IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
Appellee,
v. : **CR 92-0181-TFH**

DEBORAH GORE DEAN
Appellant.

REPLY MEMORANDUM TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT DEBORAH GORE DEAN'S MOTION FOR A NEW TRIAL

Defendant Deborah Gore Dean, by and through the underabnRa counsel, hereby submits this reply to the Office of Independnt Counsel's opposition to Ms. Dean's motion to set aside the verdict on Count One or, in the alternative, for a new trial. Contrary to the government's assertions, Ms. Dean is not "simply replowing old ground." Government's Opposition to Defendant Dean's Motion of New Trial ("Opp.") at 22. Rather, on the basis of newly discovered material evidence as set forth in the affidavit of Lance Wilson,' Ms. Dean has moved this Court to set aside the verdict on Count One or, in the alternative, for a new trial. Ms. Dean's motion is not a dilatory or delaying tactic utilized to postpone her sentencing hearing, which is inevitable, and Independent Counsel's suggestion to the contrary is

1 The affidavit of Lance Wilson is attached as Exhibit 1to the Memorandum in Support of Defendant Deborah Gore Dean's Motion to Set Aside the Verdict on Count One or in the Alternative for a New Trial.

scurrilous. Indeed, the affidavit of Lance Wilson satisfies each element of the test applied in this Circuit for granting of a motion for a new trial. United States v. Lafayette, 983 F.2d 1102, 1105 (D.C. Cir. 1993); United States v. Kelly, 790 F.2d 130, 133 (D.C. Cir. 1986). As a consequence, Ms. Dean's Motion should be granted.

ARGUMENT

Federal Rule of Criminal Procedure 33 provides for the granting of a new trial "if required in the interest of justice." See also United States v. Glover, 21 F.3d 133 (6th Cir. 1994). This Circuit has established, and applied, a five part test in satisfaction of Rule 33's requirement:

> (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 material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

Lafayette, 983 F.2d at 1105. Contrary to the government's assertions, Ms. Dean satisfies each and every element of Lafayette's five part test.

I. Lance Wilson's Affidavit is Newly Discovered Evidence

There can be no doubt that the testimony of Lance Wilson in his affidavit is newly discovered evidence. See United States v.

Badger, 983 F.2d 1443 (7th Cir.), cert. denied, 508 U.S. 928, cert. denied, 510 U.S. 820 (1993)("An affidavit recanting trial testimony is newly discovered evidence, and, if the circumstances are appropriate, may warrant a new trial."). At the time of Ms. Dean's trial, Mr. Wilson was under indictment and unwilling to testify. Affidavit of Lance Wilson ("Wilson Aff.") 15. As a consequence, the statements which were in existence at the time of Ms. Dean's trial, and to which Mr. Wilson is now willing to testify, were not available to Ms. Dean in any usable form at the time of her trial. See Lafayette, 983 F.2d at 1105 ("In general to justify a new trial 'newly discovered evidence' must have been in existence at the time of trial."). Mr. Wilson's unavailability at the time of Ms. Dean's trial deprived Ms. Dean and the court of valuable material evidence regarding the timing and occurrence of events integral to the funding decision made in the Arama project. Indeed, Mr. Wilson's affidavit speaks to the heart of Ms. Dean's conviction, stating unequivocally that he was the individual responsible for making the funding decision for the Arama project. Wilson Aff. 9-13. Mr. Wilson's affidavit leaves absolutely no doubt that it was Mr. Wilson, not Ms. Dean, who was involved in that crucial funding decision.

In its brief, Independent Counsel relies heavily on case law holding that the failure to call as a witness a co-conspirator or a co-defendant who will invoke a Fifth Amendment privilege does not result in newly discovered evidence when that person is later willing to testify. Opp. at 5. Independent Counsel's reliance

on this case law is misplaced. In particular, the decisions cited by Independent Counsel in United States v. Dale, 991 F.2d 819 (D.C. Cir.) (per curiam), cert. denied, 510 U.S. 1030 (1993) and Chirino v. NTSB, 849 F.2d 1525 (D.C. Cir. 1988) are very limited in scope, pertaining only to new trial motions in cases in which a conspiracy is alleged. Such is not the case here.

Ms. Dean and Mr. Wilson were not alleged to be co-conspirators on the Arama project.[2] Moreover, the circumstances surrounding the submission of the affidavit in Chirino are factually distinguishable from the instant matter. Specifically, in Chirino an alleged co-conspirator and affiant pled guilty and then submitted an affidavit in support of another defendant's administrative petition for reconsideration on the very subjects to which that defendant had pled guilty. That is certainly not the basis for Mr. Wilson's affidavit in the instant matter. Unlike the affiant in Chirino, Mr. Wilson contested his indictment, specifically choosing not to plead guilty and did not testify in the case. Thus, there are no prior existing statements by Mr. Wilson regarding his involvement in the funding of the Arama project. The statements in Mr. Wilson's affidavit, therefore, cannot be characterized as anything but newly discovered evidence which was not available to Ms. Dean until

2 Independent Counsel admits in its brief that it has never been alleged that Mr. Wilson and Ms. Dean were co-conspirators in connection with the funding of the Arama project. See Opp. at 6 n.2.

after Mr. Wilson was granted immunity and his conviction subsequently reversed.[3] See Wilson Aff. ¶ 15.

Independent Counsel's reliance on Rodriguez v. United States, 373 F.2d 17 (5th Cir. 1967) is also misplaced. As with Chirino and Dale, Rodriquez involves allegations of conspiracy. Moreover, contrary to Independent Counsel's contentions, Rodriguez's failure to call a potential witness who was not implicated in any wrongdoing yet indicated he would invoke his 5th Amendment privilege, is not akin to the failure to list Mr. Wilson as a potential witness. Indeed, Mr. Wilson, unlike the Rodriguez witness, was not merely a potential witness innocent of involvement in an alleged conspiracy. Rather, Mr. Wilson was, at the time of Ms. Dean's trial, under indictment for alleged illegal activities at the Department of Housing and Urban Development's ("HUD") which he was vigorously contesting.

Because of that, and the testimony he would have given implicating himself in the Arama funding, he would have absolutely invoked his 5th Amendment rights if Ms. Dean had called him to testify.

Mr. Wilson would have invoked his privilege against self-incrimination to protect himself in connection with his own

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3 At the time Mr. Wilson was granted immunity by the government in connection with his assistance in the indictment of James G. Watt, the government failed to take advantage of the opportunity to question Mr. Wilson regarding the Arama project. Wilson Aff. ¶ 15. Independent Counsel does not argue to the contrary.

indictment if he had been called as a witness by Ms. Dean. After his grant of immunity by the government and the reversal of his conviction, Mr. Wilson was willing to consider executing an affidavit concerning his involvement in the Arama project. Such testimony amounts to newly discovered evidence in satisfaction of the first prong of Lafavette's five part test.

II. Ms. Dean Exercised Due Diligence in Obtaining Mr. Wilson's Affidavit

Ms. Dean has unquestionably established that she exercised due diligence in procuring the newly discovered evidence set forth in Mr. Wilson's affidavit. As stated supra, Mr. Wilson was under indictment at the time of Ms. Dean's trial and unwilling to testify as a witness on her behalf. It was not until Mr. Wilson was granted immunity and his conviction subsequently reversed by the court of appeals on June 17, 1994 (Wilson Aff. 15) that Mr. Wilson became willing to testify on Ms. Dean's behalf that he, not Ms. Dean, was the individual responsible for HUD's final funding decision on Arama. Independent Counsel's suggestion that Ms. Dean did not exercise diligence in obtaining Mr. Wilson's testimony statement, even though Mr. Wilson stated in is his affidavit that he was unwilling to testify at Ms. Dean's trial, simply because Mr. Wilson was physically present in the courtroom during Ms. Dean's trial is, at best, illogical. Opp. at 7-8. Undeniably, there is great distinction between being present as a bystander in a courtroom and testifying as a witness on a party's

behalf. Certainly if Independent Counsel believed Mr. Wilson had no involvement in the Arama funding and his testimony would not have incriminated him, they could have called him as a rebuttal witness to dispell any impression that might have been left by the failed attempt to impeach Mr. Barksdale or the use of the telephone messages. See infra. However, Independent Counsel did not call Mr. Wilson.

Furthermore, in attacking Ms. Dean's diligence in obtaining Mr. Wilson's affidavit, Independent Counsel fails to recognize that she was prevented from filing a motion for a new trial prior to the resolution of her case on appeal. Following the June 1994 reversal of Mr. Wilson's conviction, the verdict in Ms. Dean's case was on appeal, depriving the Court of jurisdiction over this matter until the Supreme Court eventually denied certiorari on March 18, 1996. After the Supreme Court's denial of certiorari, and the issuance of the mandate on April 17, 1996, this Court once again obtained jurisdiction over this matter. Ms. Dean then pursued efforts to meet with Mr. Wilson and his attorney to discuss Mr. Wilson's involvement in the decision to fund the Arama project. The final result of those efforts was the affidavit Ms. Dean has submitted in support of her motion for a new trial. Contrary to Independent Counsel's bald and scurrilous assertions, the timing of Ms. Dean's motion for a new trial has everything to do with the discovery of new evidence and nothing to do with delaying her sentencing, see Opp. at 8, which inevitability is clearly recognized by Ms. Dean.

III. Mr. Wilson's Affidavit Presents Neither Cumulative or Impeaching Evidence

The evidence Ms. Dean has presented in the form of Mr. Wilson's affidavit is neither cumulative nor merely impeaching for two reasons: (1) Mr. Wilson's affidavit is an admission of responsibility for HUD's funding of the Arama project in a case in which Ms. Dean, who was subjected to attacks on her credibility, was the only person able to testify to her innocence; and (2) Mr. Wilson's affidavit, as discussed in detail supra, is newly discovered evidence which also tangentially impeaches the testimony of Assistant Secretary Maurice Barksdale.[4]

A. Mr. Wilson's Affidavit is Not Cumulative Evidence

Evidence which is cumulative is defined "as evidence 'which goes to prove what has already been established by other evidence.'" Smith v. Sec'v of New Mexico Dep't of Corrections, 50 F.3d 801, 829 (10th Cir.), cert. denied, 116 S. Ct. 272 (1995) (quoting Black's Law Dictionary 343 (5th ed. 1979)); see also Rodriquez v. Richardson, 331 F. Supp. 545, 545 (D.P.R. 1971) (when evidence is not in the record, such evidence is not cumulative if different in kind than previously presented).

4 Since the affidavit clearly calls into question the whole premise upon which the prosecution on Arama rests and reveals that Mr. Barksdale may have testified falsely when he denied talking to Mr. Wilson about the funding, it is somewhat surprising that Independent Counsel does not join in the motion for a new trial.

In Smith, the court examined whether the subsequent introduction of the specific contents of a police officer's report was cumulative evidence. Noting that the specific contents of that report had not been disclosed at a prior time, the court found that that evidence was not cumulative. Id. The circumstances surrounding the court's decision in Smith are similar to those here. The specific contents of Mr. Wilson's affidavit have not been disclosed and put into evidence. At Ms. Dean's trial, there was no testimony regarding the admissions Mr. Wilson makes in his affidavit. Furthermore, there was no testimony detailing the conversations Mr. Wilson had with Mr. Barksdale about funding the project which later became known as Arama[5] and the assurances Mr. Wilson received from Mr. Barksdale that it would be funded. It is clear from Mr. Wilson's affidavit that the decision to fund Arama was made prior to Ms. Dean's appointment as Executive Assistant to Secretary Pierce. Wilson Aff. ¶ 13. The mere fact that the formal funding of Arama occurred after Ms. Dean took office as Executive Assistant to Secretary Pierce does not erase the fact that the funding decision for Arama was assured prior to Ms. Dean's appointment as Executive Assistant and was the result of Mr. Wilson's discussion with Mr. Barksdale. See Wilson Aff. 9-13. In fact, there is no evidence that Ms. Dean was involved in the funding decision.

5 Mr. Barksdale testified before the grand jury that whenever Mr. Wilson spoke to him on a matter, Mr. Barksdale assumed he was speaking on behalf of Secretary Pierce. Barksdale G.J. at 11.

Independent Counsel argues that Mr. Wilson's affidavit is cumulative evidence because of Ms. Dean's testimony at trial 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]". Opp. at 10. Independent Counsel, however, misleads the Court by failing to advise the Court that a hearsay objection was made by Independent Counsel and sustained concerning this testimony. Trial Tr. 2887-88. As a consequence, Ms. Dean's conversation with Mr. Wilson was never admitted into evidence. Even the Mitchell/Wilson telephone message slips which allude, on their face, to conversations regarding Arama served only to possibly impeach Mr. Barksdale's testimony that he did not recall speaking with Wilson regarding funding of Arama, since Mr. Wilson and Mr. Mitchell, who is deceased, were not available to testify. Thus, without the testimony of either Mr. Wilson or Mr. Mitchell concerning conversations between Mr. Wilson and Mr. Barksdale, or of Mr. Wilson's actions in securing funds for Arama, the message slips on their own were of limited probative value.

B. Ms. Dean is Not Using Mr. Wilson's Affidavit Merely for Impeachment Purposes

Independent Counsel argues that the third prong of the five part test set forth in Lafayette prohibits "reliance on evidence that is merely impeachment . . " Opp. at 12. Independent Counsel is correct; however, Independent Counsel's argument fails to recognize that Mr. Wilson's affidavit is more than "merely

impeachment" evidence. Id. (emphasis added). At its essence, Mr. Wilson's affidavit is undeniably new evidence which demonstrates that Mr. Wilson, not Ms. Dean, was responsible for the funding decision for Arama. As a tangential matter, however, Mr. Wilson's affidavit may also have the effect of impeaching Mr. Barksdale's trial testimony that he did not recall having any conversations with Mr. Wilson about Arama.[6] Yet that alone does not vitiate the fact that Mr. Wilson's affidavit, as discussed supra, is newly discovered evidence.

Furthermore, Ms. Dean is not attempting, contrary to the government's assertions, to relitigate her claim. Independent Counsel did not show Mr. Barksdale pre-trial the telephone messages or question him about Mr. Wilson's involvement in the Arama funding. Opp. at 15. It is a fact that the Office of

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6 Independent Counsel claims that it is unable to determine whether it produced the March 22, 1993 Barksdale interview. Opp. at 14 n.4. When Independent Counsel made its Jencks production, it gave the defense a list of each Barksdale item that the 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, the 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 Mr. 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 the Independent Counsel immediately to provide a copy of their interview to he defense and an explanation as to why it originally failed to provide the interview.

Independent Counsel in its interview of Mr. Barksdale never asked about the Mitchell/Wilson message slips.[7] These message slips were used in an attempt to impeach Mr. Barksdale. Mr. Barksdale's failure to recall any discussions with Wilson about Arama ended the probative value of the messages without anything further. Simply stated, therefore, Mr. Wilson's affidavit is new evidence of his self-professed involvement in the funding of Arama and also has the effect of explaining the notations on the messages.

IV. Mr. Wilson's Affidavit is Clearly Material to the Issues Involved

Mr. Wilson's affidavit is clearly material to the issue in this case: whether or not Ms. Dean was involved in the decision to fund Arama. Mr. Wilson's affidavit states unequivocally that he, not Ms. Dean, was the critical party involved in that decision. Independent Counsel's attempts to ignore this crucial material evidence by focusing solely on the chronology of events (i.e. the date of the July 5, 1984 letter) rather than on the substance of when the funding decision was actually made stretches the bounds of credulity.

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7 The only explanation for the government's failure to question Mr. Barksdale about the clearly relevant message slips is that the government had targeted Ms. Dean for the wrongdoing associated with Arama. Indeed, that may be the reason that the Mitchell/Wilson message slips were buried in an avalanche of documents turned over by Independent Counsel to the sole practitioner representing Ms. Dean.

Mr. Wilson's statement in his affidavit that he was the individual responsible for obtaining funding of Arama through his conversations with Mr. Barksdale makes the materiality of his affidavit undeniable. Wilson Aff. at ¶¶ 9-13. The fact that the funding of Arama was not formalized until after Mr. Wilson left HUD does not eviscerate the fact that the final decision was made while Mr. Wilson was at HUD and prior to Ms. Dean's elevation to the position of Executive Assistant. Wilson Aff. ¶ 12. Indeed, Mr. Wilson's affidavit clearly states that there was "a lag between the decision to fund Arama and the actual funding of the project . . . ." Wilson Aff. at ¶ 10. Independent Counsel's only circumstantial evidence of Ms. Dean's alleged involvement in Arama is the July 5, 1984 to Louie Nunn. Yet, what Independent Counsel cannot dispute and Mr. Wilson's affidavit confirms, is that Ms. Dean served as merely a conduit for information regarding the prior funding decision on Arama. Wilson Aff. at ¶ 13. Indeed, there is no evidence that Ms. Dean was directly involved in the Arama funding decision, and Mr. Wilson's affidavit presents new evidence that he was the individual responsible for funding Arama.[8] Clearly, therefore, Mr. Wilson's affidavit is material.

8 It is disingenuous for Independent Counsel to argue that Ms. Dean made the final decision regarding the funding of Arama simply because of the July 5, 1984 letter to Louie Nunn. At most, the July 5, 1984 letter memorializes a conversation in which Ms. Dean was merely told by Mr. Barksdale that funding of Arama had been designated. If, in fact, as Independent Counsel claims, Ms. Dean was knowingly committing an illegal act, it is implausible that she would have memorialized it in a letter

Independent Counsel places great weight on the Court of Appeals' characterization of the July 5, 1984 letter in its decision in United States v. Dean, 55 F.3d 640, 651 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1288 (1996). However, Independent Counsel fails to confront the fact the court's characterization was the result of having no evidence concerning Mr. Wilson's involvement in the funding decision as set out in this affidavit. The court therefore could find that Ms. Dean's involvement in the Arama funding decision was illegal because it was unaware of Mr. Wilson's involvement and the lag between the time the decision to fund Arama was made and the actual funding of that project. See Wilson Aff. at ¶ 10. Mr. Wilson's affidavit clearly states that he, along with Mr. Barksdale and not Ms. Dean, were responsible for the funding of Arama. Moreover, Mr. Wilson's affidavit speaks to the innocence with which Ms. Dean wrote the July 5, 1984 letter. Because Ms. Dean did not participate in the decision to fund Arama, any information in the July 5, 1984 letter was merely derived from a conversation Ms. Dean had with Mr. Barksdale. The materiality of Mr. Wilson's affidavit to this issue, contrary to the government's assertions, is clearly evident.

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prepared by HUD personnel on HUD stationery which would be maintained in a HUD file. Indeed, if it was Ms. Dean's intent to commit an illegal act, she would have telephoned Ms. Nunn or spoken directly to Mr. Mitchell rather than memorializing it in a letter for the HUD files for anyone to find.

Exemplary of the Independent Counsel's actions concerning the Arama funding throughout this case is the claim in its Opposition that the government presented evidence "showing that defendant was running HUD 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 Commission is named.' Trial Tr. at 262, 527; GX 147; 55 F.3d at 647-48." Opp. at 22 (Independent Counsel underlinings; boldface added.)

The document that the Independent Counsel cites as showing Ms. Dean was making mod rehab decisions in 1984 was a memorandum from Ms. Dean to Acting Assistant Secretary for Housing Shirley A. Wiseman, dated February 1, 1985 (not a 1984 document as Independent Counsel states). 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 Ms. Dean's approval of mod rehab selections was an interim requirement concerning any projects

approved by Mr. Barksdale before he left but not yet implemented, and that such approval had not been required while Mr. Barksdale was in the position of Assistant Secretary for Housing-Federal Commissioner. Such interpretation was also suggested by the fact that in the memorandum, Ms. Dean was requesting a report on FY 1985 funds so far allocated.[9]

The Independent Counsel had additional reasons to know that such interpretation was correct because of statement in interview reports, including Mr. Barksdale's statement that Ms. Dean was not in the Mod Rehab loop as late as October 1984, and a statement he had made in another interview focused specifically on the Wiseman memorandum. According to a report of an interview of Mr. Barksdale by Independent Counsel on June 28, 1992. The interview report stated:

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

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9 Ms. Dean testified that Secretary Pierce directed that she send the memorandum to Wiseman because Mr. 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 the Independent Counsel strongly suggested this testimony was true. Between October 19, 1984, and January 3, 1985, Mr. Barksdale had allocated over 3800 FY 1985 mod rehab units. As discussed in Memorandum at 16-17, Mr. Barksdale's last three mod rehab allocations would be subjects of the 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.

Attachment III-11, at 4.

Despite Mr. Barksdale's statements unequivocally indicating that Ms. Dean did not approve mod rehab decision during his tenure, the Independent Counsel intended to lead the jury to believe that Ms. Dean's February 1, 1985 memorandum to Wiseman showed that Ms. Dean had to approve all mod rehab decision while Mr. Barksdale was Assistant Secretary, including the July 1984 allocation underlying the Arama project. Independent Counsel continues to argue this same obviously erroneous and false interpretation of the Wiseman memorandum.

Finally, Independent Counsel argues erroneously that Ms. Dean, is "replowing old ground" by attempting to relitigate matters which have been established as "law of the case." United States v. Singleton, 759 F.2d. 176 (D.C. Cir. 1985). Opp. at 22. Nothing could be further from the truth and Independent Counsel's reliance on Singleton is misplaced. As discussed in detail supra, Mr. Wilson's affidavit is new material evidence on the issue of the funding of Arama, which is at the core of this case. It also has the effect of rehabilitating Ms. Dean's credibility, supports her testimony that she was not involved in the funding of the Arama project,[10] United States v. Young, 17 F.3d 1201,

10 The Independent Counsel asserts that Ms. Dean joined a conspiracy and now seeks to lessen her culpability by submitting Mr. Wilson's affidavit. Opp. at 24. The Independent Counsel's argument is, at best, baseless. It has never been alleged that Ms. Dean was involved in a conspiracy with Mr. Wilson to fund

1202 (9th Cir. 1994)(new trial granted where false testimony of witness "seriously undermined [the defendant's] credibility"), and eliminates the significance of the July 5, 1984 letter. Indeed, there can be no question that Mr. Wilson's affidavit significantly alters the dynamics of a trial on this Count which used not only incomplete, but inaccurate evidence to convict.

V. Mr. Wilson's Affidavit Would Probably Produce An Acquittal

Independent Counsel absurdly argues that Mr. Wilson's affidavit "would not probably produce an acquittal [of Ms. Dean] on Count One." Opp. at 25. It is difficult to envision such a result in light of the fact that Mr. Wilson admits to being the individual responsible for the funding decision for Arama. Indeed, Independent Counsel is hard pressed to argue that Ms. Dean should continue to be punished for the wrongful acts committed, and admitted to, by another. Ms. Dean has more than demonstrated that Mr. Wilson's affidavit would "probably" produce an acquittal. At a minimum, Mr. Wilson's affidavit raises a reasonable probability, which "is a probability sufficient to

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Arama. Indeed, Independent Counsel in its brief acknowledges that Wilson "was not named as a co-conspirator with Dean." Opp. at 6 n.2. Moreover, a basic element of the crime of conspiracy requires knowledge that a conspiracy exits. Mr. Wilson's affidavit demonstrates that Ms. Dean not only made no efforts to join a conspiracy, but also that Ms. Dean was not aware of the existence of a conspiracy to fund Arama. Without any such knowledge of a preexisting conspiracy, Ms. Dean could never have joined one by her act of sending the letter which in light of the affidavit was innocent.

undermine confidence in the outcome," that Ms. Dean would be acquitted of wrong doing on Count One. United States v. Marshall, 56 F.3d 1210, 1212 (9th Cir. 1995), cert. denied, 116 S. Ct. 1830 (1996). There is no other evidence against Ms. Dean, other than the circumstantial evidence of the July 5, 1984 letter which Mr. Wilson's affidavit readily places in the proper context, and which would compel a reversal of the conviction.

Cf. United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989)(new trial not granted where despite newly discovered evidence the "great weight of the evidence" connected appellant to the wrongful acts). As a consequence, Ms. Dean has satisfied the fifth and final prong of Lafavette's five part test.

CONCLUSION

WHEREFORE, for the reasons set forth above, Defendant Deborah Gore Dean respectfully requests that this Court grant her motion to set aside the verdict, or in the alternative, grant a new trial.

Respectfully submitted,

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January 27, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27, 1997, a true and correct copy of the foregoing was served by first-class mail, postage pre-paid, to the following counsel of record:

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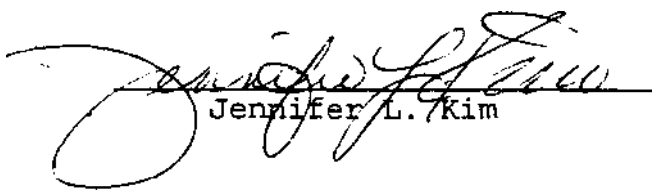

Jennifer L. Kim