

## **SUBAPPENDIX: ABBREVIATED SUMMARIES OF TRIAL COUNSEL MISCONDUCT**

Items 2-10 are abbreviated summaries of nine narrative appendixes (there numbered 1 to 9) that were attached to the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.," delivered to the Department of Justice on December , 1994. Since there was no abbreviate Cain summary, the full Cain summary is presented as item 1 here. In addition, the full summary from the January 17, 1995 narrative appendix styled "Supp I: Nunn's Annotation of the .

### **1. Testimony of Supervisory Special Agent Alvin R. Cain, Jr.**

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

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

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

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

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

In support of a motion for a new trial, Dean argued that Cain was one of at least three government witnesses who lied and who the OIC knew or should have known had lied. (The others are Ronald L. Reynolds and Thomas T. Demery.) Dean provided an affidavit

stating that when she asked Cain about the check from Nunn to Mitchell, he said it was maintained in the HUD regional office. Dean also stated that, after talking to Cain, she told James Scanlan what Cain had told her. Scanlan, a career government attorney, filed an affidavit stating that in April 1989, Dean had told him about the call to Cain and had said that Cain had told her the check was in a field office. Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.

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

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

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

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

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

At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. The OIC still refused to state what it knew about the check, but argued that Dean could have surmised that the check was maintained in a field office through a statement in the HUD Inspector General's Report. That statement, however,

could not reasonably have provided a basis for Dean's knowledge. The court denied Dean's motion without indicating what it believed about who was telling the truth about the call.

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

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

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

See Section B.1 of [Prosecutorial Misconduct in US v Dean](#) regarding later developments and the implications of Cain's being pressured into giving the testimony on the basis that it would be literally true even though he remembered the call.

## **2. Testimony of Ronald L. Reynolds**

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

## **3. Arama: The John Mitchell Messages and Maurice Barksdale**

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

See Section B.3 of [Prosecutorial Misconduct in US v Dean](#) regarding Dean's motion to have Count One dismissed.

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

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

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

The day before Shelby testified, O'Neill showed him documents reflecting certain contacts with Dean, but none of the documents reflecting his contacts with DeBartolomeis. When Shelby testified that his principal HUD contact concerning Park Towers was DeBartolomeis, not Dean, O'Neill asked him this question: "Now, did you review any records, trying to refresh your recollection as to who you dealt with at HUD on this project?" When Shelby indicated that he had reviewed documents the night before, O'Neill elicited the testimony that the documents Shelby reviewed mentioned

Dean, but not DeBartolomeis. O'Neill questioned neither Shelby nor the creator of the document with the conspiratorial reference to "the contact at HUD" regarding the identity of the person so referenced.

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

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

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

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

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

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

- that Park Towers was discussed at a September 9, 1985 lunch attended by Shelby, Mitchell, and Dean
- that Dean provided Shelby a copy of a funding document known as a rapid reply
- that Dean had been responsible for a post-allocation waiver of HUD regulations that allowed the Park Towers project to go forward
- that Dean had provided Shelby a copy of that waiver
- that Shelby concealed his contacts with Dean from Feinberg and Fine

## **5. Testimony of Thomas T. Demery**

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

See Section B. 6 of [Prosecutorial Misconduct in US v Dean](#) regarding further developments concerning this matter.

## **6. Russell Cartwright Receipt**

O'Neill cross-examined Dean with a receipt from consultant Russell Cartwright indicating that Cartwright paid for an October 1987 dinner for Dean and a HUD employee named Abbie Wiest. Wiest, however, testifying with immunity and under oath, had emphatically told the prosecution that Dean was not at the dinner. There is much reason to believe that the prosecution, believing the receipt to be false, cross-examined Dean with it precisely because it expected her to deny it. Responding to O'Neill's questioning based on the Cartwright receipt, Dean denied that she had ever eaten with Cartwright, and O'Neill badgered her into saying that the receipt must be false. In closing

argument, though O'Neill was very likely confident, if not certain, that the receipt was in fact false, nevertheless asserted to the jury that Dean had lied by claiming that "all Russell Cartwright's receipts are lies." O'Neill stated as evidence that Dean's testimony was false that her calendars showed that she often met with him for lunch. Dean's calendars, however, showed not a single meeting of any sort with Cartwright.

## **7. The Andrew Sankin Receipts**

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

See Section B.7 of [Prosecutorial Misconduct in US v Dean](#) regarding further developments regarding this matter.

## **8. Kitchin's Delivery of the Atlanta Request**

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

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

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

#### **10. Closing Argument Characterization of the Dade Selection**

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

#### **11. Supp I: Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee.**

Summary: In the Superseding Indictment in United States of America v. Deborah Gore Dean, the Office of Independent Counsel alleged that the co-conspirators involved in Count One would tell their developer/clients of their association with John Mitchell, who was Deborah Gore Dean's stepfather. Consistent with that theme, the OIC included allegations in the Superseding Indictment indicating that on January 25, 1984, the day that Louie B. Nunn entered into a consultant agreement with developer Aristides Martinez to secure moderate rehabilitation funding for the Arama project, Nunn wrote on the agreement that Mitchell was to be paid half of the consultant fee. All actions the OIC took with regard to this matter -- including the words chosen in the Superseding Indictment and the presentation in the OIC's summary charts, as well as the actions the OIC took in selecting, introducing, and calling attention to the various copies of agreements between Nunn and Martinez introduced into evidence -- were calculated to support the interpretation that Nunn had annotated the consultant agreement on January 25, 1984, and that, consistent with Nunn's annotating the agreement at the time it was originally executed, Martinez possessed a copy of the agreement bearing Nunn's annotation.

Yet, Nunn would not make that annotation until the original agreement had been modified in several respects, including the addition of a guarantee by the three general partners of Arama Limited, and Nunn would not have a copy of the agreement bearing that guarantee until subsequent to April 3, 1984. There is no reason to think that Martinez ever saw a copy of the annotated agreement. The OIC thus introduced documents into evidence representing them to be things other than what the OIC knew them to be.

The court prevented the OIC from eliciting from Martinez that he had been told by Nunn or Mitchell that Mitchell was Dean's stepfather, as the OIC had alleged in the Superseding Indictment. Possibly because of being denied the opportunity to elicit that testimony, the OIC eventually would change its approach. Instead of arguing that Nunn had emphasized Mitchell's involvement with the Arama project to Martinez, the OIC argued that Nunn had concealed Mitchell's involvement from Martinez. The OIC would make that argument despite knowing with absolute certainty that Nunn had not concealed Mitchell's involvement with Arama from Martinez and despite in-court testimony from Nunn as to his discussions with Martinez about involving Mitchell. In making this argument, the OIC also had to ignore the various exhibits that it had placed in evidence that demonstrated, though falsely, that Martinez possessed a copy of the consultant agreement bearing the annotation indicating that Mitchell was to receive half the consultant fee.