*To Be Argued by*
*Elena Ruth Sassower*

#04-CM-760
#04-CO-1600

# DISTRICT OF COLUMBIA COURT OF APPEALS

ELENA RUTH SASSOWER,

*Appellant,*

-against-

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANT'S BRIEF

On Appeal from D.C. Superior Court [#M-4113-03]
Judge Brian F. Holeman

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## ISSUES PRESENTED FOR REVIEW

1. **As evidenced from the course of the proceedings before Judge Holeman, was appellant entitled to his disqualification for pervasive actual bias meeting the "impossibility of fair judgment" standard articulated by the U.S. Supreme Court in *Liteky v. United States*, 510 U.S. 540?***

   A. Were appellant's February 23 and March 22, 2004 pretrial motions to disqualify Judge Holeman sufficient, as a matter of law, to require his disqualification for pervasive actual bias, divesting him of jurisdiction to "proceed...further", pursuant to D.C. Superior Court Civil Procedure Rule 63-I – and was there any basis in fact and law for Judge Holeman's conduct and rulings challenged therein?

   B. Were Judge Holeman's subsequent pretrial, trial, and post-trial rulings further confirmatory of his pervasive actual bias – and were they factually and legally supported?

2. **Whether D.C. Code §10-503.18 entitled appellant to removal/transfer of this "disruption of Congress" case to the U.S. District Court for the District of Columbia where, additionally, the record establishes a pervasive pattern of egregious violations of her fundamental due process rights and "protectionism" of the government?**

3. **Is the "disruption of Congress" statute, D.C. Code §10-503.16(b)(4), unconstitutional, *as written and as applied*?**

4. **Whether, when Judge Holeman suspended execution of the 92-day jail sentence he imposed upon appellant, his terms of probation were appropriate and constitutional and whether, when appellant exercised her right to decline those terms, pursuant to D.C. Code §16-760, it was legal and constitutional for him to double the 92-day jail sentence to six months?**

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* Encompassed in this issue is whether Judge Holeman's rulings, individually and collectively, were so egregiously "erroneous" and prejudicial as to require reversal.

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## STATEMENT OF THE CASE

This is a consolidation of two appeals. The first appeal [#04-CM-760] is from a June 28, 2004 Judgment of Conviction and Commitment Order of D.C. Superior Court Judge Brian F. Holeman [A-6] which, following an April 20, 2004 jury verdict convicting appellant Elena Ruth Sassower [hereinafter "Sassower"] of a single misdemeanor charge of "disruption of Congress" under D.C. Code §10-503.16(b)(4), imposed upon her a maximum six-month jail sentence, a maximum $500 fine, and a maximum assessment of $250 under the Victims of Violent Crime Compensation Act of 1981. The Notice of Appeal specifies:

> "Judgment of Conviction and Commitment, including the Verdict of the jury, any and all remarks, rulings and directions of the Court in the Trial Proceedings and each [and] every preliminary and pre-trial Order made by the Court and filed therein, so as to encompass as well the issue of probable cause and the constitutionality of [the] statute and related court rules and procedures, on which the conviction and sentencing were based." [A-5]

The second appeal [#04-CO-1600] is from Judge Holeman's November 22, 2004 Order [A-10] denying Sassower's motion to correct his illegal sentence pursuant to D.C. Criminal Procedure Rule 35(a) and D.C. Code §23-110(a).

## STATEMENT OF THE FACTS

The facts relevant to these consolidated appeals are largely known to this Court by reason of prior proceedings, incorporated by reference and of which the Court is asked to take judicial notice.

The facts, pretrial, were presented to this Court by Sassower's April 6, 2004 petition for a writ of mandamus/prohibition for Judge Holeman's disqualification, which additionally sought certiorari and/or certification of questions of law as to her asserted entitlement to venue in the U.S. District Court for the District of Columbia [#04-OA-17]. Accompanying the April 6, 2004 petition was a motion for a stay of the April 12, 2004 trial pending

adjudication of the petition and a full copy of the D.C. Superior Court record, up to and including March 30, 2004 -- for which an inventory was supplied.

The relevant trial and post-trial facts were presented by Sassower's motions for release from incarceration pending appeal [#04-CM-760, #04-CO-1239], which she and *pro bono* attorneys on her behalf filed with this Court from June through October 2004, a period spanning the first four months of the six-month jail sentence imposed by Judge Holeman, which she fully served – all applications for her release pending appeal having been denied. The most significant presentation of the trial and post-trial facts, as well as the appellate issues based thereon, is in the affidavit Sassower began to write within the first hour of waking up on June 29, 2004, the first morning of her incarceration in D.C. Jail– an affidavit she finished eight days later. Such was presented to this Court as Exhibit "C" to her July 16/August 12, 2004 motion for reargument/reconsideration and other relief – and included her draft memorandum of law as to the unconstitutionality of the "disruption of Congress" statute, annexed as the motion's Exhibit "D". Before this Court on that motion was the amended transcript of the June 28, 2004 sentencing proceeding [A-1707] and copies of pertinent documents from the record before Judge Holeman. Among these, D.C. Court Services' presentence report [A-1601], the U.S. Attorney's memorandum in aid of sentencing [A-1619], and Sassower's June 28, 2004 affidavit commenting upon and correcting the presentence report and opposing the U.S. Attorney's memorandum [A-1641].

By reason of the foregoing and because the Argument herein particularizes the material facts, with copious record references to support each of the Issues Presented for Review, a Statement of the Facts may be deemed redundant and superfluous. Consequently,

such Statement – chronologically reciting the proceedings below – is being furnished, as a convenience to the Court, in an accompanying volume.

## ARGUMENT

The first, foremost, and overarching issue on this appeal is Judge Holeman's pervasive, actual bias, obliterating due process, equal protection, and the rule of law. As to this issue, the Court has a critical appellate function, reinforced by mandatory disciplinary responsibilities, pursuant to Canon 3(D)(1) of the Code of Judicial Conduct for the District of Columbia Courts.

As hereinafter shown, Judge Holeman's pervasive, actual bias is resoundingly established by the record. It discloses an unending succession of pivotal rulings by him that are insupportable -- factually, legally, or both – and which he knew to be so. Individually and collectively, these rulings and Judge Holeman's indecent, insulting, and oppressive conduct toward the *pro se* Sassower constitute a mountain of egregious "error" which cannot be said to be harmless beyond a reasonable doubt – the standard for reversal in cases that do not involve judicial bias. In cases of judicial bias, such as this, the traditional "harmless error" rule – which "presumes the existence of an impartial judge. *Rose v. Clark*, 478 U.S. 570, 578...(1986)", *Scott v. United States*, 559 A.2d 745, 750 (1989)(*en banc*) -- does not apply because a biased judge renders a trial fundamentally unfair. Either way, the conviction and sentence cannot stand.

At bar, the threshold issue is not Sassower's entitlement to reversal, but to vacatur by reason of the legal sufficiency of her two pretrial motions for Judge Holeman's disqualification. Such divested him of authority to "proceed...further", pursuant to Rule 63-I, rendering all subsequent rulings by him null and void.

This Court's review of the legal sufficiency of those two motions is *de novo* – as likewise of other matters of law, whose disregard by Judge Holeman in his legally insupportable and unsupported rulings is encompassed by the disqualification issue. Also *de novo* is this Court's review of statutory interpretation, *McNeely v. United States*, 2005 D.C. App. LEXIS 254 -- such as presented by Sassower's second, third and fourth appellate issues, *to wit*, the venue provision of the "disruption of Congress statute, the "disruption of Congress" statute, whose constitutionality Sassower challenges, *as written and as applied*, and the statute for imposing sentence and suspending its execution.

With respect to discretionary rulings by Judge Holeman, this Court's decision in *Johnson v. United States*, 398 A.2d 354 (1979), recognizes that discretion must be based on due respect for the factual record – ascertainment of which, together with proper interpretation of the law, is this Court's province. Quoting *Johnson*, this Court has stated in the recent case of *Pinkney v. United States,* 851 A.2d 479 (2004):

> "...in deciding whether a trial court in any case has abused its discretion, the reviewing court should consider 'whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion.'", at 491.

To the extent that Judge Holeman's rulings, as hereinafter particularized, were discretionary, none can withstand such examination.

## ISSUE I

**JUDGE HOLEMAN WAS DISQUALIFIED FOR PERVASIVE ACTUAL BIAS MEETING THE "IMPOSSIBILITY OF FAIR JUDGMENT" STANDARD OF *LITEKY v. UNITED STATES*, 510 U.S. 540**

### 1-A SASSOWER'S FEBRUARY 23 & MARCH 22, 2004 PRETRIAL DISQUALIFICATION MOTIONS WERE SUFFICIENT, AS A MATTER OF LAW, TO REQUIRE JUDGE HOLEMAN'S DISQUALIFICATION

This Court has held that when a party moves for a judge's recusal for bias, the motion is governed by D.C. Superior Court Civil Procedure Rule 63-I, *York v. United States*, 785 A.2d 651, 653 (2001).

Rule 63-I, made applicable to criminal cases by D.C. Superior Court Criminal Procedure Rule 57(a), has the force of law[1]. In pertinent part, it states:

> "(a) Whenever a party to any proceeding makes and files a sufficient affidavit that the judge before whom the matter is to be heard has a personal bias or prejudice either against the party or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned, in accordance with Rule 40-I(b), to hear such proceeding." (underlining added).

This language was interpreted by the U.S. Supreme Court in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230 (1921), in the context of the substantially identical federal statute that is now 28 U.S.C. §144:

> "There is no ambiguity in the declaration...It is clear in its...direction. It...directs an immediate cessation of action by the judge whose bias or prejudice is averred, and in his stead, the designation of another judge. And there is purpose in the conjunction; its elements are complements of each other. The exclusion of one judge is emphasized by the requirement of the designation of another." (*Berger*, at 36, underlining added).

Similarly, this Court has held as to Rule 63-I:

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[1] "'if a Superior Court rule is identical to or substantially identical to a corresponding federal rule, it would have, just as the federal rule, the force and effect of law.' *In re C.A.P.*, 356 A.2d 335, 343 (1976), *citing Campbell v. United States*, D.C. App., 295 A.2d 498, 501 (1972)", *Varela v. Hi-Lo Powered Stirrups*, 424 A.2d 61 (1980).

> "The rule is by its terms mandatory.... If an affidavit meets the rule's standards, the judge has a duty to recuse himself...", *In the Matter of Evans*, 411 A.2d 984, 994 (1980) (underlining added).

> "When the affidavit is 'sufficient' under the rule, a judge must recuse himself or herself from the case. *See* Rule 63-I; *In re Evans*, 411 A.2d 984, 994 (D.C. 1980)", *York v. United States*, 785 A.2d 651, 654 (2001) (underlining added).

Under *Berger* and the ensuing caselaw, the judge against whom a party's affidavit of bias or prejudice has been filed may only determine the legal sufficiency of its allegations. In the words of *Berger*, the statute "withdraws from the presiding judge a decision of the truth of the matters alleged", *supra*, 36. The "duty of the judge [is] to pass only on the legal sufficiency of the facts alleged to ascertain whether they support a charge of bias or prejudice", *Mims v. Shapp*, 541 F.2d 415, 417 (3rd Cir. 1976). Faced with a legally sufficient motion, the judge is divested of authority to "proceed...further" and has "no lawful right or power to preside as judge on the trial", *Berger*, at 36.

In evaluating motions under Rule 63-I, this Court has recognized that the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994), is the "governing standard[]", *Fischer v. Estate of Flax*, 816 A.2d 1, 12 (2003). *Liteky* defined "personal bias and prejudice" as:

> "a favorable or unfavorable disposition or opinion that is somehow ***wrongful*** or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess...or because it is excessive in degree." (at 550, italics in the printed Supreme Court decision).

*Liteky* also rejected that "personal bias and prejudice" had to be "extrajudicial". Justice Kennedy's four-judge concurring opinion succinctly summarized what the five-judge majority held:

> "...the Court is correct to conclude that an allegation concerning some extrajudicial matter is neither a necessary nor sufficient condition for disqualification under any of the recusal statutes." (at 561).

In that connection, *Liteky* recognized that there are situations where a judge's bias in the case before him is so pervasive as to reach an "impossibility of fair judgment" warranting disqualification, at 551, 555, 556.

At bar, Sassower's February 23 and March 22, 2004 motions [A-265, A-375] were sufficient, as a matter of law, to require his disqualification and divest him of authority to "proceed...further". All subsequent acts taken by him were null and void.

In denying Sassower's February 23, 2004 disqualification motion [A-265], Judge Holeman's February 25, 2004 order [A-407] did not identify Rule 63-I as governing adjudication of her moving affidavit – nor determine the legal sufficiency of its allegations of his bias. Rather, his February 25, 2004 order rested on a bald assertion that she had "established no facts that the trial judge's impartiality might reasonably be questioned."

The brazen untruth of this assertion is evident from the most cursory examination of Sassower's 22-page affidavit supporting her February 23, 2004 motion [A-267]. Sassower's March 22, 2004 motion pointed this out [A-395-399] and showed that Judge Holeman's order had employed an improper legal standard of "established...facts" to allegations of bias -- the existence of which the order concealed [A-397]. Consequently, the first branch of Sassower's March 22, 2004 motion [A-375] was to vacate the February 25, 2004 order as violative of Rule 63-I and, based thereon, to vacate Judge Holeman's subsequent orders, as he had no authority to "proceed" in face of her sufficient February 23, 2004 affidavit. As to these subsequent orders, Sassower demonstrated [A-379-393] that virtually all of them were factually and legally baseless, further manifesting his disqualification for actual bias.

As for Judge Holeman's April 6, 2004 order [A-468] denying the disqualification/vacatur sought by Sassower's March 22, 2004 motion [2] [A-375], such conceded that Rule 63-I governs disqualification for bias. Absent, however, was any explanation as to why Sassower's February 23, 2004 motion had not been adjudicated by the February 25, 2004 order in a manner consistent therewith. Instead, the April 6, 2004 order identified the February 23, 2004 motion as made "pursuant to Canon 3E of the American Bar Association Code of Judicial Conduct" [A-468], possibly implying that this was the reason. In fact, Sassower's February 23, 2004 motion had invoked "Canon 3E of the Code of Judicial Conduct for the District of Columbia Courts" [A-265], "binding on the judges of the District of Columbia Courts", *York*, at 655.

Tellingly, Judge Holeman's April 6, 2004 order failed to discuss adjudicative standards for disqualification motions either pursuant to the ABA Code of Judicial Conduct or the Code of Judicial Conduct for the District of Columbia Courts. Nor did it even purport that Sassower's February 23, 2004 motion had been adjudicated consistent with those unidentified standards. To the extent disqualification under the Codes requires "established...facts", rather than, as with Rule 63-I, sufficient allegations, Judge Holeman's April 6, 2004 order [A-468], like his February 25, 2004 order [A-407], failed to identify a single fact which Sassower's February 23, 2004 motion had alleged, but not "established". As examination of the motion shows [A-265], its relevant factual particulars were *all* documentarily established.

As for adjudicative standards for disqualification motions under Rule 63-I, Judge Holeman's April 6, 2004 order asserted, "It requires that the alleged bias or prejudice against

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[2] The April 6, 2004 order was not released until April 7, 2004 – by which time Judge Holeman had the further benefit of Sassower's petition for a writ of mandamus/prohibition, served upon him on April 6, 2004, reinforcing the facts and law presented by her March 22, 2004 disqualification motion.

a party be personal, rather than judicial, and have originated from sources *outside of court proceedings...*" [A-468, italics in the order]. Such flew in the face of *Liteky*, on which Sassower's March 22, 2004 motion expressly rested [A-377, 397-8] – a fact Judge Holeman then covered up by claiming, falsely, that her motion "failed to cite any legal authority for the requested relief." [A-470].

Judge Holeman also ruled that Sassower's March 22, 2004 motion was procedurally deficient because it was not accompanied by a certificate of counsel of record attesting to the good faith of her affidavit and because her affidavit, allegedly, was not sufficient [A-469]. The first of these grounds was legally unsupported; the second factually and legally false.

As to the certificate of counsel of record, Judge Holeman asserted that Sassower, as "Defendant *pro se*", was her own "counsel of record" and, therefore, should have supplied her own such certificate [A-469]. He cited no legal authority for this proposition – and there is none that would transform a non-lawyer litigant representing herself into "counsel of record". Nor would it be anything but redundant to have the party, who has already sworn to the truth of her allegations by affidavit – for which she is liable for perjury – to additionally submit a certificate as her own "counsel of record". The purpose of such certificate is simply to subject counsel of record to disciplinary penalties, much as the party's affidavit subjects the party to legal penalties for perjury, *see Berger*, at 324.

As for the sufficiency of Sassower's March 22, 2004 affidavit, Judge Holeman purported that it failed "to state with particularity material facts that, if true, would convince a fair and reasonable mind that bias exists." [A-469]. He falsely implied that the sole basis of her disqualification request was that his orders denying her February 23, 2004 motion were "all based on 'conclusory claims'" and because his order granting the prosecution's motion *in*

*limine* "did not state reasons". Judge Holeman then asserted that it was "unclear" what she meant by "conclusory claims", but that

> "further clarity is unnecessary to disposition of the pending question. None of the grounds asserted by Defendant even remotely assert prejudice from an extrajudicial source. Rather, they simply reflect the Defendant's dissatisfaction with this Court's Orders." [A-469].

This was patently untrue. Sassower's 27-page March 22, 2004 affidavit [A-379-381] was not only clear as to the meaning of "conclusory claims", but very specific in identifying them as "outright judicial lies", "without basis in fact and law" (underlining in original), as likewise Judge Holeman's without-reasons order granting of the prosecution's motion *in limine* – establishing pervasive actual bias under *Liteky*.

Additionally, Judge Holeman's April 6, 2004 order claimed that Sassower had "failed to establish *any* facts to support the required showing that the Court's alleged bias stems from a source outside the scope of official judicial conduct..." [A-470, italics in order]. This too was untrue. Sassower's February 27, 2004 notice of motion and affidavit [A-266, 267, 274] each identified the extrajudicial source of bias for which she had long sought to have the case removed from the D.C. Superior Court, *to wit*, that that the Court was funded directly by Congress, with judges – such as Judge Holeman -- appointed by the President with the advice and consent of the Senate or one of its committees.

Conspicuously, neither of Judge Holeman's two orders denying disqualification [A-407, 468] identified that Sassower had requested that he make disclosure of any facts bearing adversely on his ability to be fair and impartial – and that she had pointed out that this was his obligation to do pursuant to Canon 3E of the Code of Judicial Conduct for the District of

Columbia Courts [A-294, 294, 271, 272-3][3]. Judge Holeman did not purport that he was uninfluenced by the source of the Court's funding or by the parallels between his appointment and confirmation and that of New York Court of Appeals Judge Wesley, whose confirmation Sassower had opposed[4]. Nor did he purport that he was uninfluenced by his undisclosed professional and/or personal relationships, such as with Senior Judge Mary Ellen Abrecht, whose seat he assumed on the bench. As the record before Judge Holeman showed, it was Judge Abrecht's husband, the former Chief of Capitol Police, who had wrongfully dismissed [A-185] Sassower's September 22, 1996 police misconduct complaint against, *inter alia*, Sergeant Bignotti [A-154, 184] – the true arresting officer in Sassower's May 22, 2003 arrest. Sassower's March 22, 2004 motion highlighted [A-400, fn. 7] this record evidence, as well as Judge Abrecht's due process violations in this case – including by her denial of Sassower's application for her disqualification based on her husband's dismissal of the complaint [A-463, fn.1][5]. Nonetheless, Judge Holeman covered up what Judge Abrecht had done by relying, and continuing to rely, on her insupportable and outdated September 4, 2003 "Memorandum Explaining Denial of Motion for Change of Venue" [A-460] to deny [A-411, 468] the removal/transfer relief sought by Sassower's February 23 and March 22, 2004 motions. This, in addition to covering up Sassower's entitlement to production of the investigative file of the

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[3] This Court's *en banc* decision in *Scott v. United States*, *supra*, recognized the importance of full disclosure, stating that it would have "completely removed any basis for questioning the Judge's impartiality..." (at 754).

[4] As noted by Sassower's February 23, 2004 affidavit [A-274, fn. 2], Judge Holeman had been appointed by President Bush on May 22, 2003 – the same day as she was arrested at the Senate Judiciary Committee for "disruption of Congress" -- and was thereafter confirmed by Congress: a voice vote of the Senate, without a printed report of his confirmation hearing before the Senate Committee on Government Affairs.

[5] Evident from this Court's decision in *York*, *supra*, is that the connection between this case and the 1996 police misconduct complaint which her husband dismissed required Judge Abrecht to disqualify herself.

1996 police misconduct complaint – from which Police Chief Abrecht's whitewash would have been evident.

Thus may be seen that the sufficiency of Sassower's February 23, and March 22, 2004 motions [A-265, 275] -- for which she was entitled to Judge Holeman's disqualification pursuant to Rule 63-I -- was purposefully concealed by his factually and legally insupportable, unsupported, and fraudulent February 25 and April 6, 2004 orders [A-407, 468].

**1-A: THE CONDUCT AND RULINGS CHALLENGED BY SASSOWER'S FEBRUARY 23 & MARCH 22, 2004 PRETRIAL DISQUALIFICATION MOTIONS ARE FACTUALLY & LEGALLY INSUPPORTABLE**

In *Fischer v. Estate of Flax*, *supra*, the case in which this Court recognized *Liteky* as the "governing standard[]" for disqualification motions for bias under Rule 63-I, this Court gave instructive comment with regard to a trial judge's challenged rulings, namely, that "sound reasons were given or were readily at hand" (at 12).

In *Re: J.A. & L.A.*, 601 A.2d 69, 77 (1991), another case involving a trial judge's bias, this Court held:

> "Although we do not decide the nature of the judge's obligation to reveal to the parties the information relied upon for a decision, it may be considered by the reviewing court in determining bias."

Notwithstanding Superior Court Criminal Rule 47-I(g) does not require the trial judge to state findings of fact on the record in ruling on a motion, this Court has held that the trial court's determination "must be reliable and clear-cut and...must appear from the record with unmistakable clarity", *Staton v. United States*, 466 A.2d 1245, 1253 (1983).

At bar, Sassower's March 22, 2004 disqualification/vacatur motion [A-375] detailed that Judge Holeman had issued a succession of orders, all either without reasons or, to the limited extent that reasons were given, readily revealed by the record as "outright judicial

lies" [A-380, 385]. In the words of her unopposed April 6, 2004 mandamus/prohibition petition [at p. 10], these orders were "'so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment', *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)".

Sassower's March 22, 2004 disqualification/vacatur motion [A-375] provides the requisite detail and substantiating record references, all uncontested – to which, in the interest of judicial economy, she refers this Court with respect to:

> (a) Judge Holeman's February 25, 2004 order denying the second branch of her February 23, 2004 motion to postpone/continue the calendared March 1, 2004 trial pending "responsive, written adjudication" of her October 30, 2003 discovery/disclosure/sanctions motion [A-409];
>
> (b) Judge Holeman's February 25, 2004 order denying the third branch of her February 23, 2004 motion to transfer the case to a court "whose funding does not come directly from Congress and, if possible, whose judges are not appointed by the President with the advice and consent of the Senate or one of its committees" [A-411];
>
> (c) Judge Holeman's February 25, 2004 order granting the prosecution's motion *in limine* – without reasons [A- 413]; and
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> (d) Judge Holeman's February 26, 2004 order purporting that Judge Milliken had "determined that the sole discovery obligation of the Government was the ex parte in camera submission of documents relevant to bias cross-examination, which was satisfied by way of the Government's submission of responsive documents for [the] Court's review on January 14, 2004" [A-433].

Additionally, with respect to Judge Holeman's March 30, 2004 order denying the second and third branches of her March 22, 2004 motion [A-466], Sassower refers the Court to her April 6, 2004 mandamus/prohibition petition [#04-OA-17].

All Judge Holeman's insupportable eve-of-trial and trial rulings directly flow from these succession of orders, covering up Sassower's dispositive October 30, 2003

discovery/disclosure/sanctions motion [A-39] and further "protecting" the government by granting its factually fraudulent and legally unsupported December 3, 2003 motion *in limine* [A-247].

**Judge Holeman's Wilful Violation of Sassower's Pretrial Discovery Rights, "Protecting" the Government**

D.C. Criminal Rule 16(a)(1)(C) is mandatory in its direction:

> "Upon request of the defendant the prosecutor shall permit the defendant to inspect and copy...documents...[and] tangible objects...which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense..." (underlining added).

This Court has stated,

> "The purposes underlying the criminal discovery rules are clear. 'Broad discovery contributes to the fair and efficient administration of criminal justice...by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence.' Fed.R.Crim.P. 16, Advisory Comm. Note (1975)", *Lee v. United States*, 385 A.2d 159, 163 (1978).

It has therefore held that "...anything relevant to an issue in a case is material and, absent a showing of undue burdensomeness, therefore presumptively discoverable", *United States v. Curtis*, 755 A2d 1011, 1015 (2000).

> "In order to establish materiality, the defendant must demonstrate a relationship between the requested evidence and the issues in the case, and there must exist a reasonable indication that the requested evidence will either lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence. *United States v. Lloyd*, 301 U.S. App. D.C. 186, 188-89, 992 F.2d 348, 350-51 (1993). A defendant must 'make a threshold showing of materiality, which requires a presentation of facts... The threshold showing of materiality is not a high one.' *Lloyd*, 992 F.2d at 351.", *Curtis*, 1014-15.

It is left "to the discretion of the trial court to determine what type of threshold showing is appropriate in each case", *Curtis*, 1015.

This Court reviews a trial court's Rule 16 discovery determinations, including as to materiality, for abuse of discretion, *Curtis*, at 1014. In order to do so, however, the trial court must make findings. As stated in *Curtis*, at 1015,

> "Because the trial court failed to make any specific findings before concluding that the requested materials were material to the preparation of the defense and thus producible, we are unable to determine whether the trial court abused its discretion in granting the requested discovery on the basis of Rule 16(a)(1)(C) and in dismissing the case as a sanction for failure to comply with discovery, See *Williams v. Ray*, 563 A2d 1077, 1080 (DC 1989)".

As to sanctions, this Court has held that although they are within the trial court's discretion,

> "[such] discretion is 'not unlimited, however; it must be exercised 'not arbitrarily or wilfully...The court's determination must be based on a firm factual foundation and supported by substantial reasoning.", *James Wiggins v. United States*, 521 A.2d 1146, 1148 (1987).

Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-39] was sufficient in establishing the materiality of each of the 22 items of "documents and tangible objects" requested by her August 12, 2003 first discovery demand pursuant to Rule 16(a)(1)(C) [A-70]. It also was sufficient to establish her entitlement to severe sanctions against the prosecution, *inter alia*, by reason of Assistant U.S. Attorney Aaron Mendelsohn's October 3, 2003 response to the demand [A-74], demonstrated by her motion as false and in bad faith with respect to virtually each of these 22 items. No aspect of Sassower's showing was denied or disputed by Mr. Mendelsohn, whose November 12, 2003 opposition [A-212] was itself so false and deceitful as to reinforce Sassower's entitlement to sanctions against the prosecution, which she explicitly sought by her December 3, 2003 reply affidavit [A-222].

At the December 3, 2003 oral argument before Judge Milliken [A-300], Mr. Mendelsohn requested, and was given, the opportunity to respond to Sassower's reply affidavit [A-318]. He did not thereafter do so, however – thereby leaving undenied and

undisputed Sassower's showing of his further misconduct in connection with the motion. At no point did Mr. Mendelsohn or anyone else on behalf of the prosecution ever purport that the production of "documents and tangible objects" requested by her August 12, 2003 first discovery demand [A-70] would be "burdensome".

Judge Milliken made no "specific finding" – nor even a bald assertion – that any of the 22 items of "documents and tangible objects" requested by Sassower's August 12, 2003 first discovery demand were not "material" and, therefore, not producible. Rather, he expressly stated that he was leaving the issue of materiality to be determined by the permanent judge to be assigned to the case [A-304, 316-7, 335], who he stated had "heard the bulk" of the December 3, 2003 oral argument [A-333]. Nevertheless, Judge Holeman not only refused to confirm his presence on December 3, 2003, but completely disregarded Sassower's transcript-supported showing as to what Judge Milliken had ruled so as to falsely purport, by his February 26, 2004 order [A-433], that the prosecution's discovery obligations were satisfied by its *ex parte in camera* submission. As for Sassower's entitlement to sanctions against the prosecution for its discovery misconduct, neither Judge Milliken on December 3, 2003 [A-300] nor Judge Holeman by his February 26, 2004 order [A-433] made any findings with respect thereto.

The consequence of Judge Holeman's pretrial fiction that Sassower's October 30, 2003 discovery/disclosure/sanctions motion had been properly addressed was that a prosecution case that should have been thrown out on that motion was, instead, brought to

trial – where that very fiction fatally tainted virtually every evidentiary ruling[6] and doomed the development and presentation of her defense[7].

## 1-B JUDGE HOLEMAN'S SUBSEQUENT PRETRIAL RULINGS ARE FURTHER CONFIRMATORY OF HIS PERVASIVE ACTUAL BIAS & ARE FACTUALLY & LEGALLY INSUPPORTABLE

### March 22, 2004: Judge Holeman's Denial of the March 9, 2004 Motion of Sassower's Legal Advisor for a Continuance of the Trial to May 3, 2004

This Court has held that:

> "'a rigid insistence by the court upon expedition of trial in the face of a justifiable request for delay can render the right to defend an empty formality.' *O'Connor v. U.S.*, 399 A.2d 21, 28 (D.C. 1979)", *Kimes v. United States*, 569 A2d 104, 114 ( ):

It reviews a trial court's denial of a continuance for abuse of discretion – as to which it evaluates:

> "whether the trial court considered relevant factors, or relied upon improper factors, and whether the reasons for its actions are reasonably supported." *Yancey v. United States*, 755 A.2d 421, 427-8 (D.C. 2000), citing *Johnson v. United States*, 398 A.2d 354, 365 (D.C. 1979).

On March 22, 2004, Judge Holeman stated his reasons for denying the March 9, 2004 motion made by Sassower's legal advisor, Mark Goldstone, to postpone/continue the April 5, 2004 trial date to May 3, 2004 [A-343]. Neither these reasons, nor the premises contributing to his denial, were "reasonably supported".

In denying the motion, Judge Holeman essentially replicated a claim put forward by Assistant U.S. Attorney Jessie Liu [A-353]. Accordingly, he stated that he was "not

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[6] Judge Holeman's April 8, 2004 order on Senate Legal Counsel's March 26, 2004 motion to quash Sassower's subpoenas: A-367, 549, 551; Judge Holeman's April 12, 2004 ruling on Ms. Liu's April 5, 2004 *Drew* Notice: A-556; Judge Holeman's *sua sponte* April 15, 2004 exclusion of Sassower's September 22, 1996 police misconduct complaint: A-978-9.

[7] *See* A-714, 733, 738-40, 817-8, 855-8.

convinced by this lack of preparation argument that I hear from the defense" because "we were prepared to have this case go to trial on the 1st of March" and the defense trial preparations should have taken place "in anticipation of that March 1st trial date" or "at the time we were notified of [Sassower's] emergency", *to wit*, February 27, 2004 [A-360].

Unless the mandatory language of D.C. Superior Court Criminal Rule 16(a)(1)(C) is to be emptied of meaning, the case was not ready for trial on March 1, 2004 – or at any time thereafter.

Sassower's August 12, 2003 first discovery demand quoted the language of Rule 16(a)(1)(C) in asserting that the requested 22 items of "documents and tangible objects" were "all...'material to the preparation of [her] defense'" [A-70]. She then demonstrated this materiality by pages 7-20 of her October 30, 2003 discovery/disclosure/sanctions motion [A-47-60]. As neither Judge Holeman nor Judge Milliken ever ruled on the materiality of any of these 22 items "to the preparation of [her] defense"-- let alone on the prosecution's response to each of these 22 items -- Judge Holeman's assertion that the case was ready for trial on March 1, 2004 and that Sassower's defense should have been prepared was not only untrue, but represented a *sub silentio* repudiation of Rule 16(a)(1)(C).

Indeed, throughout the month preceding the March 1, 2004 trial date, Sassower notified Judge Holeman [A-296] that she was being prevented from proceeding with her pretrial preparations, including with respect to her subpoenaing of witnesses, by his failure to rule on the prosecution's *ex parte in camera* submission and her October 30, 2003 discovery/disclosure/sanctions motion. Judge Holeman did not deny or dispute this. Rather, he simply ignored it – for which reason Sassower, to protect herself from the prejudice she was being caused by the approaching March 1, 2004 trial date, made her February 23, 2004

motion to disqualify him for actual bias – whose second branch was for "postponement/continuance of the March 1, 2004 trial date, chargeable to the Government or the Court, pursuant to Rule 16(d)(2) of the Superior Court Rules of Criminal Procedure, pending responsive, written adjudication" of her October 30, 2003 motion [A-265, underlining added].

Judge Holeman's rulings with respect to this second branch consisted of his February 25, 2004 order baldly purporting that Sassower had "failed to establish that a continuance of the trial date [was] necessary to prevent manifest injustice" [A-409], his separate February 25, 2004 order releasing the prosecution's palpably insufficient *ex parte, in camera* submission [A-414], and his February 26, 2004 order baldly purporting that the *ex parte in camera* submission gave Sassower everything to which her October 30, 2003 discovery/disclosure/sanctions motion entitled her [A-433]. As particularized by Sassower's February 26 and February 27, 2004 memoranda for supervisory oversight [A-426, 435], copies of which she sent to Judge Holeman [A-431, 442], the conclusory claims of these orders were "judicial lies", readily verifiable as such from examination of her February 23, 2004 motion [A-265].

Additionally, Judge Holeman predicated his March 22, 2004 from-the-bench denial of Mr. Goldstone's motion to postpone/continue the trial on his view that resolution of Sassower's subpoena rights was "not at all related to this issue of a continuance" [A-352]. He provided no explanation as to why this should be so, except that it was a "separate Discovery issue" [A-352]. Yet, even as a "separate Discovery issue", adequate time was still needed to resolve the complex constitutional and legal issues that would be presented by Senate Legal Counsel's anticipated, but not yet made, motion to quash on separation of powers grounds.

Nonetheless, Judge Holeman refused to recognize that setting the trial for April 12, 2004 and a schedule for preliminary matters running from April 2 to April 8, 2004 -- dates during which Mr. Goldstone would be out of town -- would not allow Sassower sufficient time to research and respond to the motion [A-367-8]. Indeed, from Judge Holeman's comments [A-362-5], he appeared to deem her response as superfluous.

The predictable consequence was that Sassower was unable to respond to Senate Legal Counsel's March 26, 2004 motion to quash – or to Judge Holeman's oral timetable for preliminary issues. This resulted in pretrial and trial rulings by Judge Holeman which were erroneous for that reason, over and beyond his pervasive actual bias. As hereinafter demonstrated, such rulings were not reasoned adjudications of the factual and legal issues before him, but, rather, superficial, inconsistent, often bullying pronouncements. It also meant that the non-lawyer Sassower and her unavailable and unprepared attorney-advisor were not equipped – as they would otherwise have been – to raise a plethora of preliminary issues and trial objections essential to the defense case – the absence of which would contribute to an adverse jury verdict, as well as prejudice her rights on appeal.

Finally, it deserves note that underlying Judge Holman's denial of Mr. Goldstone's motion to postpone/continue the trial to May 3, 2004 [A-343-5] was his rejection of Sassower's reiteration of the representation in the motion that the trial was expected to "consume a full week". Judge Holeman based his rejection of this time projection on his "understanding of the information" [A-354]. Such one-sided reliance on the prosecution's charging document was a further manifestation of Judge Holeman's bias. Apart from the fact that Sassower's October 30, 2003 discovery/disclosure/sanctions motion established that the underlying prosecution documents were "materially false and misleading", pages 7-20 of that

motion [A-47-60] presented a fact-specific "roadmap of the defense case" which had to be factored into any projection of the trial's length.

In fact, the trial, with preliminary proceedings and jury selection, did "consume a full week" [A-536-1402] – and would properly have continued longer, but for Judge Holeman's steam-rolling and otherwise violative conduct. Such included his aborting of Sassower's legitimate cross-examination and examination of witnesses, his refusal to allow sufficient time to assess the admissibility of evidence essential to her defense, and his refusal to permit her to testify as to the events at issue and her intent.

**April 8, 2004:**
**Judge Holeman's Order on Senate Legal Counsel's March 26, 2004 Motion to Quash Sassower's Subpoenas – and his April 12, 2004 Refusal to Grant Reargument/Reconsideration**

This Court has stated,

> "In considering a motion to quash, the trial court usually holds a hearing on the motion and, as necessary, entertains any relevant testimony.", *In re Johnson*, 699 A.2d 362, 371 (1997).

In *Watkins v. United States*, 846 A.2d 293, 300 (2004), this Court referred to the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), as

> "clarify[ying] the scope of a criminal defendant's right under the Sixth Amendment to confront and cross-examine witnesses against him (or her) and reemphasiz[ing] the significance of that right."

Judge Holeman's April 8, 2004 order [A-503] on Senate Legal Counsel's motion to quash Sassower's subpoenas of five Senators and four of their staff [A-472] was rendered without any hearing on the motion – and in face of knowledge that Sassower's failure to respond to the motion was not because she was uninterested in doing so.

Judge Holeman's order did not provide any of the background relevant to Sassower's failure to respond – such as what she had stated at the March 22, 2004 pretrial hearing [A-

367-9] – or disclose that on April 6, 2004 Sassower had brought a mandamus/prohibition proceeding against him in this Court, with an accompanying stay application – the substantial nature of which understandably accounted for her inability to respond to the motion to quash.

Instead, with no hearing on the motion and in the absence of Sassower's response, his order rested on "the pertinent facts adduced during pretrial discovery" [A-504]. Without identifying where in the pretrial discovery record he had obtained these "pertinent facts", he purported that aside from Senator Clinton's counsel, Leecia Eve, and legislative correspondent, Joshua Albert,

> "None of the other subpoenaed respondents are known to have had telephone contact with Defendant, nor are any known to have directed communication to Defendant by any other means." [A-504, underlining added].

These incomplete "pertinent facts" from an undisclosed source then became the basis for factual determinations on which his ultimate ruling rested:

> "there has been no showing that Subpoenaed Respondents who are Senate Members were involved in activities other than the confirmation hearing or deliberative and communicative processes";
>
> "there has been no demonstration that extraordinary circumstances exist which compel the Senate Members or staff members from testifying at trial. On the facts known to date, Defendant has 'failed to proffer any reason why others present who did not hold such high office could not provide the testimony.' *Bardoff v. United States*, 628 A.2d 86, 90 (D.C. App. 1993)."
>
> "...Defendant has not established that the testimony of Senate Members Saxby Chambliss, Hillary Rodham Clinton, Orrin Hatch, Patrick Leahy, and Charles Schumer, nor that of Senate staff members Tamera Luzzatto and Michael Tobman, is evidentiary or relevant....However, the testimony of Senate staff members Leecia Eve and Joshua Albert *may* be evidentiary or relevant as to the events leading to Defendant's arrest." [A-506, underlining added].

On April 12, 2004, Judge Holeman denied Sassower's request for reargument/reconsideration of his April 8, 2004 order by taking the position that his March 30, 2004 order requiring response to Senate Legal Counsel's motion to quash by April 5, 2004

[A-501] ended the matter and that any motion she would now bring was "unavailable" [A-549, 579-80]. This inflexible position was in face of Sassower's assertions that his April 8, 2004 order [A-503] was erroneous in that: (1) it rested on "pertinent facts adduced during pretrial discovery" [A-539, 549] – when, in fact, Sassower had been deprived of the discovery to which she was entitled; (2) it incorrectly stated that Ms. Eve and Mr. Albert were the only subpoenaed respondents known to have had contact with Sassower – an assertion apparently based on Judge Holeman's reading of the prosecution's *ex parte in camera* submission, rather than pages 7-20 of Sassower's October 30, 2003 discovery/disclosure/sanctions motion and such integral documents as her 39-page May 21, 2003 fax to Detective Zimmerman [A-539-40, 551]; (3) it ignored that Senator Chambliss had had contact with Sassower both at the May 22, 2003 Senate Judiciary Committee hearing in directing that order be restored and as the complainant on the criminal charge against her [A-540-4].

Sassower further stated that Senate Legal Counsel and Mr. Vinik had committed fraud by the motion to quash – the particulars of which Judge Holeman would not allow her to particularize, while righteously denying that Mr. Vinik engaged in any improper conduct [A-549-51].

These reasons – and the additional good and sufficient reasons [A-547] Sassower articulated as to why she had been unable to give written response to the motion to quash by April 5, 2004 – more than sufficed to require Judge Holeman to grant reargument/reconsideration. Instead, Judge Holeman adhered to her failure to meet the April 5, 2004 deadline, seemingly because it was the easiest way to dispose of issues dispositive of her rights. These included Sassower's Sixth Amendment confrontation rights, as reinforced

by the recent Supreme Court decision in *Crawford v. Washington*, and Sassower's own simple, self-evident proposition:

> "Speech and debate has nothing to do with initiating a criminal charge, [Senator Chambliss] lodged a criminal charge; that's not part of his legislative function" [A-541].

Faced with this simple proposition, Judge Holeman had turned to Mr. Mendelsohn, who turned to Senate Legal Counsel Vinik, who fell back on a bald claim that Senator Chambliss was "protected by the Speech and Debate Clause of the United States Constitution", citing *Bardoff*, and the Ninth Circuit case of *Schultz v. Sundberg*, 759 F.2d 714 (1985) [A-542]. Sassower answered that *Bardoff* "does not control in this case, no way...the circumstances are not comparable" and asked, as to *Schultz*, "are we talking about a right of a criminal defendant...To call the complainant as witness?" [A-543]. Sassower then asserted, "I respectfully submit that surely in that case what is not involved is a right of a criminal defendant to have the complainant called by – by way of confrontation rights under the Sixth Amendment." [A-543-4]. Judge Holeman did not answer that question – nor call on Mr. Vinik to do so. Instead, and without so much as asking Sassower to amplify her assertion that the circumstances of *Bardoff* were not comparable or himself specifying why they were, Judge Holeman simply declared, "Bardoff is controlling, it flows from his legislative duties, you've made your record, next issue." [A-544].

In fact, *Bardoff*, where the trial court held a hearing on the motion to quash the congressional subpoenas (at p. 89), does not control. Aside from the fact that none of the subpoenaed congressional respondents were alleged to be complainants to the criminal charges therein lodged, there were no allegations of the kind of "extraordinary circumstances" here at issue: a criminal defendant exculpated by a "paper trail" of prior correspondence to the

Senators [A-1431, 1436, 1474, 1478, 1493, 1495, 1522, 1535, 102, 104, 106, 119, 1539, 142], all of which required their personal attention and which, beginning with Sassower's May 19, 2003 memoranda [A-1522, 1535], urgently requested same.

Additionally, and without reasons, Judge Holeman's April 8, 2004 order both denied and granted the production of documents requested in Sassower's subpoenas of Mr. Albert and Ms. Eve [A-507]. Judge Holeman circumscribed Sassower's requested production from "All documents and records relating to Defendant, the Center for Judicial Accountability, Inc. and Defendant's attempts to testify before Senate Judiciary Committee Hearing on 5/22/03" [A-495-6, 503-4] to "any documents which have been prepared by Mr. Albert or Ms. Eve pertaining to Defendant and which have not been previously produced" [A-507]. The profound prejudice thereby caused became evident at trial, where Mr. Albert and Ms. Eve – aided by Judge Holeman[8] -- stymied Sassower's examination of them by purporting they had no specific recollection of documents she had hand-delivered to Senator Clinton's office, and/or e-mailed and/or faxed, for which she had transmittal receipts. Their evasive and materially false and misleading testimony, including as to whether documents had even been received, would have been all but impossible had they been required to produce the copies and/or originals of these documents, as sought by Sassower's subpoenas. [A-1081-3, 1086-7; 1090-1104; A-1126-8, 1130-3, 1148-77][9]. Certainly, it would have been impossible for them

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[8] Judge Holeman continually blocked Sassower's questioning of Ms. Eve by *sua sponte* asserting that she had already testified to having "no specific recollection", especially as to documents. Among these, her question, [A-1142-3]: "Is it not correct that I asked you to bring the March 26th statement to the personal attention of Senator Clinton so that she could make a determination as to its seriousness?" [*See also*, A-1131, 1133, 1149, 1159, 1161-3, 1166, 1177].

[9] *Cf.* Judge Holeman's failure to respond to Sassower's question, during her cross-examination of Special Agent Lippay, "She was asked to bring documents. Had she brought the documents, would we have been able to introduce that?" [A-738].

to pretend – with Judge Holeman's assistance – that they could not recollect Sassower's April 23, 2003 package [A-1476] containing the document-supported March 26, 2003 written statement of opposition to Judge Wesley [A-1436], which looked nothing like any of the other correspondence they received from her.

**April 12, 2004:**
**Judge Holeman's From-the-Bench Ruling on the Prosecution's April 5, 2004 Notice to Admit *Drew* Evidence**

This Court has enunciated the cardinal rule with respect to *Drew* evidence of "other crimes":

> "This jurisdiction has long adhered to the presumptive inadmissibility rule for other crimes evidence...Once such evidence is before the jury it is difficult, if not at times practically impossible, to avoid its use as predisposition evidence...
>
> Because of the inherent prejudice of other crimes evidence, the trial judge must make a series of factual determinations before admitting the evidence to ensure that the defendant's right to a fair trial is not undermined...The threshold inquiry of any of these determinations is whether there is clear and clear and convincing evidence that the other crime occurred and that the defendant is connected with it. Unless the judge as a trier-of-fact finds such clear and convincing evidence, the admissibility inquiry comes to a halt", *Groves v. U.S.*, 564 A2d 372, 374 (1989) [underlining added].
>
> "...Before evidence of other offenses probative of any of the allowable issues may be admitted, a trial court is required to find: (1) that the defendant committed the other offenses by clear and convincing evidence...", citing *Flores v. United States*, 698 A.2d 474, 482 (1997), *Parker v. United States,* 751 A.2d 943, 948 (2000).

This Court has also recognized, as "well established", that a defendant is entitled to use other crimes *Drew* evidence "defensively" and that the standard for this "reverse Drew" is, by contrast to that imposed on the prosecution, a generous one since "prejudice to the defendant is no longer a factor", *Newman v. United States*, 705 A.2d 246, 255 (1997).

On April 12, 2004, Judge Holeman ruled from-the-bench on Ms. Liu's April 5, 2004 "Notice of Intent to Introduce Other Crimes Evidence Pursuant to Drew v. United States." [A-

509]. The "Other Crimes Evidence" sought to be introduced was the Capitol Police's account of why Sassower was arrested on June 25, 1996 – and this primarily for purposes of showing her "intent" to disrupt Congress on May 22, 2003.

On its face, the April 5, 2004 "Notice" [A-509] – which Ms. Liu identified as a "motion" in arguing before Judge Holeman [A-553] – was insufficient as a matter of law. Although reciting the legal requirement that "uncharged misconduct" be "proved by clear and convincing evidence" [A-511], the "Notice" contained no assertion that Capitol Police's account of its June 25, 1996 arrest was so-proven, let alone disclosed that the case had never gone to trial and had been dropped by the prosecution.

The April 5, 2004 "Notice" [A-509] was also deficient because it presented no procedural history of this case. Thereby omitted was that, at her May 23, 2003 arraignment, the prosecution had given Sassower a "*Drew/Toliver* Notice" [A-82], to which she had responded by her October 30, 2003 discovery/disclosure/sanctions motion, expressly asserting [A-60: ¶42] that the prosecution's announced intent to use the 1996 arrest made "all the more relevant" item #22 of her August 12, 2003 first discovery demand [A-73] for the investigative file of her September 22, 1996 police misconduct complaint arising from the 1996 arrest. The legitimacy of this assertion had never been denied or disputed by the prosecution.

Ms. Liu's April 5, 2004 "Notice" -- and the response it required if Judge Holeman were not going to dismiss it, out-of-hand, for insufficiency -- further underscored that the case had not been ready for trial on March 1, 2004. Judge Holeman disregarded this during the April 12, 2004 argument [A-554-8]. He also impliedly rejected that it was improper for Ms. Liu to have interposed her "Notice" at a time when she knew Mr. Goldstone was "in

communicado, on vacation", explicitly rejecting that Sassower was entitled to have had Mr. Goldstone's assistance in addressing it.

It was in face of Sassower's express assertion that she had "never had [her] day in court" with respect to the 1996 arrest and that the prosecution had not produced the investigative file of her 1996 police misconduct complaint [A-556-8] that Judge Holeman granted what he termed "the motion" [A-558]. In so ruling, he gave no reasons and made no findings – and then revised it shortly thereafter for no stated reason other than that he had "had an opportunity to rethink the issue of the prior crimes" [A- 571]. He would now not allow other crimes evidence under *Drew* as part of the prosecution's "case in chief", but would "allow it on rebuttal if the evidence warrants" [A-571].

This revised ruling was no less contrary to law -- in the absence of "clear and convincing evidence" establishing the prosecution's account of the 1996 arrest. This was compounded at trial by Judge Holeman's refusal, also without reasons, to inform the jury that there had been no conviction with respect to the 1996 arrest [A-1256]. Such refusal was all the more egregious as the jury had heard the prosecution's account of the 1996 arrest solely because Judge Holeman exploited a too-broad question that Sassower had asked Sergeant Bignotti during cross-examination[10].

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[10] As Sassower tried to halt Sergeant Bignotti's answer, Judge Holeman interjected, "No, you asked the question. She's going to answer it" [A-994-5] – knowing that Sergeant Bignotti would recite the false, unadjudicated allegations of the 1996 arrest report, and that, only minutes earlier, he had barred Sassower from introducing, or even mentioning, her police misconduct complaint against Sergeant Bignotti arising from the 1996 arrest [A-980].

Following Sergeant Bignotti's predictable recitation, Judge Holeman adhered to that bar in refusing to allow Sergeant Bignotti to respond to Sassower's question as to whether she subsequently became aware of "certain actions" Sassower had taken [A-1001].

Thereafter, when Sassower was being cross-examined by Mr. Mendelsohn [A-1268-71], Judge Holeman insisted that she respond to his request that she give demonstrative testimony pertaining to the prosecution's allegations concerning her 1996 arrest – and

At trial, Judge Holeman's *Drew* ruling became a club to intimidate Sassower into foregoing her independent right to introduce the relevant facts pertaining to 1996, as well as a pretext for prosecution witnesses to conceal those facts which would otherwise exculpate Sassower and highlight the maliciousness of her May 22, 2003 arrest.

As Sassower informed Judge Holeman on April 12, 2004 immediately prior to his *Drew* ruling [A-556-8], the 1996 arrest would come in irrespective of his *Drew* ruling for the reasons presented by her October 30, 2003 discovery/disclosure/sanctions motion [A-50-2, 59, 184], namely, (1) Sergeant Bignotti, who arrested her on May 22, 2003, was involved in the 1996 arrest and was the subject of Sassower's September 22, 1996 police misconduct complaint [A-184]; and (2) Sassower had informed Detective Zimmerman and Special Agent Lippay in lengthy telephone conversations on May 21, 2003 – thereafter memorialized by her 39-page May 21, 2003 fax to Detective Zimmerman [A-102] -- that she had not been arrested for respectfully requesting to testify at the Senate Judiciary Committee's June 25, 1996 confirmation hearing.

Yet, upon Sassower's opening statement that the evidence would show that she was not arrested on June 25, 1996 for requesting to testify in opposition at the Senate Judiciary Committee's hearing on that date – and that Capitol Police knew that fact when it arrested her for requesting to testify in opposition on May 22, 2003 [A-680-2] -- Judge Holeman entertained Ms. Liu's claim that Sassower had "waived" his ruling on *Drew* by her "reference to that earlier incident", as to which she further stated that Sassower had "mischaracterized

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directed that her assertion, "How is this relevant? I was not arrested for requesting to testify at the Senate Judiciary Committee hearing" be stricken. Upon her response to Mr. Mendelsohn that "The events have been particularized by me in a police misconduct complaint, Judge Holeman ordered her "stepped back".

The false, unadjudicated police allegations of the 1996 arrest were repeated by Ms. Liu in her rebuttal closing [A-1378].

the incident to suggest that she was not actually arrested in connection with her disruption in 1996" [A-691-2]. Stating, "we have instructed our witnesses to be very careful about not mentioning that incident in 1996", Ms. Liu asked, "may we instruct our witnesses that they may now make reference to it?" Rather than allowing Sassower to be heard, Judge Holeman responded to Ms. Liu, "I think you raised a good point" and "the fact that it was raised at all and the manner in which it was raised gives the Court some concern." [A-692]. Although he left his *Drew* ruling intact, his stated reason was because "statements made prior to the presentation of evidence simply is not evidence" and "Ms. Sassower theoretically can promise whatever it is that she chooses to promise". He then denied Sassower's request to be heard, even in the face of her assertion "It's a complete misrepresentation of the facts in the record, totally." [A-693].

A short while later, during the luncheon recess of Sassower's cross-examination of Special Agent Lippay, Ms. Liu again interjected on the issue of *Drew* evidence. Purporting that Sassower had "made reference once again to the 1996 arrest and events flowing therefrom" in her cross-examination [A-745], Ms. Liu requested that the prosecution be allowed "to ask about that '96 arrest and that incident on redirect as well as in rebuttal." Without permitting Sassower to be heard – and notwithstanding she had, in fact, not referenced the "'96 arrest" or any "events flowing therefrom" -- Judge Holeman agreed with Ms. Liu and ruled [A-745-6]:

> "Well, certainly it would be a different issue had there not been any mention made of the 1996 arrest until the defense case.
>
> The answer would be simpler then. Here we have a case where the 1996 evidence has been admitted through, some of it has been admitted through the witness that's currently on the stand.
>
> As a matter of judicial economy, it seems to me that the follow-up questioning on redirect as to that 1996 arrest would be appropriate."

Judge Holeman rejected Sassower's attempt to clarify the matter. His response to her assertion that Special Agent Lippay's testimony was "materially incomplete, because it was [Special Agent] Lippay who brought up the 1996 arrest in the phone conversation that she initiated with me. And this was the subject of such discussion that I demanded to speak with Detective Zimmerman as her supervisor" [A-746] was:

> "...To the extent that there was discussion of the 1996 arrest, at least in theory, it has no bearing on the arrest in 2003 and therefore it should be kept out. I've ruled on that.
>
> Through this witness, however, information pertaining to the 1996 arrest has now been brought before the jury. I am now confronted with a dilemma. Evidence that I previously ruled would only come in during rebuttal has now been introduced by virtue of your cross-examination." [A-747]

This was untrue. The only ruling Judge Holeman had previously made restricting introduction of the 1996 arrest was his *Drew* ruling – which did not, and could not, apply to Sassower's independent right to introduce the events of 1996.

From the direct testimony of Special Agent Lippay, as likewise of the prosecution's other witnesses, the meaning of Ms. Liu's statement that based on Judge Holeman's *Drew* ruling, the prosecution's witnesses had been "instructed...to be very careful about not mentioning that incident in 1996" [A-691] became obvious. These witnesses had not only been instructed to withhold reciting the prosecution's version of Sassower's 1996 arrest – the subject of Ms. Liu's April 5, 2004 "Notice" [A-509] -- but to withhold the very different aspects of the 1996 arrest that Sassower had discussed with them before or immediately after her May 22, 2003 arrest, *to wit*, that she had not been arrested for requesting to testify at the Senate Judiciary Committee's June 25, 1996 hearing, that this stood as "precedent", and that she had filed a police misconduct complaint arising from the 1996 arrest. As these discussed facts were devastating to the prosecution's case, the prosecution conveniently misinterpreted

the *Drew* ruling to instruct their witnesses to omit them from their testimony. As a consequence, Sassower was required to elicit from prosecution witnesses by cross-examination what should have been part of their direct testimony. Doubtless, their evasive and reluctant answers on cross-examination were also the product of prosecutorial instruction.

Judge Holeman's knowledge that – with respect to *Drew* -- he had transposed the restriction on "other crimes" evidence from the prosecution to Sassower was evident from his revision to the prosecution's proposed jury instruction for "Evidence of Acts Not Charged in Information". In place of the prosecution's sentence:

> "That [other crimes] evidence was admitted for various collateral purposes, such as to show motive, opportunity, intent, preparation, planning, knowledge, identity or absence of mistake or accident with respect to the crime with which the defendant is actually charged here." [A-1412],

Judge Holeman substituted:

> "That [other crimes] evidence was admitted by the defendant solely for the purpose of showing bias against her." [A-1299, underlining added].

This then became the only jury instruction to be the subject of substantive discussion, initiated by Ms. Liu [A-1299-1305, 1307]. In spite of a clear and unequivocal record going back to Sassower's May 21, 2003 fax to Detective Zimmerman [A-102] and reinforced by her October 30, 2003 discovery/disclosure/sanctions motion [A-39] and a plethora of statements made by Sassower before Judge Holeman and in the presence of Ms. Liu [A- ], Ms. Liu now admitted, belatedly and as if some new revelation, that Sassower's introduction of the 1996 incident was not only to show bias against her, but to show that she had no "intent". For his part, Mr. Mendelsohn tried to cover up the complete mess that Judge Holeman and the prosecution had made with respect to the events of 1996 by purporting that the case involved a "very complicated Drew/Toliver analysis" [A-1304].

In fact, no "complicated Drew/Toliver analysis" was involved in this case. The prosecution could not properly introduce the Capitol Police's version of the 1996 arrest as *Drew* evidence in the absence of a conviction or other "clear and convincing evidence" establishing the recitation in its police report. This, however, had absolutely no bearing on Sassower's independent right to introduce the events of 1996 -- and to unabridged, honest testimony by prosecution witnesses as to such critical aspect of her defense.

**April 12, 2004:**
**Judge Holeman's Without-Notice, From-the-Bench Ruling "Clarifying" his February 25, 2004 Order Granting the Prosecution's Motion *in Limine***

Judge Holeman's question on April 12, 2004 as to what "clarification" the prosecution wanted of his February 25, 2004 order granting its motion *in limine* to preclude Sassower's political motivations, political causes, or political beliefs [A-560] was a concession that even by its April 8, 2004 "Statement of Preliminary Issues" [A-515], the prosecution gave no notice of the "clarification" sought.

Upon Mr. Mendelsohn's identifying that the "clarification" was to preclude Sassower "from admitting any evidence as to the judicial nomination process or her specific opposition to that nominee, because that is not relevant to the charge at issue in this case." [A-560-1], Judge Holeman compounded the prosecution's failure to afford notice. Without turning to her for response, he proceeded to rule by reiterating the enigmatic boilerplate of his original ruling, "With regard to motivations, beliefs, causes, that's irrelevant to the information. It has no bearing whatsoever on the – on the information upon which she's charged" [A-561]. He then ignored what Sassower had to say: that Mr. Mendelsohn's request for "clarification" validated her December 31, 2003 opposition to his motion *in limine* as "impermissibly and prejudicially vague", that she knew of "nothing political" that she had introduced at any point,

and that her defense was that her arrest had nothing to do with anything she did at the May 22, 2003 Senate Judiciary Committee hearing, but was "part of a design and plan set in motion on May 21st when [she] received a call from Special Agent Lippay --" [A-561-2]. Judge Holeman's non-response response, interrupting Sassower mid-sentence, was, "Very well, all of this is documented in your papers..." [A-562].

After further enigmatic boilerplate [A-577-8], Judge Holeman accepted as a "point...well taken" [A-583], Mr. Mendelsohn's assertion that "It's the Government's position that why the defendant was opposed to the nomination, any background about that particular judicial nominee, is not admissible at trial" [A-582-3]. Although Sassower pointed out that such position would exclude the subject matter of conversation that she had had with Capitol Police -- as reflected by her October 30, 2003 discovery/disclosure/sanctions motion [A-50-1] and her 39-page fax to Detective Zimmerman [A-102] -- Judge Holeman adhered to this exclusion, holding [A-584-5]:

> "what may have been the source of inquiry during the course of investigation of this case may or may not have any bearing upon proof or disproof of the elements of the offense...or a defense thereto"

When Sassower sought to ensure that Judge Holeman understood that her defense, as reflected by her October 30, 2003 motion, was that:

> "Leecia Eve and Senator Clinton's office set in motion a chain of events to – based upon inquiry of me, extensive inquiry of me as to the basis of the opposition. I was arrested for reasons having nothing to do with anything that took place at the hearing" [A-585],

Judge Holeman did not respond except to state:

> "Miss Sassower, your record on this issue has been made. I will await further deliberations – I'll just await our final adjudication of these issues on a question by question basis as they arise and it will become very clear to me in short order as to whether efforts are being made to get in what I perceive to be irrelevant evidence and I'll let you know that at that time." [A-585-6].

Just as there had been no basis in law and fact for Judge Holeman's February 25, 2004 order which, without reasons, granted the prosecution's December 3, 2003 motion *in limine* [A-413], there was even less basis for his from-the-bench, without notice April 12, 2004 "clarification". Sassower's substantive communications with Senate staff and Capitol Police were not "motivations", "beliefs" and "causes" – political or otherwise – capable of exclusion. Rather, these communications were her oral and written words to them, constituting the *res gestae* – which could not be excluded. Especially was this so when Sassower's defense, as reflected by pages 7-20 of her October 30, 2003 discovery/disclosure/sanctions motion [A-47-60], was that the true reason for her arrest, orchestrated in advance of the hearing, was because she had documented the corruption of federal judicial selection. This, by CJA's March 26, 2003 written statement of opposition to Judge Wesley [A-1436], whose transmitted substantiating documentation sufficed to establish not only his unfitness, but – as showcased by CJA's "paper trail" of subsequent correspondence [A-1474, 1478, 1493, 1495, 1522, 1535, 102, 104, 106, 119, 1539, 142] -- the fraudulence of the bar association's approval ratings and the complicity therewith of the Senate Judiciary Committee and New York's home-state Senators Clinton and Schumer.

Based on Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-39], Mr. Mendelsohn was well equipped to have identified the specifics of what he wished to exclude when he made his December 3, 2003 motion *in limine* [A-247]. He did not do so. That his motion had been founded on a false recitation of facts which, among other things, totally concealed the background to the arrest consisting of communications from Capitol Police to Sassower at the instance of Senator Clinton's office, following Sassower's written and oral communications with its staff, as likewise with Senator Schumer's office and the

Senate Judiciary Committee, was a recognition that reciting such background would have been fatal to his motion. Tellingly, even on April 12, 2004, when, for the first time, Mr. Mendelsohn revealed the "clarification" he was seeking, he failed to disclose that the preclusion would require witnesses to obliterate from their testimony the material content of their conversations with Sassower. Then – and thereafter – he was silent as Sassower made and repeated that point [A-584-5], leaving it to Judge Holeman to purport – without legal authority – that the content of these conversations was "irrelevant".

As pointed out by Sassower's opposition [A-257, ¶16] to Mr. Mendelsohn's motion *in limine*, the motion [A-247] concealed all background to the May 22, 2003 arrest. Consequently, it did not disclose that prosecution witnesses would be testifying as to that background, *to wit*: Special Agent Lippay and Detective Zimmerman. Plainly, once they were called to testify as to their conversations with Sassower, she was entitled to challenge their deliberately vague recitations with the specifics of what she had said to them regarding the serious and substantial nature of CJA's opposition to Judge Wesley and the misconduct of Senator Clinton's office, Senator Schumer's office, and the Senate Judiciary Committee in connection therewith. Likewise, she was entitled to challenge the deliberately vague recitations of Mr. Albert and Ms. Eve with the specifics of her conversations with them. Such was not "irrelevant". The consequence of precluding her from examining Mr. Albert and Ms. Eve about CJA's March 26, 2003 written statement particularizing the documentary evidence of Judge Wesley's misconduct as a New York Court of Appeals judge [A-1436] – where her 35-minute phone conference with them was about that document-supported written statement -- was to strip her of the means to contest their materially incomplete and defamatory characterizations about that phone conference and to prevent her from establishing the

legitimacy of her misconduct complaints against them on which her allegations of their bias rested.

Although Judge Holeman stated, at the time of his April 12, 2004 "clarification", "It's difficult for me sitting here now without the posing of specific questions to make a ruling other than I have already." [A-577]; "I don't know how much clearer I can be before we're confronted with the – with the circumstances of its attempted admission. But I'll know it when I hear it." [A-578]; "it's very difficult to do this without having the question posed outside of a trial, and I'm not asking anyone to provide me with trial questions. We'll address it as it develops." [A-585]. "I'll just await our final adjudication of these issues on a question by question basis as they arise..." [Tr. A-585][11], his trial rulings were peremptory and barred Sassower's introduction of even the most basic aspects of CJA's opposition to Judge Wesley and the functioning of federal judicial selection. As illustrative:

> (1) During Sassower's opening statement, Judge Holeman sustained the prosecution's unspecified objection to her attempt to compare the critical importance of the impartiality of jurors, secured by *voir dire* and having nothing to do with the merits of the case, with the basis of CJA's opposition to Judge Wesley, namely, his response to disqualification motions in two public interest cases, having nothing to do with the merits of those cases [A-698]. Judge Holeman's response to Sassower's assertion that "the basis will be in evidence" because it would "come out during this trial", was not to call a bench conference so as to inquire why she believed this[12] or to clarify whether what Sassower had

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11 "'Rulings on motions in limine normally are considered provisional in the sense that the trial court may revisit its pretrial evidentiary rulings' in the context of the presentation of the evidence in the case", *Jung v. George Washington University*, 2005 D.C. App. LEXIS 264.

12 Sassower's reason for believing this was obvious from the record before Judge Holeman. The basis of CJA's opposition was laid out in the March 26, 2003 written statement [A-1436], which had been hand-delivered to Senator Clinton's office under an April 23, 2003 coverletter [A-1474]. Moreover, as reflected by Sassower's 39-page fax to Detective Zimmerman, it was the subject of her 35-minute phone conference with Ms. Eve and Mr. Albert on May 20, 2003 [A-107-8].

to say about CJA's opposition to Judge Wesley might, in fact, be appropriate, but to terminate her opening statement.

(2) During Sassower's cross-examination of Special Agent Lippay, Judge Holeman *sua sponte* ordered the redaction of a paragraph of her subject profile [A-522, 1600] as containing "the very information, the type of information that I excluded during the ruling on the motion in limine" [A-771, 773]. In fact, the paragraph [A-522] related to more than CJA's opposition and, to the extent it purported to describe the basis of that opposition, it was false. Despite that falsity, Judge Holeman would entertain no discussion, stating that Sassower's objection, which he had interrupted, was "noted for the record" [A-775].

(3) During Sassower's testimony, Judge Holeman barred Sassower from identifying anything about CJA's March 26, 2003 written statement [A-1436], other than that it was "opposition" [A-1232]. He stated "[t]he details of that opposition are not relevant to this case." [A-1233] – by which he meant even the most cursory description of the "opposition", *to wit*, that it "concerned Judge Wesley's misconduct"; that it "included his lies" [A-1232]; and that it "gave an overview of what he had done in two public interest cases" [A-1233]. Although Sassower asserted she was not going to go "into the specifics of what [Judge Wesley] did" [A-1233], Judge Holeman allowed no elaboration.

(4) After Sassower's testimony, Judge Holeman *sua sponte* ruled that the package of documents transmitted by CJA's April 23, 2003 coverletter to Senator Clinton [A-1476] was not admissible, as its "content" pertained to "the specific reasons for having Judge Wesley disqualified" [A-1318]. When Sassower tried to explain that "It shows the serious and substantial nature of my presentation as to which there needed to be findings of fact and conclusions of law by counsel at Senator Clinton's office, by the Senate Judiciary Committee, by Senator Schumer's office", Judge Holeman's sole response was, "Your record's made. It's not coming in." [A-1318-9][13].

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[13] As to other at-trial exclusions, expressly or impliedly based on Judge Holeman's ***in limine*** "clarification":

During Sassower's cross-examination of Detective Zimmerman, Judge Holeman sustained, on grounds of relevance, the prosecution's objection to Sassower's question that her 39-page May 21, 2003 fax to him [A-102] included a two-page memo to Chairman Hatch and Ranking Member Leahy [A-867]; sustained the prosecution's non-specific objection to her question that the 39-page fax included a July 3, 2001 letter to Senator Schumer [A-878-9]; sustained an unarticulated objection to her question that, based on the 39-page fax, he saw that in 1996 she had received written notification from Chairman Hatch [A-879]; sustained an unarticulated objection to her question as to whether, following his receipt of her 39-page fax, he examined the documents on CJA's website relating to its opposition to Judge Wesley and the basis therefore [A-878]; and sustained the prosecution's non-specific objection to her question as to whether they discussed together the basis of CJA's opposition to Judge Wesley's confirmation [A-878].

During Sassower's examination of Mr. Albert, Judge Holeman sustained the prosecution's non-specific objection to Sassower's question, "A home state senator can prevent a nomination from proceeding to hearing by opposing the nomination, is that not correct?" [A-1073]; sustained an unarticulated objection to her clarification to Mr. Albert's question, "what kind of documents", *to wit*, "Documents that I provided to establish the unfitness of Judge Wesley for the Second Circuit Court of Appeals so that Senator Clinton could exercise her prerogative to block the confirmation" [A-1081]; sustained unarticulated objections to the following questions, "Do you recall me telling you that not only was I going to deliver a duplicate copy of those materials to the Senate Judiciary Committee but five boxes of further substantiating evidence establishing the unfitness and corruption in office?" [A-1084], "Did I tell you that I was gonna be in Washington D.C. on May 5th expressly for the purpose of making hand delivery of documents establishing the unfitness of Judge Wesley?" [A-1084], "...was a meeting tentatively scheduled by you for me with Leecia Eve at 1 P.M. on Monday, May 5th, for purposes of discussing the documentation establishing the unfitness of Judge Wesley?" [A-1084-5] – thereafter purporting that these questions stated her "opinion as to Judge Wesley" [A-1085]; sustained a non-specific objection to "...what were your conversations with Leecia Eve concerning the documentation I had provided to the New York office?" [A-1094]; sustained an unarticulated objection to "Did you know that I had set forth in summary form the evidence of Judge Wesley's unfitness..." [A-1095-6]; interrupted Sassower's question, "Isn't it correct that because neither you nor Ms. Eve had read the concise written summary that I had prepared as to the evidence of Judge Wesley's unfitness that you required me to spend valuable time going through the basis that had already been set forth in a written document which neither of you had read?" [A-1102]; sustained an unarticulated objection to Sassower's as yet unfinished question, "And did I say it was your obligation, you must –" [A-1102]; sustained an unarticulated objection to Sassower's response to Mr. Albert for clarification of the underlying documents referred to by the March 26, 2003 statement, *to wit*, "The substantiating proof of Judge Wesley's official misconduct as a New York Court of Appeals judge." [A-1103-4]; sustained as "irrelevant" an unarticulated objection to Sassower's question, "On May 21st, did you receive a fax and e-mail from me setting forth what I viewed as your professional misconduct and that of Leecia Eve?" [A-1106-7].

During Sassower's examination of Ms. Eve, Judge Holeman sustained an unarticulated objections to the following questions, "Does Senator Clinton, does Senator Schumer have some special responsibility and prerogative regarding federal judicial nomination for New York [and the] Second Circuit?" [A-1131]; "did I express in written form why I was presenting evidence to the office of Senator Clinton for review regarding the fitness of Judge Wesley?" [A-1131]; "Did you have any communications with staff of the Senate Judiciary Committee as to their review of the March 26th statement and the underlying documents?" [A-1135]; "Did I express the view that it was your obligation to review the March 23, March 26th statement and specifically referred to the substantiating documentary proof?" [A-1138]. He sustained as "irrelevant" an unarticulated objection to Sassower's question, "did I inform you during our telephone conversation that I was not only concerned, just, that you and Mr. Albert had not read the March 26th overview statement or reviewed the underlying substantiating evidence but that there had been no investigation from the Senate Judiciary Committee? Did I express my concern on that score?" [A-1141-2] and sustained an

In fact, but for Judge Holeman's "clarification" of his February 25, 2003 order granting the prosecution's legally insufficient and factually fraudulent motion *in limine*, the prosecution case would have fallen apart. Its case – summed up by Ms. Liu's closing statement [A-1357-1366, 1377-1379] -- rested on a grotesque and untrue caricaturing of Sassower as an unreasonable person, "who refused to be satisfied with the reams of documents that she sent to the Senate and with the 40-minute phone conversation that she had with Senate staffers about her views". [A-1358, 1377]. Yet, as evident from CJA's March 26, 2003 statement [A-1436]– which, like virtually all of the "paper trail" [A-1431, 1474, 1478, 1493, 1495, 1522, 1535, 102, 104, 106, 119, 1539, 142], was not before Judge Holeman on April 12, 2004 when he made his from-the-bench "clarification"[14]– Sassower was not presenting "views" or "concerns" about Judge Wesley, but verifiable documentary proof of his on-the-bench misconduct, which the Senate Judiciary Committee and New York's home state senators were duty-bound to confront. As chronicled by the "paper trail", they wilfully failed and refused to do so – and no reasonable person could be "satisfied" by this malfeasance, whose seriousness was all the greater because it also covered up the fraudulence of the bar associations' ratings approving Judge Wesley, which the "paper trail" also documented.

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unarticulated objection to "Did I ask how a hearing could possibly be held on this confirmation when there was no investigation of the evidence?" [A-1142].

[14] Sassower does not recollect whether, on April 19, 2004, when Judge Holeman excluded the March 26, 2003 written statement as a "statement of opinion, that won't come in" and "irrelevant" [A-1208], he did so based on any examination of either the statement or the two substantiating motions it transmitted. If so, his examination was so momentary as to not even be reflected by the transcript.

Finally, this Court's decisional law recognizes the "defense of necessity", as excusing "criminal actions taken in response to exigent circumstances". This defense applies where a defendant had no legal alternative available or where his actions were capable of preventing the anticipated harm, *Reale v. United States*, 573 A.2d 13 (1990). Judge Holeman's without notice, from-the-bench "clarification" prevented Sassower from developing this defense, whose legitimacy was evident from her "paper trail" of correspondence. Such established that neither the Senate Judiciary Committee staff nor the offices of Senators Clinton and Schumer would address the documentary evidence transmitted by CJA's March 26, 2003 written statement as to Judge Wesley's corruption as a New York Court of Appeals judge and the fraudulence of the bar association ratings approving him – nor confirm that Chairman Hatch, Ranking Member Leahy, and Senators Clinton and Schumer had themselves reviewed CJA's evidence-supported statement. Indeed, established by Sassower's May 19 and May 22, 2003 memoranda to Chairman Hatch and Ranking Member Leahy [A-1522, 1539] was that she had been unable to obtain any response from anyone in a position of authority at the Senate Judiciary Committee as to whether she would be permitted to testify. Sassower's only avenue for ensuring that the Senators themselves were aware of such exigent situation – and potentially stopping Judge Wesley's confirmation -- was by going to the Senate Judiciary Committee May 22, 2003 hearing to request to testify as to the documentary evidence ignored by underling staff – and she so-stated in her opening and closing statements [A-681-2; 1370-1].

**April 12, 2004:**
**Judge Holeman's Ruling that Sassower was Not Prejudiced by the Prosecution's Eve-of-Trial Production of Documents Sought Eight Months Earlier & Disclosure that Key Evidence was "Lost"**

This Court has recognized:

> "Where there has been a 'failure to make proper disclosure under Rule 16, among the factors which the trial court must consider and weigh are: (1) the reasons for the nondisclosure; (2) the impact of the nondisclosure on the trial of the particular case; and (3) the impact of a particular sanction on the proper administration of justice in general.' *Lee v. United States*, 385 A.2d 159, 163 (D.C. 1978)", *Ferguson v. United States*, 866 A.2d 54, 59 (2005) (underlining added).

Situations involving a loss of evidence under Rule 16 impose a "'heavy burden' on the government to explain the loss", *Robinson v. United States*, 825 A.2d 318, 330 (2003). In *Robinson*, this Court reaffirmed the binding effect of *United States v. Bryant*, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971), and recited what *Bryant* held:

> "sanctions 'will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation. It placed the burden squarely on the government to make this showing, and held that 'negligent failure to comply with the required procedures' would provide no excuse.", *Robinson*, at 330 (italics in original).[15]

*Robinson* summed up the framework for assessing sanctions under Rule 16 as follows:

> "...when evidence producible under Rule 16 has been lost, the trial court determines whether sanctions must be imposed by evaluating '(1) the circumstances occasioning the loss; (2) systemic steps taken toward preservation; and (3) the magnitude of demonstrated evidentiary materiality.' *Brown v. United States*, 372 A.2d 557, 560-61 (D.C. 1977)", *Robinson*, 331 [underlining added].

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[15] Although *Robinson* traced a greater flexibility stemming from the Supreme Court's decision in *United States v. Augenblick*, 393 U.S. 348 (1969), *Bryant* itself had been guided by *Augenblick*, describing it as "mak[ing] clear that the circumstances of the [evidence's] disappearance...should be relevant to the question of proper sanction".

On April 12, 2004, Judge Holeman cut off Sassower as she sought to raise the prosecution's eve-of-trial document production and disclosure of "lost" evidence, requested eight months earlier by her August 12, 2003 first discovery demand [A-70] and the subject of her October 30, 2003 discovery/disclosure/sanctions motion [A-39]. After stating, "I believe that we can effectively forego any discussion of this", he ruled, without the slightest confirmatory inquiry of the prosecution,

> "the matters were disclosed when they were discovered by the Government, you now have the items, there was no effort once they were disclosed to the Government to keep those materials away from you, you have them. I don't find prejudice, I don't find rule 11 applicable, and to the extent that rule 11 could be argued applicable, a point that I don't hold, I am not finding any grounds for sanctioning the Government. There's no further discussion on ...that issue..." [A-581-2].

This ruling was without basis in fact and law. Indeed, irrespective of the applicability of Rule 11, the imperative for serious inquiry of the prosecution for purposes of assessing sanctions was underscored by the deceitful nature of Ms. Liu's April 7, 2004 letter to Sassower [A-520], transmitting Special Agent Lippay's subject profile [A-521] and bulletin [A-523] on Sassower, and a police card of the June 25, 2996 arrest [A-524]. Not only did Ms. Liu's letter conceal that these were the documents being transmitted and that they were responsive to items ## 5, 6, 9, 10, and 11 of Sassower's August 12, 2003 first discovery demand [A-71], but the letter's claim that such documents had come "into the government's possession this afternoon during a witness conference in preparation for trial on April 12, 2004" [A-520], if true, evinced the prosecution's wilful non-compliance with Judge Milliken's express instruction to Mr. Mendelsohn, in the presence of Ms. Liu, four months earlier at the December 3, 2003 oral argument on Sassower's October 30, 2003 discovery/disclosure/sanctions motion:

> "So that's my charge...Talk to Capitol Police. See what records they maintain on her, see what communications they got about her in this instance, and get any history of complaints of police misconduct [by] this defendant for potential bias cross-examination. [A-310][16].

Ms. Liu's April 7, 2004 letter [A-520] was additionally deceptive as it did not account for, let alone transmit, other "documents and tangible objects" encompassed by Sassower's August 12, 2003 first discovery demand which the newly turned-over subject profile identified Capitol Police as having: Sassower's May 19, 2003 fax to Senator Clinton and Sassower's May 20 and 21, 2003 voice mail messages to Senator Clinton's office. Sassower had to write an April 8, 2004 letter for same [A-525]. Only then, in Ms. Liu's responding April 9, 2004 letter [A-529], was it finally revealed that the tape containing the messages had been "lost"[17] and that Capitol Police was "in possession of only one page" of Sassower's 12-page May 19, 2003 fax to Senator Clinton– with that page ending midsentence [A-532].

If Ms. Liu was contending that only on April 7, 2004, as a result of the prosecution's witness preparation, had it come into "possession" of documents sought by Sassower's August 12, 2003 first discovery demand, its prior responses with respect to the demand were not based on inquiry of those witnesses -- even after Judge Milliken's explicit December 3, 2003 direction. For this reason, Sassower brought up this Court's decision in *George Montgomery v. Jimmy's Tire*, 566 A.2d 1025 (1989). As she stated, "rule 11 is mandatory

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[16] *See also*, Judge Milliken's preceding comments to Mr. Mendelsohn "that duty of discovery devolves upon your support of law enforcement agencies as much as it does to you so your duty of inquiry doesn't end at your file." [A-306]; "...but is that awareness after diligently inquiring of Capitol Police" [A-307].

[17] The prosecution's failure to acknowledge that the tape was "lost" until its reluctant April 9, 2004 disclosure was notwithstanding Capitol Police discovered its loss "in the summer of 2003" [A-755].

when there is failure on the part of an attorney or a party to make appropriate inquiry before interposing papers." [A-580].

The salutary principle of pre-filing inquiry, governed in civil proceedings by Rule 11, deserves application to criminal proceedings, particularly with respect to the obligations of a prosecutor. In any event, this Court's caselaw regarding "lost" evidence is – like Rule 11— mandatory and Judge Holeman was duty-bound to require that the prosecution meet its "heavy burden" of explanation and, based thereon, to impose upon it severest sanctions, including dismissal of the charges.

**April 13, 2004:**
**Judge Holeman's Granting of the Prosecution's Without-Notice Oral Request to Amend the May 23, 2003 Information**

This Court has recognized that "the primary function of an information is to inform the accused of the precise charge against him and give him an opportunity to prepare and present his defense to the charge", *Robles v. United States*, D.C. Mun. App., 115 A2d 303, 306 (1955); *Dyson v. United States*, 485 A.2d 194, 196 (1984).

For this reason, the prosecution cannot freely amend an information, but must seek permission of the court. Yet, even when the prosecution meets the prerequisites for amendment, the court retains discretion not to allow it. Thus, Superior Court Criminal Procedure Rule 7(e) states that the trial court:

> "may permit an information to be amended...if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." (emphasis added),

but does not require it to do so.

In *District of Columbia v. Van Nuys*, 282 A.2d 550, 551 (1971), this Court quoted 1 C. Wright, Federal Practice and Procedure Sec.128 (1969) in noting, "Leave of court is required in order that the court may protect the defendant against any possibility of prejudice."

On April 13, 2004, Judge Holeman granted the prosecution's oral request to amend the Information – a request made only moments before. Such emendation expanded Sassower's purported violation of D.C. Code §10-503.16(b)(4) to add an alternative basis for violation under the statute. The Information's claim that Sassower "engaged in disorderly and disruptive conduct" was now supplemented by the alternative that she "uttered loud, threatening, or abusive language".

Judge Holeman's response to Sassower's objection that the amendment was untimely and late was to state that Ms. Liu was correct, "the information may be amended at any time prior to trial". He further represented, "This happens all the time in misdemeanor cases where the information contains one charge and perhaps the trial is held on a lesser included offense because of lack of proof of a particular element" and that "This circumstance is really no different. It is an effort to bring the information into conformity with the statute and the instruction to the jury as to the elements of the charge into conformity with the statute."

In so ruling, Judge Holeman made it appear that what he was doing was completely standard and innocuous – and of no consequence to Sassower. Indeed, in face of Ms. Liu's assertion, "we don't believe that there would be any prejudice to Ms. Sassower", Judge Holeman did not even ask Sassower whether she shared that belief, let alone offer her a continuance so that she would have the opportunity to assess the amendment's potential prejudice to her. Clearly, too, a continuance would have served the salutary purpose of

enabling Sassower to tailor her defense case to the possibility of the granting of the amendment.

Tellingly, Judge Holeman not only did not inform Sassower that he would be precluded from granting the amendment if doing so prejudiced her substantial rights, but made no finding that she would not be prejudiced.

The prejudice was evident at trial, where the prosecution and its witnesses repeated the word "loud" [18] for purposes of reinforcing the newly-amended Information [A-1405] and the "Elements of the Offense", signed by Judge Holeman based on that amendment [A-1409].

## 1-B JUDGE HOLEMAN'S TRIAL RULINGS ARE FURTHER CONFIRMATORY OF HIS PERVASIVE ACTUAL BIAS & ARE FACTUALLY & LEGALLY INSUPPORTABLE

> Under our adversary system, the judge must be an impartial arbiter. *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L.Ed 2d 460, 106 S.Ct. 3101 (1986). Although he has the authority to intervene in the case where such action is

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[18] Ms. Liu's examination of Officer Jennings: *Question*: "How loud was her tone?" Answer: "It was loud as to cause a disruption of the hearing that day." [A-902]; *Question*: "...when the defendant was asking whether the senator wanted her arrested, what was the volume of her voice?" *Answer*: "It was loud as to disrupt Congress..." [A-903]; *Question*: "Can you clarify for the ladies and gentlemen of the jury just how loud Ms. Sassower was when she was speaking in Dirksen 226?" *Answer*: "Based on my recollection, Judge Wesley, look into the corruption of the New York Court of Appeals." [A-960].

Mr. Mendelsohn's examination of Sergeant Bignotti: *Answer*: "But she stood up and screamed out – Judge Wesley, look into the corruption of the New York Court of Appeals. Now she used loud language, it was very loud." *Question*: "Perhaps you could demonstrate for us....Try to mimic her tone that day, how, how loud it was." [A-971]. *Answer*: "And when asking, escorting her out, she wanted, twice I believe she asked, am I under arrest, am I under – you know, screaming in a loud language, you know, am I under arrest, am I under arrest?" [A-973];

Sergeant Bignotti, on cross-examination by Sassower: "You used, from what I saw, used loud language and disrupted the committee." [A-1007].

Ms. Liu's closing: "Now there's no question that Ms. Sassower was loud. Both Officer Jennings and Sergeant Bignotti, who were in the room...have testified to that. Sergeant Bignotti even gave you a demonstration from the witness stand of just how loud Ms. Sassower was. And you can hear on that videotape that Ms. Sassower was screaming to make herself heard." [A-1358-9].

necessary in the interest of justice, *see Womack v. United States*, 350 A.2d 381, 382-83 (D.C. 1976), the development of the facts is a task primarily assigned to counsel, and the judge should exercise his power sparingly. *Greenhow v. United States*, 490 A.2d 1130, 1136 (D.C. 1985). Unless the reasons for intervention are compelling, a judge generally acts within his discretion when he declines to inject himself unilaterally into the controversy or to take measures which counsel have not asked him to take. *See King v. United States*, 550 A.2d 348, 352-53 (D.C. 1988).", *Mack v. United States*, 570 A.2d 777 (1990).

**Judge Holeman's *Sua Sponte* Interruptions of Sassower's Opening Statement, His Calling in of the Marshal – and His Insistence on the Marshal's Presence During Trial**

"The purpose of an opening statement for the defense is to explain the defense theory of the case, to provide the jury an alternative interpretive matrix by which to evaluate the evidence, and to focus the jury's attention on the weaknesses of the government's case.' *Oesby v. United States*, 398 A.2d 1, 5 (D.C. 1979). Put another way, 'the function of a defendant's opening statement is to enable him [or her] to inform the court and jury [of] what he [or she] expects to prove and to frame the questions and issues with which the jury will be confronted.' *Jennings* [*v. United States*], 431 A2d, 552, 560 (1981)]", *Wright v. United States*, 508 A.2d 915, 920-921 (1986).

Approximately ten minutes after Sassower began her opening statement, Judge Holeman interrupted four times, in close sequence -- without identifying the basis for any of the interruptions and without the prosecution having objected to anything Sassower said. The first interruption, "Excuse me. Move forward please" [A-682, ln. 17], came after she had identified that the evidence would show that Capitol Police knew her contention that they had no authority to arrest her for respectfully requesting to testify at the Senate Judiciary Committee hearing -- unless directed to do so by the presiding chairman – and that they effectively conceded this when they put Senator Chambliss' name as the complainant on the arrest report. The second interruption, "Excuse me. Move further please." [A-683, ln. 10], followed upon her reciting that the evidence would show that Senator Chambliss had refused to respond to her question as to whether he was directing her arrest, as Capitol Police removed

her from the hearing room and, shortly thereafter, when he passed her in the hallway while she stood in handcuffs. His third interruption, "Ms. Sassower" [A-684, ln. 6], came after she stated that the prosecution was not calling Senator Chambliss as its witness and that her subpoena his testimony had been quashed, "but he could have chosen to testify upon [her] subpoena". His fourth interruption, "Do you have anything further, Ms. Sassower?" [A-684, lns. 20-1], came after she pointed out that "the videotape establishes...that the arrest documents, the prosecution documents underlying this bogus charge are false, materially false and misleading."

Sassower's response to Judge Holeman's final interruption – the only one which asked a question -- was "Yes, yes." – leading to the following colloquy [A-684-5]:

> Holeman: Then please get to it or sit down and we'll begin the trial.
>
> Sassower: No reason to, Your Honor, I have yet to conclude. As to these prosecution documents...

Judge Holeman thereupon excused the jury and, without any clarifying inquiry of Sassower, launched into a condemnation and deprecation of her, culminating in his announcement that she would be "stepped back" – for which purpose a U.S. marshal was being summoned [A-687].

Judge Holeman's explanation for such draconian remedy was a further manifestation of his pervasive actual bias, falsifying the record and denying Sassower the most fundamental due process. He stated:

> "Throughout the pendency of this case, both at hearings preliminary to trial, during jury selection and during trial, I have afforded you the opportunity to present your case as a pro se defendant. And in so doing, I have probably allowed you more latitude than I have ever allowed a lawyer who appeared in front of me." [A-685]

The record shows the exact opposite. Sassower had a right to represent herself *pro se*, which she exercised long before Judge Holeman ever assumed the case and which, from their very first contact, he failed to respect. Indeed, his invidious treatment of her as a *pro se* defendant, according her less rights than an attorney, was set forth in her January 22, January 30, and February 10, 2004 letters to him [A-291, 293, 295] and was pivotal to her February 23, 2004 motion for his disqualification [A-268-275]. Thereafter, Judge Holeman's further disrespect of her status as a *pro se* defendant was highlighted in her March 18, 2004 letter to him [A-450] – and embodied in her March 22, 2004 disqualification/vacatur motion [A-391]. Judge Holeman's treatment of her at the March 22, 2004 pretrial hearing only further evidenced his disregard for her *pro se* status [A-361 ] and showcased his view that the *pro se* Sassower was entitled to no solicitude, but would be held to the same standards as a lawyer [A-362, 368-9]. In fact, he imposed upon Sassower pretrial timetables that were oppressive and unfair for a lawyer – and she so-stated to him on March 22, 2004 and again on April 12, 2004 [A-547-8, 555] – without dispute from either Judge Holeman or the prosecution [A-368-9].

Judge Holeman next accused Sassower of having "repeatedly violated [his] directives" and of having "repeatedly sought to inject [her] views into this case where injection of same is inappropriate and not pertinent to the charges" [A-685]. He gave no specificity, other than his "instruction to move along in this case when you're giving your opening statement". As to this he identified (1) "the statements with regard to subpoenas having been quashed, inappropriate" [A-685]; and (2) his ruling that "the charging document...is not evidence in this case" [A-686].

Judge Holeman cut off Sassower from responding – not even affording her the opportunity to be heard after it was clear, from what she sufficed to say [A-686], that he misunderstood. Her opening statement had not referenced "the charging document" about which he had ruled, *to wit*, the Information [A-100], but the "underlying prosecution documents" consisting of the arrest report, supplemental report, citation release report, and the "Gerstein" [A-84-9, 93, 101] – as to which he had made no ruling. Nor could he properly exclude these prosecution documents, as she was legally entitled to introduce them into evidence [*see* pp. *infra*].

Telling, Judge Holeman made no claim that he had ever ruled that it would be "inappropriate" for Sassower to inform the jury that her subpoena for Senator Chambliss – or other Senators -- had been quashed. Nor does it appear he could have – as this Court's caselaw makes plain that Sassower was not only entitled to have apprised the jury with respect to these "missing witnesses", but to a powerful jury instruction with respect thereto [*see* pp. *infra*].

It was without giving Sassower any opportunity to be heard that Judge Holeman announced:

> "Now, it is clear to me and to anyone in this room that you don't intend to follow my instructions because you have not done so thus far.
>
> And it is difficult for me to determine at this juncture whether that failure to follow my instructions is borne out of your intent to disregard my orders or whether there is some mental defect on your part that will not allow you to appreciate the consequences of your failure to do so."[A-686-7].

These statements themselves required giving Sassower an opportunity to respond. Yet Judge Holeman also did not do that – nor make any inquiry of her – preliminary to his announcement that a marshal was being called, as she would be "stepped back" [A-687]. Nor did Judge Holeman allow her to respond when, upon the arrival of the marshal and without

explanation, he announced a change of plan. Rather than stepping Sassower back, he would "move beyond the opening statements and into the trial evidence of this case." [A-688]. Indeed, the only response Judge Holeman permitted from Sassower was to his question as to whether she was going to reject "the opportunity" to have Mr. Goldstone represent her "as lead counsel". Upon Sassower's rejecting this, Judge Holeman denied her request to respond to what he had said. This, even after she asserted, "At every point I have been...within my rights." [A-689]. He also denied her request to make a statement for the record following his announcement that the trial would proceed "with the marshals present." [A-689].

Judge Holeman adhered to this ruling the next day, when Sassower brought up something "very prejudicial" she had realized upon reading a Washington Post article about the case in that day's paper:

> "Quite aside from what took place at the opening and the effect that it must have had on the jurors, there is a marshal that has been both standing and sitting directly in back of me. I am directly facing the jurors...
>
> I realize in reading the article that the prejudice, among other things, of this marshal's presence gives the suggestion that I must be monitored. There must be surveillance of me.
>
> This is a case involving disruption of Congress. What it does subliminally – I mean I think it would be prejudicial in any case. But in this case, there is too strong a parallel to what took place at the Senate Judiciary Committee.
>
> It gives a subliminal message that legitimizes the surveillance and monitoring of me by the Capitol police." [A-847-8].

Not only did Judge Holeman rule on this without giving the prosecution a chance to be heard, but he interrupted Ms. Liu as she attempted to speak, telling her, "You don't have to speak" [A-848]. He then stated to Sassower:

> "I gave you every opportunity during the pendency of this case, after it had been assigned to me, to comport yourself in such a manner that the need for a marshal would not exist. You failed to do so.
>
> I brought marshals in here to demonstrate to you, and I'm telling you right now that if there is any further disruption, the warning that I gave to you yesterday remains in effect.

We will have no further discussion on this issue. Your record is made. Step down." [A-849, lns. 8-17].

To this, Judge Holeman also denied Sassower an opportunity to be heard, which she requested [A-849, lns. 18-21]. As to Sassower's further protest, later that day, that "it's prejudicial to have the marshal behind me", he directed that the marshal continue to sit in the same place [A-984].

Judge Holeman's refusal to hear Sassower – at any point – reflects his knowledge that there was no basis in fact or law for his *sua sponte* actions – and that anything she would say would expose as much.

**Sassower's Entitlement to have Introduced the Underlying Police Reports into Evidence at Trial – and their Exclusion by Judge Holeman *Sua Sponte* and Without Notice**

"Police reports are admissible...when 'offered by a criminal defendant to support his defense'", *United States v. Warren*, 42 F.3d 647, 656 (D.C. Circ. 1994), quoting *United States v. Smith*, 521 F.2d 957, 965. Such admissibility rests on the business record exception of Rule 803(6) of the Federal Rules of Evidence, which this Court has recognized as also codified in Superior Court Civil Rule 43-I(a), applicable to criminal cases in Superior Court pursuant to Superior Court Criminal Rule 57(a), *Sullivan v. United States*, 404 A.2d 153 (1979).

Consequently, Sassower was "within [her] rights" when she asserted in her opening statement that the videotape of the Senate Judiciary Committee's May 22, 2003 hearing would show "that the arrest documents, the prosecution documents underlying this bogus charge are false, materially false and misleading" [A-684] – as she had reason to believe that she would be able to introduce them into evidence. Indeed, reinforcing this belief were the pretrial proceedings, during which she highlighted that the underlying prosecution documents

were materially false and misleading – and were so-exposed by the videotape [A-48 (¶18), 288 (¶46) & fn. 10]. At no time did the prosecution ever suggest that these could be excluded at trial, let alone make any application for their exclusion. Nor did Judge Holeman or any other judge intimate that these materially false and misleading police documents – upon which any fair and impartial tribunal would have dismissed the charge, pretrial – could not be presented at trial to support her defense of wrongful and malicious arrest and prosecution.

At trial, Officer Jennings acknowledged that he had prepared and/or signed the May 22, 2003 police reports [A-915] – thereby entitling Sassower to their admission for her cross–examination of him, as well as for her cross-examination of his superior, Sergeant Bignotti, who thereafter testified to having reviewed and signed them [A-985-6, 1015-6]. Such was thwarted by Judge Holeman, who, without any objection having been made by the prosecution, interjected, *sua sponte* and without any prior notice, "Police reports are hearsay. They're not gonna be admitted into evidence." [A-916]. The prosecution kept silent in face of this assertion, much as it did in face of Sassower's protest, "this supposed hearsay underlies the prosecution against me"; "They're contemporaneous preparation, they're contemporaneous notes" [A-916-7]. Judge Holeman's response was to repeat, "It's a police report. It is inadmissible", and to tell her that her objection was "noted for the record" [A-917].

**Sassower's Entitlement to a "Missing Witness" Argument with Respect to Senator Saxby Chambliss – and to a Jury Instruction Based Thereon**

Sitting *en banc* in *Harris v. United States*, 602 A.2d 154, 160 (1992), this Court stated:

> "It has been recognized for almost a century that 'if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' *Graves v. United States*, 150 U.S. 118, 121, 37 L. Ed. 1021, 14 S.Ct. 40 (1893)."

The Court reiterated the two-fold criteria to be used by a trial judge in determining whether a party is entitled to inform a jury as to a "missing witness" and to a jury instruction as to the adverse inference that could be drawn with respect thereto. The witness must not only have been physically and practically "available" to the party against whom the inference is sought, but his testimony must be "'relevant and material to a disputed issue in the case[,] . . . noncumulative, and an 'important part' of the case of the party against whom the inference is drawn.'", *Harris*, at 161, citing *Thomas v. United States*, 447 A.2d, 52, 57 (1982).

From the record before him, Judge Holeman could readily see that this two-fold criteria was met as to the absent Senator Chambliss, presiding chairman of the Senate Judiciary Committee's May 22, 2003 hearing and the purported "complainant" on the underlying police reports [A-88, 89]. Consequently, rather than rebuking Sassower that it was "inappropriate" for her to have identified, in her opening statement, that her subpoena for Senator Chambliss' testimony had been quashed [A-685] – when he had not precluded her from mentioning it and there had been no objection by the prosecution -- Judge Holeman should have taken the opportunity of the jury's absence to address Sassower's entitlement to a "missing witness" argument and jury instruction. Such was especially appropriate for Judge Holeman to do as the consequence of his having rushed the case to trial, in the face of Mr. Goldstone's asserted unreadiness and other commitments and Sassower's protests that his pretrial schedule was unworkable, was that the non-lawyer Sassower was unequipped to herself raise so decisive an issue.

This Court has held that in ruling on a "missing witness" argument and jury instruction, the trial judge must "articulate the findings underlying the ruling", *Simmons v. United States*. It is clear that Judge Holeman could not have articulated such findings without

exposing that his quashing of Sassower's subpoena for Senator Chambliss' testimony was indefensible. Indeed, Rule XXVI – which Judge Holeman purported to have reviewed immediately before the proceedings on April 13, 2004 [A-619] -- contains a relevant provision which seems to establish the point of law which Sassower had raised from the outset, namely that it is the presiding chairman – not the police – who is in charge of the hearing:

> "Whenever disorder arises during a committee meeting that is open to the public, or any demonstration of approval or disapproval is indulged in by any person in attendance at any such meeting, it shall be the duty of the Chair to enforce order on his own initiative and without any point of order being made by a Senator..." [subsection 5(d)]

Excepting Sassower's own testimony, no other testimony was as decisive of the "disruption of Congress" charge as was Senator Chambliss'. It was a matter of law – for threshold determination by Judge Holeman -- whether the prosecution could proceed in his absence – and whether, in fact, he was the "complainant", as purported by the underlying prosecution documents [A-88, 89].

**Judge Holeman's *Sua Sponte* and Without Notice Exclusion of Sassower's September 22, 1996 Police Misconduct Complaint as Irrelevant and, Alternatively, More Prejudicial than Probative**

> "[t]he Supreme Court has established that the refusal to allow any questioning about facts indicative of bias from which the jury could reasonably draw adverse inferences of reliability is an error of constitutional dimension, violating the defendant's rights secured by the Confrontation Clause.", citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678-9; 106 S.Ct. 1431 (1986); *Davis v. Alaska*, 415 U.S. 308; 318; 94 S.Ct. 1105 (1974) , *McCloud v. United States*, 781 A.2d 744, 752 (2001), quoting from *Ford v. United States*, 549 A.2d 1124 (1988).

> "Relevant evidence is 'that which makes the existence or nonexistence of a [contested] fact more or less probable' than it would be without the evidence. *Punch v. United States*, 377 A.2d 1353, 1258 (D.C. 1977), *cert. denied*, 435 U.S. 955, 55 L. Ed 2d 806, 98 S.Ct 1586 (1978). The 'test for relevance is not a particularly stringent one.' *Street v. United States*, 602 A.2d 141, 143 (D.C.

1992). For evidence to be relevant, it must be 'related logically to the fact that it is offered to prove...the fact sought to be established by the evidence must be material...[and] the evidence must be adequately probative of the fact it tends to establish." *Freeman v. United States*, 689 A.2d 575, 580 (D.C. 1997) (quoting *Reavis v. United States*, 395 A.2d 75, 78 (D.C. 1978))."

On April 15, 2004, immediately before Sassower's cross-examination of Sergeant Bignotti, Judge Holeman ruled – without any request or application having been made by the prosecution:

> "There will be absolutely no inquiry, no utterance, no verbiage, no questioning whatsoever with regard to the police misconduct complaint that was filed in 1996 by Ms. Sassower against Officer Bignotti. It is irrelevant to these proceedings.
>
> And to the extent that one might make a colorable argument of relevance based on bias, it is more prejudicial than probative." [A-980].

This from-the-bench, mid-trial ruling was so completely *sua sponte* and unfounded that not only had the prosecution never had the temerity to have requested such preclusion relief -- as, for instance, by a motion *in limine* or by its pre-trial "Statement of Preliminary Issues" [A-515] – but it had never even intimated that any objection could be raised to Sassower's using her September 22, 1996 police misconduct complaint [A-154] in bias cross-examination of Sergeant Bignotti.

As to this ruling of irrelevance, such was an out-of-the-blue pronouncement[19], belied by Judge Holeman's so-called "analysis of relevance" [A-982]. Indeed, to the extent his from-the-bench ruling was preceded by any "analysis", it had impliedly recognized "relevance":

> "What we're dealing with currently is an evidentiary issue and it has to do, as I see it, with the balancing.
>
> On the one hand, if Officer Bignotti would have the, a bias based upon a prior interaction with Ms. Sassower, that potential bias would be relevant to

[19] Prior thereto Judge Holeman ruled that the police misconduct complaint was not relevant to Sassower's examination of Detective Zimmerman [A-873-5].

this case and therefore some exploration of the 1996 arrest and Officer Bignotti's involvement in it would be warranted.

However, as the judge presiding, I have to make sure the jury is not prejudiced by this bias inquiry." [A-979, underlining added].

Based on ¶¶41 and 42 of Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-59-60], particularizing the relevance and materiality of item #22 of her August 12, 2003 first discovery demand for:

> "Any and all records pertaining to the investigation and disposition of Elena Sassower's September 22, 1996 police misconduct complaint by both Capitol Police ('Internal Affairs Case #96-081') and Metropolitan Police." [A-73],

no determination of "irrelevance" were possible – and the place for such determination, if it were possible, would have been by a written, responsive pretrial adjudication of her entitlement to item #22. Yet from Judge Holeman's inexplicable inquiry, "Assuming that the complaint was filed, what was its disposition?", asked preliminary to his from-the-bench ruling on April 15, 2004 [A-977] – the second day of trial -- it was obvious that he had not read Sassower's October 30, 2003 discovery/disclosure/sanctions motion. He certainly had not read its Exhibit "M", which included the certified mail/return receipts for the complaint [A-154, 156-7], and its Exhibit "N-1", the dismissal letter of Capitol Police Chief Gary Abrecht [A-185]. Nor could he have read such other parts of the record as the recitation in Sassower's March 22, 2004 disqualification/vacatur motion [A-40, fn. 7] pertaining to Senior Judge Mary Ellen Abrecht's September 4, 2003 memorandum denying change of venue [A-460] – on which his February 25, 2004 order denying removal/transfer relied [A-411]. Indeed, it is impossible to reconcile Judge Holeman's April 15, 2004 inquiry with the fact that three days earlier, on April 12, 2004, during argument on Ms. Liu's *Drew* Notice [A-556-7],

Sassower had directly stated to him that the complaint had been dismissed by Capitol Police Chief Abrecht, Senior Judge Abrecht's husband.[20]

As to Judge Holeman's ruling that the complaint was "more prejudicial than probative" [A-980], its sole basis was his assertion that "a complaint was filed, an investigation was undertaken. It went nowhere. There was no adverse action against this officer." [A-980]. Such only reinforced Sassower's entitlement to the records of that investigation. The prosecution's failure to produce such records in face of Judge Milliken's unequivocal direction at the December 3, 2003 argument on Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-308-311] warranted an inference that the so-called investigation of the complaint, culminating in Police Chief Abrecht's dismissal, was nothing but a cover-up.

In any event, as Sassower pointed out both before and after Judge Holeman's ruling – to no avail – Sergeant Bignotti was knowledgeable of the complaint. Judge Holeman's response, "I don't care, don't mention it" [A-980]. When Sassower clarified that "bias does not necessarily have to be the result from adverse action...adverse disposition"[21] [A-982], Judge Holeman, who had already denied her request to put a statement on the record, did not respond except to say that her "statement and any objection that could possible be made we

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[20] During that earlier exchange, Judge Holeman had interjected that the investigative file of the complaint had been "disclosed by the Government" and then ignored Sassower's contrary assertion [A-556]. Now, three days later, he tried to stop Sassower from reiterating that that investigative file was "never turned over" [A-978] – and called for the marshal when she so-stated. Without denying or disputing the truth of what she said – because he knew it was true – Judge Holeman then repeated his standard: "To the extent we are talking about a discovery issue, the door is closed on that. There is no further production of documents. That was addressed some time ago." [A-979].

[21] *Scull v. United States*, 564 A.2d 1161, 1165 (D.C. App. 1989): bias as a matter of witness' subjective belief.

will assume has been made, even though not articulated by you. My stand, my holding still remains." [A-982].

The prosecution's sole contribution to Judge Holeman's completely *sua sponte* ruling came at the end – when Mr. Mendelsohn requested "clarification" as to whether he was "ruling that any evidence of the police misconduct charge is substantially more prejudicial than it is probative in this case?" [A-983]. Judge Holeman's "clarification" was that it was "absolutely more prejudicial – than probative", "based upon the information" he currently had. He thereupon refused Sassower's request that he identify what information he was relying on for his now more emphatic assessment [A-983].

In and of itself, Judge Holeman's exclusion of Sassower's September 22, 1996 police misconduct complaint [A-154] and all bias cross-examination of Sergeant Bignotti based on thereon requires reversal, as a matter of law.

**Judge Holeman's Interference with Sassower's Legitimate Cross-Examination to Prevent Her From Establishing Her Defense**

Sassower's defense was mapped out at pages 7-20 of her October 30, 2003 discovery/disclosure/sanction motion [A-47-60] and highlighted by her opening statement [A-680-685, 693-698]. Judge Holeman repeatedly interfered with her legitimate cross-examination to prevent her from establishing key elements of that defense.

***Preventing Sassower from Establishing the Identity of the True Arresting Officer***

Central to Sassower's defense was that Sergeant Bignotti, against whom she had filed a police misconduct complaint in 1996, was the true arresting officer and had her own personal animus for arresting Sassower, apart from any direction she received from Capitol Police or the Senate Judiciary Committee [A-59-60].

Upon Officer Jennings' effective concession that Sergeant Bignotti, not he, had arrested Sassower [A-954-5], Judge Holeman sustained, on grounds of relevance, the prosecution's objections as Sassower sought to further establish and reinforce that fact [956-8][22]. Thereafter, upon Sassower's cross-examination of Sergeant Bignotti, asking "Isn't it true that you arrested me?", Judge Holeman not only sustained the prosecution's unspecified objection and halted Sergeant Bignotti as she began to respond, but refused to answer Sassower's question "What is the basis?", telling her "Ask your next question [A-1012-3].

***Preventing Sassower from Establishing Her Words in "Wanting to Testify"***

Central to Sassower's defense in establishing the unconstitutionality of the "disruption of Congress" statute and the falsity of the underlying prosecution documents was establishing the precise words she spoke at the Senate Judiciary Committee hearing.

Judge Holeman sustained the prosecution's unspecified objections to Sassower's questioning of Officer Jennings as to the specific words she had used at the hearing for "wanting to testify" [A-947-9]. Likewise, he sustained the prosecution's unspecified objections to her similar question to Sergeant Bignotti, threatening her to move to the "Next line of questioning...Or we proceed with redirect" [A-1015].

***Preventing Sassower from Establishing Sergeant Bignotti's Knowledge of the Precedent of 1996***

Central to Sassower's defense in establishing the malicious nature of her arrest was Sergeant Bignotti's knowledge of the fact that she had not been arrested in 1996 for respectfully requesting to testify at a Senate Judiciary Committee hearing.

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[22] Judge Holeman precluded, as "irrelevant", introduction of Sassower's May 22, 2003 Prisoner's Property Receipt [A-1578], which she had refused to sign because it falsely represented Officer Jennings as the arresting officer [A-1216].

Upon the prosecution's unspecified objection to Sassower's inquiry as to Sergeant Bignotti's knowledge that she had risen to testify with citizen opposition at the Senate Judiciary Committee's June 25, 1996 hearing [A-1000], Judge Holeman called a bench conference and -- without turning to the prosecution to clarify its objection -- stated that he would not permit such question because it would require Sergeant Bignotti to "speculate" and might "also conceivably require that she testify as to matters that were written or recorded after the fact." He also sustained the prosecution's unspecified objection to Sassower's question as to when Sergeant Bignotti became knowledgeable of the fact that Sassower had not been arrested in 1996 for respectfully requesting to testify – and stated, *sua sponte* and before the jury, that it was "not relevant to this case." [A-1021]. Likewise, he *sua sponte* stated that Sassower's question to Sergeant Bignotti, "Did I tell you when you were arresting me [on May 22, 2003] that in 1996 I had not been arrested for requesting to testify?", was "irrelevant" [A-1021]. [*See also* A-1013-4].

***Preventing Sassower from Establishing the Identity of the Complainant on the Police Reports***

Central to Sassower's defense was that Capitol Police had no authority to arrest her for respectfully requesting to testify at the Senate Judiciary Committee's public hearing –and that only the presiding chairman could direct such arrest.

Judge Holeman sustained the prosecution's unarticulated objection to Sassower's query to Sergeant Bignotti as to who the complainant was on the arrest reports, directing her to proceed to the "next line of questioning" [A-1016, 1021][23].

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[23] Judge Holeman also sustained – including on grounds of relevance – the prosecution's objections to her cross-examination probing of Officer Jennings' statement that he had "no recollection" of Senator Chambliss exiting the back door of the Senate Judiciary Committee and passing her while she stood in the hallway in handcuffs [A-955-3].

***Preventing Sassower from Establishing Sergeant Bignotti's Responsibility in Denying Her Citation Release***

Corroborative of Sassower's defense that Sergeant Bignotti was motivated by an animus against her was that, as reflected by the citation release report [A-93], Sergeant Bignotti made the determination to deny her citation release on May 22, 2003 – a denial which violated Capitol Police's General Order #4430 pertaining to its "Citation Release Program" [A-186]. As set forth at ¶47 of Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-62], it is impossible to read her September 22, 1996 police misconduct complaint [A-154], dismissed by Police Chief Gary Abrecht on February 18, 1997 [A-185], and not believe that it led to the issuance of that General Order on March 18, 1997.

Judge Holeman not only sustained the prosecution's unspecified objection to Sassower's question to Sergeant Bignotti about her determination to deny Sassower citation release, but, in the presence of the jury added, "Irrelevant". [A-1017].

**Judge Holeman's *Sua Sponte* Cutting Off of Sassower's Examination of Witnesses – Including as to Bias Cross-Examination**

This Court has stated:

> "...to satisfy the Sixth Amendment, the trial court should permit exploration of all matters that contradict, modify or explain testimony given by a witness during direct examination. *Morris v. United States*, 398 A.2d 333, 339 (D.C. 1978).", *Goldman v. United States*, 473 A.2d 852, 857 (1984);
>
> "the permissible scope of cross-examination 'must be limited with the utmost caution and solicitude for the Defendant's Sixth Amendment rights,' ...The trial court's 'wide latitude in the control of cross-examination...'cannot...justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.'' *United States v. Harris*, 501 F.2d 1, 8 (9th Cir. 1974), quoting *Gordon v. United States*, 344 U.S. 414, 423, 73 S.Ct. 369, 97 L.Ed. 447 (1953).", *Springer v. United States*, 388 A.2d 846 (1978).

This Court has reversed where a trial court has imposed a fixed, preset time limit to questioning – and has recognized that where the trial court refused to hear proffers of additional questions, the "lack of record" not only makes it "impossible" for this Court, on appeal "to evaluate whether a significant line of inquiry was foreclosed; it also precludes the government from meeting its burden to show harmlessness beyond a reasonable doubt.", *Flores v. United States,* 698 A.2d 474, 481 (1997).

This Court has also recognized that bias cross-examination is a delicate inquiry, requiring subtle questioning for "a reasonable length of time" to elicit answers which, if asked in "direct and ultimate fashion", would not be fruitful. *Petway v. United States*, 391 A.2d 798, 801-2 (1978).

Judge Holeman's demonstrable violations with respect to Sassower's cross-examinations and inquiries for bias require reversal, as a matter of law.

***Special Agent Lippay***

In the midst of Sassower's cross-examination of the prosecution's first witness, Special Agent Lippay [A-707-796], Judge Holeman *sua sponte* announced, "This examination should come to its conclusion in 15 minutes." [A-785]. He cited no reasons for imposing this time limit, other than "It's simply lasted too long. Too much time has been consumed unnecessarily." In so doing, he did not identify anything unnecessary or wasteful about the cross-examination, which had then proceeded for approximately two hours. Nor did he inquire of Sassower as to what further areas remained in her cross-examination.

In fact, there was no basis for curtailing Sassower's cross-examination – as it had been extremely productive, even devastating. It had proceeded methodically through the document purported by Special Agent Lippay to be the entirety of her "notes" of her "investigation" – *to*

*wit*, her two-page subject profile of Sassower [A-521-2]. Where the subject profile identified her preparation of a bulletin on Sassower, Sassower had methodically cross-examined Special Agent Lippay as to that document as well [A-523]. Again and again, Sassower had established stunning deficiencies and discrepancies in Special Agent Lippay's "investigation", her record-keeping, and in Capitol Police procedures.

Sassower's methodical cross-examination based on the subject profile and bulletin, as well as on a second bulletin that Special Agent Lippay had generated [A-535], continued during the ensuing 15-minutes. By then, Sassower was reaching the end of the subject profile where the entry about Special Agent Lippay's May 21, 2003 phone call to Sassower appeared [A-522]. It was as Sassower was beginning to cross-examine Special Agent Lippay about the entry that Judge Holeman announced, "The matter that I previously discussed at the bench is effective. So to the extent that there is one remaining question, we'll have that..." [A-795].

Sassower responded with a request that after asking her question she be permitted to "put an objection on the record" – to which Judge Holeman replied that her objection was "noted for the record" and she should ask her question [A-795]. This question, also intended to highlight a discrepancy in the subject profile, was whether the subject profile was accurate in stating [A-522] that during their phone conversation Sassower "denied being arrested in 1996". Upon Special Agent Lippay's answer "That's what my notes states, ma'am.", Judge Holeman would not even allow Sassower's follow-up question, "Are your notes correct and accurate?" – and would not respond when she asked him "why?", except to tell her to be seated and call for "Redirect examination" [A-796].

In such fashion – without basis in fact or law – Judge Holeman interfered with appellant's proper and effective cross-examination of Special Agent Lippy, wholly preventing

her from cross-examining about their May 21, 2003 phone conversation, about which Special Agent Lippay had given direct testimony [A-704-5]. By then, the significance of that testimony had been highlighted by Mr. Mendelsohn's opening statement [A-673], as it would be subsequently by Ms. Liu's closing [A-1363-4]. That Judge Holeman would, thereafter, prevent Sassower from giving her own direct testimony from the witness stand as to that conversation only exacerbated the prejudice caused by his unwarranted termination of her cross-examination of Special Agent Lippay, preventing her from exposing its materially false and misleading nature.

***Joshua Albert***

Approximately 40 minutes into Sassower's examination of Mr. Albert [A-1061-1109], Judge Holeman *sua sponte* announced,

> "The examination of this witness is taking far too long. ...to the extent that you want to continue to question this witness, you must make inquiry into the, the area that precipitated the events of May 22." [A-1088].

As Sassower's examination had been entirely proper and relevant in querying Mr. Albert as to the precipitating events of May 22, 2003, there was no basis for Judge Holeman's reproaching – or pressuring – Sassower on that score. Nor was there any basis for blaming her for the length of her examination, as it was attributable to the purported lack of recollection of Mr. Albert, a lawyer witness. Notwithstanding Mr. Albert occupied a position of responsibility as Senator Clinton's legislative correspondent, he purported to be unable to "recall" the most basic information as to his contacts with Sassower, purported to have taken no notes of those contacts, purported that his recollection was not "refreshed" by Sassower's correspondence memorializing their contacts -- which should have refreshed his recollection -- and purported to have no recollection of any documents Sassower had provided Senator

Clinton's office. To this, Judge Holeman expressed not the slightest consternation, blaming instead the faultless *pro se* defendant, who he had done nothing to assist.

Quite the contrary, Judge Holeman had assisted the prosecution in styming Sassower from introducing admissible evidence that would impeach the disingenuous Mr. Albert – *to wit*, his own e-mails, produced at trial in response to Sassower's subpoenas. Illustrative was Mr. Albert's May 2, 2003 e-mail to Leecia Eve [A-1414], which read:

> "Leecia, she's stopping by at 1 pm on Monday to meet us. She handdelivered a package to NYC on 4/23, no way it could have reached us yet even if forwarded from there. She's faxing a cover letter."

Although Sassower ultimately succeeded in having the e-mail admitted into evidence, without objection from the prosecution [A-1091], substantial time was wasted through no fault of Sassower, as Judge Holeman frustrated her two prior attempts to admit it. Thus, at the outset, Judge Holeman, without first hearing Sassower, "piled on" to endorse the prosecution's initial objection that if the e-mail was being admitted "for the truth of the matter that a packet was hand delivered to New York, then it's hearsay" [A-1077]. Judge Holeman asserted without limitation -- "the document itself is hearsay" and that he could "think of no exception to the hearsay rule that would permit the admission of this document" [A-1077-8]. He did not modify this position, as he properly should have, upon hearing what Sassower had to say – notwithstanding the prosecution did [A-1078, ln. 22]. Nor did he modify it the second time Sassower attempted to introduce the e-mail [A-1080, ln. 5], which was immediately after Mr. Albert's response to a question that he could not "recall" whether Sassower had ever informed him that she had hand-delivered a package to the New York office on April 23, 2003. Instead, Judge Holeman sustained Ms. Liu's unspecified objection. When Sassower asked the basis, he called a bench conference, but did not ask Ms. Liu to

specify her objection. Rather, he *sua sponte* asserted "We were pretty clear about that you're seeking to offer this for the truth of the matter contained within. It's hearsay. It's not any hearsay exception." [A-1080, ln. 13].

Judge Holeman thereafter continued to discourage Sassower, "you've got to find an exception to the hearsay rule. I can think of none. I don't believe you'll be able to have it admitted into evidence." [A-1089]. Yet, two minutes later, after Mr. Albert read aloud the content of his May 2, 2003 e-mail [A-1090] – something Judge Holeman had previously stated he could not do [A-1078-9][24] -- the e-mail was readily admitted into evidence, without objection from the prosecution [A-1091] on Sassower's third attempt.

Thereafter, Judge Holeman ***sua sponte*** terminated Sassower's examination of Mr. Albert as she was attempting to elicit testimony that would establish Mr. Albert's bias arising from her telephone messages complaining about him and Ms. Eve to Senator Clinton's Chief of Staff, Tamera Luzzatto [A-1106]. He not only sustained the prosecution's unspecified objection to Sassower's perfectly proper question, "On May 21st, did you receive a fax and e-mail from me setting forth what I viewed as your professional misconduct and that of Leecia Eve?" [A-1106-7] – but, *sua sponte* and before the jury, commented that it was "Irrelevant". He thereupon, *sua sponte*, blocked Sassower from questioning Mr. Albert about her May 19, 2003 memorandum to Senator Clinton [A-1535] by demanding to know if it was going "to demonstrate that Mr. Albert called the Capitol Police." As she attempted to explain that it was

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[24] Thereafter, when Sassower sought to introduce a chain of three May 13, 2003 e-mails between Mr. Albert and Ms. Eve or Eric Lovecchio of the New York office [A-1415] – whose content undermined Mr. Albert's claimed lack of recollection to innumerable questions – Mr. Albert stated that he would have to read the e-mail in order to answer Sassower's question. Judge Holeman then responded to Mr. Albert's query as to whether he could do so by telling him he could not [A-1094].

"going to demonstrate that she complained to --", he cut her off, asserting that he didn't "care about [her] complaint". He then further chastised her:

> "we have now consumed an inordinate amount of time in your questioning this witness who testifies that his recollection of these events is limited... At some point in time get to your arrest." [A-1108].

From here, Judge Holeman went directly to an ultimatum [A-1108]:

> "Well, actually unless the next question specifically addresses your arrest and his involvement or not in it, this examination is concluded."

Sassower's next question was "Did there come a time when you learned that I had been threatened by Capitol police as a result of the contact between your office and Capitol police?" [A-1108]. Upon Mr. Albert's answer "No", Sassower sought to impeach him by introducing a further e-mail, "Defendant's Exhibit 45" [A-1422]. Judge Holeman then interrupted to ask its date and time, to which Sassower responded "May 22nd". Judge Holeman then interjected "8:38 a.m.?" [A-1109]. Because three e-mails bore the same May 22nd date [A-1421, 1422, 1423], with two having the same time of 8:38 a.m. [A-1421, 1422], Sassower became momentarily confused[25] and asked if the lunch recess could be taken – it being then nearly 1 p.m. Judge Holeman responded by threatening Sassower that her examination would be concluded unless the e-mail pertained to her arrest. Notwithstanding she immediately responded that it did, Judge Holeman just as immediately countered it did not -- and without affording Sassower any opportunity to elaborate, ended the examination [A-1109]. Upon excusing the jury for lunch, Judge Holeman launched into a condemnation of her for having "squander[ed]...time on matters that are completely extraneous to the, to the

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[25] This confusion directly resulted from Senate Legal Counsel's turnover of the e-mails at trial. As Senate Legal Counsel gave her only a single copy, she was handicapped in questioning witnesses since, upon providing the e-mail to a witness, she no longer had it in front of her for questioning. [See especially A-1079]

offense with which [she was] charged." [A-1110], asserting that her May 22, 2003 e-mail had "absolutely nothing to do with this witness' involvement in [her] arrest." [A-1111]. Having not afforded Sassower any opportunity to be heard, he then announced that he would not "hear further discussion on this matter" [A-1111].

Once again, there was no basis in fact or law for Judge Holeman's termination of Sassower's examination – including because the May 22, 2003 e-mail about which she sought to question Mr. Albert [A-1422] consisted of his forwarding to Ms. Eve and Ms. Luzzatto her May 22, 2003 e-mail to him bearing the title "Not being arrested: May 22nd Wesley Confirmation Hearing" and transmitting a copy of her May 21, 2003 letter to Detective Zimmerman [A-102].

***Leecia Eve***

Approximately an hour and a half into Sassower's examination of Ms. Eve [A-1117-1179], Judge Holeman announced, *sua sponte*, that Sassower would have only ten minutes. The sole reason he gave was that her bias cross-examination "simply ha[d] no bearing with regard to the current line of inquiry" [A-1172].

This was untrue. Sassower's bias cross-examination [A-1161-2] bore directly on the "current line of inquiry" – whatever Judge Holeman's meaning was by the ambiguous phrase. It began with the question, "Did you not suffer from conflict of interest because you knew judges? You had worked for judges at the Court of Appeals whose misconduct was part and parcel of Judge Wesley's misconduct?" [A-1161]. Upon Ms. Eve response that she didn't understand the question and that Sassower should explain and rephrase, Sassower stated, "The evidence presented to you in this [March 26, 2003] written statement included misconduct from other judges of the New York Court of Appeals with whom you were familiar and

worked." [A-1161-2]. Judge Holeman's reaction at the phrase "The evidence presented to you in this written statement" was to sustain an unarticulated objection and direct "Next question" as Sassower was midsentence. Upon Sassower uttering the few words that finished the sentence, Judge Holeman excused the jury and chastised her for not following his directives. Without asking the prosecution to identify that basis of the unarticulated objection he had already sustained, Judge Holeman blasted Sassower for her "continued questioning of this witness concerning documents that you may well have provided to the chambers of Senator Clinton, but which this witness has no specific recollection." [A-1162-3]. He also stated that she "appear[ed] to be attempting...to introduce the content of documents totally irrelevant to the elements of the offense in this case through witnesses who could not possibly lay the appropriate evidentiary foundation for those documents." [A-1166]. In so doing, Judge Holeman not only cut off Sassower's legitimate probe and challenge to Ms. Eve's recollection – as he had done continually throughout her questioning of Ms. Eve[26] -- but, *sua sponte*, disregarded the relevance of such documents to Sassower's defense.

Sassower resumed her bias cross-examination of Ms. Eve with the question, "At anytime – was it not apparent to you that having worked on the New York Court of Appeals, you knew judges, had worked for judges or were friendly with judges who were involved in some of the issues that were being presented as they related to Judge Wesley?" [A-1167]. Ms. Eve acknowledged having a general recollection of CJA being involved in litigation concerning the misconduct of judges, some of whom were judges of the New York Court of Appeals and that Chief Judge Judith Kaye was on that Court when she worked there. Judge

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[26] Judge Holeman continually blocked Sassower's questioning of Ms. Eve by *sua sponte* asserting that she had already testified that she lacked specific recollection, especially as to documents [A-1131, 1133, 1142-3, 1149, 1159, 1161-3, 1166, 1177].

Holeman then sustained an unarticulated objection to Sassower's question, "And did you have occasion to observe that her misconduct was fairly focal in the underlying documents?" [A-1169]. He then sustained three additional unarticulated objections to the following three perfectly proper questions; "Did you have occasion to examine documents that related to that very period at the New York Court of Appeals that were part of what was being presented in the Senate Judiciary Committee and your office?" [A-1169]; "Is it not correct that a public interest election law lawsuit came up to the New York Court of Appeals in the period in which you were there called *Castracan v. Colavita*." [A-1169-70]; "Did you examine any of the documents from which you might see that you were at the Court of Appeals during the period in which misconduct by the judges of that court were, was alleged?" [A-1171].

As a result, Sassower shifted to a different area of Ms. Eve's employment giving rise to bias [A-1170]. After Ms. Eve acknowledged that she had worked for Senator Biden in 1995-1996 when he was the Senate Judiciary Committee's Ranking Member, Sassower asked whether she was at the June 25, 1996 Senate Judiciary Committee hearing when Sassower rose to request to testify with citizen opposition. Ms. Eve responded that she had no recollection, but it would have been unlikely that she would have been there as her responsibilities explicitly excluded judicial nominations. Sassower then established that Ms. Eve did handle judicial nominations for Senator Clinton [A-1171] and, based thereon, asked Ms. Eve whether she recalled Sassower's July 14, 2001 letter to Senator Clinton [A-1487], enclosing her extensive July 3, 2001 letter to Senator Schumer regarding federal judicial selection -- the same July 3, 2001 letter as was part of Sassower's 39-page fax to Detective Zimmerman [A-120]. Following Ms. Eve's negative answer, Sassower inquired "Have you

ever read it to this day?" [A-1171] – to which Judge Holeman sustained an unarticulated objection. The next question Sassower asked was:

> "Were you aware that during Senator Biden's chairmanship of the Senate Judiciary Committee in 1992, the predecessor citizens group to the Center for Judicial Accountability had documented the, the Senate Judiciary Committee's disregard for evidence that the bar associations were rendering ratings on federal judicial nominations which were inadequate and dishonest?" [A-1171-2]

Again, Judge Holeman sustained an unarticulated objection and *sua sponte* called a bench conference. Without asking Sassower to clarify her line of bias cross-examination, he announced that it "simply has no bearing with regard to the current line of inquiry. It's more of a speech than is testimony" and commanded that she would have only another ten minutes for her examination.

In fact, Sassower's questioning had a direct bearing in establishing Ms. Eve's bias, arising from her 1996 employment with Senator Biden in his capacity as Ranking Member of the Senate Judiciary Committee – and her question to Ms. Eve as to whether "to this day" she had ever read Sassower's July 3, 2001 letter was directly relevant in establishing that bias. Judge Holeman may be presumed to know this. The 18-page July 3, 2001 letter and its 3-page Exhibit "H" [A-120-37, 138-40] constituted over half of Sassower's 39-page May 21, 2003 fax to Detective Zimmerman [A-102] and detailed the Senate Judiciary Committee's corruption of federal judicial selection, including its cover-up of fraudulent bar ratings, during the years when Senator Biden was Senate Judiciary Committee Chairman and its Ranking Member. Indeed, the very e-mail that Mr. Albert had forwarded to Ms. Eve at 8:38 a.m. on May 22, 2003 [A-1422] – the same e-mail as Judge Holeman had used in ending Sassower's examination of Mr. Albert [A-1109] – had attached not only a copy of Sassower's May 21,

2003 letter to Detective Zimmerman [A-102], but the July 3, 2001 letter to Senator Schumer [A-120].

As Sassower was in the midst of productive examination of Ms. Eve, Judge Holeman ended Sassower's examination "based upon our prior bench conference" [A-1179].

**Judge Holeman's Trial Rulings with Respect to his April 8, 2004 Order Pertaining to Sassower's Subpoenas of Mr. Albert and Ms. Eve**

On April 16, 2004 – only eight days after his April 8, 2004 order [A-503] on Senate Legal Counsel's motion to quash Sassower's subpoenas of five Senators and four of their staff [A-472] – Judge Holeman asked Mr. Vinik to set forth for him what he should have known from adjudication of the motion: "the involvement of Ms. Eve and Mr. Albert, I believe it is, as regards to Ms. Sassower" [A-1034].

Before ruling on the scope of Mr. Albert's and Ms. Eve's testimony, Judge Holeman asked the prosecution whether it agreed with Mr. Vinik's recitation. He did not, however, ask Sassower – and when she thereafter pointed this out, his response was that "[her] opinion" was "not relevant" because what was "important" and what he "needed to hear" was counsel's representations as "member[s] of the bar", "bound by the rules of professional conduct" [A-1042-3].

Such assertion was without basis in fact or law. A criminal defendant does not forfeit the right to be heard simply because he is not represented by counsel. Nor was Sassower without the assistance of a legal advisor who, as a bar member, was bound by professional conduct rules – and from whom Judge Holeman might have solicited the defense view with respect to Mr. Vinik's statements, if he was not going to call on Sassower.

As for Judge Holeman's ruling that the "heart" of Mr. Albert's and Ms. Eve's testimony would be "factual" and pertain to what occurred during their telephone

conversations with Sassower and "any actions that these individuals personally took thereafter" [A-1036], he gave no reasons for circumscribing their testimony. He did so *sua sponte* -- no request having been made by either Mr. Vinik or the prosecution for any clarification of his April 8, 2004 order [A-503].

Both Mr. Albert and Ms. Eve were lawyers on Senator Clinton's staff, with Ms. Eve employed as the Senator's counsel. Beyond fact testimony, each was qualified to give opinion testimony. Indeed, in *Carter v. United States*, 614 A2d 913, 919 (D.C. App. 1992), this Court recognized that

> "Modern rules of evidence permit non-expert witnesses to express opinions as long as those opinions are based on the witness' own observation of events and are helpful to the jury.' *Fatah v. Rich*, 481 A.2d 464, 470 (D.C. 1984)"

and, further, that this "permissive approach to law opinion testimony" is embodied by Rule 701 of the Federal Rules of Evidence:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue",

and, additionally, that Rule 704 of the Federal Rules of Evidence provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Consequently, Sassower should have been permitted to elicit from Mr. Albert and Ms. Eve crucial opinion testimony which Judge Holeman peremptorily blocked. Among the questions to Mr. Albert which Judge Holeman blocked: "As an attorney, do you not form opinions based on [evidence]" [A-1099] and "Did you believe that there was an obligation on the part of anyone in Senator Clinton's office to read the overview statement of March 26th?" [A-1106]. Among the questions to Ms. Eve which Judge Holeman blocked, "Did you believe

that I should be arrested simply for rising to request permission to testify in opposition at the hearing?" and "Do you believe that a respectful request to testify at a public congressional hearing made at an appropriate point can ever be deemed to be disruption of Congress?" [A-1179].

Moreover, restricting Mr. Albert's and Ms. Eve's testimony to actions they "personally took" precluded them from testifying as to their personal knowledge of actions taken by others. Such information was material to Sassower's defense, encompassing, as it did, collusion by a variety of actors, Senator Clinton among them.

Judge Holeman also made preliminary admissibility rulings with respect to the ten e-mails produced by Mr. Albert and Ms. Eve pursuant to his April 8, 2004 order [A-1414-1423]. His exclusion of three e-mails, each dated May 15, 2003 [A-1416, 1417, 1418], was without permitting Sassower to be heard prior thereto and without giving any reasons for these exclusions [A-1038-9].[27] Although Sassower objected that the excluded e-mails not only reflected the interaction that his April 8, 2004 order had deemed "fair inquiry", but "materially reflect[ed]" on the misconduct of Mr. Albert and Ms. Eve which was the subject of her two voice mails for Senator Clinton's Chief of Staff [A-1040], Judge Holeman did not respond. Rather, he proceeded to exclude a fourth e-mail, dated May 19, 2003 [A-1420]. Only as to this excluded e-mail did Judge Holeman give a reason, "it is the content of the e-mail itself which I believe very much places this document then within the deliberative and communicative processes" [A-1041]. Judge Holeman then cut off Sassower as she pointed out

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[27] Such e-mail were apparently the "independent research", to which Mr. Albert and Ms. Eve would thereafter testify [A-1096, 1158] – and directly related to the paragraph of Special Agent Lippay's subject profile which Judge Holeman ordered redacted [A-522, 1600] as "not pertinent to the proof of the elements or the defense thereto" and "the type of information ...excluded during the ruling on the motion in limine" [A-771, 773].

that this e-mail had transmitted the May 19, 2003 faxed memorandum [A-1535, 1522] which was the basis upon which Senator Clinton's office contacted Capitol Police. Judge Holeman's response was that "the fax is the evidence in this case", but that "The actual content as is reflected in this e-mail, it will not come into this case. It is irrelevant and it is protected by the speech and debate clause. It will not come in." [A-1045].

Conspicuously, Judge Holeman did not identify the content of the e-mail – or why it would be "protected by the speech and debate clause". It plainly is not. The content is Sassower's own e-mail message [A-1420] and not anything generated by Senator Clinton or her staff. Indeed, it would appear that Judge Holeman's true reason for excluding the May 19, 2003 e-mail was because it rendered Mr. Albert, as well as Ms. Eve, to whom he had forwarded it, vulnerable to potentially devastating examination relating to their receipt and review of Sassower's transmitted two-page May 19, 2003 memorandum to Senator Clinton [A-1535], with its enclosed ten-page memorandum to Chairman Hatch and Ranking Member Leahy [A-1522][28].

**Judge Holeman's *Sua Sponte* Time Restriction for Review of the Admissibility of Documents Sassower Sought to Introduce – and His *Sua Sponte* Exclusion of Essential Documents**

On April 19, 2004, immediately prior to Sassower's testifying, Judge Holeman *sua sponte* ruled that his review of exhibits that she wished to proffer into evidence was time-restricted – and that he would give only about half an hour for such purpose. He announced,

> "We're going to be through with this process by 10:15. If you haven't made your case or document by 10:15, we will suspend this process at that time.

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[28] This is reinforced by the fact that Judge Holeman *sua sponte* prevented Sassower from directly examining Mr. Albert with regard to this memorandum [A-1107] and *sua sponte* attempted to prevent her from examining Ms. Eve about the memorandum by his *sua sponte* interjection, "She has no specific recollection from any documents involved in this case." [A-1149].

> This is something that should have been well taken care of. Proceed. We're going much too slowly now. We will not consume a full morning dealing with records that quite frankly have little chance of being admitted into evidence. What's the next document?" [A-1201].

Judge Holeman did not identify any earlier juncture when the "process" of reviewing the potential admissibility of Sassower's exhibits might have been "taken care of". He had not indicated it for pretrial disposition – nor had it been included by the prosecution in its "Statement of Preliminary Issues" [A-515] [29]. Judge Holeman made no preliminary determinations as to the admissibility of the ten e-mails produced by Mr. Albert and Ms. Eve [A-1415-23] until directly before their testimony [A-1036-46] and then only because Ms. Liu raised the issue [A-1036]. The comparable juncture with respect to his preliminary determination of the exhibits Sassower anticipated using during her testimony was, therefore, directly before she took the stand.

As for Judge Holeman's assertion, "we're going much too slowly now" [A-1210], the record provides no basis for complaint. He had, by then, ruled on just two items. The first, Sassower's contemporaneous diary entries, he had ruled inadmissible, without any objection or input having been made by the prosecution [A-1195-98]. The second, Sassower's March 14, 2003 letter to the Senate Judiciary Committee [A-1431], he had ruled potentially admissible, after denying Sassower the opportunity to respond to Mr. Mendelsohn's objection [A-1198-1201]. Nor was there any basis for Judge Holeman's expression of prejudgment that her documents would have "little chance of being admitted.", as Sassower had not yet

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[29] Prior to trial, Judge Holeman had not requested the parties to submit exhibit lists – and, at trial, it was the prosecution that first brought up an exhibit list – which Judge Holeman thereupon adopted, stating, that it was the "preferred way to proceed..."To wait until we're at trial, in the examination, identifying exhibits and then having argument, it consumes a lot of time. I'm trying to avoid that. So, an exhibit list would be preferred." [A-745]. He and the prosecution thereafter chastised Sassower for not having had one.

identified the "immediate exhibits which [she] did plan to introduce on [her] direct case" [A-1195], other than the two exhibits on which Judge Holeman had already ruled[30].

In such fashion, Judge Holeman restricted to a completely arbitrary and inadequate time frame his determination of Sassower's potentially admissible exhibits. The consequence was to prevent her from going "methodically and properly through the documents so that [she could] defend [her]self." [A-1209], as well as hasty rulings by him that improperly kept critical documents from the jury and impacted on the testimony Sassower was able to give.

**Judge Holeman's Ruling that CJA's March 26, 2003 Written Statement and April 23, 2003 Coverletter to Senator Clinton was "Opinion" and, Therefore, Inadmissible**

On April 19, 2004, Judge Holeman *sua sponte* ruled that two documents were inadmissible because they were "opinion". The first, which he *sua sponte* excluded before Sassower took the stand, was CJA's March 26, 2003 written statement [A-1436] detailing and transmitting the documentary evidence establishing Judge Wesley's misconduct as a New York Court of Appeals judge. Judge Holeman's only stated reason for this was that it was a "statement of opinion" and that the courtroom was not a forum for Sassower "to stand up and espouse [her] opinions" [A-1208]. Although Sassower pointed out that she "did not espouse opinions to the Senate Judiciary Committee and to the home state senators", but had "presented them with a fact specific presentation outlining the evidence" [A-1209], Judge Holeman ignored this difference, answering, "Absolutely. You said enough, that's what I needed to hear. It's out." [A-1209]. The second exclusion, also *sua* sponte, was Sassower's April 23, 2003 coverletter to the package she had hand-delivered to Senator Clinton's New

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[30] Sassower had already identified that it was not her intention to introduce all the exhibits on her exhibit list [A-1425] and that her listed exhibits included those she had prepared in anticipation of cross-examination [A-1195].

York office on that date [A-1474]. Although prior to Sassower's testifying, Judge Holeman had ruled, after ascertaining that the prosecution had no objection, that this letter and the package of documents it transmitted were admissible [A-1209], he *sua sponte* halted her testimony about it [A-1232-6]. He thereafter excluded both the letter and package as exhibits were being compiled for the jury. His sole reason for excluding the letter was because it was allegedly not a "true cover letter simply identifying the documents contained therein." This, because it included "a page and a half of statement of opinion by Ms. Sassower as to matters such as the, and I'm quoting here, 'documenting their grotesquely inadequate where not outrightly fraudulent judicial ratings'" [A-1322-3]. Although Sassower explained that the documents in the package – which Judge Holeman also excluded -- were "a substantiation of what the American Bar Association and City Bar had been doing with their judicial ratings", Judge Holeman ignored this [A-1322-3].

The March 26, 2003 statement [A-1436] and April 23, 2003 coverletter [A-1474] were the key documents substantiating Sassower's misconduct complaint against Mr. Albert and Ms. Eve and establishing the basis upon which the Senator was duty-bound to have opposed Judge Wesley's nomination and to have endorsed Sassower's request to be permitted to testify. They were no more "opinions" than any of the other "paper trail" documents which Judge Holeman allowed to be admitted into evidence: Sassower's May 5, 19, and 22, 2003 memoranda [A-1495, 1522, 1535, 1539] – all of which rested on the March 26, 2003 statement [A-1436]. Indeed, of all the "paper trail" documents, the March 26, 2003 statement was the very opposite of "opinion" – being a meticulous description of the transmitted documentary proof establishing Judge Wesley's judicial misconduct as a New York Court of Appeals judge.

The documentary proof substantiating the March 26, 2003 statement was independently verifiable – and was before Judge Holeman, in the precise fashion as it had been before the Senate Judiciary Committee and accessible to Senator Clinton. As identified by Sassower's exhibit list, her exhibit 40 [A-1427] was the same document-filled boxes and folders that she had hand-delivered to the Senate Judiciary Committee on May 5, 2003, under a memorandum of that date to Chairman Hatch and Ranking Member Leahy [A-1495]—and which the prosecution returned to her at the December 3, 2003 conference before Judge Milliken, over her objection [A-340-41].

As detailed by the May 5, 2003 memorandum [A-1495], the transmitted documents not only fully substantiated CJA's March 26, 2003 statement as to Judge Wesley's unfitness, but established the fraudulence of the barebones approval ratings conferred upon him by the American Bar Association and the Association of the Bar of the City of New York.

As for Sassower's April 23, 2003 coverletter to Senator Clinton [A-1474], the package it transmitted included, in addition to the March 26, 2003 statement [A-1436], documentary proof that was itself sufficient to establish Judge Wesley's misconduct. The package also included a full copy of CJA's July 3, 2001 letter to Senator Schumer [A-120], particularizing CJA's history of documentary presentations to the Senate Judiciary Committee and Senate leadership establishing the fraudulence of the bar ratings. CJA had previously sent such important letter to Senator Clinton under a July 14, 2001 coverletter – a copy of which was also enclosed in the package.

The consequence of Judge Holeman's exclusion of these pivotal documents was to enable the prosecution to over again falsely portray Sassower as someone who should have been "satisfied" because she had sent "boxes and boxes and boxes" of documents to the

Senate Judiciary Committee and had had a 40-minute conversation with Mr. Albert and Ms. Eve [A-1286, 1289, 1358, 1377] – when neither the Senate Judiciary Committee nor Senator Clinton's office had verified – and were refusing to verify – the readily-verifiable documentary facts, detailed by the March 26, 2003 statement, as to Judge Wesley's corruption in office – facts simultaneously exposing the fraudulence of the bar ratings.

**Judge Holeman's *Sua Sponte* Preclusion of Sassower's Testimony as to the Events at Issue and His Resting of the Defense Case**

This Court has stated, "...we hold that the defendant's right to testify in a criminal trial is a fundamental and personal right...", *Boyd v. United States*, 586 A.2d 670, 674 (1991), asserting that "The United States Supreme Court has made clear that a criminal defendant enjoys a constitutional right to testify on her own behalf.", at 672.

Such fundamental right cannot be terminated by a court, absent the most compelling, overriding reasons – if then. Yet, *sua sponte*, without notice, and without permitting Sassower to be heard prior thereto, Judge Holeman stopped her from continuing with her chronologically-ordered testimony just as it reached the point of the events recited by her 12-page May 19, 2003 memorandum to Senator Clinton [A-1535, 1522] pertaining to the Senate Judiciary Committee's misfeasance and nonfeasance with respect to CJA's March 26, 2003 written statement [A-1436] and request to testify. He then threatened her that unless she proceeded to her analysis of the videotape, her testimony would be concluded [A-1244-5]. His reasons: that she had been testifying for "about 59 minutes now", that "too much time has been consumed already" [A-1244], and that she had given some unidentified testimony to which the prosecution could have objected and which he could have stricken [A-1245]. Judge Holeman thereafter amplified this [A-1251], stating that the record would reflect the estimate made prior to Sassower's testimony as to its length and that he and the prosecution, "to their

credit", had not interposed objections, which he would have sustained -- and had done so "in an effort to move this matter along" [A-1251-2]. He also stated that "undue time was consumed...in efforts to get before the jury documents which were clearly inadmissible, clearly referred to by Ms. Sassower in a way to indicate to the jury that there were materials that she submitted to the Senate Judiciary Committee, to Senator...Schumer and to Senator Clinton." and that the content of these documents was not to be disclosed "except as previously addressed during the preliminary part of today's proceedings." [A-1252].

Collectively and individually these reasons -- even if true – do not remotely suffice for Judge Holeman's barring Sassower's continued testimony – which perhaps explains why he entertained no discussion about them. Upon granting Sassower's request to place her objections on the record [A-1250], he promptly cut her off as she was speaking [A-1251].

As Sassower noted at the outset of her truncated on-the-record objections, Judge Holeman had not indicated "any time restriction" prior to her testifying and she believed she would have "adequate opportunity" to present "the most relevant particulars which, having provided the necessary background, [she] was then reciting" [A-1251]. Judge Holeman did not deny or dispute this – and his subsequent assertion that the record would reflect "the representations that were made prior to the testimony being rendered as to the estimate of time" [A-1251] concealed that the only "representations" were Sassower's own volunteered projection of "longer than approximately an hour" [A-1192] – an estimate to which Judge Holeman had not stated she was bound.

As Judge Holeman never inquired of the prosecution as to the reasons for its not objecting to Sassower's testimony – and the prosecution never volunteered such information -- there is simply no record support for Judge Holeman's assertions that the prosecution had

not objected, indeed had "refused" to object, "in an effort to move this matter along" [A-1252]. As to what Judge Holeman would have stricken – but did not -- Judge Holeman did not specify what he was referring to. Nor did he specify what "undue time" Sassower had consumed in getting inadmissible documents before the jury, what these inadmissible documents were, when he had ruled that she was precluded from identifying her submission of documents to the Senate Judiciary Committee and Senators Schumer and Clinton, and what she had said about these documents that he deemed as breaching his bar on disclosing their contents – not to mention when such bar had been unequivocally announced. The record does not support any of these assertions.

It must be noted that when Judge Holeman halted Sassower's testimony and directed that she proceed to her analysis [A-1245, ln. 3], Sassower requested another "five minutes", which Judge Holeman granted [A-1245, ln. 8]. Yet, not a minute later, as she was describing that her May 19 and May 22, 2003 memoranda [A-1522, 1535, 1539] chronicled the misfeasance and nonfeasance at the Senate Judiciary Committee – which she had had relayed to Mr. Albert and Ms. Eve during their 40-minute May 20, 2003 phone conversation -- Judge Holeman halted her again and again directed that she proceed to her analysis [A-1245, ln. 25; A-1246, ln. 5] – giving no reason for doing so. This second interruption, like the first, was entirely *sua sponte*.

Also completely *sua sponte* was Judge Holeman's halting of Sassower's oral presentation of her written analysis of the videotape – which he did as she was describing what it showed with respect to Senator Chambliss reaching for his reading glasses and a paper from which he seemed to read after she is taken out of the hearing room [A-1249, ln. 19]. Judge Holeman's only expressed reason for this -- stated before the jury -- was that Sassower

had "consumed enough time with this explanation." [A-1249, lns. 23-5]. The time consumed – which Judge Holeman did not identify – would have been approximately six minutes [A-1247-1249].

Judge Holeman did not thereafter supplement this reason. Rather, and in face of Sassower's objection that she had not concluded her analysis of the videotape, he ordered it "in fact concluded" [A-1252, ln. 24]. This, after denigrating it as "defendant's analysis, such as it was." [A-1252, lns. 19-20]. There was no basis for this disparagement: the analysis [A-1574] being a meticulous examination of an all-too-fast and in places unintelligible video clip, decisive of the fact that the testimony of Officer Jennings and Sergeant Bignotti was materially false and misleading as to: (1) what Sassower had said at the May 22, 2003 hearing; (2) when she had said it; and (3) Senator Chambliss' response. Indeed, had Sassower been able to introduce their police reports and the amended "Gerstein" into evidence [A-84-89, 100], the jury could have additionally seen that her unexpurgated analysis [A-1565] also exposed these underlying prosecution documents as materially false and misleading.

In ruling that there would be "no further discussion of the tape and...no further testimony from the witness stand", Judge Holeman moved to "the next matter": "does the defense rest?" [A-1253]. Upon Sassower's negative reply, he then asked what additional evidence she wished to offer. He immediately rejected her first answer that she would attest to the placement of Officer Jennings and Sergeant Bignotti, stating that it was "irrelevant" [A-1253]. This, notwithstanding they had testified as to their placement[31] -- and such was germane in impeaching their testimony as to what Sassower had said at the May 22, 2003 hearing. To Sassower's second answer, that she would attest to "the fact that Sergeant

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[31] Each had testified as to their placement: A-901, 929, 964, 1003, 1004, 1005, 1008.

Bignotti alone arrested me, Officer Jennings had nothing to do with it. His testimony is he told me to sit down. He is not the arresting officer, it was Sergeant Bignotti against whom I had filed a police misconduct complaint in 1996" [A-1254], Judge Holeman responded only with respect to the police misconduct complaint. Asserting it was "not in this case", he directed that she "sit down now". He then stated that "based upon the proffer", the evidence is "not admissible" and that he was "ordering that the defense case be closed at this point. The defense rests." [A-1255]. To Sassower's protest that the defense did not "rest" as the jury had not received "the pertinent evidence which comes from the witness stand" [A-1255], Judge Holeman warned her that he was "not entertaining any further discussion on the issue. You have made your objection for the record. It's done... Please sit" [A-1256].

But for the prosecution's request to be heard, Judge Holeman was ready to move to closing argument and jury instructions. That did not happen only because the prosecution stated that it was "not opposed to the defendant finishing up her recitation of the facts by way of reading her analysis" and, additionally, that it had cross-examination [A-1256-7].

The result of Judge Holeman's *sua sponte* halting of Sassower's testimony – and resting of her defense case – was to wrongfully deprive the jury of what she had to say about those aspects of the May 22, 2003 Senate Judiciary Committee hearing not encompassed in her analysis of the videotape, most importantly, her intent. Such would have included her testimony as to the note page she had held in her hand and read from [A-1548], what Officer Jennings and Sergeant Bignotti said to her in the hearing room and her response, the substance of their conversations in the hallway, her exchange with Senator Chambliss as she stood in the hallway in handcuffs [A-143], and relevant aspects as to her processing at Capitol

Police Station – all matters about which she had either cross-examined them or had attempted to [A-930-959, 1006-1021].

Likewise, the jury was deprived of her side of her 40-minute phone conference with Mr. Albert and Ms. Eve on May 20, 2003 – about which they both had testified – as well as her side of Special Agent Lippay's May 21, 2003 phone call to her and her phone conversations thereafter with Detective Zimmerman – about which both Special Agent Lippay and Detective Zimmerman had testified.

The importance of this testimony was evident from the prosecution's opening and closing statements [A-671-7, 1357-66, 1377-9], which relied on testimony from Officer Jennings and Sergeant Bignotti, not corroborated and/or reflected by the video, to establish Sassower's "intent" -- then reinforced by a false depiction of Sassower as not following rules and as being unreasonable and intractable, concocted from the evasive testimony of Special Agent Lippay, Sergeant Zimmerman, Mr. Albert, and Ms. Eve about their phone conversations with Sassower.

**Judge Holeman's Conclusory Denials of Sassower's Motions for Judgment of Acquittal**

In *Curley v. United States*, 160 F.2d 229, 232 (1947), this Court set forth the standard to be applied by the trial court in ruling on a motion for judgment of acquittal:

> "...if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond reasonable doubt, the motion must be granted."

Judge Holeman's April 16, 2004 denial of Sassower's motion for judgment of acquittal [A-1027-32] at the end of the prosecution's case went from invoking the standard articulated in *Curley* to a conclusory assertion "In this case, the standard has not been reached. There has been evidence presented by the government from which a reasonable mind could

conclude guilt beyond a reasonable doubt." [A-1033]. In so stating, Judge Holeman neither identified nor addressed any of the facts and legal argument which Sassower had presented – just as Mr. Mendelsohn had neither identified nor addressed them in his opposition to the motion [A-1032-3].

Similarly, Judge Holeman's April 19, 2004 denial of Sassower's motion for judgment of acquittal [A-1326-1329] following his resting of her defense went from invoking the standard articulated in *Curley* to a conclusory assertion "certainly there has been the presentation of evidence from which a reasonable fact finder could find guilt beyond a reasonable doubt." [A-1329]. Once again, Judge Holeman neither identified nor addressed any of the facts and legal argument which Sassower had presented – just as Mr. Mendelsohn had neither identified nor addressed them in opposing the motion [A-1329].

Both these motions were sufficient – under *Curley* -- to require Judge Holeman to grant a directed judgment of acquittal – and, indeed, to render dismissals on the matters of law presented.

Sassower's first motion [A-1027-32] identified that the videotape which the prosecution had introduced was "conclusive evidence that there was no act of disruption of Congress within the statute, within the proof, within the burden of proof." In substantiation, she proffered her July 7, 2003 memorandum to the ACLU [A-1565], containing her analysis of the videotape and additionally demonstrating that the underlying prosecution documents were materially false and misleading. She also identified that her 39-page May 21, 2003 fax to Detective Zimmerman [A-102], which Detective Zimmerman had acknowledged receiving, established that there was no intent. She further pointed out that Senator Chambliss, though identified as the complainant on the underlying prosecution documents [A-88, 89], had not

been called by the prosecution as a witness in support of the charge, that Senate Legal Counsel had moved to quash her subpoena – and that she had Sixth Amendment confrontation rights. Finally, and in face of the evidence showing that there was no other incident where a citizen's respectful request to be permitted to testify at a congressional committee's public hearing resulted in a criminal charge of disruption of Congress, Sassower submitted,

> "as a matter of law, and as an elementary proposition, that a citizen's respectful request to testify at a congressional committee's public hearing is not and must never be deemed to be, disruption of Congress." [A-1032].

Sassower's second motion [A-1326-9] asserted that the case "fails as a matter of law". She stated "The evidence now resoundingly shows that the Senate Judiciary Committee hearing was adjourned. That at issue is a public congressional hearing at which a respectful request was made to testify. That is consistent with what a hearing is supposed to be about. The taking and receiving of testimony." Sassower repeated that no precedent had been shown of another case where a citizen's respectful request to testify had resulted in arrest; that there had been no appearance by the complainant to support the prosecution against her, and that it appeared that no one at the Senate Judiciary Committee had been willing to put their name to such a proposition that a respectful request to testify at a congressional hearing is disruption of Congress. Additionally, she stated that there was no evidence in the record that she intended anything but to respectfully and appropriately request to testify – which is what she had done – and that her intent was "clear as a bell stated over and again and most particularly in the 39-page May 21st fax to Capitol Police". She pointed out that there was no sign at the Senate Judiciary Committee warning people not to request to testify, that the Senate Judiciary Committee had not come forward with any rules or regulations relating to requests to testify at

a public hearing, and that she had inquired as to the rules and procedures, and none were forthcoming. She then continued,

> "Finally, again critical to this charge is that when someone claims the right to speak in a public place, the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.
>
> Again, we are talking about a public congressional hearing --".

As Sassower was adding "and consistent with the purpose of a hearing" [A-1238-9], Judge Holman cut her off, preventing any further elaboration of her motion.

As hereinbelow summarized, the interpretive commentary and case citations annotating Judge Holeman's "Elements of the Offense" [A-1403], evidence his knowledge that Sassower was entitled to a directed judgment of acquittal.

**Judge Holeman's Failure to Properly Charge the Jury, Especially with Respect to the "Defense Theory of the Case"**

This Court has held that:

> "Where a narrowing construction or interpretation has been placed by a court upon a statute that, absent the narrowing construction, might otherwise be unconstitutional in some respect, that narrowing construction or interpretation, upon request and where supported by the evidence, must be the subject of proof at trial and should be submitted to the trier of fact for its determination." *Hasty v. United States*, 669 A.2d 127, 133 (1995).

It has further stated:

> "failure to give an instruction embodying a defense theory that negates guilt of the crime charged, when properly requested and **supported by any evidence,** is necessarily reversible error.' *Gray v. United States*, 549 A2d 347, 350-351 (D.C. 1988)", *Russell v. United States*, 698 A2d 1007, 1016 (1997) (bold in the original).

Judge Holeman's knowledge of the law from which the evidence in this case had to be viewed is reflected by the interpretive commentary and case citations to his "Elements of the Offense" [A-1403], which, *sua sponte*, he presented to the parties on April 13, 2004, already

signed. His recognition that "disorderly and disruptive conduct" is "conduct that hinders or interferes with the peaceful conduct of governmental business", for which he cited *Smith-Caronia v. United States*, 714 A.2d 764, 766 (1998), meant he knew that there could be no "disruption of Congress", as a matter of law, once the hearing had been adjourned. He certainly knew this had he read *District of Columbia v. Gueory*, 376 A.2d 834 (1977), whose significance is evident from *Smith-Caronia*. Likewise, he would have known this had he read *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the underlying source for his interpretive commentary that "When someone claims the right to speak in a public place, 'the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time'" and so-reflected by *Armfield v. United States*, 811 A.2d 792, 796 (2002), which his "Elements of the Offense" cited for such proposition [A-1403].

Judge Holeman's interpretive commentary for "disorderly and disruptive conduct" in his "Elements of the Offense" was too insufficient and vague to alert the jury that once a congressional body is adjourned, there can be no hindrance or interference with its "peaceful conduct of governmental business" as a matter of law. The two paragraphs from Mr. Goldstone's "defendant's theory of the case", which Judge Holeman excluded in charging the jury [A-1314, 1348-9], both highlighted that the hearing was adjourned – a material fact as to which the jury required the necessary law to render their verdict. Judge Holeman gave no reason for excluding Mr. Goldstone's proposed two paragraphs, other than his agreement with Ms. Liu's objection to them. Her objection to Mr. Goldstone's second paragraph that

> "A citizen's respectful request to testify following adjournment of the public hearing is not disorderly and disruptive conduct as it does not hinder or interfere with the peaceful conduct of government business",

was ambiguous in stating "I think that's an argument of law. It's certainly not well established that that's the case." [A-1313]. As Judge Holeman could be expected to know, the legal significance of "adjournment" is not only "well established", but the fact of the hearing's adjournment was evidentiarily established by the videotape [A-1574], for which a directed verdict was called for. Indeed, the law pertaining to an already-adjourned proceeding made irrelevant what Sassower had said at the hearing, *to wit*, her respectful request to testify -- and the jury should have been so-instructed by Judge Holeman.

Although, as a matter of law, the videotape precluded the jury from finding anything but that the hearing was adjourned – for which reason, based on the law, Judge Holeman was required to throw the case out on Sassower's motions for judgment of acquittal – Sassower was additionally entitled to a jury instruction that separated out the adjournment issue from the independent proposition:

> "A citizen's respectful request to testify at a public congressional hearing is not – and must never be deemed to be – 'disruption of Congress'".

From the record before him – including Sassower's already-made first motion for judgment of acquittal [A-1032] -- Judge Holeman may be presumed to have realized that this was her "considerably stronger" proposition to which she referred [A-1314] when he excluded Mr. Goldstone's two paragraphs. Judge Holeman denied her the right to set it forth, stating "I don't care what your proposition is. I don't want to hear from you at this time. Please be seated..." [A-1314]. This, after telling her that "Mr. Goldstone is an officer of the court and understands what he's doing" [A-1314].

Evident from Judge Holeman's "Elements of the Offense" that "the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time" [A-1403] is that Sassower's proposition as to "a citizen's

respectful request to testify" was also a matter of law. She was likewise entitled to a jury instruction to this effect if he was not going to direct a judgment of acquittal as to this further video-supported defense.

**Judge Holeman's Response to Sassower's Motion to Set Aside the Verdict as Against the Weight of the Evidence and Contrary to Law**

On April 20, 2004, Judge Holeman responded to Sassower's oral motion "to set aside the jury verdict as against the weight of evidence and contrary to law" by telling her she could file a post-trial motion for such relief [A-1397]. For a judge who had acted from-the-bench and/or *sua sponte* on a whole range of substantive issues, not before him on motion papers, no formal motion should have been necessary. All the uncontested facts and legal propositions warranting the granting of Sassower's oral motions for judgment of acquittal [A-1027-32, 1326-29], reiterated by her closing statement [A-1366-77], warranted his granting of her oral motion to set aside the verdict as "against the weight of evidence and contrary to law".

As to "the weight of evidence", no evidence was weightier and more dispositive than the videotape of the Senate Judiciary Committee's May 22, 2003 hearing. It established that there was no act of "disruption of Congress" in that (1) Senator Chambliss had already announced the hearing "adjourned" before Sassower began to speak; and (2) Sassower's words at the hearing were a respectful request to testify, "Mr. Chairman, there's citizen opposition to Judge Wesley based on his documented corruption as a New York Court of Appeals judge. May I testify?". The materially false and evasive trial testimony of Officer Jennings and Sergeant Bignotti could not override this celluloid DNA, the material portions of which were audible [A-1574-7].[32]

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[32] Both testified that Sassower had said, "Judge Wesley, look into the corruption of the New York Court of Appeals" [A-902, 903, 905] – with Officer Jennings purporting that

The absence of any act of "disruption of Congress" made Sassower's intent irrelevant. Yet, as Judge Holeman knew, his *sua sponte*, without notice, halting of her testimony deprived the jury of the most important evidence establishing that she had no intent to disrupt Congress. He thereby prevented Sassower from testifying as to those aspects of what had taken place at the May 22, 2003 hearing not recorded by the videotape and as to her conversations with Special Agent Lippay, Detective Zimmerman, Officer Jennings, Sergeant Bignotti, Mr. Albert and Ms. Eve – from which the prosecution, in its closing [A-1357-66; 1377-9], had culled the supposed indicia of her intent. Judge Holeman could be presumed to have recognized that this indicia, played up by the prosecution as if it were probative, was utterly misleading where not outrightly false -- and that the best evidence of her intent was her 39-page May 21, 2003 fax to Detective Zimmerman [A-102].

As to the law – the purview of the judge, not the jury – Judge Holeman's recital of interpretive law in his own "Elements of the Offense" [A-1403], as hereinabove summarized [ , *supra*], reflected his knowledge that Sassower was entitled to having her conviction set aside as "contrary to law".

## 1-B JUDGE HOLEMAN'S POST-TRIAL RULINGS ARE FURTHER CONFIRMATORY OF HIS PERVASIVE ACTUAL BIAS & ARE FACTUALLY AND LEGALLY INSUPPORTABLE

**Judge Holeman's June 28, 2004 Sentencing of Sassower**

This Court has recognized that there are circumstances where a trial judge's sentencing of a defendant gives rise to "a presumption of vindictiveness" – and that in such circumstances, the reasons for the sentence "must affirmatively appear" in order for the

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Sassower said this twice, the second time being after presiding chairman called for order when she "continued to attempt to testify at the hearing" [A-903]. Conspicuously, neither could recall the words Sassower used in "wanting to testify".

presumption to be rebutted, *Johnson v. United States*, 628 A.2d 1009, 1012 (1993), quoting *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969).

At bar, the circumstances of Sassower's sentencing gave rise to a "presumption of vindictiveness" by Judge Holeman. Pretrial, Sassower had twice moved for his disqualification [A-265, 375], had repeatedly sought supervisory oversight from supervisory judges and administrative personnel [A-426, 435, 454], had stated her intention to file a judicial misconduct complaint against him, irrespective of the outcome of the trial [A-435, 383], had brought a mandamus/prohibition proceeding to remove him [#04-OA-17], and, following a trial permeated with flagrant violations of her rights, had received from him two sentences [A-1722, ln. 1 & A-1728, ln. 15], each dramatically deviating from the recommendations of the D.C. Court Services' presentence report [A-1618] and the prosecution's memorandum in aid of sentencing [A-1619] – with the superseding second sentence imposing the maximum six-month jail time allowable under the "disruption of Congress" statute.

Judge Holeman gave no reason for departing from the sentencing recommendations in the record before him. Both the D.C. Court Services' presentence report [A-1617 "EVALUATIVE SUMMARY"] and the prosecution's memorandum in aid of sentencing [A-1620-1: "DEFENDANT HAS FAILED TO TAKE ANY RESPONSIBILITY FOR HER ACTIONS"] recognized that Sassower was not remorseful, contrite, and acknowledged no wrongdoing. Even still, the Court Services' "RECOMMENDATION" was not jail, but a "Fine" [A-1618]. The prosecution's recommendation was "five days of incarceration, all suspended, and six months of probation conditioned on completion of an anger-management course." [A-1619].

Judge Holeman's original 92-day jail sentence [A-1722, ln. 1] was 18 times the five days deemed appropriate by the prosecution. The superseding six-month jail sentence he imposed after Sassower declined probation [A-1728, ln. 15] was 36 times. As for the rejected probation, its two-year term [A-1722, ln. 4] was four times what the prosecution had recommended and attached a laundry list of conditions which, with the exception of the anger management course, were entirely Judge Holeman's own. These *sua sponte* conditions, as well as the anger management course, not only had no basis in the record, but were irrelevant to the "disruption of Congress" charge. Their inclusion was to degrade, impugn, and harass Sassower, including by intruding on her CJA employment to the point of surveillance and to prevent her from discharging her professional duties by appropriate First Amendment petitioning of the Senators in matters pertaining to the corruption of federal judicial selection and discipline[33].

Judge Holeman gave no reason for any of the probation terms – or for his original 92-day jail sentence. He also gave no reason for imposing his superseding six-month jail sentence, except what he termed Sassower's "pride" in withholding her consent to probation [A-1728, ln. 22]. Such conclusory assertion as to Sassower's "pride" was without any inquiry of Sassower as to why she was withholding consent and had no basis in the record.

Yet, Judge Holeman's sentences, both original and superseding, were not only without basis in the record, they were also without basis in precedent. There had never been a "disruption of Congress" case against a citizen for respectfully requesting to be permitted to testify at a public congressional hearing, let alone, as here, where the hearing was already adjourned. Sassower highlighted this at the June 28, 2004 sentencing, wherein she referred to

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33 *See* Issue IV, *infra*.

what appeared to be a practice of not arresting citizens at committee hearings, even where their conduct was disruptive and provocative. Judge Holeman cut her off as she cited three incidents, two within the previous nine weeks [A-1721].

**Judge Holeman's June 28, 2004 Denial of Sassower's Request for a Stay Pending Appeal**

> "...when the trial court recognizes its right to exercise discretion but declines to do so, preferring instead to adhere to a uniform policy, it also errs. *Berryman v. United States*, D.C. App, 378 A2d 1317, 1320 (1977), *Springs v. United States*, D.C. App. 311 A.2d 499, 501 (1972)", *Johnson v. United States*, 398 A.2d 354 (1979).

The record showed no basis for Sassower's immediate incarceration such that the propriety of Judge Holeman's sentencing and the lawfulness of her conviction could not first be tested by the appellate process. In denying Sassower's request for a stay pending appeal [A-1729-30], Judge Holeman made no claim that he believed that either Sassower's conviction or his sentence could stand on appeal. As he knew from his profound due process violations of her rights – such as reflected by Sassower's May 25, 2004 letter for inclusion in the presentence report [A-1685] and her June 28, 2004 affidavit commenting upon and correcting the presentence report and opposing the U.S. Attorney's memorandum in aid of sentencing [A-1641] – they could not.

As to Judge Holeman's asserted reason for denying Sassower a stay, *to wit*, that it would show her "favorable treatment" that he had "not in the past shown any other convicted criminal defendant" and he would not "start the practice now" [A-1730], such represented a prefixed position not to evaluate whether the facts and law in her case entitled her to a stay and release pending appeal, as was his duty to do. From the record before him, he knew she fully qualified for release pending appeal since – over and above the fact that her likelihood of

success on appeal was 100% by reason of his pervasive actual bias, denying her due process -- she was not a flight risk and posed no threat to persons or property.

**Judge Holeman's November 22, 2004 Order Denying Sassower's Motion to Correct an Illegal Sentence**

Like his pretrial orders, Judge Holeman's November 22, 2004 order denying, as "devoid of merit", Sassower's October 26, 2004 motion pursuant to D.C. Criminal Procedure Rule 35(a) and D.C. Code §23-110(a) to correct an illegal sentence and denying a hearing was a "judicial lie", being factually and legally insupportable and fabricated.

The November 22, 2004 order [A-10] was fashioned on concealing the very basis upon which the October 26, 2004 motion [A-1739] was made: that the six-month jail sentence was an illegal second sentence, superseding a legal first sentence of 92 days.

The order nowhere referred to this 92-day sentence. Even in acknowledging Sassower's contention that she was "sentenced twice" and that "the imposition of 6 months incarceration is a *second* sentence, and therefore illegal" [A-13, italics in order], the order purported Sassower "argues that the rejected proposal of probation is a *first* sentence" [A-13, italics in order]. This is untrue. The motion argued that the first sentence was the 92-day sentence, announced by Judge Holeman before setting forth any proposal of probation [A-1743, 1745-6, 1752-4].

As this first 92-day sentence was dispositive of Sassower's entitlement to relief under Rule 35(a) and 23-110(a), the November 22, 2004 order concocted a fiction that Judge Holeman had not imposed any sentence until after Sassower rejected probation:

> "On June 28, 2004 Defendant was offered probation, Defendant rejected probation, and only following Defendant's clear and unequivocal rejection of probation was sentence imposed." [A-13].

The flagrant untruth of this and similar statements in the November 22, 2004 order is established by the June 28, 2004 transcript [A-1707], which Sassower's motion not only quoted from, but annexed [A-1745]. It shows Judge Holeman's announcement, "I'm sentencing you to 92 days; I'm going to give you credit for any time served in this case. I'm going to suspend the execution as to all remaining time." [A-1722] This is then followed by his recitation of probation terms [A-1722-7], after which, upon Sassower's rejection of probation [A-1728], Judge Holeman scrapped the originally announced 92-day sentence with the words, "You are sentenced to six months incarceration." [A-1728].

Yet, Judge Holeman's November 22, 2004 order was not only factually false in its claim that no sentence had been imposed upon Sassower until after she had rejected probation, it was also without the slightest legal support for such proposition. This would have been evident had the order cited the statutory provision governing the offering of probation to a defendant and his right of consent thereto. It is D.C. Code §16-760 and its pertinent language, quoted in Sassower's motion, states:

> "...the court may, upon conviction...impose sentence and suspend the execution thereof, or impose sentence and suspend the execution of a portion thereof, for such time and upon such terms as it deems best if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby. In each case of the imposition of sentence and the suspension of the execution thereof, or the imposition of sentence and the suspension of the execution of a portion thereof, the court may place the defendant on probation under the control and supervision of a probation officer....A person may not be put on probation without his consent.".

This Court in *Schwasta v. United States*, 392 A.2d 1071, 1073 (1978), has provided the obvious interpretation of this statutory language, *to wit*, that it "permits the trial court to grant probation only after it has imposed a sentence and suspended its execution." Consequently, had Judge Holeman done what his November 22, 2004 order claimed, namely,

not imposed any sentence until after Sassower rejected probation, such would have violated D.C. §16-760 and its explicit interpretation in *Schwasta*.

A multitude of other deceits permeate the November 22, 2004 order – worthy of note only because they further demonstrate the unremitting pervasiveness of Judge Holeman's dishonesty, the consequence of which was to wrongfully incarcerate Sassower for the last remaining month of the six-month sentence – rather than release her in time for Thanksgiving. Among these deceits, (1) his repetition of the fact that the six-month sentence was within the maximum allowed by the "disruption of Congress" statute [A-10, 12, 13] – when that was completely irrelevant to the basis upon which Sassower's motion contended the sentence was illegal; (2) his repeated assertion that the motion was untimely for purposes of "correcting a sentence imposed in an illegal manner" and implication that the motion was brought on such ground [A-11, 12] – when it was not; (3) his pretense that Sassower's motion rested on "mere conclusory allegations, the authority cited inapposite and non-controlling, and the argument confusing" [A-11, 12] – for which he offered not a single example; (4) his pretense that Sassower's motion was "in substantial part, a critique of the *proposed conditions* of probation presented to Defendant prior to the imposition of sentence." [A-3, italics in his order) – when most of the motion was addressed to the legality of his superseding six-month sentence, not any of the probation conditions; (5) his pretense that Sassower's motion had contended that Judge Holeman's first sentence was "the rejected proposal of probation"[34] [A-13] – when her

[34] As to Judge Holeman's assertion that "a proposal of probation is not a sentence under any reading of authority" [A-13], the law review article cited by Sassower's motion, "*Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*", 57 Wash & Lee L. Rev 75, 93 (2000) [A-1750] reflects that that is not the case. "A small minority of states, as well as, notably, the federal legislature have explicitly declared probation to be a sentence...". *See*, 18 U.S.C. 3551(b) (1994) "identifying probation as sentence".

motion clearly stated that the first sentence was his announcement of 92 days; (6) his pretense that "Defendant's current argument that she was sentenced twice is inconsistent with the record" [A-13] – when the transcript irrefutably established that she had been "sentenced twice"; (7) his declaration that "The sentencing judge is empowered to offer a defendant sentencing alternatives from which the defendant may choose" [A-13-4] – falsely implying that he had offered Sassower the choice of probation or six months incarceration as "sentencing alternatives", when, in fact, he imposed the six-month jail sentence without the slightest prior notice to Sassower, who he had already sentenced to 92-days; (8) his pretense that there could be no challenge to his jurisdiction [A-10-11, 12], when, as he knew from Sassower's April 6, 2004 petition for a writ of mandamus/prohibition, he was without authority to proceed further by reason of her sufficient February 23 and March 22, 2004 motions for his disqualification [A-265, 375]; (9) his misrepresenting D.C. Code §23-110(e) as "expressly prohibit[ing] consideration of a second or successive motion for similar relief on behalf of the same prisoner." [A-12-3], when its plain language confers discretion on the judge to entertain further motions; (10) his misrepresentation of Sassower's motion as "nothing more than a reiteration of issues" presented by her September 23, 2004 motion for release to preclude mootness [A-1732] and her virtually identical prior motion to this Court [A-13] – when, in fact, both those motions were limited to precluding mootness on appeal of the issue of the legality of the six-month sentence; (11) his pretense that Sassower was not entitled to a hearing pursuant to D.C. Code §23-110 because her "constitutional claims are not only conclusory, they are palpably incredible" [A-13]; because her "claims do not merit a hearing" [A-14] and because "On its face the Motion fails" and "the existing record provides an adequate basis for denying the Motion" [A-14].

## ISSUE II

**D.C. CODE §10-503.18 ENTITLED SASSOWER TO REMOVAL/TRANSFER TO THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA -- WHERE, ADDITIONALLY, THE RECORD ESTABLISHES A PERVASIVE PATTERN OF EGREGIOUS VIOLATIONS OF HER FUNDAMENTAL DUE PROCESS RIGHTS AND "PROTECTIONISM" OF THE GOVERNMENT**

It does not appear that this Court – or any other -- has ever interpreted D.C. Code §10-503.18 – the section of the District of Columbia Code pertaining to prosecutions for offenses committed on "Capitol Grounds" under D.C. Code §10-503.16. In pertinent part, it states:

> "(c)...Prosecution for any violation of 10-503.16(a) or for conduct which constitutes a felony under the general laws of the United States or the laws of the District of Columbia shall be in the United States District Court for the District of Columbia. All other prosecutions for violations of this part **may** be in the Superior Court of the District of Columbia.... (bold added for emphasis)

In other words, while a prosecution for "disruption of Congress" pursuant to D.C. Code §10.503.16(b)(4), "**may** be in the Superior Court for the District of Columbia", it is actually properly venued in the United States District Court for the District of Columbia.

Based on the language of D.C. Code §10.503.18, Sassower was legally entitled to have the U.S. Attorney prosecute the "disruption of Congress" charge against her in the U.S. District Court for the District of Columbia, with no special showing by her required for that venue. That being said, the record of this case establishes a pervasive pattern of judicial lawlessness and "protectionism" of the government[35], warranting removal to another venue.

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[35] This includes the wilful failure of supervisory authorities of the Superior Court to respond to Sassower's February 26, February 27, and March 17, 2004 memoranda for their supervisory oversight of Judge Holeman [A-426, 435, 454], as well as this Court's response to her April 6, 2004 mandamus/prohibition/certiorari petition and stay application – a prelude to what this Court thereafter did on her motions for release from incarceration pending appeal of Judge Holeman's six-month jail sentence.

Sassower's rights under D.C. Code §10-503.18 were presented for the first time by her March 22, 2004 motion [A-375]. Her interpretation of D.C. Code §10-503.18 was drawn from the plain meaning of its language [A- 401-2] and not denied or disputed by the prosecution's March 23, 2004 opposition [A-464]. Judge Holeman's March 29, 2004 order [A-466] disposed of the issue by falsely purporting that Sassower had presented "no...change in substantive law, nor citation of any legal authority supportive of the requested relief" [A-466-7].

## ISSUE III

## D.C. CODE §10-503.16(B)(4) IS UNCONSTITUTIONAL, AS WRITTEN & AS APPLIED

### *The Statute is Unconstitutional as Written*

In *Armfield v. United States*, this Court quoted the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), as to the standard by which speech and expressive conduct in public places might be restricted, consistent with the First Amendment:

> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

This "crucial question" – which Judge Holeman quoted in his "Elements of the Offense", citing *Armfield* [A-1403] -- makes obvious that a citizen's respectful request to testify at a public congressional hearing – as at bar -- cannot be prosecuted under D.C. Code §10-503.16(b)(4). Quite simply, such request is compatible with the "normal activity" of a public congressional hearing, *to wit*, the taking of testimony, including from members of the public.

The essential and necessary role of citizen participation in this "normal activity" as relates to the Senate Judiciary Committee's public hearings to confirm federal judicial nominees – at issue herein – was reflected in the record before Judge Holeman, including . Sassower's 39-page May 21, 2003 fax to Detective Zimmerman [A-102]. That fax, the dispositive document in Sassower's October 30, 2003 discovery/disclosure/sanctions motion [A-39], referenced and quoted from a variety of sources with respect to citizen participation [A-122, 128 (fn. 6)]: the 1986 Common Cause report, Assembly-Line Approval [A-1587], the 1988 Twentieth Century Fund book, Judicial Roulette [A-1595], and the 1975 book by the Ralph Nader Congress Project, The Judiciary Committees [A-1579] whose chapter, "*Judicial*

*Nominations: Whither 'Advice and Consent'?*", described a confirmation hearing at which the presiding chairman inquired "if anyone in the room wished to speak on behalf of or against the nominee" [A-1584, 128 (fn. 6)] – a hearing not represented to be atypical in that or any other respect.

From *Grayned*, it is clear that D.C. Code §10-503.16(b)(4), as written, is unconstitutional. Whereas the anti-noise statute upheld in *Grayned* involved noise "adjacent" to a school while in session – in other words, was explicitly restricted to a single "particular place at a particular time" -- D.C. Code §10-503.16(b)(4) is not narrowly-tailored to a public congressional hearing. Rather, it reads:

> "(b) It shall be unlawful for any person or group of persons willfully and knowingly:
>
> * * *
>
> (4) To utter loud, threatening, or abusive language, or to engage in any disorderly or disruptive conduct, at any place upon the United States Capitol Grounds or within any of the Capitol Buildings, with intent to impede, disrupt, or disturb the orderly conduct of any session of the Congress or either House thereof, or the orderly conduct within any such building of any hearing before, or any deliberations of, any committee or subcommittee of the Congress or either House thereof."

It thus combines more than a single "particular place at a particular time". More significantly, it combines places having divergent "normal activity". The "normal activity" of sessions of Congress and either House, as likewise of their committee/subcommittee deliberations, consists of communications between and among the members of those bodies – with the public having no role. [36] By contrast, the "normal activity" of public committee/subcommittee hearings is the taking of testimony from non-members of Congress – frequently members of the public.

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[36] "The public is admitted to the gallery to observe, nothing more", *Smith-Caronia*, 714 A.2d 764, 765 (1998).

Exacerbating this facial unconstitutionality of D.C. Code §10-503.16(b)(4) is the absence of any caselaw with respect to its combination of places with disparate "normal activity". Indeed, neither this Court's decision in *Smith–Caronia v. United States*, 714 A.2d 764 (1998), upholding the constitutionality of the language thereafter recodified as D.C. Code §10-503.16(b)(4), nor its decision in *Armfield* resting thereon, have anything to do with committee/subcommittee hearings – or any conduct which would be compatible with same. *Smith-Caronia* and *Armfield* involved conduct in the galleries of the Senate and House respectively, which had it been committed during a committee/subcommittee hearing, may also have been deemed disruptive. Those cases, because they arise from conduct in the galleries where citizens are invited only to observe, never participate, do not control and have little to do with the constitutional challenge to D.C. Code §10-503.16(b)(4) here presented arising from a public congressional hearing. Nor do they control for a further reason: in *Smith-Caronia* and *Armfield*, the respective "disruptions" occurred while the Senate and House were in session.

Obvious from *Smith-Caronia* and *Armfield* (at 798) is that there can be no "disruption of Congress" if the congressional body is adjourned because its "normal activity" has then ceased. *Smith-Caronia* explicitly rests on this Court's decision in *District of Columbia v. Gueory*, 376 A.2d 834 (1977). It describes that case as one in which the Court "sustained against First Amendment challenge an almost identically worded Commissioner's order", construing its language as "prohibiting only 'actual or imminent interference' with the peaceful conduct of governmental business." As evident from *Gueroy* (at 837), the standard of "actual or imminent interference' with the peaceful conduct of governmental business" is

derived from *Grayned*, where the Supreme Court upheld a statute which unambiguously contained a time restriction for school while "in session".

To the extent there is ambiguity that the language "any session of the Congress or either House thereof" means "in session", with proceedings in progress and not adjourned – and that this applies, as well, to the language "any hearing before...any committee or subcommittee of the Congress or either House thereof", D.C. Code §10-503.16(b)(4) is facially deficient.

From the discussion in *Smith-Caronia* as to why the language that is now D.C. Code §10-503.16(b)(4) "comfortably meets" the standards of facial constitutionality (at 766) – a discussion largely resting on *Gueory* -- it is evident that D.C. Code §10-503.16(b)(4), is unconstitutional as applied to the facts of this case. Thus, although the statute is "viewpoint-neutral on its face", it can, as here, readily lend itself to being utilized for discriminatory, selective, and retaliatory purposes. Although the statute also "leav[es] open ample means of communication not calculated to disrupt the orderly conduct of the legislature's business", no effective alternative means of communication is, in fact, available. Nor does this case support the proposition that the statute only prohibits "loud speech and other acts both of a nature to and specifically intended to disrupt the businesses of Congress". Moreover, as stated in *Gueory* (at 838), "It has long been recognized that a requirement of knowing conduct can serve to narrow a statute attacked on overbreadth and vagueness grounds" and "Intent requirements have also narrowed statutes attacked specifically under the First Amendment on overbreadth and vagueness grounds." That being the case, this Court's admission in *Armfield* (at 797-8) that it has "not squarely addressed the question of what kind of evidence is required

to establish the specific intent necessary for conviction" under the "disruption of Congress" statute means that D.C. Code §10-503.16(b)(4) has been not been appropriately narrowed .

***The Statute is Unconstitutional as Applied***

The instant case is unprecedented. No decisions have been located with any facts remotely resembling those at bar: a citizen arrested and prosecuted under the statutory provision that is now D.C. Code §10-503.16(b)(4) for respectfully requesting to testify at a public congressional hearing, where, additionally, the request is made after the hearing has been "adjourned" and where the record shows that "alternative channels of communication" to the pertinent members of Congress and congressional offices were exhausted prior thereto.

Precisely because the facts of this case do not support a prosecution under D.C. Code §10-503.16(b)(4), they were concealed and falsified by Capitol Police in materially false and misleading prosecution documents in which the U.S. Attorney was complicitous. Such concealment and falsification is established by the videotape of the Senate Judiciary Committee's May 22, 2003 hearing and further buttressed by Sassower's "paper trail" of correspondence [A-102-140, 1431-1539, 142-148], most specifically, by her 39-page May 21, 2003 fax to Detective Zimmerman [A-102] and her May 28, 2003 memorandum to Senate Judiciary Committee Chairman Hatch and Leahy [A-142] – each pivotal documents in her October 30, 2003 discovery/disclosure/sanctions motion [A-39].

The U.S. Attorney never came forward with any decisional law criminalizing what the videotape and substantiating "paper trail" evidentiarily establish -- a citizen's respectful request to testify at a public congressional hearing, made after the hearing was announced "adjourned" and against a record establishing that her repeated efforts to communicate with the Senators and/or supervisory staff by alternative means were all unavailing. Nor did the

U.S. Attorney make any production with respect to the very first item in Sassower's August 12, 2003 first discovery demand [A-70] for:

> "(1) Any and all records of arrests by Capitol Police of members of the public for requesting to testify in opposition to confirmation of federal judicial nominees at Senate Judiciary Committee hearings -- particularly where the arrestee was charged with 'disruption of Congress' (10 D.C. Code Section 503.16(b)(4))".

Indeed, the precedent for Capitol Police's handling of a citizen's respectful request to testify at a Senate Judiciary Committee confirmation hearing was supplied by Sassower herself: the Committee's June 25, 1996 confirmation hearing at which, prior to adjournment, Sassower had risen to respectfully request to testify with "citizen opposition". She was neither arrested nor even removed from the hearing room.

In *Grayned*, the Supreme Court laid out three grounds for striking a law as unconstitutionally vague:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[fn. 3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[fn. 4] A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[fn. 5] Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,'[fn. 6] it 'operates to inhibit the exercise of those freedoms.'[fn. 7] Uncertain meanings inevitably lead citizens to ''steer far wider of the lawful zone'...than if the boundaries of the forbidden areas were clearly marked.'[fn. 8]" (at 108).

The record of this case establishes each of these three grounds.

First, D.C. Code §10-503.16(b)(4) is plainly an impermissible "trap [for] the innocent". There is nothing in its generic language that would lead "a person of ordinary intelligence" to

believe that a respectful request to testify at a public congressional hearing – made at an appropriate point of the hearing -- is prohibited conduct. Reflecting Sassower's good-faith, reasonable belief as to what was permissible[37] is her 39-page May 21, 2003 fax to Detective Zimmerman [A-102] – also sent to Senate Judiciary Committee Chairman Hatch and Ranking Member Leahy, and New York Home-State-Senators Schumer and Clinton. Such fax presented her contention, based on prior Senate Judiciary Committee precedent cited in the 1975 book of The Ralph Nader Congress Project [A-1584], that the presiding chairman at the May 22, 2003 hearing could and should inquire whether anyone present wished to testify and that, if he did not, she had "a citizen's right in a democracy to peaceably and publicly request to testify in opposition". None of the recipients of the May 21, 2003 faxes denied or disputed this – let alone responded that she would be liable for arrest and prosecution if she made such respectful request – and that D.C. Code §10-503.16(b)(4) would furnish a legal basis therefore.

Certainly, if such respectful request warranted arrest under D.C. Code §10-503.16(b)(4), Sassower should have been arrested at the June 25, 1996 hearing for her respectful request to testify with "citizen opposition". That she was not arrested only reinforced her good-faith, reasonable belief as to the lawfulness of any similar request as she would make at the May 22, 2003 hearing -- and here too the recipients of the May 21, 2003 faxes did not respond to the contrary.

Second, D.C. Code §10-503.16(b)(4) lends itself to arbitrary and discriminatory enforcement by its failure to "provide explicit standards for those who apply [it]." This is evident from the incidents to which Sassower referred at the June 28, 2004 sentencing [A-

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[37] A defendant's "bona fide belief" in the lawfulness of his actions "may negate criminal intent, and thereby exonerate behavior which otherwise contravenes the [criminal] statute", *Leiss v. United States*, 364 A2d 803, 809 (1976).

1721], of protestors who, having disrupted hearings in-progress, had not been arrested[38]. Each of the cited incidents was disruptive – in contrast to what Sassower did in respectfully requesting to testify in opposition to Judge Richard Wesley's confirmation to the Second Circuit Court of Appeals – which she did not do until presiding chairman Chambliss had announced the Senate Judiciary Committee's May 22, 2003 hearing "adjourned" [A-1246-49, 1265-67, 1574]. Such palpably selective arrest and prosecution of Sassower is precisely the kind of arbitrary, discriminatory, disparate treatment that runs afoul of the equal protection guarantees of our Constitution.

Tellingly, the U.S. Attorney supplied NO documents in response to the second item in Sassower's August 12, 2003 first discovery demand for

> "(2) Any and all documents pertaining to the protocol and/or guidelines of Capitol Police for responding to 'disruptive' conduct by members of the public and for evaluating when arrest is appropriate",

except for a copy of D.C. Code §10-503.16 itself. This, notwithstanding it was clear from Detective Zimmerman's testimony upon Sassower's cross-examination that such protocol exists [A-857-8].

The "lack of explicit standards" in D.C. Code §10-503.16(b)(4) was evidenced at trial by the testimony of Officer Jennings, purported to be the "arresting officer" by the underlying

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[38] The particulars of these incidents were set forth in Sassower's draft memorandum of law on the unconstitutionality of the "disruption of Congress" statute, as written and as applied – which, as evident from the face of the document, she had intended to hand up to Judge Holeman in support of her request for a stay pending appeal. These incidents were (1) the eight or nine protestors at the May 7, 2004 Senate Armed Services Committee hearing, who unfurled a banner "FIRE RUMSFELD" and similarly shouted out; (2) the protestor at the April 27, 2004 Senate Foreign Relations Committee hearing to confirm John Negroponte as ambassador to Iraq, who objected to Mr. Negroponte's response to a question; and (3) this same protestor, in September 13, 2001, interrupting a Senate Foreign Relations Committee hearing to confirm Mr. Negroponte to be U.S. ambassador to the United Nations by holding a small sign and telling Mr. Negroponte that "the People of Honduras consider you to be a State terrorist".

prosecution documents [A-88, 89], and Sergeant Bignotti, the true arresting officer. On cross-examination, Officer Jennings not only conceded that it was Sergeant Bignotti who had arrested Sassower [A-954-5], but testified that his response to Sassower had not been – as Sergeant Bignotti's was – to order her from the hearing room, but, rather, to tell her to sit down [A-953]. Since their testimony as to Sassower's conduct did not materially diverge [A-888-960 / A-961-1023], their incompatible responses as to whether Sassower's arrest was warranted may reasonably be attributed to the "lack of explicit standards" of D.C. Code §10.503.16(b)(4). At bar, such permitted Sergeant Bignotti to give reign to her vindictive, personal *animus* against Sassower for filing a police misconduct complaint against her in 1996, based on her role in Sassower's arrest in the hallway outside the Senate Judiciary Committee on June 25, 1996 on a trumped-up "disorderly conduct" charge [A-59-60]. Such was over and beyond any directive Sergeant Bignotti may have received, as the senior officer assigned, from Capitol Police and/or the Senate Judiciary Committee to arrest Sassower – an arrest whose retaliatory purpose could easily be concealed within the vague, overbroad language of D.C. Code §10.503.16(b)(4).

Third, D.C. Code §10-503.16, as applied, unconstitutionally "abut[s] upon sensitive areas of basic First Amendment freedoms" because it has sustained an arrest, prosecution, and conviction of a person who not only did nothing more than respectfully request to testify with "citizen opposition" at the Senate Judiciary Committee's May 22, 2003 hearing – after the hearing was already announced "adjourned" -- where the record shows that her opposition testimony would have exposed not only Judge Wesley's "documented corruption" as a New York Court of Appeals judge, but the official misconduct of Home-State Senators Schumer and Clinton and the Committee's leadership under Chairman Hatch and Ranking Member

Leahy with respect thereto. As the "paper trail" of evidence establishes, these Senators were motivated to intimidate and arrest Sassower lest her appearance at the confirmation hearing and publicly-made request to testify pierce the Senators' "insulation" from culpability afforded by the staff underlings, whose misfeasance and nonfeasance she had so resoundingly documented. Indeed, it appears that such motive was actualized and that she was "set up" to be arrested. Sassower's analysis of the videotape describes the "tell-tale" signs [A-1576-7].

As applied, D.C. Code §10-503.16 is also unconstitutional for overbreadth. As the Supreme Court recognized in *Grayned*:

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. [fn.27] ... overbroad laws, like vague ones, deter privileged activity... The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." (at 114-115).

A respectful request to testify at a public congressional hearing – particularly, at a Senate Judiciary Committee hearing to confirm a "lifetime" federal judicial nominee – cannot be other than "constitutionally protected conduct", squarely within First Amendment free speech and petition rights. As this Court stated in *Matter of M.W.G.*, 427 A.2d 440 (1981) "[T]he circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed.", citing *Williams v. District of Columbia*, 419 F.2d 638, 645 (1979).

Finally, D.C. Code §10-503.16 is unconstitutional, as applied, because this Court, by its own admission, has "not squarely addressed the question of what kind of evidence is required to establish the specific intent necessary for conviction", *Armfield*, at 797-8. As a consequence, Judge Holeman was able to blithely ignore Sassower's 39-page May 21, 2003 fax to Detective Zimmerman [A-102] – whose two-fold significance in establishing that her

intent was to respectfully request to be permitted to testify and that the prosecution had no case to prosecute by reason thereof – was focally presented by her October 30, 2003 discovery/disclosure/sanction motion [A-48-58].

## ISSUE IV

**JUDGE HOLEMAN'S TERMS OF PROBATION FOR SUSPENDING EXECUTION OF THE ORIGINAL 92-DAY JAIL SENTENCE HE IMPOSED ON SASSOWER WERE IMPROPER AND UNCONSTITUTIONAL – AND THE SUPERSEDING SIX-MONTH JAIL SENTENCE HE SUBSTITUTED WHEN SHE EXERCISED HER RIGHT TO DECLINE THOSE TERMS PURSUANT TO D.C. CODE §16-760 WAS ILLEGAL AND UNCONSTITUTIONAL**

This Court has recognized that:

> "'judicial discretion in formulating terms and conditions of probation is...limited by the requirement that the conditions be reasonably related to the rehabilitation of the convicted person and the protection of the public.'", *Gotay v. United States*, 805 A.2d 944, 946 (2002), quoting *Moore v. United States*, 387 A.2d 714, 715 (1978).

It has also held that:

> "A trial judge may not penalize a defendant for not admitting guilt and expressing remorse since the jury has found him guilty. Such an admission might jeopardize his right of appeal or a motion for a new trial..." *Miller v. United States*, 255 A.2d 497, 498 (1969)

As the "disruption of Congress" charge was not based on any harassing, stalking, violent, threatening or intimidating conduct – and the record was devoid of any such conduct on Sassower's part – there was no basis for Judge Holeman to require that she:

(a) have "no verbal, written, telephonic, electronic, physical or other contact" with the nine Senators and Senate staffers whose trial testimony she had sought by subpoena, as well as the four police officers who had testified against her – with some relaxation of the prohibition as to Home-State Senators Schumer and Clinton (but none as to the other senators who, as members of the Senate Judiciary Committee and its leadership she would have reason to contact in connection with her work as CJA coordinator) [A-1726-7];

(b) stay away not only from the Senate Judiciary Committee and the three-block radius that was the prescribed condition for her release on her own recognizance at the May 23, 2003 arraignment, but from the entire Capitol complex of all Capitol buildings and grounds indicated on "maps provided herewith" and encompassing the Library of Congress, Supreme Court, Capitol Power Plant, etc. [A-1724-1726]

(c) stay away from Judge Wesley [A-1726];

(d) pay $250 to the Victims of Violent Crimes Compensation Fund [A-1722] – the statutory maximum.

As the record showed that Sassower had a secure job as CJA coordinator – which she had co-founded – and had answered Judge Holeman's inquiry at sentencing as to how many hours she worked by stating "24/7", citing the prodigious, quality workproduct that was before him [A-1718] – there was no basis for him to order her to work 40 hours a week minimum, that she get other work if she did not keep that job, and submit to him "daily time records containing a description of the task performed and the time expended", with each entry recorded "to the nearest tenth of an hour", with a warning that "block entries are not acceptable" [A-1723].

As the record showed that Sassower's "24/7" work as CJA's coordinator constituted full-time "community service" – and she so-stated in her June 28, 2004 affidavit [A-1662] and at sentencing [A-1717] – there was no basis for Judge Holeman to order that she perform a substantial 300 hours of community service – 200 in New York and 100 in Washington, D.C., with an express exclusion of Sassower's work at CJA beyond the 40 hour minimum as satisfying the "community service" requirement [A-1723-4]. That Judge Holeman identified no provision to cover her traveling, food, and lodging expenses for the 100 hours of community service in D.C. – and required that only 25 of the 100 hours could be discharged during each six-month period -- made this condition all the more onerous

Although there was nothing in the record that would constitute a basis for requiring Sassower to submit to medical, mental health, and drug screening and comply with testing and screening, this was ordered by Judge Holeman [A-1722-3, 1724], as likewise that she notify the probation officer if she left the jurisdiction for more than two weeks [A-1724].

As for Judge Holeman's final *sua sponte* condition of probation – that Sassower write letters of apology to the Senators and Judge Wesley [A-1727] – the Senators had never requested an apology, let alone attested to any injury for which an apology was warranted, and the record furnished no basis for an apology. Indeed, excepting for Senator Chambliss' name appearing on the underlying prosecution documents [A-88, 89], the Senators had absented themselves from the criminal case. They had not testified on behalf of the prosecution, they had quashed Sassower's subpoenas for their testimony, they had ignored appellant's memoranda calling upon them to deny or dispute the facts corroborative of her innocence from her "paper trail" of correspondence with them, and they had failed to even respond to her invitation as to what jail sentence they deemed appropriate [A-1696, 1703].

Point I of Sassower's October 26, 2004 motion [A-1748-52] challenged the constitutionality of the apology letters on First and Fifth Amendment grounds. It argued that the requirement that Sassower express remorse would require her to espouse political and ideological beliefs with which she did not agree, *to wit*, "that Judge Wesley was appropriately qualified to be appointed to the federal bench and that citizens should not be permitted to contribute to discourse regarding the confirmation process." [A-1749]. Indeed, reinforcing this was the condition barring Sassower from all contact with the Senate Judiciary Committee – thereby precluding her from contributing information with respect to other federal judicial nominees – as well as the condition that she record, to 1/10 hour increments, her work as CJA coordinator, thereby inferring that its content was somehow illegitimate and required surveillance.

These three conditions – the apology, the stay-away order, and the intrusion into the content of appellant's work as CJA's coordinator – infringe on Sassower's First and Fifth Amendment rights.

The statutory provision governing suspension of execution of sentence is D.C. Code §16-760. This Court's decision in *Schwasta v. United States*, 392 A.2d 1071, 1073 (1978), provides its obvious interpretation, *to wit*, that it "permits the trial court to grant probation only after it has imposed a sentence and suspended its execution." Plainly implicit in the announcement of sentence is the recognition that a defendant cannot give informed consent to probation unless he is advised of the consequence in withholding it. Nor would the right to withhold consent be meaningful if a judge could punish such exercise by thereafter scrapping the announced sentence and imposing a maximum in its stead. Such would constitute an "unfree choice", *North Caroline v. Pearce*, 89 S.Ct. 2072, 2080 (1969), and "coercion as a matter of law", *Byrd v. United States*, 377 A.2d 400, 405 (1977).

The terms of probation are the conditions for suspending execution of the announced sentence. Thus, when Sassower exercised her right under D.C. Code §16-760 to decline to consent to the probation terms, she forfeited the suspension of execution of sentence, not the sentence. By doubling to the six month maximum his already-announced 92-day jail sentence, Judge Holeman punished Sassower for exercising her lawful right to withhold consent to probation terms. That he did so without affording her notice or opportunity to be heard – where the rejected terms were palpably abusive and unconstitutional and where, additionally,

he denied her request for a stay pending appeal -- made his actions all the more unlawful[39], constitutionally violative, and, vindictive.

[39] Sassower incorporates by reference the further good and sufficient arguments as to illegality of Judge Holeman's superseding six-month sentence made at Points II-V of her October 26, 2004 motion [A-1752-55].