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July 14, 2011

The Honorable James D. Whittemore
United States District Judge
United States District Court
for the Middle District of Florida
Tampa Division
Sam M. Gibbons U.S. Courthouse
801 N. Florida Ave.
Tampa, FL 33602

Re: Robert E. O'Neill's Prosecution of *United States v. Kevin L. White*, 8:11-cr-00318-JDW-TGW-1

Dear Judge Whittemore:

According to a July 1, 2011 *St. Petersburg Times* [article](#),¹ United States Attorney Robert E. O'Neill intends to personally try the case of *United States v. Kevin L. White*, 8:11-cr-00318-JDW-TGW-1, which is scheduled for trial in August 2011. This letter is to alert the Court of matters of which it should be aware in order to effectively administer the case.

Described in Section A are two matters concerning the trustworthiness of Mr. O'Neill. One involves Mr. O'Neill's conduct as an Associate Independent Counsel in the prosecution of *United States v. Dean*, an Independent Counsel case tried by Mr. O'Neill 1993. The other involves a false statement Mr. O'Neill made in a Florida Federal Judicial Nominating Commission application for the United States Attorney position concerning a District of Columbia Office of Bar Counsel investigation of his conduct in the *Dean* case. The Court should be fully aware of these matters in order to assure that neither the jury, the defense, nor the Court is in any manner misled by Mr. O'Neill.

Described in Section B is the extent to which matters described in Section A have so far been publicized and may be further publicized by the time of the trial and during the trial. The Court should be aware of the extent of such publicizing in order to assure that a jury may be impaneled that will not be improperly influenced by awareness of matters calling into question Mr.

¹ Underlinings indicate a link to the underlined item in an electronic copy of this letter that may be found by its date on the Letters (Misconduct) sub-page of the Prosecutorial Misconduct page of jpscanlan.com.

O'Neill's integrity and to assure that impaneled jurors do not come to be influenced by such awareness during the course of the trial.

A. Conduct Indicating the Robert E. O'Neill is Untrustworthy

1. Robert E. O'Neill's Conduct in *United States v. Dean*

The conduct in the prosecution of *United States v. Dean* indicating that Mr. O'Neill is untrustworthy is described on the [Robert E. O'Neill profile](#) and related pages of [jpscanlan.com](#). These pages and materials they make available show that while serving as lead trial counsel in the *Dean* case Mr. O'Neill repeatedly attempted to lead the court and the jury to believe things he knew or believed to be false and that, in order to facilitate his doing so, made misleading or false statements to the court and the defense concerning the existence of exculpatory materials, witness scheduling, and issues relating to the admissibility of evidence. The materials should be appraised with recognition that the trial judge in the *Dean* case, though unaware of many aspects of Mr. O'Neill's deceitful conduct, repeatedly noted the near impossibility of appraising the cumulative effect of identified abuses on the defendant's ability to defend herself. The trial judge also stated, among other severe criticisms of the prosecution, that Mr. O'Neill had acted in a manner that the judge would not have expected from any Assistant United States Attorney who had ever appeared before him.² Irrespective of the trial judge's observations, however, few careful readers of the referenced materials would substantially disagree with my appraisal of Mr. O'Neill's conduct.

2. The False Statement on the United States Attorney Application

In an [application](#) for the United States Attorney position submitted to the Florida Federal Judicial Nominating Commission on June 5, 2009, Mr. O'Neill mentioned the *Dean* case several times, calling it a "showcase trial" and listing it among his ten most important litigations. One mention occurred in response to a request for information on disciplinary matters,³ where Mr. O'Neill provided the following entry (at [page 43](#)) (Attachment A):

(b) Deborah Gore Dean, Office of Bar Counsel, The Board on Professional Responsibility, District of Columbia Court of Appeals (1995):

I prosecuted Deborah Gore Dean on behalf of the Office of Independent Counsel. The trial occurred in Washington, D.C. After her conviction on all counts, Ms. Dean filed a

² The trial judge's criticism of the prosecution are more fully summarized in the second paragraph of the Introduction to the O'Neill profile.

³ The request was as follows:

19. Disciplinary Matters. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative office or agency, bar association, disciplinary committee or other professional group? If so, give the particulars.

bar complaint alleging a number of instances of prosecutorial misconduct during the trial. On June 27, 1996, Bar Counsel sent a letter stating that there was "insufficient evidence of professional misconduct" and Bar Counsel terminated the investigation.

Contrary to Mr. O'Neill's representation, however, the investigation was not initiated by the defendant. The investigation was initiated by Bar Counsel itself as a result of reading a reported court of appeals [opinion](#) "deplor[ing]" the conduct of Mr. O'Neill and his colleagues. Such fact is explicitly stated on the [first page](#) (Attachment B) of the June 27, 1996 Bar Counsel letter that Mr. O'Neill quotes.⁴ Mr. O'Neill could not have been mistaken on the matter. The unavoidable inference is that Mr. O'Neill falsely described the origin of the Bar Counsel investigation because he believed an investigation initiated by a convicted defendant would raise fewer concerns with the Nominating Commission or other readers of his application than an investigation Bar Counsel itself initiated after reading a reported opinion sharply criticizing prosecutor conduct.

If Mr. O'Neill made a like representation regarding the initiation of the District of Columbia Bar Counsel investigation of his conduct in the *Dean* case to a federal entity during the course of the nomination/confirmation process, as seems likely, he almost certainly violated 18 U.S.C. § 1001. Language in this Court's February 11, 2011 [Order](#) in *Jeffrey J. Del Fuoco v. Robert E. O'Neill et al.*, as well as arguments Mr. O'Neill and the Department of Justice made in the case, suggest that the statement on the Nominating Commission application itself violated that statute. See my February 19, 2011 Truth in Justice article styled "[Robert E. O'Neill and 18 U.S.C. § 1001.](#)" Whether or not Mr. O'Neill violated 18 U.S.C. § 1001, however, the false statement on the application reflects unfavorably on his trustworthiness.

Thus, should Mr. O'Neill try the *White* case, his behavior and representations should be carefully scrutinized by the Court.

B. The Publicizing of Robert E. O'Neill's Conduct in *United States v. Dean* and Robert E. O'Neill's False Statement on the United States Attorney Application

Commencing in June 2008 I created the [Prosecutorial Misconduct](#) page on [jpscanlan.com](#) discussing the conduct of Mr. O'Neill and other Independent Counsel attorneys in the *Dean* case and making available extensive materials documenting that conduct. Approximately a year later I created the [Misconduct Profiles](#) page, which included sub-pages describing the conduct of Mr. O'Neill and other Independent Counsel attorneys in the case.

⁴ On that page, under the "History of Disciplinary Investigation" heading, the first paragraph reads:

We commenced an investigation upon review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in [United States v. Deborah Gore Dean](#), 55 F.2d 640 (1995), which raised questions concerning the prosecutors' compliance with their obligations under [Brady v. Maryland](#), 373 U.S. 83 (1963), and certain of the prosecutors' trial tactics.

Following the June 9, 2010, nomination of Mr. O'Neill for the position of United States Attorney for the Middle District of Florida, I started posting items on the editorial blog of the organization Truth in Justice relating to Mr. O'Neill's candidacy and, among other things, describing aspects of Mr. O'Neill's conduct in the *Dean* case, the courts' criticism of that conduct, and the false statement Mr. O'Neill made on the Florida Federal Judicial Nominating Commission application for the United States Attorney position. Between June 23, 2010, and June 29, 2011, I posted a total of sixteen items, ranging from just over 800 words to just over 3300 words, all of which either focused on, or in some manner touched upon, the conduct of Mr. O'Neill in the *Dean* case, the false statement on his Florida Federal Judicial Nominating Commission application, or the process that led to his confirmation by the Senate and his subsequent tenure as United States Attorney.⁵

The second most recent of these items, a June 21, 2011 article styled "[United States Attorney Robert E. O'Neill as Crusader Against Corrupt Public Officials](#)," discusses press coverage of Mr. O'Neill's involvement in the prosecution of Kevin L. White. Speculating that Mr. O'Neill's personal appearance at a June 15, 2011 hearing in the matter suggested that he might personally try the case, the item discusses the incongruousness of Mr. O'Neill's trying a case involving an 18 U.S.C. § 1001 claim when Mr. O'Neill is almost certainly guilty of violating that statute by making one or more false statements concerning the District of Columbia Bar Counsel investigation of his conduct in the *Dean* case. It also notes that if information concerning the likelihood that Mr. O'Neill's violated 18 U.S.C. § 1001 becomes widely known in the Tampa/St. Petersburg area, the trial court would face problems in impaneling a jury and ensuring that such information did not come to the jury's attention during the course of the trial.

The most recent item, a June 29, 2011 article styled "[Robert E. O'Neill's Tricks of the Trade – One \(The False or Misleading Testimony of Supervisory Special Agent Alvin R. Cain, Jr.\)](#)," is the first of a series of items describing deceitful tactics Mr. O'Neill employed in the *Dean* case. It addresses in some detail an episode alluded to in most other items on Mr. O'Neill in which he caused an agent to give false or misleading testimony in order that Mr. O'Neill could lead the jury falsely to believe that the defendant lied about an interaction with the agent. As the item suggests, other treatments will mainly involve matters covered in the O'Neill profile.

The major internet search engines yield among the first ten results of searches for "Robert E. O'Neill" the referenced profile I maintain on Mr. O'Neill and one or more of the Truth in Justice items I have written about him. Most recently, the Truth in Justice items yielded among the first ten internet search results are the items just mentioned or a ,," which seems to be the most widely read of the Truth in Justice items focused on Mr. O'Neill. That item suggests that Mr. O'Neill must avoid any situation where someone may ask him if he lied on his Florida Federal Judicial Nominating Commission application. It also discusses the hypocrisy of Mr. O'Neill in light of his calling people liars as a prosecution tactic, as well as the implications of a statement Mr. O'Neill made in another Middle District of Florida case to the effect that a person who lies about one

⁵ Links to most of the items are available in the prefatory notes to the O'Neill profile.

thing cannot be trusted with regard to anything. Addendum 1 to the item reminds the reader that, while the false statement on the Florida Federal Judicial Nominating Commission application is undisputable, they should not lose sight of larger issues such as Mr. O'Neill's use of the testimony of Supervisory Special Agent Alvin R. Cain, Jr. (the subject of the item discussed in the immediately preceding paragraph above).⁶

Thus, the profile page on Mr. O'Neill and Truth in Justice items I have written about him (and other things I will write about him in the ensuing months on the Truth in Justice blog or in other forums⁷) will for some time be among the readiest sources of information on the character and background of Mr. O'Neill. Further, a number of items on the widely-read powerlineblog.com, relying on my treatments of Mr. O'Neill, have also made my interpretation of the conduct and character of Mr. O'Neill available to a substantial audience.⁸

In addition, persons other than Mr. O'Neill who were involved in prosecutorial abuses in the *Dean* case also went on to hold high positions in the Department of Justice. Most pertinent, Bruce C. Swartz, since 2000 the Deputy Assistant Attorney General in the Criminal Division in charge of international issues, not only supervised Mr. O'Neill in the prosecution of the *Dean* case, but defended against charges of prosecutorial abuse perpetrated by Mr. O'Neill. See, e.g., the [Bruce C. Swartz profile](#) on jpscanlan.com and Truth in Justice items of February 6, 2011 ("[Bruce Swartz – Our Man Abroad](#)"), March 10, 2011 ("[Criminal Division Deputy Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material](#)"), and June 4, 2011 ("[Willful Ignorance at the Department of Justice, and its Consequences](#)"). Because of the importance of Mr. Swartz's position at the Department of Justice, my treatments of his conduct in the *Dean* case receive almost daily attention, which in turn brings attention to the conduct of Mr. O'Neill.⁹

The *St. Petersburg Times* has to date given only passing attention to my accounts of Mr. O'Neill's conduct in *United States v. Dean*. See Susan Martin, "[Humble beginnings, hard work](#)

⁶ The September 26, 2010 item also discusses the Department of Justice's asserted reason for refusing to consider whether Mr. O'Neill lied on the Florida Federal Judicial Nominating Commission application. The matter is discussed in several other places as well. See, e.g., the October 3, 2010 Truth in Justice item styled "[Whom Can We Trust?](#)"

⁷ As in the case of the June 23, 2011 item mentioned *supra*, such material may include discussion of Mr. O'Neill's personally trying the *White* case, a matter also addressed in prefatory note 6 to the O'Neill profile.

⁸ See the items powerlineblog.com items by Paul Mirengoff dated July 4, 2010 ("[A Nomination That Should be Scrutinized Closely](#)") and September 8, 2010 ("[A Nomination that Should be Scrutinized Closely, Part Two](#)").

⁹ As discussed in the March 3, 2011 Truth in Justice item styled "[The Curtailed Tenure of Criminal Division Assistant Attorney General Jo Ann Harris](#)," Jo Ann Harris, the attorney who preceded Mr. O'Neill as lead trial counsel in the *Dean* case, and who set in motion many of the schemes of deceit ultimately carried out by Mr. O'Neill, became Assistant Attorney General for the Criminal Division in late 1993. But materials pertaining to Ms. Harris receive considerably less attention than materials pertaining to Mr. Swartz.

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[define, Obama's U.S. attorney pick for Florida](#)," June 20, 2010.¹⁰ The paper has failed yet to mention my allegations concerning the false statement Mr. O'Neill made on the Florida Federal Judicial Nominating Commission application. But it would seem difficult for a responsible newspaper to fail ever to report an allegation of such nature or to fail to attempt to determine whether such allegation is true. The documents attached hereto, which, as indicated, are also available on the internet, will make it impossible for the newspaper, or any other person or entity that seeks to determine the merit of the allegation, to fail to conclude that Mr. O'Neill lied on the application. As suggested above, in my view, careful inquirers must also conclude that the allegations detailed in the O'Neill profile and related materials are true as well.

But regardless of what attention the local (or national) press gives to my allegations concerning Mr. O'Neill – or to the facts underlying those allegations – I suggest that when the Court impanels a jury, it will have to take cognizance of the possibility or likelihood that any number of potential juries may be familiar with my accounts concerning Mr. O'Neill and thereby be influenced to be suspicious either of prosecutors generally or of Mr. O'Neill in particular. Further, unless instructed otherwise, impaneled jurors, out of simple curiosity, might be inclined to look up on the internet a United States Attorney who is personally trying a case. If that occurs, jurors previously untainted by knowledge about Mr. O'Neill's conduct in *United States v. Dean* or the false statement on his Florida Federal Judicial Nominating Commission application, could become unsuitable jurors.

Thus, I suggest, if the Court allows Mr. O'Neill to personally try the *White* case, it will have to take exceptional measures to ensure that jurors are not influenced by the matters described in Section A or my allegations concerning those matters.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Attachments [Online copies of the attachments may be found [here](#).]

cc (without attachments):

The Honorable Thomas G. Wilson
United States Magistrate Judge

The Honorable Robert E. O'Neill
United States Attorney

¹⁰ Online reader comments on the Martin article and most other *St. Petersburg Times* articles over the last two years focused on Mr. O'Neill or the *White* case have provided links to materials concerning Mr. O'Neill on my web site or (over the last year) items concerning Mr. O'Neill at Truth in Justice. On several occasions I provided such links myself. These links have brought varying numbers of viewers to the pages I maintain on Mr. O'Neill. Presumably, the links have also brought some number of viewers to the Truth in Justice items.

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