UNITED STATES OF AMERICA v• **DEBORAH GORE DEAN**	CR 92-181-TPH

IN THE UNITED STATES DISTRICT COURT
FOR TRi DISTRICT **OF** COLU!GIA

GOVERNMENT •S OPPOSITION TO
DEFENDANT DEAN'S MOTION FOR NEW TRIAL

On December 24, 1996, defendant Deborah Gore Dean moved this Court for a new trial on Count One of the indictment against her on the ground of newly discovered •vidence.' In support of this motion, Dean submits an affidavit of a witness she did not call at trial, and argues that the affidavit establishes that she was not involved in the HUD project that the Court of Appeals found formed the basis for her conviction on Count One and that the chief piece of evidence relied upon by the Court of Appeals in upholding that conviction was therefore irrelevant.

The United States, by and through the Office of Independent Counsel, hereby opposes Dean's motion, which, it 'should be made clear from the outset, addresses onlyown of the seven counts on which she remains convicted. Furthermore, the supposedly "newly discovered evidence" Dean cites in support of her motion for a new

$ Dean also argued in the alternative for **setting** aside the verdict on Count One In her memorandum of points and authorities in support of her notion for a new trial.

trial on Count One -- the affidavit of Lance Wilson, another former HUD official also convicted in the course of the HUD investigation -- fails each and every element of the stringent test this Circuit applies to motion& for a new trial. United States v. Sensi, *879 P.2d 988, 901 (D.C. Cir. 1989).*

First, this supposedly new evidence has not been discovered since the trial of this matter; to the contrary, Dean testified at trial that Wilson had told her prior to trial that "he had been the person working with [Mitchell]" on the Arsaa project. Even if this **were** not the case, Wilson's affidavit would, at beet, constitute newly "available" evidence, which cannot form the basis for a new trial, rather than newly "discovered" evidence. Finally, *Dean's* failure to call Wilson as a witness at trial is also fatal to her attempt to secure a new trial on Count One.

Second, Dean has completely failed to show that she exercised any diligence in attempting to procure her "newly discovered" evidence either at trial or thereafter; to the contrary, although she testified that Wilson had told her of **his** involvement in Arama after her indictment, she did not call Wilson as a witness at trial, makes no showing that she attempted to call, far less, to subpoena his to testify, and did not come forward with his affidavit for over two years after his own conviction was overturned on appeal.

Third, this allegedly new evidence is at best cumulative and **impeaching -- precisely the type of evidence that cannot form the basis for a Rule** 33 motion.

Fourth, the affidavit is not material on the critical point at issue; that is, what actions Dean took on Arama, regardless of any actions *Wilson may have* taken.

Finally, the affidavit would not probably produce an acquittal on Count One because it is immaterial, the premise underlying it is wrong and has already been rejected at trial and in post-trial proceedings, and Wilson's own credibility would be an issue.

Moreover, in again challenging the evidence that the jury, this Court, and, the Court of Appeals found established her own participation in the conspiracy set forth in Count One, Dean improperly engages in an attempt' to relitigate issues already conclusively decided against her. seg United States v. Singleton, 759 F.2d 176, 182-53 (D.C. Cir. 1995) (issues adjudicated on prior *appeal* constitute the "law of the came" and cannot be relitigated) .

For all these reasons, Dean's motion for a new trial should be denied.

I. MOTIONS FOR NEW TRIAL ARM DISFAVORED AND WILL BE GRANTED ONLY *IF THE DEFENDANT* SATISFIES A FIVE-PART TEST.

While Rule 33 of the Federal Rules of Criminal Procedure provides that the district court may grant the defendant a new trial on the basis of newly discovered evidence, such motions "are not favored by the courts and are viewed with great caution." 3 C. Wright, **Federal Practice and Procedure: Criminal** g 537 at 315 (2d ad. 1982). This Circuit employs a five-part test for determining whether a motion for a new trial Should be granted on this groundt

> (1) the evidence must have been discovered since the trial; (2) the *party* seeking the new trial must show diligence in the attempt to procure the newly discovered

> evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be matextal to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

United States v, Sensi, 879 F.2d at 901; Thompson V. United States,

A. The Allegedly New Evidence Here Is Not Newly Discovered Since Trial.

188 F.2d 652, 633 (D.C. Cir. 1951).

11. DBJ M'S NOTION CLEARLY FAILS THE FIVE-PART TEST FOR NOTIONS FOR NEW TRIAL.

Dean's motion does not meet the first element of the five-part test for determining when a motion for new trial should be granted because it relies on evidence that has not been "discovered since the trial" of this matter. First, Dean herself testified that Wilson told her prior to trial, apparently without fear of disclosing evidence somehow damaging to him, that he had been involved in Arama. When asked on croae-examination whether Wilson was the same person she claimed was helping Mitchell on Arama, she replied that "subsequent to this indictment I have had a conversation with Mr. Wilson and Mr. Wilson told me that he had been the person working with (Mitchell]." Trial Transcript ("Trial Tr.") at 2887. Thus, Dean can make no argument that the matters set forth in Wilson's affidavit are newly discovered. Bee United States v. Glover, 21 F.3d 133, 138-39 (6th Cir.), cert. denied, 115 S..Ct . 360 (1994) (defendant who was "well aware" of witness's proposed testimony prior to trial fails to carry burden of proof under Rule 33).

Even if Dean had not been aware of these matters prior to her trial, her motion must still fail on the ground that the evidence

is not newly discovered, A number of courts, including those in this Circuit, have,made clear that evidence that was not produced at trial because of a potential witness's Fifth Amendment concerns cannot be considered newly discovered for the purposes of a new trial motion. In United States V. Dale, 991 F.2d 819, 838-39 (D.C. Cir.) (per curiam), cart. denied, ' 510 U.S. 1030 (1993), for example, this Circuit held that the "unanimous view of circuits that have considered the question is that this requirement (that evidence have been discovered since trial) . is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial." The court cited in support its own decision in Chirino v. NT8B, 849 F.2d 1525 (D.C. Cir. 1988), in which it had held, in the administrative context, that the NTBH "had reasonably concluded the proffered testimony of an FAA inspector who had invoked his fifth amendment nrivileae at a pilot certification hearing but had since pleaded guilty to charges related to the hearing's subject-matter did not constitute 'newly discovered' evidence under an NTSB rule so as to warrant reconsideration of the certification denial." , at 839 (emphasis added). it also cited several decisions from other dircuits holding that when a defendant who has availed himself of his privilege not to testify comes forward, post-trial, to offer exculpatory evidence for a codefendant, the evidence is not "newly discovered." Ids

In Chirino, the Court of Appeals stated that "(i]nasmuch as (the author of a poattrial affidavit who had since pled guilty to charges arising out of the same set of circumstances] chose to

remain silent in the earlier proceedings, the (NTSB) could reasonably cor^;lude that he should not now be allowed to come forward to exculpate his co-conspirator at a point when to do so was apparently 'coat-free' (or at least no longer unacceptably costly) to him." 049 F.2d at 1333. The same reasoning applies here. The matters set forth in the Wilson affidavit are not "newly discovered" *for* the purposes of Rule 33; they have merely been made "available" at this time, apparently because Wilson has decided that it is no longer too costly for him to cow forward.3

Finally, and equally fatal to her attempt to portray the Wilson affidavit as newly discovered evidence, even though Wilson apparently acknowledged his involvement in Arena to her prior to trial, Dean did not list **his** as a potential witness, did not call him as a witness, and makes no showing that she attempted to call, far less, to subpoena him to testify., e. ., Rodriguez v. United States, 373 F.9d 17, 18 (5th Cir. 1967) (where defendant chooses not to call witness who has indicated he will refuse to testify based on ground of self-incrimination, such tactical decision effectively foreclose$ new trial on basis of newly diSCdvered evidence); Annot., What Constitutes "Newly Discovered Evidence" Within Keening of Rule 33 of Federal Rules of Criminal

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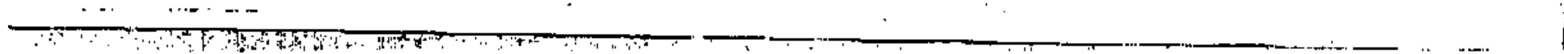
Wilson states in his Affidavit (1 1·5) that at the time of Dean's trial, he "had been convicted of one Count concerning (his) conduct while an executive of PaineWebber, Inc. and (he) was not willing to testify on the Arama matter or any other matter." Although he was not named as a co-conspirator with Dean in her indictment, he was centrally involved in the HUD matters the Independent Counsel was charged to investigate and his indictment arose out of those matters. Moreover, as his affidavit shows, his interests were aligned with Dean's at trial. .



Procedure Relating to Motions for New Trial, 44 A.L.R.Fed. 13, 52--56 (1979 a Supp. 1996) (collecting cases holding that a witness's previous unwillingness to testify at trial does not excuse the defense's failure to call that witness at trial).

The matters sot forth in the **Wilson affidavit are** not newly discovered evidence under Rule 33. For this reason alone, the Court should deny Dean's motion for a new trial.

S. Dean Did Not Exercise Due Diligence in Seeking This **Allegedly New Evidence.**

Dean has also failed completely to meet the second element of the five-part test for new trial motions -- that **is,** that she exercised diligence in attempting to procure the evidence set forth in Wilson's affidavit at trial or any time soon thereafter. As discussed above, Dean was apparently aware of **Wilson's** alleged involvement in the Prams project before her trial, yet did not list Wilson as a potential witness at trial, did not call him to testify, and makes no allegation that she tried to call or subpoena him. Indeed, she did not call Wilson as a witness even though she and Wilson have been vary good friends ever since he left HEM, he was her predecessor and her advisor, and he supported her throughout her trial, going so far as to appear in court on **numerous occasions** and being pointed out to the jury on at least one occasion.' Trial Ti. at 2670-71, 2646, 2885, 3152-53. This alone is indicative of a lack of diligence **on her part.**

Not surprisingly, therefore, the "new" evidence in Wilson's affidavit tracks exactly the theory Dean put forward at **trial through her own testimony and other evidence.**

Dean's failure in this regard is particularly striking, since, notwithstanding his bars assertion that he *was "not willing" to* testify on the Arama or any other matter (Affidavit, g 15), Wilson's prior conviction did not relate to Arama or even to the mod rehab program. In fact, since Wilson suggests in his affidavit that both his conduct and that of Dean was blameless and since he has not made his affidavit under any grant of immunity, his supposed previous reticence cannot be credited.

Just as telling is Dean's failure to move for a new trial on the basis of matters apparently well known to her prior to trial in 1993 until more *than two* years after Wilson's *own* conviction was overturned on appeal in June 1994. *Dean's timing has* nothing to do *with the "now' nature of* this evidence and everything to do with yet another attempt to delay her sentencing.

C. The Allegedly New Evidence Is Merely Cumulative And Impeaching.

The allegedly new evidence set forth in Wilson's affidavit is also insufficient for the purposes of a new trial for a third reason: *it would have been,* at best, cumulative to or impeachment of other evidence presented at trial. Dean first seeks to use the affidavit in a cumulative manner -- that is, to buttress her own testimony regarding Arama and certain telephone message slips referring to Wilson, found in John Mitchell's files, and made available to the jury in this matter. She next seeks to use the *affidavit for purposes of* impeachment -- that is, to attack the testimony and credibility of Maurice Barksdale. indeed, even this impeachment is cumulative, since it follows the same lines *of*

defense Dean pursued at trial. Furthermore, as *shown below,* the Wilson affidavit is cumulative on immaterial points. Thus, neither purpose for which Dean uses the affidavit can result in a new trial *on the* basis of newly discovered evidence.

1. The Allegedly New Evidence In Cumulative.

In his affidavit, Wilson states that he had *contact with John* Mitchell and Louie Nunn regarding the Arama project before he left HUD at the and of May 1984, that Assistant Secretary Maurice Barksdale "led (him] to believe" that he would approve funding the project, *that by the time* he left 1HUD *he* "believed" that Barksdale *had* approved *the* funding, and that he would have remembered if he had talked to Dean about *the* project, which he did not. Wilson Affidavit, It 8-9, 12-13. These matters, *however,* even if proven, would have constituted at the very most evidence cumulative to the other evidence presented at trial.

- The government made no secret at trial that events relating to the Aram& project had occurred before Dean wrote a letter about the project to Nunn on July 5, 1964. *Government* Exhibit ("GX") 28 (attached hereto at Tab A). The evidence showed that in January 1984 Nunn had entered into two agreements with the developers of Arama to seek mod rehab funding for the project and signed over part of the fees called for by these agreements to Mitchell. Trial Tr. at 238-42, 1351-52, 1368-69J GX 20, 21. to March the local HUD *office received an* application from Arama for 293 mod rehab units, and the developer wrote to Nunn at Mitchell's office in Washington, D . C., telling *Nunn* that the developer understood "that the unite

must now be released from HUD Central office. It is highly advisable that you corroborate this and further obtain the authorization for these units as soon as possible." G8 23, 24. In April, the developer wrote to Nunn at Mitchell's office to ask when the funding of the 293 units for Arams would take place. Trial Tr. at 157-581 GX Z5.. On July 5, Dean wrote the letter to Nunn about the ongoing efforts to award mod rehab funds to Araina, HUD authorized the award on July 16, and Dean sent a copy of the HJD paperwork to Mitchell's office on July 18. Trial Tr. at 2985-86; GX 28, 30.

Indeed, the jury heard evidence, including Dean's testimony, that suggested that Wilson may have been involved in Arama while he was at HUD. During Dean's cross-examination. for examn1A. as pointed out above, Dean testified that "subsequent to this indictment I have had a conversation with Mr. Wilson and Mr. Wilson told me that he had been the person working with [Mitchell]" on Arama. Trial Tr. 2887. Defense counsel also used the Mitchell/Wilson telephone message slips to cross-examine Barksdale about Wilson's involvement in Arama's funding, used them in cross-examination of three other government witnesses about Wilson, and argued that they showed Dean's innocence in the funding of Arama during closing argument. Tr. 359-60, 377-79, 510-11, 1395-96, 3461-62, 3469-70; Dean Ex. 23-24.

Although Dean alleges that the message slips support her theory that Wilson was involved in the funding of Arama and reiterates her previous claims to this Court and to the Court of

Appeals that the government did not produce the slips as *Brady* material (Motion at 5-8), it could not be clearer that she made full use of the slips at trial. As the Court of Appeals found, Dean "effectively used the phone messages that the government did not segregate as exculpatory. The government provided the messages to Dean more than a year before trial, she placed the message slips into evidence at trial, and argued their significance to the jury. ° United States v. Dean, 55 P.3d 640, 664 (D.C. Cir. 1995), cart. denied, 116 S.Ct. 1298 (1996). The Court of Appeals therefore affirmed this Court's denial of Dean's motion for a new trial on the ground that the government failed to provide her with the message slips. .Id. at 665.

Wilson's description of his activities relating to Arama is, at best, cumulative to the other evidence produced at trial relating to the events that took place regarding Arama between January and July 1984. The affidavit therefore fails under the third element of the stringent five -part test for obtaining a trial on the basis of newly discovered evidence, which prohibits granting such motions based on evidence that is merely cumulative.'

2. Rule 33 caanot Be Used for Imoeachsient purposes.

Dean also improperly seeks to use the Wilson affidavit to impeach the trial testimony and Credibility of Barksdale. She argues in 'her motion that the affidavit demonstrates that Barksdale's testimony "that he did not know that the 293-unit allocation was intended for the Arama project and that he never made any project-specific allocations was misleading, if not

false." Motion at 14. This contention does not, however, meet the standards for granting motions on the basis of newly discovered evidence. If true, it would only have been useful at trial as impeachment material in cross-examining Barksdale.

The third element of the five-part teat for granting new trial motions forbids reliance on evidence that is merely impeachment; it is well established that newly discovered evidence "that merely goes to impeach the credibility of a prosecution witness is not sufficient to justify a new trial." 3 C. Wright, Federal Practice and Proceduret Criminal f 317 at 330 (2d ed. 1982). See also United States V. Lee, 513 P.2d 423, 425 (D.C. Cir.) .(per curiam), cart. denied, 423 U.B. 916 (1975); Murphy V. United States, 198 P.2d 87, 88 (D.C. Cir. 1953) (per curiam). Thus, even it Wilson's statements about Barksdale in his affidavit are correct, Dean is not entitled to a new trial on this ground.

Dean also attempts to use the Wilson affidavit as an excuae to make a number of other claims regarding Barksdale, none of Which is properly the subject of a Rule 33 motion, and none of which, in any event, bears scrutiny. First of all, she claims that Wil 8en'i. statements that he spoke to Barksdale about Areas are supported by her own testimony, the indictment of James G. Watt, and the interviews and testimony of Barksdale'. assistant, Stuart R. Davis. Notion at 15-17.

Dean's own testimony was, of course, self-serving and rejected by the jury when it found her guilty of all the charges against her. With regard to the Watt material -- which was not produced by

Watt until well after Dean's trial -- the statement in Watt's letter to Barksdale that three enclosed mod rehab applications were not project-specific, "(j)ust as you like it," is not inconsistent with Barksdale's testimony at trial that IUD had a policy against making project-specific awards of mod rehab funding. Trial Tr. at 457-39, 463, 465. Moreover, Barksdale also testified at trial that he met with and spoke to Watt about HUD business, including approval on applications and mod rehab funding; that information he and his staff used in making mod. rehab funding decisions came from, among Other sources, developers and consultants like Watt; that such persons "lobbied" him for mod rehab funding; and that he would listen attentively to their requests. Id. at 491-95, 515-19, 537.

As to Dean's allegations regarding the interviews and testimony of Davis, these claims provide a very telling example of her willingness to ignore inconvenient facts -- while making reckless charges against the government. Contrary to her assertion that those materials support her allegations that Wilson, not she, was involved in Arama and that they serve to impeach Barksdale's credibility (Motion at 15-16), they suggest, i! anything, precisely the opposite. In fact, Davis's interviews and testimony implicate Dean in the awarding of mod rehab units, stating, inter alia, that units "were usually awarded after Barksdale received a telephone call from someone in the Secretary's office, usually Debbie Dean or Tom Demery, to fund a specific project"; that "[t)echnically, Barksdale's signature was required for all funding decisions related to Section A allocations; however funding decisions were

actually made by someone in the Secretary's office (Lance Wilson' 4$4 or Debbie Dean) or someone in the Undersecretary's office (Phil Wynn)"; that Barksdale "was a 'straight shooter,' . . an administrative type who made sure that the office was well run and not political. . . . [hje was honest"; that even though Davis kept track of the political contacts regarding mod rehab funding, "no specific project was usually funded unless Mr. Barksdale wan told by Secretary Pierce's office (or Undersecretary Abrams' office) to provide the specific mod rehab funding"; that the directions on funding usually came from Pierce's Executive Assistant, "who through early 1984 was Lance Wilson and after that time was Debroah (sic] Dean"; and that the people who actually made the decisions as to which projects to fund were Pierce or the people (Wilson and Dean) in his office. Report of Interview, Stuart R. Davis, February 12, 1993, at 2-3; Davis Grand Jury Testimony, March 12, 1993, at 11-16.' -

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Dean alleges in her motion for a new trial that she does not know when the Davis materials were produced to her, but presumes that it was the night before Barksdale testified. Notion at 15, n.13. The government's review of its files has been, of course, complicated by Dean's long and unexplained delay in raising the issues as to what was produced to her and when in her motion. As far as the government can ascertain from its records, however, it appears that the Davis materials were provided as Gig lio material on Barksdale before he testified. Many of the statements from these materials were also not out in a letter to Dean's counsel of August 20, 1993, as being potential Brad information.

Dean also alleges that a statement of March 1993, made to the government by Barksdale was not produced to her. Notion at 16 n.14. While the government has been unable to determine whether it was produced or not, its possibly exculpatory contents, as Dean acknowledges, j, were summarised in the government's letter to counsel of August 20, 1993, and therefore available to be used in cross-examination of Barksdale at trial.

Dean also taken the opportunity to reiterate her claim, again not cogniaablt on a **i uie** 33 motion, that the government did not ask Barksdale at trial about Wilson's involvement in the Arama funding as reflected in the Mitchell/Wilson message slips (on one of which he was cross-examined at trial). Motion at 9 -10; Tr. 510-11, Dean Ex. 23. Dean first **claimed** that the **goverment failed to confront Barksdale** with the **message slips** either **before or** after trial **in her motion for a now trial of November 30, 1993** (at **119-20);** this **Court denied the motion on February 14, 1994. She also claims that Barksdale'** n ***statement*** **in a January 1990** interview that Dean was not **involved in the** *mod* ***rehab*** **funding process was not** turned over as **Brad**y material. Notion at 11 n.7. The government's **records** indicate that this interview report was produced to Dean prior to trial, and that, in an August 10, 1993 *letter* setting out possible Brad[y] **statements,** the government noted that Barksdale had stated that he, not Dean, had been responsible for making mod rehab allocation ***decisions.***

As to **Dean's allegations regarding the MUD audits of the Title X and loan management set-aside programs** (Notion at 17-19), these **matters also are not cognisable under Rule 33** since they **would have** been relevant only as impeachment material. **In any,** event, the **government's files** ***indicate*** that **Dean** was **given** the copy of a two-page document relating to joint MUD/FBI investigations of the Title X loans showing Barksdale's name prior to his testimony. She Motion at 18 n.18, ax. 19 (FAO 5-6 (Attachment VI-3)). Moreover, as Dean's own notion makes *clear,* the Lantos Committee hearings had

made public that Barksdale had ree:eived consulting tees with regard to Title X long before tri i 3n Motion at 18 n.17; Abuses, Favoritism, and Mismanagement in JiUD Programs$ Hearings before the Employment and Mousing Subcomm. of the Comm. on Government Operations, 101st Cong., lot Bess., Pt. 3 at 766-70 (1989). in addition, the government's records indicate that she was given the information set forth in the Cushing interview about the loan management set-aside matters as part of Barksdale's Giglio materials, and could therefore have used it on cross-examination at trial.'

Even more self-defeating is Dean's curious suggestion, based on information she gleaned from the public congressional hearings on the HUD matter, that Barksdale was involved in improper activities with Wilson and therefore would have wanted to hide Wilson's involvement in Arama (Motion at 19 n.19); certainly Wilson's affidavit, on which Dean's entire motion rests, suggests nothing of the kind. Dean's statement does suggest, however, that she will stop at no argument, no matter how inconsistent, to achieve a new trial.

I As to the three audit reports and two other one-page documents included in Exhibit 12 to Dean's motion for a new trial to which Dean 'refers (Notion at 17-19, 17 n.16, if nn.17), the first audit (No. 89-AO-119-0006) is a general review, of the loan management set-aside program that does not refer to Barksdale or to his company, or to any role they may have had in any of the projects mentioned. The government has been unable to find a copy of the other audits in its files. The government's records indicate that it does not have copies of the two one-page documents in its files, and the copies attached to Dean's motion in Exhibit 12 do not have the government's identifying numbers on them.

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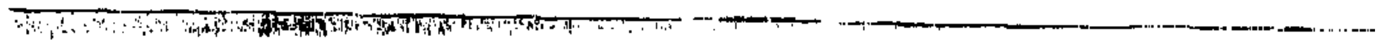
D. The Allegedly Now Evidence Is Not **Material.**

The fourth defect in Dean's motion is that the matters set forth in Wilson's affidavit are not material to the issues involved in her conviction. It is beyond dispute that, whatever Wilson now claims to have believed, the actual funding of Arama did not occur until July 16, 1984, more than a month and a half after he left HUD. It is equally beyond dispute that Dean was involved with. Aroma, at least after Wilson left HUD, If not before. Much as his affidavit seeks. to confuse the issue, Wilson cannot, and does not, say what actions Dean took after his departure. Indeed, Dean's use of this affidavit appears to be an ill-disguised and ultimately futile attempt to relitigats the sufficiency of the evidence against her in violation of the "law of the case" doctrine. e.g. see,

, United States v. Singleton, 759 F.2d at 182-83.

1. The Wilson Affidavit in ZsSaterial to the issues Involved.

The evidence the jury, this Court, and the Court of Appeals principally relied upon to support Dean's conviction on Count One shows that Dean was involved in the funding of Aroma after Wilson' e departure from HUD and that she essentially can the mod rehab program as Executive Assistant. ft 55 r.3d at 647-4A, 651. As the Court of Appeals found in upholding her conviction on Count One, Dean was Involved in the funding of Anna at least by July 5, 1984, over a month after Wilson left MUD. Id: at 651; Wilson Affidavit, ! 1. Dean wrote to Louis Nunn on that date to confirm her "recent telephone conversation with General Mitchell" concerning Aroma's request for additional mod rehab units. CX 28



(attached hereto at Tab A). She also stated in the letter that BUD was ire the Process of completing the ***paperwork for the award of 293*** **units to the local public housing authority, assured** Nunn that the Arama Partnership (rather than the public housing authority) would "definitely receive these units from HUD," and expressed her hope r that "the additional units will make the partnership a viable venture."

On July **6, Nunn wrote to the developer of the Arama project, who called Nunn from** time to time because he was anxious to know whether his project was going through, to tell him *that the request_* for 293 mod rehab units for the project had been approved at HUD ***headquarters*** **and** that the paperwork would be sent to the **Atlanta** ***HUD regional of tics within*** **three days. Dean Trial Tr. at** 251-52, 1373-75; OX 29. After receiving this information, the developer went to his **local** PHA and informed it that the funding for his project would be forthcoming. The MUD headquarters paperwork authorizing the award of 393 mod rehab units to Arama was signed on ***July 16, 1986, and*** **the Atlanta END office was** ***informed of*** **the award on** July **27. Trial Tr. at 251; OX 30. 311 Moion for Now V-riA** 1 - VW

Dean obtained a copy of the MUD headquarters paperwork and had it hand **dslivsXBd** at government expense to Arama at Mitchell's **office on July 1$. Trial Tr. at 2986; GR 30.**

The ***Mitchell/Wilson*** telephone . message slips suggest that Mitchell spoke to Wilson in January 1984. But, ***contrary to*** **Wilson's convenient** recollection now, the slips, far from indicating that funding was granted **in early 1984,** suggest just the

opposites that Wilson was "(t]alking to Barksdale," and would keep Mitchell advised. a,_ message slips• attached to Ex. 1, Dean's Motion for New Trial. The other evidence shows that the funding did not take place until more than six months later, after Dean became Executive Assistant.

Similarly, Wilson's description of Dean as simply being in charge of the "correspondence unit" before she became Executive Assistant is not consistent with her own trial testimony. Wilson Affidavit, s 13. At trial, Dean testified that she began to interject herself into program matters and to call other MUD officials for explanations of their actions shortly after joining HUD. Trial Tx. at 2176-79. Her testimony is corroborated by her own letters, which establish that she pursued matters for Mitchell and Nunn even while she was still a special assistant. See GX 17 ("Dear Dad" letter to Mitchell regarding Xarbilt); GX 18 ("FYI" note to "Daddy" regarding Same).

It is clear from this evidence that Wilson, assuming his truthfulness, lacks personal knowledge of Dean's activities in regard to the funding of Arama, and certainly of any of Dean's acts relating to that project that, occurred after he resigned his position at EM and Dean took over that position. It is also clear that, regardless of what Wilson now claims he supposedly believed in 1984, Arama'had not been funded when he left HUD and was not funded for six weeks thereafter. simply because Wilson supposedly did not know of Dean's unlawful conduct, it does not follow that Dean was not involved in such conduct. Moreover, as a legal

matter, it is irrelevant, even assuming it to be true, that Wilson may have attempted to ensure a project-specific award before Dean assumed his position; it is enough that she took actions designed to. advance the goals of the conspiracy. See, e.g. , Blumenthal v. United States, 332 ***U.S.*** 539, 557 **(1947)** (co-conspirators may join the agreement at any time during the course of the conspiracy).

The Court of Appeals found Dean's letter of July 5 ""damaging to her for two reasons':

> First: she wrote it before the Federal Housing Commissioner, **the** Department official with final responsibility for authorizing the disbursement of housing funds to public housing authorities, had notified the Florida public housing authority that the Department had approved its request for funding. second, the letter assured Nunn that the Arama Partnership, rather than the Florida housing authority,. would receive funding. Both the letter' s timing and its reference to project-specific funding suggest that federal regulations -- which made public housing authorities responsible for selecting which rehabilitation projects to fund . . . -- had been bypassed. In letters to other developers who inquired about funding, Dean wrote that regulations "prohibit HUD from making project specific allocations.'

55 F.3d at 651 (citation omitted). The Court of Appeals also found that, "[gjiven these irregularities," the July 5 letter was

> committed an overt act in tusthesance of a conspiracy to sufficient to support the verdict on Count One that Dean defraud the Department. Dean testified at tial that she had asked the Federal Housing Commissioner whether the Arama project had been funded. The Commissioner confirmed that it had been, and her letter simply passed this information along to Nunn. But the former Housing Commissioner testified otherwise. Although he did "not remember Deborah Dean asking" him to sign off on the funding document, he stated that he did not know that the 293 units would go to a specific project in Miami. According to the former Commissioner, the letter ran contrary to the Department' a prohibition against project-specific awards. From this evidence, a jury could conclude that Dean had acted with Mitchell and Nunn to

defraud the federal government by impairing the functioning of the Department.

Id.•

The Wilson affidavit is immaterial to the issues on which Dean was convicted. Her motion should also be denied on this ground.

2. Dean Cannot Relitigate **Issues** Already Decided Against Her

Dean argues that the Wilson affidavit is material because it renders her July 5 letter to Nunn irrelevant, prevents the use of that letter to support her conviction on Count One, and shows that her act in writing the letter was "innocent,° because it "was nothing more than the passing along of information from Mr. Barksdale to Mr. Nunn. M? Motion for New Trial, at 12-14. Not only was the affidavit immaterial to the issues on which Dean was convicted, as shown above, but her arguments relating to her innocence are also attempts to relitigate matters already

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Dean also alleges in her motion for a new trial that Barksdale's testimony at trial does not contradict Wilson's affidavit because of Barksdale's statement that he did not recall Dean contacting him about the request for 293 units for Arama. Motion at 11. But she fails to point out that Barksdale also testified that, to the best of his recollection, he did not have a conversation with Wilson about the Arama project and that he would have remembered if Wilson had asked him about Arama. Trial Tr. 510-11, 535.

. Dean also cites in support of her innocence here that Richard Shelby testified that he intentionally concealed Mitchell's involvement with MUD from Dean and that Jack Brennan testified that Dean was "shocked" when he told her about Mitchell's consulting at MUD. Notion at 13. Dean previously raised these issues in both her first and second notions for judgment of acquittal, which this Court denied. Motions, October 4, 1993, Trial Tr. at 2001, October 19, 1993, at 29-30, 36. see so Mesatandua of Law in support of Deborah Gore Dean's Motion oruJudgment of Acquittal . . . and for New Trial . . . , November 30, 1993, at 14-15, 20-21.

conclusively decided against her. Dean cannot "attempt to raise again, under the guise Of newly discovered evidence, a matters . already considered and disposed of." United States v. Lee, 513 F.2d at 425 (motion for a new trial on matters already ruled upo n "an imposition on the time as well as the patience of this court").

Deane argument ignores the fact that the jury, this Court, and the Court of Appeals have all already rejected her claim of innocence on Count One and found the evidence, sufficient to convict her of that count. At trial, Dean also attempted to explain away the documentary evidence relating to her on the Arama project as innocent acts, claiming that the letters she wrote an Ara ma simply conveyed information decided by others at MUD or forwarded materials given to her by others. Trial Tr. at 2620 -22, 2649, 2975-90. The jury rejected this explanation, which was belied not only by the letters she wrote but also by the government's evidence showing that she was running MUD in 1984 -87, including making funding decisions, and that in 1984 she instructed the HUD official who replaced Barksdale that the Office of the Secretary "will concur on all funding decisions regarding Mod Rehab funds not previously approved by both Maurice and myself , until a new Federal Housing Commissioner is named." Trial Tr. at 464, 527; G8 147; 55 F.3d at 647-48.

Dean is simply replowing old ground. She first moved for judgment of acquittal on Count One on October 4, 1993, at the close of the government's case, and renewed the motion on October 22, at the close of the evidence in the case, arguing again that she was

innocent of the charges against her, that the funding decision on Arama had already been made when she wrote to Nunn and to the Arama Partnership on July 9, and that she did not talk to Barksdale about funding the project. Motions for Judgments of Acquittal, October 4, 1993, at 5, October 19, 1993, at.34; Trial Tr. at 2012, 3322. This Court denied the first motion for acquittal on October 4 and took her second motion for judgment of acquittal under advisement. Trial Tr. at 2045, 3330.

Dean renewed her arguments in a joint motion for judgment of acquittal and for new trial filed In November 1993, suggesting once again that the evidence at trial was insufficient to show that she joined in a conspiracy to award funding to Aram&. Motion, November 30, 1993, at 3-9, 19. She specifically alleged that Barksdale did not recall discussing the project with her and that he signed the HUD document regarding the award of 293 mod rehab units to Arama, that the July 5, 1994 letter to Nunn showed only that she sent information to Mitchell and Nunn after the decision to award the funding had been made, that Barksdale's and Wilson' n names appear on various exculpatory telephone messages relating to.the.project, and that Mitchell was dealing with **Wilson** with regard to Arama. Id. **at** 5, 7-B, 19, 109. This Court denied Dean's motions for judgment of acquittal and for a new trial on February 14, 1994.'

• Prior to sentencing, Dean objected to a paragraph in the presentence investigation report stating that De an had directed HUD staff members to award 293 units to the local public housing authority. This Court dismissed the objection, stating that "defendant argues no evidence supports a statement that she was responsible for awarding any units to Metro Dade PH A and that Barksdale was the one who signed the documents and he didn't

On appeal, Dean again **argued** that the. evidence of her involvement in Arai.a was insufficient to justify her conviction in that she only checked on the status of the funding for Arama at Mitchell's request, that Wilson was Mitchell's HUD contact on the project, and that Barksdale testified that he approved the allocation to Arama, did not recall Dean asking him to fund Arama, and would have remembered if she had. Appeal Brief, August 17, 1994, at 10-12; Reply Brief, September 30, 1994, at 4. The Court of Appeals denied relief to Dean on these grounds. Dean then repeated the allegations that there were innocent explanations for the July 5, 1984 letter in her petition for rehearing and suggestion for rehearing en.banc. Petition, July 6, 1995, at 10. The Court of Appeals also denied the petition and suggestion. Order, September 13, 1995.

Dean cannot again rslitigate the sufficiency of the evidence convicting her on a motion for a now trial on the basis of newly discovered evidence. Her allegation that it was Wilson, not she, who was involved in funding Arama does not lessen her own culpability for joining a conspiracy and taking actions to ensure that it accomplished its purposes. According to the "law of the case," this issue has been conclusively settled in the decisions on her trial and poattrial motions and on appeal. See United States

recall the defendant asking him to do it, again my recollection of the trial testimony and the evidence at trial is that could show the defendant was involved in the direction of funding of these projects. X think others were involved **as** well, but there's no question, I think, that Me. Dean was." Presentencing Hearing Tr., 2/32/94, is 57-5S.

singleton, 759 F.2d at 183-83.

Z. The Allegedly Now ZvidenTa Would *Not Produce an Acquittal* <u>on Count One,</u>

Finally, the Wilson affidavit also fails the fifth test for newly discovered evidence; it *would not probably produce an* acquittal on Count One, both because it is immaterial on the critical issue of Dean's activity and because its underlying premise is contrary to the findings of the jury, this Court, and the Court of Appeals. That promise is that a project-specific award to Arama was perfectly appropriate. Faced with the necessity of explaining away Dean's July 5 letter to Nunn -- which stated that she wished to confirm her recent conversation with Mitchell and to assure Nunn that <u>the Arama Partnership</u> would definitely receive the requested mod rehab units -- Wilson asks this Court to accept that Dean's letter was, in Wilson's words, "not unusual" and in keeping *with* the usual practice of HUD officials. Wilson Affidavit, ! 14. The jury, this Court, and the Court of Appeals all conclusively rejected this view of the evidence, finding that the project-specific awards were part of a conspiracy to defraud the government.

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in stating otherwise, Wilson conveniently ignores the fact that Dean wrote to Other persons, who were not involved in her conspiracies, that "HUD does not allocate Section 8 moderate rehabilitation funds on a project specific basis" (GX 31a) and that "(f]ederal regulations prohibit ;MUD from making project specific allocations." GZ 31b. As *noted above,* the Court of Appeals, in reviewing this evidence, found the Dean letter to Nunn particularly

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damaging both because it preceded notification of the award to the local housing authority and for its reference to project-specific funding, which suggested that federal regulations regarding selection of projects for funding *had been* bypassed -- a point *reinforced, the Court observed, by* Dean's deceptive letters to other developers. 55 F.3d at 651.

It is not surprising that Wilson would take a position contrary to all the evidence *before the* jury and contrary to the *findings* of the jury, this Court, and the Court of Appeals. He was not only a close friend of Dean's, but had also been implicated by Dean at trial as being involved in the funding of Arama. Trial Tr. at 2848, 2987. Wilson was himself convicted of having given an illegal gratuity to a HM official after leaving HUD -- a conviction that was overturned *only on statute of* limitations grounds -- and evidence at his trial showed that he had altered records in an effort to conceal that gratuity.Under the circumstances, this is not a witness whose evidence would *be* likely to produce an acquittal on retrial, even assuming that that evidence spoke to the critical points at issue.

It is immaterial whether *Wilson was* involved in the funding of Aran= even if he had been, Dean was convicted on the basis of her *own actions once she assumed Wilson's* position and continued the efforts to make this project-specific award. The .premise underlying Dean's arguments -- that her July S letter and other acts relating to Arama were entirely proper -- is demonstrably false and was rejected by the jury and the courts. Wilson's

credibility is such that his evidence would have carried little weight at trial. Fos these reasons, it is not likely that Wilson's affidavit would have resulted in Dean's acquittal on Count One at trial.

CONCLV`

for the reasons set forth herein, the government respectfully requests that Dean's motion for new trial be denied.

Respectfully submitted,

Larry D. Thompson
Independent unael

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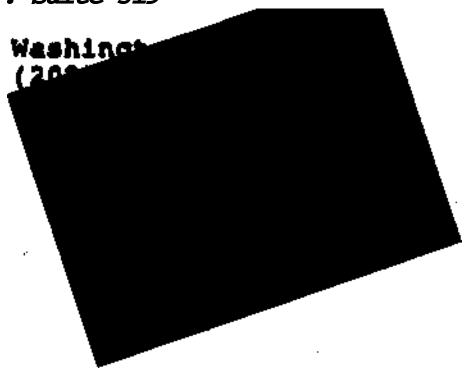

Datedt January 15, 1997

U.S. 0 PAA'TME4r OF HOUSING At UP49AN 0EV .OPhIENT
OFFICE OFTNE SECRETARY
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July S, 1984

Governor Louie Nimn
c/o Global Research International
2828 Pennsylvania Avenue, N.W.
Suits 300
Washington, D.C. 20007

Dear Governor Nunn:

This will confirm my recent telephone conversation with General Mitchell concerning the *Mama* Partnership's request to [liD for additional Mod-Rehab units.

The Department is na+ in the process of caapleting the papers for the 293 units to the Public Housing Authority in Florida. Let me assure you that all the necessary paperwork for the units will be transmitted by the end of this week and that Arrant Partnership will definitely receive these units from FIIID.

I hope that the additional units will make the partnership a viable venture. Please keep in touch.

With best wishes,

Very sincerely yours,

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Deborah Gore
Executive Assistant
to the Secretary