

Thursday, February 15, 2007

### **Libby and Cheney will not testify. How will the defense explain that in closing argument?**

Dick Cheney and Scooter Libby will not testify at trial. (Image from the public domain). Now that Scooter Libby's trial will be without the testimony of Mr. Libby and Dick Cheney, his lawyer is left to explain to the jury in closing argument why he came up short with evidence to back up his opening statement's claim that Mr. Libby's mis-statements to law enforcement were due to poor memory rather than any intentional mis-statement. In this and all criminal trials in the United States, the prosecution has the burden to prove a defendant's guilt beyond a reasonable doubt, and a defendant's silence at trial is not permitted to be used against the defendant. That is not to say, though, that jurors, being human, will always follow such rules to a tee. A question now arises whether any jurors will penalize Mr. Libby for the gap between (1) his counsel, in opening statement, asserting that Mr. Libby had a terrible memory that contributed to his mis-statements to law enforcement, and that he had been thrown under the bus by the Bush Administration (if indeed the latter assertion was made in the opening statement) and (2) the apparent substantial lack of evidence to prove those assertions without at least having the testimony of Mr. Libby. In hindsight, should the Libby defense have promised at the opening statement stage to provide such compelling defense evidence? First, had the defense reserved making an opening statement until the prosecution rested, the defense team might not have made such promises. However, ordinarily it is best for the defense to give an opening statement immediately after the prosecution gives an opening statement, in order to give the jury an alternative and persuasive framework against the prosecution's theory of the case. Second, ordinarily, the defense should put some real teeth into its opening statement, rather than just talk about such general ideas as the prosecution's burden to prove the case beyond a reasonable doubt. I say real teeth, as opposed to promising more than the defense might realistically be able to reasonably deliver. As I already have said, as much as I want Bush out of office, I will be more than happy to see Mr. Libby acquitted. His indictment accuses him of lying to law enforcement and the grand jury investigating how and when Valerie Plame's CIA employment status got leaked to the press. So long as the criminal justice system remains as unjust as it has long been, it will be difficult for me to want to see convictions for such alleged crimes. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00