

*Note: The material below is an excerpt from an item provided to DC Bar Counsel, as discussed in [Section B.11a](#) of the main Prosecutorial Misconduct page (PMP) of [jpscanlan.com](#). It has only minor redactions. The main purpose of this material is to show that, in an apparent effort to diminish the chances that the defense would discover the Mitchell telephone message slips, in the Independent Counsel's preliminary exhibit production Independent Counsel attorneys reordered documents produced from Mitchell's files in order not to call attention to the fact that certain items (the message slips) had been excluded from an otherwise comprehensive production of certain portions of Mitchell's files. The penultimate paragraph of this excerpt includes this sentence: "This would be the only instance among the almost 3,700 pages in the preliminary exhibit production where documents bearing a particular microfiche prefix were placed out of order." That was written before it was discovered that the Sankin Harvard Business School application was hidden among the Stanley Arms materials. See [Section B.7a](#) of PMP. The manner of that hiding – which involved insertion of the exculpatory document in large mass of innocuous materials to which it was entirely unrelated – also entailed, at least in a sense, a reordering of documents. There may be other undiscovered materials as well. In any case, the only discovered instances of the reordering of documents in the preliminary exhibit production involved apparent efforts to cause the defense not to discover certain exculpatory materials.*

### C. Preliminary Exhibit Production

At the end of 1992, the OIC would make a preliminary production of the exhibits it intended to use in its case-in-chief. The exhibits totaled approximately 3,679 pages and bore consecutive stamping-machine numbers (SMN), and were produced in the form of copies of microfiche that bore the OIC's microfiche numbers (OMN). They were far more inclusive than the exhibits the OIC ultimately use at trial nine months later, which were a little more than enough to fill two large three-ring binders.

Eighty-six (86) pages were provided from Mitchell's files (SMN 2165-2250). This production was far more inclusive than the documents from Mitchell's files that would actually be used at trial.<sup>1</sup> Nevertheless, though documents maintained in Mitchell's files were produced that were maintained right next to the two messages, the two messages were not produced in this overinclusive production of documents that the OIC might wish to use at trial. [SENTENCE REDACTED]

Yet, it appears that the OIC not only pulled these message slips from the documents produced from Mitchell's files, but attempted to obscure the fact that they had done so in order not to call attention to the missing items.<sup>2</sup> The more significant of the two was the January 12, 1984 message slip that mentioned Wilson's discussion with Barksdale about 300 units. In the documents the OIC put on microfiche from Mitchell's files, the message slip bore the OIC microfiche number CA159 2049. It was preceded by a three-page document relating to Arama (CA159 2044-46, the letter from Dean transmitting the Arama rapid reply, which would eventually become Government Exhibit 30) and a two-page document relating to Arama (2047-48, a March 29, 1984 letter from Dade County to HUD's Jacksonville Area Office, a version of which would eventually become parts of Government Exhibits 25 and 36). And it was followed by the four pages

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<sup>1</sup> As explained in the Nunn Appendix (at note 29), however, the OIC introduced 13 pages from the materials produced from the Mitchell files (OMN CA159 0019-31, SMN 2176-88) as if they were the file copy of the Dade County March 29, 1984 letter to HUD's Jacksonville area office, even though the attachment was different from the attachment in the actual letter. While there is little to suggest that this involved any effort to mislead, Respondents should explain how that occurred.

<sup>2</sup> The items had been produced among the 400,000 pages provided during discovery. But the OIC as yet did not know whether Dean had discovered them.

comprising Martinez' January 5, 1984 letter with envelope and Federal Express receipt (OMN CA159 2050-53, which would eventually become Government Exhibit 19).

When the OIC made its preliminary production, the exhibits were grouped according to the OIC two-letter/two-or-three-digit prefix to the microfiche numbers (e.g., CA159), which reflected the files of the individuals from whom the documents had been secured. With the exceptions noted below, the documents bearing each such prefix would be grouped in the numerical order in which they had been put on microfiche, based on an additional four-digit number. Though not all documents would be produced from each prefix grouping, those that were produced were kept in numerical order according to the four-digit part of the OIC microfiche number. For example, from the BA155 grouping, which were from Louie Nunn's files, 30 pages were produced between BA155 0302 and BA155 0372; those that were produced were in numerical order according to the four-digit part of the OIC microfiche number.<sup>3</sup>

Among other documents from Mitchell's files, the OIC produced all documents with OMN numbers CA159 2044 through 2053, with the exception of 2049, the January 12, 1984 message slip. However, the OIC had obscured the fact that one item was pulled from between 2048 and 2050--as well as the fact that the omitted item had been maintained right next to Martinez' January 5, 1984 letter to Nunn (OMN CA159 2050-53). It had done so by removing the four pages comprising the latter item from the sequence in which it was found in Mitchell's files, and placing it 17 pages later in the sequence of produced documents. Thus, rather than appearing at SMN 2214-17, the January 5, 1984 item (OMN CA159 2050-53) would appear at SMN 2231-34 (with the

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<sup>3</sup> That group of documents may be found as Attachment 8 to the Nunn Appendix.

first page of the set moved to the last position in the set), among the last few pages of the CA159 group.<sup>4</sup> This would be the only instance among the almost 3,700 pages in the preliminary exhibit production where documents bearing a particular microfiche prefix were placed out of order.<sup>5</sup>

If, in addition to pulling the Mitchell message slips from the preliminary exhibit production, Respondents in fact reordered the Mitchell files in its preliminary exhibit production in order to avoid calling attention to the missing items, that would seem conclusive proof that the OIC recognized the exculpatory nature of the messages, and conclusive proof as well that Respondents would not call the defense's attention to exculpatory documents (though both cases are made well enough regardless of the reasons for the reordering the CA159 documents). In any event, it is suggested that Bar Counsel require Respondents

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<sup>4</sup> After 2091 (the last item from the CA159 production before pages appeared out of order) the following microfiche numbers would be the last 8 pages of the CA159 production: 2073, 2074, 2051, 2052, 2053, 2050, 2068, 2269 (sic). (Between CA159 2068 (SMN 2235) and CA159 2269 (SMN 2237) there was a break in the sequence of the stamping-machine numbers.) Thus, in addition to the 2050-53 set, 2073-74 and 2068 had been moved to the end of the CA159 production. These were the pages that otherwise would have been contiguous to the CA159 2069-72 set (Exhibits II-A to II-D hereto) comprising the correspondence reflecting Mitchell's earlier dealings with Nunn to secure moderate rehabilitation funding through Wilson. Those pages were not included in the preliminary exhibit production.

<sup>5</sup> The less significant January 26, 1984 message slip (2065) was also omitted from the preliminary production. There is less, however, to suggest that the OIC purposely sought to obscure the fact that it had been removed. Though 2066 was produced, the pages immediately preceding the message slips--OMN 2062-63 (some Mitchell handwritten notes that would eventually become Government Exhibit 36a) and OMN 264 (a Mitchell note referencing with a reference to January 10 and a Florida Section 8 project)--were not produced either.

in their affidavits to explain why they pulled the two messages from this vastly overinclusive preliminary production and why this would be the only instance in the preliminary exhibit production where documents were reordered.