IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT
DEBORAH GORE DEAN'S POST HEARING MOTION

During the February 18, 1997 hearing on Defendant Deborah Gore Dean's Motion for a New Trial, 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 readily admitted in a post hearing motion ("Motion"), which Independent Counsel describes in its Opposition to Defendant's "Post Hearing Motion"

("Opposition") as a motion "that appears to seek reconsideration of this Court's ruling," that such case law involving factual circumstances similar to Ms. Dean's (where there is no allegation of a conspiracy or involvement of a co-defendant) could not be located. Opposition at 1. However, counsel for Ms. Dean did find authority for this Court's exercise of its inherent powers to grant Ms. Dean's motion for a new trial. Independent Counsel's efforts to distinguish and diminish this precedent cannot constrain this Court's ability to utilize those inherent

powers, in the interest of justice, in Ms. Dean's case. As a consequence, Ms. Dean's motion should be granted.

ARGUMENT

I. The Proper Legal Standard for a Motion for a New Trial is Applied with Flexibility in the Interests of Justice

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). Ms. Dean does not dispute, contrary to Independent Counsel's assertions, the applicability of this test to her Motion for a New Trial. Indeed, Ms. Dean does not argue that a different standard should apply to her. Rather, the dispute is with the inflexibility and rigidity of the application of this test advocated by Independent Counsel. Independent Counsel asks this court to blindly adhere to rigid application of the Lafayette test in order to conform "with the commitment of the courts to insure the appearance of justice." Opposition at 7 (emphasis added). Ms. Dean, however, asks this Court to do more than be rubber stamp on the "appearance" of justice. Instead, Ms. Dean simply asks the Court to look at the evidence of Mr. Wilson's affidavit, apply the Lafayette test, and-employ its inherent powers to do justice.

The Lafayette formula was developed as an attempt to devise a means of ensuring the reliability of the evidence. Independent Counsel, and this Court, should not ignore for the sake of mere words that the ultimate result, regardless of

whether evidence is "newly discovered" or "newly available," is an inability to utilize, for any reason, relevant and exculpatory evidence. Evidence not available in any usable form at trial and evidence which was not known at trial are indistinguishable on the singular ground that matters -- the evidence could not be utilized by a defendant at trial. It is for that reason that Ms. Dean's Post-Hearing Motion, as well as her Motion for a New Trial, should be granted. See Grace v. Butterworth, 586 F.2d 878, 880 (1st Cir. 1978) ("It may be assumed that a compelling claim for relief might be presented when newly available evidence

. . shows that a vital mistake had been made.") (emphasis added); Newsom v. United States, 311 F.2d 74 (5th Cir. 1962)(appellate court reversed denial of a motion for a new trial made on the basis of post-indictment testimony previously unavailable to the defendant at trial because of a refusal to testify); Ledet v. United States, 297 F.2d 737 (5th Cir. 1962)(motion for a new trial granted on basis of post-conviction affidavit of co-defendant who elected not to testify at trial).

II. The Case Law Relied on by Independent Counsel Does Not Control the Disposition of Ms. Dean's Motion

In its Opposition, Independent Counsel asserts that two Supreme Court decisions, Carlisle v. United States, 116 S. Ct. 1460 (1996), and United States v. Smith, 331 U.S. 469 (1947), effectively bar this Court from exercising its inherent supervisory authority to hear Ms. Dean's Motion for Dismissal or, in the Alternative, for a New Trial -- this despite the Court's well-established power "to correct that which has been wrongfully

done by virtue of its process," Arkadelphia Milling Co. v. St. Louis Southwestern Rv. Co., 249 U.S. 134, 145-46 (1919). However, the cases cited by Independent Counsel cannot control the outcome of this case, for the simple reason that the operative facts in those cases do not in any way resemble the uniquely compelling circumstances presented here. Despite Independent Counsel's plea to the contrary,[1] nothing in the factually inapposite Carlisle and Smith decisions compels the inequitable result advanced by Independent Counsel.

The Supreme Court's decision in Carlisle should not control the disposition of Ms. Dean's Motion. First, Carlisle involved a motion for judgment of acquittal, based on the insufficiency of the evidence presented at trial, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Ms. Dean's Motion is for dismissal of the indictment or, in the alternative, for a new trial, based on newly discovered evidence. Second, the district court in Carlisle, sua sponte, reversed its prior ruling denying defendant's motion for judgment of acquittal, filed one day out of time, at defendant's sentencing hearing without any prior notice to the parties. Carlisle, 116 S. Ct. at 1462. Moreover, in its initial opinion denying Defendant's motion for judgment of acquittal, the district court did not rely on the motion's alleged untimeliness, but rather

[1] While Ms. Dean maintains that the interests of justice dictate that the Court entertain Ms. Dean's Motion regardless of how it is captioned, Ms. Dean submits that the newly raised issues must fairly be characterized as newly discovered evidence under the unique circumstances of Ms. Dean's case.

denied the motion on the merits. Id. Put metaphorically, Independent Counsel is asking the Court to compare apples with oranges. The Supreme Court in Carlisle probably stated better than anyone why Carlisle does not control: "at issue here [is] a district court's power to enter iudgment of acquittal for insufficient evidence, without motion, and after the return of a guilty verdict." Id. at 1466 n.5(emphasis added). That issue clearly is not implicated here.

Furthermore, Independent Counsel's reliance on United States v. Smith, 331 U.S. 469 (1947), is entirely misplaced. As noted by Justice Scalia in Carlisle, the Court in Smith was faced with the issue of whether former Federal Rule of Criminal Procedure 33 should be interpreted to "permit[] the judge to order retrial without request and at any time." Carlisle, 116 S. Ct. at 1464 (quoting Smith, 331 U.S. at 473) (emphasis added). The Court is not confronted with that issue here: Defendant has requested a new trial prior to resentencing and entry of final judgment by this Court.

The peculiar facts of Smith are so far afield of the circumstances in this case that they require only brief mention. As recognized by other courts distinguishing the bizarre facts in Smith, "[t]he trial court in Smith had not a shred of jurisdiction at the time the new trial order was entered." United States v. Hughes, 759 F. Supp. 530, 534 (W.D. Ark.), aff'd, United States v. Haren, 952 F.2d 190 (8th Cir. 1991). See also Arizona v. Manypennv, 672 F.2d 761, 765 n.10 (9th cir.) ("Smith is, however, distinguishable . . . more important[ly], as

a case in which the trial court retained no jurisdiction over the case at the time of its action . . . The quoted language of Smith cannot be applied indiscriminately outside of the particular factual context at issue there."), cert. denied, 459 U.S. 850 (1982). This Court is not faced with the blatant jurisdictional malady presented in Smith, and the Court otherwise should not be guided by Smith's inapposite circumstances, despite Independent Counsel's urgings. Smith, like Carlisle, is clearly inapplicable to Ms. Dean's case.

III. Lance Wilson's Affidavit is Reliable and Trustworthy

Notwithstanding Independent Counsel's arguments to the contrary, Mr. Wilson's affidavit is trustworthy and supported by circumstantial evidence of reliability through the documents and other evidence that Independent Counsel was aware of at the time of Ms. Dean's trial. Undeniably, this evidence corroborates Mr. •ilson's statements in his affidavit. Independent Counsel cannot diminish the trustworthiness of Mr. Wilson's affidavit, and buttress their otherwise tenuous argument, by drawing a strained parallel between recantation testimony by a co-defendant and Mr. Wilson's affidavit testimony. There is absolutely no foundation for Independent Counsel's argument that "this reasoning [regarding the untrustworthiness of co-defendant testimony] applies equally" to Mr. Wilson because he is a "very good friend" of Ms. Dean. Opposition at 5. Independent Counsel's argument wholly circumvents the Mitchell/Wilson telephone message slips which allude, on their face, to conversations regarding Arama.

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. Furthermore, Mr. Wilson is not a co-defendant in this proceeding, and Independent Counsel's repeated attempts to diminish the significance of Mr. Wilson's affidavit testimony by relying wholly on case law uniquely applicable to circumstances pertaining to co-defendants is unpersuasive.

Moreover, Independent Counsel, in the litany of speculative and superficial reasons why Mr. Wilson's testimony is untrustworthy, ignores concrete indicia of trustworthiness which Independent Counsel themselves conferred on Mr. Wilson. In addition to the telephone message slips, in particular, during the grand jury hearing when Mr. Wilson was granted immunity, Independent Counsel did not pursue the opportunity to question Mr. Wilson about the funding decision of the Arama project. Wilson Affidavit ¶ 15. Independent Counsel could have learned at that time everything set forth in Mr. Wilson's affidavit which could have been corroborated by evidence Independent Counsel had in its possession. This corroborating evidence, contrary to Independent Counsel's arguments, enhances rather than diminishes Mr. Wilson's credibility. Further, Mr. Wilson's credibility is reinforced by the clear conclusion that as a result of Independent Counsel's own investigation involving the indictment of James G. Watt, they found Maurice Barksdale to be untruthful

with respect to the "project specific" awards of funding of Housing and Urban Development ("HUD") projects.[2]

In addition, Independent Counsel unpersuasively argues that Mr. Wilson's affidavit is "quite limited," choosing to parse the language of Mr. Wilson's description of his conversations with Mr. Barksdale to achieve this end. Opposition at 6. This argument misses the central point that 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. See Barksdale G.J. at 11. Independent Counsel also absurdly argues that Mr. Wilson does not state in his affidavit that he "would have invoked his [Fifth Amendment] privilege . . . had be been called to testify." Opposition at 6. To the contrary, Mr. Wilson plainly states that

> At the time of Ms. Dean's trial I had been convicted of one Count concerning my conduct while an executive of PaineWebber, Inc. and I was not willing to testify on the Arama matter or any other matter.

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[2] Independent Counsel attacks Mr. Wilson's credibility by untruthfully mischaracterizing in its Opposition a statement in Mr. Wilson's affidavit. Specifically, Independent Counsel states that it "was 'not unusual' for HUD officials it defraud the government . . . ." Opposition at 5-6. Mr. Wilson's affidavit, to the contrary, however, states: "It was not unusual for HUD officials to either call or send a . . . letter informing a particular consultant who was interested in a specific project that the units he or she was seeking were approved or denied funding." Wilson Affidavit 114. Clearly, contrary to Independent Counsel's misrepresentations, Mr. Wilson's affidavit makes no reference to defrauding the government, or the fact that defrauding the government was a common and accepted practice.

Wilson Affidavit 15(emphasis added). The only conclusion which can be drawn from Mr. Wilson's statement is that he would have asserted his Fifth Amendment privilege not to testify if he had been called as a witness during Ms. Dean's trial. Indeed, the Fifth Amendment is the vehicle through which Mr. Wilson could have asserted his unwillingness to testify if called as a witness. Independent Counsel cannot credibly argue that Mr. Wilson's affidavit states any intent to the contrary.

Finally, Independent Counsel implies in its argument that Mr. Wilson "lacks personal knowledge about the activities in which Dean was involved" that there were other "activities" which were unlawful and in which Ms. Dean was involved. Opposition at 6. Such an argument is not only unsubstantiated by the evidence, but contradicted by Independent Counsel's own actions. Indeed, if there were other such "activities," Independent Counsel surely would have discovered them, but obviously did not, in its investigation. This argument by Independent Counsel is equally unpersuasive in light of Mr. Wilson's exculpatory affidavit testimony.[3]

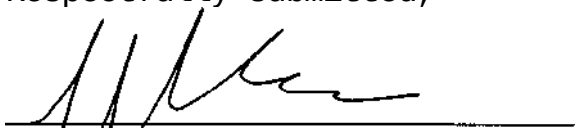
[3] If, in fact, as Independent Counsel claims, Ms. Dean was knowingly committing an illegal act, it is implausible that she would have memorialized it in a letter prepared by HUD personnel on HUD stationery which would be maintained in a HUD file. Indeed, if it was Ms. Dean's intent to commit an illegal 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.

CONCLUSION

The Supreme Court's holdings in Carlisle and Smith should not control the disposition of Ms. Dean's Motion in light of the unique and compelling circumstances of this case. And, as Independent Counsel must acknowledge, Carlisle and Smith have absolutely no bearing on the Court's consideration of Ms. Dean's Motion on the basis of newly discovered evidence. Moreover, the interests of justice and this Court's inherent powers compel this Court to consider the exculpatory evidence embodied in Mr. Wilson's affidavit to do justice on behalf of Ms. Dean.

Therefore, for the foregoing reasons, Defendant Deborah Gore Dean respectfully requests that this Court grant her Motion for Dismissal, or in the Alternative, a New Trial.

Respectfully submitted,



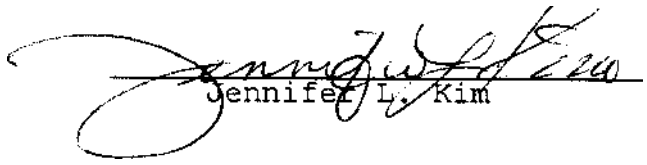
Jo J. Aronica, Esq.
Je er L. Kim, Esq.
Co sel for Defendant
Dechert Price & Rhoads
1500 K Street, N.W.
Washington, D.C. 20005
(202)626-3354

March 17, 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 1997, a true and correct copy of the foregoing was served via hand delivery to the following counsel of record:

Larry D. Thompson, Esq.
Independent Counsel
Dianne J. Smith, Esq.
Deputy Independent Counsel
Michael Sullivan
Associate Independent Counsel
444 North Capitol Street, N.W.
Suite 519
Washington, D.C. 20001



Jennifer L. Kim