

THE RUSSELL CARTWRIGHT RECEIPT

Summary: The OIC cross-examined Dean with an expense record of a consultant named Russell Cartwright indicating that Cartwright paid for an October 1987 dinner for Dean and a HUD employee named Abbie Wiest. When Dean denied that she ever had dinner with Cartwright, the prosecutor badgered her into saying the receipt must be false. The prosecutor then relied on Dean's denial of the receipt in attacking her credibility in closing argument, arguing that though Dean asserted that "all Russell Cartwright's receipts are lies," her calendars showed that she often met with him for lunch.

In support of her motion for a new trial, Dean argued that the OIC knowingly confronted her with a false receipt in order that she would deny it and the OIC could then assert to the jury that she had lied when she stated that other persons had created false receipts. Dean showed that Wiest had told the grand jury that she (Wiest) was certain that Dean was not at the October 1987 dinner in question. Dean also stated that her calendars show no meeting of any sort with Russell Cartwright.

Dean advised the court that the OIC had been requested to produce material on its contacts with Cartwright to show whether Cartwright also told the OIC that Dean was not at the dinner.

The OIC did not respond to Dean's request for information on Cartwright. It responded evasively in its Opposition to Dean's motion. In the Opposition, the OIC offered no reason for questioning Wiest's statement that Dean was not present at the October 1987 dinner and did not challenge the statement in Dean's Memorandum that Cartwright never appears in Dean's calendars at all. The OIC made no reference whatever to what Cartwright had told it about the receipt.

At a February 14, 1994 hearing, the court denied Dean's motion for a new trial. The court viewed the Cartwright receipt solely in terms of the OIC's failure to ensure that the receipt was valid. In a motion for reconsideration, Dean emphasized that her position was that the OIC had knowingly used a false receipt in order to cause her to deny it and thereby allow the OIC to argue that she had lied. Dean argued that the court should not rule until the OIC produces the requested material on Cartwright.

At February 22, 1994 hearing, the OIC responded orally attempting to divert court to separate issue of whether Dean ever ate with Cartwright. The OIC produced certain Cartwright grand jury testimony, solely for the court's examination, that OIC counsel maintained provided support for questioning Dean about the receipt, though acknowledging that Cartwright had testified that he at times submitted false receipts. The court refused to allow Dean's counsel to

review the material and denied Dean's request to have Cartwright called as a witness. The court denied Dean's motion without revealing the content of the Cartwright grand jury testimony, though seeming to suggest that the testimony somewhat supported Dean's argument that the OIC did not believe that Dean was at the event in question.

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Attachments

1. Exhibit OO to Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F. R. Crim. P. 29(c) and (d) and Motion for New Trial Pursuant to F. R. Crim. P. 33 (Nov. 30, 1993) (Pages 1, 56-57 of Abbie Wiest Grand Jury Testimony)
2. Pages 28-30 of Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 (Dec. 21, 1993)

Principal References:

1. Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F. R. Crim. P. 33 at 128-32, 191-94 (Nov. 30, 1993) ("Dean Mem.")
2. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 at 25-29 (Dec. 21, 1993) ("Gov. Opp.")

3. Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial at 9-11 (Jan. 7, 1994) ("Dean Reply")
4. Motion of Deborah Gore Dean for Reconsideration of Ruling Denying Her Motion for a New Trial at 7-10 (Feb. 18, 1994) ("Dean Motion for Reconsideration")

A. Background

Russell Cartwright, a former aide to Florida Senator Paula Hawkins, was affiliated with the political consulting firm of Black, Manafort, Stone & Kelly, which received much publicity for its HUD lobbying during the congressional investigation of HUD's moderate rehabilitation program. The Office of Independent Counsel ("OIC") intensively investigated the firm. One OIC indictment alleged that Victor Cruse, a former Connecticut housing official, falsely denied having made statements about contacting Russell Cartwright to have Cartwright use his influence to have HUD cancel an award. See Exhibit to Dean Motion for Reconsideration. Cartwright testified before the grand jury and was probably often interviewed by representatives of the OIC as well. Probably he received immunity relative to the Cruse prosecution.

Associate Independent Counsel Robert E. O'Neill cross-examined Deborah Gore Dean about a Cartwright expense record indicating payment for a dinner with Dean and a HUD employee named Abbie Wiest in October 1987. Dean responded that the receipt could not have applied to her since she had never eaten with Cartwright. Tr. 2864-65.¹

A short time later, O'Neill returned to this matter following a recess.

¹ That exact questioning was as follows:

Q. How about Russell Cartwright? Did you ever have meals with Russell Cartwright.

A. No, I've never eaten with Russell Cartwright.

Q. Do you recall going out to dinner with Mr. Cartwright, Abbie Wiest and yourself on October 22, 1987.

A. I've never eaten with Russell Cartwright.

Q. Miss Dean, when we left off we had been speaking about certain expense accounts for certain people. Isn't it your testimony that Miss Murphy falsified certain expense accounts?

A. Well, I know that I did not -- it doesn't truly reflect what had to do with me.

Q. Then she falsified them.

A. Well, I don't -- I don't know. I -- it does not accurately reflect an expense that should have been to me or having to do with me.

Q. So they're false.

A. It's an assumption, but my assumption would be that, yes, people falsify their records.

Q. Well, I showed you the records and you stated that you were not present at certain of those meals, is that correct?

A. Yes, that is correct.

Q. So then they're false.

A. All right.

Q. How about Lance Wilson, the same thing?

A. Yes.

Q. How about Black, Manafort & Stone, the same thing?

A. I didn't look at any [receipts] from Black, Manafort & Stone, I don't remember looking at any.

Q. The Russell Cartwright entry?

A. I didn't see it. I didn't allow you to show it to me, I'm sorry.

Q. Let me show you --

A. Wedgewood, Wadsworth, Wiest. I don't have any recollection of being with Miss Wiest and Mr. Cartwright.

Q. So this would be false as well, correct?

A. He may have been with Ms. Wiest.

Q. I believe you just testified that he was not with you?

A. He was not with me.

Q. So this is false?

A. All right.

Q. Now you understand that to file false statements like that would be illegal, correct, ma'am.?

A. Yes, I believe it is. Yes.

Q. So each of these individuals has committed a crime?

Tr. 2870-71.

At this point, the court sustained a defense objection. Tr. 2871-72.

Dean was similarly questioned about the receipts of several other persons and similarly badgered about whether their receipts were false. See Dean Mem. at 128-32.

In closing argument, after asserting that Dean's defense rested entirely on her credibility, O'Neill repeatedly asserted that Dean had lied throughout her testimony on the stand. In pursuing that theme, O'Neill asserted that Dean had falsely accused others of dishonesty. With reference to the Cartwright receipts and the receipts of several other persons, O'Neill stated:

Mr. Sankin takes her out to lunch, out to dinner. You heard a lot of testimony that his receipts were fabricated, that they're all lies. Well as you go through them you'll see one receipt goes right on point.²

And isn't it coincidental that all of his receipts are lies, all the Lance Wilson receipts are lies? Lance Wilson is actually a very good friend. All of Linda Murphy's receipts are lies? Remember Linda Murphy, one of her closest friends. I showed you that on an affidavit. And she said one of her closest friends. All of Russell Cartwright's receipts are lies. All of these people.

² See Narrative Appendix styled "The Andrew Sankin Receipts."

Look through her calendars. She's meeting with them for lunch all the time, but yet they're all lies, all attempts to deduct business expenses and commit crimes.

Tr. 3408.

B. Dean's Rule 33 Motion

In support of her Rule 33 Motion, Dean argued that the OIC had baited her to force her to accuse others of lying in order that it could later accuse her of falsely attacking the honesty of others. The OIC did so, Dean argued, even when it knew Dean was telling the truth. Dean Mem. at 128-32.

With regard to the Cartwright receipt in particular, Dean presented the grand jury testimony of Abbie Wiest. Wiest had testified that she specifically recalled the event in question, noting that it had been the night before her birthday, and that Dean was not present.³ Dean argued that, for several reasons, including the Wiest statement, there was reason to believe that the OIC knew for a fact that Dean was not present at the dinner, and used the receipt knowing she would deny it, thereby providing the OIC a basis for accusing her of lying, though it knew that she in fact had told the truth.⁴

³ The Wiest testimony, Exhibit OO to Dean's Memorandum, is appended hereto as Attachment 1.

⁴ Dean had also argued that it was improper for the OIC even to reference the Cartwright expense record since it was not in evidence. She noted that "there is every reason to believe that the Government could not, and knew it could not, introduce the record into evidence without eliciting perjured testimony." Dean Mem. at 193. The OIC argued that the Federal Rules of Evidence precluded the introduction of impeachment evidence in these circumstances. Gov. Opp. at 30 n.19. Dean did not argue the OIC's interpretation of the evidence rule, but contended that it was in any case inappropriate to rely on inadmissible evidence. Dean Reply at 11 n.9.

Dean noted that she had requested the OIC to produce all interview notes and grand jury testimony reflecting the questioning of Russell Cartwright with respect to any receipt relating to her. Dean Mem. at 129 n.96.

Dean also asserted that, even apart from the OIC's efforts to show she had lied when it knew she had told the truth, the OIC had seriously distorted the evidence of record. She pointed out that her calendars showed only three lunches with Wilson and only one with Murphy, and that the calendars showed no meetings with Cartwright of any sort. Dean Mem. at 191-94.

C. OIC's Opposition

In its Opposition, the OIC characterized the issue as one of whether the court had abused its discretion by failing to cut off cross-examination. Gov. Opp. at 25. With regard to the conflict with the Wiest statement, the OIC argued:

.... But that conflict alone -- which defendant was aware of from the government's disclosures -- would not render the government's use of the receipt improper, as the prosecutor's questions would nevertheless have been based on a "well-reasoned suspicion" raised both by the receipt and defendant's practice. United States v. Pugh, 436 F.2d 222, 225 (D.C. Cir. 1970). Inasmuch as defendant implied in her testimony that the receipt was false, Tr. 2864-65, the government was entitled to ask her that question directly.

Id. at 28 (original emphasis). The OIC then went on to argue why the court had not abused its discretion in permitting the questioning. Id.

At the time of filing its Opposition, the OIC had failed to respond to Dean's request for Cartwright's statements about the receipt. In the Opposition, the OIC made no reference to any Cartwright testimony or to Dean's request for that testimony. And it made no mention of whether, in point of fact, its attorneys knew that the receipt was false.

With regard to the statements in closing argument, the OIC's arguments (Gov. Opp. at 28-30) are difficult to characterize, and so are included in Attachment 2. The OIC did not challenge the statement in Dean's Memorandum that, contrary to the prosecutor's representation to the jury, her calendars showed no meetings of any sort with Cartwright.

D. Dean's Reply

In her Reply, Dean argued that the OIC had misleadingly characterized the issue. Pointing to the OIC's silence as to any inquiry it had made of Cartwright regarding the receipt, Dean argued that, "as the record now stands, it suggests that, in point of fact, the government confronted defendant with the receipt precisely because the government knew the receipt was false, and resolution of that issue is itself an appropriate subject of a hearing with court-ordered discovery as to what the government had learned from Mr. Cartwright when it used the receipt." Dean Reply at 10.

Later in her Reply, Dean again cited the failure of the OIC to respond to inquiries related to the Russell Cartwright receipt as reflective of the OIC's willingness to use false evidence. Dean Reply at 28.

E. February 14, 1994 Hearing

At a hearing on February 14, 1994, the court asked Deputy Independent Counsel Bruce C. Swartz: "What about the Russell Cartwright expense record that defendant raised and the accessibility to that?" Tr. 11. The court's reference to accessibility apparently concerned Dean's request for the receipt itself, which also had not been responded to, but which was of minor importance, compared with the issue of the Cartwright testimony.⁵

Swartz responded as follows:

Well, again, this is a situation in which a pattern exists of, in the particular case, Mr. Cartwright's receipt that indicates that he did entertain Deborah Gore Dean. Much as in the Sankin receipts or the Wilson receipts, defendant took the position that this was not an accurate reflection of what actually happened.

We believe that the government was entitled to put these documents -- or excuse me, that document was not put into evidence -- to cross-examine the defendant on this matter in light of her testimony regarding her statements to the Senate and her testimony about never taking meals. Defendant was free to argue, as she did, of course, that consistently across the board, individuals had falsely represented on their expense receipts that she was the recipient of these meals. We believe that the

⁵ Dean had requested the receipt with which she was cross-examined in order to clarify whether the date was October 22, 1987, or October 27, 1987. Dean Mem. at 129 n.96 on 130. In her Reply, however, Dean indicated that the matter apparently was resolved. See Dean Reply at 10 n.7.

jury was appropriately allowed to decide whether or not that was a plausible explanation or not.

Tr. 11.

Swartz said nothing about the OIC's knowledge of whether the receipt was false, and he made no reference to the requested Cartwright testimony. He did not even mention the issue of the "accessibility" of the receipt that the court had specifically asked him about. The court merely said, "All right"(id.), and moved on to another matter.

When questioning Dean's counsel, Stephen V. Wehner, however, the court asked: "Explain to me the Russell Cartwright receipt concern that you have as to what difference that would make or not about anything of this one receipt." Tr. 15.

Wehner responded that Dean was being forced to respond to matters that had no basis in fact. He pointed to the Sankin receipts, stating that "these Sankin receipts were garbage. An additional Cartwright receipt is garbage." Id.⁶ But Wehner did not focus the court on the fact that the OIC had failed to respond to inquiries regarding what it had been told about the receipt by Cartwright, nor did he clarify that the issue was one of the OIC's reliance on a false document in order to falsely accuse Dean of lying.

In expressing its concerns about the OIC's conduct before denying Dean's motion, the court would mention the Cartwright receipt, but discussed it as if it were merely a matter of failing to ensure the accuracy of a document that the OIC had used to challenge Dean's truthfulness. Tr. 26.

F. Dean's Motion for Reconsideration

In her Motion for Reconsideration (at 7-8), Dean attempted to refocus the issue, stating:

A critical thing to understand about the defendant's contentions regarding the government's use of a Russell Cartwright receipt in its cross-examination of defendant and in its closing argument is that defendant does not contend that the government merely sought to have attributed to defendant the acceptance of a meal that it knew she did not receive. Rather, defendant maintains that: (1) the government knew that the receipt was false; (2) the government cross-examined defendant with the false receipt believing that defendant was likely to testify that it was false because it in fact was false; (3) the government did so in order that it could state to the jury that defendant had lied when she denied the receipt even though the government knew that defendant had not lied, and in

⁶ See Narrative Appendix styled "The Andrew Sankin Receipts."

order that, after telling the jury that defendant's entire case rested on her credibility, it could point to such things as defendant's denial of the Russell Cartwright receipt and tell the jury that defendant should be convicted because she was a liar.

Dean then argued that the record so far developed, particularly in light of the OIC's failure to respond regarding what Cartwright had said about the receipt, supports that interpretation. She argued that the court should not rule on her Motion until it resolved the factual issue regarding what statements Cartwright made to the OIC and asked that the OIC be required to produce all material reflecting Cartwright's statements about the receipt.⁷

G. February 22, 1994 Hearing

At a hearing on February 22, 1994, Swartz responded orally to the Motion for Reconsideration.⁸ First, quoting Dean's statements that she had never eaten with Cartwright, Swartz argued that Dean had perjured herself by those statements. Tr. 9-10. Swartz asserted that the Wiest testimony provided as an Exhibit to Dean's Rule 33 Motion had itself indicated that Dean's statement was perjurious, noting that while Dean relied on Wiest's statement that Dean was not present at the October 27, 1987 meal, "[d]efendant neglects to inform the Court, however, that Abbie Wiest went on to testify that she and Russell Cartwright had had at least two meals with the defendant." Tr. 10.

The reference was to page 57 of the Wiest testimony, which Dean had included as part of Exhibit OO to her Rule 33 Memorandum (Attachment 1 hereto), even though it did not pertain to Wiest's statement that Dean was not present at the October 27,

⁷ In her Motion for Reconsideration, Dean also requested the court to require the OIC to reveal its knowledge of the whereabouts of a check from Louie Nunn to John Mitchell, a matter treated at length in the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

⁸ The relevant pages of the hearing transcript are found in Attachment 6 to the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

1987 dinner. Wiest had mentioned a lunch attended by herself and Dean, along with four other persons including Cartwright, and a dinner attended by herself and Dean, along with four other persons including Cartwright.

Turning specifically to the October 27, 1987 dinner, Swartz argued that the receipt alone was a sufficient basis for giving the OIC a reasonable suspicion that Dean was present, dismissing Wiest's statement on the grounds that Wiest, like others, had denied receipts or argued that the occasion described on a receipt involved personal matters. He stated:

Your Honor, with regard to the October 27, 1987 incident, of course, the question is as a legal matter whether the government had a reasonable basis for suggesting that indeed defendant was along on that, that occasion, and Wiest said not, but of course, Wiest, like many others, when confronted with receipts that suggested that while they were HUD employees, they had taken meals from particular individuals who had business pending before HUD, would frequently say, as we've suggested, that really she was personal friends with these people and it didn't have anything to do with HUD, or that occasion didn't happen, but the receipt itself, Your Honor, standing alone would have given more than sufficient basis for the government to have a reasonable suspicion that it did.

Tr. 10-11.

Swartz then described the evidence indicating that the information recorded on the receipt did involve a Black, Manafort client, arguing again that the receipt alone "would give the government a reasonable basis for going forward on cross examination." Tr. 11-12.

Swartz then offered to produce for the court's in camera inspection Russell Cartwright's grand jury testimony. The court interrupted to inquire about whether Dean had been provided Wiest's grand jury testimony "at the time this issue arose." Swartz responded affirmatively. Tr. 12.

Discussion then turned to the Russell Cartwright testimony. Because the colloquy is difficult to characterize, it is set out in its entirety below.

SWARTZ: I should say, Your Honor, that without going into the specifics of Russell Cartwright's testimony, that it suggests, it also confirms that defendant perjured herself with regard to saying that she had never eaten with Russell Cartwright, and furthermore, that the receipt is an accurate one.

That is not to say, Your Honor, that Russell Cartwright did not suggest that with regard to other HUD employees, although he could name none, that he might not have been submitting false receipts supposedly

pursuant to a Black Manafort [sic] policy, but what he explicitly said was that he had gone out to dinner and lunch with Dean, again confirming that she'd perjured herself, and that he entertained her on two occasions, including at the Mayflower Hotel, which of course, is the subject of the receipt.

If your honor so desires, we'll submit that.

THE COURT: All right. Do you have that here?

SWARTZ: Yes, I do, Your Honor.

THE COURT: All right, I'll take that in camera.

SWARTZ: Okay.

WEHNER: Could we have the opportunity to review that, please?

THE COURT: No, I'm taking that in camera.

WEHNER: Thank you. I just wanted to make the record.

THE COURT: All right.

SWARTZ: As you see, your honor, Russell Cartwright's testimony before the grand jury is extremely extensive. We are glad to provide the whole record to Your Honor, and we're glad to provide any excerpts to defense counsel relating to defendant Dean that Your Honor considers to be appropriate.

In particular, Your Honor, the page numbers here would be page 27 with regard to other meals, page 30 with regard to the Mayflower matter, and the later pages, -- 34, 36, with regard to the supposed Black Manafort practice, although again, I would like to stress, Your Honor, two points in that regard:

One, Russell Cartwright could not identify any individuals that he supposedly followed this practice with regard to, and again, as I've suggested to Your Honor, it's not uncommon in our experience that the attempt has been to suggest that these events never occurred, but the second point and the more important point here is that he had already admitted having gone out with the defendant Dean on four occasions.

And, Your Honor, that brings me to my concluding point, which is that the defendant should not be permitted to continue to obstruct justice in this way and to make statements that require the government to go back

through the record at a massive expenditure of time and effort and require the Court to do so. It is defendant that has made misstatements to this Court, it is defendant who perjured herself, and we submit, Your Honor, that the motion for reconsideration is a further basis for holding that defendant should receive a two-level enhancement for obstruction of justice for making material false statements to the Court pursuant to Sentencing Guideline 3.C.1.

Tr. 12-14.

Though the above argument is not very clear, Swartz seems to say that Cartwright's statements that his receipts were not always accurate may have had specific bearing on the October 27, 1987 receipt. But Swartz seems also to say that Cartwright indicated that he had entertained Dean at the Mayflower Hotel. The latter point presumably is intended to suggest that the referenced occasion at the Mayflower was the October 27, 1987 occasion reflected in the receipt, but Swartz is not explicit about that.

Wehner then read Wiest's specific denial that Dean was at the October 27, 1987 dinner. He argued that if the court was to consider the Cartwright grand jury testimony, the court should focus on what Wehner characterized as testimony "that Cartwright routinely phoned up his expense vouchers." Tr. 16. Wehner also argued that if the OIC was going to argue that Dean had lied on the basis of the Cartwright testimony, Cartwright (and Wiest) should be subjected to cross-examination. Tr. 16-17, 18.

The court then questioned Wehner about whether he had the Wiest grand jury testimony at trial and pointed out Wiest's statement that Dean had been present on other occasions with Dean. Tr. 19. Wehner argued that the statements were not inconsistent with what Dean had said, and, noting his difficulty in responding to Cartwright testimony that he had not seen, Wehner said the grand jury problem could be avoided by having Cartwright take the stand and letting Wehner cross examine him. Tr. 20.

After indicating with regard to the issue of the testimony of Alvin Cain, which also had been a subject of Dean's Motion for Reconsideration (see note 8 supra), that the evidence produced "doesn't mean of necessity that the government is putting on information they knew was false before the jury" (Tr. 21), the court ruled as follows with regard to the Russell Cartwright issues:

As to the issue of Mr. Cartwright, I think the same is true. There is information in the government's possession both ways that they had a receipt charging he had Dean and Wiest for dinner that evening in question. The impression they had is information from Ms. Wiest that she had eaten alone with Mr. Cartwright.

I've reviewed the grand jury testimony of Mr. Cartwright in this consideration as well as his recollection as to the accuracy or not of his receipts, and that does not change the court's opinion that the government, while, as I said before, zealous and aggressive, misrepresented to the jury the issue as to the Cartwright receipt or not, the defendant had information to challenge that inference or recollection of Mr. Cartwright's about it.

Ms. Dean had testified at trial -- we'll go further if necessary into this in the sentencing phase of it -- "Did you ever have meals with Russell Cartwright?" That was asked right after a question about Rick Davis of Black, Manafort [sic] Stone & Kelly, she mentioned about that, she answered, "I've never eaten with Russell Cartwright."

And she was asked specifically about going out on October 22, 1987, I'm not sure that was the right date; it was October 27. But in any event, she answered again, "I've never eaten with Russell Cartwright."

There is evidence that she had eaten with him. I don't know the context in which she was answering that question in her mind. I can't say she's lying when she said she never ate with him on October 22, whether when she said, "I've never eaten with Russell Cartwright," she means by herself, with others, I don't know, but for the purposes of the new trial motion, I will not find that it raises any substantial issues that more likely or not would result in a different jury verdict or prosecutorial misconduct would result in ordering a new trial, and because of that, I see no need to have Mr. Cartwright or Ms. Wiest testify further in the matter of Agent Cain.

So I'm going to deny the renewed motion for a new trial, I guess, or reconsideration. I'm denying the motion for a new trial at this time.

Tr. 21-22.

H. Comments

There is no question that it was improper for O'Neill to assert to the jury that Dean had falsely testified that all Cartwright's receipts are lies or that her calendars indicated that she frequently met him for lunch and dinner. The critical issue as to the allegations of the more serious governmental misconduct, however, concerns: (1) whether O'Neill knew that the receipt was false or was probably false when he confronted Dean with it, (a) in order that he could be assured of a denial by Dean that he could later assert was false, or (b) in order to suggest to the jury that Dean had received a meal from Cartwright when he (O'Neill) believed that she had not received the meal from Cartwright; and (2) whether following Dean's denial, O'Neill asserted to the jury that Dean had lied about the receipt even though O'Neill believed that she had not lied.

Because the content of the Cartwright grand jury testimony was not revealed, it is difficult to know just how it bears on these issues. Swartz's characterization of the material is ambiguous. The court's characterization of the testimony that it reviewed is also difficult to interpret. Certainly, however, the court gives no indication that Cartwright had explicitly stated that Dean was at the dinner reflected in the receipt. The second quoted paragraph suggests that the court in fact read Cartwright's statements about the inaccuracy of the receipts as providing at least some additional evidence that

the OIC had acted improperly, though, in the court's view, not beyond being what it had previously recognized to be "zealous[ness] and aggressive[ness]."⁹

⁹ The Court had previously used the word "zealousness" in describing the OIC's conduct during the court's original February 14, 1994 ruling on Dean's Rule 33 Motion, stating, after reviewing certain of the matters discussed in the Narrative Appendix styled "The Andrew Sankin Receipts":

I think if it had been an assistant United States Attorney who had done that before the Court in an everyday case, had put a witness on the stand and asked him to identify this group of documents, they all related to

meetings with the defendant, and then had been told by the witness that that was not accurate, I would expect every assistant I've ever had here would have brought that immediately to my attention and the defense's attention, and that was not done, and again, I don't understand that.

It evidences to me in the Independent Counsel's Office, where there were Brady requests made a long time ago, statements that there were no Brady materials, which is obviously inaccurate, where these witnesses are put on that I've just reviewed, where there was substantial questions and information that they may not have been telling the truth in the prosecution's files or the prosecution didn't ask if they were telling the truth to make sure they were before they went on stand, it evidences to me a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors I'm very familiar with, and that concerns the Court and is not the first time I've seen it in Independent Counsel cases.

Tr. 27.

As in other instances treated in these materials, the OIC's approach in responding to Dean's contentions may provide the best insight into what the facts are likely to have been.¹⁰ Had Cartwright in fact specifically advised the OIC that, notwithstanding Wiest's testimony, Dean had been at the October 27, 1987 dinner, such statement by Cartwright would have provided the OIC its best argument as to why it had a legitimate basis for cross-examining Dean regarding the receipt. Yet, in its Opposition, the OIC made no such argument, instead relying solely on what the receipt said on its face, and responding not at all to Dean's statements about the Cartwright grand jury testimony. In fact, the OIC's Opposition can fairly be read as an implied representation that its justification for relying on the receipt notwithstanding the Wiest testimony was comprised entirely of the information on the face of the receipt and what the OIC represented to be Dean's known practice of receiving meals from consultants. This would suggest that neither Cartwright's grand jury testimony, nor any other statements of Cartwright, provided the OIC any additional justification for its use of the receipt.

The same applies to Swartz's argument at the February 14, 1994 hearing, where he relied solely on what was stated on the receipt.

¹⁰ In addition, of course, as pointed out from time to time in these materials, the OIC's actions with regard to the Cartwright receipt must be appraised in light of the OIC's other actions, including, for example, the actions that the court recognized in its discussion of the Andrew Sankin receipt and the testimony of Ronald Reynolds as reflecting a willingness to rely on evidence that the OIC at least knew was probably false.

It should be borne in mind, however, that while one would expect the OIC to have initially produced such a statement if it existed, a Cartwright statement that Dean was present at the dinner would not actually have legitimized the cross-examination unless Cartwright adhered to that statement after being advised the Wiest had testified firmly to contrary. If the OIC did not confront Cartwright with the Wiest statement, the failure to do so would suggest a preference for relying on evidence that was probably false rather than to take the modest actions necessary to determine whether in fact the evidence was true or false. Recall the OIC's refusal to review with Sankin the many receipts that probably or certainly did not apply to Dean before attempting to cause the jury to believe that the receipts did apply to Dean.¹¹ Recall also what apparently was a refusal to confront Feinberg with Shelby's statement that Feinberg knew about Mitchell's involvement with Park Towers because of a preference to use Feinberg's original statement, even though there was reason to believe that the statement was probably or certainly false.¹² Other examples abound.

¹¹ See Narrative Appendix styled "The Andrew Sankin Receipts."

¹² See Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony."

With regard to the issue of what Cartwright in fact told the OIC, it should be kept in mind that the OIC ultimately provided only Cartwright's grand jury testimony, relying on the importance of the secrecy of such testimony.¹³ Swartz said nothing at all about its investigators' interviews of Cartwright, as to which it would not have been able to make the same assertion.

At the February 22, 1994 hearing, responding to the Motion for Reconsideration, which had more precisely focused the issue than had Wehner's oral argument at the February 14 hearing, and which had strongly urged the court not to go forward without requiring the OIC to produce all Cartwright statements on the matter, Swartz's first argument was aimed at shifting the focus to whether Dean's statements about never dining with Cartwright were true. Yet, had that been a material issue, the OIC could have cross-examined Dean with the Wiest testimony and any other evidence that it had indicating that Dean had dined with Cartwright. Dean would then have had the opportunity to say whether she remembered the event (which in the case of the events mentioned in the Wiest testimony occurred almost six years earlier), whether she believed she and Cartwright were in fact both among the six persons supposed to be at the event, and whether she even knew who Cartwright was at the time.¹⁴

¹³ In offering the grand jury testimony for the court's inspection, Swartz would refer to the production as being "what defendant Dean has requested here." Tr. 12. Swartz did not state whether there existed other material pertaining to Cartwright and the receipt.

¹⁴ Though Swartz would characterize Wiest's testimony as being "that [Wiest] and Cartwright had had at least two meals with defendant" (Tr. 10), and that "Wiest refers both to a dinner and a lunch with defendant Dean and Russell Cartwright," *id.*, with regard to each event Wiest stated that there were six persons present. Swartz did not elaborate on the nature of the events supporting the statements that Cartwright "entertained [Dean] on two occasions, including at the Mayflower Hotel, which, of

The OIC had no interest, however, in questioning Dean about an event where she and Cartwright might in fact both have been present. Only questioning on events at which the OIC knew Dean was not present would assure a denial from Dean, which the OIC could later assert was a lie. Any acknowledgement by Dean that Cartwright might have been present at another event would only have complicated the use of the October 27, 1987 receipt in the manner the OIC would later use it.

With regard to the OIC's intentions in confronting Dean with the receipt, the following should also be borne in mind. In the OIC's Opposition (at 26-28) and in Swartz's argument quoted above, the OIC would maintain that it had used the Cartwright receipt to challenge a statement that Dean made to Senator Proxmire that she had not accepted meals. Yet, Dean had made the statement in August 1987, and the Cartwright receipt related to October 1987, making the receipt irrelevant to the truthfulness of Dean's statement to Proxmire. The OIC, of course, might still desire to use the receipt for challenging the statement to Proxmire while glossing over the timing issue. Yet, the fact that the receipt actually had no bearing on that issue may be another reason to expect that the OIC found the receipt useful, not because it was a true receipt that cast doubt on Dean's integrity, but because it was a false receipt that Dean could be expected to deny.

A further observation is warranted regarding Swartz's statements that it was the OIC's experience that persons would either seek to make it appear that an event reflected in a consultant's receipt involved a personal relationship or deny that the event occurred. In twice making the latter point, Swartz was impliedly representing to the court the OIC's experience in that regard was such that it would lead the OIC to disbelieve Wiest's statement that Dean was not at the October 27, 1987 dinner and Cartwright's statement that he sometimes fabricated his receipts.

Yet, Wiest was testifying with immunity. Apart from whether she would have had any interest in denying Dean's presence in any case, with a grant of immunity, Wiest had no interest in testifying falsely about that matter, particularly when there would be two persons who could contradict a false statement that Dean was not present.

course, is the subject of the receipt," (Tr. 13) or "the more important point here is that [Cartwright] had already admitted having gone out with defendant Dean on four occasions." Tr. 14.

Presumably, Cartwright also testified with immunity. But a consultant testifying with immunity has no interest in falsely stating that receipts have been fabricated even if the receipts are highly incriminating.¹⁵ A truthful acknowledgment of the receipt is immunized and, at a minimum, complicates the government's effort at prosecution on the basis of other evidence. On the other hand, by falsely denying a receipt a witness violates the immunity agreement and commits perjury as well. Moreover, in denying that a receipt accurately reflects an event, by definition the denial is of a fact that there exists another person capable of specifically contradicting. Hence, to the extent that the OIC's experience was that immunized witnesses frequently denied that their receipts were accurate, the OIC therefore had a basis for believing that receipts were commonly fabricated, not that a particular denial by an immunized witness was unlikely to be true. The frequency of such immunized statements thus gave the OIC additional reason to believe that the receipt was false, and that, as Wiest had stated, Dean was definitely not at the October 27, 1987 dinner. In any case, it would seem that Swartz's implied representation that the OIC's experience would lead it to disbelieve Wiest's denial that Dean was present at the dinner or Cartwright's statement that he fabricated receipts was an attempt to mislead the court.

Finally, aspects of Swartz's approach at the February 22, 1994 hearing must also be appraised for their reflection of the OIC's overreaching and the OIC's strategy of attacking to divert attention from its weaknesses on the misconduct issue. Relevant in this regard are both the efforts to cause the court to find that Dean had perjured herself on the basis of contrary grand jury testimony about peripheral issues, and, more particularly, Swartz's argument that "the motion for reconsideration is a further basis for holding that defendant should receive a two-level enhancement for obstruction of justice for making material false statements to the Court pursuant to sentencing Guideline 3.C.1." Tr. 14-15.

¹⁵ Even testifying without immunity, it would rarely make sense for a consultant to falsely state that a receipt was fabricated. In doing so a consultant would be acknowledging a fraud as to his employer, his client, and/or the tax laws. There would seem few occasions when a consultant would find a receipt to be so incriminating as to his lobbying a government official that he would falsely deny it at the expense of acknowledging an obvious crime.

Not only does the Motion for Reconsideration make no statement whatever that could be interpreted as a misrepresentation, the OIC's refusal up to that point to reveal anything about what Cartwright had said about the receipt gave Dean compelling reason to continue to press the issue. More important, however, despite the emphasis on the other instances where Dean was supposed to have dined with Cartwright, Swartz plainly was also seeking to have Dean's sentence increased on the basis of her having falsely denied that she was at the October 27, 1987 dinner. Thus, as with the Cain testimony,¹⁶ the issues are no longer simply whether trial counsel knowingly relied on a false receipt and whether his superiors failed to be forthcoming on the matter. Notwithstanding being directly confronted with the Wiest immunized testimony, the OIC would still proceed to seek to increase Dean's sentence on the basis that the receipt was true and Dean's denial of it was false. If the OIC did so without at least at that time confronting Cartwright with Wiest's statement,¹⁷ this would seem another instance of the OIC's preferring to rely on evidence that is probably false rather than to take modest steps to determine the truth.

Yet, the OIC's approach had its effect on the court. In its ruling, the court gave as much attention to the issue of whether Dean had committed perjury in the statement about never eating with Cartwright as it did to the issue of the OIC's use of the Cartwright receipt. The court even indicated that it might return to that issue in the context of sentencing, though it ultimately would not do so, presumably recognizing, among other things, that it could not so rule relying merely on transcripts of grand jury testimony to contradict Dean's in-court testimony.

¹⁶ See Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr."

¹⁷ It is known that the OIC never confronted Wiest regarding this matter during the period between the filing of Dean's Rule 33 motion and the sentencing.

Another aspect of the court's actions deserves note. The court's inquiries of both Swartz and Wehner regarding whether Dean had the Wiest testimony at the time of trial suggests that the court viewed the issue as another matter of disputed testimony, with the defendant's having been provided material necessary to present her side of the matter to the jury. The court seems not to recognize that the Wiest testimony was merely provided as Jenks material for Wiest, who was originally on the OIC's witness list.¹⁸ More important, however, the court's focus suggests that it contemplated that Dean would review the Wiest testimony as a result of the question about the Cartwright receipt, then would call Wiest as a witness to testify that Dean was not at the event. Yet, the rule is that when cross-examining a defendant on a peripheral matter for impeachment, the government may not introduce evidence to challenge the response.¹⁹ Having no reason to anticipate the OIC's improper closing argument, it would have been absurd for Dean to call Wiest, who lived in Florida, as a witness on this peripheral matter.

The key to precisely what the OIC believed about the Cartwright receipt when OIC trial counsel used it in court, and when OIC trial counsel subsequently impliedly represented to the jury that Dean had lied in denying it -- and when higher levels of the OIC sought to have Dean's sentence increased for falsely denying the receipt -- may lie in what Cartwright told the OIC in and out of the presence of the grand jury, or it may lie simply in whether the OIC chose to confront Cartwright with Wiest's statement. If the government investigates its own actions in this regard, it will presumably be able to avail itself of complete disclosure. Others may have to rely on what Cartwright is willing to reveal.

¹⁸ The court's suggestion that it was important that Dean was provided the Wiest testimony suggests as well that it was important that Dean be provided the Cartwright statements about the practice of falsifying receipts. The court, however, had already refused to allow Dean's counsel even now to review that material.

The record suggests as well that the OIC had reason to believe that the other receipts that Dean denied might also be false. See Dean Mem. at 128-33. But even in the case of the Cartwright receipt, it was only because Wiest's name was also on the expense entry, and because the OIC had listed her as a witness and therefore provided her grand jury testimony that happened to discuss the matter, that Dean was able to make the case she did.

¹⁹ The OIC's point in its Opposition that the Rules of Evidence precluded it from attempting to introduce the receipt may well have been correct. Yet, it seems clear that, failing to produce the receipt, the OIC cannot then argue to the jury, in effect, that a receipt did exist and Dean falsely denied it (as well as many others by Cartwright). See note 4, supra.