This is a directly accessible PDF version of Section B.3, Section B.3a, and Section B.3b the main Prosecutorial Misconduct page on jpscanlan.com.

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 (rev. Mar. 10, 2011)[b3]

Prefatory notes to Section B.3:

1. Materials closely related to this item include (in addition to items B.3a, B.3b, and B.9a that follow it on the main Prosecutorial Misconduct page) Section D and Addendum 7 of the Bruce C. Swartz profile and Section D of the Robert E. O'Neill profile.

2. In a March 10, 2011 Truth in Justice editorial styled "Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material," for the first time in my many years of writing about the Dean case (if memory serves), I used the word "framed" in relation to the Arama charge, referencing this section and related materials. I have generally the term because it is too often used hyperbolically and hence invites skepticism. Readers are urged to review the materials below carefully to determine if the usage is justified.

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. Mitchell, who had died in October 1988, about six months before the HUD scandal broke, had been regarded as a stepfather by Dean. The Cain testimony issue discussed in Section B.1 (as well as Section B.2) principally involves that count,[1] 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 (or, perhaps more important, that, in point of fact, he had been promised a court appointment by Richard Nixon but Mitchell had vetoed it), as well as his having other reasons to harbor ill feelings toward Mitchell.) See the Arlin M. Adams profile and the February 22, 2011 Truth in Justice

[1] 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.

item styled "Unquestionable Integrity versus Unexamined Integrity: The Case of Judge Arlin M. Adams." As discussed in that item, 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.

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 of PMP, as well as the discussions in the Section C of the Robert E. O'Neill profile and in the Paula A. Sweeney profile concerning O'Neill's and Sweeney's actions in creating a false record regarding the matter and the discussion in Section B of the Bruce C. Swartz's profile of Swartz's efforts to deceive the court in covering up what O'Neill and Sweeney had done. Nevertheless, the court of appeals still would find that there was insufficient evidence to sustain 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 April 1989 HUD Inspector General's report. It was that mention that prompted Dean to call Agent Cain in April 1989 to demand to see a check showing the payment to Mitchell, as discussed in Sections B.1 and B.2 of PMP. 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.[2] Wilson was a friend of Mitchell's and had helped him on other HUD matters. Mitchell also knew HUD Secretary Samuel R. Pierce, Jr., on whose behalf Barksdale would have regarded any communications for Wilson.

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

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[2] 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 Section D of 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.

the representations of those attorneys as to why they did not do so, 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 reasons for the failure to disclose the documents. And any reasonable observer would conclude, as the court of appeals obviously did, that the representations were false. *See* Section D and Addendum 2 of the Bruce C. Swartz profile 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 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 24-45 of the latter memorandum also show 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.[3] 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 kept 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. See the February 22, 2011 Truth in Justice editorial styled "Unquestionable Integrity versus Unexamined Integrity: The Case of Judge Arlin M. Adams."

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 does not excuse Adams for accepting the position of Independent Counsel given his acknowledged belief that Mitchell had kept him from the Supreme Court and it certainly does not excuse Adams and his subordinates from fabricating the Mitchell count. Nor does it refute the possibility or likelihood that Adams' animosity against Mitchell was a substantial factor in the prosecution. But Independent Counsel attorneys clearly had other motivations for fabricating the Mitchell count.[4]

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[3] 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.

[4] 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

B.3a. Independent Counsel Efforts to Cause the Defense to Fail to Discover the Mitchell Telephone Message Slips [b3a]

[This section along with Sections B.3 and B.3b may be found as a separate pdf with notes as footnotes by means of this link.]

The Bruce C. Swartz profile (at [4]) discusses Bruce C. Swartz's representation to Judge Laurence Silberman in the court of appeals argument that Independent Counsel attorneys regarded the Mitchell telephone message slips as incriminating rather than exculpatory, as well as the following statement, also made to Judge Silberman (Tr. 44):

> I must say that, everything in the record belies any suggestion that the government had an interest in hiding information here. The government exceeded, in almost every area, its statutory obligation in terms of turning over materials.

That in its decision the court of appeals would "deplore" the failure to segregate the Mitchell message slips indicates that it did not believe Swartz's representation that Independent Counsel attorneys did not segregate the message slips because they thought the message slips were incriminating rather than exculpatory. Section B.3 and the materials it references show why no one could believe that representation.

But a word is in order regarding Swartz's reference to the "hiding of information." Swartz was merely using the word "hiding" with regard to the failure to segregate exculpatory information rather than actually hiding. Because the Sankin Business School application discussed in Section B.7a was actually hidden (and successfully hidden for many years), the Independent Counsel's actions regarding the actual hiding of that document was not at issue. But apparently efforts were also made, if not to hide the Mitchell message slips in precisely the way that Independent Counsel attorneys hid the Sankin Business School application, at least to diminish the chances that the defense would discover the message slips.

That matter can best be explained with reference to the claim that Independent Counsel attorneys regarded the message slips as incriminating, even if doing so belabors that issue somewhat. To begin with, if the Independent Counsel attorneys in fact regarded the message slips as incriminating, they would have confronted Maurice C. Barksdale with information on the message slips rather than failing to do so. And, it would seem, they would at least consider using the items in some manner in their case. As it was, of course, after the defense introduced the items into evidence, in closing argument Robert E. O'Neill, while knowing with absolute certainty that the message slips in fact pertained to the Arama project, would seek to lead the jury

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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.

to believe that the receipts did not apply to Arama, stating in closing argument: "First of all, we don't know what project they're talking about here. Arama is not mentioned ... " Tr. 3516.[5]

In any event, the instant subject involves the Independent Counsel's preliminary trial exhibit production at the end of 1992. The production consisted of 3679 unindexed pages of materials that the Independent Counsel indicated it might be using at trial. As is common in the circumstances, the production was vastly overinclusive in order to include anything that, as trial approached, Independent Counsel attorneys might decide actually to use as an exhibit. As in the case of the Sankin Harvard Business School applications discussed in Section B.7a (and who knows what other items), Independent Counsel attorneys also used the production to fulfill production obligations as to important relevant materials that they had previously withheld from the defense.

In the case of materials from Mitchell's files, while Independent Counsel attorneys otherwise included all documents relating to the Arama project in the preliminary trial exhibit production, they excluded the Mitchell telephone message slips. The exclusion of the items from this vastly overinclusive preliminary production of materials the Independent Counsel might possibly use at trial is further, albeit superfluous, evidence that Independent Counsel did not regard the items as incriminating.

More to the instant point here, however, in producing the Mitchell files regarding the Arama project, Independent Counsel attorneys (who did not yet know whether the defense had discovered the message slips) took some pains to obscure the fact that two items had been excluded from Mitchell's Arama files. The precise manner in which that was done is set out in

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[5] Given that one must conclude that O'Neill knew with absolute certainty that the message slips pertained to the project that would eventually be named Arama, two other points he made in opening or closing, warrant mention. In the opening, O'Neill stated regarding the Arama project (at 53):

> The evidence will show that Louie Nunn at this time went to an individual by the name of John Mitchell. Again, we've spoken about John Mitchell, an ex-attorney general of the United States, a person who the defendant considers to be her father. Nunn asks Mitchell to help him out to try to get the units, and what does Mitchell do? Mitchell goes to the defendant. Now John Mitchell died in 1988, so you might say, "Well, how are you going to prove that he went to the defendant?" We're going to prove it through documents, the documents in black and white are going to show that Mr. Mitchell spoke with the defendant about Arama and that she agreed to send 300 units to units to Arama.

When O'Neill made this statement, precisely because he had it in black and white, O'Neill knew with absolute certainty that Mitchell did not go to the defendant, but went to Executive Assistant Lance Wilson.

In the closing argument, O'Neill stated (at 3348):

> Obviously, he's paid $425,000 to hire somebody with influence, somebody with connections in Washington, somebody who knows the right people, an ex-governor and an ex-attorney general of the United States, and they know the defendant, Deborah Gore Dean.

Once again, when making this statement, O'Neill knew with absolute certainty than an ex-governor (Nunn) and an ex-attorney general (Mitchell) were sought out because of their connections with Lance Wilson, not with Dean.

Part II.C of the District of Columbia Bar Counsel materials, which, with slight redaction, is available by means of the indicated link.

It is probably too late to know – or so it seems at the moment – whether similar efforts were made to cause the defense to fail to find the Mitchell telephone message slips when the Independent Counsel Independent Counsel included them in its original production, not of 3700 pages of documentary materials, but of several hundred thousand pages of documentary materials. But certainly there is no reason to believe that the involved Independent Counsel attorneys would have felt ethically constrained from obstructing the defense's efforts to discover exculpatory information if they believed they could get away with it. And, as reflected throughout the misconduct materials made available on this site, those attorneys believed they could get away with a great deal.

B.3.b. The Failure to Produce the March 22, 1993 Barksdale Interview [b3b]

[This section along with Sections B.3 and B.3a may be found as a separate pdf with notes as footnotes by means of this link.]

As discussed in Section B.3, Maurice L. Barksdale was a crucial witness with regard to the Arama funding.

In the August 20, 1993 letter in which Robert E. O'Neill and Paula A. Sweeney belatedly disclosed exculpatory information from witness statements, they included four statements from Barksdale. The fourth statement read:

> Barksdale stated that, when Deborah Dean would call him, sometimes she would say that she was calling on the Secretary's behalf and sometimes she would just call herself, but that, any time she called, Barksdale assumed that she was calling on behalf of the Secretary's office because she was an Executive Assistant and reported to the Secretary. Barksdale also said that, if he was asked to consider a funding situation that his staff had recommended against or there was no way in the world that it legitimately could be put together or worked out, he would ask to speak to the Secretary and would ask the Secretary whether in fact Deborah Dean was really representing him; according to Barksdale, in many situations the Secretary would say yes.

The August 20, 1993 letter did not provide dates for any of the statements in the letter. After Dean's counsel requested the dates, by letter dated August 29, 1993, O'Neill and Sweeney provided the requested dates, including, for the quoted Barksdale statement, the date of March 22, 1993.

When the Independent Counsel made its Jencks production on Barksdale, it provided nine items, none dated subsequent to June 29, 1992, and none bearing dates of a nature whereby a transposition or other typographical error might cause the date to be erroneously recorded as March 22, 1993.

Because the March 22, 1993 interview of Barksdale was substantially more recent than the Jencks materials actually produced, there was reason to believe it could be more revealing than the other interviews. For it was likely to involve follow-up questions that Independent Counsel attorneys had in preparing the case for trial. Further, the interview took place shortly after Barksdale's Special Assistant Stuart Davis testified to the grand jury that he (Davis) maintained a notebook for Barksdale recording all the projects funded, the number of units, the consultant and developer involved, and the name of the project (see Dean February 1997 Mem., Section III A.2.d). That testimony was directly contradictory to the Barksdale testimony on which the court of appeals would specifically rely in upholding the conviction on Arama.

Thus, there is reason to believe that the interview report contained information even more exculpatory than the information Independent Counsel attorneys provided from the interview in the August 20, 1993 letter, and that, precisely for that reason, those attorneys decided not to produce it. Assuming they were aware of the reference in the August 29, 1993 letter, they took the chance that the defense that was then being swamped with Jencks and *Giglio* materials would not realize that an item mentioned in the August 29, 1993 letter was never produced, which in fact proved to be the case.

I first recognized the discrepancy between the August 29, 1993 letter and the list of Barksdale Jencks materials sometime near the end of 1995. By letter of January 3, 1996, I brought the matter to the attention of Independent Counsel Larry D. Thompson, suggesting that he promptly provide the interview report to the defense and that he determine why the interview was not provided to the defense during the trial.

Thompson never responded to me on the matter and never contacted the defense on the matter. When Dean filed her December 1996 motion to dismiss Count One, she noted (at 16 n.14) that the interview had never been produced. In the Government's Opposition to Defendant Dean's Motion for a New Trial at 14 n.4 (Jan. 15, 1997), the Independent Counsel said it could not tell whether the interview report had originally been produced. It also stated that any exculpatory information in it had been provided in the August 20, 1993 letter. Apart from the arrogance of this statement, one can safely assume the Independent Counsel attorneys making it did so without the least consideration of whether it was true or not.[6] At any rate, the Independent Counsel still failed to produce the interview report and ultimately never did.

One might note that, assuming that Independent Counsel attorneys simply failed to make this item available to the defense at all because it contained exculpatory materials, this conduct on the part of Independent Counsel attorneys differs from the many instances where those attorneys failed to identify exculpatory statements, failed to segregate exculpatory documents, and even hid exculpatory documents (*see* Section B.7a), but at least did make the relevant materials available to defense. Yet the fact that this is the only instance that has been discovered where an

[6] The quoted part of the interview states that when Barksdale checked with Secretary Pierce regarding whether what Dean had told him in fact reflected the Secretary's wishes, "in many situations the Secretary would say yes." As presented, the statement suggests that in some situations the Secretary said no. In any case, obviously Barksdale was asked whether there occurred any situations where the Secretary said no and, if there had been, such fact would have been used at trial. Thus, one must assume that in some manner or another Barksdale affirmed that the Secretary had said yes on every occasion. This exculpatory information that should have been produced.

interview report was never produced at all hardly suggests that such failure to produce did not occur. Rather it merely indicates that there may be many instances where documentary materials that were exculpatory of the defendant were never produced but where Independent Counsel attorneys left no tell-tale sign of the existence of such materials such as occurred in the August 29, 1993 letter.

The same may be said regarding to the allegation of the former document manager discussed in Section B.9 that Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce C. Swartz altered or destroyed interview reports that did not advance the government's case. The only identified instance where information surfaced providing strong reason to believe that an interview report was altered involved the Aristides Martinez interview discussed in Section B.9a. But as with the unusual circumstances that revealed that the March 22, 1993 Barksdale interview was never produced to the defense, as a rule only unusual circumstances will reveal that a document had been altered. See the March 10, 2011 Truth in Justice item styled "Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material" regarding the failure to produce an interview report discussing the Sankin Harvard Business School application that, as discussed in Section B.7a, was initially not disclosed at all and then hidden.

With regard to the altering of interview reports, some might be reluctant to believe that the Independent Counsel and Deputy Independent Counsel would do these things themselves. But it is precisely because the alteration of interview reports is something that even the most unprincipled attorneys are reluctant to do that there exist strong reasons for the persons in charge of the prosecution to do such things themselves.