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ELEVENTH CIRCUIT COURT OF APPEALS CASE NO. 09-14066-EE

DISTRICT COURT NO. 8:05-CR-475-T-27TGW

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

vs.

THOMAS SPELLISSY,  
Defendant-Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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BRIEF OF THOMAS SPELLISSY  
CRIMINAL CASE

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DATE: September 18, 2009

**CERTIFICATE OF INTERESTED PERSONS  
And  
CORPORATE DISCLOSURE STATEMENT**

Counsel for Defendant/Appellant THOMAS SPELLISSY pursuant to Local Rule 28-2(b) and FRAP 26.1, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Robert O'Neill, Assistant United States Attorney;
2. Linda Julin McNamara, Appellate Counsel for the United States;
3. Strategic Defense International, Inc., Co-Defendant;
4. Arthur Lee Bentley, III, First Assistant United States Attorney

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument. It is respectfully submitted that argument by Counsel familiar with the issues, the facts, and the record on appeal will provide this Honorable Court with assistance in resolving this action.

## **CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION**

The Appellant certifies that this brief contains 13,955 words in Times New Roman 14 pt. font.

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## **STATEMENT OF JURISDICTION**

This is an appeal from three post trial motions concerning a criminal conviction. The United States District Court, Middle District of Florida, Tampa Division, had original jurisdiction pursuant to 18 U.S.C. § 3231. The final judgment was entered on August 14, 2006 (Dkt 85) and the orders from the Court, Order (Dkt 195) granting the United States' Motion to Strike Defendant's "Joint Response in Opposition to United States' Motion to Strike Affidavit of Jeffrey J. Del Fuoco" (Dkt 189) and Defendants' Response in Opposition (Dkt 192) was entered on the July 24, 2009 and Order (Dkt 194) denying "Defendants' Joint Motion to Compel the United States to Produce Impeachment and/or Exculpatory Evidence (Dkt 193) was entered on July 23, 2009 and Order (Dkt 196) denying Defendant's "Joint Motion for New Trial Based on Newly Discovered Evidence (Dkt 185) was entered on July 31, 2009. Notice of Appeal was timely filed on August 6, 2009, (Dkt 197). Jurisdiction now lies with this Honorable Court under 18 U.S.C. § 3742 (a) (1) and 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

- I. THE CONVICTION SHOULD BE VACATED DUE TO ACTUAL INNOCENCE.
- II. CONSPIRACY COUNT SHOULD BE VACATED BECAUSE THE OBJECTS OF THE CONSPIRACY ARE CONTRARY TO LAW.
- III. THE DISTRICT COURT ERRED WHEN IT GRANTED THE UNITED STATES' MOTION TO STRIKE DEFENDANT'S "JOINT RESPONSE MOTION IN OPPOSITION TO STRIKE THE AFFIDAVIT OF JEFFREY J. DEL FUOCO."
- IV. NEW EVIDENCE SUBSTANTIATES NO PROBABLE CAUSE EXISTED FOR SEARCH WARRANT.
- V. RELIEF IS MANDATED BECAUSE CUMULATIVE ERRORS BY THE COURT VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

**STATEMENT OF THE CASE  
COURSE OF PROCEEDINGS AND  
DISPOSITION IN THE COURT BELOW**

A five (5) count Indictment was returned in the Middle District of Florida on November 8, 2005 naming Thomas F. Spellissy and his company, Strategic Defense International, Inc. as Defendants. (Dkt 1).

Count I of the Indictment charged the Defendants with conspiracy to defraud the United States and to commit offenses of bribery and wire fraud against the United States in violation of Title 18, U.S.C. §371.

Count II and Count III both charged the Defendants with bribery of public official in violation of Title 18, U.S.C. §§ 201 (b) (1) (A) and (B) and 2.

Count IV and Count V both charged the Defendants with wire fraud in violation of Title 18, U.S.C. §1343, §1346 and §2.

The case proceeded to trial before United States District Judge James D. Whittemore and on May 12, 2006 the Defendants were found guilty by a jury on all five (5) counts. (Dkts 62, 63).

On July 6, 2006, the trial judge denied Defendant's Joint Renewed Motion for Judgment of Acquittal as to Counts One (1), Four (4) and Five (5); granted the Joint Renewed Motion of Acquittal as to Counts Two (2) and Three (3); denied the Motion for a New Trial as to Count One (1); and the court granted the Motion for a New Trial as to Counts Four (4) and Five (5). (Dkt 72).

Appellant appeared before the trial judge on August 14, 2006 for sentencing on the conspiracy count conviction. (Dkt 85).

The conviction was affirmed on appeal. (Dkt 134).

After the direct appeal, two motions sought a new trial pursuant to Rule 33, Fed. R. Crim. P. (Dkts 125,129). Four motions sought relief for a stay of sentence before Appellant was incarcerated. (Dkts 126, 130, 133, 151). These motions have been either denied or dismissed. (Dkts 145, 146, 152).

On July 22, 2008 Appellant filed a motion for a new trial based upon Rule 33 (a), Fed.R.Crim.P. and/or in the Alternative Rule 60 (b) (6). (Dkt 158). This motion was dismissed in part and denied in part on September 3, 2008. (Dkt 166). This order is under appeal in this Court and Oral Argument is scheduled for September 15, 2009. CASE NO. 08-15208-E.

Dkt 185 is a motion for a new trial pursuant to Fed. R. Crim. Rule 33 and the order denying Dkt 185 in part and dismissing in part, Dkt 196, is being appealed in this appeal along with the Order, Dkt 195, granting the United States' Motion to Strike Defendant's "Joint Response in Opposition to United States' Motion to Strike Affidavit of Jeffrey J. Del Fuoco" (Dkt 189) and Defendants' Response in Opposition, Dkt 192, and Order, Dkt 194 denying "Defendants' Joint Motion to Compel the United States to Produce Impeachment and/or Exculpatory Evidence, Dkt 193.

## STATEMENT OF THE FACTS

### a. Active Duty and Transitional Leave

From April 2001 to July 30, 2004, Appellant, a combat veteran and Hall of Fame Member of the United States Army Ranger Regiment for Operations Enduring Freedom and Iraqi Freedom (Defendants' Trial Exhibit 23), was the Program Executive Officer, Special Operations (PEO-SP) for the United States Special Operations Command (USSOCOM), located at MacDill Air Force Base, Florida and was responsible for managing approximately \$3.5 billion for our special operations forces acquisition programs to fight the war on terror. (Dkt 44). On July 30, 2004 Spellissy relinquished his procurement authority, and then went on regular leave until October 21, 2004. (Dkt 44). Between October 21 and December 31, 2004 Spellissy was on transitional leave. (Dkt 44). During the periods of leave and transitional leave, Spellissy worked for his company, Strategic Defense International, Inc. (SDI), which he had previously obtained permission from his superior officer and the SOCOM JAG office. (Dkt 44). Spellissy was immediately rehired by USSOCOM while on terminal leave employed as a subject matter expert advisor as a government contractor to his former office at USSOCOM and issued a Top Secret access badge in accordance with Federal Acquisition Regulation, 37.114 and maintained his USSOCOM Special

Access Program clearance. (Dkt 38, Government's Trial Exhibit 3h, Defendants' Trial Exhibit 7, Dkt 111 p. 716, Dkt 159). Spellissy retired from active duty on December 31, 2004. (Dkts 22, 38, 41, 121, Affidavit for Search Warrant).

**b. Private Practice**

Spellissy also worked as a consultant on behalf of companies who wished to do business with United States Government agencies while he simultaneously worked as a consultant/advisor contractor on several ammunition/weapons programs for USSOCOM. (Dkts 38 Government Exhibit 1, Government Trial Exhibit 3, Defendants' Trial Exhibit 7, 159). Spellissy conducted scrupulous research into the matter obtaining a number of ethics opinion letters from USSOCOM JAG counsel that he utilized to alert him to potential conflicts of interest that he would need to avoid and made Government officials aware of those conflicts of interests. (Dkt 38, Government Exhibit 1 and Government Trial Exhibit 3).

As a Government contractor, USSOCOM directed him to attend critical classified meetings in Europe, in late November of 2004, acting on behalf of the USSOCOM Ammunition Program Office. (Dkt 38, Government Exhibit 1). The Appellant attended only the authorized meetings for which the Government hired him and he billed the Government

for the work that he did on the government's behalf. Spellissy *never* represented any of his clients to the government on this trip. (Dkt 38 Government Exhibit 1, Dkt 160). Spellissy saved the government \$2 million on this trip to Europe on a classified program and was paid approximately \$9,000.00 for this mission. (Dkts 158, 159). Major General (Ret) C.A. Hennies, a competitor of Spellissy filed a complaint to USSOCOM when Spellissy was on transitional leave concerning Spellissy's work for the Government while he was on active duty. (Dkt 33-2). Hennies had a personal relationship with several officers including the Commanding General at USSOCOM. (Dkt 33-2). The Inspector General, USSOCOM presented false information to the Defense Criminal Investigative Service (DCIS) to start the investigation of Spellissy and his company. (Dkt 44).

**c. The Search Warrant**

On or about April 10, 2005 Assistant United States Attorney (AUSA) Robert O'Neill and Special Agent Robert Calvert, a Federal Agent from the DCIS, Department of Defense (DoD) crafted an affidavit (that was first denied, Dkt 121 p. 93), by "cherry-picking" and manipulating the information in their possession, all in a wrongful and corrupt effort to give the "appearance" of criminal conduct, and all while ignoring clear evidence of innocence. (Dkt 44).

On April 13, 2005 Agent Calvert executed the search warrant at

Spellissy's home, which allegedly supported probable cause existed to believe that Spellissy violated certain conflict of interest laws, 18 U.S.C. § 207 & § 208. (Dkt 121, p. 44-119) The search yielded emails, bank statements and contracts and other records. (Dkt 109, p. 276-318).

While the search of Spellissy's home did not result in a prosecution for violation of conflict of interest laws, the Government believed it revealed evidence of a conspiracy to bribe a public official. (Dkt 44). According to the indictment; the alleged conspiracy was initially formed between Spellissy and his company, Strategic Defense International, Inc. (SDI), that they knowingly conspired and agreed, and then with others known and unknown to the grand jury and it was further alleged that William E. Burke joined this conspiracy by accepting illegal payments for preferential treatment to certain contractors. (Dkt 1).

Burke, an employee of the Sentel Corporation, was also a civilian contractor who worked on a service support contract at USSOCOM. (Dkt 59, Defendants' Trial Exhibit 41). His specific role as the Task Leader in the Foreign Comparative Testing (FCT) Office overseeing two (2) other Sentel employees whom were administratively working at USSOCOM in the FCT Office. (Dkt 59, Defendants' Trial Exhibit 41).

**d. Motion to Suppress re: The Search Warrant**

Spellissy began his defense by challenging the search warrant that yielded circumstantial evidence against him as illegal. (Dkt 21). This was based on the argument that Agent Calvert made serious and material misrepresentations and omissions in his Probable Cause Affidavit which demonstrated, at the very least a reckless disregard for the truth, and at the most outright dishonesty, in his efforts to obtain a search warrant. (Dkt 121, p. 145-146).

At the hearing for the Motion to Suppress, the trial judge agreed that Calvert made many statements and omissions in his affidavit that demonstrated a reckless disregard for the truth, and he redacted those portions of the Probable Cause Affidavit that he felt were the most egregious. (Dkt 44). However, even after redaction, the trial judge found that probable cause still existed on the face of the affidavit to justify issuance of the search warrant. (Dkt 44). This probable cause was found to be based upon a violation of 18 U.S.C. § 207(a) because Spellissy allegedly attended a 70mm warhead meeting concerning the particular matter, “Bunker Buster” warhead, in Norway as a nongovernmental representative and was alleged to have a conflict of interest on a “Bunker Buster” warhead. (Dkt 44). The District Court was informed by Appellant’s Motion, Dkt 158, eighteen months after trial that

Spellissy did not attend any 70mm meeting in Norway as evidenced in Dkts 159 & 160. The District Court denied the motion. This is currently one of the issues under appeal at the 11<sup>th</sup> Circuit at this time.

e. **The Trial**

The case proceeded to trial, primarily based upon Burke's alleged cooperation. The Government's theory presented to the jury was that a bribe [\$4,500.00] was paid to Burke by Appellant for a Swedish company [Exensor] and the payment was sent interstate wire for preferential treatment. (Dkt 109 p.190 line 17 to p.189 line 7). While on the stand, after being called by the Government to testify consistently with his plea agreement, Burke testified that there never was a conspiracy between himself and Spellissy and that he never accepted any sort of bribe nor did he dole out any preferential treatment. (Dkt 110, p. 459-616, Dkt 111, p. 621-645). He further testified that he did honest work for Spellissy for which he obtained honest pay, and that the emails espoused by the Government to be instruments of a conspiracy were nothing more than communications in which he, Burke, was attempting to gain full time employment with Spellissy's company, SDI. (Dkt 110, p. 459-616, Dkt 111, p. 621-645).

Burke disavowed his plea agreement and the Government was forced to attempt to impeach its own witness with the statements that he had

adopted as part of that plea agreement during his plea hearing. (Dkt 110, p. 570-616). Over rigorous and highly confrontational direct examination by the Government, Burke maintained his position that neither he nor Spellissy had ever done anything illegal. (Dkt 110, p. 370-467).

Spellissy moved for a Directed Judgment of Acquittal under Rule 29 based on the argument that the Government had failed to prove a prima facie case of conspiracy, bribery or wire fraud. (Dkt 111, p. 731-740). The District Court Judge denied the Motion (Dkt 111, p. 740). On May 12, 2006 the jury returned a verdict of guilty on all counts against Spellissy and his company, SDI. (Dkts 62, 63).

**f. Post Trial**

After the verdict, Spellissy renewed his Rule 29 Motion for a Directed Judgment of Acquittal and, in the alternative, made a Rule 33 Motion for a New Trial. (Dkt 65).

The District Court Judge overturned all of the substantive counts against Spellissy and SDI, granting a judgment of acquittal notwithstanding the verdict on the bribery counts and granting Spellissy and SDI a new trial on the wire fraud counts. However, the trial judge found that Spellissy and SDI had conspired to commit mail fraud, thus depriving the United States DoD of the intangible right of Burke's honest services (Dkt 72) even though

the Conspiracy Count from the Indictment does not mention the statutory language, words, or phrases “mail fraud” or “the intangible right of honest services.” (Dkt 1).

**g. Sentencing**

On August 14, 2006 the trial judge sentenced Spellissy on the conspiracy to deprive the United States DoD of the intangible right of Burke’s honest services. (Dkt 114). At the sentencing hearing, the Government presented no evidence, however, successfully argued that Burke was a public official in a high level decision-making or sensitive position, thereby requiring an increase of four (4) levels to Spellissy’s base offense level of twelve (12). (Dkt 114, p. 39). Spellissy was sentenced to fifteen (15) months in prison and fined \$4,000.00. (Dkt 85).

**h. Direct Appeal**

Spellissy appealed to this Court on January 7, 2007, Case No. 06-14287-BB. The appeal consisted of four issues. (1) The Appellant’s Motion to Suppress the evidence seized from his home should have been granted because the warrant utilized in conducting the search was obtained based upon a Probable Cause Affidavit that was fatally flawed by serious and material misrepresentations and omissions that were made with either intentional dishonesty or a reckless disregard for the truth. (2) Insufficient evidence

was presented at trial for which a reasonable juror could find the Appellant guilty of conspiracy and, further, for which could withstand the Appellant's Rule 29 Motion for Acquittal as well as the Appellant's renewed Rule 29 Motion for Acquittal and, in the alternative, Rule 33 Motion for a New Trial. (3) The introduction into evidence of the plea agreement violated the Appellant's Sixth Amendment right to confront the witnesses against him because he was not able to truly and meaningfully cross examine the witness against him because the witness who took the stand at trial presented favorable testimony to the Appellant and the witness who, in reality, testified against him was a different version of that same witness who testified at a prior plea hearing. (4) The District Court Judge erred in calculating the Appellant's sentence because he incorrectly assessed the Appellant a four (4) level increase in his base offense level based upon the Government's argument that the Co-Defendant whom the Appellant was convicted of conspiring with was a public official in a high level decision-making or sensitive position when, in fact, he was not.

Oral argument heard on September 11, 2007 was argued by the original trial counsel's firm. Much of the oral argument centered on the affidavit for the search warrant and issues concerning the overt acts of conspiracy. The conviction was affirmed on appeal. (Dkt 134).

**h. Post Direct Appeal**

Several motions have been filed by former Pro Bono counsel since the conspiracy conviction has been affirmed. The first motion, Dkt 125 sought a Rule 33, new trial based on new evidence for: (1) Witness Tampering by the Government, which resulted in a key Defense witness being ordered to not honor his subpoena for trial; the District Court found lack of due diligence of Appellant's trial counsel (Dkt 146) (2) Burke was found guilty of perjury; the District Court; (3) Appellant passed a Polygraph Test. The District Court found that this was not material (Dkt 146). The second motion, Dkt 129, was an amendment to Dkt 125 adding new evidence because the Department of the Army sent correspondence to Spellissy stating (1) Defendant Spellissy was on active duty for the United States Army when the alleged conspiracy was born, albeit contrary to the Government's case against Appellant (in the opening argument the Government stated that Spellissy had retired from active duty) and this raised the question whether or not (2) The Department of Justice doesn't have jurisdiction on Defendant Spellissy. Both motions were denied, however, the District Court Judge ruled "It is undisputed that Defendant Spellissy had retired from active duty when he committed the offenses of conviction" (Dkt 146, p.6, line 7) and found "In sum, when these offenses were committed, Defendant Spellissy was retired from active duty." (Dkt 146, p.6, line 10). The only evidence in the record concerning anything after December 31, 2004 (retirement date), is that

Burke testified that he was paid \$3,000 for legitimate work (Dkt 72) on or about January 3, 2005 by SDI Inc. for 30 hours of work he completed in December, 2004 (Dkt 110 p. 436) and that Spellissy hired Burke as a consultant on July 1, 2005 after Burke was laid off by Sentel Corporation on June 20, 2005. (Dkt 110 p. 463).

The next three motions, Dkts 126, 130, and 133 were motions for a continued stay of sentence pending a hearing for the two motions mentioned above. In these three motions 28 U.S.C. § 2255 was mentioned, however, Spellissy was *not in Federal custody* of the Bureau of Prisons. The trial judge denied these three motions.

The sixth motion, Dkt 151, was a motion for a new trial based on prosecutorial misconduct, ineffective assistance of counsel by the trial and appeal counsel and new evidence. The District Judge dismissed the motion as a successive 28 U.S.C. § 2255. (Dkt 152). This motion was not heard, adjudicated or ruled upon its merits.

The seventh motion for new trial pursuant to Fed. R. Crim. Rule 33 (a) and/or alternatively pursuant to Fed. R. Civ. P. 60 (b) (2) and 60 (b) (3), (b) (6), accompanied by 28 U.S.C. § 1651 (a) and/or 1651 (b), Dkt 158 which is currently under appeal since October 17, 2008. Oral Argument was on September 15, 2009.

The last motion, Dkt 185 is for a new trial pursuant to Fed. R. Crim. Rule 33 and the order denying Dkt 185 in part and dismissing in part, Dkt 196, is being appealed in this appeal along with the Order, Dkt 195, granting the United States' Motion to Strike Defendant's "Joint Response in Opposition to United States' Motion

to Strike Affidavit of Jeffrey J. Del Fuoco” (Dkt 189) and Defendants’ Response in Opposition, Dkt 192, and Order, Dkt 194 denying “Defendants’ Joint Motion to Compel the United States to Produce Impeachment and/or Exculpatory Evidence, Dkt 193.

Spellissy is presently under supervisory custody of the Probation Office for the Middle District of Florida, Tampa Division.

## STANDARDS OF REVIEW

In reviewing questions on the jurisdiction of the district court, this court reviews de novo. United States v. Oliver, 148 F.3d 1274, 1275 (11th Cir. 1998) (per curiam).

In reviewing the District Court's ruling on a motion to suppress, this court is to review findings of fact for clear error and the District Court's application of the law to those facts de novo. United States v. Tokars, 95 F. 3d 1520 (11th Cir. 1996).

Whether the evidence is sufficient to sustain a defendant's conviction is a question of law which the appellate court reviews de novo. United States v. To, 144 F.3d 737 (11th Cir. 1998); United States v. Grigsby, 111 F.3d 806 (11th Cir. 1997); United States v. Gonzalez, 71 F.3d 819 (11th Cir. 1996); United States v. Starke, 62 F.3d 1374 (11th Cir. 1995).

The decision to grant or deny a new trial motion is within the sound discretion of the trial court and will not be overturned on appeal unless the ruling is so clearly erroneous as to constitute an abuse of discretion. United States v. Pedrick, 181 F. 3d 1264 (11th Cir. 1999).

The appellate court reviews de novo "[i]ssues of constitutional law and statutory interpretation." United States v. Gilbert, 130 F.3d 1458, 1461 (11th Cir.1997).

## SUMMARY OF THE ARGUMENTS

- I. It took Spellissy over three years to get sworn affidavits from Mr. Fred Chan, Government Service-14, United States Department of Defense Program Manager and former Program Manager for the United States Special Operations Command and former end user representative for the United States Special Operations Command, Lieutenant Colonel (Retired) Donald Allgrove. Both sworn affidavits provide substantial evidence that Appellant is actually innocent of any crime because alleged co-conspirator William Burke was not in a position nor had the authority to dole out preferential treatment to Appellant concerning the acquisition contracting process at the United States Special Operations Command.
- II. The District Court ruled at the JNOV Hearing that the evidence presented at trial was only sufficient to find Appellant guilty of conspiracy “to commit the offense of mail fraud, that is, deprive the United States of the intangible right of William Burk’s honest services...” (Dkt 72 p.2). In Count One, the indictment charges conspiracy to commit bribery and *attempts* at charging conspiracy to commit wire fraud, and the jury returned a general verdict of guilty. When a jury returns a general verdict of guilty in a multiple-object

conspiracy, the verdict may be set aside if one of the conspiracy theories is contrary to law.

- III. Former AUSA Jeffrey Del Fuoco's Affidavit is relevant to this case because when AUSA O'Neill introduced Burke's plea agreement to the Court, Government's Trial Exhibit 41, then AUSA O'Neill became a witness. O'Neill became a witness because he witnessed the plea agreement and he is a signatory of the document. Three other AUSA's allege that O'Neill committed perjury. Therefore the prosecutor of this case is not trustworthy.
- IV. Appellant filed a civil complaint against USSOCOM concerning a denied Freedom of Information Act request relating to all the documents pertaining to the criminal investigation of Appellant in the instant case. The United States Attorney's Office for the Middle District of Florida responded to the complaint and included a "Vaughn matrix" listing all of the evidence that USSOCOM has pertaining to the criminal investigation of Appellant. The Vaughn matrix was provided under a sworn statement and the matrix is "new evidence" within the meaning of Rule 33 and concerns documents, interviews and tapes that USSOCOM had and withheld from Appellant's trial counsel. The District Court erred when it didn't consider this as new evidence in its ruling.
- V. Cumulative errors by the Court prevented Spellissy to be fairly prosecuted. This is a violation of his right to due process of law.

## **ARGUMENTS AND CITATIONS OF AUTHORITY**

### **I. THE CONVICTION SHOULD BE VACATED DUE TO ACTUAL INNOCENCE.**

During pre-trial and trial the Government prevented witnesses from being interviewed by Appellant's trial attorney and prevented witnesses to honor their subpoena which in itself is a violation of Appellant's due process given that the Government was able to interview witnesses without any issues. (Dkt 172, p.8-11, Dkt 125 p. 2 and Dkt 125-2, Exhibit A). After trial, Government and former Government witnesses have voluntarily come forward to be interviewed by sworn testimony or to give affidavits. (Dkts 159, 160, 173 & 174). Mr. Fred Chan, Government Service Employee, GS-14, Department of Defense Government Program Manager and former United States Special Operations Command Program Manager, and former end user representative for the United States Special Operations Command, Lieutenant Colonel (Retired) Donald Allgrove have come forward and given sworn affidavits in support of the instant motion under appeal. (Dkt 185 and their affidavits are at Dkts 173 & 174). These two affidavits are new evidence and firmly establish Appellant's actual innocence. Their testimony was not available because the Government prevented Program Managers and end user representatives from testifying at trial. (Dkts 125, 159, 172). Appellant asserts the reason behind the Government prevention of these or witnesses in similar positions being prevented to testify on behalf of Appellant is because their testimony would have been directly

contradictory to the Government's theory that Sentel Corporation's employee, Burke was in a position to give preferential treatment [approve or recommend approval of Government proposals or contracts] to Appellant Spellissy or his former clients. Contrary to the District Court's finding (Dkt 196) their testimony is not cumulative because Appellant did not put a defense on at trial and no program manager or end user representative testified at trial. The prosecutor controlled all testimony and defense counsel was never controlling the testimony of any witness. This is critical evidence not presented at trial; either the evidence was not presented because the Government prevented witnesses from testifying (See Dkt 172 and Dkt 125) or because of lack of due diligence by defense trial counsel (then ineffective assistance of counsel). The fact remains that witnesses from these key government positions did not testify and this adversely affected Appellant's Constitutional right of due process, a fair trial. Chan states,

“.....Foreign Comparative Test/Defense Acquisition Challenge proposals *are approved or rejected by Program Managers in accordance with their technical evaluations, priorities and funding.* Program Managers submit their approved proposals to the Program Executive Officer who ranks the Programs from his Program Managers according to the Command's priorities. The Program Executive Offices submit their proposals to the Acquisition Executive. These proposals now become the Command's proposals.

The Command's proposals are ranked according to the Command's priorities which come from the Command's Board of Directors. The Board of Directors is made up of General Officers from the Component Commands and the Commanding General of USSOCOM. The final ranking is then signed by the Acquisition

Executive and sent to the Department of Defense. The Department of Defense ranks the proposals according to the Department's priorities through a formal board and sends them to Congress for approval based on the available funding.

All of the rankings, approvals and disapprovals are done by government personnel and *not by contractors*. These are *government only decisions*.....There is no opportunity in the process, *especially for a contractor* to change an approval, disapproval or ranking of a proposal. Any change would require the approval of the Program Manager and Program Executive Officer as a minimum.

Mr. William Burke *did not have any authority* to approve, disapprove, rank or change a proposal.” (Dkt 173).

Allgrove states,

“The priorities for acquisition program funding are determined by the USERS in the field not by the staff at USSOCOM. The USER priorities are consolidated at USSOCOM and approved by the USSOCOM Board of Directors. The staff agency at USSOCOM responsible for maintaining the priority list is the Assessment Directorate. The only staff agency at USSOCOM who can change a priority is the USSOCOM Board of Directors. *Mr. Burke had no role in determining priorities and there is no way possible that he could change the priorities.*

I will testify that Mr. Burke *cannot give any preferential treatment* to Colonel Spellissy or to his clients because Mr. Burke was in *no position and had no authority to do so*. Simply stated, priorities for acquisition funding come from the units and the units decide what will be tested and procured in coordination with the Program Manager not Mr. Burke.

I will also testify that *Contractors at USSOCOM do not perform government functions*. A contractor can perform a government function if they are on specific orders to do so. Burke did not have this authority. I would also testify that Bill Burke cannot change any USSOCOM priorities *because he has no decision making authority*.

USSOCOM priorities are determined by the users in the field.” (Dkt 174).

Now, based on Chan’s and Allgrove’s un-contradicted sworn affidavits, the Court knows that Burke did not have the authority to influence or direct Government action concerning USSOCOM’s Foreign Comparative Test Program or Defense Acquisition Challenge Program to benefit Appellant. These affidavits are fatal to the Government’s theory that Burke can provide preferential treatment to Appellant’s clients. The Government in its opposition motion did not argue, contest or dispute the facts contained in Chan’s and Allgrove’s affidavits that Burke was not in a position to provide any preferential treatment to Spellissy or his former clients. (Emphasis added). See Dkt 191. Therefore, the evidence contained in the affidavits is un-contradicted fact.

Assuming, *arguendo*, Appellant was charged by the grand jury for conspiracy to commit mail fraud, thus deprive the United States of Burke’s honest services (Dkt 72) and assuming, *arguendo*, the Government’s alleged theory that Spellissy was an “outsider”, not a public official (Dkt 111, p.798, line 3), and that William Burke was a public official (Dkt 1), then Burke would owe a fiduciary duty to the public *to make governmental decisions* in the public’s best interest; and any misuse of his office for *private gain* would constitute fraud. United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999). The evidence of the record substantiates that Appellant’s business was law abiding as well as Burke’s performance of his duties and the Government

cannot prove the elements of the mail fraud conspiracy offense because Burke could not benefit from an undisclosed conflict of interest to support his [Appellant's] conviction for conspiracy to deprive the public of his [Burke's] honest services. See *id.* (citing and quoting United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (“If the official . . . *secretly makes his decision* based on his own personal interests -- as when an official . . . personally benefits from an undisclosed conflict of interest -- the official has defrauded the public of his honest services.”)). Burke nor Appellant can benefit from an undisclosed conflict of interest because Burke is in a non decision making position, he doesn't even make recommendations to influence government action and Appellant had disclosed his conflicts of interest to the Government (Dkt 121, Defendants' Trial Exhibit 3h) and there is no evidence to contradict these facts.

As stated in United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997), cert. den. 118 S. Ct. 625 (1997):

“[H]onest services” contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer-- or that he consciously contemplated or intended such actions. For example, something close to bribery. *If the employee renders all the services his position calls for and if these and all other services rendered by him are just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.*

In the instant case Burke did render services as a faithful employee as evidenced by Government witness Pettigrew testified that there is no evidence of preferential treatment (Dkt 111 p.680) and there is no evidence of a plan on how or when Burke was to give preferential treatment to Appellant, simply because in Burke's position he cannot give preferential treatment because he lacks authority to act on behalf of the Government in approving proposals in the contracting process. (Emphasis added).

The Federal Acquisition Regulation (FAR) should have resolved any questions to the investigating agent and prosecutor of this case that private contractor Burke, cannot make decisions on behalf of the government.

FAR 2.101, "Definitions," defines an inherently governmental function as a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include activities that require either discretion in applying Government authority or judgment in making decisions for the Government. Additionally these functions involve interpreting and executing the laws of the United States so as to bind it to take or not take some action by contract, policy, regulation, authorization, order, or otherwise.

FAR 7.503, "Inherently Governmental Functions Policy," provides examples of inherently governmental functions including:

- determining what supplies or services are required by the Government;
- approving any contractual documents to include documents defining requirements, incentive plans, and evaluation criteria;
- administering contracts, which includes ordering changes in contract performance or contract quantities, taking action

based on evaluations of contractor performance, and accepting or rejecting contractor products or service;

- determining whether contracts are reasonable, allocable, and allowable; and directing and controlling Federal employees.

FAR 37.114, “Special Acquisition Requirements,” states that contractors working in situations where their contractor status is not obvious to third parties are required to identify themselves as contractors. This avoids creating an impression in the minds of members of the public or Congress that they are Government officials, unless, in the judgment of the agency, no harm can come from failing to identify themselves. Agencies must ensure that all contractor personnel attending meetings, answering Government telephones, and working in other situations where their contractor status is not obvious must identify themselves.

Given the foregoing regulation, Burke is not allowed to approve or administer contractual documents because it is prohibited by FAR 7.503. The prosecutor told the Jury in his opening statement,

“William Burke was a retired military officer who was working at SOCOM as civilian employee *doing governmental functions*. And he, likewise, was involved in acquisitions.” (Dkt 109 p. 183 line 12).

This statement is not true because Burke is not a Government employee and cannot perform government functions. This false statement greatly prejudiced Appellant by the prosecutor misleading and painting a false picture for the Jury to what Burke’s role was as a private *contractor*.

The scheme or artifice must lead to actual or intended actual injury. That is, the official [allegedly Burke] must be performing a discretionary function which the scheme or artifice is intended to influence because it is the exercise of a discretionary

function (the “service”) which must be the target of the scheme. In this case the discretionary function is not explicitly identified by the Government.

It is impossible to conspire to commit a crime if you do not have the involvement of someone actually capable of committing that crime. See, e.g., United States v. Freedman, 562 F. Supp. 1378, (N.D. Ill. 1983) (dismissing charge of extortion under color of official right as to attorneys who obtained money under pretense that it would be used to bribe a state judge) (“[W]hat is missing here is the actual involvement of a public official. . . . Just as a Hobbs Act conspiracy must in itself have an actual link to interstate commerce, so must a conspiracy to affect commerce by obtaining property “under color of official right” have an actual connection to a public official. To hold otherwise would require a kind of mysterious levitation—in which Appellant and Burke could conspire only with each other, and with no one else involved, to violate a statute neither could himself violate. This Court has not yet seen that version of the Hindu rope trick.”).

The District Court stated, “And a miscarriage of justice may very well have occurred, if the verdicts are based on Bill Burke’s plea agreement and guilty plea.” (Dkt 113, p.66, line 12). This statement is vital to the instant case because Burke’s *coerced* plea agreement is the only evidence against Appellant and the jury more than likely was prejudiced by this evidence when the prosecutor attempted to impeach his own witness, Burke. Appellant asserts that the failure of this Court to review the

claims based upon newly discovered evidence raised herein will “result in a fundamental miscarriage of justice.” See Murray v. Carrier, 477 U.S. 478, 485 (1986). In Murray v. Carrier, the Court stated that procedural default would be excused, even in the absence of cause, when a “constitutional violation has probably resulted in a conviction of one who is actually innocent.” 477 U.S. at 496. See also, House v. Bell, 126 S. Ct. 2064, 2076-77 (2006) (“[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” (Quoting Schlup v. Delo, 513 U.S. 298, 327 (1995))); See, e.g., Gonzalez v. Abbot, 967 F.2d 1499, 1504 (11<sup>th</sup> Cir. 1992) (procedural default excused under actual innocence exception because petitioners claim if true, rendered conviction void and could not be legal cause of imprisonment), amended by 986 F.3d 461 (11<sup>th</sup> Cir. 1993). There still is no procedural barrier to a second habeas petition because this Circuit has said that persuasive, free-standing innocence claims should not be barred by procedural default. Mize v. Hall, 532 F.3d 1184, 1195 n.9 (11<sup>th</sup> Cir. 2008).

It is now clear based on Chan’s and Allgrove’s affidavits that Burke did not have the authority to benefit Appellant or his clients. Previously stated, at trial, Government witness Pettigrew testified that there was no evidence of preferential treatment by Burke to Spellissy. (Dkt 111 p.680). Burke denied any agreement to do

anything illegal and at trial stated that Spellissy never asked him to do anything illegal. (Dkts 110, 111, 72). There is no evidence that Burke was in a position with the “authority” to do what the Government alleges in the indictment because Burke cannot approve, disapprove, rank or change an acquisition proposal document. No witness testified at trial that Burke had this authority. The record for this case has substantial evidence that Burke was not in a position to give preferential treatment. Mr. James Santa Lucia, of the Sentel Corporation, gives the following sworn testimony:

Question: FCT’s and DAC’s are both competitive processes?

Lucia: Yes

Question: How does a contractor influence that competition, if ever?

Lucia: A contractor doesn’t influence it. These are --- each of the projects are in support of an ongoing acquisition program and those programs are managed by the Department of Defense, either SAM’s or PM’s, program managers or system acquisition managers. (Dkt 151, Exhibit 9 p.4).

Question: Did you ever see him [Burke] make a recommendation that was not amply substantiated by the data?

Lucia: No, I never did. As a matter of fact-- (Dkt 151, Exhibit 9 p.5).

Mr. Charles Snellgrove, Sentel Corporation, gave the following sworn testimony:

Question: And did you ever see Mr. Burke make a decision relative to purchasing any product?

Snellgrove: No

Question: Did he have the capacity to do that?

Snellgrove: No, he did not. (Dkt 151, Exhibit 10 p.4).

Therefore, the record is clear and without question Burke was not in a position or had the authority to do anything to benefit Defendants. There is no evidence Burke made or could even make a recommendation to benefit Defendants. Burke was a private contractor who possessed no authority and his influence on the process was not even identifiable as the following testimony from Dr. Uhler, USSOCOM's Acquisition Executive, during the sentencing hearing demonstrates:

Question: Okay. As for you personally, did you personally ever seek Bill Burke's opinion on a project or proposal?

Uhler: I did not.

Question: Did you personally ask Bill Burke for his opinion as to the ranking of proposals?

Uhler: I did not.

Question: Did you personally – so then the answer would be that you personally never relied on Bill Burke's personal opinion in the course of your work?

Uhler: I did not. (Dkt 114, p. 33).

Government Program Manager Jones states in his sworn testimony,

“His [Burke's] role was to – again, my understanding, was to brief the Foreign Comparative Test Program to personnel who participated in it, let him know what it was about and help them with the process of fulfilling the program.” (Dkt 159, p. 24).

Jones' also testified,

Question: Do you remember or do you know whether or not a program manager can change a U.S. SOCOM priority without coordinating with the end users at the units?

Jones: No. The end users are the ones who determine the priorities. (Dkt 159, p. 24).

The Government never presented any evidence to substantiate the allegations in the Indictment that Burke had the authority or power to influence any government action in order to provide preferential treatment to Appellant. The Government did not even present Burke's contract, performance reports or *any proposal or contractual document* with Burke's signature directing or recommending to direct *any* Government action. The Government never called Burke's immediate Government supervisor, United States Army Major Glenn, or his Sentel supervisor to testify as to how or what exactly Burke could do to allegedly benefit Appellant. No one, to include law enforcement investigative agents testified as to what preferential treatment could be doled out to benefit Appellant. No law enforcement agent testified that Burke confessed or acknowledged to what is alleged in the Indictment. Therefore, the record is clear that Burke could not give Appellant preferential treatment.

At the Judgment notwithstanding the Verdict Hearing (JNOV), the trial judge found uncorroborated circumstantial evidence to justify a conviction of Appellant for conspiracy by finding that he "agreed to commit the offense of mail fraud, that is,

deprive the United States of the intangible right of William Burke's honest services.”

(Dkt 72, p.2). At Sentencing the Court stated,

“And I accept that the seriousness of the offense of conviction, that is, *the conspiracy to deprive the Department of Defense of the honest services or intangible right of honest services of Bill Burke...*” (Dkt 114 p.77, lines 18-22).

However, Appellant was not charged in the indictment with conspiracy to commit mail fraud. See Dkt 1. Appellant was charged with conspiracy to commit bribery and wire fraud. The conspiracy to commit wire fraud charged in Dkt 1 p. 3 paragraph B. 6.b. (2) does not allege the statutory language for what was to be obtained or deprived from the victim; such as money, property or the intangible rights of honest services. (Emphasis added). Appellant cannot be found guilty of a conspiracy to commit mail fraud because this illegal goal is needed for the second element to commit conspiracy which was not charged in the indictment. Even if the indictment properly charged Appellant with conspiracy to commit the offense of wire fraud to deprive the United States of the intangible right of Burke’s honest services; witnesses Chan, Allgrove, Jones, Lucia and Snellgrove state that there is no action Burke can take to benefit Appellant. How can the United States be deprived of Burke’s honest services if he does not make decisions or recommendations to potentially benefit Appellant? There is no language in the Conspiracy Count stating the words “depriving the United States of the intangible right of Burke’s honest services.” The Judge’s instruction to the jury was,

“In this instance with regard to the alleged conspiracy, the indictment charges that the defendants conspired to bribe a public official and to commit wire fraud. (Dkt 58, p. 11-12 & Dkt 111, p. 883, lines 3-6).

There is no instruction to the jury charging conspiracy to commit mail fraud. There is no describing of the elements of the alleged crime for 18 U.S.C. § 1346, and § 1341 in the jury instruction for the conspiracy count. (Dkt 58, p. 8-13 & Dkt 111, p. 879-886). Appellant cannot be found guilty of a crime not properly charged in the indictment or not properly instructed to the jury. See United States v. DuBo, 186 F.3d 1177 (9th Cir. 1999), and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the Supreme Court, and the Ninth Circuit, determined that the Indictment must plead to specific statutory language in each of the charges filed against the defendant. As such, there is specific language in each statute that must be identified to put a defendant on proper notice of what constitutes the charge of the grand jury.

The scope of conduct covered by the honest services mail fraud statute is extremely broad. See United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996). Nevertheless, even if a public official engages in “reprehensible misconduct related to an official position,” his conviction “for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to [his] honest services, and it is not shown to intend the result.” *Id.* (Emphasis added). In all honest service fraud cases, the person must have been in a position to provide some benefit to his

co-conspirator. In this case the Government's theory is fatally flawed because Burke possesses no authority to benefit Appellant as evidenced in the record. Also, given the fact that Appellant had disclosed his clients to the Government because Appellant was also a Government contractor, how could Burke potentially benefit those clients when he didn't have the power to do so and the Government Program Managers knew who Spellissy represented?

Furthermore, the evidence presented at trial clearly demonstrated that there never existed an agreement, legal or otherwise, between Spellissy and his company and then to William Burke. At the trial, Burke, the prosecution's star witness, took the stand and unequivocally testified that there never existed any *intent* between himself and Spellissy to enter into an agreement to *conduct any illegal activity*. (Dkt 110, p. 547, line 23, p. 548, lines 5-22).

Question: Am I clear, can I stand in front of this jury in closing arguments and tell them that you're saying unequivocally you never conspired to do anything illegal?

Burke: That's true. I will qualify that by saying I entered into the agreement with no intent to commit a crime. I'm not a legal expert. I learned after the fact I made mistakes and maybe shouldn't have done it. That I acknowledge and I accept responsibility for that. But I didn't knowingly and wittingly establish a company, sign an agreement and send invoices to conduct illegal activities.

Question: Because you have to know the unlawful purpose of a plan and willfully join it?

Burke: That's correct.

Question: You never did that; did you?

Burke: No, sir. (Dkt 110, p 548, lines 5-22)

Here was the Government's most critical witness, the man whom the government claimed had entered into a conspiracy with Spellissy, taking the stand and denying that such an agreement or conspiracy to commit an unlawful act ever existed. Burke also testified, "I can't say there was ever an agreement where I agreed up front that you'll [Spellissy] get preferential treatment." (Dkt 110 p. 440).

The Court found,

In sum, the Government presented no evidence that Defendants "directly or indirectly gave or offered or promised something of value" to Burke and that the Defendants "did so knowingly and corruptly, with intent to influence an official act or to influence such public official (Burke) to allow or make opportunity with the commission of a fraud on the United States." (Dkt 72 p.3).

Where the Government charges an official with receiving a bribe, some circuit courts limit honest-services fraud by requiring that the government prove a quid pro quo - a link between the corrupting payment and intent to influence the official's conduct. The Government did not prove beyond a reasonable doubt any intent of Appellant to influence any behavior of un-indicted co-conspirator Burke.

The Court found,

The only credible testimony from Bill Burke is that he denied the criminal conspiracy, denied bribery. (Emphasis added). (Dkt 113 p. 14).

On May 17, 2007, Spellissy took a polygraph test, which contrary to the

District Court's recent order is scientific evidence. (See Dkt 196 p.11). The test was administered by an independent agent. Spellissy passed the test. (See Dkt 125-3). The relevant questions that were asked with Spellissy's answers underlined are as follows:

Question: Did you bribe Bill Burke in order to receive any preferential treatment for your clients at SDI? NO

Question: Did you plan with Bill Burke to defraud the United States Government? NO

The examiner concluded by stating "The examination was visually and numerically scored. Both showed no deception."

The trial judge stated to Spellissy, "And I am convinced that what you did was not with the mindset of violating the law. I don't think there's any question because of your character." (Dkt 114 p. 81 lines 2-4). If you have no mindset to violate the law how can you have intentional participation or to act knowingly to achieve an illegal objective which is an element of conspiracy that the Government must prove beyond a reasonable doubt. The District Court found no intent to commit a crime; therefore, there is no conspiracy.

The District Court concluded,

It may not have been intended by you [Spellissy] to violate the law, but he [Burke] was in a position of conflict. And an employee who is in a position of conflict with a competing entity has not only a conflict of interest, but that presents that intangible right or the jeopardy – puts in jeopardy the intangible right of honest services. And that is where this case begin [s] and that's where it ended. (Dkt 114 p. 83-84).

This erroneous finding in a nutshell is the issue of why the jury and then the trial judge at the JNOV got it wrong in convicting Appellant with conspiracy. First, the Court for the second time finds no intent of Appellant to violate the law; however, intent is an element of the crime in a conspiracy that must be proved beyond a reasonable doubt. Second, Appellant and his company, SDI is not a competing entity of the United States DoD; both are supporting entities of the DoD. They are defense contractors and this is well documented that Appellant is a Government contractor with the appropriate clearances, approvals, contracts and disclosed conflicts of interest to the appropriate Government Officials. Third, the work that Burke was hired for by SDI was to assist SDI with technical writing for a Company named Exensor. (Government Trial Exhibit 29). The record is clear that this company is a foreign company that was not eligible for FCT funding at USSOCOM because they failed to meet the requirements for FCT on or about the year 2000. (Dkt 110 p. 399-400). Therefore, there can be no conflict of interest with respect to Burke's administrative duties as a service support contractor at USSOCOM because the Exensor product *cannot* be accepted by a USSOCOM Program Manager for FCT funding; the Exensor product will never pass through the office where Burke is employed as a contractor. Fourth, the evidence substantiates that Burke, a private contractor, does not have to seek permission to work a second job. Government witness James Pettigrew testified that only U.S. Government, Government Service

employees and Military members must seek permission from the Government to work second jobs at USSOCOM. Burke is neither a Government Service employee nor Military Member. (Dkt 111, p. 693). Burke was not in violation of any federal regulation or federal or state law when he performed (45) hours of work for SDI in support of client, Exensor and the Court ruled that the 45 hours of work and the pay for that work was legitimate. (Dkt 72). Sixth, Spellissy had informed USSOCOM of his conflicts of interests to include Exensor. (Dkt 38, Dkt 159, Government Trial Exhibit 3 and Defendants' Trial Exhibit 7). The work done by Appellant for Exensor had nothing to do with his duties concerning the work he was doing for the Government and the same logic applies to Burke.

If Burke was in any position to influence government action then the duties and responsibilities of a government position would at the very least require him to file the Confidential Financial Disclosure Report, Office of Government Ethics Form 450, to avoid involvement in a real or apparent conflict of interest. The purpose of the report is to assist employees and their agencies in avoiding conflicts between official duties and private financial interests or affiliations. Title I of the Ethics in Government Act of 1978 (5 U.S.C. App.), Executive Order 12674 (as modified by Executive Order 12731), and 5 CFR Part 2634, Subpart I, of the Office of Government Ethics regulations require the reporting of this information. The

Government never presented such evidence because Burke was not required to file this form because of his position nor the Sentel Contract did not require it.

It can be concluded from the foregoing that there was no conspiracy to deprive the United States of William Burke's intangible right of honest services and Appellant is factually innocent.

II. CONSPIRACY COUNT SHOULD BE VACATED BECAUSE THE OBJECTS OF THE CONSPIRACY ARE CONTRARY TO LAW.

The District Court states in its last order under this appeal, "After a jury trial in May 2006, Defendant's were convicted of conspiracy to defraud the United States and to commit bribery and wire fraud (Dkts 62, 63, 85, 86)." This is true; however, the District Court ruled at the JNOV Hearing that the evidence presented at trial was only sufficient to find Appellant guilty of conspiracy "to commit the offense of mail fraud, that is, deprive the United States of the intangible right of William Burk's honest services..." (Dkt 72 p.2). In Count One, the indictment charges conspiracy to commit bribery and attempts at charging conspiracy to commit wire fraud, and the jury returned a general verdict of guilty. When a jury returns a general verdict of guilty in a multiple-object conspiracy, the verdict may be set aside if one of the conspiracy theories is contrary to law. See Griffin v. United States, 502 U.S. 46, 59, 112 S. Ct. 466, 474 (1991); Yates v. United States, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073 (1957). Therefore, because two of the theories asserted in Count One,

conspiracy to commit bribery and conspiracy to commit wire fraud, were legally insufficient, the conviction on Count One should be vacated. See United States v. Pendergraft, 297 F.3d. 1198 (11<sup>th</sup> Cir. 2002).

The Court found no evidence to conspire to commit bribery,

“Simply put, the Government's primary witness, William Burke, testified unequivocally that he never conspired with Defendants to commit any type of fraud, never did anything illegal and was never bribed in return for preferential treatment of any of the Defendants’ consulting clients. Notwithstanding that Burke entered a guilty plea pursuant to a written plea agreement in which he stipulated to facts in support of the charges, Burke essentially disavowed his guilty plea and those underlying facts, explaining to the jury that he pled guilty simply to avoid going to prison. With respect to the \$4500.00 the Government contends was a bribe paid by Defendants to Burke, Burke explained that he performed more than 45 hours of services for Defendants for which he invoiced Defendants at the rate of \$100.00 per hour. Burke invoiced Defendants for those services (Government's Exhibits 4B and 4C) and received IRS 1099 forms from Defendants. Burke adamantly maintained without any contradictory evidence presented by the Government that he actually performed those services and was paid only for those services. Applying Rule 29 standards, the Court, “assumes the truth of the evidence offered by the prosecution,” to wit, Burke's testimony that he performed legitimate services and was paid at the rate of \$100.00 per hour for 45 hours. United States v. Martinez, 763 F.2d at 1312. The Government offered no evidence to the contrary and accordingly, there was no evidence on which a reasonable jury could have concluded that the \$4500.00 represented a bribe paid to Burke in exchange for preferential treatment of Defendants’ consulting clients.

In sum, the Government presented no evidence that Defendants “directly or indirectly gave or offered or promised something of value” to Burke and that the Defendants “did so knowingly and corruptly, with intent to influence an official act or to influence such public official (Burke) to allow or make opportunity with the commission of a fraud on the United States.” (See Jury Instructions,

Dkt 58 at p. 14). Moreover, to the extent Burke's guilty plea and the facts he stipulated to in his plea agreement constituted a prior inconsistent statement supporting the bribery allegations, those prior inconsistent statements cannot suffice to support a conviction as to Defendants Spellissy and Strategic Defense International, Inc.” (Dkt 72 p. 2).

The Court made no finding on the conspiracy objective of the Grand Jury’s attempt to charge conspiracy to commit wire fraud, thus fraudulently obtain money or property from the United States Department of Defense or to deprive another of the intangible right of honest services. Count 1 of the indictment at paragraph B. 6. b. (2) states,

“Having devised and intending to devise any scheme and artifice to defraud, transmit and cause to be transmitted by means of wire, radio, and television communication in interstate and foreign commerce, any writings, signs, signals, pictures and sounds for the purpose of executing such a scheme and artifice, in violation of Title, 18, United States Code, Sections 1343, 1346 and 2.”

The statutory words “*or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,*” were omitted from the indictment to properly charge conspiracy to commit wire fraud in accordance with Section 1343. The statutory words “*or artifice to deprive another of the intangible right of honest services*” are missing from Count 1 of indictment to properly charge conspiracy to commit honest services wire fraud in accordance with Section 1346.

Therefore, the conspiracy count should be vacated and a new trial granted because there is no evidence to convict Appellant from the two criminal objects that are charged in the indictment and this is contrary to law.

III. THE DISTRICT COURT ERRED WHEN IT GRANTED THE UNITED STATES' MOTION TO STRIKE DEFENDANT'S "JOINT RESPONSE MOTION IN OPPOSITION TO STRIKE THE AFFIDAVIT OF JEFFREY J. DEL FUOCO."

Appellant submitted a response in accordance with Local Rule 3.01 and the Federal Rules of Evidence, Rule 608, Evidence of Character and Conduct of Witness. Local Rule 3.01 allows Defendants ten (10) days to procedurally respond to a Motion. Although the Court entered an order striking the Affidavit of Jeffrey Del Fuoco (Dkt 184), undersigned Counsel believed he was under an ethical obligation to file a response within the ten days allowed.

Del Fuoco's Affidavit is relevant to this case because when AUSA O'Neill introduced Burke's plea agreement to the Court, Government's Trial Exhibit 41, then AUSA O'Neill became a witness. O'Neill became a witness because he witnessed the plea agreement and he is a signatory of the document. In accordance with Federal Rules of Evidence, Rule 608. Evidence of Character and Conduct of Witness (a) Opinion and reputation evidence of character.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the

character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The First Assistant United States Attorney (FAUSA) filed the response for the Government to Strike Del Fuoco's Affidavit. (Dkt 187). The comments in his pleading are misleading, and they omit certain crucial facts in an apparent effort to conceal from the Court the whole truth about the misconduct of the Government that Del Fuoco describes in the instant case.

As a government prosecutor, he [Del Fuoco] was an insider and most certainly had a close-up, personal and professional understanding of the criminal and prosecutorial misconduct that is detailed in his affidavit, that his opinion that AUSA O'Neill is not trustful is very relevant to this case. What is even more troubling to the integrity of AUSA O'Neill's office is that Del Fuoco's Affidavit is allegedly supported by three (3) other AUSAs from O'Neill's office.

The FAUSA denigrates Del Fuoco's expertise and claims that he is not an "expert" at investigating and prosecuting public corruption cases. While Del Fuoco is not attempting to qualify himself as an expert, all one need do is to look at PACER to determine that Del Fuoco has participated in many cases before the District Court, many of which were complex public corruption and conspiracy cases requiring detailed, knowledgeable expertise, attention to investigative nuance and the ability to structure investigations, something that O'Neill himself has commended Del Fuoco for numerous times. O'Neill has written in employee evaluations that

“Mr. Del Fuoco has performed in an outstanding manner . . . In a number of investigations he has handled . . . Mr. Del Fuoco has encountered unique legal issues . . . Mr. Del Fuoco is as good as anyone in identifying, developing and structuring investigations.” (Dkt 189-7).

The FAUSA selectively lifted portions from a lawsuit filed in the District Court and attempts to create the impression that Del Fuoco is not credible. The clear purpose is that the FUASA misleads the Court to believe that Del Fuoco has in fact been thrown out of the Army, which is false.

In performing due diligence, undersigned counsel, McGuire, contacted Sergeant Joseph Burnhart. Burnhart is also familiar with Del Fuoco and his work with corruption cases concerning the Manatee County Sheriff’s Office (MCSO). Burnhart contacted Del Fuoco at the U.S. Attorney’s Office to warn him that he and his family were in danger, and that certain deputies had made comments about retaliating against Del Fuoco for what he “did to” the Sheriff’s Office by convicting and sending to prison six (6) MCSO narcotics detectives on civil rights, conspiracy and obstruction of justice charges. (Dkt 189).

The pattern of behavior that Mr. Del Fuoco describes in his sworn affidavit specifically concerning the misconduct of AUSA O’Neill is relevant and with other supporting documents obtained in pursuing our due diligence in investigating this case are consistent with our belief of the incidents of misconduct that occurred under radar and unchecked by the Department of Justice in prosecuting an innocent man in

the instant case at bar.

In the instant case there is evidence of witness tampering of witnesses who were favorable to the Appellant. The events of witness tampering include the uncontradicted testimony of Mr. Burke describing how a Federal agent threatened him and his family by threats as evidenced by the statement from law enforcement agent Calvert “we know where you and your family live.” Dkt 110, p. 572. There is also the incident of unknown senior military officer knowingly who ordered Sergeant First Class Landers, 75th Ranger Regiment not to honor the subpoena which is part of the legal process, summoning him to appear as a witness at Appellant’s trial, an official proceeding. Dkt 125. This was known to AUSA O’Neill and O’Neill alleges that Appellant decided not to pursue Landers attendance which Appellant respectfully disagrees. Dkt 137. It took nearly two years after trial for Appellant to get to interview former Ammunition Program Manager for USSOCOM. Dkt 159. There are at least three witness interviews (Steve Fetherman, Brad Mohr & LTC Wil Riggins) missing from discovery. Dkt 185. Now, the FAUSA is desperately trying to discredit new witness Del Fuoco. The FAUSA presented no substantiated evidence to back what he is alleging against Del Fuoco. Also, Del Fuoco is not the only AUSA alleging perjury of AUSA O’Neill. Del Fuoco has named three other AUSAs in support of his [Del Fuoco’s] allegations. Given the FAUSA’s claims either Del Fuoco is not telling the truth or the government is continuing to hide from the truth.

The Court cannot determine the truth unless it has an evidentiary hearing.

On July 12, 2005 (9 months prior to Appellant's trial) O'Neill appeared and testified in a deposition in the federal civil trial of Del Fuoco. v. Wells, et al. In that appearance, O'Neill allegedly committed material perjury and obstruction of justice, *inter alia* when he testified falsely under oath. Appellant has information and belief that on July 28, 2005, the U.S. Attorney, Paul I. Perez had evidence and witnesses proving O'Neill's perjury. As such, the U.S. Government and specifically, the DOJ, the U.S. Attorney's Office and Messrs. Perez and O'Neill were well aware of it, and were well aware of the serious evidence and allegations contained in it as of July 28, 2005. This material, impeaching information was known to the Government at several different levels well before the trial of Appellant in May of 2006.

Given Defendants were unaware of evidence contained in the July 28, 2005 complaint against O'Neill until early April 2009 when it was first disclosed by former AUSA Del Fuoco, such information constitutes "new evidence", all in light of O'Neill's clear status as a "witness" for the Government in the same trial and case he was prosecuting against Appellant, as set forth, *supra*.

Appellant has information and believes that the DOJ Office of Professional Responsibility investigation of AUSA O'Neill's alleged misconduct involves several allegations unchecked and unresolved since August, 2003 and the Government provided no evidence to challenge this belief, which is the basis for Del Fuoco's

attacks supported in the form of opinion on the untruthfulness of character of a witness. AUSA O'Neill's alleged misconduct was not disclosed to Appellant during the discovery period before trial. Dkt 185.

On July 14, 2009, Appellant learned for the first time that the "lead and sole" prosecutor of this case, AUSA O'Neill filed an Application for the position of United States Attorney in and for the Middle District of Florida. (Dkt 193-2).

AUSA O'Neill discloses in his application for appointment the following:

*“. . . (W)hile I was the Chief of the Criminal Division, it was brought to my attention that an employee of a federal law enforcement agency had a *problematic background* that *might need to be disclosed to the defense* if that employee were to *testify* at trial. *I took the position, and still do that I need to review all personnel matters pertaining to that employee before a decision can be made as to whether the information needs to be produced to the defense, or at a minimum, to the court in camera.* The federal agency has taken a *contrary position*. I have been in *dispute* with this agency for a couple of years now. As of today, *it is still not resolved*. It would be simple to accede to the agency's request and their interpretation of the law. However, *because I believe my position is the lawful one*, I will not.” (Emphasis added).*

Upon information and belief, Appellant contends that that AUSA O'Neill is referring to the case at bar, given that there were and still are many so-called "problematic issues" concerning the investigation and prosecution of this case with the lead investigative agency, the Department of Defense Criminal Investigative Services, and the United States Special Operations Command as amply set forth previously in the record of this case and incorporated herein by reference.

AUSA O'Neill's interpretations about what is "lawful" in terms of discovery

and inspection do not carry the day, especially in light of AUSA O'Neill's own admission that he and the law enforcement agency in question "*have been in a dispute.....for a couple of years now*" over the issues presented.

If information would have a substantial impact on the defense's ability to impeach a witness, it should be disclosed. United States v. Cuffie, 80 F. 3d 514 (D.C. Cir. 1996). Here, given O'Neill's intertwined role in this case as a witness involving in improper vouching as set forth with Government's Trial Exhibit 41 and the Government's closing and rebuttal statements, what could be more important to the jury than knowledge that Appellant had evidence that the prosecutor's character had been attacked by opinion or reputation evidence?

AUSA O'Neill improperly vouched for something denied on the witness stand, *to wit*: that Appellant Spellissy had offered and paid a bribe to Burke. A lawyer cannot vouch for something that has been denied from his own witness on the stand without proper evidence. In this case, O'Neill did so and succeeded in doing so by "testifying" through a document that contained his signature as the representative of the United States Department of Justice, then arguing to the jury that the version he sponsored and propounded (the facts contained in the plea) was the version the jury should believe. This made O'Neill a witness in the case, (*albeit* unavailable for cross-examination) and the scenario created denied Appellant his right under the 6<sup>th</sup> Amendment of the Constitution to cross-examine O'Neill under that amendment's

Confrontation Clause.

O'Neill had been told on at least two (2) separate occasions (See, January 13, 2006 meeting notes, Defendants' Trial Exhibit 36 and Burke's meeting with Defense Counsel, December 2005) by Burke that Spellissy was innocent and the third time under oath in front of the jury, and that he had been threatened and coerced into implicating Spellissy by lead case Agent Calvert. Despite all of this, O'Neill never called Calvert or any other witness in rebuttal to the contention that Burke had "recently fabricated" the contention that Spellissy was innocent. Instead, O'Neill (who was a witness and key signatory for the Government to Burke's plea agreement) did nothing about the exculpatory evidence proffered, and drove on with the prosecution of Spellissy. O'Neill's entry of this document into the Court's record as an exhibit (after *knowing* earlier that Burke had disavowed it prior to trial) constituted a reckless disregard for whether or not a false and fraudulent document was being presented to the Court, all in an effort to wrongfully convict Appellant Spellissy.

A prosecutor cannot improperly vouch for evidence contradicted by the witness on the stand. Such vouching consists of placing the prestige of the government behind (evidence) through personal assurances of the (evidence's) veracity. United States v. Necoechea, 986 F. 2d 1273, 1276 (9<sup>th</sup> Cir. 1993). By vouching in the manner he did, O'Neill intruded upon the jury's right to make all

credibility determinations. United States v. Joy, 192 F. 3d 761, 769 (7<sup>th</sup> Cir. 1999). Numerous cases have found such vouching to be an improper practice, all violative of due process. *See*, “Defending Federal Criminal Cases: Attacking the Government’s Proof”, Law Journal Press (2006), p. 9-62 (citations omitted). As the U.S. Supreme Court has stated with regard to such vouching:

“such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury; and a prosecutor’s opinion carries with it the imprimatur of the government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.”

United States v. Young, 470 U.S. 1, 8 (1985) (Emphasis added).

In this case, O’Neill’s conduct was highly improper, and it constituted an impermissible violation of Appellant’s due process rights.

#### IV. NEW EVIDENCE SUBSTANTIATES NO PROBABLE CAUSE EXISTED FOR SEARCH WARRANT.

On January 5, 2009 Appellant filed a civil complaint (Dkt 185-5) against USSOCOM concerning a denied Freedom of Information Act (FOIA) request relating to all the documents pertaining to the criminal investigation of Appellant in the instant case. On April 3, 2009, the United States Attorney’s Office for the Middle District of Florida responded to the complaint. The response included a “Vaughn matrix” listing all of the evidence that USSOCOM has pertaining to the criminal investigation of Appellant. The Vaughn matrix was provided under a sworn

statement by the USSOCOM Chief of Staff. See Dkt 185-6. This matrix is “new evidence” within the meaning of Rule 33 and concerns documents, interviews and tapes that USSOCOM had and withheld from Appellant’s trial counsel. Of critical note, the Vaughn matrix is missing an alleged “taped interview” between, Mr. Don Jones, USSOCOM Ammunition Program Manager and Colonel Rupp, Inspector General. See Application and Affidavit for Search Warrant of Former Special Agent Calvert which stated *inter alia*, “(y)our affiant learned from a *taped interview* conducted on March 2, 2005, between Col. Robert Rupp, Deputy Inspector General, SOCOM, and Don Jones, Program Manager, PEO-SP, Jones stated that approximately one or two weeks before their departure in November, 2004, for the meeting in Norway, Spellissy made the following comment to him: “I’m there not as a consultant, I’m there as a NAMMO rep.” The “taped interview” was relied upon in the District Court by two different judges. First, Magistrate Judge Scriven approved the amended (the second application was granted) Search Warrant at face value which included reference to the tape. Second, the District Court relied on this alleged “taped interview” when it allowed probable cause to stand, even though the District Court found that Calvert’s Affidavit was riddled with falsehoods and omissions, including those by the USSOCOM Inspector General. See Dkt 44. The District Court again relied on the “taped interview” when it made a ruling in a post trial motion. See Dkt 166, p.9. The alleged “taped interview” is also currently being referenced by

AUSA Linda McNamara in the Government's Reply Brief now pending before this Court in Case No. 08-15208-E. Notwithstanding all of this, the Government's own Vaughn matrix suggests that this tape does not exist. If this is so, then Agent Calvert committed more perjury that the District Court must examine in order for justice to prevail in this case. Appellant further asserts that if the prosecutor knew or should have known that the tape never existed, then he has suborned perjury. Witnesses testified for the Government at trial from all three investigative agencies, USSOCOM, DCIS and the FBI, and there was no "taped interview" of Jones given to trial counsel as part of discovery. If the tape does exist, then this is a Brady violation.

During the Motion to Suppress hearing, the Court erroneously determined that the 70mm "Bunker Buster" warhead was a "particular matter" under Appellant's responsibility while on active duty because Navy Captain Huss testified that NAMMO's warhead was synonymous with the 70mm Foreign Comparative Test (FCT) request. See Dkt 44. Huss based his comment on two market survey results that he had reviewed. See Dkt 121, p. 16, line 13. These referenced documents are directly related to the investigation of Appellant and these documents were not given to Appellant as a result of the FOIA request and were not disclosed in USSOCOM's Vaughn matrix. Given the Government's misconduct in prosecuting this case, Appellant doubts if they ever existed. According to the Vaughn matrix they don't exist and if they do exist, it was not part of the discovery.

Special Agent Calvert stated in paragraph 6 of his Sworn Application and Affidavit for Search Warrant: “Your affiant has learned from documents as provided by SOCOM that Spellissy was assigned as the Program Executive Officer, Special Operations (PEO-SP) for the SOCOM from April, 2001 to his retirement on December 31, 2004.” Where are these documents? They certainly are not mentioned in the referenced Vaughn matrix. Calvert states at paragraph 7 in his Sworn Application and Affidavit for Search Warrant: “According to Col. Kruelskie, his investigation to date revealed that Spellissy.....Col. Kruelskie provided a copy of the letter.....U.S. Department of Defense.” Where are the documents from Kruelskie’s investigation and where is the letter? They too, are not disclosed on the Vaughn matrix and probably are fabricated evidence.

Appellant has new evidence that is directly contrary to what the Court erroneously inferred with respect to Captain Huss’ testimony during the Franks Hearing. Huss’ testimony referred to an entirely different procurement proposal which was not supervised by Spellissy, and which occurred after Spellissy’s retirement. The Court erroneously determined that the 70mm “Bunker Buster” warhead was a “particular matter” under Spellissy’s responsibility because Huss testified that NAMMO’s warhead was “synonymous” with the 70mm FCT request. (See Dkt 44). The FCT request that Huss is referring to *is not* the same request for the “*Bunker Buster*” warhead that Doctor Uhler’s office had requested. Huss is

referring to the FCT proposal that was staffed under his authority. See Dkt 185-4. Huss based his comment on the result of two market surveys that he had reviewed. (Dkt 121 p.18). Dkt 185-2 and Dkt 185-3 are Notices titled “70mm Multipurpose Penetrator,” that will produce market surveys. However, the 70mm warhead in the notices is not the same warhead that was the center of discussion at the Franks hearing. The Franks hearing focused on the particular matter, “*Bunker Buster*” warhead as referred to in Dr. Uhler’s request in May, 2004. The dates of these notices or requested information for market surveys, Dkts 185-2 & 185-3, are dated after Spellissy gave up procurement authority. Most importantly, Dkt 185-4 is the FCT proposal sent by USSOCOM to the Office of Secretary of Defense, it is dated January 18, 2005 which is after Spellissy retired from active duty and a month and half after the Norway meeting. Therefore, Spellissy was not in violation of any “particular matter” pending in the last year of his responsibility even if he had attended the 70mm warhead meeting in Norway as a Government consultant because the Multipurpose Penetrator warhead proposal did not exist under Spellissy’s responsibility while on active duty.

The Government does not dispute any of the foregoing facts in their opposition motion, Dkt 191. The Motion to Suppress should be granted based on that Appellant did not have a conflict of interest on the Multipurpose Penetrator warhead because the proposal for the particular matter referred to by Captain Huss during his

testimony was sent to the DoD after Appellant retired and was not pending under his official responsibility while on active duty and there is no evidence that the alleged “taped interview” exists. This evidence renders the affidavit for the search warrant to be completely void of any truth, therefore, no probable cause. It is a fundamental miscarriage of justice for the district court to not recognize these facts that fatally destroy what is left of the mostly impeached affidavit for a search warrant which are not disputed by the Government in their opposition motion.

The District Court erred when it didn’t recognize the FOIA documents as new evidence. The Project Innocence organization is regularly involved in using information obtained by requests under FOIA to further its mission of improving the accuracy of the criminal justice system in prosecuting, convicting, and incarcerating only those who are actually guilty of having committed the charged crimes. Project Innocence uses the FOIA as an important tool to investigate potential government misconduct in improperly withholding exculpatory materials-so-called “Brady materials” – from criminal defendants. See Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process”). And it uses the information obtained through FOIA to exonerate individuals who have been wrongfully convicted. The Project Innocence experience in this area has helped to establish that negligent or deliberate noncompliance with Brady obligations within some law enforcement

agencies is a significant issue of public importance in the criminal justice arena. The FOIA has been an invaluable tool in the increasingly prominent public discussion over the scope and impact of Brady violations. That statute has also helped to hold government agencies accountable for meeting their constitutional obligations to disclose exculpatory material to the defense. There have been two litigated cases in the Supreme Court whose cases turned on evidence that was unlawfully suppressed at trial and discovered later during federal habeas corpus proceedings. See House v. Bell, 126 S. Ct. 2064 (2006); Banks v. Dretke, 540 U.S. 668 (2004). In House, the Supreme Court allowed the petitioner to proceed on a claim of actual innocence based on a showing that included both new exculpatory DNA results as well as other critical forensic evidence that came to light during habeas proceedings. In Banks, the Court's ruling critically depended on open access to law enforcement records that led to the discovery of material, exculpatory facts the prosecution had withheld at trial. *Id.* at 703-05. Appellant has the right to use the FOIA results for his case and for the foregoing reasons, the District Court should have ruled upon the merits of Appellants arguments and granted a new trial based on cumulative Brady violations for not turning over witness interviews of Don Jones, Steve Fetherman, Brad Mohr, Wil Riggins and others unknown and for the fabrication of evidence by law enforcement as evidenced by the FOIA Vaughn matrix which is void of the referenced "taped

interview” between Don Jones and the USSOCOM Inspector General which makes the affidavit of the search warrant totally false.

V. RELIEF IS MANDATED BECAUSE CUMULATIVE ERRORS BY THE COURT VIOLATED APPELLANT’S RIGHTS UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

The record has now been made clear due this newly discovered evidence and fraud upon the court proves that the government did knowingly commit cumulative errors which violated the Spellissy’s Constitutional Rights under the Confrontation and Due Process Clauses, which alternatively prejudiced Spellissy and the effective administration of justice. These new revelations must clearly now be deemed reversible. “The cumulative effect of several errors that are harmless by themselves can so prejudice the defendant’s right to fair trial that a new one might be necessary.” United States v. Adams, 74 F.3d 1093, 1099 (11<sup>th</sup> Cir. 1996), quoting United States v. Perdicado-Cordobas, 981 F.2d 1206, 1215 n.8 (9<sup>th</sup> Cir. 1995); see also Ramseyer v. Wood, 64F.3d 1432 (9<sup>th</sup> Cir. 1995) where the court held interestingly that “prejudice may result from the cumulative impact of multiple deficiencies.” Id. At 1438, citing to Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9<sup>th</sup> Cir), en banc cert. denied, 440 U.S. 974 (1974). This is clearly evident in this case because Spellissy was forced to not put up a defense at trial because of the lack of availability of key witnesses due to multiple witness tampering incidents by the government. The errors are also

cumulative when added to the false statements made by the prosecutor in his opening and closing arguments.

Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a defendant's right to due process of the law. Taylor v. Kentucky, 436 U.S. 478, 487 note 15. 98 S. Ct. 1930, 56 L.Ed.2d 469 (1978). United States v. Santos, 201 F.3d 953, 965 (7<sup>th</sup> Cir. 2000); United States v. Haddon, 927 F.2d 942, 949 (7<sup>th</sup> Cir. 1999). "The cumulative effect of two or more individual harmless errors has the potential to prejudice a defendant to the same extent a single reversible error." United States v. Rivera, 900 F.2d 1462, 1469 (10<sup>th</sup> Cir. 1990) (en banc); United States v. Rogers, 89 F.3d 1326, 1338 (7<sup>th</sup> Cir. 1996); Alvarez v. Boyd, 225 F.3d 820,824 (7<sup>th</sup> Cir. 2000). To prevent the synergistic effect of these errors from escaping review, courts must attempt to determine whether the whole is greater than the sum of its parts.

The cumulative effect analysis requires a petitioner to establish two elements: (1) at least two errors were committed in the course of trial; and (2) considered together, along with the entire record, the multiple errors so infected the court determination and/or jury's deliberation that they denied the petitioner a fundamentally fair trial. Jackson v. Johnson, 194 F.3d 641, 665 n. 59 (5<sup>th</sup> Cir. 1999); United States v. Cople, 24 F.3d 535, 547 n.17 (3<sup>rd</sup> Cir. 1994); Rivera, 900 F.2d at 1471 n.11.

The record and evidence presented in this brief indisputably proves there are cumulative errors that deprived Spellissy's liberty guaranteed by and through Fourth and Sixth Amendment violations which caused an unfair trial. The Supreme Court has inferred that statutory protections essential to assuring procedural fairness is violated when as in the instant case the "right to full, adversary-style representation has not been afforded." Burns v. United States, 501 U.S. 129, 138, 115 L.3d.2d 123, 133, 111 S. Ct. 2182 (1991).

### **CONCLUSION**

The Appellant respectfully requests this court to reverse his conviction for conspiracy by either finding that Spellissy is actually innocent or grant a new trial because the Conspiracy count is contrary to law and/or the Motion to Suppress should have been granted due to fraud upon the court and/or no probable cause existed for the search. Should this Court not reverse Spellissy's conviction for conspiracy from actual innocence, Spellissy respectfully requests the court grant a new trial based on Cumulative Error by the Court.

Respectfully Submitted,

/s/ John F. McGuire  
John F. McGuire, Esquire

DATE: September 18, 2009

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant together with the Record Excerpts were furnished by United States Mail to Linda Julin McNamara, Assistant United States Attorney, United States Attorney's Office, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, on this 18<sup>th</sup> day of September, 2009. I also hereby certify that, in compliance with 11<sup>th</sup> Cir. R. 31-5(c), an Adobe Acrobat® PDF file of the foregoing brief was uploaded via the Internet to this court's website on the 18<sup>th</sup> day of September, 2009.

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