

TESTIMONY OF SUPERVISORY SPECIAL AGENT ALVIN R. CAIN, JR.

*Summary: A critical issue in United States of America v. Deborah Gore Dean concerned whether Deborah Gore Dean was aware that former Attorney General John N. Mitchell earned HUD consulting fees. One immunized witness who retained Mitchell on a HUD matter testified that he deliberately concealed Mitchell's role from Dean. Mitchell's partner, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he knew or thought that Dean was aware of Mitchell's HUD consulting.*

*Dean denied knowing that John Mitchell earned HUD consulting fees until she read the HUD Inspector General's Report when it was issued in April 1989. The report had stated that Louie B. Nunn paid Mitchell \$75,000 for assistance in securing funding for the Arama project in 1984. Dean gave emotional testimony about calling HUD IG investigator Alvin R. Cain, Jr., who had prepared the report, to express her anger about statements in the report that Mitchell earned the \$75,000 consulting fee and to demand to know if there was a check proving that Mitchell earned that fee.*

*Dean started to testify as to what Cain had told her when she called him. A prosecution objection to that testimony would be sustained, however, so Dean would not be allowed to testify as to what Cain had told her.*

*Though OIC counsel would not cross-examine Dean about the call to Cain, the OIC called Cain as a rebuttal witness. Cain, who had been detailed to the OIC for the preceding three years, firmly stated that he had no recollection of any such call.*

*In closing argument, the prosecutor relied heavily on Cain's testimony in asserting that Dean lied when she testified that she did not know that John Mitchell had earned HUD consulting fees.*

*In support of a motion for a new trial, Dean argued that Cain was one of at least three government witnesses who lied and who the OIC knew or should have known had lied. (The others are Ronald L. Reynolds and Thomas T. Demery.) Dean provided an affidavit stating that when she asked Cain about the check from Nunn to Mitchell, he said it was maintained in the HUD regional office. Dean also stated that, after talking to Cain, she told James Scanlan what Cain had told her. Scanlan, a career government attorney, filed an affidavit stating that in April 1989, Dean had told him about the call to Cain and had said that Cain had told her the check was in a field office. Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.*

*In its opposition to Dean's motion, the OIC said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. In a reply, Dean noted that the OIC's failure to discuss the check suggested that the check was in fact maintained in a field office in April 1989 and that the OIC did not have a plausible theory as to how she could have learned of that matter other than through her call to Cain.*

*Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the U.S. Probation Officer, the OIC relied on Cain's testimony in arguing that Dean committed perjury during her trial and should therefore have her sentence increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the Probation Officer agreed, recommending a two-level upward adjustment that would increase Dean's minimum sentence by six months.*

*On February 14, 1994, the court denied Dean's motion for a new trial. The court essentially agreed with Dean's claims that Reynolds and Demery lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Cain and the OIC's heavy reliance on Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the OIC's failure to respond regarding the whereabouts of the check in April 1989 is probative that the OIC knew that Cain lied.*

*Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the OIC's argument that Cain's testimony contradicting Dean showed that she lied during trial. Dean also argued that, whatever may have been the OIC's knowledge regarding the truth of Cain's testimony at the time of trial, the OIC had continued to rely on Cain's testimony having the additional information provided in the Dean and Scanlan affidavits as well as the opportunity to investigate such matters as the whereabouts of the check.*

*Dean requested the court to defer final ruling on her motion for a new trial and on the sentencing until the matter of the whereabouts of the check was resolved. Dean argued that, if the check was maintained in a field office in April 1989, there should be discovery as to whether the OIC knew or should have known that Cain committed perjury and whether such perjury should be imputed to the OIC.*

*At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. The OIC still refused to state what it knew about the check, but argued that Dean could have surmised that the check was maintained in a field office through a statement in the HUD Inspector General's Report. That statement, however, could not reasonably have provided a basis*

*for Dean's knowledge. The court denied Dean's motion without indicating what it believed about who was telling the truth about the call.*

*Later in the day at the February 22, 1994 hearing, the court refused to accept the Probation Officer's recommendation to increase Dean's sentencing level on the basis of Cain's contradiction of Dean's statement about her call to him. The court stated that it believed that Dean may have in fact called Cain.*

*The court, however, accepted the Probation Officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement Dean had made that she did not know Mitchell that well until after she left HUD. In so ruling, the court relied on Dean's testimony about her call to Cain as evidence of the closeness of Dean's relationship to Mitchell. That reliance would only have made sense if the court accepted that Dean in fact had told the truth about the call to Cain.*

*Ultimately, the court would reconsider the obstruction of justice ruling, indicating that Deans' statement about Mitchell would only seem misleading when taken out of context.*

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Attachments:

1. Relevant Trial Transcript: Pages 2615-19, 3195-203, 3269-71.

- 1a. Listing of Prosecutor's Statements in Closing Argument that Dean had lied in her Testimony.
2. Affidavit of Deborah Gore Dean.
3. Affidavit of James P. Scanlan.
4. Pages 1, 8-9 of January 18, 1994 Letter from Arlin M. Adams to Probation Officer Gregory Hunt.
5. Pages 1, 13, 51 of Revised Presentence Investigation Report
6. Transcript of Hearing of February 22-23, 1984: Pages 1-22, 53-56.
7. Interview of Louie B. Nunn from HUD Inspector General's Report
8. USA Today Article Reporting Interview in Which Arlin M. Adams Stated That He Might Have Been on the Supreme Court if He Had Not Angered John Mitchell.

Principal References:

1. Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F. R. Crim. P. 33 at 160-71, 203-04 (Nov. 30, 1993) ("Dean Mem.")
2. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 at 49, 73-77 (Dec. 21, 1993) ("Gov. Opp.")
3. Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial at 25-29 (Jan. 7, 1994) ("Dean Reply")
4. Motion of Deborah Gore Dean for Reconsideration of Ruling Denying her Motion for a New Trial at (Feb. 18, 1994) at 1-7 ("Dean Motion for Reconsideration")
5. Transcript of Hearing at 3-9, 17-21, 54-56 (Feb. 22, 1994)

A. Background

Count One of the Superseding Indictment alleged that Deborah Gore Dean had facilitated the funding of three projects for former Attorney General John N. Mitchell, a person whom Dean considered to be her stepfather. The projects, all in Dade County Florida, were called Arama (funded in 1984), Park Towers (funded in 1985); and South Florida I (funded in 1986). Arama also involved former Governor of Kentucky Louie B. Nunn. Park Towers also involved political consultant Richard Shelby. South Florida I also involved Nunn, as well as Mitchell's partner, Colonel Jack Brennan.

In the case of Arama, however, Mitchell telephone messages showed that, in January 1984, at the same time Nunn was negotiating a contract for securing 300 moderate rehabilitation units for the project, Mitchell was talking to Dean's predecessor, Lance Wilson, about securing 300 moderate rehabilitation units. A note on one of the messages, in Mitchell's handwriting, also indicated that Wilson would be talking to Maurice C. Barksdale, the Assistant Secretary for Housing, about securing the units. Wilson knew Mitchell and had worked for the same firm as Mitchell. Tr. 357-58. Mitchell had previously set up a meeting between Wilson and Louie Nunn with regard to another matter. Tr. 1395. The Mitchell message was dated four months before Dean had become Executive Assistant and long before she had any role in the moderate rehabilitation program.<sup>1</sup>

In the case of Park Towers, Richard Shelby, an immunized OIC witness who had retained Mitchell to assist in securing funding for the project, stated that he had intentionally concealed Mitchell's involvement from Dean. Shelby also stated that in his own efforts to secure funding for the project, though he had talked to Dean, he dealt primarily with a deputy assistant secretary named Silvio DeBartolomeis.<sup>2</sup>

In the case of South Florida I, Mitchell's partner Jack Brennan, another immunized OIC witness, testified that Mitchell refused to do anything on the project because of Dean's position at HUD. Tr. 319-22. Brennan also testified that when he (Brennan) later told Dean of Mitchell's HUD involvement, she was shocked. Tr. 369. No testimony whatever was offered to show that Dean knew Mitchell was being paid for HUD work. Dean denied knowing that Mitchell had been paid as a HUD consultant at any time until the fact was revealed in the HUD Inspector General's Report on the moderate rehabilitation program issued in April of 1989.

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<sup>1</sup> See Narrative Appendix styled 'The John Mitchell Messages and Maurice Barksdale.'

<sup>2</sup> See Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony."

B. Dean's Testimony About Her Call to Cain

Dean testified about learning of Mitchell's HUD consulting on her fourth day on the stand. She first explained, in some detail, how she had acquired a copy of the report from Alvin Cain, the agent in HUD's Inspector General's office who had been in charge of writing the report. Among other things, Dean explained how, after talking to Cain about getting a copy of the report, she had sent Mitchell's daughter (Marti Mitchell) with a check to the Inspector General's office to secure a copy. Dean then testified that she (Dean) learned that Mitchell had earned a consulting fee when she started to read the report (which had indicated that Mitchell had earned \$75,000 in consulting fees on the Arama project). This testimony followed:<sup>3</sup>

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

A. Yes.

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

A. Yes, the day the report came out.

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

A. He had died the previous November.

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

A. Yes.

Q. Who did you call.

A. I called Al Cain.

Q. What did you say to Mr. Cain?

A. I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, that John would never have done that, and that he better be prepared, because I was really mad, and I wanted to see the check, and if there had been a check written to John Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in any way

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<sup>3</sup> Relevant portions of the trial transcript are included in Attachment 1 hereto.

had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.

And Al said, Al told me that he --

Tr. 2616-18.

At this point, prosecutor Robert M. O'Neill rose to object. Before he actually said anything, the court stated: "I'll sustain the objection. Don't get into what he said." Tr. 2618.<sup>4</sup> Thus, Dean was not permitted to testify as to what Cain might have told her in response to her specific questions regarding the existence of a check.

Dean's counsel then continued his questioning:

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

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

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

A. Yes. He told me that --

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

THE COURT: All right.

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

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

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

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

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<sup>4</sup> The court's ruling on this point was consistent with hearsay rulings throughout, even when the statement was in no sense offered for the truth of what was stated.

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

Tr. 2618-19.

C. Cain's Denial that Dean had Called Him About Mitchell

Though Dean would be on the stand for parts of four more days, including three days of cross-examination by Associate Independent Counsel Robert E. O'Neill, O'Neill never questioned her about the call she said that she made to Cain. Within an hour after Dean had left the stand, however, the OIC called as its second rebuttal witness Supervisory Special Agent Alvin R. Cain, Jr.

Cain had been the principal author of the HUD Inspector General's Report on the moderate rehabilitation program. The report had borne Cain's name on the cover as the preparer, immediately above the name of former Assistant Secretary for Housing Thomas T. Demery as the subject.<sup>5</sup> Cain had conducted the earliest interviews recorded in the report (Banking Hearings at 766, 778, 944, 952, 966), which interviews had apparently led to the full scale investigation. Cain had also interviewed most of the key headquarters officials (id. at 1042-52), including two interviews of Dean. Id. at 949, 1048. The report had been sharply criticized for focusing on Demery's activities with a charity called F.O.O.D. for Africa, while ignoring what Demery asserted were the larger roles of Dean and Secretary Pierce.<sup>6</sup> It was even asserted by some members of Congress that the focus on F.O.O.D. was itself a conspiracy that was specifically intended as a cover-up for Dean's activities.<sup>7</sup>

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<sup>5</sup> HUD Investigation, Hearings Before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, 101st Cong., 1st Sess. at 569 ("Banking Hearings").

<sup>6</sup> See Narrative Appendix styled "Testimony of Thomas T. Demery."

<sup>7</sup> See Hearings Before the Employment and Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong., 1st Sess., Pt. 1, at 321, 502, 518-19, 522-24, Pt. 2, at 402-03, Pt. 5, at 425-26; Abuse and Mismanagement of at HUD, Twenty-Fourth Report by the Committee on Governmental Operations, 101st Cong., 2d Sess. (House Report 101-977) at 4-5, 88; Maitland, L., "H.U.D. Inspector on Firing Line," The New York Times, June 16, 1989, p. A15; Shenon, P., H.U.D. Chief Feared Speed on Inquiry, House Panel Hears, The New York Times, June 17, 1989, at 1, 8.

Examined by Associate Independent Counsel O'Neill, Cain first gave his background, indicating that he was employed as a Supervisory Special Agent for HUD's Office of Inspector General, and that, prior to joining HUD, had served 22 years in the Air Force, including 20 years in the Air Force's Office of Special Investigations. Since June of 1990, he had been detailed to the Office of Independent Counsel. Tr. 3195-96.

Cain then recounted in some detail, and in terms essentially identical to those of Dean, how Dean called him to secure a copy of the HUD Inspector General's Report in April 1989, including the fact that Dean had sent Marti Mitchell with a check to pick up a copy of the report. Tr. 3196-98. After Cain had stated that he had given a copy of the report to Marti Mitchell, this questioning followed:

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

A. No, I do not.

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

A. No, I do not.

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

A. Absolutely not.

Tr. 3198-99.

It is to be noted for purposes of subsequent discussion that, though Dean had twice referred to an inquiry of Cain about whether there existed a check showing that Nunn had paid Mitchell for work on Arama, O'Neill would make no reference to that check in his questions to Cain.

Dean's counsel, Stephen V. Wehner, briefly cross-examined Cain, but solely on collateral matters. Wehner asked Cain if Dean had approached him to call to his attention that certain HUD subsidies were being misused in a project called Castle Square. Cain responded merely by saying that, while there had been an investigation of that project, he did not recall whether he interviewed Dean in his office or in her office. Tr. 3199-3202.

Wehner also cross-examined Cain about whether he recalled attending a party at Hernando's Hideaway at the Beverly Wilshire Hotel celebrating awards to Cain and

his partner (Clarence Day) that was paid for by Dean. Cain stated that it was possible that he had been at the Beverly Wilshire with Dean and that he may have been at the Beverly Wilshire with Secretary Pierce on one or two occasions. He said, however, that, though he and Special Agent Day had received the Secretary's Excellence Award, he believed that Day may have received it on his (Cain's) behalf, and that he did not recall a party at the Beverly Wilshire paid for by Dean in celebration of those awards. Tr. 3201-02.

Redirect examination was limiting to bringing out that part of Cain's responsibilities included providing protection for Secretary Pierce when Pierce traveled. Tr. 3203.

Though Cain had merely stated that he did not remember Dean's call, given the detail with which he recalled to the jury the events related to Dean's securing from him a copy of the IG report, the impression conveyed by Cain's testimony that he did not recall the telephone call was that, if Cain was telling the truth, the call did not happen. Thus, within an hour after leaving the stand after eight days of testimony, Dean had been directly contradicted by an agent of the United States Government. Moreover, she had been directly contradicted on testimony that she had delivered with apparent feeling and sincerity. And, while being tried before an all black jury, she had been contradicted by a government agent who happened to be an African American.

If Dean had made up the story about the call to Cain, it was an absurd thing to do, given that she knew that Cain was readily available in the offices of the OIC to contradict her. (Cain had originally been on the OIC's witness list. Dean had herself indicated to the prosecution that she wanted to call Cain as witness, but had decided not to do so when the OIC advised that Cain had refused to agree to be interviewed.)

Moreover, it must be remembered that, but for the O'Neill's objection, Dean would also have testified what Cain had told her when she called him about Mitchell. Thus, if Dean had not made the call to Cain, she must have intended not only to make up what she had said to Cain but also to make up what he had said to her, all the while with Cain available to contradict her, and with potentially devastating consequences for her credibility.

Dean's counsel sought to recall Dean to the stand for surrebuttal in order to respond to Cain's testimony, as well as to the testimony of two of the other four OIC rebuttal witnesses. Wehner indicated that Dean would testify about the Beverly Wilshire party and about the Castle Square project. In the face of vigorous objection by the OIC, however, surrebuttal was not allowed. Tr. 3269-71.<sup>8</sup>

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<sup>8</sup> These and other relevant transcript pages are appended in Attachment 1.

D. The Role of the Cain Testimony in the Prosecutor's Closing Argument

In closing argument, O'Neill would focus the case on Dean's credibility: "... Everything she's told you rests on her word, on what she says" (Tr. 3377); "Her entire case rests on her credibility, her believability" (Tr. 3413); "... and that's what her whole case hinges upon, her veracity, her honesty, her credibility." Tr. 3502. O'Neill vigorously attacked Dean's credibility by repeatedly stating to the jury that Dean had lied on the stand.<sup>9</sup> Cain's testimony played a significant role in that attack.

Three quarters of the way through the first day of the OIC's closing, O'Neill pressed the attack on Dean's credibility with particular acerbity, stating:

Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees:

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<sup>9</sup> The pervasiveness of O'Neill's assertions that Dean had lied is not paralleled in reported federal cases. A fairly comprehensive summary of the remarks is set out in Attachment 1a hereto. A sampling of the statements is set out immediately below: Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her..she lies about that.. if she's going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it.").

Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave. That's exactly what she told you.

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

Tr. 3419-20.

During rebuttal the following day, O'Neill continued to assert that Dean had repeatedly lied on the stand, pursuing that approach with a virulence at least equal to that of the day before. In listing a number of statements by Dean that he asserted were lies, O'Neill again noted the contradiction by Cain:

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

Tr. 3506.

E. Dean's Motion for a New Trial

In support of her motion for a new trial (Dean Mem. at 160-72), Dean argued that Cain had lied about failing to remember the telephone conversation and that the OIC knew or should have known that Cain had lied. With regard to whether Cain in fact had lied, Dean first pointed out the absurdity of her telling the story about the call to Cain (and being ready also to testify as to what he had told her) if the story were not true, particularly since it added little to her testimony about calling Colonel Brennan. Dean Mem. at 193-64.

Dean also submitted affidavits providing additional information by way of affidavit.<sup>10</sup> In her own affidavit, Dean stated that when she asked Cain about the check,

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<sup>10</sup> The Affidavits of Deborah Gore Dean and James P. Scanlan are appended as Attachments 2 and 3.

he had responded that a check did exist, but he did not have a copy, for the check was then maintained in the Regional Inspector General's Office. Dean also stated that after talking to Cain in April of 1989, she had then told what Cain had told her, including the fact that the check was maintained in the field, to James P. Scanlan whom she was dating at the time.

Scanlan, an assistant general counsel with the Equal Employment Opportunity Commission and a career government attorney with over 20 years of federal service, submitted an affidavit corroborating Dean's statements as to what she told him, including that she had told him that Cain had told her that the check was maintained in a field office. Scanlan stated that he remembered the matter very well, recalling that he had been confident at that time that, whether or not a check could be produced, if the Inspector General's Report had stated that Mitchell had received a HUD consulting fee, there was little reason to doubt that he had. He also stated that he remembered Cain's name very well, among other reasons, because he had been writing a book about the IG investigation and the Congressional hearings, and he frequently noticed that Cain was the investigator conducting interviews recorded in the IG report.

Both the Dean and Scanlan affidavits also attested that Dean had also told Scanlan about the call to Brennan, which call was consistent with Brennan's testimony and which is presumably undisputed. Thus, Dean's memorandum argued, while it is not logically impossible that she could have told Scanlan about a call that she actually made to Brennan and also told him about a call that she was fabricating about Cain, the chances of her doing so are too remote even to consider. Therefore, she argued, it is virtually inconceivable that Cain and Scanlan were both telling the truth. Dean Mem. at 171-72.

With regard to the OIC's knowledge of Cain's perjury, Dean pointed to the improbability of her having made up the story as well as what she maintained were evasive answers by Cain on cross-examination. In her affidavit she described how she had approached Cain about HUD's questionable funding of Castle Square and that he had then said he would commence an investigation. She also indicated that she had raised the same matter with the Deputy Assistant Secretary for Multi-Family Housing (Hunter Cushing) and the HUD Undersecretary (Carl Covitz). Dean gave a detailed account of an occasion at the Beverly Wilshire Hotel in May of 1986, where Secretary Pierce had opened an expensive bottle of champagne in his suite, to be shared among Pierce, Cain, Cain's partner Clarence Day, and herself, in celebration of an award presented to Day to mark his 20th year of government service, as well as his retirement from HUD. She described how she had paid a large bill for a party in Day's honor at "Hernando's Hideaway" in the Beverly Wilshire Hotel, which she said was attended by Cain and Day, and several other HUD employees, two of whom she named. Dean attached an American Express receipt, dated May 28, 1986, for \$428.78 from the Beverly Wilshire hotel. The credit card was in the name of Mary Gore Dean and was signed "Mary Gore Dean," though in Deborah Dean's handwriting. Dean said she had later received a thank-you signed "Joe," which she took to be a reference to the line in

the song called "Hernando's Hideaway," which had been a frequent refrain during the course of the party. In her support of her motion, Dean argued that Cain's responses on cross-examination about the Castle Square investigation and Beverly Wilshire party had given the OIC additional reason to question Cain's truthfulness with regard to the telephone call. Id. at 169-71.

Dean also asserted that, on the issue of the prosecutor's knowledge of Cain's perjury, it might prove significant that, in closing argument, while the prosecutor recounted the details of both her and Cain's testimony, he omitted any mention of her statement that she had told Cain that he had better be able to produce a check. Id. at 171 n.123.

Dean pointed out that the OIC presumably had records indicating whether the check was in fact maintained in a HUD field office in April 1989. She argued that the whereabouts of the check at that time would be highly relevant to the issue of whether Cain had committed perjury. Id. at 171.

Dean requested an evidentiary hearing on this matter.

#### F. OIC's Opposition

In its Opposition, the OIC argued that Dean's "charge of perjury, and the affidavit submitted in support thereof, are demonstrably false" (Gov. Opp. at 2), and further that her allegations against Cain "constitute at best a wholly unfounded and reckless slander against a career employee of the United States," adding, however, that "there is evidence here that defendant's allegations are not merely reckless, but perjurious and a deliberate fraud upon the court." Id. at 73.

The OIC dismissed with the word "irrespective" the improbability of Dean's having made up the story about the call to Cain, though without suggesting why she would have made up such a story or mentioning her apparent willingness also to make up a story as to what Cain had told her. The OIC then argued that there was merely a credibility issue, with Dean's argument resting entirely on her own word and that, "if nothing else, the jury verdict in this case stands for the proposition that [Dean] should not be believed." Id. at 75.

The OIC dismissed the Scanlan affidavit in a footnote, arguing that the affidavit added nothing to Dean's statements, since "apart from [Scanlan's] obvious bias," Scanlan merely relied on what Dean had told him. Gov. Opp. at 75 n.31. The OIC did not address Dean's contention that Cain and Scanlan could not both be telling the truth. During the three weeks between the filing of Dean's motion and the filing of its Opposition, the OIC had not sought to interview Scanlan.<sup>11</sup>

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<sup>11</sup> Though Dean had challenged O'Neill's characterization of Cain's testimony (Dean Mem. at 203), she also argued that the detail provided by Cain compelled the

The OIC did not respond to Dean's arguments regarding the relevance of the whereabouts of the check and whether there was a way Dean and Scanlan could have known that it was maintained in a field office in April 1989 other than through Dean's call to Cain. The OIC provided no information as to the whereabouts of the Mitchell check in April 1989. In fact, the OIC did not mention the check at all.<sup>12</sup>

The OIC did provide affidavits of Joseph Parker and Clarence Day, along with other documents, showing, apparently conclusively, that Cain had not been present at the event at the Beverly Wilshire Hotel described by Dean; that the Beverly Wilshire event had occurred on May 29, 1985, not May 28, 1986; and that the retirement was of Joseph Parker, not Clarence Day, though Day was present. Both affidavits indicated that the two other persons named by Dean were present on the trip to Los Angeles. Parker indicated that he did not know who paid, but that he (Parker) did not, and that it would have been his practice to send thank-you notes to all involved with the party. Gov. Opp., Exh. D. Day indicated that he did not know who paid, but that when he had offered to pay, Dean had said she would speak to him later about it. Gov. Opp., Exh. E.

Based on these materials, the OIC argued that Dean had intentionally fabricated the story about the Beverly Wilshire party. It argued that Dean's account of the note signed "Joe" was an attempt to give plausibility to her account by explaining away the fact that the note was not signed by Clarence Day, adding "but like defendant's testimony before the United States Senate and all the defendant's trial testimony before this court, defendant's affidavit displays here again both defendant's reckless disregard for the truth, as well as her unrepentant willingness to lie to avoid responsibility for her actions." Gov. Opp. at 76.

Noting that "defendant does not inform the Court that her own calendar entries for May 28-30, 1986, indicate that she was in Washington, not Los Angeles," the OIC argued that "[t]his necessarily raises serious questions about the American Express receipt submitted by defendant." Noting also that the receipt was signed by "Mary Gore Dean," not "Deborah Gore Dean," and bore the date May 28, 1986, though the trip

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inference that he would have remembered the call if it had occurred and that, in any case, it was not something that a person in Cain's position was likely to forget. Dean Mem. at 166 n.122. In arguing in its Opposition that the prosecution had accurately summarized Cain's testimony in closing, the OIC agreed that the inference to be drawn from Cain's testimony is that he would have remembered the call if it had occurred. Opp. at 50.

<sup>12</sup> The check had been introduced into evidence by the OIC as Government Exhibit 35. The item was a \$75,000 cashier's check of the First Security Bank of Lexington, Kentucky, dated July 1, 1985, which is the same date as Nunn's check to First Security Bank. The Cashier's check would also be mailed to Mitchell that same day.

"actually occurred in 1985," the OIC requested the court to order Dean to produce the receipt for inspection by the court and the OIC. Id. at 77-79.

The OIC also attached materials showing Dean being interviewed about the Castle Square project in May 1989, where she stated that she had worked for the Castle Square developer for a brief period, and an October 1988 letter by Dean to HUD on behalf of the developer. Gov. Opp., Exh. F. The OIC asserted that the May 1989 interview grew out of an earlier investigation and showed that Dean had not initiated the investigation; it also asserted that the documents showed that Dean had been trying to promote the project, not to have it stopped. See Gov. Opp. at 78 n.32.

The OIC did not provide statements from any of the three persons Dean had named (Cain, Cushing, and Covitz) as persons to whom she had spoken to raise the issue of irregularities in the Castle Square funding.

#### G. Dean's Reply

In Dean's Reply, with regard to Cain's testimony, she pointed out most of the same omissions from the OIC's Opposition noted in the preceding section. Dean Reply at 27-29. She noted that any bias resulting from Scanlan's relationship to her was an appropriate subject of inquiry that could be explored in a hearing on the matter, but could not be a basis for entirely dismissing his affidavit. Dean also argued that the OIC's dismissal of the affidavit because Scanlan merely recounted what Dean had told him ignored the fact that, given the circumstances in which Scanlan says Dean told him of the call, if Scanlan was telling the truth, then Cain could not be. Id. at 28.

Dean noted in particular the OIC's failure to mention the check, much less to say whether it was in fact maintained in the field in April 1989, or whether, assuming it was maintained in the field, how Dean would have learned of that matter either at any time prior to the filing of her affidavit or prior to her telling Scanlan about it in April 1989. The OIC's failure to be forthcoming on that matter, Dean argued, was itself suggestive of a willingness to rely on false testimony. She again requested a hearing to resolve the matter. Id. at 27-28.

Dean acknowledged that she was evidently mistaken about Cain's presence at the Beverly Wilshire party, acknowledging as well that the fact that Cain was not at the Beverly Wilshire event vitiated her argument that Cain's reaction to the question about the event should have alerted the OIC to the fact that his testimony was otherwise false. Id. at 26. Dean argued, however, that the OIC's assertion that she had intentionally fabricated the story were groundless, because it would have made no sense for her to make up a story that could so easily be disproved. (As noted, in her affidavit, Dean had named three persons who she said were present apart from Cain and herself; the presence of those persons was corroborated by the Parker and Day affidavits.) Dean argued that the OIC's suggestion of something suspicious about the receipt was disingenuous, since the OIC, which possessed all of her records for the

period, well knew that she often used her mother's American Express card and also certainly knew that the receipt was a valid receipt for the party in May 1985, even though it was apparently wrongly dated. Id. at 26 n.22.

Dean argued that the OIC's response regarding Castle Square was also an effort to mislead the court. She noted that her affidavit, as well as the materials supplied with the OIC Opposition, showed that her initial discussion with Cain would have been in late 1988. She noted that HUD documents showed that the Assistant Secretary for Housing was responding to IG inquiries about Castle Square in early December 1988, which may have been prompted by her earlier discussion with Cain. Id.

With regard to both the Beverly Wilshire party and the Castle Square matter, Dean's Reply referenced a Supplemental Affidavit of Dean. Id. However, no Supplemental Affidavit was submitted and, in a subsequently filed document, Dean advised the court that the references to a Supplemental Affidavit were in error.

#### H. OIC's Response to the Probation Report

In a letter dated January 18, 1994, the OIC responded to a preliminary Presentence Investigation Report of the U.S. Probation Officer. The OIC took particular issue with the failure of the Probation Officer to adjust the recommendation upward to take into account obstruction of justice based on perjury by Dean at trial. Though the principal focus of the OIC's argument involved other matters, it specifically asserted that Dean had perjured herself in her testimony at trial about the call to Cain. Letter from Arlin M. Adams to Gregory Hunt at 8.<sup>13</sup>

The OIC also argued that Dean had further perjured herself in her affidavit in support of her Rule 33 Motion. In the latter regard, the OIC responded to the contention in Dean's Rule 33 Reply that it would not have made sense for her to make up the story about the Beverly Wilshire party when it could be so easily disproved. The OIC argued that, "in truth, defendant obviously hoped that the government would not be able to prove definitively that Agent Cain was not at this party." Letter at 8 n.9.

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<sup>13</sup> The relevant parts of the Adams letter are appended as Attachment 4.

I. Revised Presentence Investigation Report

On February 7, 1994, the U.S. Probation Officer issued a Revised Presentence Investigation Report. In the Report, the Probation Officer recommended an upward adjustment of two levels for obstruction of justice, because Dean had "testified falsely with regard to her relationship with John Mitchell" (id. at 13),<sup>14</sup> and such false testimony had involved a matter "which could materially affect the outcome of defendant's case." Id. at 51.<sup>15</sup> In support of that recommendation, the report noted that Dean had testified that she did not know that Mitchell was being paid as a HUD consultant, but did not point to evidence to the contrary. The Report then stated the following:

She also testified that when she learned of his involvement, she contacted HUD IG special agent Alvin Cain to express her anger at these accusations. The agent testified that he does not recall any such conversations.

Id. at 13. The paragraph went on to indicate a belief that Dean had falsely testified that she did not know Mitchell very well while she was at HUD. See Narrative Appendix styled "Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD."

Apparently as a result of the addition of the two points for obstruction of justice, the recommended sentence for Guidelines' offenses would be raised from a range of 24 to 30 months to a range of 30 to 37 months.

The following day, as part of an omnibus motion requesting, inter alia, a postponement of the sentencing hearings, Dean pointed out that the Independent Counsel had not yet provided requested information on the whereabouts of the Nunn-to-Mitchell check.<sup>16</sup>

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<sup>14</sup> Relevant pages of the Revised Presentence Investigation Report are appended as Attachment 5.

<sup>15</sup> Based on the jury's verdict on Count Four, the Report (at 13) also found that Dean had obstructed justice by testifying that \$4,000 she had received from Louis Kitchin related to her agreement to decorate an apartment for Kitchin. No points were added as a result of that finding, however, since the report found only Counts One and Two to fall under the Sentencing Guidelines. See Revised Presentencing Investigative Report at 51.

<sup>16</sup> See Deborah Gore Dean's Omnibus Motion and Memorandum of Law to: 1) Stay Sentencing Pending Appeal; 2) in the Alternative to Staying the Sentence, Delay any Reporting Until Such Time as a Stay Can be Sought in the Court of Appeals for the District of Columbia Circuit; 3) Continue the Sentencing Hearings Scheduled for February 14, and 17, 1994; 4) Modify the Presentence Investigative Report and to Hold

J. February 14, 1994 Hearing

At a hearing on February 14, 1994, the court denied Dean's motion for a new trial, though the court strongly criticized the OIC for various aspects of its conduct. In support of her motion, Dean had argued that at least two OIC witnesses besides Cain had lied, and the OIC knew they had lied. These witnesses were Thomas Demery and Ronald Reynolds. Reynolds was another rebuttal witness, with regard to whom, as with Cain, the OIC had resisted Dean's effort to present surrebuttal. Also, as with Cain, in closing argument, the OIC had relied heavily on Reynolds' testimony in asserting to the jury that Dean had lied. The court essentially agreed with Dean's arguments as to both Demery and Reynolds, including the argument that the OIC had presented Reynolds' testimony notwithstanding that it had documents showing that Reynolds was not telling the truth. See Narrative Appendixes styled "Testimony of Ronald L. Reynolds" and "Testimony of Thomas T. Demery."

In the course of its ruling, however, the court made only passing reference to Cain, and noted only the issue of Cain's presence at the Beverly Wilshire party and Dean's concession that she had been mistaken in her affidavit.<sup>17</sup> The court did not discuss at all Dean's argument that Cain had committed perjury in denying any recollection of Dean's call about John Mitchell.

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a Hearing in Support of Those Modifications; and 5) for a Hearing with Regard to Deborah Gore Dean's Motion for a New Trial, and in the Alternative, for a Judgment of Acquittal at 5-6 (Feb. 8, 1994). With that motion Dean provided certain documents referenced in her Reply but not attached thereto. Dean also advised the court of certain errors in her reply, including the referencing of a Supplemental Affidavit that would not be submitted. Id. at 4-6.

<sup>17</sup> The court stated:

There was one other issue that I did not discuss with counsel, but I'd just note for the record that another instance where the evidence was challenged by the defendant was Agent Cain's testimony. The defendant had raised the issue that Mr. Cain couldn't have been where he said he was etc., and that's been briefed by both sides, and the defendant was going to submit a supplemental affidavit that's never been filed, so I take it her recollection then was mistaken as to Agent Cain as to the situation in Los Angeles at this party and that what she said originally was not accurate.

Tr. 29.

K. Memoranda on Sentencing

Immediately following the hearing, the parties filed a number of memoranda relating to sentencing issues that touched on the matter of whether Dean had lied regarding her call to Cain. In (Defendant's) Memorandum of Law in Support of Modifications to the Presentence Investigation Report at 25 (Feb. 16, 1994), Dean argued that the jury could have believed her about the call to Cain and still have convicted her. In Defendant's Supplemental Memorandum of Law in Support of Modification to the Presentence Investigation Report at 16 (Feb. 18, 1994), citing United States v. Dunnigan, 113 S.Ct. 1111, 1117 (1993), Dean argued that in order for the court to enhance Dean's sentence based on her trial testimony, it would have to "review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice."

The OIC, in the Government's Memorandum Regarding Sentencing Guidelines at 15-16 (Feb. 16, 1994), asserted that the Probation Officer had properly determined that Dean should receive a two-level enhancement for "her perjury during the prosecution," arguing that the enhancement was also warranted for Dean's false statements to the probation officer.

L. Dean's Motion for Reconsideration

On February 18, 1994, Dean filed a Motion for Reconsideration of Ruling Denying Her Motion for a New Trial (Recon. Mot.). In that Motion, Dean argued that the court had failed to address the critical issue with regard to Cain's testimony -- whether he had lied when he testified that he had absolutely no recollection of her call -- pointing out that said testimony had played a crucial role in the prosecutor's undermining of her credibility in closing argument. Dean Motion for Reconsideration at 1-3. Dean also argued that the OIC had agreed that the issue could not be resolved simply by assuming that Cain might have forgotten the call. Id. at 4 n.4.

Dean also noted that the issue had taken on additional importance in light of the Probation Officer's acceptance of the OIC's argument that Cain's testimony showed that Dean had lied when she testified that she had called him to question the discussion of John Mitchell in the HUD Inspector General's Report.

Noting that the court had already observed that throughout the proceeding the OIC had not been forthcoming or candid about exculpatory information, Dean argued that the OIC's response on the issue of Cain's testimony, including its failure to provide information regarding the check, and obfuscatory arguments about extraneous issues, strongly suggested that, instead of fulfilling its obligation to reveal false testimony, the OIC was seeking to conceal and cover up what it believed to be the perjury of its agent. Id. at 4-6.

Dean asserted that the OIC's arguments about the Beverly Wilshire party, especially with regard to the validity of the receipt, which the OIC knew to a virtual certainty was the receipt for the party described by Dean, were an effort to make the court believe what the OIC itself did not believe. Dean argued that the OIC's evident purpose in doing so was to cause the court to overlook that the OIC cannot reasonably respond to the allegation of perjury by Cain without addressing the whereabouts of the check. Id. at 5 n.6.

Dean also noted that the issue of the OIC's knowledge of Cain's testimony had to be viewed from an additional perspective in light of the OIC's recent actions. In contrast to the situation when the OIC relied on Cain's testimony at trial, ever since the filing of Dean's motion for a new trial, the OIC had the additional information provided in the Dean and Scanlan affidavits and had the opportunity to further investigate such matters as the whereabouts of the check in April 1989. Nevertheless, while still declining even to reveal anything about the whereabouts of the check, the OIC was continuing to rely on Cain's testimony in its arguments to the Probation Officer. Id. at 5-6.

Dean argued that the court should not finally rule on either the motion for new trial or the obstruction of justice issue without requiring the OIC to disclose what it knows about the whereabouts of the Nunn to Mitchell check in April 1989. Dean also submitted that, if it is revealed that the check was maintained in the field, the court should hold a further hearing regarding whether the OIC knew or should have known of the perjury of Cain either when it introduced and relied on the testimony at trial or when it relied on the testimony in post-trial arguments to the Probation Officer, as well as whether Cain's perjury should be imputed to the Office of Independent Counsel. Id. at 6-7.

M. February 22, 1994 Hearing--Morning Session

At a hearing on February 22, 1994, the court treated Dean's Motion for Reconsideration.<sup>18</sup> Associate Independent Counsel Bruce C. Swartz responded orally for the OIC, speaking at some length. Initially he observed first that the motion for reconsideration raised no issue not previously ruled on by the court; second, that "Ms. Dean's arguments in her motion for reconsideration are wrong and are demonstrably wrong"; and third, that "the motion for reconsideration itself provides a further basis for finding that defendant Dean has obstructed the administration of justice in this matter and has repeatedly made false statements, including in the motion for reconsideration..." Tr. 3-4.

Though Dean had emphasized in her Motion for Reconsideration that the critical issue was whether Cain had lied about the call from Dean, Swartz first spoke, and at

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<sup>18</sup> The relevant pages of the hearing transcript are appended as Attachment 6.

considerable length, about Dean's statements regarding the Beverly Wilshire party and the Castle Square project, asserting that these had been the issues "particularly stressed" in Dean's original motion. Tr. 5. With respect to the Beverly Wilshire party, Swartz asserted that, though Dean had admitted making a mistake in her affidavit, "we believe that it is more than simply a mistake." Without mentioning the persons Dean specifically identified as having been at the party, Swartz stated: "We submit that defendant never expected that the government would be able to obtain travel records from approximately nine years ago to rebut this claim." Tr. 5-6.

Swartz then pointed to materials indicating that Dean had worked as a consultant on the Castle Square project, arguing that Dean was working to have the project funded rather than stopped. He asserted that "there can be no mistake about that kind of thing, nor can there be a question, I believe of recklessness. The intent was to have the Court believe that she had nothing to do with the project and again to suggest that agent Cain had lied." Tr. 7.

Swartz then turned to the matter of Cain's testimony about the call. In that regard, Swartz argued as follows:

That brings us, Your Honor, to the third suggestion, that Agent Cain perjured himself, and that is the supposed conversation with regard to John Mitchell. Defendant's argument both in her original motion and in her motion for reconsideration is that she was told by Agent Cain that the check from Louie Nunn to John Mitchell in connection with the Arama project was being kept in the field, being maintained by the HUD regional inspector general's office. She says if true, that's a fact she could have only learned from Agent Cain, and therefore she is entitled to discovery on the issue of where the check was. But, Your Honor, it's false.

I'd like to provide to the Court, if I may, an excerpt from --if I can find it -- the inspector general's report. If the Court will indulge me for a moment.

Tr. 7-8.

At this point, two things about Swartz's argument regarding the check warrant comment. First, as Swartz's ensuing argument will reveal, his statement that something was false did not involve the matter of whether the check was maintained in the field, as Dean stated Cain had told her; though Swartz would not state whether or not the check was maintained in the field, he would not deny it. Rather, Swartz apparently was contending that it was false that Dean could only have learned of the matter through her conversation with Cain.

Second, the excerpt from the IG report that Swartz would produce was the report of an IG interview that took place in Nunn's office on December 12, 1988,<sup>19</sup> just over four months before the IG report was issued, though Swartz would not mention this matter to the court. Though the interview report would discuss two checks that the investigator would show to Nunn (these being checks reflecting payments from Florida developer Aristide Martinez to Nunn), it would make no reference to Nunn's providing a check or any other document to the investigator. In fact, the report stated that "NUNN also stated that he does not know where any of the contracts/agreements between him and MARTINEZ are."

Having located copies of the interview report, Swartz proceeded with his argument as follows:

If Your Honor will turn to the third page of this interview report, which again was in defendant's possession by her own testimony, you'll note that the final statement in the report is, "Agent's note: All the contract agreements shown to Nunn were obtained from HUD OIG audit file in Atlanta, Georgia."

So, Your Honor, the report itself suggests that the materials shown to Nunn that involved General -- excuse me, former Attorney General Mitchell were maintained in the field. There's simply no basis for her suggestion that she could have only learned such a fact from Agent Cain. Even if it were true, the report itself on its face would have provided her with information that suggested to her that materials were being maintained in the field.

We submit that on all three of these points then, Your Honor, defendant has attempted to pit her credibility against Agent Cain and has made attacks on Agent Cain's integrity that are completely unfounded.

Tr. 8-9.

In asserting that the quoted agent's note regarding materials shown to Nunn had provided a basis for Dean to surmise that the check from Nunn to Mitchell was in the possession of HUD in April 1989 and also that it was then maintained in the field office, Swartz did not indicate whether the OIC deemed it more probable that Dean reached

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<sup>19</sup> The interview report is appended as Attachment 7. Most of the interview reports compiled in the Inspector General's Report record interviews conducted by investigators from the local HUD offices. The Nunn interview was conducted in Park, Kentucky by Special Agent Lester A. Davis. Davis conducted one other interview reported in the Inspector General's Report, that being an interview of Emmett Moore, Jr. in Lexington, Kentucky on June 8, 1988. Banking Hearings at 997.

these conclusions prior to the time in 1989 when she informed Scanlan that Cain had told her the check was maintained in the field, or that, on the basis of the agent's note, both Dean and Scanlan had recently fabricated the story about their 1989 conversation.

Wehner pointed out that the interview was dated December 12, 1988, months before the IG report was issued in Washington, and in any event said nothing about a check and was therefore more consistent than inconsistent with Dean's testimony. He also requested that Cain be called to testify. Tr. 18-19.

The court denied Dean's request to call Cain and denied the Motion for Reconsideration without indicating a view as to the implications of the whereabouts of the check.<sup>20</sup> The court's ultimate ruling is contained in the following somewhat cryptic statement:

On the motion for reconsideration, the court is going to deny it at this time. The government has produced materials both at the original Cain argument -- and I'll put it in quotes -- Cain argument by defendant as to where she met him and discussed matters with him. It seems to the court that is not accurate as to the John Mitchell check and Cain, when he knew about it -- when she knew about it and where the documents were, I think that's argument and could be argued either way about it, but it doesn't mean of necessity the government is putting on information they knew was false before the jury.

Tr. 20-21.

In apparently concluding that Dean had not shown that the OIC necessarily put information known to be false before the jury, the court said nothing about Dean's arguments that, whatever the OIC knew at the time Cain testified, the OIC had since come to understand that Cain had committed perjury and had then sought not only to conceal that perjury, but to rely the perjured testimony in order to increase Dean's sentence.

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<sup>20</sup> In Dean's Motion for Reconsideration, she also raised an issue that is discussed at length in the Narrative Appendix styled "The Russell Cartwright Receipt."

N. February 22, 1994 Hearing--Afternoon

That afternoon the court considered the same matter with regard to the Probation Officer's recommendation of an upward adjustment in Dean's sentencing level based on Dean's statement about the call to Cain, which the Probation Officer, on the basis of Cain's testimony, had found to be perjurious. Tr. 54-55. Without entertaining argument on the matter, the court found that an adjustment was not warranted on the basis of Dean's statement because the court believed that Dean may in fact have been telling the truth. The court stated the following:

I am not convinced that the defendant was lying about a telephone conversation with Mr. Cain. I think it could have occurred. I'm not convinced that the jury found that she was lying about that, and I'm going to construe that in the light most favorable to the defendant, and I'm not going to raise the level by two points for any testimony she gave about consideration of speaking to Mr. Cain or not.

Tr. 55.

The court went on, however, to find that a two-point upward adjustment was warranted because of a statement by Dean that she did not know Mitchell very well while she was at HUD. In explaining its reasoning for that ruling, the court again mentioned Dean's testimony about the call to Cain, in this instance for the way it reflected on the closeness of Dean's relationship to Mitchell. The court stated:

But the testimony regarding Mr. Mitchell concerns the Court, because there's no question in my mind that she knew Mr. Mitchell quite well and had for a long time, and I don't understand evidence going -- except to that point that she was not involved with Mr. Mitchell as to HUD matters, and even her recounting the telephone call with Mr. Cain about how upset she was about Mr. Mitchell being named, she didn't believe it, etc, reflects her, I think, relationship with Mr. Mitchell, payment for the birthday party, the letters signed to Daddy, etc. So I believe that it's appropriate to raise for obstruction of justice by two points for that testimony she gave as to Mr. Mitchell, and that's in accordance with what the probation officer found.

Tr. 55 (emphasis added).

It should be noted at this point that it would make no sense for the court to use Dean's testimony about her call to Cain as evidence of Dean's close relationship to Mitchell unless the court accepted that Dean did in fact make the call, since the court was finding that the testimony about the call contradicted what the court viewed as testimony in which Dean had attempted to diminish her relationship with Mitchell. See Narrative Appendix styled "Dean's Statement that She Was Not That Close to Mitchell

Until After She Left HUD."<sup>21</sup> (Given the court's interpretation of the implications of the call as it reflects on Dean's relationship with Mitchell, false testimony about the call would have been to exaggerate, rather than diminish, her relationship with Mitchell.) Hence, at least if one assumes that the court was reasoning logically, its reliance on Dean's testimony about the call to Cain to increase Dean's sentencing points for the statement about not knowing Mitchell well until after she left HUD would seem a clear indication that the court accepted that Dean had called Cain. It seems necessarily to follow that the court believed that Cain, a government agent, had lied.

#### O. Comments

In order to believe Cain's testimony that he had no recollection of the call from Dean, one has to believe (1) that Dean was behaving almost insanely by making up the story about the call (and being also ready to make up what Cain had told her); and (2) that Scanlan testified falsely about what Dean told him in 1989. Whatever the plausibility of either of those statements, the whereabouts of the check is highly relevant to resolving the matter. Had the OIC initially come forward with an acknowledgement that the check was in the field, and then argued that there were other ways that Dean could have learned that the check was in the field, one would have to evaluate the plausibility of Dean's having learned of the matter in the manner suggested in determining the corroborative value of Dean's (and Scanlan's) statement about the check. But even without the corroboration of the check, there would remain sufficient evidence that Cain was lying -- i.e., the implausibility of Dean's making up the story and the affidavit by Scanlan in which he described Dean's April 1989 statement to him -- to warrant further inquiry.

In light of the OIC's actions with regard to the check, however, it is reasonable to assume that the check was maintained in the field and the OIC knew it but ignored the matter in its original Opposition because it had no plausible hypothesis for how Dean could have learned that the check was in the field other than through the call to Cain. The OIC's principal tactic in its Opposition and afterwards was to divert attention to the other matters raised in Dean's affidavit. That tactic was successful through the February 14, 1994 hearing, where the court entirely ignored the issue of the call to Cain.

In the argument at the February 22, 1994 hearing the OIC took the same approach. On that occasion, however, the OIC was forced by Dean's Motion for Reconsideration to confront the issue of the whereabouts of the check. In response, the OIC attempted a wholly absurd argument that it believed might succeed in consequence of the diversion created by the other issues and the fact that no one

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<sup>21</sup> As indicated in that Appendix, the court ultimately would find that statement not to be a basis for an obstruction of justice adjustment.

would be in a position to very carefully appraise the interview report that Swartz provided in the midst of his argument.

With regard to that document, Wehner's arguments were valid, but not strong enough. It is clear from the interview report that the investigator approached Nunn with materials that the investigator had secured from an audit file on Dade County, including Nunn's contract with the developer of Arama (Aristides Martinez). Nunn then told the investigator that he paid Mitchell \$75,000, but there is nothing in the interview to suggest that Nunn was ever asked to provide a check to the investigator, or that he did. Nor is there anything in the interview to suggest that the HUD investigator had or would secure the cashier's check from the First Security Bank. Indeed, there is no reason whatever even to think that the investigator who interviewed Nunn, apparently a local agent who conducted only two of the interviews reported in the Inspector General's Report (see note 19 supra), would have seen any purpose in securing a copy of the check prior to issuance of the report.

Further, while the report indicates that the materials shown to Nunn had been obtained from a HUD IG audit file in Atlanta, Georgia, there is nothing to indicate that the agent interviewing Nunn would have placed anything he secured from Nunn in that or other files in the Atlanta Office or that such materials would still be retained in those files in April 1989, without either the originals or copies of those documents having been transmitted to Washington along with the interview report that would appear in the Inspector General's Report issued from HUD headquarters. Thus, the interview report could not have provided Dean a reasonable basis to infer that HUD even had the check at the time she says she called Cain, much less that the check was then maintained in the field.

Nevertheless, Swartz would argue to the court that the statement in the interview report had provided Dean a sufficient basis for taking the chance of falsely stating under penalty of perjury that Cain had told her the check was maintained in a field office. Implicit in Swartz's argument was also the argument that either (a) Dean had relied on the same statement in the report of the Nunn interview when in 1989 she lied to Scanlan about the call to Cain or (b) Scanlan, too, had thought that the statement in the report made it likely enough that the check was maintained in the field in 1989 that he would chance falsely stating under penalty of perjury that Dean had told him about the call in 1989. In sum, not only was the argument absurd, it is inconceivable that Swartz did not know it was absurd. The very making of the argument suggests that Swartz believed that Cain's testimony was false and was seeking to conceal that fact.

The failure of the OIC to reveal what it knows about the check is germane to a matter that may be of greater importance than its knowledge of Cain's perjury at the time Cain testified or at the time O'Neill so relied on that testimony in closing argument. Since the OIC did not then have the benefit of the Dean and Scanlan affidavits, those affidavits have no bearing on whether O'Neill and Sweeney or others in the OIC knew or should have known that Cain committed perjury during the trial. But having reviewed

the affidavits and the statements about the whereabouts of the check -- and apparently having failed to develop a plausible theory of how Dean came to know about the whereabouts of the check other than through her call to Cain -- the OIC's failure to be forthcoming on the matter indicated an adamant refusal to recognize an obligation to reveal perjurious testimony of government agents. The OIC's conduct, moreover, can no longer be supposed to be possibly the errant action of an overly aggressive trial counsel, for now all levels of the Office of Independent Counsel were certainly implicated. Further, if the OIC's reliance on Cain's testimony at trial and in closing argument was innocent, that cannot be said of the OIC's efforts not only to conceal evidence of perjury in opposing Dean's motion, but to rely on testimony the OIC believed to be false in seeking to increase Dean's sentence.

A few additional matters warrant consideration at this point. Assuming arguendo that at the time of receiving Dean's Rule 33 Motion, the lawyers in the OIC charged with responding to the Motion were then completely innocent of any questionable conduct that had gone before, at a bare minimum, one ought to expect those lawyers to confront Cain with the information in the Dean and Scanlan affidavits regarding the check and determine whether the information refreshed Cain's recollection or the confrontation with the information otherwise caused him to change his story. If Cain still maintained that the call never took place, he should have been asked whether he knew it to be a fact that the check was maintained in the field in April 1989. A bare minimum would also seem to require that Cain be at least asked if he would take a lie detector test (with a refusal interpreted accordingly), and that he be examined in detail about his discussions with O'Neill and Sweeney prior to testifying. (O'Neill and Sweeney should also have been separately questioned about the details of their discussions with Cain.)

It seems more likely, however, that Cain was not pressed on any of the matters because of the fear that he might (1) acknowledge that he had lied on the stand or (2) provide answers that would force the prosecutors either to recognize beyond any doubt that Cain had lied or to explicitly acknowledge among themselves that they believed Cain had probably or certainly lied. With regard to the prosecution's subsequent contacts with Cain, it may well be significant that, though Cain is the logical person to provide additional affidavits on each of the three matters about which the OIC maintained Dean lied in her affidavit, in fact he would provide nothing further on any of the matters.

In any event, should the government investigate the conduct of its prosecutors following the filing of Dean's Rule 33 Motion, Cain is an important witness. If it turns out that the prosecutors did not press Cain on these matters following the filing of Dean's motion -- or did not confront Cain about the matter at all -- the conclusion seems inescapable that the prosecutors believed that Cain probably had lied and that Dean probably had told the truth, but nevertheless endeavored to cover up what they believed

to be Cain's perjury and to increase Dean's sentence in reliance on testimony they believed to be perjured.<sup>22</sup>

Even if Cain had been vigorously confronted and very credibly denied any recollection of a call from Dean, however, that would not resolve whether the OIC counsel had reasonably concluded that Cain, rather than Dean, had told the truth. There would still exist the question of what OIC counsel did to learn of the whereabouts of the check in April 1989 and how they rationalized what they did learn. The OIC's observed actions with regard to the check suggest little prospect that an inquiry into the OIC's actual actions and motivations would show the OIC's conduct to be justified.

With regard to the likelihood that O'Neill and Sweeney knew (or believed it more likely than not) that Cain was not telling the truth when they used him as a rebuttal witness, when they argued to prevent surrebuttal by Dean, and when O'Neill so emphasized Cain's testimony in closing argument, it is true that trial counsel did not then have the information provided with Dean's Rule 33 Motion. An appraisal of O'Neill's and Sweeney's conduct, however, must be made with due regard to the material in the other Narrative Appendixes, as well as other matters raised in Dean's Rule 33 Motion. Those materials cumulatively if not individually make it evident that O'Neill and Sweeney were quite willing to put on testimony (and documents) they believed probably or certainly to be false, so long as there was a chance that the jury would find it to be true.<sup>23</sup>

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<sup>22</sup> While it is not known what OIC said to Cain during this period, it is known that the OIC made no effort to interview Scanlan. It is true that OIC counsel had many reasons to question Scanlan's impartiality. Yet, assuming that the OIC recognized an obligation to learn the truth about whether a government agent had lied on the stand, unless OIC counsel were absolutely certain that Cain had told the truth, the OIC certainly had a strong interest in learning whether Scanlan had told the truth. Even if OIC counsel were absolutely certain that Cain was telling the truth, the OIC should have wanted to question Scanlan to undermine his testimony in support of Dean.

<sup>23</sup> Many of these matters are addressed in some detail in other Narrative Appendixes and in somewhat less detail in the Introduction and Summary and the collected individual summaries of each Narrative Appendix. But to make this particular appendix as self-contained as possible, abbreviated summaries of aspects of trial counsel's behavior are contained in the Subappendix at the end of the appendix. The characterizations in these abbreviated summaries lack the precision of the Narrative Appendixes, but readers who also review the underlying material ought to find the summaries to be fair. In any case, such readers are likely to recognize that the trial counsel in this case had a remarkably narrow understanding of the United States Government's obligation to ensure that evidence it presented to a jury was not false, and that those attorneys believed that it was entirely permissible to present to a jury in a criminal case evidence that the government's lawyers believed probably to be false or even almost certainly to be false.

Two further matters warrant elaboration with regard to O'Neill and Sweeney. Even though Cain's testimony about not remembering the call from Dean was made in a context where it was almost impossible to believe that he would not have recalled the conversation if it occurred, it would still make the point stronger if Cain had testified that he would likely have recalled the conversation if it occurred. O'Neill, however, declined to ask that question. (It is perhaps significant as well that each of O'Neill's questions was phrased in terms of "do you recall?," though that is a common enough phrasing of questions.) The failure to ask Cain if he believed he would have recalled may reflect Cain's unwillingness to say anything beyond that he did not recall the conversation, which in turn may reflect the common perception that statements that one cannot remember something rarely can be shown to be perjurious. If so, it is difficult not to find O'Neill to be implicated in the perjury.

On the other hand, if Cain had told O'Neill that he (Cain) was not confident that he would recall the conversation if it took place, then O'Neill's use of Cain's denial of a recollection in the manner he did would itself have been the use of use of false evidence, and the OIC's subsequent reliance on Cain's failure of recollection to increase Dean's sentence notwithstanding the Dean and Scanlan affidavits would have been even more indefensible. Again, however, it seems inconceivable that Cain could simply have forgotten.

The second matter involves O'Neill's failure to mention anything about the check either in questioning of Cain or in recalling Dean's detailed testimony to the jury during closing argument. Both failures suggest that Cain had in fact told O'Neill the content of the conversation that, under oath, he (Cain) denied having with Dean. It is also possible, however, that O'Neill did not mention the check because of concern that the jury would wonder about the check in a way to cause it to be less ready to accept Cain's testimony over Dean's. If that was O'Neill's motivation, however, it nevertheless suggests that, regardless of what Cain had told O'Neill, O'Neill questioned whether Cain in fact could not remember the call.<sup>24</sup>

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<sup>24</sup> It may also be significant with regard to O'Neill's knowledge of Cain's perjury that O'Neill did not question Dean about her call to Cain, even though she was on the stand for four more days after she testified about the call. It is possible, to be sure, that a prosecutor who genuinely believed Cain might make the tactical decision not to probe Dean on the matter. On the other hand, O'Neill knew that Dean was still considering calling Cain at this time, and any questioning suggesting that she may have fabricated the call might have caused her actually to call Cain to testify in circumstances over which O'Neill would have less control. Further, in responding to questioning on the matter, Dean, who often volunteered more in her answers than O'Neill requested, might also have stated things that Cain told her, complicating O'Neill's later use of Cain in rebuttal. Given the facial improbability of Dean's having testified about the call if it did not occur, some government attorneys might have deemed it appropriate to probe Dean on the matter in order to resolve any doubts they might have about Cain's

One may wonder why Cain would have lied in these circumstances, particularly if, as Dean suggested, he and Dean were friends. Most people recognize, however, that law enforcement officers sometimes do lie to assist in the conviction of a person they believe to be guilty of a crime. And though perjury may be a felony, it is hardly clear why Cain would regard accommodating prosecutors' stated or unstated desires that he not remember something that he did remember to be any more immoral than numerous actions being taken by the prosecutors, such as the drafting of an indictment containing inferences known to be false or falsely denying to the court that they were aware of any exculpatory material.

In any case, there exists an additional reason why Cain might be willing to lie to accommodate the prosecutors in this case. Though the Inspector General's Report on the moderate rehabilitation program would bear Cain's name as the preparer, it would be his superiors who testified about the report before unfriendly Congressional committees. And it would be those superiors who, in public hearings and in the press, were accused of malfeasance or conspiracy in focusing on Demery's charity while ignoring what the accusers deemed to be the more serious misconduct of Dean and Secretary Pierce. In this context, one can understand the pressures Cain might feel when confronted by OIC counsel asking why he had never previously discussed the call from Dean, or expressing the hope that the statement Dean had made about calling Cain was not true.

The above observations about trial counsel's conduct are not intended to suggest that the OIC's use of Cain's testimony at trial, or any other instance of improper conduct at the trial level, were principally the fault of those trial counsel. At the times when the OIC was crafting an indictment to create inferences that the OIC's immunized witness had said were not true, its lawyers were defying Judge Gesell's order to immediately produce exculpatory materials (such as those statements showing that the inferences created by the indictment were not true), and those lawyers were falsely stating to the court that they were aware of no exculpatory material, it seemed to most observers that Bruce Swartz was heavily involved with the details of the litigation. It is believed that it was Swartz who personally reinterviewed Shelby about Feinberg's knowledge of Mitchell's role before the OIC evidently decided to elicit from Feinberg sworn testimony that he was unaware of Mitchell's role without confronting him with Shelby's contrary statements.<sup>25</sup> Swartz was also frequently in court during the trial and may have been directing many aspects of the prosecution.

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truthfulness or recollection. O'Neill's conduct recorded throughout the Narrative Appendixes, however, plainly indicates a preference for relying on testimony that is probably false rather than making inquiries that might reveal that it definitely is false.

<sup>25</sup> See Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony."

As to Independent Counsel Arlin M. Adams, it is not known how involved he might have been with any of the details of the case. Adams participated only briefly in a number of hearings, most notably at the sentencing hearing, arguing that the court should issue a sentence at the higher end of the guideline range, in order that Dean not be perceived as being treated more leniently than a member of a minority group. Transcript of Hearing at 11 (Feb. 26, 1994). What seems clear, however, is that, having stated to the press that he believed that he might have been on the Supreme Court but for having offended John Mitchell, Arlin Adams should have recused himself not only from any matter involving John Mitchell, but from any matter involving an individual who the OIC maintained was, for all practical purposes, John Mitchell's daughter.<sup>26</sup>

In any case, while Robert O'Neill and Paula Sweeney were responsible for everything they did, there is no reason to believe that they were acting entirely or even largely on their own. And they plainly were no longer controlling matters during the post-trial proceedings when the OIC sought to conceal what it then had compelling reason to believe, with a high probability if not a virtual certainty, was the perjury of a federal agent.

Dean's erroneous statements about Cain's presence at the Beverly Wilshire party were unfortunate, for they allowed the OIC to raise questions about her reliability and credibility, as well as divert the judge's attention from the crucial issue. It is also unfortunate that her affidavit did not give greater detail on the Castle Square matter, including details of her involvement with the project, in order to obviate the arguments the OIC made on that matter. Dean should have submitted a supplemental affidavit on both points.

Yet, the OIC's actions on both of these matters offer further evidence that it was covering up what it believed to be perjury by Cain. Leaving aside whether the OIC could believe that Dean would intentionally fabricate the story that Cain was at the Beverly Wilshire party she described (knowing how easily it could be disproved, for example, through the testimony of the three people she named who were there),<sup>27</sup> the

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<sup>26</sup> Shortly after being appointed to the position of Independent Counsel, Adams was described by USA Today as a person who "thinks he might have been on the Supreme Court." Adams is then quoted as follows: "'I never felt that I deserved it,' he said. 'And I had offended John Mitchell.'" (The article, from the April 11, 1990 issue, is appended as Attachment 8). When Dean learned that the Superseding Indictment was to name Mitchell as a co-conspirator, Dean wrote Adams requesting that he recuse himself because of the statement to USA Today. The request was summarily denied.

<sup>27</sup> It is true, of course, that Dean's argument that it would have made no sense for her to have intentionally fabricated the story about the Wilshire Party sounds much like her argument that it made no sense for her to make up the call to Cain. The OIC made

OIC could not possibly have believed that the receipt attached to Dean's affidavit bearing the date May 28, 1986, and signed "Mary Gore Dean" in Deborah Dean's handwriting, was not in fact the receipt for the party described in the Declaration of Joseph Parker that took place on May 29, 1985. (The discrepancy in dates presumably resulted from a waitperson's error in advancing the year rather than the day on a credit card device). Hence, the OIC's assertions to the contrary can only be interpreted as an effort to lead the court to believe something that the OIC itself did not believe. That the OIC would assert that Dean may have provided a false receipt when it was certain that such was not the case does not logically invalidate its arguments about the call to Cain, but it does show that the lawyers involved were willing to make assertions that they did not believe to be true in order to detract attention from the issue of the call to Cain. Of course, the instances of dishonesty reflected in the OIC's actions described elsewhere are equally relevant in attempting to divine whether OIC lawyers also knowingly concealed what they believed to be the perjury of a federal agent.

Consider also the OIC's response on Castle Square. In her affidavit Dean had stated that she had spoken to Deputy Assistant Secretary Hunter Cushing and Undersecretary Carl Covitz, as well as Cain, about irregularities in the Castle Square funding. Yet, no affidavit was presented for any of the three, with the OIC instead relying solely on documents that it maintained showed that Dean had promoted the project rather than tried to stop it. The documents did indicate that Dean had worked at least briefly as a consultant on the project, but they did not indicate that she did not, as she said, advise each of the referenced persons of irregularities in the project. If the OIC contacted Covitz or Cushing and either stated that Dean did not mention to him the irregularities in the funding, one would expect the OIC to secure an affidavit to that effect. What seems more likely, however, is that the lawyers involved declined to contact either Cushing or Covitz because of a concern that one or both of them would corroborate Dean's account and thereby interfere with the OIC's ability to argue to the court that Dean had lied.

In any event, the complete truth about whether Cain committed perjury and whether OIC attorneys knew of that perjury and took affirmative steps to conceal it is something that the government can readily determine. The government need only ask of its lawyers what actions they took to determine the truth, what they learned as a result of those actions, and how their subsequent actions reflected what they had

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much of this. Still, the question is what makes sense in each instance. At least in the case of the Beverly Wilshire party, the OIC had the argument that Dean made up the story believing that the OIC would not be able to locate travel records to disprove it (though to make the argument the OIC has to ignore the fact that Dean gave the names of three persons other than Cain who she claimed were present). In the case of Dean's statement about the call to Cain, however, the OIC had no argument whatever as to why Dean might make up such a story knowing that Cain was available in the offices of the OIC to refute it.

learned or, voluntarily or involuntarily, had failed to learn. The results of such inquiry ought to provide the government a basis for determining what course it should take concerning the disciplining or prosecution of culpable government lawyers and what actions it should take concerning its obligation to advise the court of the role any improper conduct of the government's agents may have had in initially securing a conviction against Dean and in subsequently resisting her efforts to secure a new trial.

ADDENDUM TO NARRATIVE APPENDIX STYLED  
"TESTIMONY OF SUPERVISORY SPECIAL AGENT ALVIN R. CAIN, JR."  
(September 1995)

At a meeting during the week of December 12, 1994, Associate Deputy Attorney General David Margolis raised the question of whether, assuming that Dean had in fact called Cain, it necessarily followed that Cain's responses to the questions put to him by O'Neill did not reflect his (Cain's) best recollection of the specifics of the call from Dean. In that regard, whatever may be said of Cain's responses to the first and third questions put to him by O'Neill, Cain's denial of a recollection that Dean had called him "mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report" would appear inconsistent with any plausible interpretation of the specifics of Dean's call to Cain. It nevertheless is worth appraising the OIC's conduct based on the assumption, albeit quite improbable, that each of Cain's three denials of recollection was literally correct.

Suppose then that Dean did call Cain and did learn from him that the check was maintained in a HUD field office, but that it is also true that Cain's recollection of what Dean specifically said to him in the call was consistent with his responses to the three questions put to him by O'Neill in court. Presumably, if the OIC fulfilled its obligation to investigate the issues raised in Dean's motion, OIC attorneys did know shortly after Dean filed her motion (if they did not know it earlier) that Dean had called Cain and had learned from him that the check was maintained in a HUD field office. Thus, one is still left with the situation that, on January 18, 1994, though knowing that Dean had made the call to Cain, Independent Counsel Arlin M. Adams wrote the U.S. Probation Officer arguing to have Dean's sentence increased because she had lied in testifying that she made the call. One is also left with the situation that, at the hearing on February 22, 1994, though knowing that Dean had learned that the check was maintained in a HUD field office from her call to Cain, Deputy Independent Counsel Bruce C. Swartz argued to the court that Dean in fact had surmised that the check was maintained in a field office from an entry in the HUD IG report and therefore should have her sentence increased for falsely stating that she learned this from a call to Cain. Indeed, that the OIC believed that it had a rationale by which Cain's statements were literally true is most significant in that it would seem to render it all the more likely that, both when O'Neill elicited from Cain testimony aimed at leading the jury to believe that Dean had not called Cain at all and when he later engaged in inflammatory argument aimed also at leading the jury to believe that Dean had not called Cain at all, O'Neill knew for a fact that Dean had called Cain.

An obvious avenue for further investigation of the matter would be an interview of Cain, questioning him about his communications with OIC attorneys both before and after he testified. The OIC's other actions with respect to the verifying of testimony that was likely to be false suggests that, if in fact the OIC attorneys handling post-trial matters were not aware that Cain had testified falsely prior to receiving Dean's motion for a new trial, upon reviewing that motion and the information provided with it, those

attorneys did not confront Cain with such information. The presumptive reason for the failure to confront Cain would be the fact that those attorneys already knew Cain's testimony was probably or certainly false or that, in any case, they did not wish to chance eliciting from Cain information supporting a belief that the testimony was false. Thus, apart from what an interview of Cain might elicit about the truthfulness of his testimony, it could yield highly significant information about the OIC's actions and motives.

One here needs also to consider the possibility that before Cain testified, he was asked by OIC counsel whether he remembered a call from Dean, with the call then being described in the terms O'Neill would later use in his questioning. If Cain said he did not, one would expect counsel to ask Cain whether Deans' repeated statements that she had asked him about a check refreshed his recollection. If such a question was not asked, it is fair to assume that trial counsel elicited Cain's testimony while believing either that Cain was truthfully testifying that he failed to recall a telephone conversation that did occur or that Cain was falsely testifying that he failed to recall a telephone conversation that he did recall.

SECOND ADDENDUM TO NARRATIVE APPENDIX STYLED  
"TESTIMONY OF SUPERVISORY SPECIAL AGENT ALVIN R. CAIN, JR."  
(December 1995)

The Cain Narrative Appendix (at 35-36) leaves open the question of the involvement of Bruce Swartz and Arlin Adams in the decision to call Cain to contradict Dean at trial. More generally, while noting that Swartz seemed to be heavily involved in the details of the case, the Narrative Appendix states that it was not known how large a role Adams had in the details of the case.

With regard to these issues, the following should be noted. Dean testified about calling Cain on her third day of direct examination, Tuesday, October 12, 1993. Her cross-examination commenced on Thursday, October 14, 1993, and continued through Monday, October 18, 1993. Cain also testified on Monday, October 18, 1993, shortly after Dean left the stand. On the morning of Monday, October 18, 1993, O'Neill told the court that Adams typically comes from Philadelphia to Washington on Sundays to discuss the case and that on such occasions "we all talk about the case." Tr. 3051. O'Neill indicated that such a meeting with Adams had occurred on the previous day, Sunday, October 17, 1993. Presumably, Swartz would have been present at such meeting, and the intention to call Cain the following day to contradict Dean would have been discussed.

Thus, it would seem that both Swartz and Adams had been involved in discussions about the calling of Cain and that Adams did involve himself in many details of the trial. Further with regard to Swartz, as indicated in the Second Addendum to the Park Towers Narrative Appendix, it appears that Swartz and O'Neill were together involved in the interviews of Richard Shelby on May 18, 1992 (where Shelby for the second time stated that Eli M. Feinberg was aware of John Mitchell's involvement with Park Towers); the telephonic interview of Feinberg on May 18, 1992 (where Feinberg stated that he was not aware of Mitchell's involvement with Park Towers); the May 19, 1992 re-interview of Shelby (where Shelby firmly stated again that Feinberg was indeed aware of Mitchell's involvement with Park Towers and provided details of Feinberg's role in setting Mitchell's fee); and the May 19, 1992 re-interview of Shelby's employer, Clarence James (where, contrary to his earlier statement, James acknowledged that he did know that Mitchell was involved with Park Towers). Thus, there is reason to believe that Swartz was very much involved in many details of the case, including the decision to elicit Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers, without confronting him (Feinberg) with Shelby's firm statements that Feinberg did know of Mitchell's role and was even involved in discussions over Mitchell's fee.

SUBAPPENDIX: ABBREVIATED SUMMARIES OF TRIAL COUNSEL MISCONDUCT

1. Testimony of Ronald L. Reynolds

In order to impeach Dean, the OIC presented Ronald Reynolds as a rebuttal witness to make statements that it had to believe were very probably false and, in some cases, undoubtedly false. The OIC then resisted Dean's efforts to respond to Reynolds' testimony through surrebuttal. In closing, O'Neill relied heavily on Reynolds' testimony that the OIC knew to be false to support claims that Dean had lied, and, in order to enhance the effect, mischaracterized Dean's testimony as well as the documentary record. The court recognized that documentary material should have caused the OIC to know that Reynolds was not telling the truth.

2. Arama: The John Mitchell Messages and Maurice Barksdale

The OIC possessed documentary evidence suggesting that Dean's predecessor Lance Wilson had contacted Assistant Secretary for Housing Maurice Barksdale in order to secure funding of the Arama project for John Mitchell. The OIC never confronted Barksdale with the information contained in those documents, however, presumably because it did not want Barksdale to be reminded of (or to be forced to acknowledge) facts that would tend to be exculpatory of Dean. The OIC also failed to provide these materials to Dean as exculpatory material, but only provided them along with hundreds of thousands of pages of material produced in discovery. Then, during the trial, O'Neill questioned Barksdale in a manner to cause him not to mention that Wilson had contacted him regarding the funding for Mitchell.

3. Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony

a. Prior to issuance of the Superseding Indictment in July 1992, the OIC had questioned an immunized witness named Richard Shelby about whether Dean was the person identified in a document as "the contact at HUD" with whom Shelby was to meet regarding a project called Park Towers. Shelby told the OIC that he believed that the reference was not to Dean, but to a Deputy Assistant Secretary named Silvio DeBartolomeis. The OIC possessed a number of documents from the files of the Park Towers developer referencing Shelby's contacts with DeBartolomeis. Shelby also told the prosecution that he had retained John Mitchell to assist him on Park Towers before knowing about Mitchell's relationship to Dean; and that when he found out about the relationship, he ceased to seek further material assistance from Mitchell; that he believed that Dean did not know about his (Shelby's) business relationship with Mitchell; that Park Towers had not been discussed at a September 9, 1985 lunch among Shelby, Mitchell, and Dean; and that someone other than Dean had sent him an HUD document called a rapid reply.

Nevertheless, the OIC would craft its indictment in a manner to create the inference that the "contact at HUD" was Dean; that Shelby had employed Mitchell because of Mitchell's relationship to Dean; that Dean knew of Shelby's business relationship with Mitchell; and that Park Towers had been discussed at the September 9, 1985; and that Dean had provided Shelby a copy of the rapid reply. Despite the obligation to turn exculpatory material over to the defendant imposed by Brady v. Maryland and being firmly ordered by Judge Gesell to provide such material as soon as it was found, the OIC would not provide the Shelby statements to the defense for more than a year, while explicitly stating that OIC attorneys were aware of no exculpatory material. Some, though not all of the Shelby statements, would finally be provided less than a month before trial, along with numerous other Brady statements. The OIC would represent to the court that the material then being provided had not been provided earlier because the witnesses had subsequently qualified their statements, a representation that was patently untrue with regard to the Shelby statements as well as the vast majority of the other material belatedly provided to Dean. Even after admonishment by the court, the OIC still continued to withhold material that was plainly exculpatory.

The day before Shelby testified, O'Neill showed him documents reflecting certain contacts with Dean, but none of the documents reflecting his contacts with DeBartolomeis. When Shelby testified that his principal HUD contact concerning Park Towers was DeBartolomeis, not Dean, O'Neill asked him this question: "Now, did you review any records, trying to refresh your recollection as to who you dealt with at HUD on this project?" When Shelby indicated that he had reviewed documents the night before, O'Neill elicited the testimony that the documents Shelby reviewed mentioned Dean, but not DeBartolomeis. O'Neill questioned neither Shelby nor the creator of the document with the conspiratorial reference to "the contact at HUD" regarding the identity of the person so referenced.

In closing argument, the OIC placed the reference to the "contact at HUD" on a large chart and O'Neill argued from the chart in a manner to lead the jury to believe that the reference was to Dean. The OIC acknowledged that such had been O'Neill's purpose, and would maintain that the approach was permissible because of Shelby's testimony as to the absence of documents indicating contacts with DeBartolomeis.

b. Miami developer Martin Fine had retained a Miami consultant named Eli Feinberg to assist in securing moderate rehabilitation funding for Park Towers. Fine retained Shelby who then retained John Mitchell. Twice prior to May 18, 1992, Shelby, already under a grant of immunity, told the OIC that he informed Feinberg of Mitchell's involvement with Park Towers and that he assumed Feinberg told Fine. In a telephonic interview on May 18, 1992, Feinberg, without having been advised of Shelby's statements, stated that he (Feinberg) was unaware of Mitchell's involvement.

On May 19, 1992, the OIC again interviewed Shelby regarding Feinberg's knowledge and informed him (Shelby) that Feinberg had stated that he was unaware of Mitchell's involvement in Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement. Shelby also provided details of Feinberg's involvement in determining Mitchell's fee. Even though there were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement, apparently between the time of Feinberg's May 18, 1992 telephonic and his being called to testify under oath on September 17, 1993, that he was unaware of Mitchell's involvement, the OIC never confronted Feinberg with Shelby's statements.

Without advance notice, the OIC would put Shelby on the stand out of order and ahead of Feinberg. Then, though knowing beyond any doubt that its immunized witness Shelby would deny that he had concealed Mitchell's involvement from Feinberg, OIC counsel would avoid any questions that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, OIC counsel changed the subject. After Shelby had testified, the OIC then called Feinberg, and, despite the evidence that such testimony would be false, OIC counsel directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement. The OIC then elicited sworn testimony to the same effect from Fine.

In closing argument, in addition to seeking to cause the jury to draw various false inferences, OIC counsel would give special attention to the testimony that Feinberg and Fine were unaware of Mitchell's involvement, asserting that such concealment was "the hallmark of conspiracy." And despite knowing with complete certainty that the OIC's immunized witness Shelby would have contradicted Feinberg's testimony, and having strong reason to believe Feinberg's testimony was in fact false, OIC counsel would make a special point of the fact that the testimony was unimpeached.

c. With regard to Park Towers the OIC would present its evidence in such a way as to lead the jury or the courts to believe the following things that were pertinent to its contentions that the OIC either knew for a fact, or had strong reason to believe, were false:

- that Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean
- that Dean provided Shelby a copy of a funding document known as a rapid reply

- that Dean had been responsible for a post-allocation waiver of HUD regulations that allowed the Park Towers project to go forward
- that Dean had provided Shelby a copy of that waiver
- that Shelby concealed his contacts with Dean from Feinberg and Fine

4. Testimony of Thomas T. Demery

The OIC called Thomas T. Demery as an immunized witness but did not elicit his most crucial testimony during his direct examination, apparently intending to give the matter greater emphasis by bringing it out on redirect. On cross-examination Demery stated that he had never lied to Congress. The OIC knew that Demery was committing perjury by that denial. The OIC had indicted Demery for perjury for his testimony before Congress, and, during the negotiation of a plea agreement that did not include a perjury count, Demery admitted to the OIC that he had lied to Congress. Thus, the OIC then had an obligation to reveal the perjury of its witness. Instead of fulfilling that obligation, however, on redirect, O'Neill ignored Demery's perjury and proceeded to elicit Demery's most important testimony. Even though the OIC had to know Demery lied on the stand in this case, in closing argument, O'Neill asserted that Dean had falsely accused Demery of lying, adding that Dean "is the only we know who definitively did lie."

5. Russell Cartwright Receipt

O'Neill cross-examined Dean with a receipt from consultant Russell Cartwright indicating that Cartwright paid for an October 1987 dinner for Dean and a HUD employee named Abbie Wiest. Wiest, however, testifying with immunity and under oath, had emphatically told the prosecution that Dean was not at the dinner. There is much reason to believe that the prosecution, believing the receipt to be false, cross-examined Dean with it precisely because it expected her to deny it. Responding to O'Neill's questioning based on the Cartwright receipt, Dean denied that she had ever eaten with Cartwright, and O'Neill badgered her into saying that the receipt must be false. In closing argument, though O'Neill was very likely confident, if not certain, that the receipt was in fact false, nevertheless asserted to the jury that Dean had lied by claiming that "all Russell Cartwright's receipts are lies." O'Neill stated as evidence that Dean's testimony was false that her calendars showed that she often met with him for lunch. Dean's calendars, however, showed not a single meeting of any sort with Cartwright.

6. The Andrew Sankin Receipts

The OIC possessed various receipts of a consultant named Andrew Sankin, who also knew Dean personally, indicating that he had purchased meals for Dean or other HUD officials. The OIC based entries in the indictment on certain receipts that seemed at least on their face to relate to Dean, but it did not base entries on the receipts that appeared probably or certainly not to involve Dean. In opening argument, O'Neill described Sankin as someone who "was wining and dining" Dean and who was "buying her gifts." Sankin appeared as an immunized witness, among other reasons, to testify about the receipts, including those that appeared probably or certainly not to involve Dean and which the OIC had declined to base indictment entries on. O'Neill refused to allow Sankin to review the receipts before he testified, with the OIC later asserting that O'Neill had done so because of Sankin's hostility to the OIC's case. O'Neill then sought to introduce all the receipts through Sankin in a manner to cause the jury to believe that they all in fact involved Dean. After leaving the stand on his first day of testimony, Sankin, recognizing that a false impression was being created, informed O'Neill that not all of the receipts related to Dean. O'Neill did not disclose Sankin's statement. Instead, on the following day, O'Neill asked Sankin to testify about one of the few receipts that definitely related to Dean, reinforcing the false impression created the day before.

7. Kitchin's Delivery of the Atlanta Request

The OIC presented provocative testimony by two witnesses that Atlanta consultant Louis Kitchin needed a letter from an Atlanta housing authority in order that he could deliver it to Deborah Dean in Washington during a brief period at the end of October 1986. Documentary evidence, however, appeared to indicate that Kitchin and Dean did not meet during this period. The OIC had not alleged in the indictment that Kitchin brought the letter to Dean, presumably reflecting the fact that the OIC knew Kitchin had not brought the letter to Dean. During Kitchin's direct testimony, O'Neill did not question Kitchin about the letter, also probably reflecting the fact that the OIC knew that Kitchin had not brought the letter. On cross-examination Kitchin testified that he probably was in Atlanta during the period in question. In closing argument, however, O'Neill explicitly told the jury that Kitchin had brought the letter to Dean. Acknowledging that the statement had been intentional, the OIC would defend it as fair argument.

8. Dean's Statement that She Was Not That Close to Mitchell Until After She Left HUD

In closing argument, O'Neill took out of context passing remark by Dean made about her relationship with Mitchell in order to assert to the jury that Dean had lied in making the remark. When Dean challenged this action in her motion for a new trial, the OIC responded defensively. Nevertheless, the OIC relied on the same remark, misleadingly presented, to successfully persuade the Probation Officer to increase the recommended sentence on grounds that Dean obstructed justice by falsely testifying about her relationship with Mitchell. For a time, the court followed the Probation Officer's recommendation, but later concluded that the remark had seemed misleading only when taken out of context.

9. Closing Argument Characterization of the Dade Selection

In closing argument, O'Neill made various provocative points to the jury by stating things that he undoubtedly knew were untrue. These included: (1) that a defense witness stated that Dean had spoken in favor a particular funding at a Spring 1987 meeting; and (2) that funding decision was made before the housing authority had requested the units.