Oral Argument Not Yet Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-3021

UNITED STATES OF AMERICA,
Appellee

v.

DEBORAH GORE DEAN,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES OF AMERICA,
Appellee

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28

Parties

The parties to this appeal are appellant Deborah Gore Dean and appellee United States of America.

Rulings Under Review

Deborah Gore Dean appeals from judgments of conviction and sentence entered on March 15, 1994. References to the rulings at issue appear in the brief for appellant Dean.

Related Cases

An unrelated aspect of this case was previously before this Court in United States v. Deborah Gore Dean, No. 92-3180, an appeal by the United States pursuant to 18 U.S.C. §3731 from a pretrial order by the district court suppressing evidence. The decision in that appeal is reported at 989 F.2d 1205 (D.C. Cir. 1993).

The Dean suppression appeal was in turn related to an earlier appeal from grand jury proceedings prior to the indictment of defendant Dean, In re Sealed Case (Government Records), Nos. 91-3088, 91-3089. The decision in that appeal is reported at 950 F.2d 736 (D.C. Cir. 1991).

There are no related cases currently pending in this court or in any other court of which counsel is aware.

Bruce C. Swartz
Deputy Independent Counsel

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GLOSSARY

The following abbreviations are used in this brief:

"HUD" -- The United States Department of Housing and Urban Development;

"Section 8" -- Section 8 of the Housing Act of 1937, now found at 42 U.S.C. §1437f, which provides legal authority for various HUD rental assistance programs for low-income families;

"Mod Rehab Program" -- HUD's Moderate Rehabilitation Program, one of the low-income rental assistance programs authorized by Section 8, pursuant to which HUD would allocate federal funds to state or local Public Housing Authorities, which in turn would use the funds to provide rent subsidies for fifteen-year periods to owners or developers who agreed to rehabilitate properties to make them decent, safe and sanitary for low-income families;

"Mod Rehab unit" -- the amount of Mod Rehab funding designated for the rental subsidy of an apartment unit;

"PHAs" -- state or local Public Housing Authorities;

"Hearing" -- Hearing on the Nomination of Deborah Gore Dean to Be An Assistant Secretary of Housing and Urban Development, Before the Committee on Banking, Housing, and Urban Affairs of the United States Senate, 100th Congress, 1st Sess. (Aug. 6, 1987);

"Tr." -- trial transcript;

"Tr. [date]" -- transcript of district court hearing;

"GX" -- government exhibit;

"DX" -- Dean exhibit.

COUNTERSTATEMENT OF THE ISSUES

1. Whether a reasonable jury could have found Dean guilty beyond a reasonable doubt on each count, in view of the extensive evidence that Dean conspired to benefit herself and her family and then testified falsely about her actions before Congress.

2. Whether the district court abused its discretion in quashing subpoenas for the testimony of former Senator Proxmire and a former Senate employee on the grounds of irrelevance.

3. Whether the district court erred in concluding that Dean received a fair trial.

4. Whether the district court's determinations that the Sentencing Guidelines applied to counts one and two, and that an upward departure was warranted, were clearly erroneous.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Pertinent constitutional provisions, statutes, and regulations are set forth in an addendum bound with this brief, except for those contained in the brief for appellant Dean.

COUNTERSTATEMENT OF THE CASE

1. Introduction: Following a jury trial, Dean was convicted of three counts of having conspired to defraud the United States, one count of having accepted an illegal gratuity, four counts of perjury, and four counts of concealment and false statements.

In reaching these verdicts, the jury had before it testimonial and documentary evidence that Dean, while the Executive Assistant to the Secretary of HUD, played a central role in the allocation of federal funds under HUD's Moderate Rehabilitation Program. There

also was extensive evidence that Dean agreed to take, and did take, official actions involving the Moderate Rehabilitation Program in which she and her family had hidden financial and personal interests. Finally, there was evidence that Dean sought to conceal her actions and to mislead Congress, as well as the public and non-favored developers, regarding the manner in which HUD funding awards were made.

2. The Evidence: In summary, the evidence, viewed in the light most favorable to the government, showed the following:

a. Background: Dean was hired in 1982 to serve as a Special Assistant to HUD Secretary Samuel R. Pierce, Jr., and as Director of the Executive Secretariat. Tr. 2170-71; GX 256. Dean's testimony established that, within weeks of becoming a Special Assistant, she began to interject herself into program matters and called other HUD officials for explanations of their actions. Tr. 2177-78.

In 1984, Dean became Executive Assistant to HUD Secretary Pierce, a position she held until 1987. Tr. 217-18. During that three-year period, Dean played a central role in the allocation of federal housing funds under HUD's Moderate Rehabilitation Program.

The Moderate Rehabilitation Program ("Mod Rehab Program") guaranteed a 15-year stream of federal rental subsidies to qualifying property owners who rehabilitated properties for low-income housing. Tr. 166; 42 U.S.C. §1437f. To obtain such Mod Rehab funds, a property owner had to apply to his or her state or local public housing authority ("PHA"). PHAs received allocations

of Mod Rehab funds from HUD. The PHAs -- not HUD officials -- were supposed to determine which properties would receive these funds. Tr. 113. PHAs were required to advertise the potential availability of Mod Rehab funds and hold a competitive selection process pursuant to their administrative plan. Tr. 113.

Prior to 1983, HUD awarded Mod Rehab funds to PHAs according to the "fair share" system, which used a geographic formula mandated by Congress. Tr. 111. Mod Rehab funds were sometimes referred to as "Mod Rehab units," which designated how many apartment units the allocated funds could subsidize; thus, for example, an allocation of 200 Mod Rehab units to a PHA generally would provide subsidies for 200 low-income apartments. Tr. 146.

In 1983, Congress made cuts in the funds budgeted for the Mod Rehab Program and waived the requirement that PHAs be allocated funds according to the "fair share" formula. Tr. 120; DX 96. Thereafter, HUD awarded Mod Rehab funds to PHAs without regard to any geographic formula, even though there were always far more PHA requests for Mod Rehab funding than there were funds available. Tr. 112. HUD continued to be prohibited from making Mod Rehab awards to specific projects, as Dean herself pointed out in official correspondence. See, e.g., GX 31A; see also Tr. 148-49, 155 (Greer); Tr. 163-67 (Hastings).

In fact, however, following the end of "fair share," Dean sought to use the Mod Rehab allocation process to steer awards to projects and individuals she favored. Notwithstanding that she had no formal "line authority," Dean took an active role in the Mod

Rehab Program after becoming Executive Assistant in 1984. Maurice Barksdale, the Assistant Secretary for Housing/Federal Housing Commissioner in 1984, testified that Dean was "running the Department," that she would contact him about "almost everything that would be involved in the day-to-day operations of the Department up to and including funding decisions," and that she would "often" ask about particular funding decisions. Tr. 464-65, 527.

Following Barksdale's departure from HUD in late 1984, Dean instructed Acting Assistant Secretary for Housing Wiseman that the Office of the Secretary "will concur on all funding decisions regarding Mod Rehab funds not previously approved by both Maurice [Barksdale] and myself, until a new Federal Housing Commissioner is named." GX 147 (emphasis added).

But no new Assistant Secretary for Housing/Federal Housing Commissioner was appointed until late 1986. Numerous witnesses testified that during that two-year period from 1984 to 1986, Dean would convene ad hoc meetings in her office and announce to the acting Assistant Secretary for Housing and other HUD political appointees which PHAs would receive Mod Rehab funding; if a PHA on Dean's list had not in fact requested Mod Rehab funding, Dean would order that the PHA be contacted and told to apply for such funds. Tr. 726, 754, 762, 789 (Hale); Tr. 825-26, 951, 957, 995 (DeBartolomeis); Tr. 1724, 1729-30 (Zagame). During this time period, HUD career employees had been cut out of the Mod Rehab funding process. Tr. 183, 209 (Hastings).

In October 1986, Thomas Demery was sworn in as Assistant Secretary for Housing/Federal Housing Commissioner. Tr. 1890. A struggle ensued between Dean and Demery for control over the Mod Rehab funding process. Tr. 1556. In January 1987, in response to this controversy, Secretary Pierce established a three-person Mod Rehab committee consisting of Dean, Demery, and either the HUD General Counsel or Under Secretary. Tr. 2570. Thus, even after the appointment of an Assistant Secretary for Housing, Dean played an important role in deciding which PHAs should be funded.

The evidence further showed that Dean agreed to use, and did use, her official position, and the power she had obtained at HUD, to advance the interests of three different sets of co-conspirators, each of which provided financial and other personal benefits to Dean and to her family.

b. The Mitchell Conspiracy: The first of the conspiracies involved John N. Mitchell. Mitchell lived with Dean's mother and Dean referred to him as her "Dad" or "Daddy." See, e.g., GX 17; Tr. 2970. Mitchell and his company were secretly hired by two "consultants" -- unindicted coconspirators Louie Nunn, a former state governor, and Rick Shelby, a political consultant who subsequently supported Dean's political ambitions -- to secure Mod Rehab funding for their developer clients, neither of whom were informed of Mitchell's role. See, e.g., Tr. 250-51, 657-58. Dean was involved in the funding of each of the projects -- known as Arama, South Florida, and Park Towers -- and Mitchell and his

company were subsequently paid over $200,000. See, e.g., Tr. 327, 339, 2989.

Dean's official actions thus directly benefitted Mitchell, whom she considered to be a family member and who provided her with financial and political support. She took these actions even though she had been expressly warned it would be improper to do HUD business with friends, and by her own admission knew that it was wrong to use HUD funds to benefit family members. GX 258; Tr. 2726.

c. The Sankin Conspiracy: The second conspiracy involved Andrew Sankin, a young lawyer and businessman who Dean acknowledged was essentially on the Dean family "payroll." Tr. 3163. On behalf of a developer, Sankin approached Dean first about obtaining increased subsidized rents for a project known as the Necho Allen Hotel, and later about obtaining Mod Rehab units for a project known as Regent Street; in both cases, Dean took action to grant the request. See, e.g., Tr. 1104, 1106-07. Dean then arranged for Sankin to team up with another consultant, Thomas Broussard, and assigned them Mod Rehab funding for 150 apartment units in Puerto Rico. See, e.g., Tr. 1010. This allowed Sankin and Broussard to peddle these federal subsidies to the highest bidding developer; Sankin and Broussard sold these federal funding "units" for $100,000 for use in the Alameda Towers project. Tr. 1076-77, 1047. Finally, Dean urged Sankin to work with Rick Shelby, who, as noted above, had previously hired Mitchell. See, e.g., Tr. 1118-19. Dean was Shelby and Sankin's contact on the Foxglenn and Eastern

Avenue projects, and Mod Rehab funds were sent to the PHAs they designated. See, e.g., Tr. 561, 599, 606, 1122, 3249.

Throughout this time, Sankin performed a variety of services for Dean and her family, including managing a troubled apartment building owned by Dean's family. See, e.g., Tr. 1125. Indeed, because Dean was providing him access to HUD funds, Sankin accepted Dean's refusal to pay him for his extensive services for the Dean family in obtaining a critical hardship rents petition for that building. Tr. 1285-86. Sankin also bought Dean expensive gifts and made a political contribution at Dean's request. Tr. 1282, 1245-46, 1288-89, 1140-41.

d. The Kitchin Conspiracy and Gratuity: The third conspiracy, and the illegal gratuity charge, involved Lou Kitchin. Kitchin was an influential political consultant. Tr. 1319, 1429. Although Dean denied having any HUD dealings with Kitchin, numerous witnesses testified to the contrary. See, e.g., Tr. 1431, 1436-37, 1524-25, 1551, 2761. Kitchin asked Dean for blocks of Mod Rehab funding units not tied to particular projects, and she assured him that the requests were "reasonable." Tr. 1433. Kitchin then found developers who were willing to pay him to receive the Mod Rehab units he had secured from Dean. Tr. 1332-35.

Kitchin, in turn, contacted the White House to support Dean's bid to become the HUD Assistant Secretary for Community Planning and Development in 1987. Tr. 1446-47, 1527. While under consideration for that position, Dean approached Kitchin and asked him for money. Tr. 1444. He gave her a check for $4,000, which he

marked "loan." GX 203. By her own admission on cross-examination, Dean was in arrears with regard to her credit card bills at this time and had insufficient funds in the bank. Tr. 2909.

Dean testified that Kitchin wanted to buy her brother's apartment, that Kitchin gave her the $4,000 as an advance for decorating the apartment, and that she attempted to repay the $4,000 on the day in June 1987 that Kitchin told her he did not intend to buy the apartment after all. Tr. 2738-46. Dean's explanation for the $4,000 payment not only was contradicted by the testimony of Kitchin and others; in addition, undisputed evidence introduced in rebuttal showed that Dean's story could not be true, since Dean's brother's apartment had in fact been sold to someone else several months before the date of Dean's alleged June 1987 attempt to repay the $4,000. See, e.g., Tr. 2835-38, 3264-65.

e. Dean's Senate Testimony: The jury also heard evidence that, when Congress inquired into Dean's role in the Mod Rehab Program, Dean gave false testimony and concealed material facts. On August 6, 1987, Dean appeared before the Senate Committee on Banking, Housing, and Urban Affairs for confirmation hearings on her nomination to be HUD Assistant Secretary.

At that hearing, Dean testified that PHA applications for Mod Rehab units were reviewed and rated by HUD regional offices and HUD's Office of Housing; thereafter, the Mod Rehab panel on which she sat would "go[] solely on information provided by the Assistant Secretary for Housing." Hearing, GX 212 at 53. She also testified that she had "never given or approved or pushed or

coerced anyone to help any developer," and that it was "a tremendous waste of time" for developers to meet with people at HUD. Id. at 53. In addition, she denied any knowledge of a project known as Baltimore Uplift One, and testified that no Mod Rehab units, "unless they were sent directly by the Secretary, have ever gone to my home State of Maryland, simply for that reason -- that I sat on the panel." Id. at 56-57. Each of Dean's statements was directly contradicted by numerous witnesses. See, e.g., Tr. 588-89, 829, 1120-23, 1298, 1703, 1785, 1898, 3180-82.

3. The District Court's Denial of Dean's Motions for Judgment of Acquittal: At the close of the government's direct case, Dean moved for acquittal pursuant to Fed. R. Crim. P. 29(a). On October 4, 1993, the district court denied that motion in a 23-page oral opinion that reviewed the evidence in detail as to each count of the indictment. Tr. 2040-63. As to each conspiracy count, the court held that there was sufficient evidence from which a jury could conclude that Dean had illegally agreed to take actions to favor her coconspirators and to receive benefits from them, thereby depriving the United States of her loyalty and interfering with lawful government functions, in violation of 18 U.S.C. §371. Tr. 2040-55. Similarly, with regard to the perjury counts and concealment counts, the court found that there was sufficient evidence to permit a jury to find that Dean intended to testify falsely and to conceal from Congress her actions and involvement in the Mod Rehab program. Tr. 2055-63.

After the jury verdict, Dean again moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). The district court denied this motion on February 14, 1994, after reviewing the "over several hundred pages of materials and references to the record" submitted in connection with Dean's renewed motion. Tr. 2/14/94 at 5. The court concluded (id.) that

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

4. The District Court's Denial of the Motion for New Trial: Following the verdict, Dean also moved for a new trial, claiming that the government, inter alia, had made tardy disclosure of Brady materials, had failed to correct the allegedly false or misleading testimony of certain witnesses, and had made improper arguments in its closing. The government strongly disputed these claims of prosecutorial misconduct both in its brief in opposition and at oral argument on February 14, 1994. Tr. 2/14/94 at 21.

The district court rejected Dean's claim of abuse as to the government's closing argument. The court held that it had taken "care of that appropriate with its own sua sponte instructions it gave after consulting with counsel." Tr. 2/14/94 at 31. The court also noted that "this was, it had to be recognized, a perjury case, and it's very hard to argue a case of perjury unless you are

allowed to refer to the defendant's testimony and have the jury consider what it's worth and taking all that into account." Id.

Furthermore, although the court stated that the government had acted with unworthy zeal with regard to the Brady and witness issues, id. at 27, the court nevertheless held that "... I do not believe there was any overwhelming failure by the government in its zealous efforts in this case that resulted in such prejudice to the defendant as would require a new trial ....." Tr. 2/14/94 at 31.

In reaching this conclusion, the court relied first upon the corrective actions it had taken during the trial. It stated that its concern about the government's conduct did not "tell[] the whole story," since "... I believe that any prejudice was met adequately by the Court's instructions and accommodations to counsel for the defendant to appropriately rebut evidence that may have been produced by the government without a full exploration as to its accuracy." Tr. 2/14/94 at 30.

The court also based its conclusion on the relative unimportance of the challenged evidence when compared to the rest of the evidence in the case. The court stated that "there were multiple other witnesses that testified as to defendant's involvement, and the defendant herself testified at length as to her noninvolvement in these matters in a criminal sense, and the jury concluded against her." Tr. 2/14/94 at 29.[1]

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[1] The other challenged rulings -- the quashing of the Senate subpoenas on the motion of the Senate Office of Legal Counsel, Tr. 2116-29, and the Guideline calculations, Tr. 2/25/94 -- are discussed in detail in Parts II and IV below.

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to permit a reasonable jury to find Dean guilty on each count. The evidence shows that Dean entered into three self-dealing conspiracies, wherein she used her official position at HUD to advance the interests of coconspirators who provided financial and other benefits to her and her family. The evidence also shows that, when the Senate questioned Dean about her actions at HUD, Dean testified falsely and concealed material facts.

2. The court did not abuse its discretion in quashing subpoenas for the testimony of former Senator Proxmire or former Senate Investigator Naylor. It correctly held that this testimony would not be relevant to the question whether Dean intended to lie to the Senate. Because Dean expressly stated to the court that these witnesses were being called solely on the question of intent, and not on the question of the materiality of her testimony, she cannot now argue on appeal that their testimony should have been allowed on materiality; in any event, their testimony would not have been relevant on that issue either.

3. The court correctly held that Dean was not entitled to a new trial on the ground of alleged prosecutorial misconduct. The court's holding that Dean did not suffer prejudice warranting a new trial is entitled to deference and is in accord with the law of this Circuit. As to each of the four pieces of evidence that Dean claims were Brady and tardily produced, she in fact received the evidence in sufficient time to make effective use of it before the

jury. Similarly, Dean suffered no prejudice with regard to the Sankin receipts; to the contrary, she elected not to have them stricken from evidence, but instead to cross-examine Sankin on the receipts to show him to be untruthful. Finally, the prosecutor's statements in closing that Dean "lied" were legally permissible and had been invited by Dean's repeated assertions in her opening and in her testimony that she was not "lying." In any event, even if those statements had been improper, that impropriety would have been cured by the court's instructions.

4. The court's determinations that the Sentencing Guidelines applied to counts one and two, and that an upward departure was warranted, were carefully reasoned and on their face not clearly erroneous.

ARGUMENT

I. THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT THE JURY'S VERDICT ON EACH COUNT.

A. Dean's Arguments Ignore The Rigorous Standard Of Review Applicable Here.

Dean's insufficiency arguments fail on both factual and legal grounds. Factually, her arguments ignore most of the evidence at trial, and rely instead almost exclusively on her own testimony. When all the evidence is considered, it overwhelmingly supports each of the jury's verdicts.

Legally, Dean fails to recognize that, even if the case had been closer than it was, it was for the jury to weigh the evidence and to resolve disputed issues of fact and credibility. Dean would have this Court reweigh the evidence and substitute its judgment

for that of the jury -- something this Court repeatedly has stated it will not do.

To the contrary, this Court has held that, when a criminal conviction is challenged for sufficiency of the evidence, the jury's verdict is reviewed "very deferentially." United States v. Harrison, 931 F.2d 65, 71 (D.C. Cir.), cert. denied, __ U.S. __, 112 S. Ct. 408 (1991). The reviewing court "do[es] not determine whether [it] would find guilt beyond a reasonable doubt, but only whether any reasonable jury could find guilt beyond a reasonable doubt." Id. (emphasis in original). See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

This standard requires the Court to determine whether, "'viewing the evidence in the light most favorable to the Government, ... and recognizing that it is the jury's province to determine credibility and to weigh the evidence, a reasonable jury must necessarily entertain a reasonable doubt on the evidence presented.'" United States v. Johnson, 952 F.2d 1407, 1409 (D.C. Cir. 1992)(citation omitted)(emphasis in original). It follows that "[w]hen a reasonable mind might fairly have a reasonable doubt of guilt or might fairly have none, the decision is for the jurors to make." United States v. Herron, 567 F.2d 510, 514 (D.C. Cir. 1977).

Dean also fails to recognize that "[i]n determining whether the government has met its burden of proof ... no legal distinction may be drawn between direct and circumstantial evidence ... since it is 'the traditional province of the jury to assess the

significance of circumstantial evidence, and to determine whether it eliminates all reasonable doubt.'" United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985), cert. denied, 474 U.S. 1064 (1986). In particular, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" Glasser v. United States, 315 U.S. 60, 80 (1942)(citation omitted). See Treadwell, 760 F.2d at 333.

In any event, the evidence was not simply circumstantial. As to each count, there was more than sufficient evidence -- both direct and circumstantial -- from which a reasonable jury could find guilt beyond a reasonable doubt.

B. There Was More Than Sufficient Evidence That Dean Intentionally Entered Into The Three Charged Conspiracies.

The evidence establishes that defendant entered into classic self-dealing conspiracies. The federal courts -- including this Court in Treadwell -- have uniformly sustained prosecutions under 18 U.S.C. §371 against public officials or others entrusted with federal funds who act in matters in which they have hidden personal interests.[2] This personal interest need not be financial in

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[2] See, e.g., United States v. Gallup, 812 F.2d 1271, 1276 (10th Cir. 1987) (PHA official secured HUD financing for property, thereby ensuring that brother-in-law would receive finder's fee); United States v. Conover, 772 F.2d 765, 770-71 (11th Cir. 1985) (employee of rural electric cooperative steered contract to friend with whom he had business dealings), aff'd in part and remanded on other grounds sub nom. Tanner v. United States, 483 U.S. 107 (1987); Treadwell, 760 F.2d at 334 (managers of HUD property engaged in "general pattern of self-dealing, conflicts of interest and shoddy management practices," such that in "every transaction there was a potential for improper favoritism").

nature.[3] Nor, Dean to the contrary (Dean Br. 20), is it necessary that the United States have suffered a financial loss.[4]

Dean has never disputed that this type of self-dealing conspiracy is punishable under §371. Instead, her claim is that the evidence was insufficient to permit the jury to find her guilty of having entered into such conspiracies to defraud the United States. According to Dean, the evidence showed "nothing more than the fact that Ms. Dean knew or had friendships with the consultants," and that "[w]hile she may have played a peripheral role in some allocation decisions that benefitted these consultants, there is no evidence that this involvement was improper or motivated by fraudulent intent." Dean Br. 20.

In fact, however, the evidence was overwhelmingly to the contrary on all these points. As to each of the conspiracies charged, there was ample evidence that Dean, while holding a powerful position at HUD, agreed to and did take official actions to advance the interests of her coconspirators; that she and her family had hidden personal interests in these official decisions; and, finally, that Dean and her coconspirators acted with

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[3] See, e.g., Gallup, 812 F.2d at 1278; United States v. Tham, 960 F.2d 1391, 1394 (9th Cir. 1991); United States v. Shoup, 608 F.2d 950, 957 (3d Cir. 1979). Indeed, even absent proof of a hidden personal interest, §371 forbids conspiracies to subvert governmental functions by "deceit, craft or trickery, or at least by means that are dishonest." See Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

[4] See, e.g., Tanner v. United States, 483 U.S. 107, 128 (1987); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); In re Sealed Case, 676 F.2d 793, 815 n.92 (D.C. Cir. 1982).

fraudulent intent and deceitfully sought to conceal their actions.[5]

1. The Evidence Was More Than Sufficient As to Count One (The Mitchell Conspiracy).

a. Dean Had a Hidden Personal Interest in Enriching Mitchell: The conspiracy charged in count one centered on John N. Mitchell. As Dean's brief concedes, Dean had a "familial" relationship with Mitchell. Dean Br. 22. Mitchell was the companion of Dean's mother and lived at her mother's home. See, e.g., Tr. 316 (Brennan); Tr. 388 (Gauvry); Tr. 2960 (Dean). Mitchell referred to Dean as his daughter, see Tr. 1367-68 (Nunn), and Dean -- in forwarding HUD documents to Mitchell -- referred to Mitchell as "Daddy" and "Dad." See GX 17, 18.

There was testimony that Mitchell's financial situation at this time was poor, and that Dean attributed her mother's decision not to marry Mitchell to her fears that his financial condition might encumber the family. See Tr. 819 (DeBartolomeis). Dean herself testified that "I felt terribly sorry for him and what was going on in his life and I tried to be kind to him and he was very kind to me." Tr. 2596-97. See also Tr. 2591, 2592, 2595, 2960 (Dean). Dean also testified that her mother paid Mitchell's living expenses. Tr. 3164.

Dean fails to recognize that her own testimony in this regard, if credited by the jury, permitted the inference that Dean was able to limit the financial burden on her mother by generating income

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[5] Similarly, this evidence of deceit also established -- and the indictment also charged -- that Dean conspired to conceal and cover-up material facts, in violation of 18 U.S.C. §§371 and 1001.

for Mitchell. Since Dean also looked to her mother for financial support, Tr. 1561 (Nettles-Hawkins); Tr. 3159 (Dean), she was personally benefitted when her mother was less burdened by expenses associated with Mitchell.

Thus, actions Dean took to benefit Mitchell would enrich the Mitchell-Dean family, and redound to the ultimate benefit of Dean's mother and herself. Indeed, there is proof that Dean received gifts of money from Mitchell after he began his consulting activities. For instance, as Dean admitted at trial, Mitchell gave her $500 on December 25, 1986, GX 236, Tr. 3013-14, and the following year he paid over $3,300 for a birthday party that was held for Dean at the Georgetown Club. See GX 238.

Dean's suggestion that these "benefits that Mitchell provided Ms. Dean were clearly consistent with that [familial] relationship," Dean Br. 22, both makes and misses the point. Dean essentially admits that, as Mitchell's "daughter," she could expect benefits received by Mitchell to flow through to her. She fails to acknowledge, however, that this gave her an improper personal interest in assisting him at HUD.

The evidence also established that Mitchell's assistance to Dean was not only financial in nature. Mitchell sought to advance defendant's career and her political aspirations. See SF 186 in GX 236; Tr. 3014-15, 2599-2600; Tr. 581 (Shelby). In addition, Dean admitted that Mitchell interceded on her behalf with the Director of the FBI when Dean complained of the manner in which the FBI was

conducting her background investigation for her nomination to be Assistant Secretary. Tr. 3017-19.

b. Dean Agreed To, And Did, Advance Mitchell's Interests at HUD: Dean argues that she lacked any power over Mod Rehab allocations, and thus could not have assisted Mitchell or any of her other coconspirators. Dean Br. 7-8, 28-29. In actuality, however, there was overwhelming evidence that Dean wielded significant power and influence in Mod Rehab funding decisions. See pp. 3-5 supra.

It is, for instance, undisputed that Dean had one of three votes on the Mod Rehab funding panel eventually established by Secretary Pierce. Furthermore, before the establishment of that panel, Dean would convene ad hoc meetings in her office and personally direct the Acting Assistant Secretary and other high-ranking HUD political appointees which PHAs would receive Mod Rehab funding. See p. 4 supra. This testimony was not "generalized opinions by second and third-level employees," as Dean would have this Court believe. Dean Br. 28. Rather, it was direct evidence of Dean's actions from witnesses -- including two acting Assistant Secretaries and one Deputy Assistant Secretary -- who were present at the Mod Rehab funding meetings run by Dean. See also Tr. 1555-56 (testimony of Dean's secretary that Dean asserted that Assistant Secretaries should obey her on Mod Rehab matters).

In light of this, Dean cannot credibly argue that a rational jury could not have found that she was in a position to assist those seeking Mod Rehab allocations. Even viewing the evidence in

the light most favorable to Dean, the sensitive nature of her position was such that she could at least influence, if not decide herself, who would receive Mod Rehab funding. Moreover, Dean fails to recognize that, as a legal matter, it is irrelevant whether she had the ultimate authority to allocate Mod Rehab funds; it is enough that she took actions designed to advance the interests of her coconspirators.[6]

Alternatively, Dean argues that she did not take such actions, and that instead she did no more than extend "routine courtesies" to Mitchell and the other charged coconspirators. Dean Br. 22, 27. Here, too, Dean misstates the evidence. There was more than sufficient evidence from which a rational jury could have concluded that Dean took official actions to aid each of the projects in which Mitchell had an interest.

For instance, with regard to Marbilt, the first Mitchell project, Dean wrote to Mitchell and advised him that she had discussed the project with relevant HUD officials; the very wording of the letter -- which suggests that "[i]t's time we say 'adios'" to the developer, GX 17 (emphasis added) -- would justify the jury in concluding that Dean and Mitchell were working together. See also GX 18.

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[6] See, e.g., United States v. Smith, 496 F.2d 185 (10th Cir.), cert. denied, 419 U.S. 964 (1974) (§371 prosecution of mid-level loan officer in SBA); see also United States v. Heffler, 402 F.2d 924 (3d Cir. 1968), cert. denied, 394 U.S. 946 (1969) (in bribery prosecution, it was not essential that defendant have authority to make the final decision); United States v. Analytis, 687 F. Supp. 87, 90 (S.D.N.Y. 1988) (same); United States v. Raff, 161 F. Supp. 276, 280 (D. Pa. 1958) (same).

Similarly, Dean's correspondence stated that she spoke to Mitchell concerning the Arama Partnership's request for "additional Mod-Rehab units." GX 27, 28. Her letter assured Nunn, who had hired Mitchell, "that all the necessary paperwork for the units will be transmitted by the end of this week and that Arama Partnership will definitely receive these units from HUD." Id. In contrast, Dean wrote to Mod Rehab applicants outside the conspiracy that "[f]ederal regulations prohibit HUD from making project specific allocations."[7] GX 31b; see GX 31a.

On the South Florida I project, Dean admitted meeting with Jack Brennan, Mitchell's partner. Tr. 2622-23. Significantly, she also admitted that she did not tell Secretary Pierce about Brennan's request for Mod Rehab units, since Pierce allegedly would not have been interested. Tr. 2625, 2868 ("[a] friend of mine asking me for something at HUD hardly required Secretary Pierce's attention"). By admitting that she did not tell Secretary Pierce about Brennan's request -- and in light of the evidence that it was Dean who would tell the Acting Assistant Secretary which requests to fund -- Dean herself provided the jury with a basis for

[7] 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 know that she was interested in the project. The jury also had before it Barksdale's testimony that Dean would "often" ask about particular funding decisions (Tr. 465), as well as GX 147, cited above, in which Dean herself made clear that Mod Rehab decisions were approved by Barksdale and herself.

concluding that she personally made the decision to award these units.[8] Tr. 326-27; GX 51.

On the Park Towers project, Dean met with unindicted coconspirator Shelby, who had retained Mitchell. Tr. 553. Furthermore, Mitchell's and Dean's calendars reflect that Dean, Mitchell, and Shelby scheduled a lunch together after Shelby and Mitchell became involved in the project; and the day following that scheduled lunch, Shelby forwarded Dean information on "the Miami Mod Rehab," which allowed the jury to conclude that the project had in fact been discussed. GX 5k, 9g & 76 (emphasis added). The evidence also showed that Shelby's self-described "friend" at HUD on this project was Dean, that she assisted him on this project, and that he was careful not to identify her by name to the developer who had hired him. GX 85; 3021.

c. There Was Ample Evidence of the Conspirators' Fraudulent Intent: Dean contends that there was no evidence demonstrating that she had a fraudulent intent and "little, if anything, to suggest that Ms. Dean had reasonable notice that her acts could be construed as criminal." Dean Br. 29, 26. Again, the evidence was entirely to the contrary.

At trial, Dean admitted that while she was at HUD she knew that it would be wrong to use HUD funds to benefit family members.

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[8] While Brennan, an unindicted coconspirator, testified that Mitchell said he would not participate in this project because Dean worked at HUD, Tr. 321-22, the jury could weigh that testimony against the evidence that Brennan worked with Mitchell and that it was Mitchell's company -- not Brennan personally -- that was paid $109,000 for obtaining these units. Tr. 326-27; GX 51.

Tr. 2726. Moreover, in 1984, Dean personally received a formal opinion from HUD's Assistant General Counsel that stated that HUD's Standards of Conduct regulations, 24 C.F.R. §0.735-202(b), (c), and (d), "require[] HUD employees to avoid any action that might result in, or create the appearance of, giving preferential treatment to any person, losing complete independence or impartiality, or making a Government decision outside official channels." GX 258. That opinion also reminded Dean that HUD's Standards of Conduct prohibited gifts or gratuities to HUD officials. Id. A number of witnesses testified that HUD employees were required to abide by these Standards of Conduct, including in making Mod Rehab decisions. Tr. 119, 132 (Greer); Tr. 167-78 (Hastings); Tr. 1742 (Zagame).

On appeal, Dean argues for the first time that her actions conformed with "[t]he applicable ethics standards," which she now claims are set forth at 5 C.F.R. §2635.502 and §2635.703. Dean Br. 24-26. But Dean fails to inform the Court that the regulations on which she now relies were not promulgated until 1992, five years after Dean left HUD. 57 Fed. Reg. 35006 (Aug. 7, 1992). Moreover, even though inapplicable here, these regulations clearly would have been violated by Dean's conduct regarding Mitchell. See §2635.502(a) & (b)(barring participation in matters that are "likely to have a direct and predictable effect on the financial interest of a member of [her] household)." Similarly, those regulations also would have been violated by Dean's other conspiracies, since she acted in matters involving persons with

whom she had a "covered" financial relationship: Sankin, who was performing financial services for her family; and Kitchin, who provided her money.[9] The evidence also contradicts Dean's claim that she informed Secretary Pierce of any of these conflicts or otherwise recused herself. See pp. 30, 34 infra.

In fact, the overwhelming evidence was that, far from making any disclosures, Dean and her coconspirators sought to conceal their involvement in these matters, which further demonstrated criminal intent. Martinez (the developer of Arama and South Florida I) and Fine (the developer of Park Towers) testified that they were never told that Mitchell was involved in obtaining funding for these projects. Tr. 250-51, 657-58. Nunn and Shelby omitted all references to Mitchell in their discussions and consulting contracts with Martinez and Fine, even though Mitchell was to share in their fees for obtaining units.[10] The evidence also suggests that Shelby avoided using Dean's name, but freely told his clients about DeBartolomeis and others. Tr. 678-87; GX 85.

Dean's criminal intent also was demonstrated by the evidence that, at the same time she was secretly acting to further the interests of her coconspirators with regard to Mod Rehab

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[9] Dean concedes that "it could be argued that Ms. Dean had a 'covered relationship' with Sankin when he managed her family's apartment building," but falsely states -- as we show below -- that "his only substantial HUD-related contacts with Ms. Dean ... occurred before he was retained in this capacity." Dean Br. 25.

[10] See, e.g., GX 20 (agreement by Martinez to pay Nunn $375,000 for obtaining Arama units; annotated by Nunn "[i]n event of death or disability 1/2 of above amount belongs to John Mitchell"); GX 37, 46 (South Florida I).

allocations, she was asserting to other Mod Rehab applicants that "HUD does not allocate Section 8 moderate rehabilitation funds on a project specific basis," (GX 31a, 8/15/84), and that "[f]ederal regulations prohibit HUD from making project specific allocations," so "[t]herefore, HUD has no direct role in providing Moderate Rehabilitation funds to a specific project" (GX 31b, 1/2/85). Likewise, Dean testified before the Senate that, among other things, it was a "waste of time" for developers to approach HUD because Mod Rehab funds were awarded by PHAs.

Finally, Dean's knowledge of the wrongfulness of her actions also was evidenced by her attempts at trial to distance herself from her coconspirators. For instance, Dean testified that she had met Nunn only after leaving HUD, but admitted on cross-examination that she had told a reporter in 1989 that she had known Nunn since she was a little girl. Tr. 3029. She also testified that she first learned of the payments Mitchell had received when she read a HUD Inspector General's report in 1989, and that she had expressed her disbelief and anger to HUD agent Al Cain. Tr. 2617. But Agent Cain testified that to his recollection this conversation never occurred.[11] Tr. 3198-99.

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[11] Similarly, in their testimony, many of Dean's co-conspirators sought to distance themselves from her. As the district court recognized, "[m]any of the witnesses the government was required to call were adverse witnesses," who "were either unindicted co-conspirators or individuals who had been given immunity and required to testify or were less than cooperating witnesses ...." Tr. 2/14/94, at 31. But even given this difficulty, the government was able to establish through many of these witnesses -- either directly or by contrasting their current testimony with their prior statements -- further evidence of intent. See, e.g., Tr. 606-09 (admission by Shelby that he knew

In sum, there was more than sufficient evidence for a reasonable jury to conclude that Dean knowingly entered into a conspiracy to defraud the United States. Indeed, Dean herself notes that similar factors in Treadwell supported a finding of fraudulent intent "because these acts could not reasonably be ascribed to an innocent person." Dean Br. 30.

2. The Evidence Was More Than Sufficient As to Count Two (The Sankin Conspiracy).

a. Dean Had a Hidden Personal Interest in Enriching Sankin: The conspiracy charged in count two centered on Andrew Sankin. The evidence established that Dean took official actions to assist Sankin in return for the services and benefits he provided to Dean and her family.

At trial, Dean acknowledged that she thought of Sankin as being on the Dean family "payroll." Tr. 3163. Among other things, Sankin took over the management of the Dean family's troubled Stanley Arms Apartments, which Dean admitted resulted in a savings to her family. Tr. 1125-26, 2698-99. Sankin also acted as an unpaid broker for the apartments, going so far as trying to sell the apartments to one of his clients who was seeking Mod Rehab units from Dean. Tr. 1137-38, 1303-04. In addition, to try to return these rent-controlled apartments to solvency, Sankin prepared a lengthy hardship rents petition for submission to the District of Columbia. Tr. 1134-36.

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that it had been wrong for him to use his influence with Dean, although he claims not to have realized this until 1989).

Sankin testified that his services on the hardship rent petition had substantial value, Tr. 1136, and stated that, when Dean indicated that she was not going to pay him, he did not push the point because at that very time he was successful in obtaining HUD funds through her. Tr. 1286-87. Sankin also recognized the relationship between his work for the Dean family and his Mod Rehab success in his method of compensating his property management staff. Tr. 1138-39.

The Stanley Arms services were not the only benefits accruing to Dean. Sankin, a lawyer, accompanied her to a real estate closing and assisted her in a dispute with her condominium association. Tr. 1139-40. He made a political contribution at Dean's request. Tr. 1140-41. Sankin also bought Dean gifts, including an expensive antique cup and saucer, Tr. 1282, 1245-46, expensive bottles of port, Tr. 1288-89, and flowers, Tr. 1140, 1288.

b. Dean Agreed To, And Did, Advance Sankin's Interests at HUD: Dean took action on each of Sankin's projects. With regard to the Necho Allen Hotel, Dean overruled HUD officials to help Sankin's client obtain increased rents for this project. GX 102, 105, 106-10a, Tr. 1558-59.

With regard to the Regent Street project, Dean's own correspondence demonstrates that she agreed to discuss Mod Rehab funding for the project. GX 122. She thereafter scheduled a meeting with Sankin, and a week later 13 of the requested 26 Mod Rehab units were awarded to the PHA. GX 5j, 124, 124a, 125.

Thereafter, the balance of 13 units was sent to the PHA, even though then-Acting Assistant Secretary Hale testified she had no information about this allocation. Tr. 738, GX 129. Significantly, despite having had the support of his United States Senators, Sankin's client had been unable to obtain the Mod Rehab units for this project without retaining a consultant who had access to Dean. Tr. 3400.

Regarding the Alameda Towers project, the evidence shows that Dean promised Sankin and his coconspirator Broussard 150 Mod Rehab units for use in Puerto Rico, which they then sold to the highest bidding developer. To obtain these units, Sankin had followed Dean's suggestion and gone into partnership with Broussard. Tr. 1108-09, 1008. Thereafter, Broussard wrote to Dean that he

> spoke to Joe Monticiollo [the HUD Regional Administrator in New York] regarding P.R. and he is putting me in contact with a group in Old San Juan that is working on units through Joe [and] D'Amato. I think Andy S. and I will be better with them than Andy's first contact. I'll speak to you when I return from Europe on June 24.

GX 137.

Rubi, the developer of Alameda Towers, testified that Broussard told him that Dean had "assigned" Broussard 150 Mod Rehab units. Tr. 1043. Despite being a supporter of Senator D'Amato, Rubi could not get all the Mod Rehab units he needed for his project without buying them from Sankin and Broussard. Tr. 1061-65. Rubi therefore agreed to pay Sankin and Broussard each $100,000 for these 150 units. Tr. 1047.

For the Foxglenn and Eastern Avenue projects, Dean urged Sankin to team up with Shelby, who previously had worked with

Mitchell. Tr. 1118-19. Shelby testified that his principal contact on Foxglenn and Eastern Avenue was Dean. Tr. 599-606. Dean had instructed a subordinate to "take good care" of Shelby. Tr. 3249 (Patenaude). The Mod Rehab units were awarded to the PHAs designated by Sankin and Shelby. Tr. 561, 564, 1122, 1297.

c. There was Ample Evidence of the Conspirators' Fraudulent Intent: In addition to the general evidence of Dean's intent discussed as to count one, there was also particularized evidence that these coconspirators acted with fraudulent intent.

Thus, Rubi, the developer of Alameda Towers, testified that his agreements with Sankin and Broussard were drafted to make it appear as though the latter were performing services, when in actuality Rubi was simply paying them for the units Dean had given them. Tr. 1047.

Similarly, James Wilson, a developer, testified that Broussard approached him and said he had Mod Rehab units to use in Puerto Rico and wanted to find a developer for a 50-50 partnership. Tr. 1080. Suspicious about the allocation, especially in light of Broussard's lack of expertise in the development field, Wilson asked Broussard how he had obtained the commitment of federal subsidies. When Broussard would not disclose more details about the allocation, their negotiations came to an abrupt termination. Tr. 1078-80.

Dean's own testimony also gave the jury a basis for concluding that she acted with criminal intent. Dean admitted, for instance, that Shelby approached her on the Eastern Avenue project. Tr.

2576, 2643. She testified, however, that this attempt by Shelby to use her friendship upset her, that she told Shelby she could not vote for the project, and that she reported this incident to Secretary Pierce, who elected to approve the application personally. Tr. 2576-78, 2643.

But there was no evidence apart from Dean's testimony -- either from Shelby or anyone else -- that supported this version of events. In contrast, a former HUD official, Pam Patenaude, testified that Dean told her to "take good care" of Shelby and that during a Mod Rehab funding round in 1986 "it was made clear [by Dean] that he was to be taken care of." Tr. 3249.

3. The Evidence Was More Than Sufficient As to Counts Three and Four (The Kitchin Conspiracy and Gratuity).

a. Dean Had a Hidden Personal Interest in Assisting Kitchin: The conspiracy charged in count three and the gratuity charged in count four relate to Kitchin. There was overwhelming evidence that Dean had a hidden personal interest in providing HUD benefits to Kitchin. First, Kitchin had provided important support for Dean's nomination to be Assistant Secretary. Tr. 1446-47, 1526-27.

Moreover, Kitchin gave her more than political support: he provided her money. Kitchin testified that Dean was facing financial problems in the spring of 1987, at a time when her nomination to be Assistant Secretary was being considered, and while Kitchin was seeking Mod Rehab units. Tr. 1443-44. On cross-examination, Dean admitted that she was in arrears with regard to credit card bills and had insufficient funds in the bank at this time. Tr. 2922.

Kitchin testified that Dean asked him for money and that he provided her with $4,000 as a loan. Tr. 1444-45. The check had "loan" written on the memo line. GX 203. Kitchin also testified that the $4,000 was never fully repaid and that he could not "show evidence or prove in any way that she paid me any money." Tr. 1445, 1480-83.

Dean admitted having received the $4,000, but claimed it had nothing to do with HUD. Tr. 2744. She testified that the $4,000 had been an advance by Kitchin to allow her to purchase antiques for him. Tr. 2741-43. According to Dean, Kitchin intended to buy a Washington apartment owned by her brother, and Kitchin had asked her to decorate the apartment for him. Id.

On direct examination, Dean testified that she attempted to repay this $4,000 on June 15, 1987. Tr. 2745-50. According to Dean, on June 15 she told Kitchin that "my brother was getting antsy about, you know, had he signed a contract" for the apartment. Tr. 2745. She asserted at trial -- and repeats in her brief on appeal (at 18, 31-32) -- that she was "shocked" when Kitchin responded that he had decided not to buy the apartment after all, and she immediately wrote him a check in repayment. Tr. 2746.

But Dean fails to inform this Court of a critical -- and uncontradicted -- fact that demonstrated to the jury that her story about the $4,000 was false. On cross-examination, and through a real estate agent called in rebuttal, the government established that Dean's brother had sold his apartment to someone else in April 1987 -- months prior to the supposed June 15, 1987 conversation

Dean described to the jury, in which she allegedly told Kitchin that her brother was "antsy" about when Kitchin was going to buy the apartment. Tr. 2835-38 (Dean); 3264-65 (Withington). This uncontradicted evidence completely undercut Dean's testimony.

Dean's testimony also ran counter to all the other evidence. The $4,000 check was marked "loan." While Kitchin testified on cross-examination that he may have wanted Dean to help him find furniture for her brother's apartment if he bought it, Tr. 1486, he reiterated on redirect that he had given her the $4,000 because "it was a period of time that she was going through these hearings, Senate confirmation hearings, and she expressed the need for some funds" because "she had some bills she wanted to get out of the way and I think it was a tough time for her." Tr. 1512-13. Moreover, Kitchin had no recollection of Dean writing him a check in a car to repay him $4,000, Tr. 1514, and Dean by her own admission did not have sufficient funds at that time to repay that amount of money. Tr. 2907.

The testimony of Jennings, Kitchin's business associate, confirmed the illicit nature of this payment. Jennings testified that while he and Kitchin were engaged in an unrelated conversation, Kitchin suddenly stated that Dean "was in a financial bind or something and that she had mentioned needing $4,000 for some furniture and he was thinking about giving her, lending her the money." Tr. 1521, 1537. Jennings warned Kitchin that it appeared "inappropriate" if not illegal for Kitchin to do this since "[y]ou do business with Debbie." Tr. 1521, 1540-41.

Jennings subsequently "got the impression that she wasn't ever going to pay him back." Tr. 1523, 1540.

Under cross-examination, Dean herself admitted not only that she was in financial arrears at the time of the $4,000 payment from Kitchin, but that she had bought a piano on credit for $4,500 only two weeks before, even though she did not have funds in her bank account to cover the purchase. Tr. 2834. Thus, the jury had a further basis for concluding that Dean was indeed buying "furniture" at this time, but for herself, not Kitchin; and that because she was in a "financial bind," she asked Kitchin for the money she needed.

b. Dean Agreed To, And Did, Advance Kitchin's Interests at HUD: Alternatively, Dean argues that there was no evidence that she did anything for Kitchin at HUD. Dean Br. 31. Dean testified that she "never discussed his [Kitchin's] having anything to do with mod rehab with him ever." Tr. 2761. She further testified that she first learned of Kitchin's interest in the Springwood/Cutlerwood projects from Demery when it came before the Mod Rehab panel. Tr. 2572-75. Dean also testified that, when she learned that Kitchin was involved with Mod Rehab, she reported this to Secretary Pierce and followed his instructions to recuse herself. Tr. 2759-60.

Dean's testimony that she did no HUD business with Kitchin was contradicted by numerous witnesses. Jennings, Kitchin's business associate, testified that Kitchin had obtained Mod Rehab units through Dean. Tr. 1524-25. Nettles-Hawkins, Dean's secretary,

testified that Kitchin would call Dean about Mod Rehab. Tr. 1551. Kitchin admitted that he had requested Mod Rehab units from Dean and that the units he requested were awarded; he also had obtained her assistance on other HUD matters. Tr. 1431, 1436-37, 1442-43. Indeed, the jury could have concluded that, as was the case with Sankin, Dean had preassigned blocks of units to Kitchin, which he then could sell to the highest bidder; this conclusion was supported by, among other things, the testimony of Claude Dorsey, the developer of the Springwood and Cutlerwood projects, who stated that Kitchin approached him and stated that he could procure Mod Rehab units for him. Tr. 1332-35.

The evidence also contradicts Dean's unsupported testimony that she recused herself with regard to the Springwood/Cutlerwood projects. Dean notes that Dorsey, the former HUD general counsel who sat on the Mod Rehab committee with Dean and Demery, testified that Demery spoke with regard to Springwood/Cutlerwood at the funding meeting. Dean Br. 17; Tr. 3176. But Dorsey did not testify that Dean recused herself from voting on these projects. Moreover, Dean ignores Demery's testimony, which was that Dean had brought this Mod Rehab request to his attention prior to the meeting with Dorsey. Tr. 1939. Demery testified that he and Dean would meet to make their funding choices before meeting together with Dorsey. Tr. 1937.

c. There was Ample Evidence of the Conspirators' Fraudulent Intent: There was more than sufficient evidence for the jury to conclude that Dean acted with the requisite criminal intent in

entering into this conspiracy and accepting the $4,000 gratuity. It obviously was improper for Dean to ask for and accept money from someone doing business with her at HUD. Beyond this, the government proved that Dean had been personally warned that she could not accept things of value from persons doing business with HUD. Tr. 286-87. Jennings' testimony established that Kitchin sought to conceal the transaction by hiding or destroying the original check when he received it back from the bank; Kitchin was unaware that the bank would have kept a copy. Tr. 1523-24, 1540-41. In addition, Dean testified falsely about the circumstances and alleged repayment of this $4,000, as well as her HUD dealings with Kitchen. All this, together with the factors of concealment set forth with regard to the prior conspiracies, more than permitted the jury to find that Dean acted with criminal intent.

C. There Was More Than Sufficient Evidence That Dean Perjured Herself and Covered Up Material Facts.

There was more than enough evidence to permit a reasonable jury to conclude that Dean's Senate testimony was knowingly false and misleading. Far from being ambiguous or out of context -- as Dean claims -- the charged testimony reflected a carefully crafted effort by Dean to falsify and conceal her role in the Mod Rehab program.

1. Counts Five and Six: These counts charged as perjurious, and as a scheme to conceal, Dean's Senate testimony that the Mod Rehab panel "goes solely on information provided by the Assistant Secretary of Housing." Below, Dean argued that her testimony was literally true, since allegedly "the evidence shows that [Demery]

was the sole presenter" at the Mod Rehab meetings. Dean Motion, 11/30/93 at 90-91 (emphasis added). But that argument was contrary to all the evidence, including the testimony of Dorsey, one of her own witnesses. The district court so held. Tr. 2059.

Rather than renew this argument, Dean now claims that "[n]o evidence shows that Ms. Dean's narration [regarding the Mod Rehab funding process] was not true as a matter of fact," and that her testimony "answered the question that was essentially asked -- whether she made these decisions alone." Dean Br. 38. But as previously shown, virtually all the evidence at trial -- apart from Dean's own testimony -- establishes that the Mod Rehab funding process did not follow the regularized process of review and evaluation by HUD field and regional offices that Dean described in her testimony.[12]

Indeed, Dean fails to note that one of her own witnesses -- former General Counsel Dorsey -- directly contradicted her Senate testimony that the Mod Rehab panel "goes solely on information provided by the Assistant Secretary," and that she had no role in the process other than sitting on that panel. Describing Dean's actions at the spring 1987 Mod Rehab funding meeting, Dorsey stated that Dean commented on the projects on a funding list by identifying "[b]asically who had called her or somebody who was interested in those specific projects." Tr. 3180, 3182.

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[12] Thus, here, as in all her perjury arguments, Dean's reliance on Bronston v. United States, 409 U.S. 352 (1962) is entirely misplaced, since her statements were false, not "literally true." Moreover, as to each statement, Dean also was convicted of illegal concealment in violation of §1001.

Likewise, former Assistant Secretary Demery testified that Dean made funding decisions regarding the Mod Rehab program. In late October or early November 1986, Dean gave Demery a list of nine public housing authorities and told Demery to fund these entities. Tr. 1892-93. After Secretary Pierce established the Mod Rehab committee, Dean and Demery would meet and discuss PHA requests that had come to the attention of either one of them; they would come to a consensus; and that consensus was presented by Demery to Dorsey, the third committee member. Tr. 1898, 1937.

Finally, as noted above, several former Acting Assistant Secretaries for Housing and/or Deputy Assistant Secretaries for Housing described Dean's central role in Mod Rehab funding and the lack of any selection criteria or participation by other HUD officers or employees. See pp. 4, 19-20 supra.

2. Counts Seven and Eight: Counts Seven and Eight charged as perjurious, and as a scheme to conceal, Dean's Senate testimony that she had "never given or approved or pushed or coerced anyone to help any developer" and that it was "a tremendous waste of time" for developers to meet with people at HUD. Hearing, GX 212 at 53. Dean suggests that there was no evidence that she favored a developer, as opposed to a PHA, and that in any event her testimony was accurate. Dean Br. 39.

In fact, there was overwhelming evidence that the developers whom Dean met with and favored would receive Mod Rehab funding, and that she would take whatever actions necessary to ensure that funding occurred. Testimony to this effect came from developers

who met with Dean, including Phil Winn, Berel Altman, and John Rosenthal, Tr. 1703, 1297-98, 695; consultants who met with Dean on behalf of their developer-clients, Tr. 553, 1104, 1432-33; and other political appointees who worked at HUD while defendant was Executive Assistant, see p. 4 supra. Her testimony was false.

3. Counts Nine and Ten: In these two counts, Dean was charged with perjury and concealment based on her repeated denials of any knowledge about a project referred to as Baltimore Uplift One. Dean claims first that her testimony was "plausible." Dean Br. 40-41. But that was a decision for the jury. Alternatively, she argues that there is no evidence that she heard the name "Baltimore Uplift One," even though she was personally involved in the project. In fact, as the district court held, "[t]here was testimony that that name was used and she was familiar with it although she's testifying sometime later after this had arisen." Tr. 2061.

Two witnesses, Golec and DeBartolomeis, testified that they spoke with Dean about Baltimore Uplift. Tr. 829, 1785 et seq. Dean's secretary testified that Dean spoke with the Baltimore Uplift developer, Bob Tuttle, and her calendars confirmed they met. Tr. 1556-57; GX 6z, 7dd. Indeed, Dean admitted that she spoke with Tuttle. Tr. 2803. She denied knowing, however, that he was talking about Baltimore Uplift. Tr. 3130.

In response to this extensive evidence, Dean does nothing more than cite her own testimony denying knowledge of Baltimore Uplift One, along with that of James Baugh, a former HUD official, who

testified that he was unfamiliar with any project called "Uplift." Tr. 2146, 2152. But that Baugh was unfamiliar with this name in no way contradicts the government's evidence that Dean knew the name.

4. Counts Eleven and Twelve: In these counts, Dean was charged with perjury and concealment based on her statement that no Mod Rehab units "unless they were sent directly by the Secretary, have ever gone to my home State of Maryland, simply for that reason -- that I sat on the panel." This testimony was contradicted by a number of witnesses, as the district court recognized. Tr. 2062.

The government introduced substantial evidence that proved that Dean participated in Mod Rehab funding allocations to projects in Maryland both before and during 1987. That testimony came from Barksdale (Tr. 468, 470), DeBartolomeis (Tr. 829-30), and Golec (Tr. 1781-84, 1791). As to the 1987 time period, the evidence demonstrated that Dean was involved in the Foxglenn project, located in Maryland, and the Eastern Avenue project, a portion of which was in Maryland. Tr. 558-59, 563 (Shelby); Tr. 1120-23 (Sankin). There was also testimony that Dean was interested in seeking political office in Maryland. Tr. 561, 564 (Shelby).

In response to this overwhelming evidence, Dean seeks to recast her Senate testimony. She states that the "plain meaning" of her statement was that she had no bias towards Maryland, not that she did not participate in decisions relating to Maryland-based applications. Dean Br. 42. Indeed, she goes so far as to state that she "never denied knowledge of or participation in Maryland allocations." Id. (emphasis added). But that is

precisely what her testimony did. That testimony was false, and knowingly so.

II. THE TRIAL COURT DID NOT ERR IN QUASHING DEAN'S SUBPOENAS TO PROXMIRE AND NAYLOR.

Dean argues that the court erred in granting the Senate Legal Counsel's motion to quash her subpoenas to former Senator Proxmire and former Senate Investigator Naylor because, she asserts, their testimony would have been relevant to the question of the materiality of her Senate testimony. Dean Br. 42-46. She fails to inform the Court, however, that at trial she expressly disclaimed any reliance on materiality as a justification for this testimony and instead argued that it was sought solely for its relevance to the question of intent:

> The testimony expected to be elicited from Mr. Proxmire is directly relevant to Miss Dean's intent when she was answering the questions. It is not relevant to materiality. It may be additionally relevant to materiality, but we don't subpoena him on that issue. Your Honor has already ruled on materiality. . . .

Tr. 2115.[13] Thus, even if it would have been error to have refused to permit these witnesses to testify on the question of materiality, Dean would have invited that error and would be precluded from asserting it on appeal. United States v. Mangieri, 694 F.2d 1270, 1280 (D.C. Cir. 1982); United States v. Thurman, 417 F.2d 752, 753 (D.C. Cir. 1969).[14]

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[13] See also Tr. 2118-19 ("Now, Judge, this is not bias. It's not materiality. It's circumstantial evidence of her intent on the precise day she answered the questions.")

[14] See, e.g., United States v. Arvanitis, 902 F.2d 489, 495 n.5 (7th Cir. 1990)(defendant estopped to complain of sentencing category imposed at his behest); United States v. De Parias, 805

In any event, these witnesses clearly would not have been relevant on the question of materiality. First, that issue was no longer open, having already been resolved by the court. See Tr. 1882. Second, Dean's theory of materiality is contrary to law. She claims that this testimony would have established that the Senate Banking Committee was not engaged in a proper legislative inquiry at the time it questioned Dean, so that Dean's answers were not "material" in a legal sense. See, e.g., United States v. Cross, 170 F. Supp. 303, 306 (D.D.C. 1959). But the charged testimony was given by Dean during her confirmation hearings, which indisputably were a proper legislative function of the Senate. See U.S. Const. Art. 2, Sec. 2, cl. 2.

There is also no merit to Dean's secondary argument, which is that the court erred in holding that the testimony sought was not relevant to the issue of intent. A trial court's determination of the relevance of evidence is reviewed only for an abuse of discretion, United States v. Akers, 702 F.2d 1145, 1149 (D.C. Cir. 1983); United States v. Carter, 522 F.2d 666, 685 (D.C. Cir. 1975), and there was no such abuse here. Dean argues that Proxmire's and Naylor's alleged knowledge of her role on the Mod Rehab panel would have supported the inference that Dean did not intend to mislead the Senate Banking Committee. Dean Br. 43-44. But as the court correctly held, such testimony simply would not have been

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F.2d 1447, 1451-52 n.1 (11th Cir. 1986) (defendant precluded from complaining about curtailment of cross-examination that defendant requested), cert. denied, 482 U.S. 916 (1987).

probative, because Proxmire and Naylor could not have "answer[ed] the question" of Dean's intent. Tr. 2127. Their testimony could only have been speculative. Id. The court further pointed out (id.) that

> [Dean was] free to testify herself and have others testify regarding evidence that would be material and relevant to her actions of intent, what she intended by her answers, but as to Senator Proxmire providing evidence material and favorable to the defense I do not see how that can be possible from the premises that have been suggested to the Court, the materiality having been decided by the Court, and motive and bias not being an issue for the jury to consider.

Indeed, even if Proxmire and Naylor had testified that Dean received congressional "input" regarding the Mod Rehab program, that testimony would have served only to highlight her perjury. In her Senate testimony, Dean was careful not to deny that she received "input" from various sources regarding Mod Rehab projects; she admitted for instance that PHAs and developers frequently came to HUD and that she regularly met with PHAs. Hearing, GX 212 at 52-53. But a major point of her testimony was that such contacts were "a tremendous waste of time" because "[t]hose funds go directly to the public housing authority." Id. Similarly, she testified that the funding process was a formal and regularized one, in which applications were rated and ranked by HUD regional offices, and then sent to the Assistant Secretary before being presented to the panel, which "goes solely on information provided by the Assistant Secretary for Housing." Id. Thus, the testimony Dean sought could not have aided her. See generally Akers, 702

F.2d at 1149 (relevance can be determined only by specific facts adduced at trial).[15]

III. THE TRIAL COURT PROPERLY DETERMINED THAT DEAN SUFFERED NO PREJUDICE FROM THE ALLEGED PROSECUTORIAL MISCONDUCT.

Dean contends she was deprived of a fair trial by several instances of alleged prosecutorial misconduct. Dean Br. at 46-57. But the district court held squarely to the contrary, finding that "... I do not believe there was any overwhelming failure by the government in its zealous efforts in this case that resulted in such prejudice to the defendant as would require a new trial." Tr. 2/14/94 at 31. In so holding, the court relied both upon the corrective actions it had taken during the trial and upon the relative unimportance of the challenged evidence when compared to the rest of the evidence in the case. Tr. 2/14/94 at 29-30.

Dean asserts, however, that the court reached this conclusion by erroneously "viewing each act of prosecutorial misconduct

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[15] Dean also argues the court erred in granting the Senate Legal Counsel's motion to quash her subpoena duces tecum. Tr. 2127-29. She concedes that the court properly determined that internal Senate notes and communications were protected under the Speech and Debate Clause, but nevertheless asserts that her convictions cannot stand because she was thereby deprived of evidence "critical" to her defense. Dean Br. at 45-46. But in fact, with the exception of these limited internal materials, the Senate did provide Dean access to all documents from her nomination hearing, as well as all files on Dean relating to the Mod Rehab hearings, and thereafter provided her copies of any documents she requested. Tr. 2113. She fails to explain how the only items withheld -- the internal materials -- were critical to her defense and accordingly fails to demonstrate any prejudice resulting from the trial court's alleged error. See United States v. North, 910 F.2d 843, 889 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). Indeed, like the testimony Dean sought from Proxmire and Naylor, these internal notes would have been neither admissible nor relevant.

individually" and "fail[ing] to consider the cumulative effect of such conduct." Dean Br. 56. Here again, the record contradicts Dean. In reaching its determination, the court expressly stated that the "[t]he real issue for the Court is whether or not the cumulative effect of multiple concerns and multiple corrections the Court gave the jury leads to an unfair trial for the defendant." Tr. 2/14/94 at 28 (emphasis added). The court's conclusion that the trial was fair is entitled to substantial deference. See United States v. Friedland, 660 F.2d 919, 929 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982).

Even apart from the factors cited by the court, the record as a whole shows that Dean received a fair trial in every respect. Contrary to the impression Dean seeks to create, the government not only provided her with extensive discovery far in advance of trial, but also sought to ensure a fair trial by making other advance disclosures. Thus, the government provided Dean a set of the government's proposed trial exhibits one month before trial (OIC letter, 8/9/93); it produced Jencks Act materials for all the government's witnesses no later than the first day of trial (Tr. 8, 10, 429), far in advance of the Act's requirements (18 U.S.C. § 3500); and, as the trial court noted, the government also exceeded its Giglio obligations by providing Dean with cross-referenced materials to assist cross-examination (Tr. 429-30).

Furthermore, the court carefully protected Dean's rights and repeatedly decided against the government on important issues. See, e.g., Tr. 3143-44 (restricting cross-examination of Dean

regarding her post-employment activities); Tr. 2957 (excluding government's charts from evidence). Dean was given extra time to prepare her defense both before and during trial. See, e.g., Tr. 6/9/93 at 19-20, Tr. 1422. And finally, the court afforded Dean the widest possible latitude in the presentation of her case. In particular, Dean's testimony was subject to no time limits and virtually no restrictions as to scope; and she was repeatedly successful in her attempts to put self-serving hearsay statements before the jury. See, e.g., Tr. 2575-79.

In short, the district court afforded Dean a fair trial. As the court held, the issues Dean raises do not provide a basis for a new trial either individually or cumulatively.[16]

A. Dean Was Not Prejudiced By The Alleged "Brady" Violations.

Dean contends she is entitled to reversal based upon the government's allegedly tardy disclosure of certain Brady material. Dean Br. 46-49. The government argued below that the items of evidence cited by Dean either were not in fact exculpatory or were more accurately described as Giglio material. See, e.g., Tr. 8/31/93 at 7-8, 12. But even assuming that this information did constitute Brady material, there were no Brady violations here as a matter of law, since in none of the alleged instances of tardy disclosure was Dean deprived of use of the exculpatory information. See United States v. Bishop, 890 F.2d 212, 218-19 (10th Cir. 1989)

[16] Dean's suggestion that the district court applied a lower standard of review because of the involvement of Independent Counsel is unfounded. The Independent Counsel also strongly denies her allegations that the experienced federal prosecutors involved in this case acted in bad faith.

("Brady is not violated when the Brady material is available to defendants during trial"), cert. denied, 493 U.S. 1092 (1990).

Late access to exculpatory information may entitle a defendant to a new trial only if she has been prejudiced. United States v. Paxson, 861 F.2d 730, 737-38 (D.C. Cir. 1988). Prejudice is measured by the likely impact on the judgment. A new trial is required only if the tardy disclosure "could 'in any reasonable likelihood have affected the judgment of the jury.'" Id. at 737 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). So long as defendant "had in fact received the evidence in time to make effective use of it," a new trial is not warranted. Paxson, 861 F.2d at 737.

Dean received the four items of evidence at issue in more than sufficient time to make effective use of each before the jury. With respect to the first three items -- the purported Brady statements by Shelby, Kitchin, and Pines (Dean Br. 47 n.27 & 48 n.30) -- the record shows that each statement was disclosed to Dean on August 20, 1993, leaving Dean ample time to make effective use of them at trial, as she in fact did.

Dean used the Shelby statement by bringing before the jury Shelby's testimony that Mitchell was paid a fee based upon a commitment made prior to Shelby's learning of Mitchell's relationship with Dean, Tr. 583, and that, so far as Shelby knew, Dean did not know that Mitchell received consulting fees in connection with HUD projects, Tr. 587, 599-600, 603. On this record, as the court concluded, Tr. 8/31/93 at 14 & Tr. 2/14/94 at

9, 30, it cannot be said that Dean was in any way prejudiced by any late access to this material.

Similarly, Kitchin's statement that he had not received special favors from Dean was available to Dean to impeach his testimony if necessary, although Dean had no need to use the statement because Kitchin repeated it in substance at trial. Tr. 1496-97. Dean also had the Pines statement available in ample time to make effective use of it. In fact, as of September 7, 1993 (nearly one month prior to commencement of Dean's case), Pines appeared on Dean's witness list as a potential witness (see Defendant's Potential Witness List, 9/7/93). Dean's failure to call Pines as a witness substantially undermines her claim that Pines's testimony would have been exculpatory.

The remaining alleged Brady violation cited by Dean involves the government's failure to segregate from the other documents provided to Dean in discovery two telephone message forms that she claims indicated that Mitchell had had contact with Lance Wilson, Dean's predecessor as Executive Assistant to the Secretary, in connection with the Arama project referred to in count one. Those messages were not in fact exculpatory.[17] But even assuming they were, no Brady violation occurred here in light of the fact that the government produced these documents to Dean sufficiently in

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[17] The Arama Mod Rehab units were not awarded until June 1984 -- after Wilson had left HUD and Dean had replaced him as Executive Assistant. See GX 27 & 28. Rather than suggesting that Wilson was responsible for awarding the Arama units, these notes reinforce the importance of Dean's role, and cast light on her phone call with Mitchell that she referenced in her letter to Nunn. Id.

advance of trial for defendant to make effective use of them. These documents were produced to Dean for her review on August 7, 1992, and she ordered copies of them shortly thereafter. The trial did not commence until over one year later, and at trial Dean did place the documents at issue in evidence and argued their significance to the jury. Tr. 3461-62, 3469-70.

Dean does not even attempt to show that she was unable to make effective use of these four items of evidence before the jury. Instead, she claims only that she suffered wasted money, time and effort. Dean Br. 49. Dean does not explain how earlier disclosure of the challenged four items would have saved her money, time or effort. But even assuming she had made such a showing, it would not amount to prejudice requiring a new trial under Paxson.[18]

Moreover, even if Dean had not had access to this information in sufficient time to make use of it, a new trial still would not be justified. In light of the relative insignificance of this evidence when measured against the evidence as a whole, it cannot be said that it "could 'in any reasonable likelihood have affected the judgment of the jury.'" See Paxson, 861 F.2d at 737.

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[18] Dean to the contrary, United States v. Bagley, 473 U.S. 667, 683 (1985), does not hold that wasted money, time and effort, standing alone, constitutes prejudice. Dean Br. 48 n.29 & 49. The portion of Bagley she cites did not constitute the opinion of the Court. Bagley, 473 U.S. at 668-69. More important, in the preceding section of the opinion, the Court explicitly equated prejudice with "undermine[d] confidence in the outcome of the trial." Id. at 678. Hence, prejudice includes an adverse impact on the preparation and presentation of a defendant's case only if that resulted in some adverse impact on the verdict.

B. Dean Was Not Prejudiced By The Sankin Receipts.

With regard to count two, the government introduced through Sankin fifteen credit card receipts related to meals and gifts. Because Sankin was a hostile witness, the government had not previewed each of the receipts with him prior to trial. Tr. 1200. On their face, however, the receipts either explicitly referred to Dean by name or position,[19] appeared to do so,[20] or otherwise appeared to be relevant to the case.[21] Indeed, Dean admitted that Sankin bought her meals and gifts. See, e.g., Tr. 2701-04.

The government initially sought the admission of the receipts one-by-one, in each case examining Sankin regarding his specific recollection of the events surrounding the creation of the receipt. The first of the receipts, GX 11c, was admitted even though Sankin, under questioning by the government, stated he was unable to recall which HUD officials he had entertained on the day of the receipt. Tr. 1143. The government continued to question Sankin on each receipt until the court expressed concern about the time being

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[19] See GX 11f ("Deborah"); 11g ("Exec Asst. to Sec."); 11j ("Debbie Dean"); 11k ("Exec. Asst."); 11l ("DD"); 11p ("Deb Dean"); 11u ("D. Dean"); 11w ("Deborah Dean"). During the course of reviewing the receipts, Sankin testified that "[t]he only executive assistant to the secretary who I knew was, was Deborah Dean." Tr. 1146.

[20] See GX 11m ("Dinner w/ Chief of Staff of HUD," chief of staff being another of Dean's titles as Executive Assistant to the Secretary, see Tr. 3112); and GX 11n ("Staff Asst. to the Sec. of HUD"); 11o ("Staff Asst. to the Sec. of HUD"); 11q ("Asst. to Sec."); and 11v ("Asst. Sec. of HUD"), where on at least one other receipt, Sankin referred to Dean as "D. Dean Asst. Sec. at HUD." See GX 11u.

[21] GX 11e (involving a luncheon meeting between Sankin and Shelby regarding a HUD project at issue in the case).

consumed by this lengthy examination. Tr. 1147. The government thereafter simply moved the remaining receipts into evidence as a group. Tr. 1151.

On cross-examination the next day, Sankin testified that he had told the government at the end of the previous day's testimony that many of the credit card receipts received into evidence did not relate to Dean. Tr. 1194-95. According to the prosecutor, however, what Sankin had said was that he could not recall the specific events surrounding any of the receipts or whether they involved Dean or not, even as to the receipts that bore her name. Tr. 1195-96, 1199.

As noted above, the government itself had elicited this very point with regard to GX 11c, which was nonetheless admitted. Moreover, the government had sought the admission of the remaining receipts as a group prior to this conversation with Sankin, and had done so only because the court expressed concern over delay. Nevertheless, the court admonished the government for not having brought Sankin's statement to the attention of the court and opposing counsel. Tr. 1199. At the same time, however, the court explicitly noted that the trial had been "remarkable for the excellence of trial counsel on both sides." Tr. 1205.

The court gave Dean a choice among (1) having the receipts stricken from evidence, (2) having a cautionary instruction read to the jury, or (3) simply leaving matters as they stood to enable defense counsel to cross-examine the witness and make him appear to have been untruthful. Tr. 1200-01. Defense counsel chose the

third option. Tr. 1202. When Dean later argued that the government's conduct entitled her to a new trial, the court held that any prejudice to defendant's case was adequately addressed by the court's action. Tr. 2/14/94 at 30-31.

In light of Dean's choice to cross-examine Sankin regarding his recollection of the receipts, Tr. 1187-1232, Dean was in no way prejudiced.[22] The fact that Dean was able to make effective use of the information at trial negates any possibility of prejudice and disposes of whatever Brady claim she might otherwise have had. See Paxson, 861 F.2d at 737-38; United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979) ("[a]s long as ultimate disclosure is made before it is too late for the defendant[] to make use of any benefits of the evidence, Due Process is satisfied"), cert. denied, 444 U.S. 1031 (1980).

In addition, as shown above, the benefits Sankin extended to Dean and her family went far beyond meals. Hence, this evidence was insignificant in the overall context of the trial.[23]

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[22] Contrary to Dean's contention, there was nothing improper about the government's subsequent reliance on the receipts. Dean Br. 49, 51 & n.33. At Dean's choice, the receipts remained in evidence and both sides were entitled to argue their positions regarding the appropriate inferences to be drawn from this evidence.

[23] Dean suggests in a footnote that the government had reason to believe that Thomas Demery and Ronald Reynolds had testified falsely. Dean Br. 55, n.39. Even were this true, it would not provide a basis for a new trial, as the district court held. Tr. 2/14/94 at 28-30. But the charge is not true, as the government demonstrated at length below. As to Demery, it is baseless to suggest that the government sought to conceal that Demery had been charged with perjury, see Dean Br. 55, n.39; not only was this a matter of public record, but Dean had been provided the indictments and all Demery's prior statements to the government. In fact, it

C. The Prosecutor's Closing Argument Did Not Prejudice Dean.

Dean argues she is entitled to reversal on the ground that the prosecutor repeatedly asserted to the jury in closing that Dean had lied. Dean Br. 51-57. This argument fails on multiple grounds. The law does not prohibit a prosecutor from asserting that a defendant lied; and that is particularly so, where as here, the defendant invites such a response by putting her veracity directly in issue in her opening and in her testimony. But even if the prosecutor's statements had been improper, they would have been cured by the court's instructions.

Dean's contention to the contrary notwithstanding, "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." United States v. Peterson, 808 F.2d 969, 977 (2d Cir. 1987). Such statements, the Second Circuit held, were appropriate where tied to pertinent evidence in the record and plainly directed toward the credibility of the witnesses. Id. at

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was the government that elicited that Demery had been convicted of obstruction of justice, Tr. 1891, and it was Dean who chose -- apparently for strategic reasons -- not to impeach Demery on the basis of his indictment or his prior statements. As to Reynolds, Dean failed to make any credible showing that his testimony was false; moreover, here again, Dean had a full opportunity to cross-examine Reynolds on the information she claimed proved the falsity of his testimony. See Gvt. Opp. 12/21/93, at 60-72.

977. Decisions from numerous other Circuits are to the same effect,[24] and the law in this Circuit is not to the contrary.[25]

Here, Dean did testify and was contradicted by numerous other witnesses. Thus, the prosecutor's subsequent characterization of Dean's testimony as lies was properly related to Dean's disputed credibility. Moreover, the prosecutor's references to Dean's testimony as a lie was made in the context of a discussion of the evidence. At no point did the prosecutor violate the injunction

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[24] See also Bradford v. Whitley, 953 F.2d 1008, 1013 (5th Cir.) (prosecutor's characterization of defendant as a "liar" did not so infect the trial with unfairness as to deny defendant due process), cert. denied, 113 S. Ct. 91 (1992); United States v. Holt, 817 F.2d 1264, 1276 n.10 (7th Cir. 1987) (prosecutor may properly refer to testimony as "lies" and witnesses as "liars"); United States v. Birges, 723 F.2d 666, 671-72 (9th Cir.) (prosecutor's comments that defendant's testimony contained numerous "lies" and was replete with "fabricat[ion]" and "imagination" not misconduct, "it [being] neither unusual nor improper for a prosecutor to voice doubt about the veracity of a defendant who has taken the stand"), cert. denied, 466 U.S. 943 (1984).

[25] This Circuit has long recognized the distinction between a prosecutor's expression of his personal opinion as to a witness's veracity and his argument based on the evidence that a witness's testimony is a lie. See Stewart v. United States, 247 F.2d 42, 45-46 (D.C. Cir. 1957). In Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968), for example, the prosecutor's transgression did not involve the use of the word "lie" per se in describing a defendant's testimony, but with the fact that that characterization of the testimony was an expression of the prosecutor's personal opinion and not an evaluation of the evidence. Id. at 657-58; see also United States v. Jones, 482 F.2d 747, 754 (D.C. Cir. 1973) (same); United States v. Dews, 417 F.2d 753, 755 (D.C. Cir. 1969) (same).

against expressing his personal opinion regarding Dean's credibility.[26]

In addition, the prosecutor's remarks must be viewed in the context of the entire trial. See United States v. Young, 470 U.S. 1, 11 (1985); Bradford, 953 F.2d at 1013. Dean testified for almost eight days, out of a total of twenty-three days of testimony for the entire trial. On such a record, it can hardly be argued that the prosecutor's focus on Dean's testimony was excessive. The court so held, noting that this was, "it had to be recognized, a perjury case, and it's very hard to argue a case of perjury unless you are allowed to refer to the defendant's testimony and have the jury consider what it's worth and taking all that into account." Tr. 2/14/94, at 31.

The prosecutor's remarks also were justified under the "invited response" rule. Young, 470 U.S. at 11. In evaluating the effect of a prosecutor's remarks on a jury's ability to judge the evidence fairly, a court "must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." Id. at 12. Thus, "if the prosecutor's remarks were 'invited,' and did no more than respond substantially

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[26] Dean cites two excerpts from the prosecutor's closing argument as examples of improper vouching. Dean Br. 53. Neither supports Dean's argument. In the first, the prosecutor's summation is taken entirely out of context; in context it is clear that the prosecutor is properly summarizing the many conflicts between Dean's testimony and the testimony of twelve government witnesses. See Tr. 3413-31. In the second, the prosecutor is simply pointing out to the jury an internal inconsistency in Dean's testimony, which the prosecutor properly asks the jury to reject based upon their common sense. Tr. 3429. See also Tr. 2868 (Dean).

in order to 'right the scale,' such comments would not warrant reversing a conviction." Id. at 12-13.

The rule of invited response is controlling here, for it was Dean who initially and repeatedly focused the case on her credibility. In its opening statement, the prosecution made no references to lies or lying, apart from characterizing the perjury and concealment counts of the indictment as essentially charging defendant with lying. Tr. 20, 48, 70-71, 73. Defense counsel not only did not object to the prosecutor's wholly proper characterization of the perjury and concealment charges, he embraced it. After summarizing the first four charges against his client, defense counsel stated: "and the rest of the counts basically charge lying. I think the Independent Counsel agree[s] that those are lying counts, that she lied." Tr. 79.

But defense counsel also went much further. During the course of his brief opening statement, defense counsel made six additional references to Dean and "lie" or "lying," including three flat statements that "she didn't lie."[27] More important, the defense immediately focused the case almost exclusively on Dean's credibility. Defense counsel's opening statement revolved around the theme that this trial would be the first time that Dean would have a chance to tell her story after years of investigation: "she's counting on you to give her the chance to explain to you for

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[27] See Tr. 77: "she didn't lie"; Tr. 78: "she didn't lie"; Tr. 78: "they say that she lied"; Tr. 80: "she didn't lie"; Tr. 81: "the Independent Counsel claims were lies"; Tr. 83: "she has been accused of lying." See also Tr. 76 (she was "honest with others").

the first time what she did, what she knew, who she did it with, and how she did it." Tr. 78 (emphasis added). And then, squarely placing Dean's credibility at this trial in issue, defense counsel stated:

> . . . and to show you how honest, how honest Ms. Dean's defense will be, we're going to tell you what she did and who she did it for and why she did it. And based upon those honest, true facts, we'll ask you to find that in everything she did, she didn't lie, she didn't cheat, and she didn't steal.

Tr. 80 (emphasis added).

This theme that Dean never lied to anyone, including the jury, was emphasized again at the end of Dean's redirect testimony. Dean's counsel asked:

> Q. And when you've been asked those questions [about HUD programs before the Senate], as well as the questions here, have you tried to answer the questions as honestly as you can?
>
> A. Yes. I, the one thing that is the saddest part and the worst part of this whole mess is that people from the very beginning just didn't tell the truth. If people had just gotten up and said what they did and take responsibility for it and tell the truth of exactly what was going on and exactly who was in charge of what and who was making the decisions and how everything was being run, none of this stuff would have happened.
>
> So when people started getting up and lying in front of Congress and lying to the press and trying to blame everything on everybody else is when all of this happened.
>
> And that's why I wanted to come here today. I've waited all these years to get someplace where you can tell the whole story and let normal people decide, not congressmen and journalists and independent counsels.
>
> Q. I have nothing further, Your Honor.

Tr. 3171 (emphasis added).

In its closing, the defense characterized the jury's task as "figur[ing] out who's lying and who's telling big lies and who's lying on purpose and who's mistaken . . . ." Tr. 3435-36. Defense counsel subsequently used the words "lie" or "lying" seven times in the following four pages of summation. Tr. 3436-39. Moreover, defense counsel twice characterized the government's case as "the big lie." Tr. 3436, 3439.

As this context shows, the prosecutor's comments could not, and did not, affect the fairness of Dean's trial, because they were made in response to defense counsel's own remarks in his opening statement and to Dean's testimony. See United States v. Miller, 895 F.2d 1431, 1437 (D.C. Cir. 1990). Having made her credibility the centerpiece of her defense, and having repeatedly asserted that she did not lie, Dean cannot credibly assert that it was impermissible for the government to respond. Indeed, it is significant that Dean did not object until the government's rebuttal, after Dean's counsel had himself repeatedly used the term "lie" or "lying" in his closing.[28] Tr. 3501.

Finally, even if the prosecution's response had been improper, any prejudice would have been eliminated by the prosecutor's and the Court's repeated reminders to the jury that they are the exclusive judges of the evidence and the credibility of the witnesses. Tr. 3374-75, 3413-14, 3531, 3535-37. On this very

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[28] Moreover, as the district court held, Dean's objection appeared to be not to the prosecutor's use of the word "lie," but to his alleged mischaracterization of Dean's testimony. Tr. 3592. Thus, the plain error standard of review should apply.

point, the court specifically instructed the jury that while the words "lie" and "lying" had been used in the closing arguments, the "issue is for you as the jury to make a decision keeping in mind the evidence in the case," since "[i]t's the evidence you have to focus on and not the statements of counsel, which I informed you previously are not evidence in the case." Tr. 3593-94. As the court held, this instruction cured any prejudice, and provided a further basis for denying Dean's motion for a new trial on this ground. Tr. 2/14/94, at 31.

IV. THE DISTRICT COURT PROPERLY APPLIED THE SENTENCING GUIDELINES.

A. Counts One and Two Were Subject To The Guidelines.

The district court held that the preponderance of the evidence showed that the conspiracies charged in counts one and two continued after November 1, 1987, because Dean's coconspirators Nunn (count one) and Sankin (count two) did not receive their final payments for having obtained the Mod Rehab units from Dean until after that date. Tr. 2/22/94 at 30-31. Accordingly, the court held, the Sentencing Guidelines apply to those counts. Tr. 2/22/94 at 29. The court's determination can be reversed only if it was clearly erroneous. United States v. Dale, 991 F.2d 819, 854 (D.C. Cir.), cert. denied, 114 S. Ct. 286 (1993).

Far from being clearly erroneous, the decision here follows directly from this Court's decisions in Dale and United States v. Milton, 8 F.3d 39 (D.C. Cir. 1993), upon which the district court explicitly relied. Tr. 2/22/94 at 30. Like the reimbursement payments made to the false claimants in Milton, the payments to

Nunn and Sankin were an integral part of the conspiracy, and were made pursuant to promises made at "the height of the illicit scheme." 8 F.3d at 48. The indictment alleged, and the proof showed, that it was a central objective of the conspiracies that Dean's coconspirators would be benefitted and enriched by the conspiracy, through receiving these payments from the developers for whom they had obtained Mod Rehab funds. See, e.g., count one ¶¶11, 20. Thus, the conspiracy was an ongoing one at least until this objective was completed. See Dale, 991 F.2d at 854.

In short, Dean errs in suggesting that the district court failed to distinguish between acts "in furtherance" of a conspiracy and events occurring "as [a] result" of a conspiracy. Dean Br. 58. The court drew precisely that distinction, holding that "Nunn and Sankin were co-conspirators ... who were to receive payments from their clients in exchange for their assistance using Dean and others in obtaining Mod Rehab units"; thus, receipt of those payments were "acts in furtherance of the conspiracy, within the scope of the conspiracy, and were necessary and natural consequences of the conspiracy." Tr. 2/22/94 at 31-32.

Dean's remaining arguments are equally ill-founded. She suggests that there is no evidence that she had an active role in the conspiracies after September 1987. Dean Br. 58. But in Dale and Milton, this Court flatly rejected the argument that the Guidelines apply only to conspirators who themselves committed overt acts after November 1, 1987. Instead, defendants have "the burden of proving that they affirmatively withdrew from the

conspiracy before that date ...." Dale, 991 F.2d at 854. Here, the district court noted that "defendant candidly states that there's no evidence that suggests she affirmatively withdrew from the conspiracy" when she left HUD. Tr. 2/22/94 at 31.

Similarly, there is no basis for the suggestion that the payments to Dean's coconspirators were the result of "independent acts of the PHAs competitively selecting their clients." Dean Br. 58. This argument ignores the district court's earlier finding that "[t]he evidence [at trial] shows, I think in the light most favorable to the government, the awards of these units to the respective Housing Authority were framed in such a way they would of necessity have to go to a particular developer that these consultants were representing." Tr. 2048.

B. The Upward Departure Was Proper.

With regard to counts one and two, the district court held that the applicable Sentencing Guideline was that for fraud or deceit, U.S.S.G. §2F1.1 (1990), which resulted in a total offense level of 10 before any departures.[29] Tr. 2/23/94 at 99. Dean makes no serious challenge to this calculation.[30] She claims,

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[29] Section 2F1.1 provides for a base offense level of 6. Applying the specific offense characteristics of that Guideline, §2F1.1(b)(2)(A), the court imposed a 2-level increase for "more than minimal planning." Tr. 2/23/94 at 99. The court then imposed a further 2-level increase under §3B1.3 because Dean "abused a position of public trust in a manner that significantly facilitated the commission and concealment of the offense ...." Id.

[30] While Dean states in text that level 10 was "the appropriate offense level," in a footnote she appears to challenge the court's 2-level increase for "more than minimal planning" on the ground that there was no more planning than is "typical for commission of the offense in a simple form." Dean Br. 59 & n.43

however, that the court erred by thereafter imposing an upward departure, for an offense level of 16.

This claim is subject to a two-step analysis that imposes an extremely narrow scope of review. United States v. Root, 12 F.3d 1116, 1120 (D.C. Cir. 1994). The first step of that analysis itself has two parts: the Court considers "whether the District Court's grounds for departure 'are, as a matter of law, of a kind or degree that may appropriately be relied upon to justify departure,'" and then "'whether the facts supporting the [court's] reasoning are clearly erroneous.'" Id. Under the second step of the analysis, the Court assesses "the reasonableness of the degree of the departure ... under the arbitrary and capricious standard." Id.

Dean's arguments do not satisfy either step of this analysis. At the outset, she fails to show why, "as a matter of law," the grounds for departure could not be appropriately relied upon by the court. The court first determined that an upward departure was called for by Application Note 9 of the fraud Guideline, which states:

> Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted. Examples may include the following: The offense caused a loss of confidence in an important institution.

(citing §1B1.1, note 1(f)). Dean misreads the Guidelines. The complex and multi-year conspiracies here on their face involved more than the planning typical for the commission of simple fraud. See §2F1.1(b)(2)(A).

Tr. 2/25/94 at 6. The court found that "[i]n this case, it is evident that defendant's conduct along with others at HUD caused a major scandal that certainly eroded the public confidence in HUD, if not in the federal government." Id. The court held that "this conduct of the defendant's was intentional and serious." Id.

Based on this, the court imposed an 8-level upward adjustment, minus 2 levels to take into account the increase for abuse of position of trust already included in the base level calculation. It found that 8 levels was the appropriate adjustment because the Sentencing Commission, in both the 1990 and subsequent Guidelines, had selected that figure as an appropriate increase in a variety of related offenses where the defendant had held a high-level decisionmaking or sensitive position. Tr. 2/25/94 at 8. In this regard, the court looked to, among other things, the 1990 Guidelines for gratuity offenses, §2C1.2(b)(2)(B); in fact, the court noted, the Probation Office originally had found this to be the applicable Guideline. Id.[31] The court also observed that the same 8-level increase is found in §2C1.7 of the current Guidelines, which governs conspiracies to defraud the United States. Id. at 6-8.[32]

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[31] As is clear from the court's other statements, the transcript of the sentencing contains a typographical error where it quotes the court as stating that the gratuity Guideline did not provide for such an 8-level increase. Tr. 2/25/94 at 8.

[32] But for ex post facto concerns, the court stated, this new Guideline would have been exactly applicable to Dean, and would have subjected her as well to a much higher base level. Id. Section 2C1.7 did provide further guidance, however, as to the Sentencing Commission's consistent adoption of this 8-level adjustment for officials holding positions like Dean's. Id.

Dean argues only that the court should not have looked to the gratuity Guideline for guidance, since it later stated that it did not "see greed as an underlying motivation" for Dean's actions. Dean Br. 59. As an initial matter, this argument is a complete non sequitur; a public official's acceptance of a gratuity is unlawful even if it was not motivated by "greed." Dean, moreover, was convicted of a gratuity offense, and it was that Guideline that the Probation Office originally considered appropriate. In any event, the court looked to the gratuity Guideline, among other Guidelines, to determine what adjustment the Sentencing Commission considered appropriate for public officials like Dean.

Similarly, Dean fails to show in what manner the facts supporting the court's reasoning were "clearly erroneous." She argues that "the conduct for which Ms. Dean was being held accountable had nothing to do with her conduct but instead reflected the Court's concern with the sorry state of affairs at HUD during the relevant time frame." Dean Br. 60. This is incorrect. To be sure, the court noted that the government also had convicted a number of other former high-ranking HUD officials. Tr. 2/25/94 at 18-20. But, as the court emphasized, "[t]hat does not excuse Ms. Dean for her conduct ...." Id. at 24. The court explicitly sentenced Dean for her own actions and her failure to fulfill "her obligations and responsibilities as a high government official"; indeed, the court noted that Dean believed that she was "essentially the head person there [at HUD] to make these decisions

and to influence the others and to run the office as she wished and for which she must be held accountable." Id. at 25.

Finally, although Dean contends that the upward departure was "manifestly harsh," Dean Br. 61 n. 44, that departure was anything but arbitrary and capricious, which is the standard of review established by Root. To the contrary, the departure was the result of a careful analysis both of the facts of this case and the language of the Guidelines.

CONCLUSION

For the foregoing reasons, the convictions should be affirmed.

Respectfully submitted,

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