ELEVENTH CIRCUIT COURT OF APPEALS CASE NO. 08-15208-E

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

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THOMAS SPELLISSY,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

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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: October 17, 2008

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

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

1. John F. McGuire, Counsel for Defendant-Appellant Thomas Spellissy;
2. Robert O'Neill, United States Attorney;
3. Linda Julin McNamara, Appellate Counsel for the United States;
4. Tamra Phipps, Chief, Appellate Division;
6. Thomas Spellissy, Defendant-Appellant;
7. Strategic Defense International, Inc., Co-Defendant;
8. James D. Whittemore, United States District Judge;

*/s/ John F. McGuire*
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Attorney for Defendant/Appellant
Thomas Spellissy

## 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 13,921 words in Times New Roman 14 pt. font.

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## STATEMENT OF JURISDICTION

This is an appeal from a post trial motion 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 (Dkts 85, 86) and the order of Appellant's last motion dismissing in part and otherwise denying Motion for a New Trial (Dkt 166) was entered on September 3, 2008. Notice of appeal was timely filed on September 10, 2008. (Dkt 168) 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. WHETHER THE DISTRICT COURT JUDGE ERRED IN DENYING THE APPELLANT'S ALTERNATIVE MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. RULE 33 (A) AND/OR 60 (B) BECAUSE IN PART CONSTITUTES A SUCCESSIVE § 2255 MOTION.

II. WHETHER THE DISTRICT COURT ERRED THAT DON JONES' TESTIMONY IS NOT NEWLY DISCOVERED EVIDENCE.

III. WHETHER THE DISTRICT COURT JUDGE ERRED IN NOT GRANTING A NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT AND/OR THE PROSECUTOR CAPITILIZING ON PERJURED TESTIMONY.

IV. WHETHER THE DISTRICT COURT JUDGE ERRED BY NOT FINDING THAT APPELLANT'S RIGHT TO CONFRONTATION WAS VIOLATED BY THE GOVERNMENT.

V. WHETHER THE DISTRICT COURT JUDGE ERRED BY NOT GRANTING MANDATED RELIEF BECAUSE CUMULATIVE ERRORS OF RIGHT TO CONFRONT ACCUSER (S) AND PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

VI. WHETHER THE DISTRICT COURT JUDGE ERRED IN NOT GRANTING RELIEF TO APPELLANT DUE TO ACTUAL INNOCENCE.

## 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, Judge Whittemore 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).

Defendants appeared before Judge Whittemore on August 14, 2006 for sentencing on the conspiracy count convictions. (Dkts 85, 86).

The conviction was affirmed on appeal. (Dkt. 134). The appealed instant motion is the seventh post trial motion filed for either a new trial or to have Appellant's convictions vacated. (Dkts 125, 126, 129, 130, 133, 151). Two of the motions sought a new trial pursuant to Rule 33, Fed. R. Crim. P. (Dkts 125,129). Four of the motions sought relief for a stay of sentence. (Dkts 126, 130, 133, 151). All post trial motions have been either denied or dismissed. (Dkts 145, 146, 152).

## STATEMENT OF THE FACTS

**a. On Active Duty.**

From April 2001 to July 30, 2004, Spellissy 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 gave up 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 to do and was also a government contractor. (Dkt 44). Spellissy retired from active duty on 31 December, 2004. (Dkts 22, 38, 41, 121, Affidavit for Search Warrant).

**b. Private Practice**

Spellissy worked as a consultant on behalf of companies who wished to do business with United States Government agencies and also worked as a consultant/contractor on several ammunition programs for USSOCOM.

(Dkts 38 Gov Exhibit 1, Gov 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, Gov Exhibit 1 and Gov Trial Exhibit 3).

As a consultant, USSOCOM directed him to attend critical meetings in Europe, in late November of 2004, as a paid contractor acting on behalf of the USSOCOM Ammunition Program Office. (Dkt 38, Gov 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. (Dkts 38, Gov Exhibit 1, 160). Spellissy saved the government $2 million on this trip to Europe on a classified program and was paid approximately $9,000.00 for the whole trip. (Dkts 158, 159) Major General (Ret) C.A. Hennies, a competitor of Spellissy filed a complaint to USSOCOM concerning Spellissy's work for the government. (Dkt 33-2). Hennies had a personal relationship with the several officers including the Commanding General at USSOCOM. (Dkt 33-2). The Inspector General, USSOCOM presented false information to the Defense Criminal

Investigative Service to start the investigation of Spellissy and his company. (Dkt 44-1).

**c. The Search Warrant**

On April 13, 2005 Federal Agents executed a search warrant at the Spellissy's home address based upon an investigation headed by Special Agent Robert Calvert of the United States Department of Defense, which allegedly supported probable cause existed to believe that Spellissy violated certain conflict of interest laws. (Dkt 121, p. 44-119) The search yielded a number of emails, a number of which were sent between Spellissy and William E. Burke. (Dkt 109, p. 276-318)

While the search of Spellissy's home office 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. (Dkt 1).

Burke, an employee of the Sentel Corporation, was a civilian

contractor who worked on a service support contract at USSOCOM. (Dkt 59, 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 assisting USSOCOM Program Managers. (Dkt 59, Exhibit 41).

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

Spellissy began his defense by challenging the search warrant that yielded the 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, Judge Whittemore agreed that Calvert made 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, Judge Whittemore 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). (Dkt 44).

**e. The Trial**

The case proceeded to trial, primarily based upon Burke's cooperation. 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 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. The Trial Judge found that Spellissy and SDI had conspired to commit mail fraud and let the conspiracy count stand. (Dkt 72).

**g. Sentencing**

On August 14, 2006 the Trial Judge sentenced Spellissy on the conspiracy count. (Dkt 114). At the sentencing hearing, the Government presented no evidence and successfully argued that Burke should be considered 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. (Dkts 85, 86).

**h. Direct Appeal**

Spellissy appealed to this Court on 7 January, 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. (Dkt 159).

Oral argument for the appeal was heard on September 11, 2007 and argued by the original trial counsel's firm. The conviction was affirmed on appeal. (Dkt 134).

**h. Post Appeal**

There have been seven motions filed by 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; (2) Burke was found guilty of perjury; (3) Appellant passed a Polygraph Test. 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 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 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) is being appealed. (Dkt 158).

Spellissy is presently incarcerated under the custody of the Federal Bureau of Prisons.

## 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.** Spellissy's instant motion should have been granted because Spellissy has not had a 28 U.S.C. § 2255 properly filed, heard and ruled upon its merits by the District Court. Several post trial motions mentioned § 2255, however Appellant *was not in federal custody* and the District Court lacked jurisdiction in regards to those motions. Also, Spellissy'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. While the Trial Judge found that the affidavit contained numerous material misrepresentations and omissions, thus requiring redaction and insertion of pertinent information, he erred in determining that the affidavit still established probable cause for a violation of 18 U.S.C. § 207(a) because he was not fully aware of additional fraud upon his court to which the Federal Agent seeking the warrant misrepresented the facts, known to him at the time, to the warrant issuing Magistrate Judge.

**II.** It took Spellissy nearly two years to get sworn testimony from Mr.

Don Jones, Government Service-14, and former Program Manager for Ammunition, United States Special Operations Command. Jones' sworn testimony proves that there is fraud upon the court and the court continues to make judgments based on false information. His testimony is substantial evidence that the Court Order from the Franks Hearing is fraudulent. Spellissy never attended a 70mm warhead meeting or represented the Nordic Ammunition Company (NAMMO) to the Government in Norway for which he had conflict of interest restrictions, nor did he violate any other post retirement restrictions.

**III.** Mr. Jones' sworn testimony further substantiates misconduct by Special Agent Calvert and AUSA O'Neill during the instant case at bar. Spellissy's Fifth Amendment right to be tried with proper "due process of law" has been violated due to Prosecutorial Misconduct and by the prosecutor capitilizing on perjured testimony at the Franks hearing and trial. Futhermore, all evidence given to the government is required to be disclosed to the defense and this did not happen. There are at least two significant Brady v. Maryland violations that the District Judge has ignored.

**IV.** The Government violated Spellissy's Sixth Amendment right to confront the witnesses against him because they did not make them available even after being ordered by the Court.

**V.** Cumulative errors by the prosecution prevented Spellissy to be fairly

prosecuted. This is a violation of his right to due process of law.

**VI**. Spellissy is actually innocent of conspiracy. The initial complaint that started the investigation was false. (Dkt 33-2). The affidavit for search warrant contained statements and omissions that demonstrated a reckless disregard for the truth. (Dkt 44-1). Spellissy was not charged with any crime for what the purpose of the search warrant was. (Dkt 1). Federal Agents and the prosecutor demonstrated misconduct from the beginning to the end of this case. Cumulative errors have so infected this case that Spellissy has been extremely prejudiced in that he did not receive a fair Franks hearing and trial. No one testified and there is no substantive evidence in the record to convict Spellissy of conspiracy as properly charged in the indictment. There is no materiality or of any specific actions were taken constituting the crime such as is required in an indictment. There can not be a conspiracy between Spellissy and his company SDI because they are one in the same person. Government witness, Burke denied the existence of a conspiracy. The District Court ruled that the offense of conviction occurred after Spellissy retired from the military. (Dkt 146). There is no charge in the indictment or evidence in the record to justify the conviction in accordance with the Judge's orders in Dkts 72 and 146. The indictment did not charge Spellissy with conspiracy to commit *mail fraud* (Dkt 1) and the Judge erred when he found Spellissy guilty for conspiracy to commit *mail fraud*. (Dkt 72).

## ARGUMENTS AND CITATIONS OF AUTHORITY

I. WHETHER THE DISTRICT COURT JUDGE ERRED IN DENYING THE APPELLANT'S ALTERNATIVE MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. RULE 33 (A) AND/OR 60 (B) BECAUSE IN PART CONSTITUTES A SUCCESSIVE § 2255 MOTION.

The claims raised in Spellissy's instant motion were never heard, litigated and ruled upon the merits in any previous proceeding(s). Furthermore, the instant motion revealed other fundamental and constitutional claims that prove Spellissy did not receive a fair Motion to Suppress (Franks) hearing and trial. The Court Order, Dkt 44-1, is factually incorrect and adversely affected Spellissy's right to a fair trial because what the government relied in their summation of facts were clearly contrary to the truth as presented and argued in Spellissy's instant motion. The government relied upon perjuries, fraudulent evidence, statements made in reckless disregard for the truth and statements made with omissions of the fact, which have now been revealed in Don Jones' sworn testimony which was obtained by Pro Bono counsel after the Franks hearing, trial and direct appeal. The fraud is not only evident in Dkt 44-1 but also made its way into the trial and sentencing.

The instant motion should have been construed and characterized as a 28 U.S.C. § 2241 as an alternative basis for relief instead of being dismissed for lack of subject jurisdiction. Under the "Savings Clause" that Congress expressly wrote into § 2255, a person can challenge his conviction under 28 U.S.C. § 2241 when the relief

provided under § 2255 is "inadequate or ineffective." 28 U.S.C. § 2255. The relief provided under § 2255 is "inadequate or ineffective" where, as here, a person can prove his actual innocence on the existing record and could not have effectively raised innocence on the existing record and could not have effectively raised his claim of innocence at an earlier time. Triestman v. United States, 124 F.3d 361, 380 (2nd Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251 (3rd Cir. 1997); In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998); See also Pack v. Yusuff, 218 F.3d 448, 453 (5th Cir. 2000); United States v. Barrett, 178 F.3d 34, 48 (1st cir. 1999) (agreeing with Davenport, Dorsainvil, and Triestman courts); Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999) (adopting Seventh Circuit's approach in Davenport).

Spellissy may file the instant motion and have the Court rule on it because the law provides relief when a petitioner had already filed motions under § 2255 and he failed to present one of the exceptions for second or successive motion: such as new evidence of his innocence. Accordingly, when the courts found the relief provided under § 2255 "inadequate" and "ineffective"; they allowed the prisoner to seek relief under § 2241. If the § 2255 "Savings Clause" were not interpreted in this manner, serious, though otherwise avoidable, questions concerning the constitutionality of § 2255 would exist. See Bousley v. United States, 523 U.S. 614 (1998) at 620-21 ("For under our Federal system it is only Congress, and not the courts, which can make conduct criminal."); Triestman, 124 F.3d at 380.

The District Court's reliance on "case law doctrine" was not valid, as Dkts 126, 130 and 133 were erroneously denied because Spellissy *was not in Federal custody* and the District Court actually lacked jurisdiction to adjudicate the filed motions. (See Dkt 145). A federal district court has jurisdiction to entertain a § 2255 motion only if the Spellissy is *in custody* under sentence of a federal court. (See 28 U.S.C. § 2255). The previous motions were actually entitled "Motion for a Continued Stay of Sentence Pending a Hearing for a New Trial Based on New Evidence" and they "mentioned" § 2255 and Rule 33 (a) but was not filed as one and this fact is clearly found in the Judge's order at footnote 3, Dkt 152. This error is being raised as an issue because it gives prelude for the fact that Dkt 151 motion was dismissed as a successive § 2255 when actually it should have been the first § 2255.

Clearly from the aforementioned previous order of the District Court, Spellissy's claims raised therein were not specifically addressed and ruled upon by the District Court on its merits or was the government ordered to respond to proper issues raised therein. The Supreme Court has stated that:

> …[T]he inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matter is the judgment conclusive in another action.

Id. United States v. International Building Co., 345 U.S. 502, 505 (1953)

Accordingly, unless each of Spellissy's claims filed in his previous appeal(s) received explicit consideration and denial, it must be conclusively assumed absent the

proof to the contrary, that unmentioned claim(s) or issue(s) were not disposed of to bar review of the same claim under Spellissy's present motion and its undisputable that the claims Spellissy now raised were not addressed in previous motions because during those filings, Don Jones' affidavit did not exist because Jones was not available. Therefore, these claims must be considered as not raised in previous motions which the District Court erroneously characterized as a § 2255 even though Spellissy was *not in custody*. This Court should remand to the District Court that Spellissy to be allowed to file an initial § 2255 because a § 2255 has never been filed, heard and ruled upon its merits.

Furthermore, the District Court was allowed to assume jurisdiction in the instant motion where fraud upon the Court was perpetrated by officers of the Court. This is just one of the issues in Spellissy's alternative authority motion pursuant to this Circuit's ruling Zakrzewski v. McDonough, 490 F.3d 1264, at 1267 (11th Cir. 2007), where the Eleventh Circuit reversed the district court's denial of Petitioner's 60(b) motion based on the ground of "Fraud Upon the Court" was erroneously denied as a successive habeas corpus motion under the Antiterrorism and Effective Death Act (AEDPA). The ruling is premised on the Supreme court ruling in Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), which held that a motion for relief from judgment based on allegations of fraud on the court in a federal post-conviction relief case under AEDPA, is not to be treated as a successive

habeas petitioner if it does not assert or reassert claims of error in the Spellissy's conviction. Id. Zakrzewski, at 1257.

Relief in the instant case is clearly mandated and should be heard by a different Judge because the one presiding refuses to inquire into its own lack of jurisdiction and has *sua sponte raised* jurisdictional defenses and barriers that should have been raised by the government. Jurisdictional defects cannot be procedurally defaulted and a defendant need not show "cause and prejudice" under Frady v. United States, 71 L.Ed.2d 816 (1982) as jurisdiction is never waived. See Harris v. United States, 149 F.3d 1304 (11 Cir. 1988).

II. WHETHER THE DISTRICT COURT ERRED THAT DON JONES' TESTIMONY IS NOT NEWLY DISCOVERED EVIDENCE.

To obtain a new trial based on newly discovered evidence, Spellissy must establish these five requirements: (1) the evidence was discovered after trial; (2) used due diligence to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial will produce a new result, United States v Schlei, 122 F.3d 944, 991 ($11^{th}$ Cir. 1977).

The first and second requirements are satisfied because Spellissy tried several times to interview Jones, Major Jackson and others. The trial attorney sought the District Court's assistance at a March, 2006 status hearing. The District Court verbally ordered AUSA O'Neill to make witnesses available to include Jones and Jackson. The AUSA delegated the responsibility over to the United States Special

Operations Command Attorney, Lieutenant Colonel Steven Weir. This is the second post trial ruling (Dkts 146, 166) that the District Court cited lack of due diligence by Spellissy's trial attorney which adversely affected Spellissy's right to have a fair trial and is also grounds for a new trial based on ineffective assistance of counsel. Also, it is clear error for the District Court to rule this way because it is now shifting the blame to the trial attorney after the trial attorney reported this very same issue to the District Court at a status hearing and the responsibility was on the government to produce the requested witnesses as directed by the District Court.

The trial attorney did seek prior to the Franks hearing and trial to make efforts to seek authorization to interview Jones and Major Jackson. (See Dkt 158, Exhibit 2, Email from LTC Weir to Trial Counsel). Jones' sworn testimony revealed that from March 6, 2006 to August 2006 he was in fact deployed in Iraq, and therefore could not have been interviewed. Jones brought to light that Spellissy personally sought to obtain an interview between Jones and his trial attorney, however, Jones notified Spellissy to obtain permission from his superiors at USSOCOM Headquarters, to which his request was denied by e-mail notifying Jones that pursuant to Special Procedure Rules Spellissy's counsel had to make an official request to the U.S. government and get approval. The trial attorney started interviews around December 2005 and January 2006, long before the April 18, 2006 Franks hearing and May 8th, 2006 Jury trial. This is the reason Spellissy's counsel sought the District Court's

assistance which basically was a verbal motion seeking an order to produce all material witnesses. This Court should also know when Spellissy's trial attorney successfully subpoenaed Sergeant First Class Landers, USSOCOM then denied Landers to testify at trial. (Dkt 125). Spellissy did not have a fair Franks hearing or trial because the government prevented witness interviews, testimony and attendance at these critical events.

Next, Jones' testimony is not cumulative or impeaching, as no defense was presented at trial due to no key witnesses. His testimony is substantial evidence that the Court Order from the Franks hearing is fraudulent. Spellissy never attended a 70mm warhead meeting in Norway. (Dkts 159, 160). Mr. James Rooney's affidavit corroborates Jones' testimony and proves there is another lie in the record by the government. (Dkt 160). The District Court should not rely on Agent Calvert's word after finding that Calvert is not honest. (Dkt 44-1). The main issue with this whole case is directly centered on Agent Calvert's actions. Every time the government says a witness said "*this*" the opposite is revealed when Spellissy confronts this very same witness. Case in point, Burke allegedly told Calvert in a July 2005 meeting that he gave preferential treatment to Spellissy's clients. 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).

Government witness Jim Pettigrew testified at the trial that there was no evidence of preferential treatment as a result of USSOCOM's investigation. (Dkt 111, p. 680).

Clearly, Jones' testimony is more than just impeaching for what is left of Agent Calvert's already mostly impeached testimony. Jones' testimony reveals that another "Co-Attendee" *does not exist* that supposedly attended the meetings in Norway. No other person who attended these meetings has collaborated with the government's sole identified witness, Major Jackson whose testimony proves that paragraph 10 of the search warrant affidavit is clearly false because sworn testimony of all parties involved in these meetings have been submitted and leaves the government without any collaborator that could support Jackson's alleged statement, which is now in serious doubt because the government has now introduced "hearsay" testimony supplied by Agent Calvert. No sworn affidavits or testimony exist in the government's discovery records relinquished to Appellant. This completely mandates that the Franks hearing finding be reviewed based upon the sworn testimonies rendered by Jones and Rooney which directly contradicts Agent Calvert's bear bones allegations which the District Court is completely relying upon, thereby mandating an evidentiary hearing. These new revelations from sworn testimonies cannot and should not be viewed or held as being one and the same and therefore sufficient to grant the government relief because knowing the existence of a person and what that person may have or would have said are entirely different things that

no parties should be left to guess. Since the government has clearly stated in Dkt 165 that there exists material differences between the sworn testimony and the previously rendered interview, which only the government has been privy to examine, would be a miscarriage of justice to render a decision in the government's favor when this Court now knows from the government's own Opposition Motion, Dkt 165 at footnote 1 that Jones' testimony, which it also relied upon in paragraph 11 of the search warrant affidavit, materially differs and makes this newly obtained testimony very relevant. Also, the government never turned over the alleged taped interview, which the Judge cited in his recent order, from Jones during discovery. This is a Brady v. Maryland violation.

The District Court order now relies on new evidence to the record submitted by the government, Dkt 165, Exhibit 1. This exhibit is an interview between Calvert and Spellissy *without* the presence of the Spellissy's attorney. This document contains false information. It is a clear violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution by that Spellissy did not have the opportunity to confront Calvert on the contents of this interview. The District Court now relies on this interview, Dkt 166 p.7, which greatly prejudices Spellissy. Spellissy *never* told Calvert nor gave sworn testimony or evidence that Spellissy represented NAMMO to the government on any "particular matter" that he had restrictions on during the November 2004 trip to Europe. Spellissy was in Norway at

the request of the U.S. government (Dkts 38, 121 p. 48 line 13, 160). The Confrontation Clause provides "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The clause does not bar admission of a testimonial statement so long as the declarant is present to defend or explain it through cross examination. Crawford v. Washington, 541 U.S. 36, 59 (2004).

The District Court's order also relies on the alleged statements of Major Jackson, who attended meetings in Norway and a December 8, 2004 e-mail from Jerry Kaffka, NAMMO's Inc.'s (USA Company) Director of Business Operations. Major Jackson is assigned to the United States Army Research and Development Center, not USSOCOM. He does not work in Spellissy's former office at USSOCOM. Jackson was representing the Army in Norway and *if* Spellissy met with Jackson concerning anything it would not be in violation of any retirement restrictions placed upon Spellissy.

Kaffa's email stated, "Tom [Spellissy] just returned from a visit to NAMMO, coordinating 70mm FCT-related events for next year…" since the District Court ordered that the proffered testimony of Jones and Rooney does not suggest that Agent Calvert had not obtained this information or that he acted recklessly in relying upon it, Appellant must now address the Court's confusion. Spellissy consulted for Rooney Group International. Kaffka's email does not comport with what is

contained in the Affidavit for the search warrant. Kaffka's email found in the Affidavit is clearly addressed to Owen Saucyn, U.S. Army and *not to "USSOCOM."* Spellissy *is not prohibited* from dealing with the U.S. Army programs or Army Foreign Comparative Test programs because they were not under his former office responsibility. In fact, Rooney had personally ensured Spellissy was not in the room for the 70mm meeting with USSOCOM because Spellissy was still on active duty and he could not be present because of conflict of interest issues between him assisting USSOCOM and his government approved consulting agreement with Rooney Group International. Spellissy had disclosed this conflict of interest to all parties and aware of this he excused himself from the meeting. Calvert's affidavit at paragraph 11 and 12 are misleading and false, therefore, the Trial Judge has again erred by relying on paragraphs with Jackson's statement and Kaffa's email. The information provided by Jones and Rooney clarifies very important facts, therefore the proffered testimonies are material and the government agreed that Jones' testimony is material. (Dkt 165 p.9 footnote 1).

The District Court and the government rely on the fact that the initial motion to suppress, Dkt 16, was filed in February, 2006, prior to the time that Spellissy contends Don Jones was deployed to Iraq. There is no indication in the motion as to whether Mr. Jones was interviewed by defendant or, if not, why not. But, what is interesting is how the government in Dkt 165 attempts to use Jones' sworn testimony

to argue that it clearly shows that Spellissy considered calling Mr. Jones as a witness prior to the time that he left for Iraq. The quote in question stated as follows:

> **Q:** Did you ever speak to an attorney representing Colonel Spellissy before you went to Iraq?
>
> **A:** No, I was--Colonel Spellissy had sent me an E-mail asking me to talk to his attorney. I said I would. <u>I then checked with headquarters to make sure it was all right.</u> **Got an e-mail back saying it <u>wasn't authorized</u> for the regulation** unless Colonel Spellissy's attorney made an official request to the U.S. Government and got approved and was authorized and things just stopped there so I could continue on with the mission to Iraq. (Dkt 165, p.8).

While the government points out when the suppression motion was filed it does not remind the District Court that the "suppression" was in the context of a hearing pursuant to <u>Franks v. Delaware</u>, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) and was held on April 18, 2006. Contrary to what the government alleges Spellissy' trial counsel did take the appropriate steps to obtain Jones' testimony, which clearly contained material facts that is fatal to the government's case, so much so that the government continues to withhold material statements it possesses from Jones. The withheld statements are supposedly contrary to Jones' sworn statement. Id. Gov's Opposition Motion (Dkt 165 p.9, footnote 1), states:

> "The investigators interviewed Don Jones on several occasions prior to trial. Those interviews, in an <u>important respect, materially differ from the deposition produced by defendants</u>. Since this is not new evidence, there is no need to set forth the difference."

This footnote states that Jones' sworn testimony is materially different from

what the government had obtained in several interviews the government never produced or notified the Court or defense counsel. Therefore, by the government's own admission reveals the fact that Jones' sworn testimony is material in this case and other statements existed to which the court and Spellissy were not made privy too. The government is now successful in not having the District Court overturn its prior findings on the Franks hearing which is the relief that Appellant is seeking from this most Honorable Court, by avoiding the argument that Jones may have committed perjury or that its investigators have possibly submitted additional deliberate or recklessly false material, documents and statements that the District Court had originally found pursuant to the Franks and Judgment Notwithstanding the Verdict and, In the Alternative, Motion For New Trial (JNOV) hearings.

The government has not produced copies of the interviews it revealed that contains material differences from the interview obtained by defense counsel. This now enhances Spellissy's claim of how important Jones' testimony truly is. Spellissy asserts that this most honorable Court should remand to the District Court to conduct at the very least an in camera review to inspect and probe for the existence of any more reckless false accusations and statements of facts by government agent interviews because there are interviews that have never been revealed to the Court, Spellissy or his attorney(s). If the interviews exist, they are in the possession of only the government. There is additional government perjury in this case and it is

unconstitutional for any United States Court to tolerate it.

The District Court states at Dkt 166 p. 9,

> What was determinative were the averments in Calvert's affidavit, not shown to have been false or reckless, which placed Spellissy in Norway as a NAMMO consultant in November 2004 when the 70mm warhead was discussed, and that Spellissy had reason to know that NAMMO's 70mm warhead, listed on Dr. Uhler's procurement letter, had been a matter under Spellissy's official responsibility as PEO-SP during May 2004.

and at Dkt 166 p. 10,

> Most importantly, Jones' and Rooney's testimony would not have negated probable cause to believe that when Spellissy was in Norway less than two years after his termination from the military as a consultant for NAMMO, Spellissy had reason to know that NAMMO's 70mm warhead had been a matter under his official responsibility within one year of his termination from service, as prohibited by §207(a)(2).

These conclusions are factually incorrect and probable cause is not legally found to exist. Spellissy *did not* represent NAMMO to the government at the 70 mm meeting or any meeting. Also, Spellissy's retirement date is 31 December, 2004 (Dkts 22, 38, 41, 121 and the Application for Search Warrant) and he does not fall under the jurisdiction of 28 U.S.C. § 207 until after 31 December, 2004. The effective measuring date for an 18 U.S.C. § 207 violation for Appellant is after 31 December 2004. Therefore, because Spellissy is still on active duty when he was assisting the government during the trip to Europe during November, 2004 he couldn't have possibly violated a post retirement statute.

There is an email in Dkt 38 from John Sztkiewicz, U.S. Army to Colonel Rupp, USSOCOM Inspector General that gives responses from an interview with Major Jackson:

> "It is my understanding that Mr. Spellissy is not an employee of NAMMO, he works for Rooney Group." (Dkt 38)

This statement directly contradicts Calvert's Affidavit which Jackson allegedly places Spellissy in Norway as a "NAMMO Representative." The Trial Judge is completely lost at its erroneous belief that Appellant was a NAMMO consultant in Norway or attended a 70mm meeting in Norway and has erred in his order at Dkt 166 for the second time because of *fraud* upon his court.

Finally, once the record of the court is factually correct with no prejudicial orders and Spellissy is given the opportunity to confront all of the government's witnesses in Court, there is no doubt that a new trial would produce a different result.

## III. WHETHER DISTRICT COURT JUDGE ERRED IN NOT GRANTING A NEW TRIAL BASED ON PROSECUTORIAL MISCONDUCT AND/OR THE PROSECUTOR CAPITILIZING ON PERJURED TESTIMONY.

AUSA O'Neill first approved Agent Calvert to get a search warrant based on a § 207 or § 208 violations when, by the his own admission, the effective date by which to measure these violations was going forward from the effective date of Spellissy's retirement on December 31, 2004. O'Neill states,

> "In order to determine whether defendant Spellissy violated the terms of his employment, and thus violated §§ 207(a) and (b) and 208(a), it was material for the government to state the date that defendant Spellissy retired. It is undisputed that defendant Spellissy retired from military service on December 31, 2004. Consequently, the restrictions on post-employment activities embodied in 18 U.S.C. § 207(a) and (b) are measured from that date, as opposed to the date that he no longer was involved in the procurement process which is meaningless." (Dkt 22, pages, 5-6)

Mr. O'Neill makes the same statements at Dkt 41, page 12 and at Dkt 121, page 120. Therefore, according to the AUSA's own admission, any violation of § 207 could have only occurred after the date Appellant actually retired from the military, December 31, 2004. Yet, Calvert with O'Neill permission presented the Magistrate Judge with an affidavit that alleged a violation of § 207 had occurred on the Norway trip, November, 2004 a month before Spellissy retired and a trip USSOCOM hired him for (Dkts 38, 158, 159, 160, 161), he had permission to work from his superiors (Dkt 38), he had secured ethics letters (Dkt 38) and he didn't even attend the USSOCOM 70mm program meeting (Dkts 158, 159, 160, 161).

This Court needs to know that O'Neill prosecuted Burke for perjury but he didn't prosecute Calvert.

At the end of the Franks Hearing (Dkt 44, p. 144) AUSA O'Neill stated,

> "They're [affidavits] normally drafted by non lawyers in a midst and haste of criminal investigation. Technical requirements of elaborate specificity, once exacted under common law pleadings have no proper place in this area. And so – and it goes on, of course, as Your Honor knows."

This statement is made to give the impression that Calvert was working alone and quickly to stop alleged criminal activity, when in reality according to their own documents (Dkt 158, Exhibit 3, March 9, 2005 DCIS Report) they were working together and had a least a five (5) weeks to properly investigate and prepare an affidavit. They had time to make phone calls and verify the information they had before they went to the Magistrate Judge to get the search warrant.

O'Neill did not turn over all exculpatory evidence to the defense before the trial. At trial, Burke testified that he gave investigators a copy of his and SDI's initial work agreement – "general services agreement." (Dkt 109, p. 359-360). No evidence or testimony was presented by the government to contradict Burke's statement. Justice is done when evidence favorable to the defendant is disclosed because such evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985).

All evidence given to the government is required to be disclosed to the defense. Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Spellissy should have received this agreement and other evidence as part of Discovery or per Jencks Act, 18 U.S.C §3500. At the trial, immediately after Burke made the above statement, AUSA O'Neill showed Burke a July 2005 contract document between Spellissy and Burke knowing that this is not the document that his witness was referring to. Burke explains that there are two separate signed agreements. (Dkt 109, p. 361). This is a

substantiated fact that the AUSA and/or his agents kept evidence from the Defendants. This agreement defines a legal agreement between Spellissy and Burke, *not a conspiracy*.

> "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. This is true whether or not the defense requests, specifically or generally, the exculpatory material. United States v. Agurs, 427 U.S. 97, 106-08 (1976).

In order to establish a Brady violation, the defendant bears the burden of establishing (1) that the prosecution suppressed the evidence, (2) that the evidence was favorable to the accused, and (3) that the evidence was material. The criteria for materiality is met only if there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed to the defense. United States v. Gonzalez-Montoya, 161 F.3d 643, 649 (1998) (quotation marks and citation omitted). The prosecution cannot overcome materiality by demonstrating that there was sufficient evidence to convict absent the undisclosed evidence. Kyles v. Whitley, 514 U.S. 419, 434-35 (1995). The gist of materiality is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Cf. Agurs, 427 U.S. at 112 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.").

The AUSA stated in his rebuttal at trial,

> "And there was also this ridiculous insinuation that the government knew about this stuff, his [Mr. Burke] claims of innocence and never said anything. Well, you recall in our opening statement, I told you right after October, right after the plea agreement, right after the press, he immediately started going south and changes his statements to everybody." (Dkt 111, page 867, line 22)

This statement is false. The AUSA never told the Jury in his opening statement that Burke was going "south and changes his statements to everybody." (Dkt 109, p. 187). In his opening statement, Mr. O'Neill never discussed the January 13, 2006 meeting (Defendants' Trial Exhibit 36) he had with Burke and his attorney, Mr. Hernandez. In the meeting notes, Burke tells O' Neill that he was unaware that he was a public official and was subject to restrictions, he voluntarily terminated his business relationship with Spellissy in December, 2004 before he became aware of the investigation. Burke also made it known to the AUSA before trial that USSOCOM government officials – and not Burke - determined the priority of proposals. (Defendant's Trial Exhibit 36). Burke also told the AUSA that he did not have decision authority on any USSOCOM acquisitions or contracting actions (Dkt 111, page 627) and there is no evidence in the record to contradict these facts. O'Neill gave the impression to the Jury on direct and re-direct examination that he was hearing all of this for the first time when Burke gave un-contradicted testimony.

AUSA said in his closing statement,

> "One of the questions that was asked was why did William Burke not

> get a check in February? You might recall that the inspector general began their investigation in January. That is why. No sense in accepting money after you're being investigated." (Dkt 111, page 868).

This is a false statement. O'Neill knows for a fact that the investigation began in early December, 2004. (Dkt 33-2). Mr. Burke was not aware of any investigation until mid or end of January, 2005. (Dkt 110, p436, line 16). Mr. Burke did receive two checks after the investigation was initiated, the first in January, 2005 and the second in July, 2005.

AUSA O'Neill states in his rebuttal closing statement,

> "One of those rules is what makes the whole intimidation of witnesses just absurd. Each time we deal with someone, we have to deal with their attorney. The law prohibits Agent Gorman from speaking to anybody unless their attorney's there when they're targets like this, or a defendant." (Dkt 111, page 868)

This is a false statement because Agents Calvert and Gorman interviewed Burke on May 10, 2005 without his attorney present. (Defendants' Trial Exhibit 3A) The Agents interviewed Spellissy on April 13, 2005 for several hours without an attorney present. (Dkt 165, Exhibit 1).

Another false statement by O'Neill to the Jury during closing argument is,

> "there was no evidence of any work done by Burke for SDI" (Dkt 111, p. 798, lines 15-25 and p. 799 lines 1-4).

Government's Trial Exhibit 29 is evidence to contrary to the AUSA's statement. In fact, this evidence demonstrated that Spellissy paid Burke for legitimate work, which directly acquitted Spellissy and SDI on the bribery

counts. (Dkt 72).

Mr. O'Neill gave his personal opinion to the jury calling Co-Defendant Burke a liar in his rebuttal,

> "A liar is a liar. And whether someone is lying to save their soul or their hide, they are still lying. And once you are a liar, you can not trust that person. And for Mr. Burke to have said what he said in this courtroom, he must have lied repeatedly before the other judge. Or as I said before, he told lies here and told the truth before others." (Dkt 111, p. 865-866)

Where the character and credibility of the defendant are at issue and the evidence allows the inference that the defendant has been less than truthful, the prosecutor does not err in closing argument by referring to the defendant as a liar. United States v. Catalfo, 64 F.3d 1070 (7th Cir.1995). It is highly improper for a prosecutor to call a defendant a liar. United States v. Rodriguez-De Jesus, 202 F.3d 482, 485 (1st Cir. 2000).

Government witness Dr. Uhler testified in a sworn statement to Defendant's legal counsel and USSOCOM Lawyer, LTC Steven Weir less than a month before the trial that Spellissy was hired back by USSOCOM as a paid contractor. (Dkt 161, p. 17). However, at trial, he denies having knowledge of it. (Dkt 111, p. 717-718). This is false testimony. He deliberately gave the jury the impression that Appellant was not a USSOCOM contractor. It is undisputed that Spellissy was a USSOCOM Defense Contractor (Defendants' Trial Exhibit 7 and Government's Trial Exhibit 3h, Dkts 38, 159). O'Neill gave false argument in his closing statement when he stated

"He's (Spellissy) not on the inside anymore. He needs someone, and that's William Burke" (Dkt 111, p. 798, line 3). Spellissy was on a contract to provide technical expertise to his former office, PEO SP and had the exact same badge as Burke for access to USSOCOM (Defendant's Trial Exhibit 7) and Jones' sworn testimony confirms this. (Dkt 159).

"A conviction obtained through use of false evidence, known to be such by representatives of the government," violates due process. Napue v. Illinois, 360 U.S. at 269 (1959). The same is true when the government, "although not soliciting false evidence, allows it to go uncorrected when it appears." Id. Once again, the rule applies even if the false evidence goes only to the credibility of the witness, id., and notwithstanding the good or bad faith of the prosecution. Giglio v. United States, 405 U.S. 150, 154 (1972).

## IV. WHETHER THE DISTRICT COURT JUDGE ERRED BY NOT FINDING THAT APPELLANT'S RIGHT TO CONFRONTATION WAS VIOLATED BY THE GOVERNMENT.

The District Court erred by not finding that Spellissy's Sixth Amendment right to confrontation was violated during "the Franks hearing premised on their inability to cross examine witnesses which Spellissy contends the Government never made available. (Dkt. 158, p. 3-4). Defendants' reliance on Crawford is misplaced. The right of cross examination is a trial right." (Dkt 166 p.3).

The "Confrontation Clause" right does not only apply to actual trial. The

confrontation clause applies to that portion of a criminal proceeding that can be *classified* as the trial. This guaranteed right applies to a defendant at any stage of the criminal proceeding that would enable the defendant to effectively cross-examine adverse witnesses. The Confrontation Clause serves to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in an adversarial proceeding. Ky v. Stincer, 482 U.S. 730, 737 (1987) (confrontation right designed to promote truth-finding function of trial and trial like proceedings). U.S. v. Watson, 76 F.3d 4, 9 (1st Cir. 1996) (confrontation right protected by giving defendant "full and fair opportunity to probe") U.S. v. Hamilton, 107 F.3d 499, 503 (7th Cir. 1997) (confrontation right allows trier of fact to observe witness's demeanor, impresses witness with seriousness of the matter, assures the identity of witness, and ensures that witness is neither looking at notes nor being coached).

The ruling in Ky v. Stincer, 482 U.S. 730, 740, 744 n.17 (1987) (confrontation right does not turn on whether stage is critical to outcome of trial), clarifies that a Franks hearing is exactly that a truth finding pre-trial proceeding which is a critical stage where the admission of hearsay evidence is allowed against a criminal defendant. In the instant case the Confrontation Clause guarantee was not afforded to Appellant to have the opportunity to confront the out-of-court declaration which was presented through the government's agent who has been found to be reckless in his presentations found in the affidavit for the search warrant. The person who

supposedly gave the only remaining incriminating statements was Major Jackson which was relied upon by the government, its agent and the Court. Jackson was not brought to court and allowed to be probed for the truth and either was Jones who's sworn statement the government has found to be "*in an important respect, materially differ*" from several prior interviews and his sworn deposition, which is shocking. (Dkt 165 p. 9, footnote 1).

The Supreme Court's Crawford v. Washington decision clearly made a distinction between "testimonial" and "nontestimonial" evidence. A statement is testimonial when in the totality of circumstances; police interrogation is not in response to an ongoing emergency, but rather to investigate past events potentially relevant to criminal proceedings. See Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006). The Court held that the admission of a "testimonial" hearsay statement(s) violates the Confrontation Clause unless the declarant is unavailable and the defendant has a prior opportunity to cross-examine the declarant. Id. Crawford, 541 U.S. at 68. Spellissy has established contrary to the government assertions that he made very diligent efforts to question and secure these witnesses for Franks hearing and even requested from the District Court and whom verbally ordered the government to make these witnesses available for the criminal proceedings and the government did not. This was clearly a bad-faith effort on the government's part to cause undue delay in the appearance of these witnesses. A witness is considered

unavailable if the government is unable, despite good faith efforts, to procure that witness's attendance" Ohio v. Roberts, 448 U.S. 56, 74 (1980) (overturned on other grounds by Crawford) See 541 U.S. at 60 and 68. Also see McCandles v. Vaughn, 172 F.3d 255, 267-68 (3rd Cir. 1999).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor" Id. U.S. Constitution Amendment VI. The Confrontation Clause protects a criminal defendant's right to cross-examine adverse witnesses, the Compulsory Process Clause grants a defendant the right to offer the testimony of favorable witnesses and to compel their attendance at trial and most importantly to show that the testimony is material and favorable to the defendant, not merely cumulative which the government has (undisputedly) provided in footnote 1, of its Opposition Motion. (Dkt 165). Due to the government's admission of new evidence of a witness statements and deposition being in its possession and same never being turned over to defense counsel which are extrinsic evidence of materially different statements than those presented to the District Court as newly discovered requires independent "in camera" review by the District Court in order to determine if it constitutes Brady, or Jencks material that should have been produced to Spellissy along with the rest of the discovery.

Contrary to the Court's Order is the fact that Crawford v. Washington does

apply in this proceeding because of Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975). Gerstein does not apply toward any proceeding that's held after initial appearance and preliminary hearings have been conducted pursuant to Rules 5 and 5.1. The proceeding that Crawford is being applied to is considered a pre-trial proceeding which is governed by Rule 12. , because Preliminary Examination may be conducted and ruled upon by a magistrate judge, however, motions to suppress must be made to the trial court judge as provided in Rule 12. See Fed.R.Crim.P. Rule § 5.1(a).

Suppression and Franks hearings are unlike the Gerstein hearing and the initial appearance, because it requires a higher level of formal trial like adversarial protections at which the defendant is entitled to be present as its considered a critical stage of the pre-trial proceedings, to cross-examine witnesses, and introduce evidence as these proceedings will directly affect any plea or trial hearing(s).

## V. WHETHER THE DISTRICT COURT JUDGE ERRED BY NOT GRANTING MANDATED RELIEF BECAUSE CUMULATIVE ERRORS OF RIGHT TO CONFRONT ACCUSER (S) AND PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

In the instant case 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. The government

admits to the existence of material differences or inconsistent testimony rendered by Jones' sworn testimony. The claims raised in this brief clearly prove that Spellissy was deprived of subjecting the prosecution's case to meaningful adversarial testing, as the government's misconduct of presenting knowingly false testimony and not presenting witnesses from which evidence was obtained denied the Appellant his right to due process under the law and to confront his accusers thereby making the adversarial process itself presumptively unreliable and this is reversible error per se. Id. Fifth and Sixth Amendments and Crawford, supra.

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 (11th Cir. 1996), quoting United States v. Perdicado-Cordobas, 981 F.2d 1206, 1215 n.8 (9th Cir. 1995); see also Ramseyer v. Wood, 64F.3d 1432 (9th 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 (9th 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.

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 (7th Cir. 2000); United States v. Haddon, 927 F.2d 942, 949 (7th 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 (10th Cir. 1990) (en banc); United States v. Rogers, 89 F.3d 1326, 1338 (7th Cir. 1996); Alverez v. Boyd, 225 F.3d 820,824 (7th 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 (5th Cir. 1999); United States v. Copple, 24 F.3d 535, 547 n.17 (3rd 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 trail. 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).

## VI. WHETHER THE DISTRICT COURT JUDGE ERRED IN NOT GRANTING RELIEF TO APPELLANT DUE TO ACTUAL INNOCENCE.

Relief is mandated due to actual innocence. Throughout the instant case at bar there is no material or testimonial evidence of any criminal activity by Spellissy or his company. The District Court erred when it stated that Spellissy's "actual innocence is not persuasive." (Dkt 166 p.11, line 13). Spellissy has demonstrated beyond a reasonable doubt that the Prosecutorial Misconduct occurred in this case due to cumulative false statements and deliberate misleading statements of facts and record which were so flagrant that it violated Spellissy's Constitutional Rights under the Due Process and Confrontation Clauses and pursuant thereto a fair trial was not heard or obtained.

It is indisputable that Prosecutors, Judges and all officers of the court must not only be scrupulously fair in the administration of justice, but must foster an aura of fairness and scrupulously refrain from injecting their credibility into part of the criminal proceedings. United States v. Brooks, 145 F.3d 466 (1st Cir. 1998), United States v. Salmeh, 152 F.3d 88 (2nd Cir 1998).

A prosecutor's duty in a criminal prosecution is to seek justice. Berger v.

United States, 295 U.S. 78, 88 (1935). A prosecutor is the representative not of an ordinary part to controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done, as such, a prosecutor is the servant of the law. Gannett Co. v. De Pasquale, 443 U.S. 368, 99 S. Ct. 2898 (1979). It is as much the duty of a prosecuting attorney to refrain from improper methods calculated to bring about a wrongful conviction as it is to pursue every legitimate means to bring about a just one. A prosecutor should "prosecute with earnestness and vigor", but may not use "improper methods calculated to produce a wrongful conviction." If the use of such methods "so [infect] the trial with unfairness as to make the resulting conviction a denial of due process." It may justify a mistrial or reversal of conviction. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. Dechristoforo, 416 U.S. 637, 643 (1974)); See also United States v. Young, 470 U.S. 1, 11-12 (1985).

The guarantee of due process protects citizens against (1) deliberate harm from Government Officials; (2) Prosecutor's sustaining a conviction through knowing use of perjured and false testimony or through the use of false evidence. Thompson v. Gladern, 109 F.3d 1358 (9th Cir. 1996), Schaff v. Snyder, 190 F. 3d 513 7th Cir. 1999).

The remedy for deliberate improper and misleading and fraudulent disclosure

under 18 U.S.C. § 1623 (a) and (c), statutory penalty provision is to punish the offending party in a contempt proceeding. U.S. v Schiavo, 375 F.Supp. 475, affirmed 506 F.2d 1053 (3rd Cir. 1974). False declarations were made throughout the entire affidavit relied upon to obtain the search warrant.

At the JNOV Hearing, 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 is very important statement because the plea agreement is the *only* evidence against Spellissy. Spellissy asserts that the failure of the District Court to review the claims based upon newly discovered evidence and fraud upon the court 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 (11th 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 (11th Cir. 1993).

Jones' and Rooney's testimonies along with the rest of the record provides substantial evidence that Spellissy is *actually innocent* meeting the requirements established in Schlup v. Delo, at 327. The Supreme Court's Actual Innocence Doctrine permits Spellissy to argue the merits of an otherwise defaulted constitutional claim if he can show "it is more likely than not that the reasonable juror would have found [him] guilty beyond a reasonable doubt and that in doing so the Court must consider all of the evidence before the court 'both old and new, incriminating and exculpatory, without regard to whether it would be admitted under the rules of admissibility that would govern at trial.'" The Court must then assess the likely impact of the evidence on reasonable jurors including, the court added, assessing the credibility of witnesses.

The Government failed to prove that there existed a conspiratorial agreement between the Spellissy and his company, SDI and then between them and Burke to commit an unlawful act. The Government indicted the Spellissy for conspiracy under 18 U.S.C. § 371, which requires the Government to prove the existence of a conspiracy by showing: (1) an agreement between at least two parties, (2) to achieve an illegal goal, (3) where the parties possess knowledge of the conspiracy and actually participate in the conspiracy, and (4) where at least one conspirator commits

an overt act in furtherance of the conspiracy. Thus, it is essential to a conspiracy charge that the Government is able to initially demonstrate that there was an agreement to do something illegal.

Spellissy and his company cannot have a conspiracy because they are the same person. SDI is one person and that is Spellissy. (Affidavit for Search Warrant). The indictment cannot properly charge conspiracy between the Appellant and SDI.

The indictment fails to cite sufficient materiality for Spellissy to argue because the indictment fails to sufficiently charge an offense. See United States v. Yefsey, 994 F.2d 855, 893-94 (1st Cir. 1993) (indictment repeating statutory language for mail fraud conspiracy insufficient because failed to allege plan to defraud as required by case law.). The conspiracy charged in the instant indictment cited multiple objects and means to wit "18 U.S.C. § 201 (b) (1) (A) and (B) and 2; / 18 U.S.C. § 1343, 1346, and 2." The indictment notification under Section B. The Agreement, the heart of the allegations cites no materiality or what specific actions were taken constituting the crime such as is required in paragraph "6 b. (1)" of the indictment. As to Section C., Manner and Means does not state any specific materiality. For example, paragraph 11 states,

> "It was further part of the conspiracy that defendant THOMAS F. SPELLISSY would and did provide illegal payments to William E. Burke for providing preferential treatment to certain projects."

This paragraph fails to state what kind or type of preferential treatment and which

certain projects. In paragraphs 7-10 there are no essential elements or materiality which is required to lawfully convict a person of the crime of defrauding the United States Department of Defense or Bribery of a Public Official. Where are the particulars in the indictment and what was the service sought and where does it state that it's illegal? As to Section D., Overt Acts cites dates and amounts of payments which were wired transferred from Spellissy and SDI to Carlisle Bradford Enterprises, however, the indictment completely fails to cite what fraud was committed, how any of his actions obstructed, impaired, and defeated the lawful government functions of the Department of Defense in the operation of its program in a manner that was dishonest, unfair, and unfree from deceit, craft, trickery, corruption, and dishonesty. In sum, the elements necessary to establish the offenses for 18 U.S.C. § 1343, 1346, and 2 are not charged in the indictment. (emphasis added).

At trial, on the stand, Burke completely disavowed any knowledge of a conspiracy and testified that he and the Spellissy never agreed or conspired to commit any unlawful act. (Dkt 72).

In his ruling denying the Spellissy's Motion for JNOV, or in the Alternative, Motion for New Trial as to the Conspiracy count, the District Court Judge stated:

> "The bottom line is there is ample evidence for this jury to have concluded, that is, a reasonable juror could have concluded, that proof of the conspiracy was established beyond a reasonable doubt. It did not require proof beyond that of the agreement to do something that was

> forbidden by law and some overt act in furtherance of it. (Dkt 113, p. 59, line 24).

This statement by the Judge is in contradiction to what a conviction under 18 U.S.C. § 371 requires. The first element and the essence of a conspiracy is the existence of an agreement to commit an unlawful act. Iannelli v. U.S., 420 U.S. 770, 777 (1975). Where there is insufficient proof that the defendant conspired with anybody, a conspiracy conviction will not be sustained. United States v. Parker, 839 F. 2d 1473 (11th Cir. 1988).

*Evidence* presented at Spellissy's trial clearly demonstrated that there never existed an agreement, legal or otherwise, between the Spellissy and his company and then to an additional alleged co-conspirator. 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.

On May 17, 2007, Spellissy took a polygraph test concerning this case. The test was administered by an independent agent. Spellissy passed the test. (See Dkt 125, Exhibit B, Polygraph Results). During the polygraph interview Spellisy stated, "Mr. Burke assisted his company [i.e. SDI] in doing research and he paid Mr. Bill Burke a total of $4,500.00." Spellissy also stated that "he has been accused of paying Mr. Burke that money, so Mr. Burke would give his company preferential treatment in obtaining contracts. That was not true. He has also been accused of planning with Bill Burke to defraud the United States Government, which is not true." A standard Zone of Comparison polygraph examination was conducted. The examination consisted of three charts and a Stem Test. 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? <u>NO</u>

> 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 *record* proves Spellissy did everything above board with respect to his actions concerning the government, his clients, Burke and the law. It is indisputed that Spellissy had disclosed his private business and had permission to work for his company from his government superiors, he had secured ethics letters, complied with the restrictions (Dkt 44) and now the Court knows he didn't attend the "70mm" meeting initially in question by Agent Calvert. (Dkt 159). It is indisputed that Spellissy was also a government contractor. Jones' testimony revealed Spellissy *saved the government $2 million on a contract* (Dkt 159) while at the *same time* he was allegedly conspiring to defraud the government. This is illogical. (emphasis added). The initial complaint by General (Retired) Hennies was lodged within days of Spellissy working for and saving USSOCOM $2 million on a contract. The complaint turned out to be unsubstantiated. Spellissy had equal or greater access to his former office and to USSOCOM than Burke. (Gov's Trial Exhibit 3, Dkt 159). Spellissy, not Burke traveled overseas to conduct sensitive Foreign Comparative Test business for the government. (Dkt 44, and Affidavit for the Search Warrant). It is undisputed that Spellissy disclosed his conflicts of interest to the government; he documented his two agreements with Burke in two separate contracts (one not

disclosed by the government), reported Burke's income on Form 1099 and reported it to the Internal Revenue Service and had the work product for the legitimate and lawful work Burke performed. (Dkt 72, p.3). This means that paragraphs 7 and 8 of the indictment are false. It is undisputed that there is no evidence of preferential treatment given to Spellissy by Burke confirmed by Pettigrew's testimony at trial. This means paragraph 10 of the indictment is false. Burke denied any agreement to do anything illegal and at trial stated that Spellissy never asked him to do anything illegal. (Dkt 72). Furthermore, Spellissy passed a polygraph test which as a minimum corroborates all of the above facts. The government presented no evidence on how Burke can actually provide preferential treatment. There is no evidence that Burke was in a position with the authority to do what the government alleges. Burke cannot approve, disapprove, rank or change an acquisition proposal for testing and no witness testified that he could do this. Mr. James Santa Lucia, Sentel Corporation, sworn testimony is as follows:

> 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, sworn testimony is as follows:

> 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, without question Burke was not in a position or had the authority to do anything to benefit Spellissy or SDI.

It is not illegal for Burke to ask for job, it is not illegal for Spellissy to entertain such a request, it is not illegal for them to discuss employment opportunities, it is not illegal for Burke to turn down a job, it is not illegal for Burke to work part-time. It is not illegal for Burke to leave Sentel Corporation and go to work for SDI.

At the JNOV hearing the Trial Judge found circumstantial evidence to convict Spellissy and his company for conspiracy by finding that they "*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). However, Spellissy was *not charged in the indictment with conspiracy to commit mail fraud.* Spellissy was charged with conspiracy to commit wire fraud, § 1343. Mail fraud consists of

violations against these statues, 18 U.S.C. 1341, 1342 & 1345; 39 U.S.C. 3005 & 3007 which were not charged in the indictment, therefore, Spellissy 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. According to Jones, Lucia and Snellegrove, there is no action Burke can take to benefit Spellissy. How can Burke's honest services be compromised if he can't benefit Spellissy? There is no mention in Count 1 of 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 mention of 18 U.S.C. §§ 1346, and 2 in the jury instruction for the conspiracy count. (Dkt 58, p. 8-13 & Dkt 111, p. 879-886). Spellissy cannot be found guilty of a crime not properly charged in the indictment or not properly instructed to the jury.

The District Court 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 "In sum, when these offenses were committed, Defendant Spellissy was retired from active duty." (Dkt 146, p.6, line 10). It is undisputed that Spellissy

retired from active duty on December 31, 2004. There is no evidence in the record after December 31, 2004 that a juror could find beyond a reasonable doubt that Spellissy knowingly and voluntarily participated in the conspiracy, that the object of conspiracy was illegal and that an overt act was committed in furtherance of the conspiracy. Paragraphs 14, 15, 16 and 17 of the indictment are the only cited events in the indictment after 31 December, 2004. These events are not sufficient for a juror or the court to convict Spellissy of conspiracy to commit any fraud upon the government, 18 U.S.C. § 371. The second agreement between SDI and Burke was for work starting on July 1, 2005 which is after Burke left Sentel Corporation and this is not charged in the indictment.

## CONCLUSION

The Appellant respectfully requests this court to reverse his conviction for conspiracy by either finding that Spellissy's Motion to Suppress should have been granted because of fraud upon the court and/or no probable cause existed for the search. The Appellant further urges this Court to find that his Sixth Amendment right to confront the witnesses against him was violated, thus also requiring a reversal of his conviction.

Should this court not reverse Spellissy's conviction for conspiracy from actual innocence, Spellissy respectfully requests the court grant a new trial based on

Prosecutorial Misconduct and/or for the prosecutor capitalizing on perjured testimony.

There are also two Brady violations. Under the Fourteenth Amendment, it is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. These violations are an abuse of discretion and this Court can vacate the conspiracy count because of due process of law violations by the prosecutor. There is more than a reasonable probability with this evidence Spellissy would have been acquitted. The fact is a lawful contract was agreed upon by Spellissy and Burke and is in possession of *only the government* and this “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Johnson v. Alabama, 256 F.3d 1156, 1189 (11th Cir. 2000).

Twice the District Court cited lack of due diligence by Appellant’s trial attorney for not producing witnesses at the Franks hearing and trial. These cumulative errors adversely affected Spellissy’s right to have a fair trial and are also grounds for a new trial based on ineffective assistance of counsel. There is no question that these witnesses were sought for interviews, Franks hearing and trial. Either they were prevented from testifying by the government or by lack of due diligence by the trial attorney. The fact remains by the absence of these critical witnesses, Spellissy’s due process and confrontation rights were violated and a new

trial should be granted to correct a serious miscarriage of justice.

In the event the Court does not grant any of the above relief, then we ask this Court to give permission to file an initial 28 U.S.C. § 2255 because of Constitutional violations which have not been heard upon the merits and ruled.

Respectfully Submitted,

*/s/ John F. McGuire*
John F. McGuire

DATE: October 17, 2008

## 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 17th day of October, 2008. I also hereby certify that, in compliance with 11th 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 October 17, 2008.

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