Pages 24 to 45 of February 1997 Renewed Motion for a New Trial (regarding the Arama charge)

III. MISCONDUCT ARISING FROM INDEPENDENT COUNSEL'S ACTIONS R E L A T I N G T O C O U N T O N E

Count One of the Superseding Indictment alleged that Deborah Gore Dean conspired with former Attorney General John N. Mitchell, who was deceased at the time of the Superseding Indictment, and others to secure mod rehab funding for three projects in Dade County, Florida: Arama (293 units, funded in 1984); Park Towers (143 units, funded in 1985), South Florida I (219 units, funded in 1986) and another project, Marbilt. Former Kentucky governor Louie B. Nunn was named as an unindicted co-conspirator with regard to the Arama and South Florida I projects; the developer of these projects was Aristides [z](Art Martinez. Richard Shelby was alleged to be an unindicted co-conspirator with regard to the Park Towers project; the developer of that project was Martin Fine. The Court of Appeals held that there was sufficient evidence with respect to only the Arama project and therefore affirmed the conviction of Count One on that basis alone.

However, the prosecutorial abuses arising out of Count One were significant, as discussed below, and warrant dismissal of the entire case.[15]

[15] Although the Court of Appeals set aside the Count One verdicts as it related to all projects except the Arama project, the misconduct arising out of those projects is discussed since it affected the overall conduct of the trial and the verdict.

A. The Arama Project

The Superseding Indictment alleged that the unindicted co-conspirators in Count One told their developer and their clients that they were associated with John Mitchell, and that Deborah Gore Dean was John Mitchell's stepdaughter. Superseding Indictment, 1 6 at 8-9, 1 6 at 11. The allegations appear to have been based on a May 15, 1992 interview of Art Martinez during which he stated that, at a meeting in early 1984, Louie Nunn or John Mitchell told him that Mitchell was related to Dean and that she held an important position at HUD. Martinez stated that he interpreted these remarks to mean that Mitchell and Nunn had connections at high levels at HUD. Attachment 1 at 4. [16] Attempting to introduce these statements into evidence, Independent Counsel told the court that this testimony could be crucial in establishing a conspiracy as to Count One. Tr. 230-31, 248.

In order to enhance the chance that the court would allow the testimony, Independent Counsel argued (1) that on January 25, 1984, at the time of reaching agreements with Martinez for a consultant fee of $150,000 and an attorney's fee of $225,000,

[16] Independent Counsel redacted the names of its attorneys and agents who conducted interviews (as well as grand jury questioning) of witnesses. The only reason for having done so was to impede Dean's ability to impeach a witnesses' in-court testimony by prior statements and to call a witness who could so testify to the prior inconsistency. In most cases the witnesses' address and telephone number were also redacted making it virtually impossible to locate those witnesses who might have testimony favorable to Dean.

Nunn wrote on the consultant agreement that one-half the $150,000 consultant fee was to be paid to Mitchell;" and (2) that Martinez knew about the annotation, because it was made in his presence, and he possessed a copy of the agreement bearing the annotation.[18]

Notwithstanding Independent Counsel's arguments to gain admission of Martinez testimony about the statement by Nunn or Mitchell concerning Mitchell's relationship to Dean, the court twice refused to allow the testimony.

1. Independent Counsel Falsely Asserted That Mitchell's Role Was Concealed From Martinez

Based upon the preceding arguments made by Independent Counsel to obtain the admission of Martinez' testimony about Mitchell's relationship to Defendant, and both the Independent Counsel interview with Martinez and Nunn's grand jury testimony, it was absolutely clear to Independent Counsel that Martinez knew that Nunn had a business relationship with Mitchell and that Mitchell was assisting with regard to the Arama project.

However, immediately after the court twice refused to allow Independent Counsel to elicit Martinez' testimony concerning the conversation about Mitchell's relationship with the Defendant

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[17] The annotation written by Nunn read: "1/25/84: In event of death or disability, one-half of above amount belongs to John Mitchell." Gov. Exh. 21.

[18] There was, however, evidence that the annotations were not placed on the document until after April 3, 1984 when changes___) to the original agreement were made.

(Tr. 228-35, 245-50), Independent Counsel elicited vague testimony from Martinez that he was not aware that he was hiring anyone other than Nunn or that Nunn was hiring anyone else. Tr. 250-51. The purpose of eliciting this testimony was to support a complete change of theory - the existence of a conspiracy was now to be shown not by the fact that Mitchell's role and his relationship to Dean were emphasized to Martinez, but instead by the supposed concealment of Mitchell's role from Martinez.

Thereafter, Independent Counsel repeatedly cited this testimony to this court and the Court of Appeals in support of a claim that Mitchell's involvement with the Arama project was concealed from Martinez and this concealment was evidence of conspiracy. Gov. Rule 29 Opp. at 19; Gov. App. Br. 5, 24. See also Gov. Supp. Acq. Oppp. at 17 n. 18. At the time Independent Counsel made those arguments, it knew that Mitchell's involvement had not been concealed from Martinez."

2. Abuses by Independent Counsel Relating to the Testimony of Maurice Barksdale

Maurice Barksdale was the HUD Assistant Secretary for Housing who made the decision regarding the Arama funding prior

[19] Before the grand jury, when Independent Counsel was pressing the theory that Mitchell's role was emphasized to Martinez, Independent Counsel elicited testimony specifically about Nunn's discussions with Martinez concerning involving Mitchell with the project. Attachment 61, at 33-36. That testimony **was then repeated during the trial. Tr. 1359-62. Nevertheless, Independent Counsel represented to** the Court of Appeals that Nunn had omitted all references to Mitchell in his discussions with Martinez. Gov. App. Br. 24.

to the time Dean replaced Lance Wilson as Executive Assistant to HUD Secretary Samuel R. Pierce, Jr. on June 24, 1984. Barksdale signed documents implementing the Arama funding on July 16, 1984 and July 27, 1984.

On January 5, 1984, Arama developer Martinez sent a letter to Nunn at Mitchell's address which enclosed a list of buildings available for mod rehab funding. Gov. Exh. 19. No specific number of units was mentioned in the letter. A telephone message slip Independent Counsel obtained from Mitchell's files revealed a conversation between Mitchell and Lance Wilson, who was Secretary Pierce's Executive Assistant from 1981 to June 1984, and who had a long-standing relationship with Mitche11.[20] Tr. 357-58. During the telephone conversation, Mitchell and Wilson discussed 300 units, and Wilson mentioned that he was talking to Barksdale[21] about the matter.[22] On January 25, 1984, Nunn"

[20] A clear indication of the Wilson, Mitchell, Nunn relationship was the Moore Land Company funding, which apparently occurred at or around the same time as the Arama funding. Dean was in no way involved in that funding. Yet, the cast was the same in Moore Land and Arama. Wilson, of course, was the Executive Assistant who had the relationship with Mitchell and who obviously had been involved with that transaction, the same way he was involved with Arama. Mitchell had previously set up a meeting with Wilson for Nunn with regard to a project for the Moore Land Company, which Wilson had approved. Tr. 1396-98. In fact, Mitchell's files indicated that in June 1984 he wrote to the head of the Moore Land Company and stated that the project "could not have gone forward without my intervention." Attachment 2.

[21] In fact, Barksdale testified before the grand jury that whenever Wilson called him, he assumed he was speaking on behalf of the Secretary. Barksdale G.J. 11.

[22] Mitchell had written on the message slip, which showed that Wilson had returned his call, the following words: "300

reached a tentative agreement with Martinez to secure 300 mod rehab units. Gov. Exhs. 20, 21. A second Mitchell telephone message slip obtained by Independent Counsel indicated that on the following day Wilson contacted Mitchell again and surely returned the telephone call as he had done with the prior message slip. Attachment 4.

As has been previously brought to the Court's attention, Independent Counsel failed to make a Brady disclosure of the Mitchell telephone message slips. Independent Counsel also failed to confront Barksdale with the message slips before calling him to testify about the Arama funding before the grand jury and in court. Gov. Rule 33 Op. at 10-12, 16-17. The only possible reason for the failure to confront Barksdale with the slips is that Independent Counsel feared that Barksdale would reveal the truth - information exculpatory of the Defendant -- that it was Wilson, not Dean, who was responsible for the Arama funding. [29]

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units, Process + Keep Advised. Talking to Barksdale." Attachment 3.

[29] When Nunn testified before the grand jury he was questioned both about his pre-1984 dealing with HUD and about his contacts with Wilson. Parts of his responses on both matters were excluded, for some inexplicable reason, from Nunn's grand jury testimony provided by Independent Counsel as Jencks material on Nunn. Nunn G.J. 25-26, 90-91. Defendant requests the Court to require Independent Counsel to produce the redacted material.

Furthermore, the Martinez April 3, 1984, letter to Nunn, written well before Wilson resigned from HUD, suggested that Martinez had already been told that the Arama project would be funded. At page 2 of the letter, after noting that Nunn should insist that the 293 units not come in two increments, Martinez states: "when will funding for the 293 units take

Barksdale's testimony was crucial to the Court of Appeals' ruling that there existed sufficient evidence to support a conviction on the Arama project. Even though Barksdale testified that he did not recall the Defendant talking to him about the funding and believed that he would remember if she had (Tr. 523), Independent Counsel relied on his testimony concerning the circumstances of the Arama funding and claimed it as evidence that Defendant had caused Barksdale to sign the funding documents.[25] The Court of Appeals, which apparently relied on

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place." Attachment 63.

[25] Independent Counsel seriously mischaracterized Barksdale's testimony. On direct, Barksdale testified that he had no recollection of why the Arama project was funded but that generally he would have signed off on such funding documents because someone in the Secretary's office had asked him to. He said that the persons with whom he had contact from that office were the Secretary, the Undersecretary and the Defendant. He then testified that neither the Secretary nor the Undersecretary asked him to sign off on the documents and that "I do not remember Deborah Dean asking me." Tr. 456-57. On cross-examination Barksdale would later state that he did not remember either the Secretary or the Defendant asking him about the project and believed that he would remember if either of them had. Tr. 535. Arguing before this Court, Independent Counsel relied on Barksdale's testimony during direct, stating that Barksdale testified that "he knew he received an inquiry from someone in [the Secretary's) office"; and that "he knew it wasn't Secretary Pierce, he knew it wasn't the Undersecretary, but he couldn't recall if it was Ms. Dean." Tr. 3327.

This was not even close to an accurate characterization of Barksdale's direct testimony.

In any event, in the Court of Appeals, Independent Counsel again relied solely on the direct testimony, asserting:

> While Assistant Secretary Barksdale testified that he did not 'remember Deborah Dean asking me' to fund Arama, Tr. 457, he did not testify that she did not do so, or that she did not seek to advance Mitchell's interests by making inquiries that would let Barksdale

Independent Counsel's characterization of the evidence, regarded that testimony as consistent with Defendant having caused the funding. See F.3d at 651.

During Barksdale's testimony before the grand jury and during his direct examination in court, Independent Counsel did not question him as to whether Wilson contacted him on the Arama funding. On cross-examination, however, Barksdale testified that he did not remember Wilson contacting him on the Arama funding, and that he believed that he would have remembered if Wilson had. Tr. 535. This is directly contrary to the information on the telephone message slips.

Barksdale also testified that he did not know that the Arama funding was going to a specific project and that he never made project-specific allocations. Tr. 457-58, 465, 467, 482-93. This testimony, which contradicted Defendant's testimony about her discussions with Barksdale, as well as her claims that project-specific allocations were commonplace, was specifically relied upon by the Court of Appeals. 55 F.3d 651.

In addition to the failure to segregate the Mitchell telephone message slips as Brady disclosures, and the failure to confront Barksdale with the information on those slips prior to calling him to testify, Independent Counsel engaged in a number of other acts of misconduct with respect to Barksdale.

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know that she was interested in the project.

Gov. App. Br. at 21 n.7. Barksdale's testimony on cross-examination, however, directly contradicted Independent Counsel's characterization of his testimony.

a. Independent Counsel Failed to Make a Timely Brady Disclosure of Barksdale's Statements That Were Exculpatory of Defendant

In addition to being examined before the grand jury on June 29, 1992, Barksdale was questioned by Independent Counsel or the F.B.I. at least five times between January 23, 1990, and the day he testified. At various times he made statements indicating

that the Defendant had not been involved in the Arama funding.

In Independent Counsel's Brady letter of August 20, 1993, Independent Counsel included four paragraphs based on statements by Barksdale in a June 28, 1992 interview. The paragraph that appeared most directly pertinent to the Arama funding indicated that Dean "could have" discussed sending funding to Jacksonville, Florida (the area office to which the Arama units had been sent). Attachment 5 at 2. Omitted from the account of Barksdale's statement, was that in the same interview Barksdale had said that he did not remember the Defendant ever urging him to send units to Jacksonville. Attachment 6 at 1.

More important Independent Counsel failed to include other, more exculpatory statements. In particular, Independent Counsel failed to include a statement given in an interview on January 23, 1990, where Barksdale had told an F.B.I. agent that as late as October 1984, three months after the actual Arama funding--"Deborah Gore Dean was not in the MRP [moderate rehabilitation program] loop and was otherwise not involved in the MRP funding process." Attachment 7 at 1. When Barksdale testified, Independent Counsel did not ask him any questions that

would elicit testimony concerning whether it was necessary that Defendant approve Barksdale's funding decisions in July 1984. This is particularly significant because of Independent Counsel's use of the memorandum written by the Defendant to Acting Assistant Secretary for Housing Shirley A. Wiseman dated February 1, 1985 to lead the jury to believe Dean was responsible for the Arama funding. The memorandum requested a report on the disposition of all mod rehab funds for FY 1985, and stated that "this office will concur on all [mod rehab] funding decisions regarding Mod Rehab funds not previously approved by both Maurice and myself, until a Federal Housing Commissioner is named." Gov. Exh. 147.

Given that the requirement of concurrence of the Secretary's office would apply only until a new Assistant Secretary-Federal Housing Commissioner was named, the reasonable interpretation of this memorandum was that Dean's approval of mod rehab selections was an interim requirement for any projects approved by Barksdale before he left but not yet implemented, and that such approval had not been required while Barksdale was in the position of Assistant Secretary for Housing-Federal Commissioner. Such interpretation was also suggested by the fact that in the memorandum, Dean was requesting a report on Fiscal Year ("FY") 1985 funds allocated so far.[26]

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[26] Dean testified that Secretary Pierce directed that she send the memorandum to Wiseman because Barksdale, without Pierce's knowledge, had expended essentially all the FY 1985 mod rehab funds in the first four months of the Fiscal Year. Trial Tr. 2259-62. Documents possessed by Independent Counsel strongly

Independent Counsel had additional reasons to know that such interpretation was correct. In interview reports, Barksdale stated that Dean was not in the mod rehab loop as late as October 1984. Further, a report of an interview of Barksdale by Independent Counsel on June 28, 1992 stated that:

> Barksdale reviewed a "Personal and Confidential" note from Dean to Shirley Wiseman, dated February 1, 1985. [the Wiseman memorandum] Barksdale said he had never seen anything like it. He didn't recall meeting with Dean to approve mod-rehab funds for FY 1985.

Attachment 6 at 4.

Despite Barksdale's statements unequivocally indicating that Dean did not approve mod rehab decisions during his tenure, the Independent Counse mislead/ the jury that Dean's February 1, 1985 memorandum to Wisem _shbwed that Dean was required to approve all mod rehab decisions while Barksdale was Assistant Secretary, including the July 1984 allocation underlying the Arama project. It did not, however, provide as Brady material either of the two statements by Barksdale contradicting Independent Counsel's interpretation of the memorandum.

When Barksdale testified, Independent Counsel asked him no questions that would elicit testimony concerning whether it was

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suggested this testimony was true. Between October 19, 1984, and January 3, 1985, Barksdale had allocated over 3800 FY 1985 mod rehab units. As discussed in Memorandum at 16-17, Barksdale's last three mod rehab allocations would be subjects of Independent Counsel's indictment of James Watt. On January 30, 1985, Wiseman had signed Form HUD-185s allocating another 325 units. During the remainder of FY 1985, it appears that less than 600 additional mod rehab units were allocated.

necessary that defendant approve Barksdale's funding decisions in July 1984. Thereafter, however, in briefs in this Court and the Court of Appeals, Independent Counsel made clear that it nevertheless had intended that the jury would infer from the February 1, 1984 memorandum that as of July 1984, "Mod Rehab decisions were approved by Barksdale and [Dean]." Gov. Rule 29 Opp. at 18 n.16 (emphasis in original); Gov. App. Br. 21 n.7 (emphasis in original). In making this point, Independent Counsel told neither court that the document was created more than six months after the Arama funding nor that Barksdale had never seen the memorandum.

Thus, Independent Counsel had sought to mislead the jury and the courts to believe that the memorandum showed that Defendant approved Barksdale's fundings even in July 1984 while knowing for a fact that the memorandum showed no such thing, and while failing to make a Brady disclosure of the statements contradicting that interpretation. Dean Rule 33 Mem., Exh. BB at 1.

b. The Failure to Include the Report of Barksdale's Interview of March 22, 1993 as Jencks materials

Apparently, Barksdale made certain statements that were exculpatory of the Defendant in a March 22, 1993 interview.[27] A

[27] This interview took place shortly after Stuart Davis testified to the grand jury that he 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 infra III A.2.d.

report of that interview was never provided to the defense.[28] The defense only learned of the interview when it was mentioned in an August 29, 1993 letter.

[28] In the Government's Opposition to Defendant Dean's Motion for a New Trial at 14 n. 14 (Jan. 15, 1997), Independent Counsel claims that it is unable to determine whether it produced the March 22, 1993 Barksdale interview. When Independent Counsel made its Jencks production, it gave the defense a list of each Barksdale item that Independent Counsel was providing the defense. That list, which is attached to the defense's Omnibus Motion of February 5, 1994, corresponded with the defense's records of the Jencks items it received. However, the list did not include the March 22, 1993 Barksdale interview. Thus, Independent Counsel clearly did not provide it at that time. Independent Counsel asks the Court to believe that any exculpatory information in the interview report was accurately summarized in the August 20, 1993 letter (though it does not state which of the statements attributed to Barksdale in the August 20, 1993 letter is from the March 22, 1993 interview). Whether the representation concerning the August 20, 1993 letter is true, it is not an excuse for the continued failure to provide an interview of a government witness. Other issues aside, the Court should order Independent Counsel immediately to provide a copy of their interview to the defense and an explanation as to why it originally failed to provide the interview.

c. Independent Counsel Failed to Disclose Significant Impeachment Material on Barksdale

Both during Defendant's cross-examination and during closing argument, Independent Counsel attempted to mislead the jury that Defendant had falsely accused Barksdale of lying. Tr. 2986-87. If successful, these efforts likely carried additional weight with the jury because Barksdale was an African-American who had held a high government position. After defense counsel had attempted to impeach Barksdale, Independent Counsel tried to rehabilitate him by vouching for his credibility when it elicited testimony from him that, (1) Independent Counsel, who was responsible for the broad reaching HUD investigation, had never questioned her integrity; and (2) though Barksdale was testifying pursuant to a grant of use immunity, he had not requested the immunity. Tr. 536.

Apart from the fact that the Mitchell telephone message slips appeared to establish that Barksdale lied about his contacts with Wilson (e.g., support of Barksdale and Wilson for Demery's Food for Africa; the benefits Barksdale and Wilson received from Demery's action on Loan Management Set-Aside and Title X awards), the government had substantial reasons to question Barksdale's integrity. In fact, it had repeatedly done so in materials that Independent Counsel never provided to the defense. Among other things, these materials suggested additional reasons why Barksdale failed to acknowledge that Wilson had

talked to him about the Arama funding.[29]

Like Lance Wilson, Barksdale (after he left HUD and became a consultant) had been an active supporter of Assistant Secretary Thomas T. Demery's charity F.O.O.D. for Africa ("F.O.O.D."). He was involved in four fundraisers for the charity. He or his clients were involved in organizing three fundraisers, including one in which Barksdale and Wilson were co-sponsors, and Barksdale's employer, **J&B** Management Co., for whom Barksdale had secured five questionable Loan Management Set-Aside awards ("LMSA awards"), contributed $7,500 to the charity. Banking Hearings at 1054, 1089, 1132, 1187, 1192, 1196, 1199; Lantos Hearings, Pt. 3, at 767-77. HUD IG even investigated F.O.O.D. and its supporters. All those involved feared that the obvious connection between contributions to F.O.O.D. and successful HUD applications would lead to indictments.

Both Barksdale and Wilson also received substantial benefits as a result of Demery's decisions.[m] In addition to the LMSA

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[29] Barksdale authorized at least one other funding after Wilson left that would be the subject of intensive investigation. This was a 600-unit allocation to Puerto Rico that would be a subject of the indictment of James Watt. This gave Barksdale some reason to be reluctant to mention that Wilson had talked to him about the Arama funding. Further, Wilson had been indicted and convicted of providing an unlawful gratuity to a HUD official named Dubois Gilliam. Barksdale (after he became a consultant) had loaned $2,000 to Gilliam while Barksdale himself had a matter pending before Gilliam. The loan to Gilliam, as well as another questionable action of Barksdale, which also involved Wilson, were subjects of the Lantos Hearing, Pt. 3, at 783-94 and of which Independent Counsel was well aware.

[m] With regard to Wilson, see Banking Hearings at 1005-09, 1017; Lantos Hearings, Pt. 4 at 545-67, 583, Pt. 5, pp. 364-68; House Report, 101-97 at 105.

awards for his employer, Barksdale was involved as a consultant in securing Title X awards on projects called Southcreek, for which he earned $110,000, Autumn Meadows, on which he earned $43,000, and Steeds Crossing, for which he earned $15,000. (The clients on both SouthCreek and Steeds Crossing were F.O.O.D. contributors.)

The LMSA awards were sharply criticized in a HUD IG audit. Audit No. 89-A0-119-0006. Attachment 65. Former Deputy Assistant Secretary for Multi-Family Housing R. Hunter Cushing told Independent Counsel that he objected to the awards but was ordered to approve them by Demery who had stated that the awards were for Barksdale. Attachment 8.[31] The Southcreek, Autumn Meadows, and Steeds Crossing Title X awards were also criticized in HUD IG investigations, as was Barksdale's role influencing the awards cited with regard to Autumn Meadows and Southcreek. See Audit 90-TS-129-0013. Attachment 64. The Southcreek, Steeds Crossing, and Autumn Meadows Title X awards were also all subjects of FBI/IG investigations identifying Demery as the responsible HUD official and Barksdale as a consultant and finding that consultant pressure influenced the awards.

The HUD IG investigation of the LMSA awards was never provided to the defense either in discovery or as Giglio on Barksdale. Neither the HUD IG audit nor the F.B.I.

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[31] The Cushing statement that Demery had said the awards were for Barksdale was included among the thousands of pages of Jencks materials provided on September 13, 1993, three days before Barksdale testified.

investigations of the Title X awards were provided in discovery or as Giglio on Barksdale.

During discovery, a two page-document was provided with one-paragraph summaries of the investigation of the Southcreek, Steeds Crossing, and Autumn Meadows awards. However, Barksdale's name was redacted. [32] There is no valid reason for having redacted Barksdale's name. Attachment 9. The fact that all references to Barksdale initially had been redacted (as had other relevant information) made it impossible to make any use of the material to impeach Barksdale at trial. [33]

When Demery testified two weeks after Barksdale, Independent Counsel provided a one-page document (dated November 2, 1989) discussing an ongoing OIG/FBI investigation of the

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[32] The night before Barksdale testified, it appears that at least part of that two-page document was provided to the defense, with Barksdale's name no longer redacted. There appears to be no valid reason for the redaction gamesmanship. Attachment 10.

[33] When Demery testified two weeks after Barksdale, Independent Counsel again produced that same two-page document summarizing the OIG/FBI investigations of the Southcreek, Steeds Crossing, and Autumn Meadows Title X awards. Attachment 13. In this instance, Independent Counsel no longer redacted Barksdale's name from the summaries on Steeds Crossing and Autumn Meadows (though it erased entirely the summary of the Southcreek investigation). Demery's testimony had nothing to do with Barksdale (though Barksdale was one of numerous F.O.O.D. for Africa contributors who benefited from Demery's decisions). Much more pertinent to the impeachment of Demery was the investigation of a Title X award for a project called Cumberland II, in which Kitchin had been involved. A summary of that investigation had been included just above the summary of the Steeds Crossing investigation in the two-page document produced in discovery (Attachment 9), though Kitchin's name had been redacted from the document. As discussed, when the document was produced as Giglio on Demery, all reference to the Cumberland II investigation had been eliminated.

Southcreek Title X award. Attachment 11. Independent Counsel also provided the single page of another document (dated September 25, 1990), discussing a grand jury investigation of the matter and indicating that Barksdale's bank and phone records were to be subpoenaed as part of the investigation. Id., Attachment 12.

d. Barksdale's Testimony Regarding Project-Specific Awards

During both direct and cross-examination Barksdale testified that he did not know that the 293-unit allocation he authorized for Dade County in July 1984 was intended for a particular project; that HUD had a policy against such awards; and that he made no project-specific awards while in the position of Assistant Secretary for Housing. This testimony would prove crucial to the Court of Appeals' ruling upholding a verdict on Count One.

Independent Counsel had reason to know that the testimony was false. Independent Counsel possessed documents indicating that Barksdale knew that the 293-unit allocation was intended for the Arama project and that each of four other allocations Barksdale made to Dade County in 1984 were intended for particular projects.

Stuart R. Davis was, at all times relevant hereto, Barksdale's Executive Assistant and also signed the Arama Rapid Reply. In an interview conducted by Independent Counsel on February 12, 1993, Davis stated that 90 to 95 percent of mod

rehab allocations were based on political contacts. Attachment 14. Davis also stated that, when Barksdale received requests for mod rehab units, he would advise Davis, who would record the name of the political contact supporting the project, as well as the project's name, location, and number of units in a book. Id. at 3.[34] Davis testified before the grand jury on March 12, 1993, that the bidding process at the PHA level was frequently a sham because senior people at HUD would ensure that specific funding would go to specific projects. Attachment 15. He indicated, for example, that units would be sent out to a housing authority in a certain number, when there would probably be only one project that fit that the description in the area that the authority could fund. Id. at 12-16.[35]

Although Davis indicated in his interview that he kept a book of projects and the political contact supporting each

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[34] The defense's records do not indicate when Davis' interview reports and testimony were provided to the defense. Presumably, the materials were provided on Barksdale the night before he testified.

[35] By letter of August 20, 1993, Independent Counsel disclosed a number of exculpatory statements by Barksdale. Attachment 5, at 2-3. By letter of August 29, 1993, Independent Counsel gave dates for those statements, including March 22, 1993. Attachment 16. Independent Counsel, however, never produced the March 22, 1993 interview as Jencks on Barksdale. This interview occurred shortly after Davis told Independent Counsel that he kept a book for Barksdale and that all allocations were product specific. The March 22nd interview may 0? reveal that Davis' information was raised with Barksdale and what ,47 his response was or even that, not withstanding what Davis had testified to in the grand jury, Independent Counsel failed to question Barksdale about it.

project, no such book was ever provided to the defense. The existence of the book, the book itself, any entry in the book mentioning Mitchell, Nunn, Martinez, Wilson or Dean all should have been disclosed. One can assume that there was no entry related to Dean otherwise it would have been used by Independent Counsel. The fact that Dean's name was not mentioned should have been disclosed as Brady.

Independent Counsel had further reason to know Barksdale's testimony was false. In February 1995, the Independent Counsel and the grand jury returned an indictment against James Watt in which Independent Counsel alleged that Watt was involved in a scheme with Barksdale and others to subvert HUD's regulations against project-specific awards. In particular, the indictment alleged as evidence of that scheme that on September 5, 1984, Watt wrote to Barksdale, referencing a conversation the previous evening, and attaching "copies of three different Sec. 8 Mod Rehab projects" --a 68-unit project in New Jersey, a 50-unit project in Massachusetts, and a 128-unit project in the Virgin Islands. In his letter, Watt stated that he had been assured that the projects "are clear [sic] as a whistle," but that the PHA applications themselves were not "project specific," "[flust as you like it." Watt also indicated that he would like to have the Form HUD-185s on these allocations as soon as possible. Attachment 17.[36] The indictment alleged that thereafter, the

[36] It is not known when Independent Counsel secured a copy of this letter. No copy was ever provided to the defense in this case.

units were awarded in numbers approximating the amounts requested by Watt. Attachment 18." Therefore, it is impossible for Independent Counsel having knowledge of all of this not to have known that Barksdale's testimony about project specific awards was false. Yet, Independent Counsel presented the false testimony to the jury.

e. Independent Counsel's Representations Concerning the Failure to Make a Brady Disclosure of the Mitchell Message Slips

Previously in this Court, and later in the Court of Appeals, Independent Counsel defended its failure to make a Brady disclosure of the Mitchell message slips on the grounds that Independent Counsel attorneys did not regard them as exculpatory, suggesting that its attorneys in fact regarded the message slips as incriminating by "reinforcing the importance of Dean's role." Gov. Rule 33 Opp. at 11; Gov. App. Br. at 47.

However, the message slips are so clearly exculpatory that Independent Counsel's representations to the contrary are manifestly implausible. Apart from the facial implausibility of the Independent Counsel's contention, Independent Counsel failed to provide an explanation as to why, assuming it regarded the message slips as incriminating, it did not question Barksdale about them in order to develop evidence to prove its case.

These were among the awards that Barksdale made shortly before leaving office in December 1984, that all but exhausted FY 1985 mod rehab funds. It was this occurrence which precipitated the Wiseman memo. See supra III A.2.a.

Further reflective of Independent Counsel's recognition of the exculpatory nature of the message slips is the fact that in closing argument Independent Counsel argued to the jury that: "First of all, we don't know what project they're talking about here. Arama is not mentioned." Tr. 3516. It is safe to say that when Independent Counsel attempted to lead the jury to believe the message slips did not apply to Arama, it knew that they did apply to Arama, though the project had not yet been named. This is but one more instance of Independent Counsel attempting to mislead the jury and the courts concerning something Independent Counsel knew to be false.

f. Failure to Make Brady Disclosures Concerning the Patriots Project

1. Failure to Disclose As Brady or Giglio the Statements of Barksdale

In December 1984, Barksdale allocated 77 mod rehab units to Baltimore, Maryland to be used for the Patriots project, in which a boyfriend of Pierce's Special Assistant Janice Golec had an interest. Barksdale testified that Defendant had talked to him about the project and had indicated to him that a friend of Janice Golec was involved.1

Yet on three separate occasions prior to his testimony Barksdale had stated that he had no distinct recollection of Defendant talking to him about the project. On October 24, 1991, Barksdale stated that he did not remember anything significant about the allocation and did not remember whether or not Defendant talked to him about the allocation. Attachment 19, at