

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	2
A. Additional Instances of Prosecutorial Abuse Not Previously Considered By This Court Are Significant	4
B. Independent Counsel Presented False Evidence At Trial	8
C. Independent Counsel Made Misleading Statements in Defense Against the Earlier Charge of Prosecutorial Misconduct	9
D. The Court Must Consider the Cumulative Impact of More Instances of Prosecutorial Abuse Balanced Against Far Less Evidence of the Defendant's Guilt ...	9
E. New Material Evidence Has Been Discovered Since Trial That Would Likely Have Resulted in Dean's Acquittal on Count One	10
II. OVERALL CONSIDERATIONS	15
A. Pervasiveness of the Misconduct	15
B. Count One Was the Focal Point for the Entire Prosecution	16
III. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNT ONE	24
A. The Arama Project	25
1. Independent Counsel Falsely Asserted That Mitchell's Role Was Concealed From Martinez	26
2. Abuses by Independent Counsel Relating to the Testimony of Maurice Barksdale	27
a. Independent Counsel Failed to Make a Timely Brady Disclosure of Barksdale's Statements That Were Exculpatory of Defendant	32

b.	The Failure to Include the Report of Barksdale's Interview of March 22, 1993 as Jencks materials	35
c.	Independent Counsel Failed to Disclose Significant Impeachment Material on Barksdale	37
d.	Barksdale's Testimony Regarding Project-Specific Awards	41
e.	Independent Counsel's Representations Concerning the Failure to Make a Brady Disclosure of the Mitchell Message Slips ..	44
f.	Failure to Make Brady Disclosures Concerning the Patriots Project	45
1.	Failure to Disclose As Brady or Giglio the Statements of Barksdale ...	45
2.	Failure to Disclose As Brady the Statement of James R. Lomenick	46
B.	Park Towers	47
1.	The Testimony of Eli M. Feinberg That He Was Unaware of Mitchell's Involvement With Park Towers Was False	49
2.	The "Contact at HUD"; the Documents Mentioning Shelby's Contacts With DeBartolomeis; and the Post-Allocation Waiver ..	53
3.	The Park Towers Rapid Reply	57
4.	Shelby's Supposed Concealment of His Contacts With Defendant From Feinberg and Fine	60
5.	The September 9, 1985 Lunch	63
C.	Other Prosecutorial Misconduct Generally Applicable to Count One	64
IV.	MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNT TWO	67
A.	The Evidence With Respect to the Necho Allen Waiver and Alameda Towers Is Tenuous	68
1.	Timing of HUD Action Does Not Establish Conspiracy	69

PAGE

2.	Sankin's Thinking and Actions Does Not Establish A Conspiracy	70
B.	The Sankin Receipts	73
1.	The Proposed Exhibits	74
2.	Introduction of the Receipts at Trial	80
3.	Independent Counsel's Misrepresentations to the Courts Concerning the Receipts	83
C.	Andrew Sankin's Harvard Business School Application	83
1.	Background	83
2.	Sankin's Testimony Was Inconsistent With Application	85
3.	Application Was Exculpatory With Respect To Necho Allen Waiver And Other Projects	86
V.	MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS RELATING TO COUNTS THREE AND FOUR	90
A.	Background	91
B.	Demery's Testimony and Independent Counsel's Representations That Independent Counsel Did Not Believe Demery's Repeated Denials That He Had Ever Lied to Congress	93
1.	Testimony of Demery	93
C.	Independent Counsel's Failure to Make Brady Disclosures of, and Withholding from Discovery Materials Concerning Investigations of Actions Demery Took to Benefit Kitchin and the Redaction of Kitchin's Name or the Elimination of Entries Relating to Kitchin From Material Produced During Discovery or as Giglio on Demery; The Failure to Produce as Jencks Material on Kitchin or Jack Jennings the HUD Interview the HUD Inspector General Conducted During the Investigation of Demery's Manipulation of the Section 8 Certificate Program	99

	<u>PAGE</u>
1. The Investigation of the Cumberland II Title X Loan	99
2. The Investigation of the Hidden Woods Title X Loan	101
3. The Hotline Complaint Record	102
4. The Interview of Kitchin or Jack Jennings During the Investigation of Demery's Manipulation of the Section 8 Certificate Program	103
C. Statements Before Metro Dade Housing Authority	104
VI. CONCLUSION	106

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

DEBORAH GORE DEAN

Defendant.

CR 92-0181-TFH

**MEMORANDUM IN SUPPORT OF DEFENDANT DEBORAH GORE DEAN'S
MOTION FOR DISMISSAL OF THE SUPERSEDING INDICTMENT
OR, IN THE ALTERNATIVE, FOR A NEW TRIAL ON ALL COUNTS**

Deborah Gore Dean respectfully moves this Court for dismissal of the remaining Counts in the Superseding Indictment on the grounds of prosecutorial abuses not known to Defendant's counsel at the time of the Court's earlier ruling on February 14, 1994. These abuses, coupled with those previously identified, establish a pattern of prosecutorial misconduct unparalleled in any reported case. These abuses were pervasive and permeated virtually every aspect of the trial process, thereby denying Ms. Dean a fair trial in this court. The only clear remedy for such abuse is dismissal of the Superseding Indictment. Should the Court find that the abuses do not warrant outright dismissal of the Superseding Indictment, Defendant moves for a new trial based on the cumulative effect of all the abuses, the fact that the Court of Appeals reversed the convictions on four counts and found the evidence to support conviction on approximately 70 percent of the projects in Counts One and Two of the Superseding Indictment insufficient, the testimony of Lance H. Wilson, not

available previously, in which he takes responsibility for the only project remaining in Count One¹ and the availability of other witnesses who were unavailable at the time of trial.²

I. INTRODUCTION

On November 30, 1993, Defendant moved for a new trial on the grounds that prosecutorial abuses by Independent Counsel³ had denied her a fair trial.⁴ At a hearing on February 14, 1994, the Court sharply criticized Independent Counsel for denying it had knowledge of any exculpatory material when Independent Counsel was in fact aware of such material; for eliciting the testimony of government witnesses when the Independent Counsel had good reason to know the testimony was false and presenting such testimony as the truth; for failing to confront witnesses with information indicating that their expected testimony was false;

¹ The Defendant has filed a motion to dismiss Count One on the basis of newly discovered evidence. This motion is based upon the affidavit testimony of Lance H. Wilson stating that he, not Defendant, was responsible for the Arama funding. The motion also addresses other matters related to evidence concerning the Arama funding.

² With regard to certain matters discussed below, there may be unresolved factual issues. Unless the Court can dismiss the Superseding Indictment without resolving such issues, the Court should order appropriate discovery or, in some cases, that the Independent Counsel provide a formal representation to the Court concerning the nature of its actions.

³ Larry D. Thompson, Esq., the current Independent Counsel, was not Independent Counsel at the time the prosecutorial misconduct occurred.

⁴ Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant to F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33 (Nov. 30, 1993)

and for failing to bring to the attention of the Court and the defense information indicating that Independent Counsel's evidence might be false. As this Court stated, Independent Counsel's action would not have occurred in a case involving any Assistant United States Attorney who had ever appeared before it and said that the actions of Independent Counsel reflected "at least a zealouslyness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors." Transcript of Hearing 24-27 (Feb. 14, 1994) (hereinafter "Hearing Tr.").

This Court repeatedly observed that it was virtually impossible to quantify the cumulative effect of the then identified prosecutorial abuses on the Defendant's ability to defend herself. In light of what this Court perceived to be all the evidence of the Defendant's guilt, however, the Court concluded that the Defendant had not been denied a fair trial. Id. 27-31.

Defendant moved for reconsideration of that ruling, and sought discovery concerning whether the testimony of a government agent on which Independent Counsel relied in attacking Defendant's credibility was perjured, and whether Independent Counsel had fulfilled its obligation to determine and to reveal to the Court whether that testimony was in fact false.⁵ The Court denied Defendant's motion on February 22, 1992.

⁵ Motion of Deborah Gore Dean for Reconsideration of Ruling Denying Her Motion for a New Trial (Feb. 18, 1994)

The denial of the motion for a new trial was affirmed by the Court of Appeals on May 26, 1995 (55 F.3d 640), and a Petition for Certiorari was denied on March 18, 1996 (___ U.S.L.W. ___). The mandate issued on April 17, 1996.

A. Additional Instances of Prosecutorial Abuse Not Previously Considered By This Court Are Significant

Defendant has discovered additional prosecutorial abuses since the Court's earlier ruling.⁶ These abuses exceed the scope

⁶

ADDITIONAL ABUSES

The newly-discovered abuses are summarized and listed below:

1. After the Court refused to allow Martinez' testimony that he had been told that Mitchell was related to Dean and that she was an important person at HUD, the Independent Counsel changed its theory and repeatedly argued to this Court and the Court of Appeals that Nunn concealed Mitchell's involvement with Arama from Martinez. Independent Counsel attorneys knew this was false. See infra Part III.A.1.

2. Though intending to rely on a February 1, 1985, memorandum from Defendant to Acting Assistant Secretary for Housing Shirley Wiseman as evidence that Defendant approved all Maurice L. Barksdale's decisions (even at the time of the Arama funding in July 1984), Independent Counsel failed to make a Brady disclosure of Barksdale's statements that Dean was not in the mod rehab loop even as late as October 1984. The Independent Counsel also failed to make a Brady disclosure of Barksdale's statement specifically refuting that the memorandum to Wiseman meant what Independent Counsel would claim that it meant. See infra Part III.A.2.a.

3. Independent Counsel failed to provide the defense with Jencks materials of a March 22, 1993 interview in which Barksdale apparently made statements exculpatory of Defendant. See infra Part III.A.2.b.

4. There existed substantial impeachment material on Barksdale in HUD Inspector General audits, as well as HUD IG and F.B.I. investigations concerning Barksdale's consultant activities in the Loan Management Set-Aside Program and the Title X Loan program. Independent Counsel never provided the HUD IG

audits in discovery or as Giglio on Barksdale. It redacted Barksdale's name from certain reports of Title X investigations provided during discovery and also failed to provide F.B.I. reports concerning further investigations and the subpoenaing of Barksdale's bank records, until long after Barksdale testified. See infra Part III.A.2.C.

5. Independent Counsel had Barksdale testify that he made no project-specific awards, yet Independent Counsel possessed documentary evidence that almost all of Barksdale's allocations to Dade County were project-specific. Barksdale's Executive Assistant, Stuart R. Davis, also told Independent Counsel that he kept a notebook for Barksdale in which he kept the name of the project and the person behind it for each mod rehab request. The Independent Counsel nevertheless elicited testimony from Barksdale that he was not aware that the 293-unit allocation in July 1984 was for a particular project and that he never made project-specific allocations. Independent Counsel never made a Brady disclosure of the documents showing the project-specific nature of Barksdale's awards or of the statements by Stuart Davis about the notebook he kept for Barksdale. See infra Part III.A.2.d.

6. While this case was on appeal, Independent Counsel brought an indictment against James Watt, in which it charged that Watt and Barksdale were involved in a scheme to violate HUD's regulations against project-specific awards and then to cover up the project-specific nature of the allocation project. See infra Part III.A.2.d.

7. In pursuing the position that conspiracy was evidenced by the concealment of Mitchell's role from developers, Independent Counsel elicited the testimony of Eli M. Feinberg that he was unaware of Mitchell's involvement with Park Towers without ever confronting him with Richard Shelby's three statements that he (Feinberg) did know of Mitchell's involvement and was even involved in setting Mitchell's fee. See infra Part III.B.1.

8. Though intending to place great weight on the alleged concealment by Richard Shelby of Mitchell's role in Park Towers from Eli M. Feinberg, and the fact that it was uncontradicted, Independent Counsel made no Brady disclosure of Shelby's three statements that Feinberg was aware of Mitchell's involvement with Park Towers. See infra Part III.B.1.

9. Independent counsel attempted to lead the jury and the courts to believe that Defendant was the person identified as Shelby's "contact at HUD," and that, more generally, Defendant was Shelby's principal contact on Park Towers, notwithstanding Shelby's statements to the contrary. To facilitate this effort,

and later to defend its actions to this Court, Independent Counsel sought to lead the jury and the Court to believe that no documents existed showing Shelby's contacts with DeBartolomeis. In fact, Independent Counsel knew that such documents existed. See infra Part III.B.2.

10. Independent Counsel attempted to lead the jury and the Court to believe that Defendant had been responsible for the post-allocation waiver on Park Towers and had provided a copy of the waiver to Shelby, even though it possessed documents showing that DeBartolomeis had told Shelby that he (DeBartolomeis) would be granting the post-allocation waiver and showing that DeBartolomeis had provided Shelby the copy of the post-allocation waiver. See infra III.B.2, 3, 4.

11. Though intending to lead the jury and the Court to believe the matters described in Items 9 and 10, Independent Counsel never made a Brady disclosure of the documents contradicting these points.

12. Independent Counsel repeatedly argued to the courts that Shelby concealed his contacts with Defendant from Feinberg, though knowing that Shelby had not concealed those contacts. See infra Part III.B.2, 3, 4.

13. Independent Counsel possessed a Harvard Business School application in which Andrew Sankin made a statement directly contrary to his in-court testimony. Independent Counsel failed to make a Brady disclosure of the document or to provide it in the normal course of discovery. Instead Independent Counsel placed the document in its 3700-page preliminary exhibit production within a 572-page group of documents concerning the Stanley Arms. See infra Part IV.C.

14. Independent Counsel knew that Sankin did not contribute to F.O.O.D. for Africa charity at Defendant's request. Nevertheless, Independent Counsel did not correct Sankin's testimony that he did or bring to the attention of the court or defense counsel that it had evidence that Sankin's testimony was false. See infra Part IV.A.2. n. 60.

15. Independent Counsel possessed substantial evidence that Thomas T. Demery had favored Louis Kitchin with regard to mod rehab and other programs. Independent Counsel failed, however, to provide in discovery HUD IG audits of the Title X projects which questioned Demery's actions on behalf of Kitchin's client. When a summary of a joint HUD Inspector General/F.B.I. investigation was provided during discovery, Kitchin's name was redacted from an entry concerning the Cumberland II Title X loan with which Kitchin was involved. When the same document was provided as Giglio on Demery the entire entry regarding Kitchin

of those previously identified in Defendant's earlier filings. Further, in committing the abuses detailed herein, the Independent Counsel not only violated its disclosure obligations, but in doing so, crippled the Defendant's ability to present a defense and effectively cross-examine government witnesses. In numerous instances, Independent Counsel was in possession of evidence that was exculpatory, or which could have been used by the defense at trial to impeach government witnesses. However, Independent Counsel failed or refused to produce such evidence at all, intentionally redacted information that directly pertained to government witnesses, or buried such evidence within thousands of pages of Jencks materials and then produced the evidence only days before a witness was to testify, leaving defense counsel the task of gleaning the information on cross-examination. At times, Independent Counsel even included the evidence within documents pertaining to other witnesses, apparently to diminish the chances that the evidence would be discovered. Requiring defense counsel (particularly where, as here, defense counsel was a sole

was eliminated. Thus the defense was unable to cross-examine either witness on these matters since it could not identify who and what it pertained to. See infra Part V.B.1, 2.

16. Independent Counsel failed to provide as Jencks materials on government witnesses Kitchin and Jack Jennings. See infra Part V.B.

17. Independent Counsel produced in discovery a HUD IG Hotline Report alleging that Demery accepted gratuities. The portion of the report mentioning Kitchin's name was redacted. See infra Part V.B.3.

practitioner) to search for a needle in a haystack, days before a witness testifies can hardly be viewed as allowing counsel the opportunity to make "effective use of the evidence at trial." United States v. Paxon, 861 F.2d 730 (D.C. Cir. 1988).

The cumulative effect of these additional and apparently intentional abuses, in conjunction with the previously-identified abuses, warrants dismissal of the Superseding Indictment regardless of other considerations.

B. Independent Counsel Presented False Evidence At Trial

Independent Counsel not only had reason to know prior to trial that the testimony he elicited from several key government witnesses was false, Hearing Tr., 25-27, but also, in many instances, made no effort to confront those witnesses with conflicting evidence prior to their testifying or even at trial, presumably, so as not to be aware of the truth. A prosecutor has the duty not to present or use false evidence at trial. Giglio v. United States, 405 U.S. 150 (1972). If the prosecutor learns that false testimony has surfaced at trial, he has an affirmative obligation to step forward and correct the record, United States v. Iverson, 637 F.2d 799, 801 (D.C. Cir. 1980), and may not exploit false testimony by affirmatively urging the truth of the false testimony to the jury. United States v. Sanfilippo, 564 F.2d 176, 178-179 (5th Cir. 1977). As discussed herein, Independent Counsel failed to meet each of these obligations.

Further, because Independent Counsel in numerous instances,

had failed to provide the exculpatory and impeachment evidence to the defense, as required by Brady or Giglio, the defense was not provided the opportunity to refute false testimony by key government witnesses. In a case resting primarily on circumstantial evidence, as this one does, false testimony from key government witnesses with respect to the major counts could not help but impact the jury's verdict. The convictions, therefore, must be set aside. United States v. Agurs, 427 U.S. 97, 103 (1976).

C. Independent Counsel Made Misleading Statements in Defense Against the Earlier Charge of Prosecutorial Misconduct

Independent Counsel made misleading statements to this court in defense of charges of prosecutorial misconduct. Independent Counsel misled the court regarding its conduct in prosecuting its case against Defendant and the nature of the evidence against the Defendant. This conduct violated Independent Counsel's continuing obligation to truthfully disclose to the court the nature of its actions, and provides additional justification for dismissal of the Indictment or a new trial on all Counts.

D. The Court Must Consider the Cumulative Impact of More Instances of Prosecutorial Abuse Balanced Against Far Less Evidence of the Defendant's Guilt

While affirming seven of the twelve counts in the Superseding Indictment, the Court of Appeals overturned the convictions on Counts 6, 8, 10, 11, and 12, and found that there was insufficient evidence to establish a conspiracy with regard

to three of the four projects that were subjects of the conspiracy charged in Count One and three of the five projects that were subjects of the conspiracy charged in Count Two. These rulings render irrelevant and inadmissible much of the evidence upon which this Court relied in concluding that the strength of the evidence was sufficient to outweigh the cumulative impact of the previously identified abuses.

E. New Material Evidence Has Been Discovered Since Trial That Would Likely Have Resulted in Dean's Acquittal on Count One

With regard to the only remaining project in Count One, the Defendant has discovered new evidence in the form of Lance H. Wilson's testimony, which was not available at the time of trial, but which demonstrates the Defendant's innocence with respect to that project. That evidence establishes the Defendant's innocence as to all allegations that she took improper actions to benefit former Attorney General John N. Mitchell. Given the immense role these allegations played in the case, and particularly in Independent Counsel's efforts to undermine the Defendant's credibility in the eyes of the jury, the evidence establishing Defendant's innocence concerning Count One alone requires a new trial on all matters.

In addition to Lance H. Wilson, who is now available to testify at a retrial, former Secretary of HUD Samuel R. Pierce, Jr., is also available, his case having been resolved by Independent Counsel through a no prosecution agreement.

Although Secretary Pierce had first-hand knowledge of many, if not all, the Counts contained in the Superseding Indictment, he was not available to testify because his testimony was deemed by the court to implicate Fifth Amendment rights against self-incrimination since at the time he was under investigation by Independent Counsel. The fact that Secretary Pierce and others, as discussed below, were not available to testify at trial but are now available is grounds for a new trial.

Now that Secretary's Pierce is available, he could provide testimony not previously available with respect to the following areas, all of which were crucial in the Defendant's conviction:

- His relationship to John Mitchell and any communications between them concerning HUD projects; his knowledge of Mitchell's involvement in HUD Projects and any discussions or lack thereof he had with Dean with respect to that involvement; and his knowledge of action taken by his Executive Assistant, Lance Wilson, on Mitchell's' behalf (Count One);
- His instructions to Lance Wilson on mod rehab funding in general, and, in specific, Arama (Count One);
- His relationship to Louie Nunn and any meetings or discussions they had concerning HUD projects (Count One);

- His directives regarding mod rehab funding, and any instructions to Barksdale, Wiseman, Hale, DeBartolomeis, and Demery regarding participation by the Office of the Secretary in mod rehab funding; his knowledge concerning Defendant's role, if any, in concurring on all mod rehab funding while awaiting appointment of a Federal Housing Commissioner; and specifically, a memorandum from the Defendant to Wisemen, Acting Secretary for Housing, dated February 1, 1985 (Count One);
- His discussions with Dean regarding the role of consultants in HUD projects, specifically Kitchin; his relationship to Demery and Demery's relationship to other consultants to HUD (Counts Three and Four);
- His discussions with Dean concerning the April 29, 1987 meeting at which funding for the Springwood/Cutlerwood projects was discussed, and his instructions to Dean to abstain from any projects in which Kitchin had an interest (Counts Three and Four);
- His role in, or knowledge of, projects in Florida, and specifically, funding for projects involving representative Paula Hawkins (Count One);

- His relationship with DeBartolomeis with respect to mod rehab fundings and DeBartolomeis' relationship to the mod rehab program generally, and specifically, to discredit DeBartolomeis' testimony with respect to Dean's role in funding mod rehab projects (Count Two);
- His review of Dean's Senate testimony and conversations he had with Dean regarding her testimony, and discussions he had with Legislative Director Casey regarding Dean's Senate testimony (Counts Five, Seven and Nine); and
- His instructions to Dean regarding mod rehab funding, specifically his instructions on fundings in Puerto Rico (Alameda Towers) (Count Two); and in Springwood/Cutlerwood, Atlanta, Georgia, and Woodcrest Retirement Center (Counts Three and Four).

Wilson also was not available to testify at trial. At the time of Dean's trial, Wilson was under indictment and was unwilling to testify on Dean's behalf. It was not until Wilson was granted immunity and his conviction subsequently reversed by the Court of Appeals on June 17, 1994, that he became willing to testify on Dean's behalf. In his affidavit, Wilson admits responsibility for HUD's funding of the Arama project (the only project remaining in Count One) and appears to impeach

Barksdale's testimony.

In addition to the matters set forth in his affidavit, Wilson could provide testimony which was not available at trial concerning:

- What Dean knew and did not know about Arama;
- His relationship with John Mitchell;
- His relationship with Barksdale;
- His relationship with Demery;
- Any instructions he had received from Secretary Pierce;
and
- The mod rehab process, in general.

II. OVERALL CONSIDERATIONS

A. Pervasiveness of the Misconduct

The evidence of misconduct presented in this case is more pervasive than any found in any reported opinion. There are numerous instances in which Independent Counsel violated prosecutorial obligations and exhibited a total disregard for the truth. Indeed, in terms of the pervasive and calculated nature of prosecutorial abuses, the conduct that has led courts in recent cases to excoriate government prosecutors does not even begin to rise to the level of the documented misconduct in this case.

The entire record--including the newly-discovered matters, the matters previously brought to the Court's attention, and Independent Counsel's conduct in responding to the earlier allegations of misconduct--conclusively establishes that Independent Counsel engaged in the following broad categories of misconduct:

1. Independent Counsel refused to fulfill its basic obligation as prosecutors to make every effort to ascertain the truth. Instead, Independent Counsel exhibited a total disregard for the truth by failing to confront witnesses with information and documents which would reveal that their expected testimony was false. This conduct was compounded by Independent Counsel's efforts to represent documents to be what they were not and to make misleading statements about those documents.
2. Independent Counsel intentionally failed to correct or advise the Court and defense counsel of testimony it knew was false.
3. Independent Counsel deliberately disregarded its Brady

and Giglio obligations even in the face of a specific order by Judge Gerhard Gesell. Independent Counsel continued to do so even after this court castigated their delinquent disclosure of some exculpatory material.

4. Independent Counsel, in defending its actions, failed to honor its continuing obligations to the courts to investigate and truthfully admit to its actions; instead it glibly and disingenuously attempted to diminish and justify those very actions.

In evaluating the evidence as to each allegation of misconduct, it is important that the court recognize that the large number of instances of misconduct is not a valid basis for giving less attention to any individual instance. Both the number and the nature of instances of demonstrable misconduct are reasons why, in any situation where there is doubt as to the precise nature of the prosecutors' conduct or the motivations underlying it, the doubts should be resolved against Independent Counsel.

B. Count One Was the Focal Point for the Entire Prosecution

A substantial number of the identified prosecutorial abuses relate to Count One of the Superseding Indictment, which alleged that Defendant was involved in a conspiracy with former Attorney General John N. Mitchell and others. This Count was the focal point of the prosecution's case, particularly with regard to its effort to undermine the Defendant's credibility and to exploit certain racial tensions. Four of the five Independent Counsel rebuttal witnesses (Supervisory Special Agent Alvin R. Cain, Jr., Special Agent David Bowie, HUD driver Ronald L. Reynolds, and

former HUD employee Pamela Patenaude) gave testimony principally related to Count One or to persons involved with Count One. Furthermore, Independent Counsel spent more than half of his closing argument ridiculing Defendant about the Count One allegations and her testimony concerning them.

The Court of Appeals found, however, that there was insufficient evidence to sustain a verdict as to three of the four projects in that Count. The affidavit of Lance H. Wilson establishes that there was no conspiracy as to the remaining project. Independent Counsel had reason to know of Wilson's responsibility for the funding because of the telephone message slips between Mitchell and Wilson referencing Wilson's contacts with Barksdale on Mitchell's behalf, in addition to other matters, before the Superseding Indictment was returned. However, they chose not to confront Maurice Barksdale (the government's primary witness with respect to the project) with any information that may have resulted in his revealing that it was Wilson, not Dean, who was involved in that matter.

The sheer number of witnesses testifying, with respect to Count One, also affected the jury. Without the Count One allegations the following witnesses would have had no relevant testimony to provide and, therefore, could not have been called to testify: Special Agents Alvin Cain and David Bowie, HUD driver Ronald L. Reynolds, Maurice Barksdale, Aristides Martinez, Jack Brennan, Martin Fine, Eli Feinberg, Pam Patenaude, Marty Mitchell, Melvin Adams, Frank Gauvry, Louie B. Nunn, and Phil

Winn.

Another aspect of Count One dealt with race. Had Count One not been part of the case, Independent Counsel would have been precluded from making many of its most improper statements. In evaluating the significance of many of these points it should be noted that Independent Counsel made a point of the fact that the Defendant was a white person from a prominent family who was being tried before a jury comprised entirely of African-Americans.⁷

The Court noted several times that it perceived Independent

⁷ The trial 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 Rodney King in 1991, and the trial of the African-American defendants alleged to have criminally assaulted Reginald Denny, a white truck driver, in the course of those riots. The latter trial occurred contemporaneously with the trial of this case, and the jury's deliberations in that case received substantial media attention. Defendant herself would be on the stand for all or part of eight trial days between October 5, and October 18, 1993, days largely coinciding with the jury's deliberations and rendering of the initial verdict (October 18), in the Rodney King case. Closing argument would commence on October 20, 1993, the day the final verdicts were rendered in the Los Angeles case. See e.g., Crosby, Judge Orders Break for Tense Jurors in Denny Beating Trial, The Washington Post, Oct. 10, 1993, at A10, col. 2; El Nasser, Cooled-Off Jury Goes Back to Work, USA Today, Oct. 11, 1993, at A3, col. 6; El Nasser, Juror Furor Rattles Denny Trial, USA Today, Oct. 12, 1993, at C3, col. 2; Hamilton, Judge Dismisses Denny Case Juror, The Washington Post, Oct 12, 1993, at A3, col. 1; Hamilton, Second Denny Trial Juror is Replaced, The Washington Post, Oct. 13, 1993, at A5, col. 1; Edmonds, For Juries, High Anxiety, USA Today, Oct. 14, 1993, at A3, col; Hamilton, Replacement of Two Jurors Brings Out Critics in L.A., The Washington Post, Oct. 14, 1993, at A3, col. 1; El Nasser, Record Reveals Juror Disarray in Denny Trial, USA Today, Oct. 15, 1993, at A1, col. 2; Hamilton, Denny Beating Trial Judge Releases Juror Transcripts, The Washington Post, Oct. 15, 1993, at A2, col. 5; El Nasser, Key Charges Stymie Denny Jury, Oct. 18, 1993, at A3, col. 3.

Counsel's ridiculing of the Defendant while on the stand to be intended to appeal to the racial differences between the Defendant and the jury.⁸ Tr. 2594, 2776-77, 2786-87, 2899-902. Indeed, this court in admonishing Independent Counsel at trial stated:

. . . What I'm impugning is that you're making these ["smart 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 whole case.

Tr. at 2776.

Further, if Count One had not been part of the case, the following prejudicial conduct implicating race would not have occurred:

- The prosecution would not have called African-American witness Special Agent Alvin R. Cain, Jr. to directly contradict Defendant's emotional testimony about calling Cain in 1989 to ask whether there was proof that John Mitchell had earned HUD consulting fees.⁹ As she could not believe it. 2

- Independent Counsel could not have argued that Dean falsely accused Maurice Barksdale (also African-American) of lying about the Arama funding.

- Independent Counsel would not have called Special Agent

⁸ In fact, the Court will recall the problems with several members of the jury in which jurors were removed and reprimanded at about the time the Defendant testified in her defense.

⁹ Independent Counsel had reason to know that Agent Cain's testimony denying receipt of defendant's telephone call was false. This court stated it believed the telephone call may have had occurred.

David Bowie (African-American) to testify that Dean had told him in an interview that Wilson had funded units for Joe Strauss, his friend and former HUD official. Independent Counsel would not have been able to argue ridiculing Defendant that she had "fingered Lance Wilson, her [black] friend" when Defendant truthfully gave information to the FBI about Wilson's activities at HUD. There is no legitimate reason why Independent Counsel would have called Agent Bowie to give the "fingering" testimony other than to incite the jury. Wilson, who had appeared in the courtroom, was identified for the jury by Independent Counsel apparently because of his race so that the "fingering" testimony would have additional impact on the all black jury. In fact, had Wilson appeared as a defense witness it is likely the dynamics of race in the jury's mind would clearly have changed.

• Independent Counsel would not likely have elicited the testimony of Melvin Adams that a local Dade County priority had been "to encourage black developers to get a piece of the pie." Tr. 411.¹⁰ Independent Counsel cited that testimony three times in closing argument in support of the claim that rich and powerful consultants like former Attorney General John Mitchell,¹¹ former Government Louie Nunn, and Republican political

¹⁰ Lance Wilson would have been able to dispell this notion.

¹¹ Whether most members of the jury would initially have known that Mitchell was a convicted felon as a result of matters related to the Watergate break-in, it is clear that Independent Counsel intended that the jury learn that Mitchell was a person they should know something about. On first mentioning Mitchell in opening argument, Independent Counsel interrupted himself to

consultant Richard Shelby had caused local priorities to be ignored. Tr. 3379, 3381, 3522-23.¹².

Further prejudicial misconduct primarily unrelated to race would not have occurred if Count One had not been part of the case:

- Independent Counsel would not have been able to argue at closing argument, that Defendant had lied when she said she did not know that John Mitchell was a consultant.

- Independent Counsel would not have been able to repeatedly and falsely argue that John Mitchell's role was concealed in Arama and Park Towers and such concealment and secrecy was the "hallmark of conspiracy."

- Independent Counsel would not have been able to repeatedly argue that Defendant corruptly transmitted "internal HUD documents" to her alleged co-conspirators.¹³

say, "and your question is, you already saw a question, he's a former attorney general of the United States." Tr. 43.

¹² It was in further development of this same theme that Independent Counsel made the statement with regard to Counts Three and Four that "[t]hey are funding 203 units to Metro-Dade before Metro-Dade even asks for them." Tr. 3414-15. As previously brought to the Court's attention, Independent Counsel knew this statement was false at the time he made it. See Dean Rule 33 Mem. at 187-91; Dean Rule 33 Reply Mem. at 13-15.

¹³ There were three internal HUD documents that, consistent with an allegation in the "Manner and Means" section of the Superseding Indictment, Independent Counsel sought to mislead the jury that Defendant had provided to her alleged co-conspirators. While Defendant sent the Arama rapid reply to Louie B. Nunn, she was unaware of any impropriety in her doing so. Independent Counsel also, through entries in its summary charts, sought to lead the jury to believe that Defendant provided Shelby copies of the Park Towers rapid reply and the Park Towers post-allocation waiver. As discussed infra Independent Counsel knew that

• Independent Counsel would not have been able to describe Richard Shelby, with regard to the Park Towers project as "an influence peddler, a guy who can go to the right place, knock on the right doors, and get the right answers." Tr. 3392. Further, Independent Counsel could not have attempted to impeach Defendant concerning her statements about her relationship with Shelby by arguing that the two had ceased to be friends after Defendant was no longer Executive Assistant. Tr. 3406.¹⁴

* * *

Although the prosecutorial misconduct falls into one of the four broad categories previously listed, supra p.15, and affected the conduct of the entire trial and the jury's consideration of the evidence, the misconduct is discussed in the context of the Counts in which it arose. By presenting it in this manner we do not mean to suggest that the misconduct discussed affected only

Defendant had not provided either document to Shelby.

¹⁴ As previously brought to the Court's attention, when making this statement, Independent Counsel had reason to know that Shelby and the Defendant remained close friends for two years after Defendant left HUD, and that they had only ceased to be friends after Defendant learned in April or May 1989 of Shelby's involvement with Mitchell. Dean Rule 33 Mem. 201-03.

that particular Count. To the contrary, the misconduct permeated the entire prosecution and undoubtedly affected the jury's entire verdict.

III. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS
RELATING TO COUNT ONE

Count One of the Superseding Indictment alleged that Deborah Gore Dean conspired with former Attorney General John N. Mitchell, who was deceased at the time of the Superseding Indictment, and others to secure mod rehab funding for three projects in Dade County, Florida: Arama (293 units, funded in 1984); Park Towers (143 units, funded in 1985), South Florida I (219 units, funded in 1986) and another project, Marbilt. Former Kentucky governor Louie B. Nunn was named as an unindicted co-conspirator with regard to the Arama and South Florida I projects; the developer of these projects was Aristides (Art) Martinez. Richard Shelby was alleged to be an unindicted co-conspirator with regard to the Park Towers project; the developer of that project was Martin Fine. The Court of Appeals held that there was sufficient evidence with respect to only the Arama project and therefore affirmed the conviction of Count One on that basis alone.

However, the prosecutorial abuses arising out of Count One were significant, as discussed below, and warrant dismissal of the entire case.¹⁵

¹⁵ Although the Court of Appeals set aside the Count One verdicts as it related to all projects except the Arama project, the misconduct arising out of those projects is discussed since it affected the overall conduct of the trial and the verdict.

A. The Arama Project

The Superseding Indictment alleged that the unindicted co-conspirators in Count One told their developer and their clients that they were associated with John Mitchell, and that Deborah Gore Dean was John Mitchell's stepdaughter. Superseding Indictment, ¶ 6 at 8-9, ¶ 6 at 11. The allegations appear to have been based on a May 15, 1992 interview of Art Martinez during which he stated that, at a meeting in early 1984, Louie Nunn or John Mitchell told him that Mitchell was related to Dean and that she held an important position at HUD. Martinez stated that he interpreted these remarks to mean that Mitchell and Nunn had connections at high levels at HUD. Attachment 1 at 4.¹⁶ Attempting to introduce these statements into evidence, Independent Counsel told the court that this testimony could be crucial in establishing a conspiracy as to Count One. Tr. 230-31, 248.

In order to enhance the chance that the court would allow the testimony, Independent Counsel argued (1) that on January 25, 1984, at the time of reaching agreements with Martinez for a consultant fee of \$150,000 and an attorney's fee of \$225,000,

¹⁶ Independent Counsel redacted the names of its attorneys and agents who conducted interviews (as well as grand jury questioning) of witnesses. The only reason for having done so was to impede Dean's ability to impeach a witnesses' in-court testimony by prior statements and to call a witness who could so testify to the prior inconsistency. In most cases the witnesses' address and telephone number were also redacted making it virtually impossible to locate those witnesses who might have testimony favorable to Dean.

Nunn wrote on the consultant agreement that one-half the \$150,000 consultant fee was to be paid to Mitchell;¹⁷ and (2) that Martinez knew about the annotation, because it was made in his presence, and he possessed a copy of the agreement bearing the annotation.¹⁸

Notwithstanding Independent Counsel's arguments to gain admission of Martinez testimony about the statement by Nunn or Mitchell concerning Mitchell's relationship to Dean, the court twice refused to allow the testimony.

1. Independent Counsel Falsely Asserted That Mitchell's Role Was Concealed From Martinez

Based upon the preceding arguments made by Independent Counsel to obtain the admission of Martinez' testimony about Mitchell's relationship to Defendant, and both the Independent Counsel interview with Martinez and Nunn's grand jury testimony, it was absolutely clear to Independent Counsel that Martinez knew that Nunn had a business relationship with Mitchell and that Mitchell was assisting with regard to the Arama project. However, immediately after the court twice refused to allow Independent Counsel to elicit Martinez' testimony concerning the conversation about Mitchell's relationship with the Defendant

¹⁷ The annotation written by Nunn read: "1/25/84: In event of death or disability, one-half of above amount belongs to John Mitchell." Gov. Exh. 21.

¹⁸ There was, however, evidence that the annotations were not placed on the document until after April 3, 1984 when changes to the original agreement were made.