

the Beverly Wilshire Hotel is a peripheral issue, however. The Court failed to mention or discuss the far more important issue of whether Mr. Cain lied in contradicting defendant's testimony about a call to Mr. Cain in April of 1989, in which she questioned him about John Mitchell's being paid as a HUD consultant. Mr. Cain's testimony, and the use of it by the government in closing argument, obviously had a large role in undermining the defendant's credibility before the jury. For that reason alone, the Court should not resolve the Rule 33 motion without exhausting all available avenues for determining whether Mr. Cain told the truth.

Further, the testimony of Mr. Cain has taken on additional importance since the briefing on defendant's Rule 33 Motion. In the Revised Presentencing Investigative Report (Feb. 7, 1994), the U. S. Probation Officer has accepted the government's arguments--advanced in a Letter from Arlin M. Adams to Gregory Hunt at 8 (Jan. 18, 1994)--that Mr. Cain's testimony formed a basis for determining that defendant obstructed justice by perjuring herself in testifying that she called Mr. Cain to express her anger at the accusation in the HUD Inspector General's Report regarding John Mitchell. See Revised Presentencing Investigative Report at 13, 51. As a result of an upward adjustment of Sentencing Guidelines points due to that finding, the recommended Guidelines Sentencing range for imprisonment was increased by the Probation Office from a range of 24 to 30 months to a range of 30 to 37 months. Compare

Presentencing Investigative Report (Dec. 28, 1993) at 13, 33, 41, with Revised Presentencing Investigative Report at 13, 33, 41.

In originally raising the issue of Mr. Cain's perjury,¹ defendant pointed out the implausibility of her making up the story about having called Mr. Cain--as well as being ready to make up a story about what Mr. Cain had told her--knowing that Mr. Cain was available in the Office of Independent Counsel to contradict her. Defendant also submitted an affidavit stating what Mr. Cain had told her when she asked to see a check proving that John Mitchell had been paid for HUD consulting--namely, that the check did exist but was then being maintained in the Regional Inspector General's Office.² Defendant also provided an affidavit by James P. Scanlan, a career government attorney, attesting that, in April 1989, defendant had told him of the call to Mr. Cain and had told him that Mr. Cain had told her that the check was maintained in a HUD field office.³ Given the circumstances, if Mr. Scanlan's statement was true, it was virtually inconceivable that Mr. Cain's testimony contradicting

¹ See Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant to F.R.Crim.P. 29 (c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33 at 16-72 (Nov. 30, 1993) (Dean Memorandum).

² Affidavit of Deborah Gore Dean in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant to F.R.Crim.P. 29 (c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33, ¶ 8 (Nov. 30, 1993).

³ Affidavit of James P. Scanlan in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant to F.R.Crim.P. 29 (c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33, ¶ 2 (Nov. 30, 1993).

defendant could also be true.⁴

Further--and of critical importance--defendant argued that records showing the whereabouts of the check in April 1989 would be highly relevant to the issue of whether Mr. Cain committed perjury. Dean Memorandum at 171.

The government responded by arguing that there simply existed a testimonial dispute.⁵ Most notable, however, when the government filed its Opposition, it had had ample time to determine whether the check was maintained in a field office. Nevertheless, the government did not state where the check was maintained. Nor did the government offer a rationale for how, assuming that the check was maintained in the field, defendant could have learned of that fact other than in the manner she stated, at any time, much less in April 1989, when Mr. Scanlan stated that defendant told him that Mr. Cain had told her the check was maintained in the field.

Rather, the government stated nothing whatever about the

⁴ As has been discussed by defendant and the government, the different stories of defendant and Mr. Cain cannot be resolved by assuming that Mr. Cain may have forgotten about the call. See Dean Memorandum at 168-69; Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 at 49-50 Dec. 21, 1993) (Gov. Opposition).

⁵ See Gov. Opposition at 74-75. In its Opposition, the government dismissed the Scanlan Affidavit, noting that "Mr. Scanlan -- aside from his obvious bias -- has no first-hand knowledge of defendant's purported conversation with Agent Cain. Rather, he relies solely on what defendant told him." Id. at 75 n.21. The government did not address defendant's argument that, given the circumstances in which she told Mr. Scanlan about the conversation with Mr. Cain, if Mr. Scanlan was telling the truth, Mr. Cain was almost certainly lying.

check. It is a more than reasonable inference that the government did not address this matter because it knows that the check was maintained in the field and it does not know how the defendant could have learned of this matter other through the conversation she stated she had with Mr. Cain.

Defendant submits that the government has the obligation to uncover and disclose the perjury of its witnesses, particularly when those witnesses are its own agents. The Court has already observed that the government throughout this proceeding had failed to be forthcoming and candid about exculpatory information or about information relating to the credibility of its witnesses. The government's failure to address the issue of the check, as well as its efforts to make obfuscatory arguments about extraneous issues in responding to the allegations about Mr. Cain,⁶ strongly suggest that, instead of fulfilling its

⁶ Defendant has conceded both that she was mistaken as to the presence of Mr. Cain at a party at the Beverly Wilshire and that her arguments as to whether the government knew or should have known of Mr. Cain's perjury that related to Mr. Cain's testimony regarding the party are no longer valid. Dean Reply at 26. She has also conceded that she erred in placing the event in May 1986, the date of the receipt, rather than May 1985. *Id.* at 26 n.22. Yet the government's assertions that defendant lied about the party--and in particular its claim that there is something suspicious about the American Express receipt--are simply efforts to lead the Court away from the critical issue. See Gov. Opposition at 75-77; Dean Reply at 26 n.22. It is fair to say that the government knows to a virtual certainty that the receipt attached to defendant's affidavit bearing the date May 28, 1986, and signed "Mary Gore Dean" in defendant's handwriting, is in fact the receipt for the party described in the Declaration of Joseph Parker that took place on May 29, 1985. (The discrepancy in dates presumably resulted from a waitperson's error in advancing the year rather than the day on a credit card device). The government's assertion to the contrary is an effort to lead the Court to believe something that the government itself

obligation, the government is seeking to conceal and coverup what it believes to be the perjury of its agent.

Further, there is now a separate issue from that of what the government knew or should have known about the credibility of Mr. Cain's testimony when he testified and when the government relied on that testimony in closing argument. The government has since that time had the opportunity to review the materials submitted with defendant's Motion and has had the opportunity to determine whether the check was in fact maintained in the field and otherwise to investigate whether Mr. Cain lied on the stand. Nevertheless, while failing to reveal even the whereabouts of the check, the government has relied on Mr. Cain's testimony in arguing to the Probation Officer that defendant committed perjury in testifying about her call to Mr. Cain.

Defendant submits that the Court cannot properly resolve either defendant's Motion for a new trial or determine an appropriate sentence without requiring that the government present to the Court a statement as to all actions it has taken to determine whether Mr. Cain has committed perjury, including what inquiries it has made to determine the whereabouts of the check and the results of such inquiries. In the event that the government has not made such inquiries, defendant submits that the government should be required to submit to discovery on that

does not believe, and the government's evident purpose in doing so is to cause the Court to overlook the fact that the government cannot reasonably respond to the allegation of perjury by Mr. Cain without addressing the issue of the whereabouts of the check.

matter.⁷

Defendant further submits that if it is revealed that the check was maintained in the field, the Court should hold a further hearing regarding whether the government knew or should have known of the perjury of Mr. Cain either when it introduced and relied on the testimony at trial or when it relied on the testimony in post-trial arguments to the Probation Officer, as well as whether Mr. Cain's perjury should be imputed to the Office of Independent Counsel.

Finally, even if the Court should be of the view that the Motion for a new trial should be denied notwithstanding that the check was maintained in the field and the government failed to disclose that fact or failed to inquire because it feared the results of such inquiry, defendant submits that, for purposes of facilitating the appeal process, the Court should at this time resolve all factual issues relating to defendant's allegations of perjury by Mr. Cain and the government's actions regarding that matter.

2. Materials Reflecting Russell Cartwright's Statements About the October 1987 Receipt

A critical thing to understand about the defendant's contentions regarding the government's use of a Russell Cartwright receipt in its cross-examination of defendant and in

⁷ Efforts have been made to determine the whereabouts of the check in April 1989 through the Freedom of Information Act (FOIA), but FOIA requests have not so far been responded to by HUD. Defendant submits that the Court also should require the government to indicate any actions it has taken with regard to HUD's compliance with FOIA requests on this matter.

its closing argument is that defendant does not contend that the government merely sought to have attributed to defendant the acceptance of a meal that it knew she did not receive. Rather, defendant maintains that: (1) the government knew that the receipt was false; (2) the government cross-examined defendant with the false receipt believing that defendant was likely to testify that it was false because it in fact was false; (3) the government did so in order that it could state to the jury that defendant had lied when she denied the receipt even though the government knew that defendant had not lied, and in order that, after telling the jury that defendant's entire case rested on her credibility, it could point to such things as defendant's denial of the Russell Cartwright receipt and tell the jury that defendant should be convicted because she was a liar.

Such behavior on the part of this or any government, of course, shocks the conscience. Yet, that such was in fact the government's behavior in this case was the reasonable inference to be drawn from points made in, and the material presented with, defendant's initial memorandum, in particular the Grand Jury testimony of Abbie Wiest specifically denying that defendant was at the event in question. See Dean Memorandum at 128-31, 191-94.

In that Memorandum, defendant noted that she was requesting the government to produce interview notes and Grand Jury testimony of Russell Cartwright with respect to any expense relating to the defendant. Id. at 130 n.97. Such information would be relevant in the following respect. If it showed that

the government had never questioned Mr. Cartwright, it would support defendant's argument that the government was using the receipt while believing that it was likely to be false. If it showed that the government had confronted Mr. Cartwright with the receipt and he had insisted that it did reflect a meal with defendant notwithstanding Abbie Wiest's statement to the contrary, it might support the government's argument that it had some legitimate basis for probing the matter with defendant. But if--as is most likely--it showed that Mr. Cartwright had acknowledged to the government that the receipt was false, it would strongly support defendant's argument as to the unconscionable nature of the government's tactics.

The government has never responded to that request.

In the government's Opposition, it acknowledged awareness of Wiest's testimony, but argued that it nevertheless had "'well reasoned suspicion' [about the receipt] raised both by the receipt and defendant's practice." Gov. Opposition at 28. The government's Opposition, however, was most notable for what it did not say. The government did not question defendant's argument that, notwithstanding the government counsel's statement that Russell Cartwright was someone whom defendant's calendars showed "she was meeting [] for lunch all the time," her calendars in fact showed not a single instance of defendant's meeting Russell Cartwright for anything at anytime. See Dean Memorandum at 194.

More significant, however, the government's Opposition

mentioned nothing whatever regarding what Russell Cartwright had told the government about defendant's presence at the dinner indicated by the receipt. Yet, there can be no doubt that the government has interviewed Russell Cartwright, probably on many occasions. Indeed, Russell Cartwright had an important role in the charges in the indictment in United States v. Victor Cruse, and may in fact be an immunized witness.⁸ Given the resources the government has devoted to developing evidence that defendant received meals from various individuals, it is exceedingly improbable that the government did not explore this matter with Russell Cartwright.

Defendant submits that it would not be proper for the Court to rule on the prosecutorial misconduct issue without requiring the government to produce all material it has reflecting Russell Cartwright's statements about the receipt in question. She respectfully requests that the Court order such production at this time and withhold final ruling on her Motion for a new trial until the implications of the materials produced can be fully resolved.

Respectfully submitted,

Dated: February 18, 1994

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⁸ A copy of a newspaper account of that Indictment is attached as Exhibit A.

CERTIFICATE OF SERVICE

I, Barbara H. Merryman, hereby certify that on this 18th day of February, 1994, I caused a true copy of the foregoing pleading to be served by first class mail on:

The Honorable Arlin M. Adams
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Barbara H. Merryman