

Final

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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.

(Tr. 228-35, 245-50), Independent Counsel elicited vague testimony from Martinez that he was not aware that he was hiring anyone other than Nunn or that Nunn was hiring anyone else. Tr. 250-51. The purpose of eliciting this testimony was to support a complete change of theory - the existence of a conspiracy was now to be shown not by the fact that Mitchell's role and his relationship to Dean were emphasized to Martinez, but instead by the supposed concealment of Mitchell's role from Martinez.

Thereafter, Independent Counsel repeatedly cited this testimony to this court and the Court of Appeals in support of a claim that Mitchell's involvement with the Arama project was concealed from Martinez and this concealment was evidence of conspiracy. Gov. Rule 29 Opp. at 19; Gov. App. Br. 5, 24. See also Gov. Supp. Acq. Oppp. at 17 n. 18. At the time Independent Counsel made those arguments, it knew that Mitchell's involvement had not been concealed from Martinez.¹⁹

2. Abuses by Independent Counsel Relating to the Testimony of Maurice Barksdale

Maurice Barksdale was the HUD Assistant Secretary for Housing who made the decision regarding the Arama funding prior

¹⁹ Before the grand jury, when Independent Counsel was pressing the theory that Mitchell's role was emphasized to Martinez, Independent Counsel elicited testimony specifically about Nunn's discussions with Martinez concerning involving Mitchell with the project. Attachment 61, at 33-36. That testimony was then repeated during the trial. Tr. 1359-62. Nevertheless, Independent Counsel represented to the Court of Appeals that Nunn had omitted all references to Mitchell in his discussions with Martinez. Gov. App. Br. 24.

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to the time Dean replaced Lance Wilson as Executive Assistant to HUD Secretary Samuel R. Pierce, Jr. on June 24, 1984. Barksdale signed documents implementing the Arama funding on July 16, 1984 and July 27, 1984.

On January 5, 1984, Arama developer Martinez sent a letter to Nunn at Mitchell's address which enclosed a list of buildings available for mod rehab funding. Gov. Exh. 19. No specific number of units was mentioned in the letter. A telephone message slip Independent Counsel obtained from Mitchell's files revealed a conversation between Mitchell and Lance Wilson, who was Secretary Pierce's Executive Assistant from 1981 to June 1984, and who had a long-standing relationship with Mitchell.²⁰ Tr. 357-58. During the telephone conversation, Mitchell and Wilson discussed 300 units, and Wilson mentioned that he was talking to Barksdale²¹ about the matter.²² On January 25, 1984, Nunn²³

²⁰ A clear indication of the Wilson, Mitchell, Nunn relationship was the Moore Land Company funding, which apparently occurred at or around the same time as the Arama funding. Dean was in no way involved in that funding. Yet, the cast was the same in Moore Land and Arama. Wilson, of course, was the Executive Assistant who had the relationship with Mitchell and who obviously had been involved with that transaction, the same way he was involved with Arama. Mitchell had previously set up a meeting with Wilson for Nunn with regard to a project for the Moore Land Company, which Wilson had approved. Tr. 1396-98. In fact, Mitchell's files indicated that in June 1984 he wrote to the head of the Moore Land Company and stated that the project "could not have gone forward without my intervention." Attachment 2.

²¹ In fact, Barksdale testified before the grand jury that whenever Wilson called him, he assumed he was speaking on behalf of the Secretary. Barksdale G.J. 11.

²² Mitchell had written on the message slip, which showed that Wilson had returned his call, the following words: "300

reached a tentative agreement with Martinez to secure 300 mod rehab units. Gov. Exhs. 20, 21. A second Mitchell telephone message slip obtained by Independent Counsel indicated that on the following day Wilson contacted Mitchell again and surely returned the telephone call as he had done with the prior message slip. Attachment 4.

As has been previously brought to the Court's attention, Independent Counsel failed to make a Brady disclosure of the Mitchell telephone message slips. Independent Counsel also failed to confront Barksdale with the message slips before calling him to testify about the Arama funding before the grand jury and in court. Gov. Rule 33 Op. at 10-12, 16-17. The only possible reason for the failure to confront Barksdale with the slips is that Independent Counsel feared that Barksdale would reveal the truth - information exculpatory of the Defendant -- that it was Wilson, not Dean, who was responsible for the Arama funding.²⁴

units, Process + Keep Advised. Talking to Barksdale." Attachment 3.

²³ When Nunn testified before the grand jury he was questioned both about his pre-1984 dealing with HUD and about his contacts with Wilson. Parts of his responses on both matters were excluded, for some inexplicable reason, from Nunn's grand jury testimony provided by Independent Counsel as Jencks material on Nunn. Nunn G.J. 25-26, 90-91. Defendant requests the Court to require Independent Counsel to produce the redacted material.

²⁴ Furthermore, the Martinez April 3, 1984, letter to Nunn, written well before Wilson resigned from HUD, suggested that Martinez had already been told that the Arama project would be funded. At page 2 of the letter, after noting that Nunn should insist that the 293 units not come in two increments, Martinez states: "when will funding for the 293 units take

Barksdale's testimony was crucial to the Court of Appeals' ruling that there existed sufficient evidence to support a conviction on the Arama project. Even though Barksdale testified that he did not recall the Defendant talking to him about the funding and believed that he would remember if she had (Tr. 523), Independent Counsel relied on his testimony concerning the circumstances of the Arama funding and claimed it as evidence that Defendant had caused Barksdale to sign the funding documents.²⁵ The Court of Appeals, which apparently relied on

place." Attachment 63.

²⁵ Independent Counsel seriously mischaracterized Barksdale's testimony. On direct, Barksdale testified that he had no recollection of why the Arama project was funded but that generally he would have signed off on such funding documents because someone in the Secretary's office had asked him to. He said that the persons with whom he had contact from that office were the Secretary, the Undersecretary and the Defendant. He then testified that neither the Secretary nor the Undersecretary asked him to sign off on the documents and that "I do not remember Deborah Dean asking me." Tr. 456-57. On cross-examination Barksdale would later state that he did not remember either the Secretary or the Defendant asking him about the project and believed that he would remember if either of them had. Tr. 535. Arguing before this Court, Independent Counsel relied on Barksdale's testimony during direct, stating that Barksdale testified that "he knew he received an inquiry from someone in [the Secretary's] office"; and that "he knew it wasn't Secretary Pierce, he knew it wasn't the Undersecretary, but he couldn't recall if it was Ms. Dean." Tr. 3327.

This was not even close to an accurate characterization of Barksdale's direct testimony.

In any event, in the Court of Appeals, Independent Counsel again relied solely on the direct testimony, asserting:

While Assistant Secretary Barksdale testified that he did not 'remember Deborah Dean asking me' to fund Arama, Tr. 457, he did not testify that she did not do so, or that she did not seek to advance Mitchell's interests by making inquiries that would let Barksdale

Independent Counsel's characterization of the evidence, regarded that testimony as consistent with Defendant having caused the funding. See F.3d at 651.

During Barksdale's testimony before the grand jury and during his direct examination in court, Independent Counsel did not question him as to whether Wilson contacted him on the Arama funding. On cross-examination, however, Barksdale testified that he did not remember Wilson contacting him on the Arama funding, and that he believed that he would have remembered if Wilson had. Tr. 535. This is directly contrary to the information on the telephone message slips.

Barksdale also testified that he did not know that the Arama funding was going to a specific project and that he never made project-specific allocations. Tr. 457-58, 465, 467, 482-93. This testimony, which contradicted Defendant's testimony about her discussions with Barksdale, as well as her claims that project-specific allocations were commonplace, was specifically relied upon by the Court of Appeals. 55 F.3d 651.

In addition to the failure to segregate the Mitchell telephone message slips as Brady disclosures, and the failure to confront Barksdale with the information on those slips prior to calling him to testify, Independent Counsel engaged in a number of other acts of misconduct with respect to Barksdale.

know that she was interested in the project.

Gov. App. Br. at 21 n.7. Barksdale's testimony on cross-examination, however, directly contradicted Independent Counsel's characterization of his testimony.

a. Independent Counsel Failed to Make a Timely Brady Disclosure of Barksdale's Statements That Were Exculpatory of Defendant

In addition to being examined before the grand jury on June 29, 1992, Barksdale was questioned by Independent Counsel or the F.B.I. at least five times between January 23, 1990, and the day he testified. At various times he made statements indicating that the Defendant had not been involved in the Arama funding.

In Independent Counsel's Brady letter of August 20, 1993, Independent Counsel included four paragraphs based on statements by Barksdale in a June 28, 1992 interview. The paragraph that appeared most directly pertinent to the Arama funding indicated that Dean "could have" discussed sending funding to Jacksonville, Florida (the area office to which the Arama units had been sent). Attachment 5 at 2. Omitted from the account of Barksdale's statement, was that in the same interview Barksdale had said that he did not remember the Defendant ever urging him to send units to Jacksonville. Attachment 6 at 1.

More importantly, Independent Counsel failed to include other, more exculpatory statements. In particular, Independent Counsel failed to include a statement given in an interview on January 23, 1990, where Barksdale had told an F.B.I. agent that as late as October 1984, three months after the actual Arama funding--"Deborah Gore Dean was not in the MRP [moderate rehabilitation program] loop and was otherwise not involved in the MRP funding process." Attachment 7 at 1. When Barksdale testified, Independent Counsel did not ask him any questions that

would elicit testimony concerning whether it was necessary that Defendant approve Barksdale's funding decisions in July 1984. This is particularly significant because of Independent Counsel's use of the memorandum written by the Defendant to Acting Assistant Secretary for Housing Shirley A. Wiseman dated February 1, 1985 to lead the jury to believe Dean was responsible for the Arama funding. The memorandum requested a report on the disposition of all mod rehab funds for FY 1985, and stated that "this office will concur on all [mod rehab] funding decisions regarding Mod Rehab funds not previously approved by both Maurice and myself, until a Federal Housing Commissioner is named." Gov. Exh. 147.

Given that the requirement of concurrence of the Secretary's office would apply only until a new Assistant Secretary-Federal Housing Commissioner was named, the reasonable interpretation of this memorandum was that Dean's approval of mod rehab selections was an interim requirement for any projects approved by Barksdale before he left but not yet implemented, and that such approval had not been required while Barksdale was in the position of Assistant Secretary for Housing-Federal Commissioner. Such interpretation was also suggested by the fact that in the memorandum, Dean was requesting a report on Fiscal Year ("FY") 1985 funds allocated so far.²⁶

²⁶ Dean testified that Secretary Pierce directed that she send the memorandum to Wiseman because Barksdale, without Pierce's knowledge, had expended essentially all the FY 1985 mod rehab funds in the first four months of the Fiscal Year. Trial Tr. 2259-62. Documents possessed by Independent Counsel strongly

Independent Counsel had additional reasons to know that such interpretation was correct. In interview reports, Barksdale stated that Dean was not in the mod rehab loop as late as October 1984. Further, a report of an interview of Barksdale by Independent Counsel on June 28, 1992 stated that:

Barksdale reviewed a "Personal and Confidential" note from Dean to Shirley Wiseman, dated February 1, 1985. [the Wiseman memorandum] Barksdale said he had never seen anything like it. He didn't recall meeting with Dean to approve mod-rehab funds for FY 1985.

Attachment 6 at 4.

Despite Barksdale's statements unequivocally indicating that Dean did not approve mod rehab decisions during his tenure, the Independent Counsel misled the jury that Dean's February 1, 1985 memorandum to Wiseman showed that Dean was required to approve all mod rehab decisions while Barksdale was Assistant Secretary, including the July 1984 allocation underlying the Arama project. It did not, however, provide as Brady material either of the two statements by Barksdale contradicting Independent Counsel's interpretation of the memorandum.

When Barksdale testified, Independent Counsel asked him no questions that would elicit testimony concerning whether it was

suggested this testimony was true. Between October 19, 1984, and January 3, 1985, Barksdale had allocated over 3800 FY 1985 mod rehab units. As discussed in Memorandum at 16-17, Barksdale's last three mod rehab allocations would be subjects of Independent Counsel's indictment of James Watt. On January 30, 1985, Wiseman had signed Form HUD-185s allocating another 325 units. During the remainder of FY 1985, it appears that less than 600 additional mod rehab units were allocated.

necessary that defendant approve Barksdale's funding decisions in July 1984. Thereafter, however, in briefs in this Court and the Court of Appeals, Independent Counsel made clear that it nevertheless had intended that the jury would infer from the February 1, 1984 memorandum that as of July 1984, "Mod Rehab decisions were approved by Barksdale and [Dean]." Gov. Rule 29 Opp. at 18 n.16 (emphasis in original); Gov. App. Br. 21 n.7 (emphasis in original). In making this point, Independent Counsel told neither court that the document was created more than six months after the Arama funding nor that Barksdale had never seen the memorandum.

Thus, Independent Counsel had sought to mislead the jury and the courts to believe that the memorandum showed that Defendant approved Barksdale's fundings even in July 1984 while knowing for a fact that the memorandum showed no such thing, and while failing to make a Brady disclosure of the statements contradicting that interpretation. Dean Rule 33 Mem., Exh. BB at 1.

b. The Failure to Include the Report of Barksdale's Interview of March 22, 1993 as Jencks materials

Apparently, Barksdale made certain statements that were exculpatory of the Defendant in a March 22, 1993 interview.²⁷ A

²⁷ This interview took place shortly after Stuart Davis testified to the grand jury that he maintained a notebook for Barksdale recording all the projects funded, the number of units, the consultant and developer involved, and the name of the project. See infra III A.2.d.

report of that interview was never provided to the defense.²⁸

The defense only learned of the interview when it was mentioned in an August 29, 1993 letter.

²⁸ In the Government's Opposition to Defendant Dean's Motion for a New Trial at 14 n. 14 (Jan. 15, 1997), Independent Counsel claims that it is unable to determine whether it produced the March 22, 1993 Barksdale interview. When Independent Counsel made its Jencks production, it gave the defense a list of each Barksdale item that Independent Counsel was providing the defense. That list, which is attached to the defense's Omnibus Motion of February 5, 1994, corresponded with the defense's records of the Jencks items it received. However, the list did not include the March 22, 1993 Barksdale interview. Thus, Independent Counsel clearly did not provide it at that time. Independent Counsel asks the Court to believe that any exculpatory information in the interview report was accurately summarized in the August 20, 1993 letter (though it does not state which of the statements attributed to Barksdale in the August 20, 1993 letter is from the March 22, 1993 interview). Whether the representation concerning the August 20, 1993 letter is true, it is not an excuse for the continued failure to provide an interview of a government witness. Other issues aside, the Court should order Independent Counsel immediately to provide a copy of their interview to the defense and an explanation as to why it originally failed to provide the interview.

c. Independent Counsel Failed to Disclose Significant Impeachment Material on Barksdale

Both during Defendant's cross-examination and during closing argument, Independent Counsel attempted to mislead the jury that Defendant had falsely accused Barksdale of lying. Tr. 2986-87. If successful, these efforts likely carried additional weight with the jury because Barksdale was an African-American who had held a high government position. After defense counsel had attempted to impeach Barksdale, Independent Counsel tried to rehabilitate him by vouching for his credibility when it elicited testimony from him that, (1) Independent Counsel, who was responsible for the broad reaching HUD investigation, had never questioned (her) integrity; and (2) though Barksdale was testifying pursuant to a grant of use immunity, he had not requested the immunity. Tr. 536.

Apart from the fact that the Mitchell telephone message slips appeared to establish that Barksdale lied about his contacts with Wilson (e.g., support of Barksdale and Wilson for Demery's Food for Africa; the benefits Barksdale and Wilson received from Demery's action on Loan Management Set-Aside and Title X awards), the government had substantial reasons to question Barksdale's integrity. In fact, it had repeatedly done so in materials that Independent Counsel never provided to the defense. Among other things, these materials suggested additional reasons why Barksdale failed to acknowledge that Wilson had

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talked to him about the Arama funding.²⁹

Like Lance Wilson, Barksdale (after he left HUD and became a consultant) had been an active supporter of Assistant Secretary Thomas T. Demery's charity F.O.O.D. for Africa ("F.O.O.D."). He was involved in four fundraisers for the charity. He or his clients were involved in organizing three fundraisers, including one in which Barksdale and Wilson were co-sponsors, and Barksdale's employer, J&B Management Co., for whom Barksdale had secured five questionable Loan Management Set-Aside awards ("LMSA awards"), contributed \$7,500 to the charity. Banking Hearings at 1054, 1089, 1132, 1187, 1192, 1196, 1199; Lantos Hearings, Pt. 3, at 767-77. HUD IG even investigated F.O.O.D. and its supporters. All those involved feared that the obvious connection between contributions to F.O.O.D. and successful HUD applications would lead to indictments.

Both Barksdale and Wilson also received substantial benefits as a result of Demery's decisions.³⁰ In addition to the LMSA

²⁹ Barksdale authorized at least one other funding after Wilson left that would be the subject of intensive investigation. This was a 600-unit allocation to Puerto Rico that would be a subject of the indictment of James Watt. This gave Barksdale some reason to be reluctant to mention that Wilson had talked to him about the Arama funding. Further, Wilson had been indicted and convicted of providing an unlawful gratuity to a HUD official named Dubois Gilliam. Barksdale (after he became a consultant) had loaned \$2,000 to Gilliam while Barksdale himself had a matter pending before Gilliam. The loan to Gilliam, as well as another questionable action of Barksdale, which also involved Wilson, were subjects of the Lantos Hearing, Pt. 3, at 783-94 and of which Independent Counsel was well aware.

³⁰ With regard to Wilson, see Banking Hearings at 1005-09, 1017; Lantos Hearings, Pt. 4 at 545-67, 583, Pt. 5, pp. 364-68; House Report, 101-97 at 105.

awards for his employer, Barksdale was involved as a consultant in securing Title X awards on projects called Southcreek, for which he earned \$110,000, Autumn Meadows, on which he earned \$43,000, and Steeds Crossing, for which he earned \$15,000. (The clients on both SouthCreek and Steeds Crossing were F.O.O.D. contributors.)

The LMSA awards were sharply criticized in a HUD IG audit. Audit No. 89-A0-119-0006. Attachment 65. Former Deputy Assistant Secretary for Multi-Family Housing R. Hunter Cushing told Independent Counsel that he objected to the awards but was ordered to approve them by Demery who had stated that the awards were for Barksdale. Attachment 8.³¹ The Southcreek, Autumn Meadows, and Steeds Crossing Title X awards were also criticized in HUD IG investigations, as was Barksdale's role influencing the awards cited with regard to Autumn Meadows and Southcreek. See Audit 90-TS-129-0013. Attachment 64. The Southcreek, Steeds Crossing, and Autumn Meadows Title X awards were also all subjects of FBI/IG investigations identifying Demery as the responsible HUD official and Barksdale as a consultant and finding that consultant pressure influenced the awards.

The HUD IG investigation of the LMSA awards was never provided to the defense either in discovery or as Giglio on Barksdale. Neither the HUD IG audit nor the F.B.I.

³¹ The Cushing statement that Demery had said the awards were for Barksdale was included among the thousands of pages of Jencks materials provided on September 13, 1993, three days before Barksdale testified.

investigations of the Title X awards were provided in discovery or as Giglio on Barksdale.

During discovery, a two page-document was provided with one-paragraph summaries of the investigation of the Southcreek, Steeds Crossing, and Autumn Meadows awards. However, Barksdale's name was redacted.³² There is no valid reason for having redacted Barksdale's name. Attachment 9. The fact that all references to Barksdale initially had been redacted (as had other relevant information) made it impossible to make any use of the material to impeach Barksdale at trial.³³

When Demery testified two weeks after Barksdale, Independent Counsel provided a one-page document (dated November 2, 1989) discussing an ongoing OIG/FBI investigation of the

³² The night before Barksdale testified, it appears that at least part of that two-page document was provided to the defense, with Barksdale's name no longer redacted. There appears to be no valid reason for the redaction gamesmanship. Attachment 10.

³³ When Demery testified two weeks after Barksdale, Independent Counsel again produced that same two-page document summarizing the OIG/FBI investigations of the Southcreek, Steeds Crossing, and Autumn Meadows Title X awards. Attachment 13. In this instance, Independent Counsel no longer redacted Barksdale's name from the summaries on Steeds Crossing and Autumn Meadows (though it erased entirely the summary of the Southcreek investigation). Demery's testimony had nothing to do with Barksdale (though Barksdale was one of numerous F.O.O.D. for Africa contributors who benefited from Demery's decisions). Much more pertinent to the impeachment of Demery was the investigation of a Title X award for a project called Cumberland II, in which Kitchin had been involved. A summary of that investigation had been included just above the summary of the Steeds Crossing investigation in the two-page document produced in discovery (Attachment 9), though Kitchin's name had been redacted from the document. As discussed, when the document was produced as Giglio on Demery, all reference to the Cumberland II investigation had been eliminated.

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Southcreek Title X award. Attachment 11. Independent Counsel also provided the single page of another document (dated September 25, 1990), discussing a grand jury investigation of the matter and indicating that Barksdale's bank and phone records were to be subpoenaed as part of the investigation. Id., Attachment 12.

d. Barksdale's Testimony Regarding Project-Specific Awards

During both direct and cross-examination Barksdale testified that he did not know that the 293-unit allocation he authorized for Dade County in July 1984 was intended for a particular project; that HUD had a policy against such awards; and that he made no project-specific awards while in the position of Assistant Secretary for Housing. This testimony would prove crucial to the Court of Appeals' ruling upholding a verdict on Count One.

Independent Counsel had reason to know that the testimony was false. Independent Counsel possessed documents indicating that Barksdale knew that the 293-unit allocation was intended for the Arama project and that each of four other allocations Barksdale made to Dade County in 1984 were intended for particular projects.

Stuart R. Davis was, at all times relevant hereto, Barksdale's Executive Assistant and also signed the Arama Rapid Reply. In an interview conducted by Independent Counsel on February 12, 1993, Davis stated that 90 to 95 percent of mod

rehab allocations were based on political contacts. Attachment 14. Davis also stated that, when Barksdale received requests for mod rehab units, he would advise Davis, who would record the name of the political contact supporting the project, as well as the project's name, location, and number of units in a book. Id. at 3.³⁴ Davis testified before the grand jury on March 12, 1993, that the bidding process at the PHA level was frequently a sham because senior people at HUD would ensure that specific funding would go to specific projects. Attachment 15. He indicated, for example, that units would be sent out to a housing authority in a certain number, when there would probably be only one project that fit that the description in the area that the authority could fund. Id. at 12-16.³⁵

Although Davis indicated in his interview that he kept a book of projects and the political contact supporting each

³⁴ The defense's records do not indicate when Davis' interview reports and testimony were provided to the defense. Presumably, the materials were provided on Barksdale the night before he testified.

³⁵ By letter of August 20, 1993, Independent Counsel disclosed a number of exculpatory statements by Barksdale. Attachment 5, at 2-3. By letter of August 29, 1993, Independent Counsel gave dates for those statements, including March 22, 1993. Attachment 16. Independent Counsel, however, never produced the March 22, 1993 interview as Jencks on Barksdale. This interview occurred shortly after Davis told Independent Counsel that he kept a book for Barksdale and that all allocations were product specific. The March 22nd interview may reveal that Davis' information was raised with Barksdale and what his response was or even that, notwithstanding what Davis had testified to in the grand jury, Independent Counsel failed to question Barksdale about it.

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project, no such book was ever provided to the defense. The existence of the book, the book itself, any entry in the book mentioning Mitchell, Nunn, Martinez, Wilson or Dean all should have been disclosed. One can assume that there was no entry related to Dean otherwise it would have been used by Independent Counsel. The fact that Dean's name was not mentioned should have been disclosed as Brady.

Independent Counsel had further reason to know Barksdale's testimony was false. In February 1995, the Independent Counsel and the grand jury returned an indictment against James Watt in which Independent Counsel alleged that Watt was involved in a scheme with Barksdale and others to subvert HUD's regulations against project-specific awards. In particular, the indictment alleged as evidence of that scheme that on September 5, 1984, Watt wrote to Barksdale, referencing a conversation the previous evening, and attaching "copies of three different Sec. 8 Mod Rehab projects" --a 68-unit project in New Jersey, a 50-unit project in Massachusetts, and a 128-unit project in the Virgin Islands. In his letter, Watt stated that he had been assured that the projects "are clear [sic] as a whistle," but that the PHA applications themselves were not "project specific," "[j]ust as you like it." Watt also indicated that he would like to have the Form HUD-185s on these allocations as soon as possible. Attachment 17.³⁶ The indictment alleged that thereafter, the

³⁶ It is not known when Independent Counsel secured a copy of this letter. No copy was ever provided to the defense in this case.

units were awarded in numbers approximating the amounts requested by Watt. Attachment 18.³⁷ Therefore, it is impossible for Independent Counsel having knowledge of all of this not to have known that Barksdale's testimony about project specific awards was false. Yet, Independent Counsel presented the false testimony to the jury.

e. Independent Counsel's Representations Concerning the Failure to Make a Brady Disclosure of the Mitchell Message Slips

Previously in this Court, and later in the Court of Appeals, Independent Counsel defended its failure to make a Brady disclosure of the Mitchell message slips on the grounds that Independent Counsel attorneys did not regard them as exculpatory, suggesting that its attorneys in fact regarded the message slips as incriminating by "reinforcing the importance of Dean's role." Gov. Rule 33 Opp. at 11; Gov. App. Br. at 47.

However, the message slips are so clearly exculpatory that Independent Counsel's representations to the contrary are manifestly implausible. Apart from the facial implausibility of the Independent Counsel's contention, Independent Counsel failed to provide an explanation as to why, assuming it regarded the message slips as incriminating, it did not question Barksdale about them in order to develop evidence to prove its case.

³⁷ These were among the awards that Barksdale made shortly before leaving office in December 1984, that all but exhausted FY 1985 mod rehab funds. It was this occurrence which precipitated the Wiseman memo. See supra III A.2.a.

Further reflective of Independent Counsel's recognition of the exculpatory nature of the message slips is the fact that in closing argument Independent Counsel argued to the jury that: "First of all, we don't know what project they're talking about here. Arama is not mentioned." Tr. 3516. It is safe to say that when Independent Counsel attempted to lead the jury to believe the message slips did not apply to Arama, it knew that they did apply to Arama, though the project had not yet been named. This is but one more instance of Independent Counsel attempting to mislead the jury and the courts concerning something Independent Counsel knew to be false.

f. Failure to Make Brady Disclosures Concerning the Patriots Project

1. Failure to Disclose As Brady or Giglio the Statements of Barksdale

In December 1984, Barksdale allocated 77 mod rehab units to Baltimore, Maryland to be used for the Patriots project, in which a boyfriend of Pierce's Special Assistant Janice Golec had an interest. Barksdale testified that Defendant had talked to him about the project and had indicated to him that a friend of Janice Golec was involved.

Yet on three separate occasions prior to his testimony Barksdale had stated that he had no distinct recollection of Defendant talking to him about the project. On October 24, 1991, Barksdale stated that he did not remember anything significant about the allocation and did not remember whether or not Defendant talked to him about the allocation. Attachment 19, at

6. Later on June 28, 1992, Barksdale stated that he did not recall the Defendant having an interest in the Patriots project.

Attachment 6, at 3. Testifying before the grand jury the very next day on June 29, 1992, Barksdale stated that he had not heard of the Patriots project until reviewing documents recently and stated that, prior to reviewing documents, he did not know that Golec's boyfriend was the developer of the Patriots project. He said that had he known that Golec's boyfriend was receiving the units at the time of the funding, he would have brought the matter to the Secretary's attention. Attachment 20, at 27-29. However, none of these statements were disclosed as either Brady or Giglio material.

2. Failure to Disclose As Brady the Statement of James R. Lomenick

Even more egregious than failing to provide as Brady the prior Barksdale interviews was Independent Counsel's failure to provide as Brady material statements made by James R. Lomenick, Golec's boyfriend concerning his efforts to obtain mod rehab funding for the Patriot project. In an interview conducted on June 6, 1991, Lomenick told Independent Counsel that he had met Dean twice; once when he and Golec went to Nathan's and then again when Dean gave a speech at a Sunday morning business meeting held regularly by then Mayor Schaefer of Baltimore. Lomenick said that he never discussed the Patriot project with Dean because of his limited contact with her. However, Lomenick said that he met Barksdale and talked to him on the telephone "on

one or more occasions." Lomenick said he had some recollection that he may have made a telephone call to have Barksdale approve the Patriot project, which he (Barksdale) eventually did. Attachment 62, at 2-3. This information was clearly exculpatory of Defendant's alleged involvement in having the mod rehab funding approved. It is obvious that where he had no contact with Dean on the project, he did with Barksdale. This is another example of Independent Counsel's failure to honor its Brady obligation and lead the jury to believe something as true (i.e., that Dean was responsible for Patriot project funding) when it had reason to know that it was false.

B. Park Towers

The Court of Appeals held that there was insufficient evidence to establish a conspiracy concerning the Park Towers project. The evidence related to this project, however, played a crucial role in the prosecution's case. Park Towers is a 143-unit moderate rehabilitation project in Dade County, Florida that was funded as a result of HUD actions taken in 1985 and 1986. The most important of these actions were the allocation of 266 mod rehab units at the end of November 1986 and the approval of a post-allocation waiver of certain HUD regulations in April 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Fine secured the services of a Miami consultant named Eli Feinberg in order to assist in obtaining HUD funding for Park Towers. Feinberg then secured the services of

Washington consultant Richard Shelby, who in turn retained John Mitchell.

With regard to the Park Towers project, the Independent Counsel intended to mislead the jury with respect to each of the statements below when it had reason to know these statements were probably or certainly false:

- (1) that Shelby concealed Mitchell's involvement with Park Towers from Feinberg and Fine;
- (2) that Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean;
- (3) that a reference in a July 31, 1985 memorandum (Gov. Exh. 72) to "the contact at HUD" with whom Shelby was to meet the following week was a reference to Dean;
- (4) that Shelby concealed his contacts with Dean from Feinberg and Fine;
- (5) that in a February 3, 1986 memorandum written by Fine (the "Fine Memorandum") (Gov. Exh. 85) which discussed a conversation with Feinberg where Feinberg stated that Shelby had lunch with "his friend at HUD," Dean was referred to as Shelby's "friend at HUD" because Shelby avoided mentioning Dean's name to Feinberg;
- (6) that Dean had been responsible for the post-allocation waiver that allowed the Park Towers project to go forward;
- (7) that Dean provided Shelby with a copy of the waiver;
- (8) that there existed no documents reflecting Shelby's contacts with DeBartolomeis.

Independent Counsel's effort to mislead the jury was facilitated by its failure to make a Brady disclosure of statements or documents contradicting points 1, 2, and 6 through 8, and the delinquent Brady disclosure of statements contradicting points 3 through 5.

1. The Testimony of Eli M. Feinberg That He Was Unaware of Mitchell's Involvement With Park Towers Was False

Independent Counsel attempted to lead the jury and the courts to believe that Richard Shelby had concealed John Mitchell's involvement with the Park Towers project from consultant Eli M. Feinberg and developer Martin Fine even though Independent Counsel had compelling evidence establishing this was false. Since Fine learned most of what he knew about Shelby's activities from Feinberg, the key testimony in this regard would be that of Feinberg, who, on September 17, 1993, testified that he was unaware of John Mitchell's involvement with the Park Towers project. Tr. 637.

Yet, prior to a telephonic interview of Feinberg on May 18, 1992, Shelby, already under a grant of immunity, told Independent Counsel that Feinberg knew about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Fine.

Attachment 21, at 2. The second instance in which Shelby informed Independent Counsel that Feinberg was aware of Mitchell's role occurred in an interview on May 18, 1992.

Attachment 22, at 8. That same day, Independent Counsel had a telephonic interview with Feinberg in which Feinberg stated that he was not aware of Mitchell's involvement with Park Towers. Feinberg's interview report indicates that at that time he was not advised by Independent Counsel that Shelby had explicitly contradicted his statements. Attachment 23, at 4.

In an interview on May 19, 1992, the day following the

telephonic interview of Feinberg, Shelby was reinterviewed by the same Independent Counsel. In his interview, Shelby was apparently advised that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Nevertheless Shelby, who also provided details of Feinberg's role in setting Mitchell's fee, unequivocally stated that Feinberg was aware of Mitchell's involvement. Attachment 23, at 2,4.

There were obvious motives for Feinberg to falsely deny knowledge of Mitchell's role, including the fact that Feinberg did not want to implicate himself by admitting his knowledge of Mitchell's involvement in the fund; Feinberg did not want to possibly risk losing the funding he had received; and national magazines had suggested that Defendant had improperly sent mod rehab units to Miami to benefit Mitchell. Even though Independent Counsel had reason to know that Feinberg would acknowledge he knew about Mitchell's involvement if he were confronted with Shelby's statements,³⁸ Independent Counsel chose not to confront Feinberg with Shelby's statements before his testimony at trial. The conclusion appears inescapable that, as with the failure to confront Maurice Barksdale with the Mitchell

³⁸ The day after Feinberg denied knowledge of Mitchell's involvement with Park Towers, the Independent Counsel reinterviewed Shelby's employer Clarence James, who previously stated that Shelby never told him of Mitchell's involvement, that he was unaware of Mitchell's involvement and that his company paid Mitchell no money. Attachment 24, at 3. Confronted with the fact that he had signed checks for payments to Mitchell, James acknowledged that he must have known of Mitchell's involvement, stating, just as Shelby had stated, that the payments must have been made to fulfill Shelby's prior commitment to Mitchell. Attachment 25, at 4.

telephone message slips, Independent Counsel failed to confront Feinberg with Shelby's statements because of a concern that doing so would cause Feinberg to acknowledge that the testimony Independent Counsel intended to elicit from him was false.³⁹

Despite the fact that Shelby's statements contradicted a point on which Independent Counsel intended to place great weight at trial, the Independent Counsel never made a Brady disclosure of Shelby's three statements that Feinberg was aware of Mitchell's involvement. Instead, those statements were included in a voluminous Jencks production pertaining to Shelby, and among several thousand pages pertaining to other witnesses, which were produced on September 13, 1993, the first day of trial. Further, although production of the statements was to occur, by court instruction, at least a week before Shelby testified, the production occurred only three days before.⁴⁰

³⁹ In the May 19, 1992, interview of Shelby, he was asked whether he remembered asking Feinberg to call someone as a reference for Mitchell. Attachment 26, at 2. This is an odd question unless Independent Counsel already had reason to believe that Shelby had asked Feinberg to call someone as a reference for Mitchell or that Feinberg had in fact called someone as a reference for Mitchell. If such information did exist, it was further evidence that Feinberg was aware of Mitchell's involvement with Park Towers. No such information was ever provided to the defense.

⁴⁰ Independent Counsel misled the defense as to the timing of Shelby's testimony. Although Shelby was not scheduled to testify during the first week of trial and apparently not before Feinberg and Fine, he was unexpectedly called on the third day, September 16, 1993. At the close of the preceding day, Independent Counsel told this court and defense counsel that because of the Jewish holidays he was reordering the witnesses for the following day. He said that after Barksdale he would call a custodial type witness and not Feinberg and Fine but "local HUD people..." "to fill in..." "whoever lives here local."

When Shelby testified, Independent Counsel did not ask any questions that would elicit whether Feinberg was aware of Mitchell's involvement. When Shelby nevertheless started to talk about Feinberg's role in setting Mitchell's fee, Independent Counsel changed the subject. Tr. 546.

Immediately after Shelby testified, Independent Counsel called Feinberg and directly elicited his testimony that he was unaware of Mitchell's involvement with Park Towers. Tr. 637. Thereafter, repeatedly in oral argument⁴¹ and in briefs before this court,⁴² as well as twice in its brief to the Court of Appeals,⁴³ Independent Counsel contended that Shelby concealed

Tr. 424-25. Shelby, who was called immediately after Barksdale, did not fit this description. This facilitated Independent Counsel's effort to lead the jury and the courts to believe that Shelby concealed Mitchell's involvement with Park Towers from Eli Feinberg without contradiction from Shelby, as well as to lead the jury and the courts to believe a number of other things that Shelby would have contradicted or that Independent Counsel otherwise had reason to know were false. It was necessary that Shelby testify ahead of Feinberg and with the defense having as little opportunity (and as little notice) as possible to review Shelby's Jencks material.

⁴¹ Tr. 2029-30 (argument by Associate Independent Counsel); Tr. 3519 (argument by Associate Independent Counsel).

⁴² Gov. Acq. Opp. at 17; Gov. Supp. Acq. Opp. at 16-17; Gov. Rule 29 Opp. at 22-23.

⁴³ Gov. App. Br. 5, 24. In contrast to the claim in this Court, in the Court of Appeals Independent Counsel argued only that Mitchell's role was concealed from developer Fine. Independent Counsel may have been required to alter his position before the Court of Appeals because as a result of documents filed with Defendant's Rule 33 Motion (Attachment 21, at 2; Attachment 22, at 8), the record included two of Shelby's statements contradicting Feinberg's testimony, including one in an interview conducted by the Deputy Independent Counsel, who signed the appellate brief.