rec'd 11/17/05

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

RETURN NOTICE

RE: ELENA R. SASSOWER V. US NO. 04-CM-760 & 04-CO-1600

THE MOTION TO EXCEED THE PAGE LIMIT received/~~filed~~

on 11/7/2005, cannot be accepted for filing and is returned herewith for the following reasons(s):

- Not timely filed. Leave of Court required for filing. ☐
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- Pleading not signed as required by Court rule. ☐
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- No certificate of service/mailing. ☐
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- Did no comply with Rule 27 ☐
- ✓ Other See 10/27/2005 barring Order.

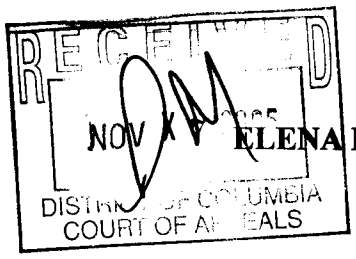
**NOTICE: New certificate of service is required when submitting a returned pleading. The Court also required an original plus three copies of all pleadings.

Returned To: ELENA R. SASSOWER
Date: 11/14/2005 Returned By: THOMAS ABRAHAM
CC: Roy W. McLeese, III, Esq., AUSA

COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 04-CM-760
No. 04-CO-1600

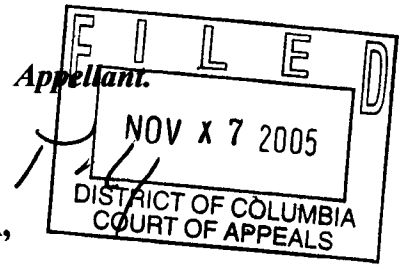
Consented-To Motion for a Procedural Order Pursuant to Rule 27(b)(1)(B)



ELENA RUTH SASSOWER,

Appellant.

v.



UNITED STATES OF AMERICA,

Appellee.

COUNTY OF WESTCHESTER)
STATE OF NEW YORK) ss:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

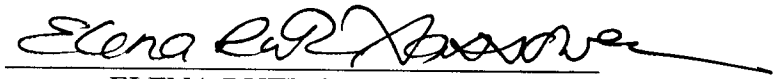
1. I am the appellant *pro se* in the above-numbered consolidated appeals and submit this motion for a procedural order pursuant to Rule 27(b)(1)(B) "to exceed the page limits" so as to add 20 pages to my accompanying "conforming brief on the merits".

2. Rule 27(b)(1)(b) expressly contemplates appellate briefs exceeding the 50-page limit of Rule 32(a)(6) – and, upon information and belief, this Court routinely grants procedural motions requesting such relief, particularly where they are consented-to.

3. The U.S. Attorney's new appellate division chief, Roy McLeese, with whom I spoke on Thursday, November 3rd, consented to these additional 20 pages.

4. Such pages further reinforce the travesty of a trial to which I was subjected before the pervasively-biased Judge Holeman, entitling me to reversal, if not vacatur, *as a*

matter of law, as well as disciplinary and criminal referrals against him and culpable members of the U.S. Attorney's office.



ELENA RUTH SASSOWER

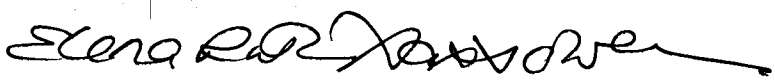
Dated: November 6, 2006

Sworn to before me this
day of November 2005

_____
Notary Public

CERTIFICATE OF SERVICE

I certify that I have served a copy of my accompanying motion for a procedural order pursuant to Rule 27(b)(1)(B) upon Assistant U.S. Attorney Roy McLeese, Chief of the Appellate Division of the U.S. Attorney's Office for the District of Columbia, by priority mail at 555 Fourth Street, N.W., Washington, D.C. 20530, on the 6th day of November 2005.



ELENA RUTH SASSOWER
Appellant *Pro Se*

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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*
...

(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][18].

In fact, but for Judge Holeman's "clarification" of his February 25, 2004 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-1357-66, 1377-79] -- rested on a grotesque and untrue caricaturing of Sassower as an unreasonable person,

[18] Excised.

"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"[19]– 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.

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

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[19] 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.

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).[20]

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).

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,

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[20] 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".

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][21].

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"[22] 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].

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[21] *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].

[22] 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].

If Ms. Liu was contending that only on April 7, 2004, as a result of the prosecution's witness preparation, it had come into "possession" of documents sought by Sassower's August 12, 2003 first discovery demand, the prosecution's 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 *Montgomery v. Jimmy's Tire*, 566 A.2d 1025 (1989). As she stated, "rule 11 is mandatory 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 [A-604-09]. 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." [A-609].

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" [A-608], 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"[23] 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 necessary in the interest of justice, *see Womack v. United States*, 350 A.2d 381, 382-83 (D.C. 1976), the

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[23] 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].

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-84-89, 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. 65-66 *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. 66-68 *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, Senate Committees 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[24], 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 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

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

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.[25]

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-308-11] 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

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[25] 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].

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"[26] [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 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 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-680-85, 693-98]. 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

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