IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	CR 92-181-TFH
DEBORAH GORE DEAN	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S "POST HEARING MOTION"

After the Court orally denied defendant Deborah Gore Dean's motion for new trial based on allegedly "newly discovered" evidence on February 18, 1997, Dean submitted a "Post Hearing Motion" that appears to seek reconsideration of the Court's ruling. The government hereby opposes the motion. The Court correctly applied the law to Dean's original motion for new trial when it denied that motion, and the reasoning of the cases she cites in support of her present motion has been rejected by the Supreme Court. Accordingly, the Court should deny Dean's latest motion.

I. THE COURT APPLIED THE PROPER LEGAL STANDARD IN THE FIRST INSTANCE.

On February 18, 1997, this Court denied Dean's first post-appeal (and second) motion for new trial. It applied the five-part test employed in this Circuit to evaluate such motions for new trial and correctly concluded that the affidavit submitted in support of the motion was not "newly discovered" evidence, but merely "newly available" evidence, which is insufficient to meet the requirements of that test. See Govt's Opp. to Dean's Motion

for New Trial, 1/15/97, at 4-7; United States v. Dale, 991 F.2d 819, 838-39 (D.C. Cir.) (per curiam), cert. denied, 510 U.S. 1030 (1993); United States v. Sensi, 879 F.2d 888, 901 (D.C. Cir. 1989); Chirino v. NTSB, 849 F.2d 1525 (D.C. Cir. 1988); Rodriguez v. United States, 373 F.2d 17, 18 (5th Cir. 1967); Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951). The Court also correctly concluded that Dean did not exercise diligence in obtaining Wilson's evidence. Nothing in Dean's post-hearing motion provides a basis for reconsidering the Court's ruling.

II. THE SUPREME COURT HAS REJECTED DEAN'S LEGAL ANALYSIS.

Dean's post-hearing motion allegedly responds to this Court's inquiry during the hearing held on February 18, 1997, "as to whether there is case law factually on point equating" the supposed unavailability of Lance H. Wilson at trial, and his recent affidavit, with "newly discovered" evidence. Dean's Motion at 1. Although she admits she has not found any "case law specifically equating newly available evidence with newly discovered evidence under [similar] factual circumstances," Dean also advises the Court that it has the "inherent" power to grant the motion for new trial. Id. This position is clearly wrong under the law; as the government pointed out in its reply to Dean's opposition to its motion to strike, the reasoning of the cases Dean cites has been conclusively rejected.[1] Govt's Reply at 2-5.

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[1] Both at the hearing on February 18, 1997, and in the present motion, Dean urges that her case be treated differently than typical conspiracy cases, which often involve drug charges, and asks the Court to ignore this Circuit's established test for newly discovered evidence and to apply a different, more lenient

As she did in her opposition to the government's motion to strike, Dean relies solely in her post-hearing motion on cases addressing a court's "inherent supervisory authority" to grant her motion, principally United States v. Broadus, 664 F. Supp. 592, 598 (D.D.C. 1987). See Dean's Opp. at 4-9. As the government pointed out in its reply to the opposition to the motion to strike, however, the reasoning of Broadus did not justify Dean's opposition, as it does not justify the present motion, since that case does not address an alternative to the standards for new trials based on "newly discovered" evidence, but only a Court's authority to grant untimely motions for judgment of acquittal. Govt's Reply at 2-3.

Even more important, Dean failed in her opposition, as she fails in the present motion, to cite controlling authority that is contrary to the cases she cites. As the government also pointed out in its reply to the opposition to the motion to strike, the Supreme Court has rejected the reasoning of Broadus in Carlisle v. United States, 116 S.Ct. 1460 (1996). Govt's Reply at 3-5.

In Carlisle, the Supreme Court expressly held in part that neither Rule 2 nor a court's "inherent supervisory power" authorizes granting an out-of-time motion for judgment of acquittal that was filed only one day after Rule 29's seven-day period had

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standard to her. See, e.g., Dean's Motion at 5 ("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 new trial"). Defendants who were high-ranking government or corporate officials, however, should not receive, or appear to receive, consideration that would not be afforded defendants in other criminal cases.

expired. 116 S.Ct. at 1466 (whatever the scope of federal courts' "inherent supervisory power," "it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure"). Carlisle also reaffirmed the Supreme Court's 1947 decision that found no "inherent" authority to grant motions for new trial that are filed after the expiration of Rule 33's time limit (now seven days after trial) for motions for new trial, except for those based on newly discovered evidence.[2] 116 S.Ct. at 1464, citing United States v. Smith, 331 U.S. 469 (1947).

Dean cites no valid authority for disregarding this Circuit's established test for motions for new trial based on "newly discovered" evidence. As Smith and Carlisle illustrate, the Court has no "inherent supervisory authority" permitting it to ignore controlling authority and to fashion a rule peculiar to this defendant. Accordingly, this Court should deny Dean's post-hearing motion.

III. THE WILSON AFFIDAVIT IS INHERENTLY UNTRUSTWORTHY.

Dean also attempts to justify the application of a special rule to her case by claiming Wilson's affidavit is unusually "trustworthy." The case law and the affidavit itself, however, compel the conclusion that it is inherently untrustworthy.

In one of this Circuit's controlling decisions on this subject, United States v. Dale, 991 F.2d 819, 838-39 (D.C. Cir.

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[2] In addition, the Supreme Court addressed and limited another case relied upon by Dean, Ansley v. United States, 135 F.2d 207, 208 (5th Cir. 1943). See Carlisle v. United States, 116 S.Ct. 1460, 1466 n.5 (1996).

1993), the court cited with approval the "unanimous" view reflected in, among other cases, United States v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992), regarding "newly available" witnesses. As the court observed in Reyes-Alvarado, such witnesses are untrustworthy: "[t]hey may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged." Id. Although Wilson was not charged as a co-defendant in the indictment returned against Dean, this reasoning applies equally to a "very good friend" of the defendant who attempts to help her only once it is cost-free to himself. Trial Tr. 2848. See also United States v. Glover, 21 F.3d 133, 138-39 (6th Cir.), cert. denied, 115 S.Ct. 360 (1994); Rodriguez v. United States, 373 F.2d 17, 18 (5th Cir. 1967) (applying same principles to "newly available" witnesses who were not co-defendants or charged as co-conspirators).

Moreover, in a new trial, Wilson's testimony would be easily discredited on several grounds. First, Wilson came forward only after he himself could no longer be prosecuted. Second, having confessed his own involvement in efforts to make a project-specific award to the Arama partnership, Wilson impeaches himself by admitting his role in the same conspiracy to defraud HUD that the Court of Appeals held had been established. Third, Wilson further undercuts his credibility by stating in his affidavit that it was "not unusual" for HUD officials to defraud the government by helping consultants obtain project-specific awards of funds in

letters like the one Dean wrote on July 5, 1984. Wilson Aff. ¶ 14. Fourth, the testimony in Wilson's affidavit is quite limited; Wilson never states that he made HUD's decision to fund Arama, but only that he "recommended" to Maurice Barksdale that it be funded, that Barksdale led him to "believe" that he would approve the units for funding, and that when he left HUD he "believed" that Barksdale had approved the units for funding. Id. ¶ 9.

Fifth, as to Wilson's claims that he talked to Barksdale's Executive Assistant, Stuart Davis, about this project, Dean did not call Davis as a witness at trial, which strongly suggests that his testimony was not helpful to her. Wilson Aff. ¶ 9. Sixth, contrary to Dean's claim that there is no dispute that Wilson would have invoked his Fifth Amendment privilege not to testify, Dean Motion at 7 n.3, Wilson does not state in his affidavit that he would have asserted this privilege on any issue had he been called to testify. Finally, because Wilson had left HUD before Dean assumed the position of Executive Assistant and was involved in the conduct that the Court of Appeals held constitutes a conspiracy to defraud, Wilson lacks any personal knowledge about the activities in which Dean was involved relating to the Arama project taken after June 1, 1984.

CONCLUSION

In short, this Court applied the law correctly to Dean's first post-appeal motion for a new trial. The reasoning of the cases she cites in her present motion has been rejected by the Supreme Court, a fact she fails to point out to the Court. Her arguments that the

Court should apply a different standard -- and not the well-established one that applies to every other case -- must be rejected as contrary to law and at odds with the commitment of the courts to insure the appearance of justice. Dean's renewed motion should therefore be denied.

Respectfully submitted,

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Dated: March 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 1997, I caused a true copy of the foregoing Government's Opposition to Defendant's "Post-Hearing Motion," to be mailed, first class, postage-prepaid to:

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