

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 09-14066-EE

UNITED STATES OF AMERICA,
Appellee,

Vs.

THOMAS SPELLISSY,
Defendant-Appellant.

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

REPLY BRIEF FOR APPELLANT
THOMAS SPELLISSY

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DATE: November 4, 2009

United States v. Thomas Spellissy

Appeal No. 09-14066-EE

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

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned attorney hereby certifies that the Certificate of Interested Persons contained in Appellant's Brief is complete, and incorporates same into Appellant's Reply Brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The Appellant certifies that this brief contains 6,973 words in Times New Roman 14 point font.

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INTRODUCTION

Appellant agrees with the Government's Statement of Jurisdiction that this appeal does not need a Certificate of Appealability (COA) and Appellant gives notice to this Court that the Government did not oppose that a COA is needed for any of the issues raised in Appellant's Brief.

First, it is necessary to point out that the Government's Brief has false and misleading statements in their Statement of the Case.

At page 3, the Government states that Spellissy and his company were charged with "committing offenses stemming from Spellissy's activities in inducing a public official, William E. Burke, at MacDill Air Force Base in Tampa to obtain work for private contractors that were SDI's clients." The word "inducing" and the phrase "to obtain work for private contractors that were SDI's clients" are not charged nor even mentioned in the indictment. (Dkt 1). If the Government is suggesting that the phrase "to obtain work for private contractors that were SDI's clients" is how Burke would allegedly "provide preferential treatment" to Spellissy's clients, then without question the Government is flatly wrong because there is not one word in the record concerning a request from Spellissy to Burke to obtain work from Burke in his official capacity at USSOCOM for Spellissy or SDI's clients.

At page 3 of the Government's Brief they fail to mention that there were not

only redactions but also “omissions of the truth” found in the affidavit for the search warrant. (Dkt 44).

At page 4, the Government states, “The district court left the conspiracy conviction intact. Doc 113 at 64.” This is not a true statement and Appellant respectfully disagrees. At Dkt 113, page 64 the District Court is giving its analysis and finding with respect to the Alternative Rule 33 motion at the Judgment notwithstanding the Verdict (JNOV) hearing. The District Court states,

“As to Count One, the conspiracy, the Rule 33 motion is denied. The conspiracy count can stand on its own on the emails that I have alluded to, specifically Government’s Exhibits 10, 11, 12 and 28.”

However, the District Court is specifically referring to the addition of conspiracy to commit “mail fraud” which was added as an additional object to the conspiracy count when at Dkt 113, page 57 the District Court stated,

“Count One in this case alleges that Mr. Spellissy and SDI, along with the unindicted coconspirator, Mr. Burke, conspired to commit the offense of mail fraud, as well as bribery by, in effect, having Mr. Burke provide preferential treatment to contractors represented by Mr. Spellissy and SDI.”

At Dkt 113 pages 57- 60, the District Court describes how Government’s circumstantial evidence, Exhibits 10, 11, 12 and 28 may have led a reasonable juror to infer that there was a conspiracy to commit mail fraud. The District Court states,

“These emails evidence an agreement to engage in a business, which the jury found and could reasonably find would have

deprived the United States of the honest services of Bill Burke, that is mail fraud.” (Dkt 113 p. 60).

Therefore, the Conspiracy Count was expanded at the JNOV hearing when the District Court added mail fraud and the deprivation of the United States’ right to William Burke’s honest services to the conspiracy count in the indictment. This expansion is known as a constructive amendment.

At page 9 of the Government Brief, the Government states that probable cause was determined following the Franks hearing for an alleged violation of 18 U.S.C. § 207 (b)(1). At Dkt 44 p. 12 the District Court found that,

“Excluding the false and reckless statements discussed, probable cause for a § 207 (a)(2) violation remains on the face of the affidavit.”

Probable cause was found for an alleged violation of 18 U.S.C. § 207(a)(2) not 18 U.S.C. . § 207 (b)(1) as the Government has erroneously stated in its facts. Also, the issue of probable cause is the subject in a concurrent 11th Circuit Panel Rehearing for Appellant’s previous appeal, Case No. 08-15208-E. Appellant’s primary concern for Panel Rehearing is to ensure that the Court has a clear understanding of the undisputed facts of this case and that these actual facts are incorporated into the Panel’s record when it makes their opinion.

At page 9 of their brief the Government states that Burke was “working as the Supervisor of the Comparative Testing Office.” This statement is false. Burke worked in the USSOCOM Comparative Test Office supervising two other employees

from his private contracting firm. The USSOCOM Comparative Test Office is supervised by a Lieutenant Colonel who is in fact a Government employee. (Dkt 111, p. 651, Dkt 38). Burke only supervised the contractor employees from his employer not government employees which is prohibited by the Federal Acquisition Regulation 7.503.

At page 9 of its brief the Government states, “Burke had agreed to work for Spellissy, while he had continued in his job at SOCOM.” This is a misleading statement. Burke worked 45 hours for Spellissy on specific tasks for a specific contractor and the work was ruled as legitimate by the District Court in which there was no conflict of interest with Burke’s contractual duties with the Government. (Government’s Trial Exhibit 4B-4C and Dkt 72).

At page 10 of its brief the Government states,

“The evidence showed further that by September of 2004, Burke had begun to exchange e-mails that revealed that Burke had agreed to use his role as the supervisor of the Comparative Testing Office to attempt to influence the awarding of government contracts on behalf of Spellissy’s clients. See Gov’t Exs. 7-15. In a series of emails, Spellissy had told Burke which companies’ projects to pursue, Burke had touted his ability and efforts to influence the contract award process on behalf of Spellissy’s clients, and Burke had complained that certain clients were not fairly compensating Burke and Spellissy for the work that Burke had done on their behalf. See Gov’t Exh. 9, 10, 11, 12. This evidence established that Spellissy and Burke conspired to defraud the United States and to commit the offenses of bribery and wire fraud.”

The foregoing paragraph is the Government’s initial theory, it is not fact, it is the

Government's interpretation of the emails and it is misplaced in their brief. The foregoing paragraph is misleading this Court of the facts established in the record. In September 2004, Spellissy and his company had no clients. (Government Trial Exhibits 3A-3M). Therefore, Burke would be unable to influence contracts for Spellissy's clients when none exist, further, there is no evidence in the record that Burke can influence the contracting process. (Dkts 110, 111, 114, 173, 174). Also, for the first time, the Government's position is that "it is not material to the issues before the Court, regardless of whether Burke had the actual ability to influence the awarding of contracts." (Government Brief p.15). On October 1st and 2nd, 2004 SDI [Spellissy's company] had three clients and none of them had products, proposals, projects or contracts with the USSOCOM Comparative Testing Office nor were they planning to submit anything to the USSOCOM Comparative Testing Office. (Government Trial Exhibits 3A-3M). From September 2004 until October 21, 2004 Spellissy was still on active duty and working for his former office in fighting the war on terror. (Dkt 38, Dkt 121 & Dkt 159). Spellissy obtained and was granted permission from the Government to work for his newly formed company while on leave. (Dkt 44, Dkt 113 & Dkt 121). On October 21, 2004 Spellissy became a consultant to USSOCOM (Government Trial Exhibit 3h, Dkt 38 & Dkt 121 p. 28) and they issued him a top secret clearance badge (Defendant's Trial Exhibit 7). Spellissy also traveled to Europe as a Government contractor and performed work for

the Government on unclassified and a critical classified USSOCOM Foreign Comparative Testing program. (Dkt 38, Dkt 121, Dkt 159 & Dkt 160). Spellissy continued working for the Government assisting the USSOCOM Ammunition Program Manager in combat operations as evidenced in Jones' sworn testimony. (Dkt 159). The USSOCOM Comparative Test Office is not supervised by Burke, it is supervised by a Lieutenant Colonel. (Dkt 111, p. 651, Dkt 38). Burke cannot influence the contracting process at USSOCOM. It is unconditionally prohibited by the Federal Acquisition Regulation. (Appellant's Brief, p. 24). Chan and Allgrove state in their affidavits that Burke has no authority in the acquisition process. (Dkts 173 & 174). 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. (Dkt 191). These affidavits are fatal to the Government's theory as alleged in the indictment. The Government does not dispute the factual basis of these affidavits in their brief. Also, at trial Government witness James Pettigrew testified that there is no evidence of preferential treatment by Burke to Spellissy's clients before or after they became Spellissy's clients. (Dkt 111 p.680). Therefore, it can be reasonably concluded that Burke's puffing and complaints in his emails are simply false and he confirmed this giving un-contradicted testimony at trial. (Dkts 110 & 111). Also, the record shows that Mr. James Santa Lucia and Mr. Charles Snellgrove, of the Sentel

Corporation [the Company that Burke was employed by], gave sworn testimony that Burke does not make decisions or influence the acquisition contract process. (Appellant's Brief p. 28-29). Burke was a private contractor who possessed no authority and his influence on the process was not even identifiable as Dr. Uhler, USSOCOM's Acquisition Executive testified. (Dkt 114, p. 33). If those emails could stand alone, then the Government would have never called Burke to the stand to testify.

As discussed in Spellissy's initial brief, and as discussed further, Spellissy's conviction for conspiracy should be granted a new trial or vacated in the interest of justice because he is factually innocent of the conspiracy charged in the indictment.

ARGUMENT AND CITATIONS OF AUTHORITY

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

The Government presented no argument in its opposition motion, Dkt 191 to Appellant's motion under this appeal and there is no argument in opposition of Appellant's Brief p. 19-38 that Appellant is factually innocent of the conspiracy as charged in the indictment and innocent of the additional conspiracy charge of mail fraud which resulted in the offense of conviction during the JNOV hearing. As previously mentioned in the Introduction of this Reply Brief the Trial Judge constructively amended the indictment by adding conspiracy to commit mail fraud, thus depriving the United States of the intangible right of William Burke's honest services when he could not find any evidence for the conspiracy objects as pled in the indictment. "A constructive amendment occurs when the essential elements of the offense as alleged in the indictment are altered to broaden the potential bases for conviction beyond what the indictment contains." *United States v. Tampas*, 493 F.3d 1291 (11th Cir. 2007) (citing *United States v. Narog*, 372 F.3d 1243, 1247 (11th Cir. 2004); *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990)); see also *United States v. Ward*, 486 F.3d 1212, 1227 (11th Cir. 2007). A constructive amendment of the indictment constitutes *per se* reversible error because it violates a defendant's Fifth Amendment right to be tried on charges presented to the grand jury. See *United States v. Tampas*, 493 F.3d 1291 (11th Cir. 2007) (citing *United States v. Weissman*,

899 F.2d 1111, 1114 (11th Cir. 1990)). Under the Fifth Amendment, “a defendant can only be convicted for a crime charged in the indictment. It would be fundamentally unfair to convict a defendant on charges of which he had no notice.” *Ward*, at 1227 (citing *Keller*, at 632-33). The conviction should be reversed.

II. THE DISTRICT COURT DID ABUSE ITS DISCRETION BY DENYING SPELLISSY’S MOTION FOR A NEW TRIAL.

The Government states in their Brief p. 20

“Spellissy never complained to the district court that he was having difficulty obtaining testimony that he required or sought assistance from the district court in those efforts, despite that the district court instructed the United States to make all government witnesses available to Spellissy and offered the court’s authority to compel the attendance of witnesses who refused to cooperate.”

This statement is false. Spellissy’s trial counsel told the District Court less than two months before trial,

“We’re having trouble talking to DOD personnel. Everyone involved in this case is a Department of Defense employee, I’m sure, or a former employee. I got a email that was sent out to everybody that says they can’t talk to me. They’re naming – I believe they’re naming me by name, but certainly they’re naming Mr. Spellissy by name. They can’t talk to Mr. Spellissy’s lawyer without a DOD lawyer being present and without permission. Whose permission thus far has not been disclosed to me. This is one of those things that my experience tells me if they want me to get information, I’ll get it. If they don’t want me to get information, I’m not going to get it. There’s no way I can find – there’s no way I can find my way through the CFRs to some people’s satisfaction.” (Dkt 171 p. 8-9).

The United States Army did not let the defense trial counsel have access to any of its government personnel and this is evidenced by when defense trial counsel subpoenaed Sergeant Jack Landers for trial. (Dkt 125). The Army ordered Sergeant Landers not to honor his subpoena. This conviction should have been reversed because Landers would have undermined the Government's case. *United States v. Stephens*, 365 F.3d 967 (11th Cir. 2004) (Defendant was prevented from calling witnesses that undermined government's case). The correspondence refusing to let Sergeant Landers appear for Appellant was sent from the United States Army dated May 3, 2006 mailed by first class, received by Appellant's trial counsel on May 11, 2006 and not seen by trial counsel until May 15, 2006, three days after the trial. The correspondence is at Dkt 125-3. These are the tactics the Government used to prevent defense counsel from interviewing and or subpoenaing witnesses for trial totally ignoring the Court to make witnesses available after a status conference hearing on March 10, 2006. (Dkt 171). In this case the Government was able to interview any witness they chose. It was not the same for defense counsel. It is disingenuous for the Government to now use a defense when these witnesses that were granted permission to talk to counsel *after* trial by the Government or have come forward on their own risk is not new evidence. Now that the truth has surfaced the Government uses procedural bar to their advantage to sustain the conviction of Appellant who is factually innocent. Appellant does realize that unless this Court recognizes the

deceitful tactics to include the gross prosecutorial misconduct by the Government in prosecuting this case Appellant may never attain justice. This case presents a scenario analogous to if a defendant were convicted, after a constitutionally unflawed trial, of murdering his wife, and then came to the District Court with his very much alive wife at his side, and sought a new trial based on newly discovered evidence (namely that his wife was alive), the District Court and the prosecutor of this case would tell him, in effect: “Look, your wife may be alive as a matter of fact, but as a matter of constitutional law, she’s dead, and as for you, innocent defendant, you’re dead too, since there is no constitutional right not to be executed merely because you’re innocent.” Yes, it is a fact that Appellant knows witnesses Chan and Allgrove [and Don Jones who was sent to Iraq] and was confident on how they would testify but Appellant did not know if they would testify and would the Army let them testify. However, at trial the Government did not prove their case and this became clearly evident at the JNOV hearing. At the JNOV hearing the trial judge found that there was no evidence presented by the Government that a juror could reasonably find the Appellant guilty of the conspiracy as charged in the indictment. (Dkt 72 & Dkt 113). (Emphasis added). For some unknown reason, the trial judge constructively amended the indictment by adding to the conspiracy charge, conspiracy to commit mail fraud, thus deprive the United States of the intangible rights of Burke’s honest services and found Appellant guilty of this charge through circumstantial evidence. Thus,

Appellant was not properly noticed as to this charge in the indictment and therefore was not constitutionally afforded the right to defend himself against the mail fraud conspiracy until after trial. These witnesses along with other evidence in the record provided the evidence needed by Spellissy to defend him against this additional object of the conspiracy that he did not conspire to commit honest services mail fraud.

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

For the first time in the history of this case the Government now raises as a defense in its Brief that the District Court made an “inadvertent misstatement describing the conspiracy count of conviction in a post-conviction order.” (Government’s Brief p. 15 & 23). It is difficult to fathom the Government’s new strategy. The definition of inadvertence in Black’s Law Dictionary is “An accidental oversight; a result of carelessness.” Appellant asserts that now the Government’s position is that the District Court was careless in finding Appellant guilty of conspiracy to commit mail fraud, thus depriving the United States of the intangible right of Burke’s honest services. The Government states in their brief at p.24, “Simply put, Spellissy was not convicted of a conspiracy to commit mail fraud.” This statement by the Government is directly contradictory to the District Court’s finding at the JNOV hearing. (Dkt 72 & Dkt 113). Appellant agrees that he should have not been convicted of conspiracy to commit mail fraud because there is not a single piece

of tangible evidence or circumstantial evidence where a reasonable juror can infer beyond a reasonable doubt that Spellissy requested Burke or that Burke agreed to take official action on Spellissy's behalf. (Dkt 72). At page 10, Governments Brief, the Government selectively cherry picks five (5) statements made by Burke in an email, however, there is no evidence that Spellissy ever acted on Burke's demands and the Government's own witness, Pettigrew testified that Burke's claims of preferential treatment were not true. (Dkt 111 p. 680).

A very in-depth review and analysis of the instant case took place during the JNOV hearing in which the District Court stated, "The only credible testimony from Bill Burke is that he denied the criminal conspiracy, denied bribery." (Dkt 113 p. 14). There is no question that the Trial Judge disturbed all the findings of the jury as evidenced in the following:

The Trial Judge is very clear to what the offense of conviction was. At the JNOV hearing the District Court's finding was,

"These e-mails evidence an agreement to engage in a business, which the jury found and could reasonably find would have deprived the United States of the honest services of Bill Burke, that is mail fraud." (Dkt 113 p. 60).

In the JNOV Order, the trial judge stated,

"As to Count One (Conspiracy), the evidence introduced, including Government's Exhibits 10, 11, and 12, sufficiently established that these Defendants and William Burke, an unindicted co-conspirator, agreed to commit the offense of mail fraud, that is, deprive the United States of the intangible right of

William Burke's honest services, that the Defendants knew of the conspiratorial goal and that Defendants voluntarily participated in accomplishing that goal.” (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).

and stated to Appellant,

“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).

The Government is flip flopping by stating that “Spellissy was not convicted of conspiracy to commit mail fraud.” (Government Brief p. 24). The prosecutor, at the JNOV hearing, after the Trial Judge gave his analysis of the case, changed his argument from conspiracy to commit bribery and wire fraud [property and money] as evidenced in the jury instruction which the prosecutor authored,

“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).

to argue for a mail fraud conviction because he was reading into what the Trial Judge stated in his analysis. At Dkt 113 p. 39 line 19, AUSA O’Neill stated,

“Shows that Mr. Burke is not giving his honest services and providing his honest services to his employer, that being Centel [sic] and through Centel [sic], SOCOM, but instead, he’s doing it on behalf of Mr. Spellissy. And we have payments to prove that, Your Honor. That in a nutshell is the government’s theory on the conspiracy to defraud the United States.”

This roaming theory of the prosecution did produce trial error of constitutional proportions. *Russell v. United States*, 369 U.S. 749, 768 (1962) (ill-defined charges leave “the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal”). Even with the additional mail fraud object added to the conspiracy; there are issues that guilt cannot be established beyond a reasonable doubt. First, the AUSA is arguing that the target of the conspiracy is that Burke is not giving his employer, Sentel Corporation, his honest services. This would be private sector honest services mail fraud. Sentel is not even named in the indictment. (Dkt 1). The theory that Sentel is being deprived of its right to Burke’s honest services is not charged in the indictment. (Dkt 1). Second, this Court has held that the United States must be the target of a conspiracy to defraud under 18 U.S.C. § 371. *United States v. Mendez*, No. 07-13443, 2008 WL 2117607, *5 (11th Cir. May 21, 2008) (*per curiam*).

There is no evidence that the United States Department of Defense owns Sentel Corporation, Jacobs Sverdrup, or SDI. Spellissy’s Government consulting contract is through Jacobs Sverdrup. (Government Trial Exhibit 3h). Sentel Corporation and Jacobs Sverdrup have contracts [and so does the majority of

Spellissy's clients] with the Department of Defense to provide services according to what their contract agreements are. However, the Sentel and Jacobs Sverdrup contracts with the Government are not in the record. But the record substantiates that Burke and Spellissy were working for the Government on private contracts which according to the evidence, both were giving their honest services to the *Government*. (Dkt 111 & Dkt 159). Also, absent from the indictment is that there is no allegation suggesting the presence of legally cognizable fiduciary duties owed by Sentel Corporation to the Department of Defense. The Government advanced no argument that the indictment supports that theory; instead the Government could rely solely on the duty of "good faith and fair dealing" inherent in a contract. However, the fact that a contract imposes a duty of good faith and fair dealing does not, without more, create a fiduciary relationship. Since, the contract is not in evidence, the Court doesn't know and Appellant avers that the contract itself does not purport to impose any fiduciary duty on Sentel Corporation. There is no evidence in the record that the Government even suggested that Sentel Corporation was a Department of Defense fiduciary because it acted as the Department of Defense's agent under a contract. The indictment did not contain any allegations suggesting that Sentel Corporation had a relationship with the Department of Defense of the type that is regarded by state or federal law as imposing a fiduciary duty upon the agent. Instead, the allegations of the indictment indicate that there was a contractual relationship between a private

contractor and Department of Defense, which obligated Burke to be assigned to USSOCOM. (Dkt 1). Because the indictment contained no facts suggesting that Sentel Corporation owed a fiduciary duty to the Department of Defense, this Court can conclude that the indictment did not have sufficient facts to allege the conspiracy of honest services mail fraud in the Conspiracy Count. To establish honest services mail fraud in a private-sector case, the Government must present sufficient evidence for a reasonable juror to conclude beyond a reasonable doubt that the defendant “intended to breach a fiduciary duty, and that the [defendant] foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.” *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999), *cert. denied*, 530 U.S. 1264 (2000). Burke may have had a fiduciary relationship with Sentel, however, the indictment did not reference a conflict of interest or allege that he had failed to disclose any such conflict or that Sentel has a policy to report conflicts of interest.

Given the foregoing facts and the mail fraud argument presented by the prosecutor, if a juror was to read the alleged emails the Government has presented to suggest that there is a conspiratorial mail fraud agreement against the United States through Sentel Corporation then a juror must infer that the emails in evidence are all connected to each other discussing the same goal, infer that that goal is illegal, infer an agreement, infer that Burke is sending them in his private capacity, infer that

Burke is seeking an undisclosed private gain from his Sentel and Government contractor duties, infer that the subject matter is against the corporate goals of Sentel, infer that Sentel has a fiduciary relationship with the Department of Defense, then infer that the ultimate goal of the conspiracy is mail fraud is aimed at the United States and infer that there is are conflicts of interest between Burke, Sentel, and the United States while simultaneously inferring that Spellissy is receiving and sending emails in his private capacity not as a government consultant, infer he agrees to same illegal goal as Burke, infer that he is not working on any of other government contracts outside of Jacobs Sverdrup, infer that he is seeking to first deprive Burke of his honest services to Sentel and then infer that through Sentel, Spellissy is conspiring to ultimately defraud the United States in an undisclosed conflict of interest even though he has disclosed all of his clients to the Government. The Government cannot build its case on “inference upon inference . . . mere suspicion[,] and innuendo.” *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992). To convict Spellissy of conspiracy to commit honest services mail fraud, a jury would have to find beyond reasonable doubt that Spellissy believed Burke to be taking official action for their [Spellissy and/or Burke] own personal gain after Burke gave un-contradicted testimony at trial that he couldn’t make decisions on behalf of the Government. Testimony by Santa Lucia, Snellgrove, Chan, Allgrove, Jones and

Uhler confirm that Burke cannot influence the acquisition process and there is no evidence that Spellissy asked Burke to take any official action on his behalf.

There is no evidence in the record that Spellissy conspired to *defraud* the United States and the District Court stated,

“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).” (Dkt 72).

On the contrary there is evidence that Spellissy was working in the United States’ best interests as evidenced that he saved the Government approximately \$2M on a classified program while he was performing consulting services on behalf of the Government on the European trip and that he was also assisting Don Jones, Program Manager for Ammunition, USSOCOM on ammunition requirements that were requested by soldiers fighting the war in Iraq. Jones testified that he spent two weeks with Appellant filling equipment in Iraq that the soldiers in combat needed. (Dkt 159 p. 30). Don Jones’ sworn testimony is substantial evidence that Spellissy had the same goals as the Department of Defense, thus there was no conflict of interest with the United States. (Dkt 159). The Government knows this and this is why they did not turn the alleged taped interview of Don Jones over to defense counsel. (Appellant’s Brief p. 50). Also, according to Government witness James Pettigrew

who conducted an investigation and testified at trial, Burke provided no preferential treatment to Spellissy. (Dkt 111). But, the Government alleges in the indictment that preferential treatment was already given. (Dkt 1). Appellant agrees with the Government that he did not conspire to commit mail fraud, thus deprive the United States of Burke' honest services. (Government's Brief p. 24). Third, the payments alluded to in the prosecutor's theory were found to be legitimate payments for legitimate work. (Dkt 72 & Dkt 113). Fourth, no one testified that any of the evidence presented by the Government at trial to include the emails was fraudulent and targeted against the United States.

IV. 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."

It is without question that prosecutor's character has come into question concerning his opening, closing and rebuttal remarks made to the jury and concerning the conduct of the lead investigator, Special Agent Calvert, Colonels Kruelski and Rupp from the USSOCOM Inspector General Office, Government witnesses William Burke and Dr. Dale Uhler, USSOCOM Acquisition Executive. In sum, either the District Court or Appellant has identified false, misleading and/or omissions of fact in statements made by these Government's witnesses. Government witness Burke is the only person that has been prosecuted for his false plea during the investigation of this case. (Government Brief p. 5). Burke's false plea was introduced as credibility

evidence to attempt to impeach Burke's testimony at Appellant's trial which the prosecutor knew that the plea was false before he called Burke to the stand. (Dkt 111 and Defendants' Trial Exhibit 36). The prosecutor had been told by trial defense counsel, Burke's trial counsel and by Burke himself before trial that Appellant was innocent and for some unknown reason the prosecutor simply ignored what his own witness was telling him. The District Court did not even conduct an evidentiary hearing to investigate this set of facts. The others who have demonstrated misconduct in this case have been given a pass by the prosecutor to include Agent Calvert who was found to have knowingly presented false information to the Magistrate Judge. (Dkt 44). The District Court has refused to investigate the fraud upon its Court that has resulted in factually incorrect findings and orders which has greatly prejudiced Appellant. (Dkt 44 and Dkt 72).

Appellant has asserted and laid out in his Brief, pages 41-49, why and how the prosecutor is now a witness in this case and alleges professional misconduct to include federal crimes that have been committed by the Government during the prosecution of this case.

There is no question that Del Fuoco's affidavit attacked the credibility of the AUSA prosecuting this case. Even more troublesome for the Government prosecutor is that Del Fuoco alleges that there are three other AUSAs from the prosecutor's office who support Del Fuoco's allegations. The Government has provided no

substantive evidence that Del Fuoco is not telling the truth. The purpose of filing Del Fuoco's Affidavit is not to support Del Fuoco's alleged personal vendetta against the prosecutor. Appellant's response motion has connection to this case and it should not be struck from the record because Appellant has a constitutional right to confront a witness who has accused him of a crime by vouching through a plea bargain document that he is the signatory on.

V. NEW EVIDENCE SUBSTANTIATES NO PROBABLE CAUSE
EXISTED FOR SEARCH WARRANT

Agent Calvert's affidavit, drafted in concert with AUSA O'Neill, (Dkt 158, Exhibit 3) clearly made an effort to characterize the Norway meetings, which took place before Spellissy's retirement, as the origin of the alleged violation for which probable cause was said to exist. (Dkt 21, Ex A, Affidavit for Search Warrant p.3-6). Because Spellissy could not have violated 18 U.S.C. § 207, or § 208 for that matter, before his retirement date had passed, the District Court erred by failing to recognize this material fact and this error is plain error. "Plain error is, by its terms, error which is so obvious and substantial that it should not have been permitted by the trial court even absent the defendant's timely assistance in detecting it." *United States v. Prieto*, 232 F.3d 816, 823 (11th Cir. 2000). The Government concedes in their Brief at p. 8 that Agent Calvert stated "he [Calvert] had received information showing that, before Spellissy's retirement, Spellissy had represented a foreign interest (NAMMO) through SDI to influence the awarding of future government contracts." Even though

this alleged statement is not true (Government Trial Exhibits 3A-3M), Calvert cannot obtain a search warrant for the purpose of probable cause using statutes for post retirement violations when the alleged act occurred before retirement.

Almost all of Agent Calvert's and AUSA O'Neill's affidavit for the search warrant is filled with false statements made with a reckless disregard for the truth and contains omissions of the truth. (Dkt 44). Trial Defense counsel has already proved at the Franks hearing that at the very least, Agent Calvert lied and has no credibility. (Dkt 44 and Dkt 121). This certainly is the reason why AUSA O'Neill did not call his lead agent to testify at the trial. The alleged taped interview between Colonel Rupp and Don Jones is discussed in Appellant's Brief p. 50-51 and in the Government's Brief at p. 30. Appellant knows for a fact that Colonel Rupp did testify at trial for the Government (Dkt 109) and the Government granted Don Jones availability after trial and then Appellant secured a sworn interview from him. (Dkt 159). The Government's alleged taped interview may or may not exist. Appellant has been led to believe that USSOCOM does not have the taped interview based on their FOIA response. First, assuming the Government is telling the truth that the taped interview does in fact exist, then without question this is a Brady violation. The taped interview was not provided to defense counsel after Colonel Rupp testified at trial. (Dkt 109 p. 209). Further, the interview of Don Jones conducted by Appellant's counsel after trial was very favorable to Appellant. (Dkt 159). Appellant

assumes that the interview of Don Jones by the Government would be the same or similar as the interview Appellant had with him. Jones has no motive to be dishonest. First, Jones testified that Appellant did not attend the 70mm Bunker Buster Warhead meeting in Norway that was the center of discussion at the Franks hearing. Second, Appellant did not represent NAMMO to the United States Government in Norway as Agent Calvert led the magistrate, trial judge and this Court [direct appeal and subsequent appeal] to believe. Third, Appellant saved the Government \$2M on a classified program – no question regarding Appellant’s honest services rendered to the Government. Fourth, Appellant did work for the Government as a private contractor and had equal to or greater access to USSOCOM than Burke. Fifth, Jones stated there was never a 70mm contract with NAMMO. (Dkt 159 p.30). If the tape does exist, then this Court can reverse the conviction because the prosecutor withheld exculpatory tapes of Government witnesses. *United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997). If the Government’s taped interview of Jones does exist and it is materially different than what Jones testified in his sworn statement then Jones committed perjury because he would have made false statements to the Government’s investigators. Jones has not been charged with perjury or making a false statement therefore if the tape does exist then it is not contradictory to Dkt 159. If the Government’s taped interview is not contradictory to Dkt 159 meaning that Jones told Colonel Rupp that Spellissy did not represent

NAMMO at the 70mm meeting to the Government then Agent Calvert presented additional false information to the Magistrate judge, the District Court and even this Court because he testified at the Franks hearing that he listened to the taped interview and all these Courts have relied on the taped interview for probable cause. (Dkt 121). If the alleged taped interview never existed then there is additional fraud upon the Court and further prosecutorial misconduct in this case. If the tape was destroyed then this is spoliation of evidence. *Flury v. General Motors Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). The taped interview must be taken favorably to Appellant. The non existing tape or the tape revealing that Spellissy did not attend the 70mm meeting is fatal to the affidavit for the search warrant to sustain probable cause and without Government's Trial Exhibit's 9-12 and 28 a jury [and trial judge] would not be able to draw any inference to find Appellant guilty of conspiracy to commit honest service mail fraud. There is no doubt that the result of the trial and the JNOV would be different. Appellant asserts that there would not have been a trial without the suppressed evidence because the prosecutor knew before trial that Burke would testify favorably for Appellant and the prosecutor knowingly presented a perjured plea bargain to the Court when he knew it was false because the plea was coerced out of Burke by Agent Calvert who lied to him and physically threatened the lives of his family. (Dkt 111, Dkt 121 and Defendant's Trial Exhibit 36). The Court cannot favor the Government without reviewing the contents of the taped interview because

it will leave a permanent effect for encouraging prosecutorial misconduct, spoliation of evidence.

On or about March 24, 2009 Spellissy received a copy of USSOCOM's request to the Office of the Secretary of Defense for a 70mm Multi-purpose warhead from a Federal Bureau of Investigation agent. (Dkt 185-4). The Government did not challenge this evidence in their opposition motion, Dkt 191. The request is dated January 18, 2005; it originates out of Spellissy's former office and specifically names NAMMO as the vendor for this warhead request. This request is dated almost six months after Spellissy relinquished his procurement authority and his office. Therefore, NAMMO's 70mm warhead did not become a particular matter until after Spellissy retired from the Army and well after he gave up responsibility of his former office. As a matter of law, the trial court should have granted a motion for a new trial because this document was discovered and given to Spellissy after trial, although it was in the Government's possession. Spellissy does not recall knowing about this document, therefore, Spellissy could not have obtained said document through discovery if Spellissy did not know it existed. The information in the document is material to the case because it saliently shows that the actual request for the 70mm warhead containing a particular matter for NAMMO went to the Office of the Secretary of Defense only after Spellissy retired therefore not pending in Spellissy's last year of procurement authority. The Government may have given this document

to Spellissy by mistake; however, the evidence from the search warrant should be suppressed. A new trial will produce a different result as previously discussed. *United States v. Reed*, 877 F.2d1398, 1404 (11th Cir. 1989).

The Government makes no argument in their brief reference the interviews of witnesses Fetherman, Mohr and Riggins or the documents from Colonel Kruelski's investigation that are referenced in the search warrant affidavit. (Appellant Brief p. 52-55.)

VI. 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 trial Judge stated that this is a weak case, "It was not a particularly good case or strong case from the get-go." (Dkt 113, p.55, line 14).

Quite simply, neither the facts nor the law support the Trial Judge's decision for probable cause to exist for an 18 U.S.C. § 207(a)(2) violation, Spellissy must have actually represented NAMMO before the government after retirement and he must have known what particular matter was subject to prohibition. You cannot issue a search warrant for an alleged post retirement conflict of interest violation when the event in question occurred before retirement which the Government conceded to.

The trial judge found no evidence at the JNOV to convict Appellant of the charges in the indictment. The offense of conviction, mail fraud should be reversed because it is reversible error.

CONCLUSION

For the foregoing reasons, this Court should reverse the conspiracy conviction against Spellissy or at the very least grant a new trial in this exceptional case where a serious miscarriage of justice has occurred.

Respectfully Submitted,

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

DATE: November 4, 2009

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant was 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 4th day of November, 2009. 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 November 4th, 2009.

/s/ John F. McGuire

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