



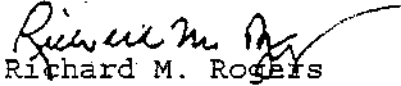
U. S. Department of Justice
Office of Professional Responsibility

Washington, D.C. 20530

February 9, 1998

MEMORANDUM

TO: David Margolis
Associate Deputy Attorney General

FROM: 
Richard M. Rogers
Acting Counsel

SUBJECT: Report of Investigation of Allegations of Misconduct by
AUSAs G. Paul Howes, Jeffrey Ragsdale, and Lynn Leibovitz
(D.D.C.)

INTRODUCTION AND SUMMARY

In a letter to this Office dated March 1, 1996, Eric H. Holder Jr., the U.S. Attorney for the District of Columbia, advised us of allegations that had been made in connection with the prosecution of United States v. Mark Hoyle, et al., Cr. No. 92-284 (TPJ), a major racketeering, narcotics, and murder case that had resulted in the convictions of four defendants in the U.S. District Court in October 1994. The letter enclosed copies of several e-mail messages and memoranda concerning communications the prosecutors of that case and others had recently had with Robert "Blue Tip" Smith, who had been a witness in the Hoyle prosecution. According to these communications, Smith was reporting that there had been improper conduct by cooperating witnesses in the case while those

witnesses were being held on the sixth floor of the federal courthouse for witness interviews and trial preparation before and during the trial. Smith also was reporting other instances of misconduct that allegedly occurred outside of the courthouse.

Specifically, according to the documents enclosed with Mr. Holder's letter, Smith reported that cooperating witnesses had obtained and consumed alcohol and illegal drugs in the courthouse; that they had engaged in sexual acts with visiting women in the courthouse; and that they had been improperly provided with federal witness vouchers in order to obtain money for general expenses rather than for legitimate witness fees.

After an extensive inquiry, OPR concluded that no Department of Justice attorney knowingly permitted or negligently failed to prevent any use of alcohol or illegal drugs or any sexual activity by witnesses in the federal courthouse. However, our inquiry did find improper use of witness vouchers by one of the prosecutors, G. Paul Howes, who left government service in 1995. Because of his intentional misconduct in this regard, we will refer this matter to the attorney disciplinary authorities in the District of Columbia, New Mexico, and California.

FACTUAL BACKGROUND

The Hoyle prosecution had its origins on the streets of Washington, D.C., in the late 1980s. David Belisle, an officer with the Metropolitan Police Department (MPD), worked virtually all of his career from 1970 until 1992 in the area originally called the 10th Precinct, later designated the 4th District, often

referred to as "4-D". This area included, among other streets, parts of Newton Street. Through his long association with this area, Belisle was very familiar with its residents, and he watched some of them grow from young children to become killers and drug dealers.

In 1987 or 1988, the Newton Street area became afflicted with a skyrocketing crime rate, sparked by the sale and use of crack cocaine. In 1988, another MPD officer working in 4-D, Donald Yates, met with Belisle and a detective in the MPD Homicide Unit, Daniel Wagner, to try to make sense of a pattern of murders occurring in 4-D. Belisle decided to bring one of the murders to the attention of Assistant U.S. Attorney (AUSA) G. Paul Howes, a homicide prosecutor in the Superior Court Division of the U.S. Attorney's Office (USAO), which was at that time forming a strike force to deal with major cases involving drug trafficking and violence. Howes met with Belisle, Yates, and Wagner to discuss the situation in the Newton Street area.

The MPD detectives and Howes decided to target a criminal gang known as the Newton Street Crew (NSC), which they believed from their intelligence-gathering to have been involved in murders and drug trafficking. They decided to conduct an operation using controlled purchases of narcotics by undercover officers in order to penetrate the organization and gather evidence against its leaders. The MPD had limited resources to carry out such an operation, which required funds to purchase drugs and equipment to conduct photographic and tape-recorded surveillance. The

investigators approached other agencies, including the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, and Firearms, and the U.S. Park Police for assistance, but received only limited support.

Then, in 1990, the Federal Bureau of Investigation (FBI) began its "Safe Streets" initiative and agreed to become involved in the NSC investigation with the MPD and Howes. With the infusion of resources from the FBI, including equipment, agents, and money for undercover drug purchases, the operation began to achieve greater success. Three FBI agents spent substantial time working on the investigation: Special Agents (SA) Linda Hooper, Mark Giuliano, and Ed McCormack.

At about the same time, Howes prosecuted a homicide case in Superior Court against Kenneth Forgy, who was convicted in May 1991 of murdering Marcus Herring, a grand jury witness. Ultimately, after a long period of defiance on the part of Forgy, in June 1992 Howes persuaded Forgy to cooperate with the government and Forgy became an important witness. At about the same time, Shelton Brooks Seldon, a cousin of Forgy, was arrested by DEA in the Eastern District of Virginia and began to cooperate with the government in the NSC investigation.

Because of the FBI involvement and the new task force approach in the USAO, the NSC case had developed into a federal case to be brought in the U.S. District Court, as opposed to a more ordinary drug or murder case to be brought under the local District of Columbia statutes in Superior Court. In July 1992 the

investigation had developed sufficient information to bring indictments, and numerous individuals were arrested in a coordinated operation. Several of those individuals soon agreed to cooperate and become government witnesses.

Also around this time, starting in 1991 and carrying over into 1992, Howes was working on the investigation and prosecution of what became known as the Javier Card/Fonda Moore case in Superior Court. Javier Card was a violent Panamanian national who ran a crack cocaine distribution ring just outside the District of Columbia. Fonda Moore was an MPD officer who had corrupt ties to Card's organization.

The Card/Moore case overlapped with the NSC investigation in at least one substantive way. There was a triple murder committed on October 29, 1990, in which the three victims were bound with duct tape. This incident became known as the "triple duct tape" homicides. At first, the MPD investigators believed the triple duct tape murders were related to the Card case, because Card himself had bragged about committing them and Ida May Stanford, Card's Panamanian crack cooker, lived near the location where those murders occurred. Later, however, it became clear that the triple duct tape murders were committed by NSC members. Therefore, at the Hoyle trial, the NSC defense tried to establish that the triple duct tape murders really were committed by Card's organization, not by the NSC. Howes and his co-counsel had to negate that claim by calling certain witnesses from the Card case.

The Card/Moore trial lasted from about September 1993 to April 1994. There was overlap between Howes' participation in that trial and his preparation for the Hoyle trial, which began on April 12, 1994, with opening statements taking place on May 3, 1994.

Beginning in about August 1992, persons who had been arrested in the NSC investigation in July 1992 began to cooperate with the government. Those who were in custody usually were debriefed in a series of four witness rooms set aside for use by the USAO on the sixth floor of the U.S. Courthouse. These prisoners were held at various times in several jails in Maryland and Virginia, including the D.C. Jail; the Montgomery County Detention Center on Seven Locks Road in Maryland; the Alexandria City Jail in Virginia; and the Central Virginia Detention Center in Orange, Virginia, about a two-hour drive from Washington. A prosecutor who needed to interview a prisoner had to submit a request, known informally as a "come-up," to the U.S. Marshals Service (USMS). The USMS would transport the requested prisoners each morning from the local jails to the cell block in the basement of the federal courthouse. Then the case agents and/or MPD officers would escort the prisoners up to the witness rooms on the sixth floor for interviews. It was while the prisoners were being held in those rooms for interviews that much of the misconduct is alleged to have taken place.

Between the arrests in July 1992 and the beginning of the Hoyle trial in May 1994, there were several other, smaller trials of cases related to that prosecution. Those cases were tried by AUSA Howes, AUSA Jeffrey Ragsdale, AUSA Lynn Leibovitz, and AUSA

Thomas Connolly. The original Hoyle indictment, returned in U.S. District Court in July 1992, consisted of 60 counts, including RICO, Continuing Criminal Enterprise, narcotics offenses, and murders in the course of racketeering and narcotics offenses. The defendants originally indicted were Mark Hoyle, John McCollough, Anthony Goldston, Mario Harris, Ronald Shelton, and Andre Perry. Perry's case was severed and he eventually pleaded guilty. Shelton went to trial and was acquitted. Hoyle, McCollough, Goldston, and Harris were convicted by the jury after a trial that lasted from April 12 to October 13, 1994. All four defendants were sentenced to life in prison by U.S. District Judge Thomas Penfield Jackson.

THE ALLEGATIONS

The initial allegations were forwarded to OPR by a letter dated March 1, 1996, from Eric H. Holder, Jr., then U.S. Attorney for the District of Columbia (Tab A). Mr. Holder's letter enclosed copies of several e-mail messages and memoranda providing details of contacts with Robert S. "Blue Tip" Smith, one of the cooperating witnesses in the NSC investigation.

The earliest item in this group was an e-mail message dated February 20, 1996, from AUSA Ragsdale to other AUSAs in the office. Ragsdale and AUSA Lynn Leibovitz both participated in the trial of the Hoyle case with Paul Howes. This message stated that, on that date, Leibovitz spoke with Smith, who "stated cryptically that he might have information about wrongdoing of some sort concerning our cooperators during the NSC trial."

Leibovitz then wrote a memorandum to the file dated February 22, outlining her knowledge of such allegations by Smith. In this memorandum, Leibovitz stated that Smith had been her witness at trial and had been out of jail since his sentencing.¹ She said that Smith had testified against his brother, John McCollough, who received a sentence of life without parole, and that, since the trial, "Tip mentioned that his brother was asking him to come up with something which would help to get him off, and that he specifically was asking for information which would suggest that improper things occurred in our witness rooms during the trial."

Then, according to Leibovitz's memorandum, "two months or so ago, Tip told me that McCollough was putting tremendous pressure on him to go to his attorney and sign an affidavit making something up that would get him off about improprieties on the sixth floor of District Court during our trial." Leibovitz asked FBI case agent Mark Giuliano to interview Smith and prepare a report. After this interview, Giuliano told Leibovitz that "Tip had told him that McCollough wanted him to lie and that anything he said in any affidavit or in response to his brother's request would be 'bullshit.'"

On February 22, 1996, after Leibovitz had written her memorandum discussed above, she participated in an interview of Smith with Ragsdale, Giuliano, and MPD Detective Anthony Brigidini at the USAO. The interview was memorialized both in a memo to the

¹Smith was held in custody in Montgomery County, Maryland; he was released on May 31, 1995.

file by Leibovitz and Ragsdale and in an FBI 302 by Giuliano. These two reports provide the earliest record of the details of Smith's allegations of misconduct in connection with the NSC trial. The allegations can be summarized as follows:

1. Smith saw cooperating witness Lazaro ("Zaro") Santa Cruz or a friend of Zaro's in a sixth floor witness room in the federal courthouse with a bottle of liquor, possibly Hennessy's cognac. The liquor was poured into cups and several of the witnesses drank some, including Smith, Kenneth Forgy, Frank Lynch, Donald Price, and Santa Cruz. One of the MPD officers present to guard the witnesses was Eddie Mayo, but Mayo and other officers did not realize the witnesses were drinking alcohol.

2. On another occasion during the NSC trial, a man known as "Stutter," who was a witness for the Card case but not the NSC case, was on the sixth floor with a six-pack of Lowenbrau beer in small, probably 7-ounce bottles. In the presence of some MPD officers, Stutter and Zaro drank some of the beer. Smith and Forgy also were present.

3. Smith once saw cooperating witness Donald Price in one of the small witness rooms on the sixth floor rolling a "joint" of marijuana from a plastic bag containing enough marijuana for about six joints. Forgy also was present, and Santa Cruz may have been. Smith later could tell by smelling the odor of smoking marijuana that Price, and possibly Santa Cruz, smoked the marijuana in the bathroom. Smith said that Price later told him he (Price) had smoked the marijuana in the bathroom. As far as Smith knew, the

MPD officers on the sixth floor were not aware of this incident.

4. Smith and Forgy were present in the largest witness room on the sixth floor when Donald Price and his girlfriend [] went alone together into a small adjoining room, leaving the door slightly ajar. Smith said he heard Price and [] making noises which sounded like sexual intercourse. Smith later heard that [] had said she was just making noises to make Price "feel good."

5. Smith was told by cooperating witness Shelton Brooks Seldon that Seldon had had sexual intercourse with a visiting woman in a witness room on the fourth floor of the courthouse. Seldon told him he had had sex with a woman named [] also known as [] Seldon told Smith that the MPD officer guarding Seldon had let him and the woman be alone together in an interior room to have sex. Seldon had not named this MPD officer.

6. Smith said that he once saw cooperating witness Kenneth Forgy receive two small packets of heroin from [] when [] visited him on the sixth floor. The heroin was concealed in a hot dog brought to Forgy [] The MPD officers in the room were not aware of this incident. Forgy also told Smith that he had received other heroin [] when she smuggled it to him with some greeting cards when she visited him on the basement level of the building housing the USAO at 555 4th Street, Northwest.

7. Smith said that, around Christmas of 1994, while he was still incarcerated after the Hoyle trial, he told Seldon he needed

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some money. Seldon suggested Smith call Howes, saying Howes would let Smith send a woman to the USAO to get a witness voucher. Smith then called Howes and Howes told Smith to send a woman to the USAO. Smith did not know a woman to do this, so Seldon sent a woman who had previously received witness vouchers for providing information about the NSC case. Later, the woman sent Smith a money order for either \$100 or \$160, which Smith believed was the amount paid for five days of witness fees. Either Smith or the woman gave Seldon a portion of the money and Smith deposited the rest in his account at the jail.

8. In about June 1995, after he was released from jail, Smith received a witness voucher for attendance on the four or five dates before his sentencing, dates on which he was still incarcerated. The voucher was given to him by MPD Sergeant Frank Morgan. Smith said that several other witnesses had received unjustified witness vouchers from Howes, including Andre Wilson, Santa Cruz, and Forgy.

In addition to these allegations, the documents supplied to us by the USAO provided details of initial attempts by that office to investigate them through interviews with witnesses other than Smith. Those interviews, which took place in late February 1996, produced the following additional information:

Forgy said he believed that Price had had marijuana on the sixth floor, although Forgy himself never saw it and he believed Smith also had not seen it. Forgy said that, to his knowledge, nobody on the sixth floor had smoked any marijuana. He said he never saw sexual activity there, but it might have happened out of

his sight; he said Seldon had told him he (Seldon) had had sex one time on the fourth floor. Forgý said there had been beer on the sixth floor, but Smith had not been present and no NSC witness had drunk any. He said that MPD officer Jim Bradley was present when the beer was there. Forgý denied having received heroin, saying his urine tests had been negative for drugs during that period. Forgý also said that Howes had at one point given witness vouchers to some unincarcerated witnesses to help them pay phone bills, but that practice had stopped after a confrontation between Howes and Ragsdale and Leibovitz.

Donald Price said that he never had sex in the courthouse, though he tried to rub against his girlfriend [] in a back room on the sixth floor while the door was open to another room where MPD officers were present. He said the marijuana found there was his, smuggled from jail in his shoe and left behind to avoid getting caught with it back in the jail. He said he never smoked marijuana in the courthouse and never saw alcohol there. However, he did smoke marijuana while he was in custody in local jails. He said he never received a witness voucher while he was incarcerated.

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Shelton Brooks Seldon said he never saw drugs in the courthouse. He said he had sex three times in the courthouse -- once in a bathroom on the sixth floor with his girlfriend [] and twice in the witness room on the fourth floor. He said he believed it was MPD officer Corbin and Corbin's partner who allowed him to spend about five minutes alone in a small bathroom with [] on the sixth floor. He was not sure if the officers were

aware of what happened in the bathroom. Seldon said an older white MPD sergeant named Roy Jones allowed a female visitor to visit with him alone in the room on the fourth floor while Jones stood outside, but that Jones did not know that they were having sex. Seldon also said that he had sex once with the mother of his child when she visited him while he was being interviewed at the Alexandria City Jail. He also said that his girlfriend once snuck some liquor to the sixth floor of the courthouse in a Pepsi cup and he drank it without anyone else noticing. He said that was the only time he was aware of liquor being in the courthouse. He said he was not aware of anyone having drugs in the courthouse or of the issuance of any improper witness vouchers.

THE OPR INVESTIGATION

After initial discussions with supervisors in the USAO, we requested that the USAO designate an AUSA who had not had any involvement in the NSC case to act as our liaison with the office. Accordingly, the USAO designated AUSA Robert R. Chapman to assist us by helping to coordinate interviews with MPD officers, helping us understand the structure and procedures of the USAO, and generally facilitating the investigation. AUSA Chapman also was assigned by his office to handle any motions for new trials that arose from the allegations of misconduct. In particular, it was his duty to ensure that the trial court was kept informed about the course of our investigation. Because of the allegations that cooperating witnesses had received unusual benefits, such as liquor, while in custody in the courthouse, it was important for

AUSA Chapman to determine whether those benefits had in fact been received and, if so, whether they had been disclosed to the court and defense counsel in the course of the Hoyle trial.

In addition, because of the large numbers of witnesses to be contacted, many of them fact witnesses from the NSC case, we arranged with FBI OPR to have an FBI Special Agent designated to be on detail full-time to assist in setting up interviews, writing reports of interviews, and obtaining and analyzing documentary evidence.

Our first investigative step was to secure a sworn statement from the principal FBI case agent on the NSC investigation, SA Mark Giuliano. Cooperating witness Brooks Seldon had alleged that SA Giuliano was present on one occasion at the Alexandria City Jail when Seldon managed to have sex with a visiting woman. In his first sworn statement and a second one clarifying some points,² SA Giuliano said that he had participated in approximately six debriefings of Seldon at the Alexandria City Jail, and that Seldon's girlfriend was present on approximately two of those occasions. SA Giuliano said that the other persons present on each occasion were AUSA Howes, Sergeant Dan Wagner of the MPD or another officer or agent, and Seldon's attorney. SA Giuliano said that Seldon and his girlfriend occasionally were left alone in the interview room for short periods so they or the government personnel could talk privately. However, on each such occasion the door was left open and the agents and prosecutor stood very close

²Both statements are attached at Tab B.

to the open door. SA Giuliano stated that he never had any indication, such as from sounds or disheveled clothes, that Seldon had managed to have sex in the room; and he said he found it "hard to believe that Seldon and his girlfriend could have had any type of sexual encounter during our debriefings at the Alexandria City Jail."

SA Giuliano also said that "at no time before, during, or after the trial of the 'Newton Street Crew' was I ever aware of or helped facilitate any witness possess or use drugs, possess or drink alcohol, and/or have sex, in the Alexandria City Jail or the U.S. Courthouse." He also stated that "I do not know of any DOJ employee, police officer, or any other individual associated with the case, that was aware of or helped facilitate any witness possess or use drugs, possess or drink alcohol, and/or have sex in the Alexandria City Jail or the U.S. Courthouse." After he submitted these sworn statements, we interviewed SA Giuliano. We found him to be a very credible witness based on his demeanor and his readiness to cooperate. No witness in the investigation ever said anything negative about SA Giuliano's credibility.

Another early step in the investigation was to request that the complainant, Robert "Blue Tip" Smith, take a polygraph examination. On June 5, 1996, Smith was examined by an FBI polygraph examiner. Although the examiner was briefed with respect to the details of the allegations Smith had made, the examiner asked Smith only a few questions, because, according to the examiner, the inherent limitations of the polygraph procedure

required him to focus the questions being tested quite narrowly and sharply. Thus, Smith gave the following answers to the following questions:

Q. To your knowledge, other than the MPD, were any government officials aware of liquor and narcotics in the (federal) courthouse?

A. No.

Q. To your knowledge, other than the MPD, were any government officials aware of individuals having sex in the (federal) courthouse?

A. No.

Q. Were you present in the (federal) courthouse when individuals used narcotics and liquor?

A. Yes.

Q. Were you present in the (federal) courthouse when individuals engaged in sex?

A. Yes.

The examiner stated his opinion that "the recorded responses to the relevant questions are not indicative of deception."³

Immediately after the polygraph examination, OPR interviewed Smith with two FBI agents, AUSA Chapman, and Smith's attorney. With respect to the allegations he had made previously, Smith provided some further details. Specifically, he said that once on the sixth floor of the courthouse during the Hoyle trial an incarcerated witness called "Stutter" from the Card case received an eight-pack of Lowenbrau beer from a visitor. Smith saw Lazaro Santa Cruz drink one of the bottles. Forgy was present but did not drink any. An MPD "SOD" [Special Operations Division] officer,

³A copy of the polygraph report is attached at Tab C.

black, six feet tall, with a close haircut, was present and was aware that beer was being consumed. No other law enforcement personnel were aware of this, according to Smith.

Smith also said that a woman named [] smuggled a bottle of cognac to Lynch on the sixth floor of the courthouse. Lynch and Santa Cruz drank some of the liquor from Coke cups; no law enforcement personnel were aware of this incident.

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On another occasion in the sixth floor witness rooms, according to Smith, he witnessed Forgy make a telephone call to his (Forgy's) cousin, Keith Blount, and asked Blount to bring marijuana to the courthouse for Donald Price. Smith never saw the marijuana arrive, although he believed Price did pay \$25 for it. Later, Smith saw Price with a small bag of marijuana, rolling some into a "joint." Smith later thought he smelled the odor of marijuana smoke in the bathroom after Price and Santa Cruz were in the bathroom.

Smith also said that [] brought to the sixth floor for Forgy a hot dog with four bags of heroin hidden between the hot dog and the bun. Smith saw Forgy take the heroin and hide it in a hole in his shoe. Smith ate the hot dog. No law enforcement personnel were aware of the heroin.

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In addition, Smith said he believed he overheard Price and Price's girlfriend [] having sex on the sixth floor in a room adjoining the main witness room while Forgy sat next to the door, which was open about six inches. MPD officer Mayo may have been

aware of this incident; no federal law enforcement personnel were aware of it.

Smith said that Brooks Seldon told him that he (Seldon) had sex with a woman named [] on the fourth floor of the courthouse just before testimony started in the Hoyle trial. Smith believed that two MPD officers were aware of this incident.

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Smith said that in December 1994, while still incarcerated, he told Seldon he (Smith) needed money. Seldon said he would call AUSA Howes and get him a voucher. Seldon reportedly talked to Howes and then arranged with Howes to put the voucher in the name of [] a friend of Seldon's. Washington received the voucher for \$160 (for four days of attendance), then gave Smith \$80, gave Seldon \$60, and kept \$20.

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Smith said that on May 31, 1995, the day Smith was released from prison, MPD officer Frank Morgan dropped an envelope on a bench outside the courthouse, saying the envelope was from Howes, and said to Smith, "You didn't get this from me." The envelope contained a witness voucher made out for four days of testimony by Smith, in the amount of \$160, signed by Howes. Smith said that Andre Wilson was getting vouchers every two weeks in 1993, probably in the name of Wilson's girlfriend [] and that Forgy had received numerous vouchers in the names of girlfriends or relatives.

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Smith reported that he and other incarcerated witnesses watched video movies in the courthouse. Most of the movies were ordinary ones that could be rented from a video store, but once the

witnesses watched a video of an incident in which a member of the rock group Rare Essence engaged in oral sex with a fan. MPD officers also watched this tape, but FBI agents and prosecutors were not aware that that tape was being watched in the courthouse.

In July or August 1995, Smith met with John McCollough's attorney, Michael Lasley, who told Smith the items Smith reported to Lasley, including, sex, liquor, and marijuana in the courthouse, were not sufficient, and Lasley never drew up an affidavit for Smith to sign.

Smith also said that in September or October 1993, Forgy told Smith that Howes was going to take care of Forgy; Forgy told Smith that Howes told Forgy that he (Howes) could not reduce Forgy's sentence but could give him \$10,000.

After Smith passed the polygraph examination, it was necessary to investigate his allegations in considerable detail. Accordingly, we attempted to interview every person who would be likely to have detailed first-hand information about the conduct of the witnesses on the sixth and fourth floors of the courthouse: the witnesses themselves, the prosecutors, the FBI case agents, the MPD officers who guarded them, and the relatives and friends who visited the witnesses. In addition, we interviewed other persons with knowledge of the issuance of witness vouchers, including several persons who received substantial sums of money through vouchers in the Howle case.⁴ The results of those interviews are

⁴A table showing the persons we interviewed in the course of our investigation is attached at Tab D.

set forth below in individual sections dealing with the various categories of allegations.

A. Alcohol

1. Hennessy's Cognac

Robert "Blue Tip" Smith stated that someone brought liquor, possibly Hennessy's cognac, to the sixth floor on one occasion; he did not recall the date. In his interview with SA Giuliano before OPR took over the investigation, Smith said he saw cooperating witness Lazaro Santa Cruz or a friend of Zaro's in a sixth floor witness room in the federal courthouse with a bottle of liquor, possibly Hennessy's cognac. The liquor was poured into cups and several of the witnesses drank some, including Smith, Kenneth Forgy, Frank Lynch, Donald Price, and Santa Cruz. One of the MPD officers present to guard the witnesses was Eddie Mayo, but Mayo and other officers did not realize the witnesses were drinking alcohol. In his interview in the OPR investigation immediately after his polygraph examination, he said that a woman named [] of cooperating witness Frank Lynch, smuggled a bottle of cognac to Lynch on the sixth floor. He said Lynch and Santa Cruz drank some of the liquor from Coke cups, and that no law enforcement personnel were aware of this incident.

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These accounts are, on their face, inconsistent in their details as to who had the liquor. We interviewed all of the persons mentioned in Smith's accounts except Santa Cruz, who declined repeated attempts to interview him. Forgy denied all knowledge of this incident, although, as discussed below, he did

acknowledge the presence of beer on another occasion. Price said he had no knowledge of this incident. Lynch said he had no knowledge of liquor being used by the cooperating witnesses on the sixth floor, although he did acknowledge that [

] did visit him there once or twice. [

] told us that she took food and soft drinks to Lynch in the courthouse but never any alcohol. Officer Eddie Mayo said he had no knowledge of the incident. He said that he and the other MPD officers guarding the prisoners on the sixth floor were veteran officers who did not allow questionable activities to take place there.

2. Bottles of Beer

The second allegation by Smith was that a man known as "Stutter," a witness primarily for the Card case but with some connection to the NSC case, had a six-pack of Lowenbrau beer on the sixth floor. The beer was consumed by Stutter and Santa Cruz in the presence of Smith, Forgy, and some MPD officers. Later, Smith said the beer was in an eight-pack and that the only MPD officer present was a black "SOD" [Special Operations Division] officer, six feet tall, with a close haircut.

Through MPD Officer James Bradley, who worked on the Card case, we identified "Stutter" as James Crawley. We arranged for the FBI to interview Crawley at the Ashland Federal Correctional Institution in Kentucky, where he was incarcerated. He acknowledged that he was a witness for AUSA Howes in the Card case and was once used as a witness by the defense in the NSC case.

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When he was appearing as a witness in the Card case, he was held in the Superior Court building, not the federal courthouse. He denied ever drinking Lowenbrau beer in the federal courthouse, and denied any knowledge of the use of alcohol by other witnesses in the courthouse. He said that, on the one occasion when he was held in the federal courthouse to testify in the NSC trial, he did not interact with Lazaro Santa Cruz.

Kenneth Forgy, in his interview with SA Giuliano before OPR took over the investigation, said that on one occasion he saw witnesses from the Card case with Heineken beer; Santa Cruz also was present, as well as MPD Officer James Bradley. In his interview with OPR, Forgy said that "Stutter" was on the sixth floor of the federal courthouse on one occasion with a green Heineken beer bottle. In this interview, Forgy said he did not think anyone else noticed the beer bottle, including the police officers. He said he had no knowledge of any NSC witness's having had alcoholic beverages on the sixth floor.

Officer James Bradley told us that James Crawley, aka "Stutter," was a key witness in the Card case. Bradley said that SA Mark Giuliano and SA Linda Hooper of the FBI transported Crawley to the federal courthouse on the one occasion Crawley testified in the NSC trial. Bradley said he had no knowledge of Crawley's having had access to beer in the federal courthouse. Giuliano said in his two sworn statements that he never was aware of any witness in the NSC case having access to alcohol. Hooper, likewise, told us that she never was aware of any witness having access to alcohol.

3. Conclusion

We interviewed many other persons who spent some time on the sixth floor of the courthouse, including witnesses, visitors, MPD officers, and federal agents. None of these persons reported any knowledge of alcohol on the sixth floor other than Smith and Forgy, with one exception. The other report was by Brooks Seldon, who initially said that his girlfriend once snuck some liquor to him in a Pepsi cup and he drank it without anyone else noticing. Later, in his OPR interview, Seldon said the girlfriend snuck some liquor into the courthouse in a wax cup, not a Pepsi cup, but she did so on her own accord and he did not drink any. We found no corroboration of this incident. Besides Seldon, only Smith asserted that any NSC witnesses drank liquor in the courthouse, and neither man asserted that any federal attorney or agent was aware of the presence of the liquor. In his polygraph examination, Smith stated that no federal government officials were aware of the liquor. In view of all this evidence, we concluded that no AUSA or FBI agent had any knowledge of the improper use of alcohol by cooperating witnesses.

B. Illegal Drugs

1. Marijuana

Smith said he saw cooperating witness Donald Price rolling a "joint" of marijuana on the sixth floor from a bag containing enough marijuana for about six joints. Forgy was present, and Santa Cruz may have been. Smith later learned from smelling smoke and talking to Price that Price and Santa Cruz smoked the marijuana in the bathroom on the sixth floor. As far as Smith knew, no MPD officers were aware of the incident. Later, in his OPR interview, Smith said he saw Forgy make a telephone call to purchase marijuana for Price, and he said that he later saw Price with a small bag of marijuana, rolling some into a joint. He later thought he smelled the odor of marijuana smoke in the bathroom.

Forgy, in his interview before OPR took over the investigation, said he believed Price had marijuana on the sixth floor, though he himself had never seen it. Forgy said he did not believe anyone had smoked marijuana there. In his OPR interview, Forgy said he had noticed a tobacco-like substance rolled up in toilet paper in an ashtray within one of the sixth floor witness rooms. He said that Price eventually admitted to Howes that the marijuana was his, after Forgy told Howes that the marijuana belonged to Price. Forgy denied knowledge of any other possession or use of marijuana by any NSC witnesses or others on the sixth floor of the courthouse.

Price, in his initial interview, said he had left some marijuana behind in the courthouse because he did not want to be

caught with it back at the jail where he was being held. He said he never smoked marijuana in the courthouse, although he did smoke it in the various local jails where he was held. He said the MPD officers were not aware that he had the marijuana until some of it was found after he left it behind. In his OPR interview, Price told us that he once left the Seven Locks jail with a marijuana joint in his shoe that he had forgotten about. On the sixth floor of the courthouse, he removed his shoes to relax and discovered the marijuana. He did not want the marijuana to be found when he was searched on returning to the jail, so he left it behind in the courthouse, where it later was found. He did not show the marijuana to anyone else, and he never smoked any marijuana in the courthouse.

Numerous witnesses, including AUSA Ragsdale, told us that a small amount of marijuana was discovered in a witness room on the sixth floor of the courthouse in September 1994, towards the end of the NSC trial. He advised us that this event was disclosed in open court, on the record. We obtained a copy of the transcript of the NSC trial proceedings for September 26, 1994 (Tab E). The transcript reflects that AUSA Howes advised the court that a small amount of marijuana, measuring 0.4 gram, was found in a "small plastic wrap." He said it was discovered after witnesses from another case had used the room in question, and that, after an investigation, there was no evidence tying this marijuana to any of

the witnesses in the NSC case. One defense attorney asked the court to order urine tests of the witnesses, but the court declined to do so.

2. Heroin

Smith alleged that he once saw Forgy receive two small packets of heroin concealed in a hot dog given to Forgy by [] when [] visited him on the sixth floor. Smith also said that Forgy received other heroin from [] that [] concealed in greeting cards delivered to Forgy on the basement level of the USAO. Smith said that no law enforcement personnel were aware of the heroin.

Forgy denied ever receiving heroin from [] at the courthouse or at the USAO. He told us he had not used heroin since 1989. We attempted to interview [] of Forgy, but we were unsuccessful after several attempts to contact []. No other witness stated that Forgy received heroin while in the federal courthouse.

3. Conclusion

The evidence shows that cooperating witness Donald Price did conceal some marijuana on his person while on the sixth floor of the federal courthouse and later left it behind, but that this was done without the knowledge of any law enforcement personnel. The prosecutors in the NSC case became aware that some marijuana was found on the sixth floor in September 1994, but there was no indication at the time that this marijuana had been left there by Price. It is not clear now that it was Price's marijuana that was found on the sixth floor, although it does appear possible that

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that was the case. In any event, we asked numerous MPD officers, cooperating witnesses, visitors, and federal law enforcement officers and prosecutors about the marijuana, and there is no evidence that there was any misconduct by any Department of Justice personnel in connection with any incident involving marijuana during the NSC case.

With respect to the heroin, similarly, we found no evidence to corroborate Smith's allegation, despite asking about the allegation of every witness we interviewed who was in a position to know about Forgy's actions. As with the marijuana, we concluded that no prosecutor or FBI agent committed any misconduct in connection with the possession or use of illegal drugs on the sixth floor by cooperating witnesses.

C. Sexual Activity

Smith alleged that on two occasions other cooperating witnesses had managed to have sexual contact with women who visited them on the sixth floor of the courthouse. First, Smith alleged that he and Forgy were present in the largest witness room on the sixth floor when Donald Price and his visiting girlfriend [] went alone together into a small adjoining room, from which Smith heard Price and [] making noises that sounded like sexual intercourse. Smith said that Forgy sat next to the adjoining door during this incident, and that MPD Officer Eddie Mayo may have been aware of the incident, but that federal law enforcement personnel were not. Smith said he later heard that [] said she was just making noises for Price's benefit. Second, Smith said that he was

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told by cooperating witness Brooks Seldon that Seldon had had sexual intercourse with a woman named [] when she visited Seldon in a room on the fourth floor of the courthouse. Seldon allegedly told Smith that an unnamed MPD officer guarding him allowed him to be alone with the woman.

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In an interview before the OPR investigation began, Price said he never had sex in the courthouse, but he did try to rub against his girlfriend, [] in a back room on the sixth floor. Seldon said that he had sex three times in the courthouse -- once with [] in a bathroom on the sixth floor and twice in the witness room on the fourth floor. He said he believed MPD officer Corbin and Corbin's partner allowed this to occur on the sixth floor, and MPD Sergeant Roy Jones allowed a woman to visit him on the fourth floor, but Jones did not know they were having sex. Seldon also said he had sex once with the mother of his child at the Alexandria City Jail.

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Forgy said in his interview before the OPR investigation began that he never saw any sexual activity on the sixth floor, but that it could have happened out of his sight. He said that Seldon had told him that he (Seldon) had had sex once on the fourth floor.

In his OPR interview, Price told us that [] did visit him a few times on the sixth floor of the courthouse. However, he said he never was left alone with her, never had any sexual contact with her, and never made sexual noises with her. He said the only intimate gesture he engaged in with her was a goodbye hug when she left. Price said he was not directly aware of any

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other cooperating witness having sexual contacts in the courthouse. However, he did say that Seldon told him he (Seldon) had sex in the courthouse.

Forgy told us that Price was visited by [] on the sixth floor. However, Forgy denied that he guarded a door while Price and [] had sex in another room. He also said he did not believe Price could have had sex with [] because there were too many police officers or FBI agents present for that to happen.

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In his OPR interview, Seldon told us that, as a witness in the NSC case, he was handled by AUSA Ragsdale. He said that, after an initial period on the sixth floor, AUSA Ragsdale moved Seldon to the fourth floor for interviews and trial preparation in order to have more privacy than was possible on the sixth floor, where several witnesses ordinarily were kept together. On the fourth floor, Seldon was held in a room adjacent to Judge Jackson's chambers in an area where there appeared to be a coat room and a bathroom.

On one occasion on the fourth floor, Seldon told us, he was visited by a girlfriend, his baby's mother, named [] who was wearing a one- or two-piece short black outfit with spaghetti straps. The MPD officer guarding Seldon was an older white male with the first name of Roy. The officer allowed Seldon and [] to be alone for about five minutes in an inner room, during which time they engaged in sexual intercourse. Seldon did not believe that this officer or any other officer, agent, or prosecutor knew that such sexual activity was going on.

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Seldon told us that he had another, similar sexual encounter with [] the next day at the same location, again with MPD officer Roy on duty. Seldon also said he had a sexual encounter with [] on the sixth floor of the courthouse, when MPD Officer Corbin allowed Seldon and [] to visit together alone in a bathroom. Finally, Seldon told us that he had sex with another girlfriend [] at the Alexandria City Jail, when Seldon was being interviewed by AUSA Howes, SA Giuliano, and Seldon's attorney, Professor Robertson. Seldon said that, at the end of the meetings, everyone had departed except Giuliano, who was waiting downstairs for Seldon, and Seldon was left alone in a conference room with [] with whom he had an incomplete sexual act. Seldon said he later told Giuliano about this incident and Giuliano was angered by the information.

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SA Giuliano gave two sworn statements about the misconduct allegations in general, one of which was specifically directed to the incident with Seldon in the Alexandria City Jail (Tab B). Giuliano very specifically denied that Seldon ever was left alone with his girlfriend in a closed room at the jail. SA Giuliano said:

If Seldon and his girlfriend needed to discuss matters privately or if we needed to talk away from Seldon and his girlfriend, myself and the others present would step out of the room into the hallway and leave the door to the room open. We were always within a few feet of the doorway to the interview room.

* * *

I find it hard to believe that Seldon and his girlfriend could have had any type of sexual encounter during our debriefings at the Alexandria City Jail. Seldon and his

girlfriend never knew when we were going to look in the room to check on them or when someone was going to enter the room.

We made numerous attempts to contact [redacted] who, according to Seldon, lived in [redacted]. We were unable to obtain an interview with her. We also were unable to locate [redacted]

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We interviewed Roy Jones, who was retired from the MPD. He told us that, as a sergeant with the MPD, he had guarded the cooperating NSC witnesses on the sixth floor of the courthouse on numerous occasions. He also said that he guarded Brooks Seldon on the fourth floor on only one occasion, for a total of about one hour. Sergeant Jones said he kept close scrutiny over Seldon the whole time he was guarding him. He said that Seldon did not have any visitors while he was guarding him, and he emphatically and credibly denied that Seldon could have had any sexual contact while he was guarding him on the fourth floor.

Sergeant Daniel Wagner, an MPD homicide detective who worked extensively on the NSC investigation and its precursors since 1986, told us that, in his view, Seldon was fabricating the stories about having sexual intercourse while in custody. Sergeant Wagner said that MPD officers are trained not to permit such activity. In addition, he said that he believed, from his knowledge of Seldon, that Seldon fabricated the stories in order to cause problems for AUSA Ragsdale, who Seldon believed had not done enough to assist Seldon in obtaining sentencing consideration from the government.

In view of all of the evidence, we concluded that it was unlikely that the alleged sexual contacts occurred as described by

Smith and Seldon. Even if they did occur, we concluded that they occurred without the knowledge of any Department of Justice attorney or FBI agent, and without the knowledge or complicity of any MPD officer.

D. Other Benefits: Videos, Lunches, Telephone Privileges

During the OPR investigation, in the course of telling us about the treatment of the cooperating witnesses on the sixth floor of the courthouse, some individuals told us that the witnesses received other benefits from law enforcement personnel. Specifically, we were told that the prisoners received free lunches purchased at local restaurants; were shown videotaped feature films; and were permitted to make and receive telephone calls from the witness rooms free of charge.

We found that all of these allegations were true. For example, Sergeant Frank Morgan, one of the MPD officers with considerable responsibility for watching the prisoners on the sixth floor, told us that the MPD officers would contribute money each day to purchase food at Popeye's Chicken, McDonald's, a local Chinese restaurant, or other establishments, and one officer would go to buy food for the officers and prisoners alike. He told us that MPD Officer Steve Hebron often would go to a restaurant that would grant a 50% discount for police officers. Sergeant Morgan also told us that Officer Hebron and Officer Donald Yates brought in videotapes for the prisoners to watch. He also said that the prisoners were permitted to have visitors, usually relatives or girlfriends, who also occasionally brought them food.

MPD Officer Steven Hebron told us that AUSA Howes at first bought lunches for the prisoners out of his own money, but later asked the police officers to contribute money as well. Officer Hebron told us that, whenever a witness was due to testify, AUSA Howes made sure that that person got his favorite food for lunch that day. Officer Hebron told us that Detective Barbara Lyles rented videotapes for the prisoners to watch. He also told us that the prisoners were permitted to use the telephones because AUSA Howes wanted them to be relaxed and comfortable in the witness rooms.

Sergeant Daniel Wagner told us that some police officers brought videotapes for the prisoners to watch, including two films starring Al Pacino. He also told us that the police officers bought lunches for the prisoners out of the officers' personal funds. He told us that the prisoners had telephone privileges on the sixth floor, but that those privileges were taken away after the marijuana was discovered on the sixth floor.

Sergeant Donald Yates told us that he and other MPD officers brought in videotapes for the prisoners to watch. He also told us that the officers bought lunches for the prisoners because the prisoners were brought up from the U.S. Marshals Service cell block early each morning, and the Marshals Service did not provide lunches for the prisoners who remained up on the sixth floor all day, as the NSC witnesses usually did. Sergeant Yates also told us that the prisoners were permitted to use the telephones, though he did not know if long-distance calls were possible or were made.

Detective Barbara Lyles told us that MPD officers bought lunches for the prisoners out of their own money and rented videotapes at video stores for the prisoners to watch. She also said that visitors sometimes brought food for the prisoners. She told us that the prisoners were permitted to make phone calls, but that a police officer would tell the prisoner to hang up after about ten minutes. She said that no long-distance calls were permitted.

One particular issue in this area was explored in more detail. Robert "Blue Tip" Smith alleged that one of the videos shown to the prisoners was a bootleg copy of a home video in which a member of the rock music group Rare Essence engaged in oral sex with a fan and in which there were images of naked women dancing. We asked every MPD officer we interviewed about this incident, and almost all of them said they never saw this tape on the sixth floor of the courthouse.

However, Officer Eddie Mayo told us that he viewed this tape on the sixth floor in the presence of one other MPD officer and cooperating witnesses Forgy and Santa Cruz. Officer Mayo said he did not know whether any of the AUSAs were aware that this tape was shown to the prisoners. Cooperating witness Frank Lynch also told us that he saw this tape in the jail where he was held, but he also heard that the tape was seen on the sixth floor of the courthouse by Santa Cruz and Forgy. Lynch told us that he did not know who brought the tape into the courthouse, but that it must have been a police officer. Cooperating witness William Woodfork told us that

he, Forgy, and Santa Cruz watched the video on the sixth floor, and that Forgy placed the tape into the VCR. Forgy told us he had heard of the Rare Essence tape, but that it had never been on the sixth floor of the courthouse to his knowledge. Forgy's evidence on this point is contradicted by that of several other persons with no motive to lie about this issue.

In light of all the evidence, it is clear that the cooperating witnesses were provided with lunches bought by the police officers and others, including AUSA Howes. It also is clear that the witnesses were permitted to have visitors, who also brought them food on occasion, and that the witnesses were provided with videotaped movies to watch, including one tape that could be considered pornographic if not obscene.

Several of these benefits were disclosed to the court during the NSC trial. For example, at the time he disclosed the incident involving the discovery of marijuana on the sixth floor, AUSA Howes told the court:

[A]s the testimony has been laid out, Newton Street witnesses from time to time, when they are here, each time they receive lunch, they have had telephone privileges and at times have seen family members.⁵

Thus, the court and counsel were told on the record about the lunches, telephone privileges, and family visits, so, with respect to those matters, there is no issue of failure to disclose a material benefit that could have given rise to cross-examination

⁵Transcript of excerpt of proceedings in United States v. Mark Hoyle, CR. NO. 92-284 (TPJ), Sept. 26, 1994, p. 3 (copy attached at Tab E).

for bias of the witnesses. There is no indication that the prosecutors disclosed the showing of videotapes for entertainment. Former AUSA Howes told us that the videotape machine was present on the sixth floor primarily because witnesses needed to be shown surveillance videos that were to be used as evidence. However, he did acknowledge that entertainment videotapes were shown as well.

We concluded that, given the disclosures of the other benefits and the fact that the videotape equipment was present for a case-related purpose, it was not misconduct for the prosecutors to permit the cooperating witnesses to watch entertainment videotapes on the sixth floor while waiting to testify or waiting to be interviewed. The evidence shows that the police officers also watched the tapes, and that one purpose of the tapes was to keep the witnesses occupied and calm while sitting for long hours in the witness rooms. Given that prisoners in many institutions are permitted to watch television for similar purposes, this was not a benefit of such significance that it should not have been granted or was required to be disclosed to the court.

A different issue is raised by the showing of the "Rare Essence" videotape that showed nudity and sexual acts. It was not appropriate for the police officers to make that tape available for viewing by the witnesses. However, there is no evidence that any Department of Justice employee was aware that it was shown, and it appears that the tape was shown on only one occasion. Accordingly, we did not find misconduct by any Department of Justice employee in that regard.

E. Conclusion With Respect to Events in the Courthouse

In summary, our investigation showed that one cooperating witness, Seldon, may have engaged in sexual conduct on the sixth and fourth floors of the federal courthouse, that one witness, Price, possessed marijuana on the sixth floor, and that several witnesses watched a sexually explicit videotape. We did not find substantial evidence that any of the witnesses had access to alcohol or other drugs. Moreover, we found no evidence that any of the prosecutors or FBI agents had any knowledge of any illegal conduct in the courthouse with the exception of the marijuana incident in September 1994.

However, we did find evidence that some government personnel criticized the practice of keeping several cooperating witnesses together in the sixth-floor witness rooms all day, even when some of the witnesses were not scheduled for testimony in the immediate future. AUSA Ragsdale told us that there were discussions in the USAO among those who disagreed with the practice, including Ragsdale himself. AUSA William O'Malley, who was Chief of the Narcotics Section in the District Court side of the USAO until December 1994, told us that AUSA Ragsdale complained to him that there were too many incarcerated witnesses together on the sixth floor before and during the Hoyle trial. AUSA O'Malley told us that he then called Howes in and counselled him about the need to avoid problems of granting too many benefits through overly generous treatment of prisoners. According to AUSA O'Malley, Howes resisted his suggestions to reduce the number of witnesses on the

sixth floor. Ultimately, the two men had heated arguments and exchanged angry memoranda, but Howes continued to have as many witnesses taken to the sixth floor as he saw fit, except for a few occasions when AUSA O'Malley intervened and actually cancelled the "come-up" orders.

Other witnesses, including AUSA H. Marshall Jarrett and FBI case agent Linda Hooper, confirmed the view that Howes continued to bring groups of witnesses to the sixth floor despite objections from others. Howes told us that he considered it very important to have Forgy on the sixth floor even when he was not being prepared for immediate testimony because of his ability to reassure other witnesses who were afraid of the defendants. Similarly, Howes said that it was important to keep the other main witnesses on the sixth floor to improve their morale by being together. He also told us, however, that he was careful to instruct the witnesses to avoid any sort of misconduct in the courthouse, and he said that he trusted the MPD officers and FBI agents to prevent any sort of lax behavior that could cause problems. No witness we spoke to was of the opinion that Howes intentionally would or did allow the cooperating witnesses to engage in improper activities.

Thus, there clearly were disputes among government personnel about Howes' practice of ordering several witnesses brought to the sixth floor even when not testifying. This system did have potential for abuse, and, as our investigation showed, some abuses may have occurred, although we found no evidence of significant undisclosed benefits arising from conditions on the sixth floor.

This issue was well known to Howes' supervisors in the USAO, Howes had a reasonable justification for keeping multiple witnesses on the sixth floor, and reasonable precautions were in place to prevent misconduct. In light of these circumstances, we concluded that no government attorney or agent committed misconduct by permitting the witnesses to be together in the courthouse witness rooms.

E. Witness Vouchers

The final allegation by "Blue Tip" Smith was, essentially, that AUSA Howes provided witnesses and their associates with federal vouchers entitling them to witness attendance fees in circumstances where such payments were not justified. For example, Smith alleged that Howes issued vouchers in order to provide witnesses with spending money, even where the witnesses had not actually appeared for testimony or interviews that would justify the payments.

1. Witness Vouchers: Background

Before discussing our investigation of the vouchers issued in the NSC case, it is necessary to set forth some background information about the nature and use of the vouchers in question. We obtained this information from interviews with supervisory personnel and AUSAs in the USAO, from interviews with persons in the Justice Management Division (JMD) and the U.S. Marshals Service, and from applicable laws, regulations, guidelines, and memoranda.

The type of witness voucher in question is an official Department of Justice form titled "Fact Witness Voucher," designated Form OBD-3. The forms used in the NSC investigation and trial were the version dated December 1992.⁶ The primary statutory authority for the payment of fees to fact witnesses is contained in 28 U.S.C. § 1821, which provides, in part:

(a) (1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

* * *

(b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

* * *

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 [relating to detention of a material witness] apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowances under this section.

The Department of Justice has issued regulations under this statute, which have not been updated to reflect the increase in the statutory fee from \$30 to \$40, but which evidently remain in effect otherwise. These regulations provide, in part:

The fees and allowances of fact witnesses . . . attending at any judicial proceeding, shall be a [sic] follows:

⁶A sample of this form, with a copy of the corresponding check, is attached at Tab F.

(a) Fee. A witness shall be paid an attendance fee of \$30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance. However, if both attendance and travel occur on the same day, a witness is entitled to only one fee.

28 C.F.R. § 21.4 The term "judicial proceeding" is defined in Section 21.1 as follows:

(c) Judicial proceeding. Any action or suit, including any condemnation, preliminary, informational or other proceeding of a judicial nature. Examples of the latter include, but are not limited to, hearings and conferences before a committing court, magistrate, or commission, grand jury proceedings, pre-trial conferences, depositions, and coroners' inquests. It does not include information or investigative proceedings conducted by a prosecuting attorney for the purpose of determining whether an information or charge should be made in a particular case. . . .

(d) Pre-trial conference. A conference between the Government Attorney and a witness to discuss the witness' testimony. The conference must take place after a trial, hearing, or grand jury proceeding has been scheduled but prior to the witness' actual appearance at the proceeding.

28 C.F.R. § 21.1.

We also found references to procedures for the payments of fact witnesses in the U.S. Attorneys' Manual and in various Department of Justice Orders and memoranda. However, none of those materials contained specific guidance on exactly when a fact witness is entitled to payment; that is, guidance on the exact meaning of "attendance."

2. Witness Vouchers: Facts

To determine the actual uses of witness vouchers in this case, we obtained from the U.S. Marshals Service copies of all witness vouchers apparently signed by AUSA G. Paul Howes or other prosecutors for the Hoyle case and related cases from 1993 through