IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	CR 92-181-TFH
DEBORAH GORE DEAN	)	

DEFENDANT DEBORAH GORE DEAN'S MEMORANDUM IN OPPOSITION TO THE GOVERNMENT'S MOTION TO STRIKE DEFENDANT DEAN'S MOTION FOR DISMISSAL OF THE SUPERSEDING INDICTMENT OR FOR A NEW TRIAL, AND TO STRIKE THE MEMORANDUM IN SUPPORT

Rather than respond to the merits of defendant Deborah Gore Dean's Motion for Dismissal of the Superseding Indictment or, in the Alternative, for a New Trial ("Defendant's Motion"), Independent Counsel has moved to strike Defendant's Motion "on the ground that the motion is frivolous because Dean is barred from raising at this stage arguments she has previously raised or has waived by not previously raising them." Government's Motion to Strike ("Government's Motion") at 1-2.[1]

[1] Independent Counsel has also moved to strike the Memorandum in Support of Defendant's Motion because it exceeds the page limitation prescribed by Local Rule 108(e) and was filed without prior approval of the Court. See Government's Motion at 6-8.

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Independent Counsel is correct that Defendant did not seek the Court's formal approval before filing its 107-page Memorandum in Support, but the Government's motion to strike should nevertheless be denied. Defendant's counsel's failure to seek the Court's formal permission was an unfortunate oversight, and, for this, we offer our sincere apologies to the Court. However, Independent Counsel can hardly claim prejudice or surprise by the length of Defendant's Memorandum in Support. First, Independent Counsel was given ample notice that Defendant was preparing a comprehensive misconduct motion. In fact, by letter and attachment dated December 27, 1996, Defendant's counsel discussed its concerns about some of the new instances of misconduct that had been uncovered since Defendant's original new trial motion and provided Independent Counsel with a copy of one example of newly uncovered evidence -- Andrew Sankin's Harvard Business School application. Moreover, by letter and attachment dated January 3, 1997 (over a month before Defendant filed her motion), Defendant's counsel provided Independent Counsel with a detailed list of the newly discovered incidents of prosecutorial misconduct which ultimately formed the basis of Defendant's Motion. Second, the sheer scope and complexity of the issues surrounding Independent Counsel's misconduct, as well as the need to place the relevant events in the proper overall context of the proceedings, explains the memorandum's length. (In fact, Defendant's counsel went through great pains to make the memorandum as short as it is.) Third, it is extremely ironic that Independent Counsel would argue that it should not be required to expend its resources responding to Defendant's "inflated memorandum," Government's Motion at 7, when it is Independent Counsel's newly discovered misconduct which necessitated Defendant's Motion in the first place. Fundamental fairness and the integrity of the criminal judicial process require that Independent Counsel respond. Finally, as noted below, Defendant does not oppose Independent Counsel's motion to extend its time to respond to Defendant's Motion. For these reasons, the Government's motion to strike Defendant's Memorandum in Support should be denied. If the Court is so inclined to formally correct Defendant's omission, Defendant has attached an appropriate motion and order for the Court's review and approval. See Attachments A and B.

As noted above, in a separate filing served concurrently with its motion to strike, Independent Counsel has moved to extend its time to respond to Defendant's Motion, if necessary, until thirty days after the Court rules on the Government's

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The Government's Motion is strong on rhetoric, weak on substance, and, most of all, patently disingenuous. As Independent Counsel well knows, Defendant's Motion is far from frivolous. The motion specifically identifies seventeen newly discovered prosecutorial abuses which, by definition, could not previously have been raised in that they collectively reflect an unprecedented pattern of intentional and affirmative acts of concealment and misleading conduct by Independent Counsel continuing well beyond Ms. Dean's trial. That Independent Counsel is asserting a waiver in such circumstances is truly extraordinary.

Curiously, Independent Counsel offers no procedural authority for its novel submission. To Defendant's knowledge, there exists no such authority for "striking" Defendant's Motion, and, on this basis alone, the Government's Motion should be denied. Furthermore, the Government's Motion, when stripped to its essence, is simply a veiled attempt to avoid addressing the concededly extensive list of newly discovered prosecutorial abuses painstakingly described in Defendant's Motion. Independent Counsel may indeed want to hide from its predecessor's egregious derelictions of duty with respect to Ms.

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motion to strike. Defendant does not oppose the Government's motion for an extension.

Dean's prosecution, but this Court, now on the eve of resentencing, should and -- consistent with its mandate to ensure "the just determination of every criminal proceeding"[2] -- must address the merits of Defendant's Motion. Accordingly, the Government's Motion should be denied.

I. THE COURT HAS INHERENT SUPERVISORY AUTHORITY TO GRANT DEFENDANT'S MOTION

Independent Counsel appears to argue that the Court lacks the authority at this juncture in the proceedings to grant the relief sought by Defendant in her motion. See Government's Motion at 1 n.1 and accompanying text. Independent Counsel is simply wrong. Regardless of whether or not the bases for Defendant's Motion can be neatly packaged under heretofore established notions of "newly discovered evidence,"[3] this Court

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[2] See Fed. R. Crim. P. 2.

[3] Although not dispositive of Defendant's Motion, as discussed in Section II below, the bulk of the evidence proffered in Defendant's Motion should fairly be characterized as newly discovered evidence for the following common sense reason: most of Independent Counsel's systematic Brady, Giglio, and Jencks violations - by their very nature -- could not have been, and were not, discovered by Defendant until well after trial. To the extent certain abuses were discovered by November 1993, they were raised in Defendant's initial new trial motion. But, unbeknownst to Defendant and the Court at the time, these initially discovered abuses were just the tip of the iceberg. Following exhaustive examination of the record over a period of many months, further abuses came to light. There could be additional instances of misconduct that have yet to be, and probably will never be, uncovered. Under such circumstances, it would be a

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has both the inherent authority and the moral obligation, prior to resentencing, to examine the propriety of Ms. Dean's conviction in light of the newly discovered abuses and other evidence set forth in Defendant's Motion, bearing in mind also the Court of Appeal's findings regarding the insufficiency of the evidence on several of the remaining "skinnied-down" counts in the Superseding Indictment.[4] See Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 145-46 (1919) ("[i]t is one of the equitable powers, inherent in every court of justice

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grave injustice to allow Independent Counsel to come into this Court and use its own misconduct as a "sword" by arguing that the issues raised in Defendant's Motion are not "newly discovered," or should have been discovered earlier, when it was Independent Counsel that flagrantly concealed, failed to provide, or otherwise manipulated crucial exculpatory and impeachment evidence -- evidence which Independent Counsel had a constitutional and statutory duty to identify and provide to Defendant -- and then has the audacity to assert that sole defense counsel, in the midst of a hectic trial, should have somehow contemporaneously uncovered Independent Counsel's pervasive misdeeds. Independent Counsel's absurd position should not be countenanced by the Court.

[4] Of course, as suggested in Defendant's Motion, the Court should examine the newly discovered abuses and other evidence in conjunction with previously identified abuses, which collectively establish an unparalleled pattern of prosecutorial misconduct tainting virtually every aspect of the trial process in this case. While the Court earlier observed that it was virtually impossible to quantify the cumulative effect of the then-identified prosecutorial abuses on Defendant's ability to defend herself, the Court must now consider the cumulative impact of even more instances of prosecutorial abuse balanced against far less evidence of Defendant's guilt in light of the Court of Appeals' findings.

so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process"); United States v. Broadus, 664 F. Supp. 592, 596 (D.D.C. 1987) ("the rules of criminal procedure . . . do[] not set outer limits on the power of a Court having jurisdiction over a case to do justice and to safeguard the integrity of the criminal process").

Consistent with its duty under Rule 2 of the Federal Rules of Criminal Procedure "to provide for the just determination of every criminal proceeding,"[5] this Court "has inherent power to evaluate the sufficiency of the evidence supporting conviction at any time while its jurisdiction over the case continues." United States v. Broadus, 664 F. Supp. 592, 598 (D.D.C. 1987) (emphasis supplied). In Broadus, Judge Richey granted defendant's untimely motion for judgment of acquittal, despite the government's strenuous argument that the seven-day time limitation for filing of motions for judgment of acquittal, see Fed. R. Crim. P.

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[5] Rule 2 of the Federal Rules of Criminal Procedure, which sets forth the "Purpose and Construction" of the criminal rules, states:

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

29(c), acts as a jurisdictional bar against late-filed motions. Id. at 594-595.

In support of its asserted authority, the Broadus court relied on a considerable line of precedent culminating in the United States Supreme Court's decision in United States v. Gaddis, 424 U.S. 544 (1976), which "recognize[d] a Court's responsibility to ensure that the evidence supports the jury's verdict, regardless of whether the defendant has asked the Court to undertake the inquiry." Broadus, 664 F. Supp. at 595.[6] The Broadus court specifically noted that several circuit courts of appeals that had recently addressed the issue have followed the Supreme Court's reasoning in Gaddis. See, e.g., United States v.

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[6] The Broadus court also had pending before it a timely filed new trial motion. In granting judgment of acquittal and thus failing to reach the merits of the new trial motion, the court reasoned:

> In United States v. Gaddis, the Supreme Court stated that a trial court confronted with a motion for a new trial is not concerned with grounds for a new trial alone. Rather, it must weigh the sufficiency of the evidence against a defendant before deciding the defendant's motion for a new trial, and, if the evidence does not support the verdict of guilty, set aside that verdict.

Broadus, 664 F. Supp. at 595 (citing Gaddis, 424 U.S. at 549). Similarly, it is incumbent on the Court here to look anew at the sufficiency of the evidence supporting Defendant's conviction -- in a substantially diminished case following the Court of Appeals' rulings -- in light of the totality of unrebutted prosecutorial misconduct which tainted nearly every aspect of the Government's evidence presented at trial.

Giampa, 758 F. 2d 928, 936 n.1 (3d Cir. 1985) (while setting a time limit for filing motions for judgment of acquittal, Rule 29(c) "does not address the court's inherent power to grant such a judgment"); Arizona v. Manypenny, 672 F.2d 761, 764-66 (9th Cir.) (observing that "wide latitude is reposed in the district court to carry out successfully its mandate to effectuate, as far as possible, the speedy and orderly administration of justice," the court held that a district court has inherent power to grant a judgment of acquittal at any time during its retention of jurisdiction over a case), cert. denied, 459 U.S. 850 (1982).[7]

Following a careful review of "every argument advanced by each party" and "extensive research of its own," 664 F. Supp. at 595, the Broadus court concluded that "a court's inherent powers to supervise the litigation before it, and to do justice through that supervision, are extremely broad." Id. at 598 n.7. Under the facts presented in Broadus, the district court held that this broad supervisory authority included the power to enter a judgment of acquittal in the absence of a timely motion. Id. at 595.

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[7]. The Broadus court also cited with approval the Fifth Circuit's pre-Gaddis opinion in Ansley v. United States, 135 F.2d 207, 208 (5th Cir. 1943), wherein the appellate court observed that a motion to set aside a guilty verdict "can and should be raised by the Court of its own motion, if necessary to prevent a miscarriage of justice." Broadus, 664 F. Supp. at 596 n.5.

It is clear from the Broadus decision and the authorities cited therein that this Court has the inherent authority to entertain Defendant's Motion, and, as amply demonstrated in the Memorandum in Support of Defendant's Motion, the interests of justice demand that the Court exercise such authority in this case. The pervasive pattern of prosecutorial misconduct in this case, which impeded Defendant's ability to defend herself and properly cross examine and impeach witnesses called to testify against her, clearly affects the sufficiency of the evidence. Following the Supreme Court's denial of Defendant's Petition for Certiorari on March 18, 1996 and issuance of the mandate on April 17, 1996, this Court once again obtained jurisdiction over this matter and will soon be faced with Ms. Dean's resentencing in light of the Court of Appeals' findings. Thus, the jurisdictional touchstone established by Broadus has been met, and Defendant's Motion may properly be heard by the Court.

II. DESPITE INDEPENDENT COUNSEL'S BALD ASSERTIONS TO THE CONTRARY, THE BULK OF THE ABUSES AND OTHER EVIDENCE IDENTIFIED IN DEFENDANT'S MOTION WAS NOT AND, FOR PRACTICAL PURPOSES, COULD NOT HAVE BEEN OFFERED BY DEFENDANT IN EARLIER PROCEEDINGS

As demonstrated above, Defendant need not package as "newly discovered evidence" each and every issue raised in its motion if the Court determines that the interests of justice otherwise demand that the Court hear the merits of the motion. Nevertheless, given that the Government's Motion is built almost

exclusively upon the misleading assertion that Defendant's Motion "is not based on any additional allegedly newly discovered evidence," Government's Motion at 2, Defendant feels compelled to respond.[8]

Section A below addresses Independent Counsel's claim that Defendant's Motion is principally a recycling of arguments previously rejected by the courts. It shows that such a claim is not only meritless, but itself involves an effort to mislead the Court concerning the true nature of the issues Independent Counsel cites.

Section B below presents one example of the newly discovered matters, which pointedly illustrates the fact that in this case

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[8] Although the case law demonstrates that the meaning of the term "newly discovered evidence" is far from self-evident and may not even apply in any meaningful way to cases of pervasive prosecutorial misconduct, see supra note 3, Independent Counsel makes no attempt in its motion to define the term, but rather relies on meaningless platitudes such as the following: "Arguments that have either already been raised and rejected or that could have been raised in prior proceedings simply cannot be 'newly discovered' evidence." Government's Motion at 6. Independent Counsel's failure even to define the purported basis of its motion to strike should alone result in its denial.

Moreover, Independent Counsel should not be heard to argue that, because it successfully misled the Court when the Court previously addressed Defendant's allegations of prosecutorial abuse, the matter may not be further reviewed. The matter warrants further review both because Defendant has uncovered additional instances of misconduct and because, as a result, it is now apparent that the earlier outcome was influenced by Independent Counsel's misleading actions.

Independent Counsel recognized no obligation whatsoever to seek the truth.

A. Independent Counsel's Claims That Defendant's Motion Principally Involves Restatement of Arguments Previously Rejected

The Defendant has set out in note 6 of her Memorandum in Support a summary of seventeen newly discovered instances of prosecutorial abuse. Defendant maintains that these matters exceed in scope the previously identified abuses. In any case, the cumulative effect of the newly identified abuses and previously identified abuses are far greater than the cumulative effect that the Court previously considered.

Independent Counsel refuses to discuss any of the newly raised matters, notwithstanding Independent Counsel's obligation, as seeker of truth, to accept responsibility for its actions. Instead, it seeks to create the impression that Defendant's Motion principally asserts issues previously addressed.

Arguing that "recycled contentions abound in the [Defendant's] motion," Independent Counsel cites six examples that it purports are mere restatements of prior contentions. Government's Motion at 4. Even if it were true that all six examples in fact merely restated prior contentions, these matters would warrant the Court's further consideration in light of the cumulative impact of the Government's additional abuses. But

Independent Counsel's claim is manifestly untrue. Almost all of the cited examples involve situations where Independent Counsel compounded its misconduct by misleading the courts in attempting to defend its actions.

First, Independent Counsel points to the issue of the Mitchell message slips and the failure to segregate those message slips or confront Barksdale with the information contained in them. The issue raised in Defendant's Motion with respect to the message slips is not "recycled." Though having an obligation to truthfully advise the Court as to why it failed to make a Brady disclosure of the message slips, Independent Counsel represented to this Court and the Court of Appeals that its attorneys believed that the message slips were not exculpatory and were in fact incriminating. Apart from the facial implausibility of this claim, the very fact that Independent Counsel failed to confront Barksdale with the information demonstrates the falsity of the representations as to why Independent Counsel failed to make a Brady disclosure of the messages.

Second, Independent Counsel cites the memorandum referring to "the contact at HUD." Government's Motion at 4. This matter was raised in the new motion for the following reason. In defending its efforts to lead the jury to believe that the reference to "the contact at HUD" was a reference to Defendant, notwithstanding Richard Shelby's statements to the contrary,

Independent Counsel asserted orally and in writing that there were no documents reflecting Shelby's contacts with Silvio DeBartolomeis. In fact, such documents did exist and Independent Counsel surely knew they existed. But Independent Counsel failed to make a Brady disclosure of the documents. Further, as part of a calculated effort to mislead the Court and the jury, Independent Counsel asked Shelby to review documents the night before he testified to refresh his recollection concerning whom he dealt with at HUD on Park Towers; however, Independent Counsel withheld the documents referencing DeBartolomeis from those presented for Shelby's review. Independent Counsel then elicited testimony from Shelby that the documents he reviewed to refresh his recollection did not mention DeBartolomeis. Memorandum in Support at 53-56.

Third, Independent Counsel cites the "faxed rapid reply." Government's Motion at 4. This matter is being raised because, in previously defending itself against Defendant's claim that it had attempted to lead the jury to believe that Dean provided Shelby the document, while knowing that was not true and while failing to make a Brady disclosure of the statements indicating that it was not true, Independent Counsel represented to this Court that it had not intended to lead the jury to believe that Dean provided Shelby the document. At the same time that the Independent Counsel was making this representation to the Court,

it was leading the probation officer to believe that Dean did provide the document to Shelby. Memorandum in Support at 57-60.

Fourth, Independent Counsel cites certain "statements to the Metro Dade Housing Authority." Government's Motion at 4. Apparently, Independent Counsel is referring to the prosecutor's statements in closing argument asserting that there was no Dade County letter request pending when Dade County was allocated 203 mod rehab units in April 1987 and that defense witness J. Michael Dorsey had stated that Defendant had spoken on behalf of the Dade County request at issue in Counts 3 and 4. Memorandum in Support at 104-05. In this instance, Independent Counsel is correct that Defendant was principally restating a matter raised previously, as Defendant expressly acknowledged in advising the Court that it must consider the cumulative effect of newly and previously identified abuses. Restatement was particularly warranted in this instance, however, to highlight the Court of Appeals' reliance that, as the prosecutor falsely stated in closing argument, there was no Dade County letter request pending at the time of the funding decision. See id. at 91.

Fifth, Independent Counsel cites the issue of the use of the Sankin credit card receipts. Government's Motion at 4. However, Defendant's memorandum raised several points regarding these receipts and Independent Counsel's representations to the Court in defense of its actions. Certain receipts did not identify

Defendant by name or position, including some that used the term "staff assistant," an official HUD position two levels below that of Defendant's. Independent Counsel acknowledged it introduced such receipts into evidence with the intent of leading the jury to believe they applied to Defendant when, in fact, it had no evidence that they did. This tactic improperly shifted the burden to Defendant to prove that the receipts did not refer to her. Apart from referring to a different position than Defendant's, one of the staff assistant receipts (Gov. Exh. 11o) was also explicitly contradicted by Defendant's calendars and her own receipts, and it can fairly be said that Independent Counsel knew with moral certainty that the receipt did not apply to Defendant. This was only one of a number of receipts that Independent Counsel had reason to know "were definitely not related to Deborah Dean" long before Andrew Sankin ever made his off-the-stand statement.

When this matter was previously raised, Independent Counsel had an absolute obligation to truthfully advise the Court regarding its actions. Instead, in writing and orally in this Court, and in writing in the Court of Appeals, Independent Counsel impliedly represented that it believed that all the receipts probably applied to Defendant, including Government Exhibit 11o and certain other receipts that no reasonable person could have believed applied to Defendant. In the Supreme Court,

Independent Counsel defended its actions by representing to the Court that all the receipts, including 11o and three other receipts that did not identify Defendant by name or position, in fact "referenced [Dean] by name or title." Memorandum in Support at 67-77.

Sixth, Independent Counsel cites as an example of a recycled contention "the alleged perjury of Thomas T. Demery and Ronald L. Reynolds." Defendant's memorandum shows that, despite Independent Counsel's obligation to truthfully reveal to the Court whether Demery had lied and whether trial counsel knew, Independent Counsel impliedly represented that neither Demery nor trial counsel knew that his testimony was false. After this Court rejected the Government's position out of hand, Independent Counsel still impliedly represented to the Court of Appeals and the Supreme Court that Demery had not lied. Finally, in seeking a downward departure in Demery's own case, Independent Counsel led the court in that case to believe Demery had given complete and truthful testimony, failing to advise the court either that an issue had been raised about the truthfulness of Demery's testimony or that this Court had effectively held that Demery had committed perjury. See Memorandum in Support at 93-104.[9]

[9] The memorandum's discussion of Reynolds does not address Independent Counsel's obligation to determine whether Reynolds

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B. The Newly-Discovered Matters that Independent Counsel Refuses to Address

Discussing any number of the newly discovered matters in detail would unnecessarily duplicate the discussion in Defendant's Memorandum in Support. However, there is one matter that deserves some attention here because it both demonstrates the falsity of Independent Counsel's claims that it did not intentionally violate its Brady obligations and illustrates the pervasiveness of Independent Counsel's pattern -most evident with regard to Barksdale and Demery -- of refusing to confront witnesses with information indicating that their contemplated sworn testimony was false.

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testified falsely and to acknowledge to the Court that such testimony was false. It warrants noting, however, that, notwithstanding this Court's harsh criticism of the use of Reynolds, Independent Counsel stated to the Court of Appeals that "Dean failed to make any credible showing that [Reynolds'] testimony was false." Gov. App. Br. at 51 n.23. This was an implied representation that Independent Counsel did not believe such testimony was false.

In the Supreme Court, Independent Counsel represented that there was nothing impermissible in presenting Reynolds' testimony notwithstanding that it was contradicted by calendars and other evidence. However, Independent Counsel further argued that Reynolds' testimony "that petitioner and Mitchell had lunch on certain occasions, and thus had a personal relationship," was merely cumulative of other evidence of the closeness of her relationship to Mitchell. Opp. Cert. at 14-15. This characterization of the testimony, obscuring that Reynolds' testimony had in fact been used almost entirely to show that Defendant committed perjury in this case.

In developing the theme that concealment of certain individuals' roles regarding various projects was evidence of conspiracy, Independent Counsel intended to lead the jury and the courts to believe that Richard Shelby had concealed John Mitchell's involvement with Park Towers from Eli Feinberg and Martin Fine. The key testimony in this regard was that of Feinberg, who testified on September 17, 1993 that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Feinberg on May 18, 1992, Shelby, already under a grant of immunity, had twice told representatives of Independent Counsel that he had told Feinberg about Mitchell's involvement with Park Towers and that he (Shelby) assumed that Feinberg had told Martin Fine. In the telephonic interview of May 18, 1992, Feinberg stated that he was not aware of Mitchell's involvement in Park Towers. Feinberg's interview report indicates that he was not at that time advised by Independent Counsel that Shelby had explicitly contradicted Feinberg's statement.

In an interview on May 19, 1992, the day following Independent Counsel's telephonic interview of Feinberg, Shelby was apparently advised by Independent Counsel that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of

Feinberg's role in determining Mitchell's fee. Even though there were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement with the Park Towers project, so far as Feinberg's Jencks materials reveal, Independent Counsel never confronted Feinberg with Shelby's statements. And, though Shelby's three statements specifically contradicted an important point Independent Counsel intended to make at trial, Independent Counsel did not include reference to these statements in its belated August 20, 1993 Brady letter.

At trial, after leading the defense to believe Shelby would not be called, Independent Counsel called Shelby to the stand out of order and ahead of Feinberg. This occurred just three days after Independent Counsel turned over to the defense Shelby's Jencks materials that contained the three statements by Shelby that Feinberg was aware of Mitchell's involvement with Park Towers. Those statements were buried among thousands of pages of Jencks material provided for 36 witnesses that day.

Then, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, Independent Counsel avoided any questions that might elicit testimony on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, Independent Counsel changed the subject. Shortly after Shelby finished his second day of testimony,

Independent Counsel then called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Independent Counsel directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers. Independent Counsel subsequently elicited sworn testimony to the same effect from Martin Fine.

In addition to repeatedly citing this testimony as evidence of conspiracy in briefs in this Court and the Court of Appeals, as well as in oral argument at the close of the Government's case-in-chief, Independent Counsel emphasized this testimony at the end of its rebuttal argument, asserting that secrecy was "the hallmark of conspiracy." And, despite knowing that Shelby would have contradicted Feinberg's testimony, the prosecutor specifically stated:

> Mr. Wehner mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?
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> Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid $225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519 (emphasis supplied). The prosecutor making these statements had been present on two of the occasions when Shelby stated that Feinberg was aware of Mitchell's involvement.

In the principal instances where Independent Counsel asserted that Shelby concealed Mitchell's involvement in Park Towers from Feinberg and Fine, it also asserted that Shelby concealed his contacts with Dean from Feinberg and Fine and that Nunn concealed Mitchell's involvement with the Arama project from the Arama developer, Art Martinez. As shown in Defendant's memorandum (at 26-27, 60-62), Independent Counsel knew that these assertions were false.

It is thus understandable that Independent Counsel does not wish to address these and other new matters raised in Defendant's Motion. But, as the Supreme Court in Gaddis and Judge Richey in Broadus instruct, the interests of justice insist that the Court require Independent Counsel to respond to these matters. There can be little doubt that, if Independent Counsel reveals the true nature of its actions, the Court will conclude that this is one of the unusual cases where prosecutorial misconduct has been so outrageous and so pervasive that dismissal of the indictment, or, at a minimum, a new trial, is the only appropriate remedy.

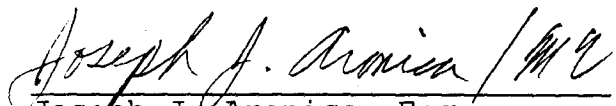
Furthermore, the evidence on the remaining counts (and projects) affirmed by the Court of Appeals is so tenuous that it is inappropriate to sentence Ms. Dean without first having

reviewed the new allegations of misconduct in light of the remaining evidence. It is clear that the pattern of misconduct in this case impeded Ms. Dean's ability to defend herself before the jury. As this Court previously stated, it was virtually impossible to quantify the cumulative affect of the then-identified prosecutorial abuses. It is now incumbent, in the interests of justice, to weigh the prior misconduct and the newly identified misconduct in light of the limited evidence of guilt.

III. CONCLUSION

For the foregoing reasons, the Government's Motion to Strike Defendant Dean's Motion for Dismissal of the Superseding Indictment or for a New Trial, and to Strike the Memorandum in Support, should be denied.

Respectfully submitted,



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