

*This is a PDF of the separately accessible version of [Section B.3](#) of the main [Prosecutorial Misconduct](#) page (PMP) of [jpscanlan.com](#). The endnotes have been converted to footnotes. This version reflects the section as it appeared when a link to it was provided in a January 2010 letter to Judith B. Wish, Deputy Director of the Office of Professional Responsibility (which may be found on the [Letters \(Misconduct\)](#) sub-page of PMP).*

### **3. The Court of Appeals' Finding that there was Insufficient Evidence to Sustain a Conviction of Deborah Gore Dean as to Three of the Four Projects Involving Former Attorney General John N. Mitchell and the Proof that She was Innocent of the Fourth [b3]**

As noted in [Section B.1](#), the focal point of the Independent Counsel's case involved a claim that Deborah Gore Dean conspired with former Attorney General John N. Mitchell to cause HUD to take certain actions regarding four projects, which matter was the subject of Count One of the Superseding Indictment. The Cain testimony issue discussed in Sections B.1 (as well as [Section B.2](#)) principally involves that count,<sup>1</sup> as do many other instances of prosecutorial abuse. Among other things, these abuses involve the inclusion of statements or inferences in the Superseding Indictment known to be false, various deceitful tactics undertaken to support those statements or inferences (including, as in the case of Government Exhibit 25, the creation of a false document, see [Nunn Appendix](#) and [Section B.9a](#) *infra*), and the eliciting of testimony that Independent Counsel attorneys had reason to know was false. This count, involving as it did both Dean and Mitchell, raised the most substantial issue of bias on the part of Independent Counsel Arlin M. Adams, in light of his stating in an interview upon taking the position of Independent Counsel that he believed he might have been appointed to the Supreme Court in 1971 had he not offended then Attorney General Mitchell. (See [Section B.11](#) *infra* regarding additional matters as to which Adams may have harbored ill feelings toward Mitchell.) As discussed in the [Arlin M. Adams profile](#), a responsible attorney in Adams' position would have recused himself from any matter involving a person Mitchell regarded as a stepdaughter regardless of whether the charges against the person also involved Mitchell.

Even though Independent Counsel attorneys managed to create a record that included many things they knew to be false concerning the issues in Count One, particularly with regard to the Park Towers project (see [Section B.4](#), as well as the discussions in the [Robert E. O'Neill](#) and [Paula A. Sweeney](#) profiles of O'Neill's and Sweeney's actions in creating a false record regarding the matter and the discussion in the [Bruce C. Swartz's profile](#) of Swartz's efforts to deceive the court in covering up what O'Neill and Sweeney had done), the court of appeals would find that there was insufficient evidence to sustain

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<sup>1</sup> It should be recognized, however, that while Cain's seeming contradiction of Dean specifically related to allegations involving John Mitchell, Robert E. O'Neill used the testimony as part of effort to generally undermine Dean's credibility in the eyes of the jury. Thus, the manner in which that testimony was elicited and used had substantial implications for the entire trial.

a conviction as to Park Towers and two other projects in Count One. This ruling effectively found Dean not guilty of the charges involving those three projects.

The fourth project in Count One was a Dade County project called Arama, which was funded pursuant to documents signed by Assistant Secretary for Housing Maurice C. Barksdale in July 1984. The Arama project is the only Mitchell matter mentioned in the HUD Inspector General's report. It was that mention, according to Dean, that prompted her to call Agent Cain, as discussed in Sections [B.1](#) and [B.2](#). The Arama project is the subject of many allegations of prosecutorial abuse raised either in the courts or with the Department of Justice. The one receiving the greatest attention in the courts involved actions of Independent Counsel attorneys concerning two telephone message slips found in John Mitchell's files. The message slips indicated that in January 1984, while Louie B. Nunn was reaching an agreement with the Arama developers to secure 300 mod rehab units for the Arama project, Mitchell was speaking with Dean's predecessor as Executive Assistant, Lance H. Wilson, about securing those 300 units, and that Wilson had told Mitchell that he (Wilson) was talking to Barksdale about the matter.<sup>2</sup> Wilson was a friend of Mitchell's and had helped him on other HUD matters.

There are two important aspects of this matter with regard to prosecutorial abuse. One involves the failure of Independent Counsel attorneys to make a *Brady* disclosure of the message slips and the representations of those attorneys as to why they did not disclose them, including Deputy Independent Counsel Bruce C. Swartz's oral representations to Judge Laurence Silberman, found at page 43 of the [transcript](#) of the court of appeals argument. While cast as arguments, in context, the various statements are representations as to the reason for the failure to disclose. And any reasonable observer would conclude, as the court of appeals obviously did, that the representations were false. See [Bruce C. Swartz profile](#) (at [4]) and [Section B.3a](#) *infra*.

An even more important aspect of the matter involves the failure of Independent Counsel attorneys to confront Barksdale with the information on the message slips before calling him as a witness to tie the funding to Dean. In this instance, while Independent Counsel attorneys acknowledged that they did not confront Barksdale with the information, they

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<sup>2</sup> The [first message slip](#), dated January 12, indicates that several days after Arama developer Aristides Martinez contacted Nunn at Mitchell's office, Mitchell had spoken to Wilson about the funding. The notation in Mitchell's handwriting read: "300 Units. Proceed & keep advised. Talking to Barksdale." The [second message slip](#) indicates that on January 26, 1984, Wilson had returned Mitchell's call. January 26 was the day after Nunn met with the Arama partners and reached tentative agreement to secure 300 moderate rehabilitation units for the Arama project in return for \$150,000 as a consultant fees and \$225,000 as an attorney fee.

The [Superseding Indictment](#) and the Independent Counsel's summary charts both state that the Arama agreements were reached or executed on or about January 25, 1984, and that on or about that date Nunn wrote on the consultant agreement that Mitchell was to receive one half of the Arama consultant fee. As discussed in the [Nunn Appendix](#) and [Section B.9a](#) (as well as the [O'Neill profile](#)), both these statements were false and part of a scheme to deceive the court and the jury in a variety of ways. But such matters are not relevant to the issue of the essential contemporaneousness of the reaching of the Arama agreements and the Mitchell-Wilson contacts.

never even impliedly advanced a reason for failing to do so. Rather, Independent Counsel attorneys merely asserted that the government does not have “an affirmative duty to question any potential witness before trial in order to seek out all *potentially* material evidence conceivably related to the defense.” [Gov. Opp.](#) at 16-17 (original emphasis). Even if one were to assume that the point is valid as a general matter and also that it could be realistically applied to this situation, the point fails to address the crucial question of *why* Independent Counsel attorneys did not confront Barksdale with the information. And here reasonable observers can only conclude that those attorneys did not confront Barksdale with the information because they believed or feared it would cause him to state (truthfully) that Wilson had caused the funding and Dean was not involved, and that those attorneys instead went forward with the hope and expectation of eliciting false testimony that would be more supportive of their case.

Among other places, the matter is addressed in some detail in the December 1, 1994 narrative appendix styled “[Arama: The John Mitchell Telephone Messages and Maurice Barksdale.](#)” Further, materials submitted with Dean’s December 1996 motion discussed below (see [December 1996 Memorandum](#)), as well her February 1997 motion (see [February 1997 Memorandum](#)) show that, when Independent Counsel attorneys brought the Arama charge, they possessed a substantial volume of material making it clear that the Arama funding was in the works months before Dean became Executive Assistant. Pages [27-46](#) of the latter memorandum also shows that, when examining Barksdale for the purpose of tying the Arama funding to Dean, Independent Counsel attorney Robert E. O’Neill knew with virtual certainty not only that the testimony that he was eliciting from Barksdale on this and other substantive issues was false, but that the testimony that he elicited to bolster Barksdale’s credibility was false as well.

Other instances of Independent Counsel attorneys’ eliciting testimony that they were virtually certain was false are documented in the December 1, 1994 [Introduction and Summary](#) and its other appendixes. (See also the profile pages on [Jo Ann Harris](#), [Paula A. Sweeney](#), [Bruce C. Swartz](#), and [Robert E. O’Neill](#).) But the simplicity of the matter of the Independent Counsel’s failure to make a *Brady* disclosure of the Mitchell telephone message slips and the eliciting of Barksdale’s testimony without addressing with him the information on the message slips makes the matter a useful starting point for an appraisal of Independent Counsel conduct. For the undisputed actions of Independent Counsel attorneys in this matter – regarding both the underlying abuses and the false representations made to the courts in denying the existence of those abuses – pointedly inform the reader of the character of the attorneys whose conduct as to other matters may be more difficult to interpret and make it easy to believe things about such conduct that otherwise might be hard to believe.

In any case, following the court of appeals’ ruling that there was insufficient evidence to support a conviction as to three of the four projects in the count involving John Mitchell, Dean, in December 1996, sought to have the remaining part of the count dismissed by the district court. In support of the motion, Lance H. Wilson submitted an affidavit stating that, after discussions with Mitchell, he (Wilson) had caused the Arama funding through

communications with Barksdale.<sup>3</sup> As discussed two paragraphs above, with the motion Dean also filed other materials bringing to the attention of Independent Counsel Larry D. Thompson further information that Independent Counsel attorneys prosecuting the case under Independent Counsel Arlin M. Adams knew that the Arama charge was false when they brought it and used false evidence to prove it. See Dean [December 1996 Memorandum](#).

Independent Counsel Larry D. Thompson nevertheless opposed Dean's motion, and did so successfully, on the grounds that the testimony in the Wilson affidavit was not newly-discovered evidence. Dean's motion to have the matter reconsidered was eventually withdrawn as part of the November 2001 agreement with the Department of Justice (as discussed in the Introduction to this page and [Section B.8 \*infra\*](#)). So Dean continues to stand convicted of the Arama charge. Nevertheless, the record establishes that Dean was found not guilty on three of the charges involving Mitchell and was certainly innocent of the fourth. Thus, the fair reading of the undisputed record is that Dean was not guilty of conspiring with John Mitchell as to anything. Similarly, the fair reading of the undisputed record is that former Attorney General John Mitchell – the person who, in the view of Independent Counsel Arlin M. Adams, may have kept Judge Adams from the Supreme Court – was not guilty of these charges as well. Further, it will be evident to anyone who gives even a cursory review to the materials related to Count One that the fact that Dean and Mitchell were both innocent of the charges in that count was clear to Arlin M. Adams and his subordinate attorneys at the time those charges were brought.

In fairness to Arlin M. Adams, however, it warrants note that when one considers how central the Mitchell count was to the case against Dean, as reflected, among other places, in the emphasis Robert E. O'Neill gave to Mitchell in opening argument (as discussed in Addendum 2 to the [Bruce C. Swartz profile](#)), one must recognize an incentive to include the Mitchell count irrespective any ill feelings Adams may have harbored toward Mitchell. That is not to excuse Adams for accepting the position of Independent Counsel given his acknowledged belief that Mitchell had kept him from the Supreme Court and it is certainly not to excuse Adams and his subordinates from fabricating the Mitchell count. Nor is it even to suggest that Adams' animosity against Mitchell was not a substantial factor in the prosecution. But Independent Counsel attorneys clearly had other motivations for fabricating the Mitchell count.<sup>4</sup>

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<sup>3</sup> At the time of Dean's trial, Wilson had been convicted of one count in a case brought by the Independent Counsel and that conviction was on appeal. The conviction was overturned in 1994.

<sup>4</sup> As it would turn out, because Dean's testimony about calling Agent Cain to complain about the discussion of Mitchell in the HUD Inspector General's Report provided Independent Counsel attorney Robert E. O'Neill the opportunity to dramatically undermine Dean's credibility (as discussed in Section B.1), the inclusion of the Mitchell count had far larger implications than Independent Counsel attorneys could have imagined when they persuaded the grand jury to approve the Mitchell count. Obviously, however, that turn of events could not have been foreseen.