

defendant. In the face of the Government's objection, surrebuttal would not be allowed. Tr. 3270-71.<sup>120</sup>

As shown in Section 3.B., infra, in closing argument, government counsel would engage in further misconduct both in its use of Mr. Reynolds' testimony to attack defendant's credibility and in its attempts to divert attention from Mr. Reynolds' perjury.

### 3. Alvin R. Cain, Jr.

Alvin R. Cain, Jr. is a Supervisory Special Agent employed by the Office of the Inspector General of the Department of Housing and Urban Development. Since October June of 1990 he had been assigned to the Office of the Independent Counsel. Tr. 3196. ✓ Mr. Cain's testimony as a government rebuttal witness formed a crucial element in the government's attack on defendant's credibility in closing argument, with government counsel citing Mr. Cain's testimony, both on the first day and in rebuttal on the following day, as directly contradicting one of defendant's most personal statements concerning her lack of knowledge that John Mitchell had earned HUD consulting fees while defendant was employed at HUD. The role of Mr. Cain's testimony is shown in some detail below. Also shown below are reasons that the government knew or should have known that Mr. Cain's testimony was perjured in several respects. Finally, it is shown why, regardless of what the record so far developed indicates may have been known to the government at the time of trial, there is sufficient evidence that an agent of the Office of Independent Counsel lied with respect to a critical aspect of his testimony to warrant a hearing and discovery into the

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<sup>120</sup> As discussed in the next section, defendant had also sought to present surrebuttal as to a third Government rebuttal witness.

issues both of (1) whether Mr. Cain committed perjury and (2) whether government counsel knew or should have known that Mr. Cain committed perjury.

In the direct examination of defendant, the following testimony was elicited with regard to defendant's first learning that John Mitchell received consulting fees for HUD-related work (Tr. 2615-19): *emphasis added*.

Q. When was the very first time that you learned that Mr. Mitchell was being paid for consulting work he was doing in relationship to HUD.

A. The -- I learned about it the day that the HUD Inspector General report came out on the Mod Rehab Program after -- well, it was in 1989, I believe. And it was a, big report, a long report. Everybody had been waiting for it to come out.

And it was basically an investigation of developers' ties to a charity that Mr. Demery had been sponsoring and whether or not that had any influence on decisions that were made, and it was of great interest. And I remember calling the Inspector General's Office, to the man who was running the report -- who wrote the report, the head of the investigation unit, his name was Al Cain, and I called him, and I said, "How do I get a copy of the report?"

And I remember it was, sixty-some dollars was the fee to get it, and I remember sending Marti Mitchell at that time down with it, a check to pick up the report and the report came back, and I opened it up, and about the second or third page, it said --

MR. O'NEILL: Objection.

THE COURT: I'll sustain it.

THE WITNESS: I learned about it when I opened up the report.

THE COURT: All right.

Q. Did you read the report?

A. I, around the second or third page of the report, as I remember, there was a listing of consultants who had earned fees in the Mod Rehab Program and had said John Mitchell --

MR. O'NEILL: Objection, Your Honor.

THE COURT: I'll sustain the objection to the report unless you have some grounds to offer it. She can testify that's how she learned of it.

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THE WITNESS: That's how I learned about it, and it had an amount of money.

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, because I was really mad, and I wanted to see the check, and if there had been a check written to Mr. Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in way 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.

*that John would never have done that, and that he better be prepared,*

*any*

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And Al said, Al told me that he --

THE COURT: I'll sustain the objection. Don't get into what he said.

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 as to what Mr. Mitchell's role was in the mod rehab 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?

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.

It was presumably shortly after defendant gave the foregoing testimony that government counsel discussed with its agent Mr. Cain the telephone conversation described by defendant where she had insisted upon verification of the Mitchell payment. Assuming that Mr. Cain informed government counsel that no such conversation took place or that Mr. Cain, in any event, had no recollection of it, government counsel had still to consider the improbability that defendant would have testified about calling Mr. Cain if she had not done so.

The statement added little to defendant's testimony about calling Colonel Brennan. The latter testimony had been entirely consistent with the testimony of Colonel Brennan, a government immunized witness, who had stated that when he informed defendant of Mr. Mitchell's HUD work, "Her reaction was shock and aghast." Tr. 369. Government counsel knew that defendant knew that Mr. Cain had been detailed to the Office of Independent Counsel and had in

fact originally been listed as a government witness, as well as a possible defense witness. Thus, government counsel knew that defendant knew that her statement certainly would be refuted if it was not true.

Moreover, it must be remembered that defendant was only prevented by an objection from telling what Mr. Cain said to her. Thus, to believe that defendant fabricated the story about calling Mr. Cain is to believe that she was also intending to fabricate a story about what Mr. Cain had said to her, all the while with Mr. Cain available at the Office of Independent Counsel to immediately refute it.

Government counsel had also to know that defendant knew that Mr. Cain was an African American, and, given the racial make-up of the jury, how devastating to her credibility such a refutation was likely to be.

These factors gave government counsel much reason to question even a strong statement by Mr. Cain contrary to the statement defendant had made on the stand.<sup>121</sup> And given the fact that Mr. Cain was an agent of the Office of Independent Counsel, as well as the potential consequences of his testimony, the government would be expected to exercise more than usual caution in ensuring that it

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<sup>121</sup> If Mr. Cain merely assured government counsel that he could not remember the telephone call but had no strong belief that it did not take place, government counsel would have had to conclude that the call did occur. Hence, it would have been improper to put Mr. Cain on the stand and by having him recall other details of the period give the impression that his failure to recollect the call reflected the fact that it did not occur. It also would have been improper later to characterize Mr. Cain's testimony in closing argument as statements that: "And you heard Mr. Cain. It didn't happen. It didn't happen like that" (Tr. 3240); "Al Cain told you that conversation never happened." As discussed infra, those characterizations were improper in any event.

did not use perjured testimony. What the government respect to ensuring the truthfulness of Mr. Cain at this point is itself an appropriate subject of inquiry, and in said inquiry, the evidence previously discussed with regard to the government's practice in verifying the receipts of Mr. Sankin would be highly relevant.

In any event, one avenue available to the government was to probe defendant on the matter in cross-examination, which commenced the day after her testimony about Mr. Cain. During the three days the government cross-examined defendant, however, the government failed to avail itself of that opportunity.

Instead, the government called Mr. Cain as its second rebuttal witness. Mr. Cain gave the following testimony (Tr. 3197-99):

Q. At or about the time [the HUD IG report] was published, do you recall having a conversation with the defendant Deborah Gore Dean?

A. A telephone conversation.

Q. And can you recount for the ladies and gentlemen of the jury what if anything was said during that telephone conversation?

A. As I recall, Miss Dean telephoned me with an inquiry relative to how she could obtain a copy of the investigative report. I related to her that the report was available under the provisions of the Freedom of Information Act. I also explained to her the cost that was associated with obtaining a copy of the report.

Basically, we had two versions that were being sold under FOIA. The report itself totalled 50 some dollars and the report plus the audit report was 60 some dollars.

Q. Did she express an interest in either report?

A. Yes, she did. Miss Dean indicated that she would like to have a copy. I explained to her that she could send in a written request which we would honor and process or she could come to my office, pay for the report and sign a receipt for the same, and that would be the quickest way to obtain it.

Q. And, Agent Cain, what if anything did she say to you?

A. What if anything did --

Q. Did she say to you.

A. She told me that she would send Marty over with <sup>a</sup>the check.

Q. Did you know who Marty was at that time?

A. I was not entirely clear. I assume Marty was a reference to Marty Mitchell.

Q. Did there come a point in time when Marty Mitchell <sup>e</sup>came to pay you for the copy of the report? <sub>1</sub>

A. As I recall, it was the same day.

Q. What if anything happened?

A. Marty came into the office. I had placed a copy of the report with a receipt to be signed with my secretary just in case if I was away from the office. Ms. Mitchell came in, gave the check, signed the receipt, took the ~~receipt~~ and left.

Q. At or about the date, do you recall any conversation with the defendant Deborah Gore Dean in which she was <sup>1</sup>upset with you about the contents of the report? *report*  
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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.

Given the detail with which Mr. Cain recalled to the jury the events related to defendant's securing from him a copy of the inspector General's report, the impression conveyed by Mr. Cain's testimony with regard to the failure to recall the telephone call from Ms. Dean regarding Mr. Mitchell was that it did not happen.<sup>122</sup>

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<sup>122</sup> Given the detail provided by Mr. Cain with regard to surrounding events, the inference is compelling that if Ms. Dean in fact called Mr. Cain, he would have remembered it. As a matter of common sense, moreover, a call such as that described by Ms. Dean, from a former Executive Assistant to the Secretary, is not

Thus, within an hour after leaving the stand after eight days of testimony, defendant had been contradicted on a critical feature of her testimony by an agent of the United States Government, who happened also to be an African American.

Yet, whatever may have been the government's concerns about the truthfulness of Mr. Cain's testimony, based solely in the absurdity of defendant's falsely testifying that she had called him about the Mitchell payment (with the intention of also falsely testifying as to what he said to her), Mr. Cain's cross-examination gave the government additional reason to be concerned whether its agent was telling the truth. During that cross-examination, defense questioned Mr. Cain as to whether defendant had come to him to advise him that certain HUD subsidies were being misused. Mr. Cain avoided directly answering that question, instead merely saying that he did not recall whether he interviewed defendant in his office or in her office. Tr. 3201.

Mr. Cain was also cross-examined about whether he recalled attending a party at the Beverly Wilshire celebrating awards to Mr. Cain and his partner that was paid for <sup>by the</sup> defendant. Mr. Cain stated that he did not recall attending such a party. Tr. 3201-02. ✓

That cross-examination may or may not have had an impact on the jury. What is pertinent here is that government counsel, which already had reason to be concerned about the veracity of its agent's crucial testimony, was now given further cause for concern and reason to inquire of its agent. And if such inquiry led the government to believe Mr. Cain had lied on the issues in cross-

something one is likely to forget entirely, particularly given Mr. Cain's continuing involvement in the investigation of the mod rehab program.



examination, there would be substantial reason to inquire further to determine whether he had lied with regard to the main point of his direct examination.

The following day, defendant requested an opportunity to present surrebuttal testimony, with counsel noting an intention to present evidence on the fact that defendant and Secretary Pierce had paid an extensive bill for Mr. Cain at the Beverly Wilshire Hotel, as well as an intent to present evidence about the Castle Square project. Tr. 3270. The proffer with regard to the Wilshire Hotel bill, in light of the receipt for that bill in the government's possession, along with the unlikelihood that Mr. Cain would forget that matter, gave the government further reason to believe that its agent had lied. The government strenuously objected to surrebuttal, however, and the Court denied defendant's request. Tr. 3271.

In closing argument, the government relied heavily on Mr. Cain's testimony on both days. On the first day, government counsel would refer to Mr. Cain's testimony in the following context, referencing defendant's claim that she had not known that John Mitchell had made money at HUD (Tr. 3420):

Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And ~~that~~ day the I.G. Report came out she called Special Agent Al 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. ✓

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. (Emphasis added.)

In rebuttal on the following day, again in the context of an attack on defendant's credibility, government counsel would make the following further reference to Mr. Cain (Tr. 3506) <sup>the Special Agent from 440,</sup> ✓  
Shocked that Mitchell made any money. Al Cain, told you that conversation never happened. ^

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The impropriety of the several statements whereby government counsel asserts that Mr. Cain said the conversation with defendant never took place is a matter treated in Section C.2.H, infra. At this point, however, it is important to note that by stating that Mr. Cain specifically denied Ms. Dean's account of her call to him government counsel has elevated the significance of that statement. Also, by noting the details that Mr. Cain was able to recall, government counsel has suggested that Mr. Cain would have remembered the matter if it occurred. Finally, it is important to recognize, that, in light of the description of defendants' testimony regarding her call to Mr. Cain, counsel's descriptions of Mr. Cain's testimony constitute a potentially devastating indictment of defendant's sincerity on the stand.

Government counsel's statement about the cross-examination with regard to the Beverly Wilshire also warrants consideration at this point. For it reflects the fact that government counsel had not merely ignored these remarks, but had endeavored to rehabilitate its witness with regard to whatever effect the cross-examination regarding the Beverly Wilshire may have had. For reasons discussed infra, "you could see he had no idea of what they were talking about," would, in any case, be improper vouching. It is improper vouching, moreover, where the cross-examination gave

the jury reason to believe that there existed something outside the record that might substantiate the question. Thus, in government counsel's observation about Mr. Cain's demeanor there was an element of the Government's assuring the jury that there existed nothing outside the record to call into question Mr. Cain's response about the Beverly Wilshire party. That assurance would have been improper even if government counsel knew <sup>the</sup> its assurance to be well-founded. But, if government counsel, based on his knowledge of matters outside the record, had reason to believe that Mr. Cain in fact did have an idea of what defense was talking about, government counsel's statement was a particularly serious breach of prosecutorial ethics. See United States v. Kojayan, No. 91-50875 (9th Cir., Aug. 8, 1993). ✓

In any event, because of the potential cruciality of the Mr. Cain's testimony given the manner in which it was employed in the government's closing argument, defendant submits that a hearing would be appropriate if there is a reasonable basis for believing that the government's agent committed perjury and/or the government knew or should have known of that perjury. This applies both with regard to Mr. Cain's statements on direct with regard to the call from defendant, and to the two matters raised in cross-examination, since perjury and the government's actions toward it with regard to the latter matters bear heavily on the issue of perjury and the government's actions toward it with regard to the former matter.

Defendant submits that, even without consideration of the government's actions with regard to the Brady material, the Sankin receipts, and the evident perjury of Mr. Demery and Mr. Reynolds, as outlined above, there would be more than ample cause for a

hearing on all three matters involving Mr. Cain. The Affidavit of Deborah Gore Dean provides a detailed account of the events at the Beverly Wilshire hotel and the initiation of the Castle Square investigation, an account that suggests Mr. Cain could not possibly have forgotten these matters. Defendant submits that an inquiry into the substance of that affidavit, which contains the facts that the Office of Independent Counsel could readily have learned had it made any effort to verify Mr. Cain's testimony, will reveal that Mr. Cain lied in his testimony. Further inquiry will reveal whether the government knew or should have known of that perjury.

The Affidavit of Deborah Gore Dean also provides Ms. Dean's statement. ~~Dean's statement~~ as to what Mr. Cain told her when she called him in April of 1989. Specifically, defendant states that Mr. Cain told her that there was a check and that it was maintained in the field.<sup>123</sup> There should be records reflecting whether the check was in fact retained in the field office at the time defendant states that she called Mr. Cain. That information would be highly relevant to a determination of whether Mr. Cain committed perjury.

In addition, the Affidavit of James P. Scanlan contains the sworn statement of a career government attorney that after calling Mr. Cain, defendant reported that conversation to Mr. Scanlan, advising him that Mr. Cain had told defendant that the check was maintained in the field. Mr. Scanlan also presents reasons why he

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<sup>123</sup> Though giving an otherwise quite detailed account of defendant's testimony regarding her call to Mr. Cain, government counsel omitted any defendant's remarks regarding a check. Though that omission may prove to be entirely insignificant, it also is possible that the reference was in order not to call attention to an important avenue for resolving the conflicting testimony.

would retain a firm recollection of these events, including that he has been writing a book about them. Mr. Scanlan also states that defendant also told him about her conversation with Mr. Brennan immediately after that took place. It is not logically impossible that defendant could have told Mr. Scanlan she had called Mr. Cain even though she had not. Yet the likelihood that anyone in defendant's position would actually call Mr. Brennan, but make up a story about calling Mr. Cain, including making up a story about where Mr. Cain had told her the check was maintained, is too remote even to warrant consideration. Thus, there exists a compelling inference that, if Mr. Scanlan's statement is true, defendant did call Mr. Cain, as she stated. Further, if Mr. Cain, an agent of the Office of Independent Counsel, did lie on this matter, there is strong reason to believe that the Government not only knew that Mr. Cain lied, but had a role in causing Mr. Cain to lie.

For all of these reasons, a hearing is warranted to determine whether Mr. Cain lied and whether government counsel knew or should have known that he lied.

#### C. GOVERNMENT CONDUCT IN CLOSING ARGUMENT

At the close of the government's case, the Court expressed concerns about the sufficiency of the Government's evidence. Tr. 2041. When the Court did allow the case to go forward, defendant put on the following significant exculpatory evidence. evidence: 1) the testimony of several persons supporting the contention that defendant was involved in securing and furnishing an apartment for Louis Kitchin and that the \$4,000 check he gave defendant was related to that undertaking; 2) the testimony of former General Counsel J. Michael Dorsey that former Assistant