witnesses, and whom, if defendant in fact lunched with Mr. Mitchell and her mother, would be at least as likely to know of it as would a HUD driver. In the case of the Cartwright receipt, if the Wiest (or Cartwright) grand jury testimony had not already persuaded government counsel that the receipt did not apply to defendant, defendant's very positive denial that the receipt related to her (particularly given her quite limited interest in falsely denying it) put the government on notice to inquire further before it in any manner represented that the receipt was true and defendant's testimony was false. With regard to both of these matters, moreover, the very fact that defendant's assertions could be so easily be disproved if in fact they were false gives them further credibility.

It is quite evident, however, from the Government's behavior with regard to these matters (and certain other matters discussed in the next section), that the Government was so bent on attacking defendant's credibility that in no circumstances would it credit defendant's account even when the great preponderance of the evidence suggested that account was true, and even when minimal investigative effort could absolutely resolve the matter. For the government's case rested on showing that the defendant lied even when it knew that she had not lied.

2. Other Misconduct in Closing Argument

Apart from representing that a defendant has lied, there are certain other things prosecutors may not do in closing arguments. They may not argue from false evidence. Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991). They may not make statements not supported by proper evidence (United States v. Perholtz, 842 F.2d 343, 361 (D.C. Cir. 1988); United States v. Jones, 482 F.2d 747 (D.C. Cir. 1973); United States v. Caldwell, 543 F.2d 1333, 1362 (D.C. Cir. 1974)), or suggest that things outside the record support a statement (United States v. Necochea, 986 F.2d 1273 (9th Cir. 1993)), particularly where doing so misleads the jury. United States v. Kojayan, No. 91-50875 (9th Cir., Aug. 4, 1993). They may not vouch for Government witnesses. United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992); United States v. West, 680 F.2d 652 (9th Cir. 1982); Unitd States v. Spivey, 859 F.2d 461, 466 (7th Cir. 1988). They also may not make inflammatory statements aimed at appealing to racial or other prejudice. United States v. North, supra; Unites States v. Monaghan, supra.

As already illustrated and as shown further below, however, the government engaged in each of these types of conduct, and it is evident that it did so in a calculated manner.

With regard to relying on false evidence, much conduuct of that nature has already been shown. For example, to place the Georgetown Leather receipt in evidence, and then use it in the manner the Government did on its summary charts, was arguing from false evidence, pure and simple. The same applies to the Government's use of the document referring to "the contact at HUD," which, in reality is no different from relying on a document written to "Deborah" that the Government knows to be a different person from the defendant in this case. So, too, with the Russell Cartwright receipt, of which considerably more will be said below.

With regard to the intentional mischaracterization of evidence, of which numerous instances are set out below, defendant recognizes that statements made in closing argument are not intended to be regarded as facts, and recognizes the appropriateness of a certain leeway for counsel who misstate, misremember, or occasionally engage in strained characterizations or exaggerations. Yet no policy is served in tolerating an intentional misrepresentation of any matter in evidence. No party, certainly not the Government in a criminal case, should be permitted to say something occurred four times when counsel knows it only occurred three, but believes that a jury will react more positively to four. Toleration of intentional mischaracterization is especially unwarranted in argument before a jury where there has been a lengthy and complex trial and a jury cannot be expected to retain a confident enough recollection of the facts to question an

assertive representation as to what the record states, especially when that representation is made by the Government. In any event, this case does not involve minor purposeful misrepresentations. Rather, it is a case of "'consistent and repeated misrepresentation'" that the Court would contrast with the facts before it in Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974). Here, indeed, the misrepresentations are sufficiently calculated and pervasive to suggest a contempt for the jury, for the Court, and for Justice itself, and should not be tolerated under any standard.

Some of those mischaracterizations involve critical factual issues related on the merits of the alleged crime. Others, ironically, are principally related to supporting the Government's efforts to support its representations that defendant repeatedly lied to the jury. In light of the central role those representations in the Government's closing, however, they are of equivalent importance to those directly related to the merits of the charges.

a. Kitchin Delivery of the Atlanta Request

Prosecution witness Nicholas Bazan testified that Louis Kitchin requested that he secure a moderate rehabilitation application from Robert Sumbry of the Department of Housing and Physical Development in the City of Atlanta and give it to Mr. Kitchin in order that Kitchin "could then take it to Washington because he was going to be having lunch apparently that day or the next day with Ms. Dean." Tr. Tr. 1313-14. Prosecution witness David Westcott, who worked for Mr. Bazan, testified that he picked up the letter from the housing authority and delivered it to Mr,

Kitchin's office in the late afternoon with the understanding that Mr. Kitchin needed to have the letter right away in order to take to Washington. Tr. 1326-27.

There is no dispute that the letter application provided by Mr. Sumbry that supported the 200-unit moderate rehabilitation to Atlanta in the fall of 1986 is dated October 27, 1986. See Gov. Exh. 179. There also is no question that defendant's note to Assistant Secretary Demery was transmitted some time no later than October 30, 1986 (Gov. Exh. 181); that the rapid reply commencing the funding process was dated October 30, 1986 (Gov. Exh. 183); and that the HUD Form 185 implementing the funding was dated November 3, 1986. Gov. Exh. 184. It therefore becomes a matter of some importance whether Mr. Kitchin actually delivered the letter to defendant between October 27, 1986, and the implementation of the funding several days later.

Mr. Kitchin, however, never testified that he took the letter to Ms. Dean or even that he was in Washington during that period. Mr. Kitchin's direct examination reflects nothing about bringing the letter to Washington, though the prosecution had ample opportunity to elicit Mr. Kitchin's knowledge of that matter. Cross-examined with phone records for the period between October 27 and October 29, 1986, Mr. Kitchin stated that he was "probably" in his office in Atlanta (though the phone records neither refreshed his recollection nor assured him that he was in Atlanta). Tr. 1504-06. Neither of the two sets of defendant's 1986 calendars that have been admitted into evidence (including the one maintained by Sherrill Nettles-Hawkins, the accuracy of which has not been

questioned) indicates a meeting with Mr. Kitchin during this period. See Gov. Exh. 6 and 7.

Thus, defendant submits, the weight of the evidence strongly indicates that Mr. Kitchin did not travel to Washington to meet defendant during this period. In any event, however, no reasonable argument can be made that the evidence indicates that Mr. Kitchin did travel to Washington during this period.

Nevertheless, in closing argument, government counsel would state the following with respect to the Atlanta funding:

> Mr. Kitchin says I'm going up to meet with Dean in a couple of days. I need a letter from the Housing Authority very quickly. Please get it for me. Bazan has his employee, you might remember David Westcott, he testified for ten minutes, he went, got the letter, brought it ~~back~~ to Kitchin's office. Kitchin brings it up with him. He asks for 200 units for Atlanta.
>
> A couple of days later, just a couple of days later, as that will show, the units come down. The letter is dated the 27th. On the 30th, three days later, the rapid reply for 200 units to Atlanta.

Tr. 3410-11 (emphasis added). There was, however, no basis for government counsel's statement that Mr. Kitchin had brought the letter with him, and it was manifestly improper to make that statement. Moreover, as the ensuing discussion of other mischaracterizations of the record will make evident, there is every reason to believe this misstatement of a critical piece of evidence was wholly deliberate.

Further, the record suggests that governmental misconduct went beyond the mischaracterization of evidence adduced in court, and went to the stating of a fact that counsel knew to be untrue. With its power to subpoena credit card records, both from individuals and credit card companies, all the business records of Mr. Kitchin's organization, and airline and phone records, the

Government was presumably capable of determining where Mr. Kitchin was between October 27 and October 30, 1986. However, the government did not even allege in the Indictment that Mr. Kitchin traveled to Washington between October 27 and October 30, 1986. [125] The record thus strongly suggests that government counsel knew for a fact that Mr. Kitchin did not travel to Washington between those dates, but that counsel nevertheless stated to the jury that Mr. Kitchin had.

It should be noted here as well that the above misrepresentation involved a subject matter that was of evident importance to the jury's deliberations. For the jury would request to review the copy of the Kitchin testimony on Count Three, further inquiring as to the timing of a telephone call to defendant's secretary. Tr. 3601-07. The misrepresentations in the next two subsections are also related to important issues in Count Three.

b. Dorsey Testimony on Dade Selection

Defense witness former HUD General Counsel J. Michael Dorsey testified regarding a Spring 1987 meeting between himself, Ms. Dean, and Assistant Secretary for Housing Demery, at which a 200-

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[125] Government Exhibit 218 shows the calls from one of Mr. Kitchin's phone lines, and indicates calls from Mr. Kitchin's office, including calls to Washington, throughout the period between October 27, 1986 and October 30, 1986. Exhibit CCC hereto, which is the document on which Mr. Kitchin was cross-examined, contained materials provided by the government for all of Mr. Kitchin's phone lines. All entries are corroborative of the fact that Mr. Kitchin was in Atlanta during this period; also corroborative is the absence of any entries for calling card calls during that period. See fifth page of Exhibit CCC hereto. The government had ample opportunity to review such materials long before it decided to fail to allege that Mr. Kitchin had brought the letter with him to Washington, and long before it decided to put Mr. Kitchin on the stand and not to ask him if he had traveled to Washington at the end of October 1986.

unit mod rehab request from Dade County, Florida was selected for funding. On direct examination he stated two things directly pertinent to the defendant's claim that Mr. Demery, not she, was responsible that funding, namely, (1), that the request had been promoted by Thomas T. Demery, and (2) that he did not recall the defendant saying anything about the request. Tr. 3176-77.[126] That testimony was entirely consistent with defendant's testimony that Mr. Demery had promoted the Dade County mod rehab request on which Louis Kitchin had been a consultant and that she had remained silent on the matter.

Questioned about the same meeting on cross-examination, Mr. Dorsey stated that Ms. Dean had mentioned the names of persons associated with some of the requests at the meeting, but that he

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[126] The exact questioning was as follows:

> Q. Directing your attention to the date of the early spring, or spring of 1987, do you recall being involved in the selection process for Moderate Rehabilitation units?
> A. Yes.
> Q. Do you recall sitting in a discussion with Mr. Tom Demery and Miss Deborah Gore Dean regarding Moderate Rehabilitation funding?
> A. Yes.
> Q. Directing your attention to that meeting, do you recall any discussion regarding a funding of 200 units to Metro-Dade Florida?
> A. I recall that there was an allocation of units to Metro-Dade and I asked Mr. Demery why we were funding Metro-Dade because as Assistant Secretary for Public Housing I was aware that there was a grand jury investigation of Metro-Dade Housing Authority and also that the Executive Director of the Housing Authority had been fired. Mr. Demery's response was that he had looked into this. He was aware of the problems that Metro-Dade had had, but he was also aware that they had an ability to do development or do development and also that they had a great need because of refugees coming from Cuba and other parts of Latin America.
> Q. Do you recall Miss Dean saying anything about that allocation of units.
> A. I don't have any recollection of her saying anything, no.

could not recall which requests. Tr. 3182.[127] Nothing in this testimony was inconsistent with defendant's testimony that Demery had pushed the Dade County request and that defendant had remained silent when it was discussed.

The following, however, is how in the rebuttal portion of his closing argument, government counsel would describe Mr. Dorsey's testimony regarding the Dade County selection (Tr. 3515; emphasis added):

> ... This is a handwritten list of the various projects, the amounts funded, and in fact on Metro-Dade, the exact bedroom configuration. It's in her handwriting.
>
> So she says to you, well, yes, this is mine, this is my handwriting, but Thomas Demery is the one who told me this and I wrote it down very quickly.
>
> Well, you remember Michael Dorsey's testimony, a witness testifying for the defense. He said that Miss Dean did speak during that meeting and was saying who was behind the project.
>
> In her own handwriting she had the bedroom configurations and the number of bedrooms, and then it says "letter.["] They are funding 203 units to Metro-Dade before Metro-Dade even asks for them. Is that the way ~~the way~~ this ~~system is~~ supposed to operate.

Even without using the singular for project in the underscored portion of the above passage, government counsel's use of Mr.

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[127] The exact questioning was as follows:

> Q. So as the list was read she identified a number of individuals associate with particular projects, is that right?
> A. Yes.
> Q. During the meeting she did not tell you that Secretary Pierce had conveyed an interest in any specific projects, is that right?
> A. I don't recall any instance of this.
> Q. The names that Miss Dean mentioned included names that you did not recognize, is that right?
> A. Yes.
> Q. You don't recall at the present time which particular projects she identified names for, is that right?
> A. No, I don't.

Dorsey's testimony would have been severely misleading. With the use of the singular for project, however, government counsel translated Mr. Dorsey's statement into a precise statement that defendant had stated who was behind the Dade County project, which is absolutely contrary to the former General Counsel's testimony.

In light of the frequency of counsel's mischaracterizations, it is evident that this mischaracterization, too, was deliberate. There is reason to believe, as well, that it was precisely because the statement was so patently false that counsel saved it for his rebuttal. See United States v. Carter, 437 F.2d 692, 694 (D.C. Cir. 1970), noting that improper remarks in rebuttal are especially harmful.

c. The Dade Letter

Yet that defendant spoke on behalf of the Dade County request is not the only patently false representation in the above passage. The final paragraph, in addition to confirming the suggestion that Mr. Dorsey had stated that defendant spoke specifically on behalf of the Dade County project, also makes the patently false statement that Dade County was being selected for 203-bedrooms, with precise configuration, "before Metro-Dade even asks for them." This statement supports a theme pursued both in government's opening and closing argument that the PHAs were being cut out of the process, and that this was a significant element of the alleged conspiracies.

As counsel well knew, however, the meeting took place in April 1987, and the letter referenced in the list was submitted by the Dade County Housing Authority on February 13, 1987, and provided the exact bedroom configurations indicated on the handwritten list.

The bedroom configuration was obviously being drawn from the PHA request; a letter was not being sought to support the configuration. That counsel knew this can be assumed from the fact that the Superseding Indictment (at 51, Para. 38) explicitly states that the letter sets out the bedroom configuration that would go on the list.

The letter would also be admitted into evidence as Government Exhibit 198. Defendant presented unrefuted testimony that the copy used as Government Exhibit 198, which had the words "Lou" and "file" penned in the top right hand corner, also bore markings found on all Mr. Demery's correspondence on mod rehab. Tr. 3153-54. The inference suggested by those markings is that Mr. Demery did in fact tell defendant which PHAs were to be funded, which defendant then recorded on the handwritten list, just as defendant stated. That inference was obviated, however, by the Government's representation to the jury that a letter from Dade Count did not even exist.

d. "All Their Receipts are Lies."

Set out in Section A.3.b., supra, was a discussion of how defendant was cross-examined about the validity of credit card receipts or expense records that there is every to believe the government itself knew were false, solely in order to allow the government to argue, in support of its attack on defendant's credibility, that she had falsely accused others of dishonesty. An examination of the propriety of the government's closing argument, however, requires that government's statements on this matter be presented in their entirety. Counsel stated (Tr. 3408):

> Mr. Sankin takes her out to lunch, out to dinner. You heard a lot of testimony that his receipts were fabricated, that

> they're all lies. Well as you go through them you'll see one receipt goes right on point.
>
> And isn't it coincidental that all of his receipts are lies, all the Lance Wilson receipts are lies? Lance Wilson is actually a very good friend. All of Linda Murphy's receipts are lies? Remember Linda Murphy, one of her closest friends. I showed you that on an affidavit. And she said one of her closest friends. All of Russell Cartwright's receipts are lies. All of these people.
>
> Look through her calendars. She's meeting with them for lunch all the time, but yet they're all lies, all attempts to deduct business expenses and commit crimes.

In the case of Mr. Sankin, the weight of the evidence is that many of his receipts in fact were lies, while others became lies through the manner of their use by the Government.[128]

In the case of Lance Wilson, Lynda Murphy, and Russell Cartwright, even if their receipts had been made evidence, under no reasonable interpretation of defendant's testimony can it be said that defendant said "all their receipts are lies" or even that many of their receipts are lies.

In fact, however, it was manifestly improper even to refer to this testimony, since those receipts were not made evidence. When a witness on cross-examination says that a receipt shown to her but not put in evidence could not be true, the witness has merely said that, if that document is what it purports to be, then it is a false document. The cross-examining party then has the right, through appropriate methods of introducing evidence, to show that such a document is what it purports to be. Only then may counsel

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[128] Counsel mentions one receipt that is right on point but did not elaborate on that matter.

for that party say that the witness stated that a receipt of such-and-such person was false.[129]

This is not a mere technicality, but a basic aspect of court procedure and evidence. It is especially not a technicality here, where as in the case of the expense record of Russell Cartwright, there is every reason to believe that the Government could not, and knew it could not, introduce the record into evidence without eliciting perjured testimony.

Further, by taking one receipt, as in the case of Russell Cartwright, for example, and stating that defendant says "all Russell Cartwright receipts are lies," counsel has suggested that he know that there are many more Russell Cartwright receipts relating to the defendant, a telling indictment of her credibility in light of her firm statement that she had never eaten with Mr. Cartwright.[130] This would be so even had counsel stopped at the end of the second quoted paragraph. Counsel went on, however, to say that proof that defendant had lied by making the alleged statements may be found in her calendars, which show that "she's meeting with them for lunch all the time," in essence telling the jury ~~they~~ There are many more receipts comparable to those used in cross-examination.

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[129] Notably, counsel did not proceed from the cross-examination with these receipts to eliciting testimony that defendant knew the persons in question were dishonest. Reference to such a statement would be appropriate unless the witness had been tricked into believing the persons were honest by being shown fabricated documents. In this instance, defendant did say that Mr. Wilson had acknowledged problems with certain of his receipts, and counsel could have appropriately referenced such statements in closing, but only those statements.

[130] That is, it would be a telling indictment if the receipt were not false. But there can be no doubt that government counsel is telling the jury here that defendant is lying by her supposed statements that all Mr. Cartwright's receipts are false.

In fact, however, the calendars do not show what the Government represents they do. Rather, they show that during the period when defendant was Executive Assistant, she met with Mr. Wilson for lunch on ~~three~~ four occasions and met with Ms. Murphy for lunch on one occasion.[131]

As to Russell Cartwright, whom defendant said she had never eaten with (Tr. 2864), her calendars would fully support that statement. His name never appears in any manner whatsoever.

e. Ronald Reynolds

The testimony of HUD driver Ronald Reynolds has already been discussed at length with regard to the Government's failure to correct Mr. Reynolds' evident perjury and with respect to the Government's intentional eliciting from Mr. Reynolds testimony that it had compelling reason to believe was perjurious. In its effort to undermine the defendant's' testimony in closing argument, the Government relied heavily on Mr. Reynolds' testimony and on asserted discrepancies between Mr. Reynolds testimony and that of defendant. The Government's manner of argument in this regard would have been manifestly improper even if there had been no reason to believe that Mr. Reynolds committed perjury in his testimony.

In attacking defendant's credibility in his closing argument, government counsel made the following statement about Mr. Reynolds and defendant's testimony concerning her knowledge of Mr. Reynolds:

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[131] The dates for the Wilson lunches are October 31, 1985, March 6, 1986, and May 15, 1986; the date for the Murphy lunch is October 25, 1985.

> That's why she doesn't want to admit that Mr. Reynolds took her [to lunch with Mr. Mitchell] -- and I neglected -- this is in evidence, you'll get a chance to look at it. Let me show you something on the visual presenter for a second. There are several pages in the middle of various, various HUD drivers and the name Ron, as you'll see runs, throughout. There are approximately, I don't know several pages. Look through it. See how many times Ron's name comes up.
>
> But she told us when I cross-examined her about it that there are many drivers. I don't know who Ron is. Well, Pam Patenaude had no problem remembering that she took trips with her when Ron was driving. But you she [sic] didn't want to admit to it, ladies and gentlemen, because she was in a trick bag. Either it's personal, and she lied to Senator Proxmire, or its business, and she lied to you. Either way, it's a lie. It can't be anything else.

Tr. 3424. (Emphasis added.)

It should be remembered that defendant in fact never denied that Mr. Reynolds had taken her to lunch with Mr. Mitchell, only that she had no recollection whatever of how she went to lunch with Mr. Mitchell. More significant, however, defendant's testimony cannot be remotely construed as stating that she did not who Mr. Reynolds was; in fact, it can only be construed as a statement that, not only did she know who Mr. Reynolds was, but he like other HUD drivers undoubtedly drove her places from time to time. The relevant testimony in this regard is as follows. After defendant had testified that she had "no memory at all" of whether she had been driven to lunch with Mr. Mitchell (Tr. 3054), she was confronted with Mr. Reynolds' stipulation that has been previously described. Defendant then stated (Tr. 3056):

> It says that if Mr. Reynolds would testify he would testify that he had driven me to lunch on several occasions when I said to him I was meeting Mr. Mitchell for lunch, and I don't believe I would have ever had that conversation with this man, nor could I remember any time of how I got to lunch with Mr. Mitchell, and I only recall having lunch with him twice.

Then after defendant had asserted that she had not stipulated that Mr. Reynolds' testimony was true, this questioning occurred (Tr. 3057-58):

Q. Did Mr. Reynolds drive you to lunch with John Mitchell?

A. Not that I recall. I don't recall any place Mr. Reynolds drove me.

Q. You don't recall any place Mr. Reynolds drove you?

A. Not in specifics. I can -- I can recall that Mr. Reynolds was a driver and --

Q. Let me show you Government's Exhibit 212 already in evidence, Miss Dean, and ask you to look through that and see if that refreshes your recollection whether Mr. Reynolds drove you anywhere?

A. Well, I didn't say that I don't recall that he was a HUD driver, but we had ten HUD drivers and all of them drove me different places. I just don't remember a specific of Mr. Reynolds driving me anywhere, but I will look through it, just as you asked me to, and see if I can find something.

Is Ron Mr. Reynolds? I don't see anything here that says Reynolds. It says Ron. Is his name Ron Reynolds.

Q. Do you know any other driver at the time, Miss Dean, named Ron.

A. As I said, there were ten drivers and I didn't know all of their names.

Q. You knew Mr. Reynolds well, didn't you?

A. I did not know Mr. Reynolds well at all.

Q. Did you use him a lot as a HUD driver?

A. No, I didn't. As a matter of fact, I'll look at this and I'll tell you who I did use often.

Q. Ma'am, I didn't ask you that.

A. All right.

Q. Did that refresh your recollection as to using Mr. Reynolds as a driver was the question.

A. I said Mr. Reynolds was a driver. All of the drivers drove me different places. Mr. Reynolds was not some special driver and he did not specifically drive me places, nor was he requested in -- to be a special driver for me. I didn't have

that sort of authority to have a special driver. I used whoever was available.

No reasonable construction of defendant's testimony would support government counsel's statement to the jury that defendant said: "I don't know who Ron is." Nor could that mischaracterization have been any less purposeful than the other mischaracterization already described. Indeed, there had been a previous exchange in chambers as to defendant's testimony as to her knowledge of Mr. Reynolds. In that conference, government counsel Sweeney had stated of defendant's testimony, "She couldn't even recall if Mr. Reynolds had driven her. I believe that was what she said." Tr. 3226. Defendant corrected that statement, observing with words almost verbatim from her testimony: "I didn't say that. I said he ~~was not~~ wasn't a special driver for me." Id.

The only reasonable interpretation of government counsel's actions in mischaracterizing defendant's testimony in closing is that counsel believed that he could make a stronger challenge to defendant's credibility with regard to her knowledge of Mr. Reynolds by misstating defendant's testimony. The calculated nature of that mischaracterization is further demonstrated by counsel's use of the motor pool logs that had been included in the transcript of defendant's Senate testimony.

Anyone listening to counsel's statement that "the name Ron, as you'll see, runs throughout"--offered, as it was to contradict defendant's supposed statement that "I don't know who Ron is"--would assume that the document showed Mr. Reynolds to be a frequent driver of the defendant. This is particularly the case in a context where Mr. Reynolds had testified that he drove Ms. Dean "two out of every three -- two out of five" trips; that on a weekly

basis he drove defendant "about ten times"; and that he had driven her to luncheon meetings "two, three times a week." Tr. 3239. Yet, the motor pool logs, which show 15 trips by the defendant in October 1986, show Mr. Reynolds as the driver on only one occasion.

The only reasonable characterization of the motor pool logs as they bear on defendant's actual testimony about Mr. Reynolds is that, while they are not comprehensive, the logs absolutely support defendant's testimony. However, by misstating the defendant's testimony and making misleading statements about the content of the logs, government counsel sought to lead the jury to believe the exact opposite of what the evidence showed.

It is no excuse for counsel's conduct that he told the jury that it could review the document. When a prosecutor representing the United States Government tells a jury that a document conclusively proves something--in this case that defendant had lied about her knowledge of Mr. Reynolds--a jury assumes that such is the case. That is precisely why prosecutors cannot be allowed to intentionally make unfounded assertions to the jury.

Even before making the above-quoted statements about Mr. Reynolds' testimony government counsel had discussed Mr. Reynolds at some length. Though knowing that many things Mr. Reynolds had said were false, government counsel attempted to rehabilitate him, and in doing so improperly suggested to the jury things that government counsel knew not to be true. Government counsel knew that when defendant stated that "you and my lawyer both agreed that that man was not quite normal (Tr. 3056)," she did so because of the statements in the Jenks material that the prosecution, too, had to recognize were preposterous. This was the subject on one bench

conference[132] and one conference in chambers.[133] As already noted, these are things that should have led the prosecution to know that Mr. Reynolds' direct testimony was likely to be untrue and that certainly would have given it additional reason to believe that Mr. Reynolds' statements in cross-examination were untrue. Yet, having full knowledge that the absurd statements in Mr. Reynolds' Jenks material formed the basis for defendant's statement, government counsel proceeded to suggest to the jury that he thought defendant's statement about Mr. Reynolds was based on Mr. Reynolds' long hair or some other personal trait, observing (Tr. 3422): 3421-22

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[132] See Section B.2, supra.

[133] See Section B.2., supra. The actual colloquy is as follows (Tr. 3223-24; emphasis added):

> THE COURT: All right, let me go to the next one then. The driver, the gentleman who, that the stipulation was if he testified, he would have testified that he had taken Ms. Dean several times to lunch that she told him were with Mr. Mitchell, as I recall the content, you want to call him back to that again basically.
> MR. O'NEILL: Yes, Judge.
> THE COURT: Since Ms. Dean said on the stand she stipulated to the testimony but not that it was true is what she said.
> MR. O'NEILL: And that both Mr. Wehner and I agree that he was a weird guy and couldn't be believed.
> THE COURT: That's right. Everybody believed that no one would believe him.
> MR. WEHNER: Yes, sir.
> THE COURT: And that's because of memory problems or something? Is that the reference?
> MR. WEHNER: It was because some statements in his Jenks material are so obviously untrue that he appears to be an unreliable person generally, and I don't mean to characterize him in such a way that Mr. O'Neill would disagree, but, for example, he testifies as to Ms. Dean's use of car phone, and there weren't any car phones in the cars at the time.
> I mean, he was clearly recalling information that he had heard from other sources or read in the newspaper and suggesting he had personal knowledge of it, and it was certainly not in my interest to have that testimony in front of the jury.

...So then she said, well, no, that didn't happen. Besides, Mr. O'Neill, you know he's a weird guy.

So we have to call Mr. Reynolds. Mr. Reynolds comes in. He's got long hair. Good thing I got a haircut, otherwise I guess I'd be a weird guy...

These statements, too, must be read as a calculated effort to mislead, in order both to alienate defendant from the jury and to present Mr. Reynolds as a credible witness who had actually contradicted defendant with plausible testimony. Counsel then went on to disparage the significance of Mr. Reynolds' statements as to the great frequency with which he had driven defendant to lunch with Mr. Mitchell--a statement akin to the several statements about the frequent driving of defendant that counsel knew had to be total fabrications--noting that Mr. Reynolds said "very clearly I remember two specific occasions.," "but I remember two specific occasions," and "the guy said two specific occasions." Tr. 3422.

The only statements to which counsel could have been referring, however, were Mr. Reynolds' statements that he remembered "at least about two or three occasions, at least, a minimum of two" (Tr. 3240) or "[i]t was probably more than twice, but I remember twice distinctly." Tr. 3421. The only testimony of any actual specificity provided by Mr. Reynolds, however, was that defendant told him after a lunch at the Fairfax Hotel, that she had been with Mr. Mitchell and her mother. Government counsel had to know, with virtual certainty, that that statement was false. As indicated above, however, counsel proceeded to use Mr. Reynolds' testimony to support government representations that defendant had lied to the jury, deliberately mischaracterizing defendant's own testimony, and documentary evidence, in the course of doing so.

As already made clear, the record can support no contention that on his first day of closing argument government counsel merely inadvertently misstated the facts to the jury. Were there any doubt on that score, however, it would be resolved by government counsel's conduct in his rebuttal. Having a day to consider what he had said, counsel made no effort to correct himself. Rather, counsel would return to the subject of Mr. Reynolds's driving defendant and state the following with regard to defendant's testimony (Tr. 3506):

> Denied the HUD driver ever drove her to lunch. The record shows that he did.
>
> Again, the reason she would lie about that, she was in a trick bag. Either she lied to the Senate about using it for personal reasons or she lied to you about Mitchell doing business with ~~HUD~~ her.

f. Andrew Sankin's Consulting

In closing argument, immediately after stating with regard to another matter, "It was just another lie," government counsel would state (Tr. 3426; emphasis added):

> Denied knowing that Andrew Sankin was a consultant. Well, we saw those letters. To believe that you'd have to disbelieve Mr. Sankin, Mr. Shelby, Mr. Broussard, Mr. Altman, Mr. Rosenthal. All saying she knew he was a consultant.

Here in support of the recurrent statements that defendant had repeatedly lied, government counsel would assert to the jury that extensive evidence shows that the underscored statement, made by defendant, was false. However, there is nothing in defendant's testimony on direct or cross-examination that could be remotely construed as a denial that she knew Mr. Sankin was a consultant.

g. Defendant's Friendship with Richard Shelby

Defendant testified that she and Richard Shelby became friends in approximately 1985. Tr. 3006. She also testified that they ceased to be friends in mid-1989. Specifically, defendant testified that after the issuance of the HUD Inspector General's Report she called Colonel Jack Brennan, who told her that Richard Shelby was involved with Mr. Mitchell on HUD business. She added that "I have never spoken to Mr. Shelby since that day, and I didn't call him. I didn't understand how it could have happened." Tr. 2619. The fact that, following this private conversation, and before there was any public disclosure of a link between Mr. Shelby and Mr. Mitchell on HUD business, the defendant ceased to speak to Mr. Shelby is, if anything, a strong indication that defendant had no prior knowledge of that connection.

More germane here, however, is the fact the since the record shows that the Inspector General's Report was issued in April 1989, these events would have occurred more than 21 months after defendant ceased to the Executive Assistant at HUD on July 2, 1987. There is no other evidence in the record showing that defendant and Ms. Dean ceased to be friends at an earlier point in time. The Government's Eastern Avenue Chart shows defendant lunching with Mr. Shelby on October 27, 1987, and lunching with Mr. Shelby and another person on November 24, 1987, and the Government's Park Towers Chart shows that defendant dined with Mr. Shelby and Mr. Mitchell on December 17, 1987. The three lunches in the half year following defendant's leaving the position of Executive Assistant reflect an unusual frequency of lunches relative to the periods when she was Executive Assistant. Further, Jenks materials provided to defendant indicate that Mr. Shelby advised representatives of

the Office of Independent Counsel that he and Dean remained friends long after she left her position as HUD and even exchanged Christmas Gifts in 1987 and 1988. See Exhibit DD at 13.

Nevertheless, in closing argument, after discussing defendant's denial that Mr. Shelby sought anything of her until Eastern Avenue, and noting the frequency with which Mr. Shelby and defendant had lunch during periods when Mr. Shelby was promoting an earlier project, government counsel would state the following in his closing argument (Tr. 3406):

> They weren't friends before her position as Executive Assistant to HUD. You will hear from her they're not friends any longer. They're only friends when she's Executive Assistant. Ask yourself does that make sense that they're not talking about Mod Rehab, about these projects while she's Executive Assistant and having lunch with him on a very frequent basis as she says.

In other words, government counsel maintained, since Mr. Shelby and Ms. Dean were not friends in any sense that would occasion their meeting after she was Executive Assistant, their contacts while she was Executive Assistant had to be about mod rehab. Thus, in support of the Government's assertions that defendant had lied about her earlier contacts with Mr. Shelby, government counsel was willing to state to the jury facts he knew to be false.

h. Alvin Cain's Testimony

In Section B.3., supra, in arguing for a hearing and discovery into whether Special Agent Cain committed perjury and whether the government counsel knew or should have known of that perjury, defendant described the manner in which the government had used that testimony in closing argumemnt. Defendant noted that, even through Mr. Cain had said only that he did not remember the call

from defendant about Mr. Mitchell's earning money from HUD business, given the detail of Mr. Cain's recollection on other matters, a jury easily might believe Mr. Cain would have remembered it if it happened.

Nevertheless, Mr. Cain did not testify that the call never happened, nor did he even testify that he would have remembered the call had it happened. Government counsel was free to argue that Mr. Cain's testimony suggested that he would have remembered the call if it had occurred. Instead, however, with respect to this key testimony in the government's effort to demolish defendant's credibility, government counsel deliberately misstated Mr. Cain's testimony, and did so on both days of his closing argument.

On the first day, government counsel would firmly state (Tr. 3420):

> .... And you heard Mr. Cain. It didn't happen. It didn't happen like that. .....

In rebuttal on the following day, government counsel would again state, with equal firmness (Tr. 3506):

> Shocked that Mitchell made any money. Al Cain told you that conversation never happened.

~~In this instance~~, Moreover, government counsel has used the word "shocked"--a word that had been used only in Colonel Brennan's account of defendant's reaction to his informing her of Mr. Mitchell's HUD involvements--thus giving Mr. Cain's testimony effect in refuting that testimony as well. In any event, it is evident that Government Counsel purposely chose to mischaracterize this critical testimony in order to cause it to carry greater weight with the jury.

i. Defendant's Relationship with John Mitchell

Evidence introduced in the government's case showed that as early as 1983, defendant wrote to John Mitchell as "Dear Dad," or "Daddy," signing such letters," Love, Deborah," or "love, D." In her direct testimony, defendant fully acknowledged such letters. Tr. 2608-11. Defendant had also explained that even much earlier, Mr. Mitchell had advised her and her brother on about school and "and acted as a -- mentor, I would say, to both my brother and I." Tr. 2595. Speaking of her relationship from the early 1970's until she went to work for Mr. Mitchell's company for a brief period in 1980, defendant said: "I really didn't know him that well, but I liked him and I -- I felt terribly sorry for him and what was going on in his life and I tried to be kind to him and he was very kind to me." Tr. 2596-97.

On cross-examination defendant similarly acknowledged a close tie to Mr. Mitchell. Asked whether "it is fair to say that you were close to John Mitchell?," defendant responded simply, " Yes." Tr. 2960. Still on cross-examination, in discussing why defendant had sought Mr. Mitchell's assistance when she believed an F.B.I. investigator was acting improperly, an event occurring while she was still at HUD, defendant spoke of Mr. Mitchell as someone "I considered to be my mentor/father-like person." Tr. 3019. Moments after that acknowledgement, defendant was asked whether while at HUD she would meet him occasionally for lunch. She responded as follows (Tr. 3019):

> I believe I was still employed at HUD when I had lunch with he and Mr. Winn, and I know I had lunch with him with Mr. Shelby. I don't believe I ever had lunch with Mr. Mitchell when it was just the two of us and I was at HUD. I really didn't get to know Mr. Mitchell very well until after I left HUD. Then we became very close. We weren't actually that close when I was at HUD.

Thus, in the course of explaining why she had never had lunch alone with Mr. Mitchell while she was at HUD--a statement that has never been contradicted--defendant observed in passing the underscored sentences. There is nothing in these sentences to suggest an intent on the part of defendant to distance herself from Mr. Mitchell, or to do anything other than explain the somewhat curious fact that she never lunched alone with him while at HUD. These statement, moreover, can hardly be said to have been a response to being confronted with anything.

Nevertheless, one of the three underscored sentences, somewhat altered, would have a large role in government counsel's assertions to the jury that defendant had repeatedly lied. As he stated (Tr. 3395-96):

> What does she get out of this? John Mitchell is like a father to her. He is as close as he [sic] comes. Later on, in her testimony, she says, well, I didn't really become close to him until after I left HUD.
>
> Ask yourselves, ladies and gentlemen, is that credible? When she's writing letters to him in 1983 saying Dear Daddy? Would she be calling somebody daddy if you're not ~~that~~ close to him.
>
> She told you that he was her mentor. He was her brother's mentor.
>
> But the story keeps changing. It changes on what question you ask. But there is no doubt in these documents, documents written in 1983, that's her dad, and that's what she's calling him.
>
> Later on when confronted on the stand, I wasn't close to him at that time.

Government counsel would return to this theme minutes later (Tr. 3421):

> I mentioned earlier, not close to John Mitchell until after she left HUD. All the letters were written Dear Daddy. Five years earlier. Come on ladies and gentlemen. Does that square with common sense? Does that make any sense at all? She's trying to talk her way out of it.

And in rebuttal the following day, counsel would return to it again when presenting a listing of the instances in which, according to counsel, defendant had repeatedly lied to the jury, this time observing (Tr. 3506):

> Not close to Mitchell until after she left HUD. In fact, the record shows she was calling him Daddy five years earlier.

This would be a bizarre and dishonest twisting of language in any circumstance. But in the context of the Government's vouching to a jury that the record shows a criminal defendant has lied, it is abusive.

j. John Mitchell's Consulting

Testifying on direct examination, defendant stated that at the time of her contacts with Mr. Mitchell on Marbilt and Arama, defendant did not know that Mr. Mitchell was a paid HUD consultant and did not know that until the HUD Inspector General's report was issued in April 1989. Tr. 2615-16. There is no evidence in any way contradicting that statement, and the testimonial evidence of immunized witnesses Richard Shelby and Jack Brennan support the defendant's general denial that she knew Mr. Mitchell was paid as a result of any actions on HUD matters with which she had dealings.

During cross-examination, defendant again denied that she had any knowledge that Mr. Mitchell had approached her in a "consultant" capacity when he contacted her about Marbilt. Tr. 2971-72. Some minutes later into defendant's cross-examination, when discussing Mr. Mitchell's request that defendant check into the status of Arama, this questioning took place (Tr. 2984):

> Q. Is it fair to say that, Ma'am, that you knew at this time John Mitchell was a consultant lobbyist?
>
> A. No. No, I never knew that.

Q. Even though you had worked for Global Research as ~~the~~ director of public relations?

A. When I worked for Global Research no one ever said anything about HUD the whole time I was there. I never heard the word HUD the entire time that I was at Global Research.

At this point, it must be said that any denial by defendant of knowledge that Mr. Mitchell was a consultant-lobbyist plainly meant that she did not know he was involved with consulting or lobbying on HUD matters. Recognizing this, counsel asked several follow-up questions.

Q. Aside from the word HUD, Ma'am, did you know that John Mitchell was a consultant working on projects, selling certain influence for certain customers?

A. I -- no, I never knew anything like that. I knew that he worked on armored cars.

Q. What was he doing in relation to the armored cars? Wasn't he marketing it around the world to various dignitaries?

A. I believe so, yes.

Q. And hew [sic] was acting as a consultant on behalf of the armored cars?

A. I wouldn't know. I'm getting a little confused as to what we call consultants these days. I know he had a business arrangement with Hess & Eisenhardt Cars and if he could sell a car he got a percentage of the car deal, a percentage of the money. I don't know if you would call that a consultant. I'd call it a broker.

Tr. 2984-85 (emphasis added).

At this point, defendant has testified as to what Mr. Mitchell did with regard to armored cars, but that she did not know whether one called that a "consultant" or not, though she thought broker was a better word for his activities in that regard. Given counsel's description of a consultant as one who is "selling certain influences," defendant's semantic preference is probably an apt one.

Moreover, the only concrete evidence of Mr. Mitchell's selling any type of influence in Washington, D.C. during the period under discussion would be that reflected in the agreement reached between Art Martinez and Louie Nunn on January 25, 1984, and the two telephone messages reflecting calls between Mr. Mitchell and Lance Wilson shortly before and immediately following that agreement. There is no evidence that prior to April 1989, defendant knew even of this instance of Mr. Mitchell's selling his influence.

In any case, after a break, government counsel resumed questioning on this matter (Tr. 2992):

> Q. Ms. Dean, do you remember testifying just before we broke about not knowing whether Mr. Mitchell was a consultant.
>
> A. Yes.

Counsel then asked defendant this question regarding a September 1982 qualification statement filled out for the White House (Tr. 2992-~~939~~ 93):

> Q. And do you recall whether you said that Mr. Mitchell was an international consultant?
>
> A. Yes.

These exchanges would form the basis for government counsel, in closing argument, to make further assertions to the jury that defendant had repeatedly lied. On the first day of his closing, government counsel would state (Tr. 3419): ✓

> No idea John Mitchell was a consultant. That was his occupation. He was in Global Research International. That's what he did for a living. I had to prod her on that and pry, and it's not easy to just keep asking questions, going into this stuff, but when you're not getting a truthful answer you have to pry, and finally she admits, yes, he's a consultant, which I won't even -- I might as well.

Then moments later (Tr. 3421):

> She lies when it benefits her. When its a benefit. When she can say I didn't know John Mitchell was a paid consultant,

she lies about that. We have to show if she's going to lie about that will she lie on anything else?

Counsel would return again to the point in rebuttal on the following day, this time in the context of listing the lies counsel maintained that defendant had told to the jury (Tr. 3506):

No idea that Mitchell was a consultant. But that was his occupation.

As with counsel's characterization of defendant's testimony about how close she was to John Mitchell, this would be a great distortion of testimony in any context, but it is particularly egregious in the context of the government's representation that a defendant has lied.

k. Defendant's Consulting

During defendant's first day of cross-examination, defendant testified that in 1984, in the discussion of the fact that Joseph Strauss might be receiving $600,000 or more as a result of the funding of 610 units of mod rehab in Puerto Rico, she had expressed to Secretary Pierce the view that it was unseemly for former Special Assistants to be receiving such sums as consulting fees. Tr. 2883. Moments later, the following questioning occurred (Tr. 2887):

Q. You became a lobbyist when you left HUD, did you not ma'am?

A. I became a lobbyist, yes.

Q. And a consultant.

A. No, not a consultant. A consultant as in what? As in mod rehab units? No, I did not.

Shortly thereafter, government counsel questioned defendant about her post-HUD work for persons named Horn. This questioning took place (Tr. 2903):

Q. And in fact, you received payments from [Mr. Horn] after you worked at HUD, correct? You worked as a consultant for Mr. Horn.

A. Yes, it was a very small job that I did for him.

Thereafter, confronting defendant with Government Exhibit 524, Government counsel sought to cause defendant to acknowledge that she had received $20,000 from the Horns, which she denied. To the question of whether Mr. Horn paid defendant $20,000 "acting as a consultant," defendant responded "Absolutely, not," and went on to describe the efforts she expended on Mr. Horn's behalf with regard to a cost certification issue, and the moneys she received. Tr. 2904. This questioning then occurred (Tr. 2904):

Q. Ms. Dean, what was the name of your company when you went out as a lobbyist-consultant.

A. I said before I wasn't a consultant.[134]

During the second day of defendant's cross-examination, she was questioned about Mr. Mitchell's role as a consultant, with government counsel, as previously discussed, on that occasion elaborating on the term "consultant" as involving the "selling certain influences for certain customers." Tr. 2984-85. On the third day of defendant's cross-examination, government counsel returned to the issue of defendant's post-HUD employment with this line of questioning (Tr. 3130):

Q. Now, Ms. Dean do you recall testifying on cross-examination that I don't approve of special assistants of the

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[134] When a bench conference ensued, it became evident that the Government, which secured all of defendant's records from the period, had no evidence that the money had been paid to defendant. Tr. 2903-06. On voir dire, defendant later explained to the Court that the $20,000 figure reflected anticipated earnings from a client if an arrangement between defendant and a law firm came to fruition. Tr. 3140-41. The court denied further inquiry into that matter. Tr. 3144-45.

secretary of HUD leaving HUD and cashing in on their former positions?

A. Yes, and I believe that.

Q. Do you recall testifying on cross examination that you did not become a consultant after leaving HUD?

A. I became a lobbyist, not a consultant, and I never called Secretary Pierce for anything, and I never did anything that was influence peddling.

After government counsel proceeded to question defendant about Government Exhibit 556, and an objection by defense counsel, there followed a bench conference and conference in open court in which was discussed whether defendant had entered into consulting agreements involving payments on a per unit basis either for mod rehab units or project-based Section 8. Tr. 3130-40. After voir dire of the witness by the court regarding the nature of her agreements involving HUD-related work (Tr. 3140-43), noting that defendant had stated that "she did not go out and become a $1,000-a-unit consultant" (Tr. 3143), the Court concluded that, notwithstanding government allegations that it had information "that fees were structured on a per unit basis" (Tr. 3138), there was insufficient evidence that defendant was engaged in per-unit fee arrangements to allow inquiry into that matter. Having previously expressed the view that the Court did not understand why defendant would draw a distinction between consulting and lobbying and that defendant's denial of consultant status made that a legitimate area of inquiry (Tr. 3132), the Court did allow inquiry "into the consulting, quote, arrangements" defendant had with two clients. Tr. 3144.

Government counsel then proceeded with this questioning (Tr. 3145):

> Q. Ms. Dean, right before the break, I was going to show you Government's Exhibit 556 for purposes of identification. I'd show it to you at this time and ask you if that refreshes your recollection that you, in fact, did become a consultant after leaving HUD.
>
> A. Well, this is a consulting agreement, but all of my contracts said "Consulting Agreement." I'm going by your definition of this trial as to what a consultant is.

Pursuant to the request of government counsel, the Court struck the last sentence of defendant's response. Tr. 3145. When questioning resumed, defendant indicated that she had entered into a "consulting arrangement" with Lynda Murphy and that said arrangement involved a monthly retainer. Tr. 3146

In government counsel's closing argument, the foregoing testimony would form the basis for these statement, again in the context of assertions that defendant had repeatedly lied to the jury (Tr. 3419; emphasis added):

> "... She wouldn't even admit being a consultant until I showed her a consulting agreement that she had signed and she said, well, if you want to say what that is. I don't testify here, ladies and gentlemen. It's what the defendant testified. <u>She was a consultant when she left. She did what she complained everyone else was doing. They left HUD and became consultants.</u> That's what she did when she didn't get the job she wanted."

The abuse here goes beyond taking what is, at most, a semantic quibble, and using it as a basis for the government to baldly state that a defendant has lied. Government counsel went on to assert that defendant was doing exactly what she complained about everyone else was doing, to wit: influencing the allocation of mod rehab units at fees of $1,000 and more per unit. There is no evidence in the record to support that assertion. Moreover, the Government requested permission of the Court to try and put evidence to that effect into the record and the Court denied that request.

Government counsel nevertheless went on to state to the jury that defendant did engage in such activity.

l. Discussion of James Wilson

In closing argument government counsel, in discussing the Alameda Towers allegations, would assert that there was conspiratorial element to the manner in which Andrew Sankin and Thomas Broussard became involved in that matter by referring to the testimony of James Wilson as to what Mr. Broussard had said to him when they discussed the 150 units that eventually would go to Alameda Towers. In discussing that matter, counsel would state (Tr. 3401): "And probably the most honest person that's testified at this trial was a Mr. James Wilson." This was bald vouching for the credibility of a government witness.

Moreover, government counsel would describe Mr. Wilson's testimony at length and then state (Tr. 3402): "And the defendant tells you ~~an entirely~~ on the stand a different story." By emphasizing a supposed contradiction between Mr. Wilson's testimony and something the defendant said, government counsel enhanced the significance of the testimony and the credibility of the testimony of a witness that the Government had just described as the "most honest person that's testified at this trial." This increased the potential harm from the Government's improper vouching.

m. Discussion of Secretary Pierce

There is no evidence anywhere in the record suggesting that defendant ever used the Secretary's autopen without the authorization of Secretary Pierce. Though the Government questioned defendant's secretary, as well as many other government and defense witnesses who worked closely with the defendant, the

government never sought to elicit testimony suggesting an unauthorized use of the autopen. Nor did the Government probe that area in the cross-examination of defendant.

The unauthorized use of the autopen was not an element of the charges against the defendant in the Superseding Indictment, including the allegation pertaining to the rental waiver for the Necho Allen Hotel. See Superseding Indictment at 31-32. Such a theory was not suggested in the Government's opening argument, which at least would have afforded the defendant an opportunity to present evidence. Given the large involvement of headquarters personnel in the review of the matter, moreover, any suggestion that the waiver would have been carried out by defendant through an unauthorized use of the autopen was manifestly implausible.

There also is no evidence anywhere in the record suggesting that defendant ever deceived Secretary Pierce. Again, the Government did not seek to elicit testimony to that effect from witnesses other than defendant and did not in any way impeach defendant's representations that she discussed various matter with Secretary Pierce.

Though there was no evidence in the trial suggesting either unauthorized use of the autopen or deception of Secretary Pierce, however, as noted in Section A.3.a, supra, press accounts regarding the defendant had been replete with such suggestions. Thus, the motives underlying a number of government counsel's statement in closing argument are suspect.

In discussing the Necho Allen Hotel waiver, government counsel would describe the matter thusly (Tr. 3399; emphasis added):

> So what happens? Andy Sankin gets John Rosenthal into see Deborah Dean. Bang. Exception rents. They'll say Secretary

> Pierce signed off on them. The autopen was used. Again, you only have her word that Secretary Pierce authorized the signature. It was not his signature. It's an autopen.

Here counsel is not merely inviting the jury to speculate about a fact for which there is no direct evidence and no evidentiary basis for inferring, he is inviting the jury to recall what they may have read in the press and to infer that defendant is placing blame on Secretary Pierce.

When similarly inviting the jury to speculate that the defendant had deceived Secretary Pierce, government counsel would employ language calculated to engender racial feelings, first observing (Tr. 3427-29; emphasis added):

> And probably the biggest lie of all is what she says about Secretary Pierce. That Secretary Pierce was responsible for all the actions she took. That Secretary Pierce was the person who was behind the funding of all these awards. That it wasn't her. That she was merely some sort of messenger. To believe that, you will have to disbelieve almost everyone.
>
> ....
>
> She would have you believe that she brought out that there's this adjoining door between his office and her office, so therefore -- and I have no problem that there's a door separating their offices, but somehow he would sneak in, tell her things, sneak out, and nobody else would see it, that's why everybody else is mistaken and they all think Sam Pierce is not hands on, but he really was.
>
> ...
>
> Just as she's deceived you or attempted to do so, ladies and gentlemen, through a series of lies and deceptions she misled Samuel Pierce and didn't tell him of her hidden interest because if this man who she said is such a fine man and prominent attorney, would he have allowed her to do this where she would have had a hidden interest on these projects? ...

There was never a suggestion in anyone's testimony that the defendant did not see Secretary Pierce often enough to consult with him on regular basis, or that she did not do so in the manner typical of any government office. Nor was there the least suggestion of secrecy in any of their communications. Government counsel has therefore chosen an unrealistic image that has no

bearing on an issue in the case, soley because it is the type of image that might stir racial feelings.

It must be recognized as well that this all took place at a time when it was publicly reported that the Office of the Independent Counsel was continuing to investigate Secretary Pierce. An argument that Secretary Pierce could not have been consulted by defendant in the manner she stated was an argument that if defendant was guilty, Secretary Pierce, a prominent African American, was innocent.

n. Discussion of Lance Wilson

A racial element was also evident in government counsel's approach to defendant's testimony regarding Lance Wilson. The defense presented substantial evidence that Mr. Wilson had been the person responsible for funding the Arama project through Maurice Barksdale, evidently at the behest of John Mitchell. Defendant would even state in cross-examination that Mr. Wilson told her that was the case, though that response would be stricken. In defendant's direct testimony defendant had stated that Mr. Wilson was a friend of hers who was present in the court room. Mr. Wilson, an African American, raised his hand to identify himself to the jury.

In cross-examination, defendant would be pressed about Mr. Wilson's receipts and whether "he, too, is lying on his taxes," (Tr. 2849), and about defendant's statements to an F.B.I. agent in March, 1987 regarding Mr. Wilson's responsibility for sending 600 units to Puerto Rico. Tr. 2882-86.

The former questioning would then form the basis for the statement in closing that, as with Russell Cartwright and Lynda

Murphy, "all the Lance Wilson receipts are lies," (Tr. 3408) even though defendant specifically acknowledged the correctness of some of those receipts.

With regard to the Puerto Rico funding, though fully agreeing with the substance of the report of her March 1987 interview, the Government deemed it appropriate to bring in Agent David Bowie, an African American, to state again the content of the interview given in 1987. Tr. 391-94. Regardless of the precise words with which defendant had characterized her belief as to Mr. Wilson's role when interviewed by Agent Bowie, it is evident that defendant told Agent Bowie the truth about what she perceived to have been an improper funding decision, and did so notwithstanding the involvement of a personal friend. In the Government's closing, however, the following is how that matter would be presented to a jury (Tr. 3420; emphasis added):

> So we had to call in Special Agent David Bowie, and remember special agent Bowie? He's been 22 years with the FBI, before that six years as a schoolteacher, before that with the United States Military in Vietnam. Mr. Bowie says that's what she told me. She fingered Lance Wilson, her friend, who was giving the 600 units to Joe Strauss.

Whether or not the elaborate description of Mr. Bowie's background was to recall to the jury Mr. Bowie's race, the message of the remainder of the paragraph was clear: Defendant "fingered" Lance Wilson, a black man, who was her friend. This statement, moreover, was made to a jury in a city where the major newspaper had earlier this year printed Mr. Wilson's picture under a banner that read "HUD Ex-Aide Guilty on Single Count," possibly leaving some jurors to think that the conviction occurred because of actions by the

defendant.[135] But for the value of distancing defendant from an African American friend, and hence from the jury, more appropriate words would have have been found to describe defendant's conduct in this instance.

o. Discussion of Public Policy

The prosecutors' role in closing argument is to focus the jury on evidence and whether that evidence demonstrates that certain crimes have been committed. It is error for a prosecutor to urge that a jury convict a defendant because of broader social concerns or the deterrent effect of such a conviction. The danger in such arguments is that "jurors may be persuaded by such appeals to believe that by, convicting defendant, they will assist in the solution of some pressing social problem." United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984).

There was special reason for such a concern in this case. The HUD Scandal, as it was known, was widely portrayed as an abuse of a program intended for the poor, where well-connected Republicans with access to high officials were able to use that access to reap large profits. It was a situation that many found to be repugnant even if not illegal. As the Government would acknowledge in arguing to the Court in opposition to defendant's Rule 29 motion, however, it was not actually an issue in this case. Tr. 2023. There nevertheless remained the danger that the jury would convict the defendant because of her involvement in that system rather than because of evidence of actual criminal activity.

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[135] York, "HUD Ex-Aide Guilty on Single Count," The Washington Post, Jan. 6, 1993, at A4 (Exhibit DDD).

It is in that context that the final words of the Government's rebuttal argument must be evaluated. They are not set out in their entirety, but they are attached as Exhibit EE hereto. Among the objectionable remarks are the following:

> Tr. 3521: "And he kept saying it's your Government, and that's right. It is your Government. It's all our Government. Not for a select few, not for certain insiders who have access to high ranking public official like Mr. Shelby who Mr. Wehner said I didn't do anything wrong.... He knew he had done something wrong. He knew he had access to high public officials."
>
> Tr. 3522: "And by your verdict tell her no more. You won't put up with corrupt public officials, people who use their office, public office, for private gain, who work for a select few and not for all of us, because it is as Mr. Wehner said your Government, our Government."
> She was a public official entrusted with millions of dollars of taxpayers' money, for what purpose? To provide housing for the poor. Is that the way it worked? Did the local priorities play any role in this? No, ladies and gentlemen. It just depended on who you knew and how it worked out. And I say millions of dollars, Arama alone, the evidence shows, was over $28,000,000 and that's still being paid to this day. They're 15-year contracts.
>
> "Think of the amounts of money that went for housing, and did it work the way it should have? ...
>
> ...
>
> Tr. 3523: " ... Remember what I said, it is we the people, by the people, for the people. We, the people. It is all of us. It is not if your [sic] prominent and powerful and belong to a select few. It is for all of us."

As the attached transcript pages will show, counsel also argued that defendant had engaged in improper conduct by enriching herself and her family. The-above quoted passages, however, are not only inflammatory and improper argument, but are an invitation to the jury to make a statement about good government that involves many issues unrelated to the defendant's guilt or innocence of the charges in the indictment.

D. REMEDIAL ACTION

Defendant submits that the governmental described above was sufficiently pervasive and sufficiently egregious to warrant the Court's exercise of its supervisorial powers to dismiss the indictment with prejudice. See United States v. Kojayan, supra, slip op. at 8316;[136] United States v. Williams, 112 S.Ct. 1735, 1742 (1992).

Absent a dismissal of the indictment, a new trial is imperative, for it is clear, defendant submits, that the aggregation of prosecutorial misconduct had denied her fundamental fairness. The perjury of government witnesses, either elicited by or allowed to go uncorrected by government counsel, including that which has been demonstrated above and that which defendants submits will be demonstrated in the requested hearing, should provide a basis for a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97 (1985); see also United States v. Rivera-Pedin, 861 F.2d 1522 (11th Cir. 1988).[137] Given that the Government itself insisted to the jury that the case turned wholly

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[136] In Kojayan, the court of appeals suggested the possibility of dismissal where the government's misconduct involved one misstatement of fact in closing argument, coupled with the government's refusal to provide the defense with information that could help it locate a witness. The court of appeals, however, left that determination to the trial court.

[137] In United States v. Cole, 755 F.2d 748, 763 (D.C. Cir. 1985), the D.C. Circuit observed that "[w]hen a government lawyer elicits false testimony that goes to a witness's credibility, we will consider it sufficiently material to warrant a new trial 'only when the estimate of the truthfulness and reliability of [the] given witness may well be determinative of guilt or innocence.'" (citations omitted). To the extent that this suggests a different standard where the perjury relates only to the witnesses' credibility, we question whether it would be appropriate here where the Government has made credibility itself the issue. In any case, we believe that this standard, too, has been easily met.

on defendant's credibility, and so much of the perjury of government witnesses related to issues of defendant's credibility, that standard is easily met ~~at~~ as to all counts.

Apart from the perjury, however, the varied forms of Governmental misconduct would in most instance amount to plain error on their own.[138] And in most instances there would be strong reason to believe that a particular type of conduct alone affected the verdict. The repeated and inflammatory representations that defendant had lied are the most obvious example, and, defendants submits, given the stark contrast between the magnitude of the behavior here and in such cases as Harris v. United States, supra, and Young, supra, would alone be grounds for a new trial under the reasoning of those cases.[139] The misrepresentations of evidence and the arguments based on false evidence are obvious examples as well.

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[138] As noted in Section C.1., defense counsel objected twice during the rebuttal argument of government counsel, once with respect to characterizations of defendant and once with regard to characterization of testimony. Both objections were overruled, and government counsel proceeded to complete his rebuttal in the same manner as he conducted his argument preceding the objections. Thus, in part, the contentions herein can be considered matters objected to at trial. Even without objection, however, defendant submits that, although plain error review is to be limited to the correction of particularly serious errors and where "the matter complained of '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,"'" (United States v. Doe, 903 F.2d 16, 26 (1990), precisely such a situation exists in this case.

[139] Consider also a comparison of this case with Darden v. Wainwright, 477 U.S. 168, 182 (1985), where the Court found that the prosecutor's calling the defendant an "animal" did not make the trial fundamentally unfair, noting that "the prosecutor's argument did not manipulate or misstate the evidence," and that there was "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges.'"

In any case, however, the varied types and instances of prosecutorial misconduct in closing argument must be examined for their cumulative effect. Moreover, they must be examined in light of the background. As the D. C. Circuit observed, in United States v. North, supra, 910 F.2d at 896, after noting that a single misstatement in closing argument would rarely amount to severe misconduct, the Court observed: "By contrast, tainted closing arguments that follow in the heels of improper and indecorous prosecutorial behavior are more likely to amount to the type of severe misconduct that justified reversing a conviction."

Here, improper behavior leading up to closing argument was part and parcel of the inflammatory and dishonest strategy employed in the closing. It was intended to influence the jury and, given the weaknesses of the case detailed elsewhere in this document, there is a high likelihood that it did influence the jury.[140]

Defendant also submits that the Court's curative instructions to the jury were insufficient to obviate the harms of the improper prosecutorial conduct. The instructions were limited, and, given the pervasiveness even merely of the Government's representations that defendant had lied, even more elaborate instructions could not have been expected to sufficiently counter the impact of the Government's conduct.

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[140] Given the evidence that ~~the Government's~~ aspects of the Government's approach to defendant both during trial and closing argument was influenced by racial considerations, constitutional issues are implicated. As such, the burden is upon the Government to prove beyond a reasonable doubt that the improper conduct in closing did not contribute significantly to the defendant's convictions. United States v. Doe, supra, 903 F.2d at 27-28. As indicated in the text, however, a new trial would be warranted here even without the application of this standard.

For these reasons[141], defendant respectfully requests that the indictment be dismissed with prejudice or that a new trial be ordered.

Respectfully submitted,

Dated: 11/30/93

/s/ Stephen V. Wehner

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[141] Although this court has previously overruled the defendant's objections on the following grounds, we continue to believe the rulings were error. These include the failure to strike juror number seven, the denial of our Brady and other discovery motions prior to trial, the disallowance of surrebuttal testimony, and the failure of the court to instruct the jury with regard to the statute of limitations.