

TESTIMONY OF RONALD L. REYNOLDS

Summary: Ronald L. Reynolds is a HUD driver whom the OIC called as a rebuttal witness to testify that he had driven Dean Gore Dean to lunch in a HUD car when she told him she was having lunch with John Mitchell. The OIC recognized that Reynolds was not a credible witness. The court also recognized that the OIC recognized that Reynolds was not credible.

Despite the court's recognition of Reynolds' unreliability, the court, over defense objections, allowed Reynolds to testify during the OIC's rebuttal case. Reynolds then made statements during direct and cross-examination that the OIC had to know were false. Instead of correcting that testimony, the OIC attempted to rehabilitate Reynolds on redirect by eliciting further testimony that OIC counsel also knew had to be false. In light of the OIC's objections, the court denied Dean the opportunity for re-cross-examination of Reynolds and denied Dean the opportunity to present surrebuttal regarding Reynolds' testimony.

In closing argument, the prosecutor relied extensively on Reynolds' testimony in attacking Dean's credibility and mischaracterized Dean's own testimony in order to further contrast it with that of Reynolds.

Dean raised these matters in a Rule 33 Motion, inter alia, citing documentary material possessed by the OIC demonstrating that Reynolds' testimony was false.

Ruling on Dean's Motion, the court admonished the OIC for its use of Reynolds as a witness because the OIC knew he was not a believable witness and because documents in the OIC's possession showed that his statements were not true. The court nevertheless denied the motion for a new trial without discussing how Reynolds' testimony had been used to attack Dean's credibility.

Contents of this document:

A. Background	3
B. Dean's Testimony	4
C. Reynolds' Testimony	5
D. OIC's Closing Argument	8
E. Dean's Rule 33 Motion	11
F. OIC's Opposition	13

G. Dean's Reply	13
H. Court's Ruling of February 14, 1994	14
I. Comments	15

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 144-60, 194-201 (Nov. 30, 1993) ("Dean Mem.")
2. Government's Opposition to Defendant Dean's Motion for New Trial Pursuant to Fed. R. Crim. P. 33 (Dec. 21, 1993) at 47-48, 69-72 ("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 15-16, 24-25 (Jan. 7, 1994) ("Dean Reply")

A. Background

Ronald L. Reynolds is a HUD driver who made some exceedingly improbable statements in an interview given to representatives of the Office of Independent Counsel ("OIC") in March 1993. He stated, for example, that he had driven Dean to have lunch with John Mitchell about once a month and that he overheard conversations of Dean and other HUD officials talking about moderate rehabilitation units on the HUD car phone. Records showed, however, that during the three years Dean had served as Executive Assistant she had gone to lunch with Mitchell between one and six times. Also, there were no telephones in the HUD cars in which Reynolds drove Dean.

Reynolds had also told interviewers that he drove Dean to lunch at the Hay Adams or Ritz Carlton when she would say she was meeting with Mitchell, and that sometimes Dean's mother would meet them. Yet, neither Dean's nor Mitchell's records showed Dean ever meeting Mitchell at either place. Records suggesting where Dean and Mitchell did have lunch indicated that the lunches took place at either The Grand Hotel, which is part of the building where Mitchell maintained an office, or in Georgetown. Dean Mem. at 146 n.107. Dean's records never showed her meeting with her mother at all.

Other improbable or demonstrably false statements are cited in the Dean Memorandum at 145-46. Many of the statements involved matters that were reported in newspapers, but which Reynolds reported as if they were matters that Dean had personally communicated to him.

At a bench conference on September 30, 1993, Dean's counsel, Stephen V. Wehner, sought to bar Reynolds' testimony because of its evident unreliability. Associate Independent Counsel Robert E. O'Neill did not dispute Wehner's assertions that portions of Reynolds' statement were demonstrably false. O'Neill nevertheless argued to be allowed to use Reynolds, with the intention to "tailor his testimony to questions to those areas I've just told you, basically that he took her to a number of various lunches," that he had waited for Dean for two or three hours "on one specific occasion only," and that Dean "had told him on a number of occasions that she was meeting with John Mitchell for lunch and her mother." Tr. 1776. The court ruled that the OIC could present Reynolds to testify as to what he knew about Dean's contacts with Mitchell. Tr. 1776-77.

Following this bench conference, the parties agreed to a stipulation that, if Reynolds were to testify, he would testify that while employed at HUD between 1980 and 1989, "he drove Deborah Gore Dean to lunch on several occasions when she said that she was meeting John Mitchell for lunch." Gov. Exh. 545.

B. Dean's Testimony

When Dean was cross-examined, she stated that she believed she might have had as many as three lunches with Mitchell while she was at HUD. She stated that she had no recollection of how she got to those lunches, but stated that it would have been inappropriate to take a HUD car. When questioned about Reynolds' stipulation, Dean stated that she would ordinarily not tell a HUD driver the name of the person with whom she was having lunch. Tr. 3053-54. Questioned about the statement in Reynolds' stipulation, Dean stated:

That's what the stipulation says, and that man's testimony [Reynolds' interview report] also says that he said that he was driving me to lunch with Mr. Mitchell and my mother and I never had lunch with Mr. Mitchell and my mother, and it says all sorts of things in there, and you and my lawyer both agreed that that man was not quite normal and instead of having him on the stand we agreed to sign a stipulation.

Tr. 3055-56. Dean further stated that she did not acknowledge that Reynolds' testimony would be true. Tr. 3056.

Dean also testified that she did not recall Reynolds' driving her to lunch with Mitchell and generally did not recall where he would have driven her, explaining that Reynolds was one of ten HUD drivers, all of whom took her various places, but that he was not a special driver for her. Tr. 3057-58. The testimony follows:

Q. Did Mr. Reynolds drive you to lunch with John Mitchell?

A. Not that I recall. I don't recall any place Mr. Reynolds drove me.

Q. You don't recall any place Mr. Reynolds drove you?

A. Not in specifics. I can -- I can recall that Mr. Reynolds was a driver and --

Q. Let me show you Government's Exhibit 212 already in evidence, Miss Dean, and ask you to look through that and see if that refreshes your recollection whether Mr. Reynolds drove you anywhere?

A. Well, I didn't say that I don't recall that he was a HUD driver, but we had ten HUD drivers and all of them drove me different places. I just don't remember a specific of Mr. Reynolds driving me anywhere, but I will look through it, just as you asked me to, and see if I can find something.

Is Ron Mr. Reynolds? I don't see anything here that says Reynolds. It says Ron. Is his name Ron Reynolds.

Q. Do you know any other driver at the time, Miss Dean, named Ron.

A. As I said, there were ten drivers and I didn't know all of their names.

Q. You knew Mr. Reynolds well, didn't you?

A. I did not know Mr. Reynolds well at all.

Q. Did you use him a lot as a HUD driver?

A. No, I didn't. As a matter of fact, I'll look at this and I'll tell you who I did use often.

Q. Ma'am, I didn't ask you that.

A. All right.

Q. Did that refresh your recollection as to using Mr. Reynolds as a driver was the question.

A. I said Mr. Reynolds was a driver. All of the drivers drove me different places. Mr. Reynolds was not some special driver and he did not specifically drive me places, nor was he requested in -- to be a special driver for me. I didn't have that sort of authority to have a special driver. I used whoever was available.

Government Exhibit 212 was a copy of Dean's testimony before the Senate Banking Committee. The portion of that exhibit that O'Neill showed to Dean during this questioning was a HUD motor pool log that had been reproduced in the Senate testimony. Though the motor pool record was not discussed at any length, it would show on examination that in October 1986, Dean took 15 trips by HUD car and Reynolds drove her on one of those trips.

C. Reynolds' Testimony

The OIC proposed calling Reynolds as a rebuttal witness. Wehner objected again pointing out that Reynolds was not a reliable witness. The court, though referring to Reynolds as someone that both parties agreed no one would believe (a characterization to which the OIC did not object), allowed the OIC to present Reynolds as a rebuttal witness. Tr. 3223-25.¹

¹ The following was the colloquy:

THE COURT: All right, let me go to the next one then. The driver, the gentleman who, that the stipulation was if he testified, he would have testified that he had taken Ms. Dean several times to lunch that she told him were with Mr. Mitchell, as I recall the

In his direct testimony, Reynolds first testified that he had driven Dean on "two out of three trips." Tr. 3238. Seconds later, Reynolds revised his estimate of the frequency with which he drove Dean, stating that it was "two out of every three -- two out of five, sorry" trips. Tr. 3239.

Immediately, thereafter, Reynolds testified that he would drive Dean "about ten times a week," and that he would take her to luncheon meetings "two, three times a week." Id.

Finally, Reynolds testified that he drove Dean "at least about two or three occasions, at least, a minimum of two," when Dean told him that she had had lunch with Mitchell. Tr. 3240.

During cross-examination, confronted with a miscalculation by Wehner suggesting that according to Reynolds' estimates, Dean had taken 50 trips a week, or

content, you want to call him back to that again basically?

MR. O'NEILL: Yes, Judge.

THE COURT: Since Ms. Dean said on the stand she stipulated to the testimony but not that it was true is what she said.

MR. O'NEILL: And that both Mr. Wehner and I agree that he was a weird guy and couldn't be believed.

THE COURT: That's right. Everybody believed that no one would believe him.

MR. WEHNER: Yes, sir.

THE COURT: And that's because of memory problems or something? Is that the reference?

MR. WEHNER: It was because some statements in his Jenks material are so obviously untrue that he appears to be an unreliable person generally, and I don't mean to characterize him in such a way that Mr. O'Neill would disagree, but, for example, he testifies as to Ms. Dean's use of car phone, and there weren't any car phones in the cars at the time.

I mean, he was clearly recalling information that he had heard from other sources or read in the newspaper and suggesting he had personal knowledge of it, and it was certainly not in my interest to have that testimony in front of the jury.

ten a day,² Reynolds expressed the view that it was "possible." Pressed further as to whether Dean traveled by HUD car ten times a day for three years, Reynolds essentially acknowledged that travel of such frequency commonly occurred. Tr. 3240; see Dean Mem. at 155 n.116.

Reynolds was further cross-examined regarding his earlier statements that he had taken Dean to lunch with Mitchell about once a month, with Wehner suggesting that this would mean Reynolds alone would have driven Dean to lunch with Mitchell about 72 times while she was at HUD. Tr. 3242. In cross-examination, Reynolds acknowledged that he had told investigators that Dean's mother had also joined Dean and Mitchell for lunch, but indicated he could not point out Dean's mother in the courtroom. Tr. 3241.

On redirect examination, O'Neill asked Reynolds the basis for his prior statement that he had driven Dean to lunch with Mitchell and her mother. Reynolds stated that when Dean came out from lunch at the Fairfax Hotel, she told him she had met with her mother and Mitchell. Asked whether he had ever met Mitchell or Dean's mother, Reynolds said that he had not. Tr. 3243.³

After Reynolds started to leave the stand, Wehner asked if he could ask one more question, advising the court that he wanted to bring out the fact that the Ritz Carlton had not been called the Fairfax Hotel since 1978. O'Neill objected, observing:

I just don't see how it's relevant to anything, Judge. Beyond the scope. Then, of course, I would re-redirect to say, 'Are you from the area? Do you know it as the Fairfax Hotel.'

Tr. 3245. The court sustained the objection. Id.

The OIC next called Pamela Patenaude as a rebuttal witness. Patenaude testified that when she used the motor pool with Dean, "Most of the time Ron was the driver." Tr. 3249-50.⁴

Dean requested to present surrebuttal with regard to Reynolds and Patenaude. She asked to be able to testify that Reynolds had not been her regular driver and that she never met Mitchell at the Fairfax Hotel. She also requested to testify that

² Actually, Reynolds' estimates that he drove Dean on two of five trips and that he drove her ten times a week would mean that he drove her 25 times a week or 5 a day.

³ During cross-examination, Reynolds testified that records were maintained for every trip he took at HUD, but that he did not have the records with him. Tr. 3243. On redirect, O'Neill elicited the testimony that motor pool records were kept for only three years and none existed for the period 1984 to 1987. Tr. 3243-44.

⁴ Patenaude's testimony is found in the Dean Memorandum at 157.

Patenaude had been demoted, something Patenaude had denied on cross-examination. In the face of the OIC's "strenuously object[ing]", the court refused to allow surrebuttal. Tr. 3270-71.

D. OIC's Closing Argument

In closing argument, O'Neill discussed Reynolds' testimony at length in pressing the point that Dean had repeatedly lied to the jury.⁵ After stating that Dean had lied in denying that she knew that John Mitchell was a paid consultant, O'Neill stated:

She denied that the HUD driver had driven her to lunch with John Mitchell. There was a stipulation that Mr. Reynolds, if called would testify. So then she said, well, no, that didn't happen. Besides, Mr. O'Neill, you know he's a weird guy.

So we have to call Mr. Reynolds. He's got long hair. Good thing I got a haircut, otherwise I guess I'd be a weird guy. He gets up there and he testifies and he says very clearly I remember two specific occasions. Does that sound like a man who is making things up out of whole cloth? He said there were other times, but I remember two specific occasions. Mr. Wehner cross-examined him about, well, didn't you say once a month. And he said yeah. Wouldn't that be 12 times a year times x-number of

⁵ The pervasiveness of O'Neill's assertions that Dean had lied is not paralleled in reported federal cases. A fairly comprehensive summary of the remarks is set out in Attachment 1a to Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr." A sampling of the statements is set out immediately below: Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her..she lies about that.. if she's going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it.").

years? But the guy said two specific occasions.

Why would she lie about a HUD driver not taking her there? Well, the reason is very clear, ladies and gentlemen. The reason it's so clear why she would lie that Mr. Reynolds did not drive her to lunch with John Mitchell, and there are two particular reasons. The first is, as you heard through her cross-examination, she admonished Hunter Cushing for doing that. And she said taking his girl friend in a car, you can't do that. You can't use a HUD car, a Government car, for personal reasons. So she's not going to admit that she did it and she had gotten somebody in trouble for doing it.

And what does she say? You heard the tape and you'll have the transcript and you can hear the tape again. She was asked by Senator William Proxmire at her hearing, the hearing she requested to get this job:

The Chairman: "Okay, Miss Dean, HUD motor pool records show that you commonly used HUD chauffeurs to drive you to restaurants. During one two-week period in October you were dropped off at the Old Post Office twice, the Hay-Adams, a Connecticut Avenue restaurant, several restaurants on Capitol Hill. Our staffers have spoken to HUD employees who say they have firsthand knowledge that you have used the HUD motor pool for private trips to restaurants. Could you comment on that?"

Miss Dean: "First of all, that is absolutely not true. Any time I have ever used a HUD car, it was for official business. There are a lot of people in this city that have official business trips over lunch. It is always their idea. If that is the time they can meet with me, I take them up on that. I have never taken a car to do anything personal."

Then it can only be one of two things. She either met with John Mitchell because it was personal and she lied to Senator Proxmire or it was business, she was dealing with John Mitchell on this HUD business, and she lied to you. It can only -- logically it can only be one way or the other.

That's why she doesn't want to admit that Mr. Reynolds took her -- and I neglected -- this is in evidence, you'll get a chance to look at it. Let me show you something on the visual presenter for a second.

Tr. 3421-24.

At this point, O'Neill put on the visual presenter the pages from Dean's Senate confirmation testimony containing the HUD motor pool records that Dean had provided to the Senate Banking Committee. These records included all the entries involving Dean for the month of October 1986. As previously stated, they showed that Dean took 15 trips by HUD vehicle that month and that Reynolds drove her on one occasion. O'Neill resumed:

There are several pages in the middle of various, various HUD drivers and the name Ron, as you'll see runs, throughout. There are approximately, I don't know, several pages. Look through it. See how many times Ron's name comes up.

But she told us when I cross-examined her about it that there are many drivers. I don't know who Ron is. Well, Pam Patenaude had no problem remembering that she took trips with her when Ron was driving. But she didn't want to admit it, ladies and gentlemen, because she was in a trick bag here. Either it's personal and she lied to Senator Proxmire, or its business and she lied to you.

Tr. 3424.

In rebuttal on the following day, O'Neill returned to this point when listing statements of Dean that he contended were lies:

Denied the HUD driver ever drove her to lunch. The record shows that he did.

Again, the reason she would lie about that, she was in a trick bag. Either she lied to the Senate about using it for personal reasons or she lied to you about Mitchell doing business with her.

Tr. 3506.

E. Dean's Rule 33 Motion

In support of her Rule 33 Motion (Dean Mem. at 144-60), Dean detailed the reasons why the OIC had to believe that Reynolds was not telling the truth, including the facial absurdity of many of the statements in his interview, documentary material in the possession of the OIC, and statements made in Dean's own testimony that the OIC had no reason to disbelieve. Thus, Dean argued, it was irresponsible to call Reynolds at all.

Dean also argued that the OIC had to know that many statements Reynolds made in his direct testimony were false. For example, she noted that records long in the possession of the OIC showed that she could not have driven with Reynolds ten trips per week; the HUD motor pool log showed she used the HUD car about 15 times per month rather than the 100 suggested by Reynolds' testimony; and the logs showed she used HUD cars for luncheon meetings about three times per month rather than the 20 plus times suggested by Reynolds' testimony. Further, instead of driving Dean 40 percent of the time, records indicated Reynolds drove her less than 10 percent of the time. She pointed out that, instead of fulfilling its duty to correct this false testimony, the OIC proceeded to elicit from Reynolds' further testimony that its counsel had also to believe was, if not undoubtedly false, at least very probably false -- namely, that

Reynolds drove her "at least about two or three occasions, at least, a minimum, of two," when Dean told him that she had had lunch with Mitchell. Tr. 3240. See Dean Mem. at 144-56

Dean noted that Reynolds made more statements in his cross-examination that gave O'Neill additional reason to believe that Reynolds' entire testimony was false. She argued that instead of then proceeding to correct that testimony, the OIC proceeded to attempt to rehabilitate Reynolds by specifically eliciting the response that Reynolds had driven Dean to meet with Mitchell and her mother at the Fairfax Hotel, a response the OIC had overwhelming reason to believe was false.⁶ The OIC then had resisted efforts at further cross-examination and rebuttal on that issue.

With regard to Patenaude, Dean noted that although Reynolds himself had ultimately testified that he drove Dean about 40 percent of the time -- an estimate that records showed not to be true -- Patenaude who had been seen entering the building with Reynolds testified that Reynolds drove Dean more than half the time. She argued that the OIC knew that testimony was not true as well. Dean Mem. at 157-59.

Dean also challenged O'Neill's characterization of the record when it relied on Reynolds' testimony in closing argument, arguing that O'Neill had intentionally mischaracterized her testimony in order to assert that Reynolds' testimony showed that she had lied. Dean Mem. at 194-201. Among other things, Dean challenged the statement to the jury that Dean had said, "I don't know who Ron is," arguing that nothing in her testimony could reasonably be so characterized. Similarly, she argued, there was no construction of her testimony that would allow the OIC to state in rebuttal that she had "denied the HUD driver ever drove her to lunch." Dean also argued that O'Neill had deliberately misled the jury about the contents of the motor pool log, believing that the jury would accept his statement "See how many times Ron's name

⁶ In arguing that the OIC had to know that Reynolds' statement in his Jenks material about driving her to lunch where she met with her mother and Mitchell was false, Dean pointed out that her calendars showed no lunch with Mitchell and her mother and in fact no lunch with her mother at all. Dean noted that this was a matter that the OIC could have verified with her secretary, who appeared as a OIC witness. Dean also noted that her mother had been called before the grand jury. With respect to Reynolds' statements that he drove Dean to lunch at the Ritz Carlton or Hay Adams when she was meeting Mitchell, Dean pointed out that the OIC possessed evidence indicating that it was extremely unlikely that any of her several lunches with Mitchell were at either place. Dean Mem. at 147-50. Dean noted that her statement on cross-examination that she had never had lunch with Mitchell and her mother gave the OIC additional reason to believe that Reynolds' statement about driving her to lunch where she met Mitchell and her mother was false. Id. at 151-52. Dean also argued that the demonstrably false statements given during Reynolds' direct and cross-examination gave the OIC further reason to believe that the statement about driving Dean to lunch where she met Mitchell and her mother was certainly false. Dean Mem. at 154-55.

comes up" to mean that it showed Reynolds frequently to be driving Dean, and that the jury would accept that representation without actually reviewing the document. Id. at 197-98.

Finally, Dean argued that in order to further alienate Dean from the jury O'Neill had falsely suggested to the jury that Dean's statement that Reynolds "was not quite normal" -- which O'Neill characterized as "Besides, Mr. O'Neill, you know he's a weird guy." -- was based on Reynold's long hair or some other personal trait. Dean argued that O'Neill well knew that Dean's statement was based on the discussions outside the jury's presence concerning statements in Reynolds' March 1993 interview that O'Neill had recognized were not believable. Id. at 198-99.

F. OIC's Opposition

In its Opposition, after listing four statements by Reynolds that Dean had argued were palpably false (Gov. Opp. at 70),⁷ the OIC argued that Dean "fail[ed] to make any credible showing that Reynolds testified falsely or that the OIC knew or should have known it," and that "any inconsistencies between Reynolds testimony and the other evidence in the case was for the jury to decide." Gov. Opp. at 71. The OIC also argued that the truthfulness of Reynolds' testimony could not have been determinative of guilt or innocence.

The OIC did not, however, address any of the reasons Dean had offered as to why the statements were palpably false. For example, the OIC listed as one of the four Reynolds statements challenged by Dean the statement that he drove Dean to luncheon meetings two or three times per week. But the OIC said nothing about whether that was a believable statement in light of documentary evidence to the contrary. See generally Gov. Opp. at 69-71.

With regard to the characterization of testimony in closing argument, the OIC argued that the characterization of Dean's testimony as "I don't know who Ron is" was a legitimate reference to the following statement that Dean had made in paging through the motor pool log: "Is Ron Mr. Reynolds. I don't see anything here that says Reynolds. It says Ron. Is his name Ron Reynolds?" The OIC argued that the prosecutor was "merely recalling to the jurors' minds defendant's apparently feigned lack of recollection of Reynolds's first name." Gov. Opp. at 48.

The OIC also argued that the statement that Dean denied that Reynolds ever drove her to lunch was a fair characterization of her testimony. Id. at 48 n.22.

The OIC said nothing about the prosecutor's use of the motor pool logs.

⁷ The OIC did not list the statement that Reynolds had driven Dean to the Fairfax Hotel when she said she was meeting Mitchell and her mother.

G. Dean's Reply

In her Reply, Dean pointed out that even without regard to the demonstrably false statements in Reynolds' interview, the OIC possessed documentary material that made it impossible to believe that certain of the statements Reynolds made in court were true. She pointed out that the OIC had ignored entirely discussion of Reynolds' statement in redirect about Dean's having lunch with Mitchell and her mother at the Fairfax Hotel, which the OIC certainly would have known was false but nevertheless elicited in order to rehabilitate Reynolds. Dean Reply at 24-25.

With regard to the OIC's claim that the truthfulness of Reynolds could not have been determinative of the outcome, Dean argued that the OIC's contention ignored the emphasis the OIC gave to this testimony in representing to the jury a defendant whose "entire case rests on her credibility, her believability" (Tr. 3413) had repeatedly lied to the jury. Dean Reply at 25.

With regard to the characterization of testimony in closing argument, Dean pointed to reasons why the OIC's argument as to why the prosecutor had stated that she had said "I don't know who Ron is" were not believable, but argued that, in any case, the prosecutor would still have mischaracterized her testimony in order to detract attention from Reynolds' demonstrably false statements as to the frequency with which he had driven her. Dean Reply at 15-16.

With regard to the OIC's argument that "the prosecutor's rebuttal summation that the defendant denied Reynolds ever drove her to lunch was a fair characterization of her testimony," Dean argued that the statement was in fact a bald misstatement, and that it was bald misstatement that would play a key role in repeated assertion that Dean had lied in order to escape what the prosecutor had termed her "trick bag." Further, she argued, it was a bald misstatement made for the purpose of further contrasting Dean's testimony with a OIC witness that the OIC had to believe had lied. Id. at 16.

H. Court's Ruling of February 14, 1994

At the hearing on February 14, 1994, before denying Dean's motion for a new trial, the Court referred to Reynolds in the following terms:

There was a witness we haven't discussed except by reference at one point, I think, by defense counsel, Mr. Reynolds testified, who originally was not going to testify and then was allowed eventually concerning the limousine trafficking, and again perhaps it's for the jury, but I think the government as well as the defendant agree that they all felt Mr. Reynolds was not a believable witness, and that was my impression why he originally was not going to be called as to his claims of transportation of Ms. Dean around, and I think the calendars and other evidence in the government's possession would suggest that his recollection was not correct, but he was put forward as having a recollection that was argued as to his testimony on limousine use by defendant.

Tr. 25.

I. Comments

Read in light of the Office of Independent Counsel's overall conduct in this case, it seems fair to conclude that OIC attorneys knew with a substantial degree of certainty that much of Reynolds' testimony was false, including several key facts that O'Neill intentionally elicited. Among other things, both when O'Neill elicited Reynolds' statements about driving Dean to lunch on two specific occasions where she told him that she had met Mitchell, as well as when O'Neill twice emphasized the credibility of those statements during his closing argument, it seem clear that O'Neill had to believe that such testimony was almost certainly false. Similarly, when in order to rehabilitate Reynolds O'Neill elicited testimony that Reynolds drove Dean to lunch at the Ritz Carlton (Fairfax Hotel) when she said she was having lunch with her mother and Mitchell, O'Neill had also to believe it highly probable, if not virtually certain, that the testimony was false.

There may be some merit to the Independent Counsel's contention that O'Neill's statement that Dean had said "I don't know who Ron is" was merely a characterization of Dean's remark in paging through the motor pool logs (though a rather licensed characterization). Nevertheless, that statement by O'Neill was part of a calculated effort to mislead the jury about how Dean's testimony squared with the documented record in order to allow O'Neill to assert that Dean had lied.

In that regard, it may be worth noting that in order to assert that Reynolds had squarely contradicted Dean, O'Neill chose to mischaracterize Dean's testimony about whether Reynolds may have taken her to lunch where she met Mitchell. (Dean had not denied that that could have happened, though she said it would have been inappropriate to take a HUD car to have lunch with Mitchell.) O'Neill would not have had to mischaracterize Dean's testimony in order to assert that she had been contradicted by Reynolds's testimony about driving her to lunch where she met Mitchell and her mother. O'Neill may simply have ignored the latter matter because it did not fit with the theme he was pressing. On the other hand, while Mitchell was dead, Dean's mother was still alive and could conceivably still provide testimony to contradict

Reynolds. She might in fact already have provided that testimony before the grand jury.

In appraising the significance of the Independent Counsel's actions regarding Reynolds, it is important not to be distracted by the essential trivialness of Reynolds' testimony. Reynolds' testimony played a very large role in O'Neill's repeatedly asserting that Dean had lied and otherwise alienating her from the jury.

The full extent of OIC misconduct, however, cannot be determined without knowing the nature of the discussions between attorneys in the Office of Independent Counsel and Reynolds prior to his testifying in court. Reynolds' false statements in his March 1993 interview, though possibly made solely to exaggerate his relationship to Dean, who had just been featured in a Washingtonian article, nevertheless constituted federal crimes if Reynolds knew the statements were false. The question is whether O'Neill or other attorneys in the Office of Independent Counsel, who had to be aware that at least some parts of Reynolds' testimony were false, impressed upon Reynolds that it was essential that he make only true statements in court or those attorneys instead suggested to Reynolds that any failure to testify in accordance with his earlier interview would make him vulnerable to prosecution for any false statements in that interview.

Reynolds remains readily available to the government for the purpose of determining whether the OIC did not merely elicit testimony known to be false, but also coercively suborned that false testimony.