

PACKERCHRONICLE 12

Did a Utah Judge help Swallow's friend get revenge?

Prosecutor Charlene Barlow: Tough on first offender, easy on second offenders.

By Lynn Packer
August 14, 2013



Prosecutor Charlene Barlow examines a witness during an unrelated 2004 murder trial.

The accusation is serious: That Charlene Barlow, now a judge but at the time a prosecutor, helped exact revenge on the foe of a friend of Utah's current Attorney General, John Swallow. Barlow is accused of participating in an influence-peddling plot against Brian Kitts, who fled to Canada in 2010 rather than accept a securities fraud plea bargain offered by Barlow. (See *PC* July 31: "New Allegations: Swallow's alleged misuse of Attorney General Power to prosecute his client's foe.")

In July 2007 the Attorney General's Office brought criminal charges against Kitts. Those charges came shortly after Kitts sued John Swallow's colleague and lobby client George Evan Bybee alleging Bybee committed mortgage fraud. Kitts and his attorney believe the case against Kitts was brought in retaliation for Kitts' suit against Bybee. With Charlene Barlow as one of the henchmen.

A chain of events led up to the alleged act of vengeance:

- Kitts, facing foreclosure on his Park City home, got a \$1.35 million short-term, hard-money loan from George Evan Bybee's company, Winterfox, LLC.
- Kitts defaulted on the loan alleging Bybee committed mortgage fraud by failing to disclose the loan's high interest rate.
- Kitts took out bankruptcy to forestall foreclosure by Bybee.
- Kitts also sued Bybee in bankruptcy court for the suspected mortgage fraud.
- The lawsuit was bitterly contested with both sides running up hundreds of thousands of dollars in legal fees.



Brian Arthur Kitts

- Meanwhile the Attorney General’s office brought unrelated fraud charges against Kitts. The prosecutor was Neal Gunnarson in the financial crimes unit whose section chief was Charlene Barlow.
- Kitts’ attorney tried to negotiate so-called “plea in abeyance”, a common deal for first-time offenders. (It’s an agreement that allows a judge to eventually dismiss a violation after completion of certain criteria, such as probation and restitution.)
- Gunnarson would not do the plea in abeyance deal; Kitts and his attorney believed he was taking orders from above.
- Gunnarson did offer to let Kitts plead to misdemeanors instead of felonies if he made full restitution but the conviction would remain on Kitts’ record.
- While finalizing the plea bargain Gunnarson retired, Barlow took over, withdrew the misdemeanor deal and insisted Kitts plead to felonies.
- Kitts, in dismay heard about a way to do an end run around Barlow, using an intermediary—Tim “The Fixer” Lawson— to get an intervention by Attorney General Mark Shurtleff.
- But Lawson reported back to Kitts that John Swallow—soon to be named Shurtleff’s Chief Deputy— and the AG’s office considered Kitts “a bad man.” Swallow purportedly told Lawson that Kitts “hurt my friend and I am going to make him pay.”
- Kitts, on the belief he was railroaded by Barlow into signing a guilty plea to felonies, took flight to Canada. There is an outstanding warrant for his arrest.

Kitt’s attorney says was surprised he could not get his client the plea in abeyance. He was aware that at precisely the same time he was trying to get one for Kitts that Gunnarson’s financial crimes section of the AG’s office negotiated a plea in abeyance for Marc Jenson, the man who mad headlines claiming that Shurtleff and Swallow accepted free meals and hotel stays from Jenson. Charlene Barlow was also the prosecutor on the Jenson case.

The deals offered Kitts and Jenson contrast sharply. Jenson had a previous conviction and had swindled millions of dollars. But he was given a plea in abeyance for the new offense. Kitts had no previous convictions and was going to plead to using deception to take only about \$100,000 of investor money. And, rubbing salt into his wounds, the AG’s office upped the deal from misdemeanors to felonies.

Kitt’s attorney recalls asking Gunnarson, “Why can’t you do a similar deal with us that you did with Jenson?” “I was trying to do the same thing for Brian,” Kitts attorney said. He says he made the argument with Gunnarson that “Jensen is probably a serial fraudster, a mega fraudster and Kitts is a penny ante guy, why are you wasting your time with him? Why can’t you do a similar deal with us?” “The only deal Gunnarson did with us was, ‘You pay the money in a plea deal and then we’ll give you the misdemeanors.’ They would not even do the plea in abeyance.”

Kitt’s attorney believes the hard. line plea-in-abeyance rejection came from Gunnarson’s section chief, Charlene Barlow. But, he says, “I don’t have any evidence that Barlow is getting her orders from Shurtleff or Swallow.” Gunnarson did not return our phone call.

Kitt’s attorney, in hindsight, says he can see why Jenson got the good deal and his client the bad. “Because Jenson was friends with Swallow and Shurtleff he is getting the better deal,” he said. “Kitts was not; he was an enemy.”

It got worse for Kitts after Gunnarson retired mid-negotiations. When Barlow took over the case, out went the old deal, which Kitts' attorney already thought was bad, and in with the new, even worse deal: Barlow demanded Kitts plead guilty to felonies.

"She said no deal to the terms that had been reached with Gunnarson," Kitt's attorney said. "She would not say why." "She seemed to be getting pressure from above."

Kitts was scheduled to be sentenced on the Barlow felonies deal on October 22, 2010. Instead of appearing he sent an email to the judge saying hemn had fled to Canada. That same week Governor Gary Herbert announced Barlow's appointment as a judge. The Kitts prosecution was one of her last.

Now, more than two years later, Judge Barlow has no recollection of the Kitts case details. She first denied any involvement with the Kitts matter when she was a prosecutor. "She said it was not her case," Barlow's court clerk said. "It may have been Neal Gunnarson's."

Then *PC* emailed the judge a copy of the docket which shows she was extensively involved in at least three hearings on the matter. Again she declined an interview. But though her clerk she says she does recall getting a case but one she does not know enough about it to make any kind of a statement. Her clerk says Judge Barlow got the Kitts case file after the original prosecutor handled it and the defendant went to Canada. "That's all she remembers," her clerk says. "She remembers having it handed to her after but she did not do anything on it."

The record says otherwise. *PC* obtained audio recordings of two of the three hearings Barlow attended. The first is from October 23, 2009 where Kitts pled guilty to the felonies that Barlow added to the agreement. The Judge took note that Kitts was upset, even asking why he was hesitating as he accepted terms of the agreement.

It was after that agreement that Kitts decided to use "The Fixer" Tim Lawson and retain a new attorney to see if he could do an end run around Barlow to Attorney General Mark Shurtleff. and get the Barlow deal withdrawn and the one he did with Gunnarson reinstated.

The next hearing where Barlow made an appearance was on March 12, 2010. Kitts new attorney, Dana Facemyer asked the court to allow Kitts to withdraw his guilty plea to the felonies Barlow wanted. Barlow opposed a plea withdrawal complaining about Kitts' pattern of getting close to a trial, saying he will take a deal "and then he doesn't take the deal." "Frankly that's why the original deal was withdrawn. He's done that twice with Mr. Gunnerson and finally Mr. Gunnerson said that deal is off the table. So I sent a letter two weeks before trial to his attorney and said this is what the deal is now, it's not as good as the deal that Mr. Gunnarson offered him, because he has backed out of that at least twice."

Kitts says Barlow's statement to Judge Deno Himonas is not true. "Barlow is not being honest at all when stating that Gunnarson upped it to felonies," Kitts said. "The fact is that Gunnarson reduced it to either two or three misdemeanors. He never got fed up at all. There were a few major verbiage changes that needed to be made. Barlow stepped in and was ruthless from the beginning. She was out to get me with a vengeance."

Kitts may have grounds to complain. A government source involved with the Kitts and Jenson cases told *PC* that Utah, generally, should offer plea in abeyances to first time securities offenders but never to repeat offenders. Yet with Kitts and Jenson it was the reverse. Both cases handled near the same time by the same prosecutor—Barlow—and the first time offender got the bad deal and the repeat offender the good.

Jenson was not the exception. Previously Barlow prosecuted the largest mortgage fraud in Utah history. Alvin Anderson was among promoters of a multi-million dollar swindle with

dozens of victims. The scam involved getting victims to take out home equity loans to invest in so-called “high yield” or “prime bank” schemes.

Prior to the Attorney General’s Office charging Anderson with securities fraud he had already served time in 1986 and 1987 after convictions on three separate frauds. The first was a theft by deception case when, as an insurance salesman, he collected premiums for a

policy he never had issued. Instead of jail he was put on probation and given a chance to make restitution. In 1985 authorities learned he had stolen from another insurance client in order to help make restitution payments. That time he got a prison sentence. During the same year Anderson pled guilty to another theft charge on a so-called Statute of Liberty scam where Anderson collected money from school children to help pay for the restoration of the Statute of Liberty. Instead of sending the money to the restoration foundation he pocketed it. “He was supposed to make restitution as part of parole. I think I got \$250 of \$25,000,” said one of his victims.

Despite the three previous scams and failures to pay restitution Barlow offered a plea with Anderson where he would serve no prison time but was on the hook for \$1 million restitution. Today, after nine years of Anderson purportedly making restitution, Utah’s Office of Debt Collections has collected exactly \$3,256 by garnishing his tax refunds. A staff worker said they have been unable to collect more because they don’t know if or for whom Anderson works to garnishee his wages.

Stay tuned. In the next installment: Why Charlene Barlow will likely be subpoenaed by a federal grand jury if she hasn’t been already.



Marc Jenson, left, and Alvin Anderson got better deals from Barlow despite prior convictions and millions in losses.