IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Appellee, v. DEBORAH GORE DEAN Appellant.	:	CR 92-0181-TFH

MEMORANDUM IN SUPPORT OF DEBORAH GORE DEAN'S POST HEARING MOTION

By and through the undersigned counsel, Defendant Deborah Gore Dean, hereby submits a post hearing motion to address this Court's concerns expressed in the February 18, 1997 hearing in which Ms. Dean's motion for a new trial based on newly discovered evidence was denied. During the hearing this Court inquired as to whether there is case law factually on point equating Mr. Wilson's unavailability at Ms. Dean's trial, and his subsequent willingness to submit affidavit testimony, with newly discovered evidence. Counsel for Ms. Dean has conducted additional research and has not located case law specifically equating newly available evidence with newly discovered evidence under factual circumstances similar to Ms. Dean's (where there is no allegation of a conspiracy or involvement of a co-defendant). However, there is precedential support for this Court's exercise of its inherent powers to grant Ms. Dean's motion for a new trial. It is this authority which Ms. Dean wishes to bring to the Court's attention at this time.

ARGUMENT

Rule 33 of the Federal Rules of Criminal Procedure provides for the granting of a new trial in the "interest of justice." In order to achieve this ultimate, but undefined, goal, the D.C. Circuit structured a simple, mechanical five part formula for determining whether a new trial should be granted on the basis of newly discovered evidence. See 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). The formula was developed, however, not as an inflexible checklist of "must haves," but rather as an attempt to devise a means of ensuring the reliability of the evidence. That means, however, cannot ignore the fact that a "trial court confronted with a motion for a new trial is not concerned with grounds [such as the five part Lafayette test] for a new trial alone." United States v. Broadus, 664 F. Supp. 592, 595 (D.D.C. 1987)(citing United States v. Gaddis, 424 U.S. 544 (1976)(emphasis added)). Instead, the court "must weigh the sufficiency of the evidence against a defendant before deciding the defendant's motion for a new trial." Id. Rigid application of this mechanical formula, therefore, cannot and should not overshadow Rule 33's ultimate mandate of the grant of a new trial in the interest of justice.[1]

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[1] Indeed, Rule 2 of the Federal Rules of Criminal Procedure recognizes that events may require that mechanics be foregone in the interest of justice and fairness because "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be

Indeed, the focus must at all times remain on the pursuit of the "interest of justice."

The ability of a court to venture beyond rigid adherence to a formulaic approach was expressly recognized by this Court in Broadus and supported by precedent culminating in the Supreme Court's decision in Gaddis. See Broadus, 664 F. Supp. at 595(citing United States v. Gaddis, 424 U.S. 544 (1976)(it is the responsibility of the court to ensure that the verdict is supported by the evidence)). In Broadus the Court expressly observed that a court has "inherent power to evaluate the sufficiency of the evidence supporting the conviction at any time while its jurisdiction over the case continues." Id. at 598 (emphasis added). See also United States v. Giampa, 758 F.2d 928, 936 n.1 (3d Cir. 1985); Arizona v. Manypenny, 672 F.2d 761 (9th Cir.), cert. denied, 459 U.S. 850 (1982). Indeed, in support of its conclusion this Court relied on Rule 2's implication that "every guilty verdict is supported by at least some evidence on every element of the crime charged." Broadus, 664 F. Supp. at 596 (emphasis added).

This recognized duty of a court to exercise its inherent powers to correct injustice, coupled with Rule 2's mandate for "just determination of every criminal proceeding", is the touchstone for analysis of Ms. Dean's request for a new trial on

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construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

the basis of the newly discovered evidence embodied in Mr. Wilson's affidavit. It is clear, as acknowledged by this Court at oral argument, that Mr. Wilson's affidavit exculpates Ms. Dean from involvement in the funding of the Arama project, the only remaining project in Count One. This exculpatory evidence should not be ignored simply because it cannot be rigidly pigeon-holed into a common law formula for granting of a new trial. To do so would be an elevation of form over substance which this Court in Broadus explicitly observed cannot be condoned. Id. at 597.

Refusal to consider the great weight of the admissions in Mr. Wilson's affidavit because there is some hesitancy over the questionable and indiscernible distinction of whether Mr. Wilson's testimony is newly available evidence or newly discovered evidence is contrary to this Court's broad "inherent powers to supervise the litigation before it, and do justice through that supervision . . . ." Id. This Court should exercise those powers, which "historically have extended to equitable corrections of injustices caused by trial," to correct the injustice of convicting Ms. Dean's for a crime for which there is no evidence of wrongdoing. Id.; see also Arkadelphia Milling Co. v. St. Louis Southwestern Railroad Co., 249 U.S. 134, 145-46 (1919) ("one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, [is] to correct that which has been wrongfully done by virtue of its process").

Ms. Dean's motion for a new trial is particularly suited for this Court's exercise of its inherent powers to ensure that the justice mandated by case law and the Federal Rules of Criminal Procedure is done.[2] Unlike the cases relied on by Independent Counsel, Mr. Wilson is neither a co-defendant nor a co-conspirator of Ms. Dean. Additionally, Ms. Dean's case is far removed from the drug related cases which cause courts additional concern about the reliability of the evidence when faced with a motion for a new trial. Instead, Ms. Dean's case and her motion for a new trial is characterized by the exculpatory evidence of Mr. Wilson's affidavit for which there is circumstantial evidence of reliability. Specifically, Mr. Wilson's affidavit is corroborated by the Mitchell/Wilson telephone message slips and the statements of Mr. Barksdale regarding Ms. Dean's exclusion from the funding "loop" until after the formal funding decision for the Arama project was made. Even more notable corroborating circumstantial evidence are the dictates of common sense. In particular, if, in fact Ms. Dean knowingly committed an illegal act, it is implausible that she would have memorialized it in a

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[2] Indeed, Federal Rule of Criminal Procedure 2

> demands that a Court attend both to the needs of the individual litigants and to the public at large and approach procedural problems flexibly so that justice, fairness in administration, and efficiency are accommodated.

Broadus, 664 F. Supp. at 596 (emphasis added).

letter prepared by Housing and Urban Development ("HUD") personnel on HUD stationery. 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. The reliability of this evidence is unquestionable because it is not evidence that Ms. Dean produced as new evidence in support of her motion for a new trial. Rather, it is indisputably pre-existing evidence of the case. Thus, any concerns the Court may have as to the reliability of Mr. Wilson's affidavit may be justifiably dispelled and should not prevent the Court from granting Ms. Dean's motion for a new trial by exercising its "[inherent] power . . . to do justice and to safeguard the integrity of the criminal process." Broadus, 664 F. Supp. at 596 (citing Manypenny, 672 F.2d at 764-65).

Federal Rule of Criminal Procedure 2 requires a court "to place justice ahead of an unyielding fealty to the words of the rules" such that there cannot be "blind adherence if it would deprive an accused person, for whom the stakes are so very much higher than a civil litigant, of a just determination of his or her cause." Id. In essence, the criminal rules and a court's inherent powers to ensure the exercise of justice are designed to eliminate the placement of a straight jacket on a court and prevent it from becoming little more than a rubber stamp on a common law mandated checklist of elements for the granting of motions. Such a rubber stamp, which ignores justice in favor of

blind adherence to inflexible and compartmentalized formulas, should not produce an unjust result in Ms. Dean's case. As argued in her brief and recognized by this Court in oral argument, Mr. Wilson's affidavit is critical, material evidence that is not cumulative and was discovered by the exercise of due diligence.[3] That evidence is indisputably exculpatory, and even Independent Counsel is hard-pressed to continue to claim that Ms. Dean was involved in the decision to fund the Arama project. Indeed, the likelihood that Independent Counsel would actually pursue a new trial, in the event the Court grants Ms. Dean's motion, is non-existent in light of Mr. Wilson's affidavit and the evidentiary testimony he would provide as a witness at a new trial.

Ms. Dean sought pursuant to Rule 33 and in the "interest of justice" a new trial on the basis of the newly discovered exculpatory evidence embodied in Mr. Wilson's affidavit. Whether

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[3] Ms. Dean exercised due diligence in obtaining Mr. Wilson's affidavit testimony. It is not disputed that at the time of Ms. Dean's trial, Mr. Wilson would have refused to testify under the Fifth Amendment if he had been called as a witness. See Affidavit of Lance Wilson ¶ 15. Since his grant of immunity, however, Mr. Wilson no longer stands on his claim of privilege, and Ms. Dean should not be penalized by her trial counsel's decision not to call Mr. Wilson as a witness because it was known he would exercise his Fifth Amendment privilege. This was certainly no "strategy." Moreover, it is not without significance that at the time of trial, Ms. Dean's counsel, a sole practitioner, was faced with an inundation of paper from Independent Counsel while he was simultaneously appearing in the courtroom, preparing witnesses, including Ms. Dean, filing motions, and drafting jury instructions.

that evidence is newly discovered within the meaning of the Lafayette/Kelly compartmentalized formula or newly available should not be the linchpin which controls this Court's decision. Such "blind adherence" to rigid and inflexible formulas is not what is mandated by the criminal rules or the law. Broadus, 664 F. Supp. at 596. Rather, as recognized by the court in Broadus and the Supreme Court in Gaddis, this Court has a duty to exercise its inherent powers to ensure that justice is served and equitably correct the injustices caused during trial. There can be no other case more ripe for this Court's exercise of its inherent powers to grant a new trial in the "interest of justice" than Ms. Dean's case. Mr. Wilson's affidavit indisputably shows that Ms. Dean is innocent, and to relegate her to the status of convicted criminal for a crime she did not commit has no foundation in the law or the exercise of fundamental fairness and justice.

CONCLUSION

WHEREFORE, Defendant Deborah Gore Dean respectfully requests that this Court grant her motion for a new trial on the basis of newly discovered evidence.

Respectfully submitted,

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February 21, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 21, 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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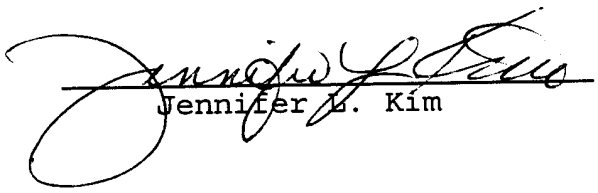

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