

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 08-15208-E

THOMAS SPELLISSY,
Defendant-Appellant,

Vs.

UNITED STATES OF AMERICA,
Appellee.

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

REPLY BRIEF FOR APPELLANT
THOMAS SPELLISSY

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DATE: December 5, 2008

United States v. Thomas Spellissy

Appeal No. 08-15208-E

**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 6,995 words in Times New Roman 14 point font.

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INTRODUCTION

The Government's brief appropriately demonstrates how unsubstantiated its case against Spellissy was at the Franks Hearing, trial, and Judgment Notwithstanding the Verdict (JNOV) Hearing and serves to make Spellissy's appeal stronger. The Government's primary argument is procedural bar; however, procedural bar is no defense to the truth and constitutional right violations. A defendant who challenges his conviction can overcome the procedural bar if he can demonstrate that the constitutional error "has probably resulted in the conviction of one who is actually innocent." Bousley v. United States, 523 U.S. 614, 623-24 (1998) (quotation omitted). Now the record is complete, as far as we know and all can be seen from the reflective vantage of hindsight, it is quite apparent that Spellissy was the victim of a concerted effort to convict him at all costs of crimes that he not only did not commit, but that are glaringly inconsistent with his lengthy record of unblemished and highly distinguished military service to the United States.

This case was about bribery and wire fraud. AUSA O'Neill stated at trial,

"As I began with, there are five charges. And they are all about the bribery and the wire fraud." (Dkt 109, p.189).

There is no mention of a conspiracy to commit mail fraud by O'Neill in any part of the case. There is a variance between wire fraud and mail fraud charges because they are two separate statutes.

The Due Process Clause serves two basic goals. One is to produce, through the use of fair procedures, more accurate results: to prevent the wrongful deprivation of interests. The other goal is to make people feel that the Government has treated them fairly by, say, listening to their side of the story. The Due Process Clause is essentially a guarantee of basic fairness. Fairness can, in various cases, have many components: notice, an opportunity to be heard at a meaningful time in a meaningful way, a decision supported by substantial evidence, etc. In this case, there is no question that Spellissy's constitutional rights have been violated and he has suffered extreme prejudice resulting in a serious miscarriage of justice – a wrongful conviction.

The Government in its brief has done nothing to effectively counter the Spellissy's argument that the District Judge found Spellissy guilty of an offense, mail fraud, which was not properly charged in the indictment as to Count One, the conspiracy count. This is because there was no substantiated evidence presented at trial from which all of the necessary elements of a conspiracy to bribe a public official and/or to commit wire fraud could be shown as charged in the indictment. More importantly, Spellissy is actually innocent and the complete record reflects no reasonable juror could have found proof beyond a reasonable doubt that an agreement had been formed between the alleged co-conspirators and Spellissy knowingly participated in an agreement to achieve an illegal goal.

Furthermore, the Government has erroneously or misunderstood Spellissy's contention that he suffered from cumulative errors, violations of his Fourth, Fifth and his Sixth Amendment rights. Spellissy was deprived of meaningful cross examination against the true witnesses against him causing his Sixth Amendment rights to be violated. No one testified at trial, to include Agent Calvert, against Spellissy to convict him of conspiracy. By not having the opportunity to cross examine the witnesses who allegedly told Agent Calvert that there was criminal culpability against Spellissy on the Norway trip, he was deprived of his right to confrontation.

Contrary to the Government's Brief at p. 56, Spellissy's motion, Dkt 158, clearly cited numerous errors by the Court, the Prosecutor and trial counsel. The Government correctly cites "the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible." United States v. Thomas, 62 F.3d 1332, 1343 (11th Cir. 1995).

This Court will clearly see how Agent Calvert's and AUSA O'Neill's overzealous and disreputable conduct in seeking a search warrant for Spellissy's home, based upon a completely erroneous, dishonest, and false probable cause affidavit, misled the Magistrate Judge into believing that certain crimes had been committed when they simply were not. (Dkt 158-3). Succinctly stated, Spellissy did

not violate 18 U.S.C. § 207 because he didn't attend the 70mm warhead meeting which became the main topic of discussion at the Franks hearing and his alleged attendance at the meeting led the District Judge to find probable cause existed for a 18 U.S.C. § 207(a)(2) violation. (Dkt 44). Additionally, the record completely and accurately reflects the manner in which Special Agent Calvert lied, cherry-picked data and manipulated facts and the law in order to intentionally mislead the Magistrate Judge into issuing him a search warrant. Unfortunately, the Trial Judge was a victim to this fraud upon the Court and made factually incorrect orders based on the Government's lack of honesty and due diligence during their investigation. The record accurately reflects how AUSA O'Neill suppressed evidence and prejudiced the jury by making false statements during closing and rebuttal arguments at the trial. (Spellissy Brief, p.32-38).

AUSA McNamara asserts in her Brief that the conclusions supported by the facts and record are scandalous and Spellissy agrees. (Government Brief p.28). The Government's Brief has false information in their statement of facts. First, p. 21, Spellissy never told Agents that he went to Norway with Jones to discuss the 70mm warhead. Spellissy was in Norway at the request of the Government and excused himself from the 70mm meeting and this is stated in Rooney's Affidavit (Dkt 160) and Jones' sworn testimony (Dkt 159). The government asserts that Spellissy went to Norway with Don Jones to discuss the 70mm from an interview summary document

authored by Agent Calvert who has no credibility. Second, on p. 22 the Government summarizes that Jones' testimony could have been arranged by video. This is completely false and very misleading. This offer was only made for an interview with General Brown. At Dkt 158, Exhibit 2 which is an email from USSOCOM Lawyer, Lieutenant Colonel Weir telling the trial attorney that Jones is unavailable for interview or to be called as a witness for the Motion to Suppress Hearing and trial because he was deployed to Iraq. It's a mere coincidence Jones was sent to Iraq after the Government conducted their interviews. Last, on page 23, Spellissy never said he was in Norway as a NAMMO 'rep' to the Government. The Government has all of Spellissy's contracts and knows that he has no contract with NAMMO.

As discussed in Spellissy's initial brief, and as discussed further, Spellissy's conviction for conspiracy should be reversed.

ARGUMENT

A. Spellissy was erroneously convicted of conspiracy to commit mail fraud

The Government did not argue in their Brief that Spellissy was or could be convicted on a theory of conspiracy to commit mail fraud thus “depriving the United States of the intangible right of Burke’s honest services” and accordingly this Court would have no occasion to decide whether that is a viable theory under the charges in Count One of the indictment and the evidence because the offense was not properly charged in the indictment. The Government states in their Brief, p.59, “Spellissy was convicted of conspiracy to commit bribery and wire fraud,” this is not true. The record is clear and undisputed that the Trial Judge, after trial at the JNOV Hearing found Spellissy and his company guilty of conspiracy 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.” (Spellissy’s Brief, p.55 & Dkt 72, p.2). The government did not appeal this finding.

In the Supreme Court’s Murray v. Carrier, 477 U.S. 478, 485 (1986), the Court found 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. In this case there is no question at the JNOV Hearing the Court found Spellissy guilty of an offense not charged in the indictment. The government is misleading the Court in their statement of facts by partially citing the record that the

District Court left the conspiracy convictions intact. (Government's Brief p.4). This is not the whole truth. It is without question the Trial Judge changed the jury finding of guilty from "conspiracy to commit bribery and wire fraud" to "conspiracy to commit mail fraud, to deprive the United States of the intangible right of William Burke's honest services." The Court states,

"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." (Dkt 113, p.57, line 57).

Count One does not even mention one word about the offense of mail fraud.

Also see Dkt 58, the Jury instructions for Count One, p.8-13. There is no mention of the term "honest services" in the jury instruction for Count One.

The Court concluded in its order,

"As to Count One (Conspiracy), the evidence introduced, including but not limited to 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 the Defendants voluntarily participated in accomplishing that goal." (Dkt 72, p.2).

A constructive amendment occurs when the evidence at trial or the jury instructions broaden the scope of the indictment by allowing a defendant to be convicted of an offense different from that charged in the indictment. See United States v. Miller, 471 U.S. 130, 135-145 (1985); Stirone v. United States, 361 U.S.

212, 218-219 (1960). In this case the broadening of the indictment occurred at the JNOV Hearing.

In United States v. DuBo, 186 F.3d 1177 (9th Cir. 1999), and Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the Supreme Court, and the Ninth Circuit, determined that the Indictment must plead to specific statutory language in each of the charges filed against the defendant. As such, there is specific language in each statute that must be identified to put a defendant on proper notice of what constitutes the charge of the grand jury.

The Fifth Circuit has held in United States v. Cabrera-Terran, 168 F.3d 141, 143 (5th Cir. 1999), that the failure of the indictment to charge each and every essential element of an offense is a serious constitutional violation. See also United States v. Morales-Rosales, 838 F.2d 1359, 1361-62 (5th Cir. 1988), that criminal information ...does not charge...the second element of the offense...the failure of an information to charge an offense is a jurisdictional defect that is not waived by a guilty plea. See also United States v. Eldrington, 726 F.2d 1029, 1031 (5th Cir. 1984). The failure to charge an essential element of a crime is by no means a mere technicality. See United States v. King, 587 F.2d 956, 963 (9th Cir. 1978). See United States v. Kurka, 818 F.2d 1427, 1431 (9th Cir. 1987). It is not amenable to harmless error review. See United States v. Spruill, 118 F.3d 221, 227 (4th Cir. 1997). See also United States v. Brown, 995 F.2d 1493 (10th Cir. 1993) (“failure of

the indictment to allege all the essential elements of an offense ... is a jurisdictional defect requiring dismissal ... The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment”); United States v. Gayle, 967 F.2d 483 (11th Cir. 1992) (“A criminal conviction will not be upheld if the indictment upon which it is based does not set forth the essential elements of the offense”); citing United States v. Italiano, 837 F.2d 1480 (11th Cir. 1988); United States v. Deisch, 20 F.3d 139 (5th Cir. 1994) (“To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense”).

The Grand Jury Clause of the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Constitution Amendment V. The court said that: “to comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense.” United States v. Santeramo, 45 F.3d 622, 624 (2nd Cir. 1995) (per curiam).

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).

The conspiracy count should be vacated because Spellissy was not charged with conspiracy to commit mail fraud, thus “depriving the United States of the intangible right of Burke’s honest services” in Count One. There is no mention of the words mail fraud, or depriving the United States of the right of Burke’s honest services or depriving Sentel of Burke’s honest services in Count One. The mail fraud elements of the offense for conviction are not stated in Count One.

B. Spellissy is “Actually Innocent”

The Government asserts in their Brief on p. 59 that Spellissy “did not even address his factual innocence of the crimes charged in the indictment which differed from crimes that were the focus of the search warrant.” It is extremely difficult for a defendant to defend himself when the Government is prosecuting using false data and its lead investigator is not honest. (Dkt 72). The Court let the search warrant stand by concluding that there was probable cause because Spellissy attended the “70mm meeting” which the Court now knows he did not attend the meeting which would have caused a conflict of interest. The Court is incorrect when it stated in Dkt 166, “In short, Jones’ and Rooney’s testimony would not have established that the information Calvert relied on was false or that he was reckless in relying on it, the appropriate inquiry in a Franks hearing.” Now that we have Jones’ and Rooney’s testimony it can be concluded that every paragraph of the Affidavit that alleges criminal culpability is either false, misleading or has omissions of truth. Jones’ testimony confirms that there is no “taped interview,” no tape was provided, and this is shocking! This would have been very important for a Jury and/or the Court to be aware of and now only the Court is aware of this because Jones’s and Rooney’s testimony were taken after trial.

Next, at trial, Burke denies the conspiracy and the bribery. The Court stated, “The only credible testimony from Bill Burke is that he **denied the criminal**

conspiracy, denied bribery.” (Dkt 113 p. 14). At trial, Spellissy learned that Burke was coerced and intimidated by Federal Agents and he couldn’t financially afford to defend himself. (Dkt 110, p. 498). Burke also told the Court that Agent Calvert told him that Spellissy’s company, SDI, is an illegal business. (Dkt 110, p. 465-466). All of this led Burke into entering a plea. This is a lie and the Court acknowledged this lie when it stated, “The evidence of that order [Motion to Suppress, Dkt 44] was kept out appropriately, but it may very well underscore, because there was testimony from at least one witness that Mr. Spellissy’s business was illegal, when it clearly was not.” (Dkt 72 p. 55). Government witness Dr. Uhler gave false testimony at trial (Spellissy’s Brief, p. 37). Then at the closing of the trial, the AUSA in trying to desperately salvage his case, gives false statements and in a state of frustration calls his own witness a liar to the Jury. (Spellissy’s Brief, p. 35- 37).

During the JNOV Hearing the District Court should have thrown out the whole case when AUSA O’Neill desperately argued,

O’Neill: Therefore, my reading of case law, Your Honor, is that the jury, despite my admonition to the contrary, was perfectly within their right to believe that William Burke was credible on his guilty plea and not credible when he denied his involvement.

The Court: You are going to get me reversed if you make that argument to the 11th Circuit.

O’Neill: Really, Your Honor.

The Court: That bootstraps the government’s case by plea agreement and guilty plea, ... (Dkt 113, p. 29)

The only evidence that the AUSA has to prove its case is Burke's plea agreement and the fact that a witness had pled guilty to a crime in the indictment is not evidence in and of itself of the guilt of any other person. The record clearly reflects that Spellissy is factually innocent of conspiracy. The initial complaint that started the investigation was false and there were no charges from that erroneous complaint. (Dkt 33-2). The affidavit for search warrant contained statements and omissions that demonstrated a reckless disregard for the truth. (Dkt 44). Spellissy was not charged with any crime for what the purpose of the search warrant was. (Dkt 1 & Government's Brief p. 59). 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 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 and the Government has agreed to this at the JNOV hearing. (Dkt 113 p. 38 lines 2-4). Government witness, Burke, denied the existence of a conspiracy. (Dkt 113 p.38) The District Court ruled that the offense of conviction occurred after Spellissy retired from the military, December 31, 2004. (Dkt 146 p.6). 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 because the mail fraud elements or the honest service statute elements are not charged in the conspiracy count. Compare Dkt 1 to the findings in Dkt 72. The indictment must contain a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c).

The following is a factual analysis of the evidence to the Indictment by paragraph:

Count One
(The Conspiracy Count)
A. Introduction

1. Defendant THOMAS F. SPELLISSY was the president of defendant STRATEGIC DEFENSE INTERNATIONAL, INC., which was incorporated in the State of Florida on April 23, 2004.

There is no evidence in the trial record to support this statement of materiality. (Dkt 112 p. 992 p.8).

2. William E. Burke was the president of Carlisle Bradford Enterprises, which was incorporated in the State of Florida on September 9, 2004.

In evidence from Burke’s trial testimony. (Dkt 109 p.359).

3. The United States Special Operations Command was located at MacDill Air Force Base, Tampa, Florida. The United States Special Operations Command was part of the United States Department of Defense.

This statement is true and universally known.

4. Defendant THOMAS F. SPELLISSY was employed as a consultant by various companies seeking to transact business with the United States Special Operations Command.

In evidence by Government's Trial Exhibit 3A-3M. What is omitted and also misleading is the fact that Spellissy was a government contractor and consultant with equal to or greater access to the USSOCOM than Burke and had decision making or at the very least recommendation authority which is evidenced by saving USSOCOM \$2,000,000.00 on a classified program connected to the Foreign Comparative Test Program. (Government's Trial Exhibit 3A-3M and Dkts 38, 158, 159, 160).

5. William E. Burke was employed by a private contractor and assigned to the United States Special Operations Command Special Operations Acquisition and Logistics Center, Management Directorate. In that capacity, William E. Burke was acting for and on behalf of the United States and the United States Department of Defense.

In evidence by Burke's testimony. (Dkt 109).

B. The Agreement

6. From on or about a date in early 2004 to on or about July 26, 2005, in the Middle District of Florida, and elsewhere, THOMAS F. SPELLISSY and STRATEGIC DEFENSE INTERNATIONAL, INC., defendants herein, did unlawfully, willfully and knowingly conspire, combine, confederate and agree with others known and unknown to the grand jury to:

Spellissy and SDI cannot conspire with each other. (Dkt 113). How can one defend himself against the others known and unknown to the grand jury when they are also unknown to Spellissy?

6a. Defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the

Department of Defense in the operation of its *program* in a manner that was honest, fair, and free from deceit, craft, trickery, corruption, and dishonesty; and to

Spellissy had permission to work for his company, SDI, disclosed all his conflicts of interests to the Government and everything was legal and above board. (Dkts 38, 113, p.47, 121). What program is the government referring to and in what way was Spellissy or SDI not honest?

6 b. Commit offenses against the United States, to wit:

(1) To give, offer, and promise anything of value to any public official, and offer and promise any public official anything of value to any other person and entity, with intent to influence any official act, and to influence such public official to commit and aid in committing, and collude in, and allow, any fraud, and make opportunity for the commission of any fraud, on the United States, in violation of Title 18, United States Code, Sections 201(b)(1)(A) and (B) and 2; and”

There is no evidence in the record of anything of value promised to anyone to include Burke. (Dkts 72, 110 & 111).

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

There was no scheme and artifice to defraud because all of Spellissy’s actions were above board. The Judge stated, “But you know Mr. Spellissy obtained permission from his commanding officer to do exactly what he ended up doing. It was perfectly

legal and above board.” (Dkt 113 p. 47 lines 21-24). The Trial Judge did not find any evidence of conspiracy to commit wire fraud at the JNOV Hearing. (Dkts 113 & 72). There is no “mail fraud” in this charge and the words “depriving the United States of the intangible right of Burke’s honest services” are not present. “To prove a conspiracy to commit wire fraud, . . . it is enough to prove that the defendant knowingly and voluntarily agreed to participate in a scheme to defraud and that the use of the interstate wires in furtherance of the scheme was reasonably foreseeable. The elements of wire fraud under 18 U.S.C. § 1343 are (1) intentional participation in a scheme to defraud and (2) use of the interstate **wires** in furtherance of the scheme. A scheme to defraud requires proof of material misrepresentations, or the omission or concealment of material facts, reasonably calculated to deceive persons of ordinary prudence.” See United States v. Hasson, 333 F.3d 1264, 1270 (11th Cir. 2003), cert. denied, 124 S.Ct. 2195 (2004), 125 S.Ct. 1366 (2005). There is no evidence that Spellissy or his company, SDI knowingly devised or participated in a scheme to defraud or for obtaining money or property by means of false pretenses. In this case there is no intentional participation in a scheme and the use of wire was used to pay Burke for legitimate work which was reported on a Form 1099 to the IRS. (Dkt 72 p. 2-3). The Trial Judge stated to Spellissy at Sentencing, “And I am convinced that what you did was not with the mindset of violating the law. I don’t think there’s any question because of your character.” (Dkt 114 p. 81 lines 2-4). Therefore, if you

have no mindset to violate the law how can you have intentional participation or to act knowingly to achieve an illegal objective. There can be no conspiracy.

C. Manner and Means

7. It was a part of the conspiracy that defendant THOMAS F. SPELLISSY would and did form a company, defendant STRATEGIC DEFENSE INTERNATIONAL, INC., which was used to make illegal payments to William E. Burke.

There were no illegal payments made. Spellissy was acquitted on the bribery charges. (Dkt 72 & Spellissy Brief p. 54).

8. It was further part of the conspiracy that William E. Burke would and did form a company, Carlisle Bradford Enterprises, which was used to accept illegal payments from defendant THOMAS F. SPELLISSY.

No illegal payments were accepted by Burke (Dkts 72, 113 & Spellissy Brief p. 54).

9. “It was further part of the conspiracy that defendant THOMAS F. SPELLISSY would and did notify William E. Burke as to which companies he represented.”

Burke was aware of a few companies Spellissy represented. (Dkt 110). However, Spellissy had disclosed his clients to the Government through the Jacobs Sverdrup Government contract, the Program Executive Officer for Special Programs and the Program Mangers. (Dkts 72, 114, 158 and Government’s Trial Exhibit 3). Also, see Spellissy Brief p. 53. This was not disputed by the Government in their Brief. Spellissy identified to the Government who his clients were. There was no secret as to who Spellissy represented.

10. It was further part of the conspiracy that William E. Burke would and did provide preferential treatment to specific contractors represented by defendant THOMAS F. SPELLISSY.

Government witness James Pettigrew testified that there was **no** evidence of preferential treatment by Burke to Spellissy. (Dkt 11 p.680). Burke denied any agreement to do anything illegal and at trial stated that Spellissy never asked him to do anything illegal. (Dkts 110, 111, 72). Preferential treatment is not defined and the specific contractors represented by Spellissy were never identified by the Government. 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. No witness testified that Burke had this authority. See sworn testimony of James Santa Lucia and Snellgrove at Spellissy Brief p. 54-55. There is no evidence of where Burke made or could make a recommendation to benefit Spellissy. Burke was a private contractor who possessed no authority and his influence on the process was not even identifiable as the following testimony from Dr. Uhler, USSOCOM's Acquisition Executive, during the sentencing hearing demonstrates:

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

Uhler: **I did not.**

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

Uhler: **I did not.**

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

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

Jones’ states in his testimony,

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

Jones’ also testified,

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

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

Therefore, the record is clear that Burke could not give Spellissy preferential treatment.

11. 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.

No illegal payments were made. (Dkt 72). Burke was not in a position to give preferential treatment. (Dkts 151-8, 151-9, 159).

D. Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Middle District of Florida and elsewhere:

- (1) On or about April 23, 2004, defendant THOMAS F. SPELLISSY formed a company, defendant STRATEGIC DEFENSE INTERNATIONAL, INC.**

There is no evidence in the trial record to support this statement of materiality. (Dkt 112 p. 992 p.8).

- (2) On or about September 9, 2004, William E. Burke formed a company, Carlisle Bradford Enterprises.**

This statement is in evidence from Burke's testimony at trial. (Dkt 109 p.359).

- (3) On or about October 1, 2004, defendants THOMAS F. SPELLISSY and STRATEGIC DEFENSE INTERNATIONAL, INC. sent an electronic message to William E. Burke.**

- (4) On or about October 1, 2004, William E. Burke sent an electronic message to defendants THOMAS F. SPELLISSY and STRATEGIC DEFENSE INTERNATIONAL, INC.**

- (5) On or about October 1, 2004, defendants THOMAS F. SPELLISSY and STRATEGIC DEFENSE INTERNATIONAL, INC. sent an electronic message to William E. Burke.**

- (6) On or about October 2, 2004, William E. Burke sent an electronic message to defendants THOMAS F. SPELLISSY and STRATEGIC DEFENSE INTERNATIONAL, INC.**

These emails were brought into to evidence by an FBI agent. (Dkt 109, p.274) The FBI agent offered no analysis of the emails. He simply read them to the Court. (Dkt 109, p.277) These emails were explained by Burke at trial. There is not a statement

in those emails that demonstrated criminal culpability. (Testimony in Dkts 110 and 111).

Paragraphs (7) through (17) are all in evidence. These alleged overt acts were the invoices between Burke and SDI and the request for payment checks and the two checks that were sent to Burke for work performed on behalf of SDI. (Dkts, 72 109, 110, 111 and 113).

Spellissy was acquitted on Counts Two and Three (Bribery) and granted a New Trial on Counts Four and Five (Wire Fraud Counts). (Dkt 72). The bottom line is Burke didn't and couldn't provide preferential treatment to Spellissy and the government presented no evidence on how Burke could provide preferential treatment to Spellissy as evidenced by Uhler's, Santa Lucia's and Snellgrove's testimony. (Spellissy's Brief p. 54-55).

C. There was no 28 USC § 2255 properly filed and ruled upon its merits

Spellissy's post trial pro bono attorney (undersigned counsel) erred when Dkts 126, 130 and 133 were improperly filed. This was essentially one motion with two amendments. Contrary to the Government's Brief the motions were not an attack to vacate Spellissy's sentence, they were erroneously requesting a stay of sentence. Also, Spellissy was not in federal custody at the time of the filings. Dkt 151 would have been the initial § 2255 filing, however it was dismissed as a successive filing. Typically, collateral attacks on the validity of a federal sentence must be brought under § 2255. United States v. Jordan, 915 F.2d 622, 629 (11th Cir. 1990). When a prisoner has previously filed a § 2255 motion to vacate, he must apply for and receive

permission from the 11th Circuit before filing a successive § 2255 motion. The fact is Spellissy has never had a § 2255 filed as a prisoner to move to vacate his sentence. Spellissy has been denied his right and the erroneous filings should not be held against him. The motion before the District Court addresses fraud upon the Court. The fraud caused errors to be made by the Court, the prosecutor, the agents and the trial attorneys. It is without question all of these errors no matter who is to blame have occurred and it should not be held against Spellissy and indeed is scandalous. The District Court has not ruled upon the merits for Prosecutorial Misconduct or Ineffective Assistance of Counsel. The motion under appeal did not cite ineffective assistance of counsel even though the District Court continues to find numerous errors by trial counsel's lack of due diligence in interviewing and compelling defense witnesses at the Franks Hearing and trial. (Dkt 166 p.8, Dkt 146 p.3).

D. Prosecutorial Misconduct prejudiced Spellissy

Contrary to the Government's Brief at p. 50 there is no fabrication of prosecutorial misconduct throughout this case and Spellissy clearly lays this out in his Brief at page 31-38. The case was initiated with a false complaint which was not properly investigated. (Dkt 33-2, Dkt 109, p.232-233) Lies, falsehoods and omissions of the truth were used to fabricate an affidavit for the search warrant. (Dkt 44). The purpose of the search warrant was for alleged conflict of interests for a retired military officer, and Spellissy was not retired at the time when these

allegations supposedly occurred. The Government prevented witnesses to be interviewed, quashed subpoenas and even prevented a subpoenaed witness, Sergeant Landers (Dkt 125) from testifying at trial. The government also suppressed evidence to include the alleged taped interview and Burke's initial service agreement with SDI. (Spellissy Brief p. 33-34).

Allegations of prosecutorial misconduct are subjected to a "two-part test." United States v. Obregon, 893 F.2d 1307, 1310 (11th Cir. 1990). This Court will "assess (1) whether the challenged comments were improper and (2) if so, whether they prejudicially affected the substantial rights of the defendant." United States v. Castro, 89 F.3d 1443, 1450 (11th Cir. 1996) (citing Obregon, 893 F.2d at 1310). AUSA O'Neill's closing and rebuttal arguments were improper and prejudicial. (Spellissy Brief p.31-38). A prosecutor may not intentionally paint for the jury a distorted picture of realities in order to secure a conviction. See Davis v. Zant, 36 F.3d 1538 (11 Cir. 1994). The false statements infected the trial with unfairness and it made the resulting conviction a denial of due process. When this Court assesses the prejudicial impact of the prosecutor's statements, in the context of the trial as a whole and assess their probable impact on the jury, you will find that O'Neill violated Spellissy's due process because statements and arguments of counsel are not evidence. There is no direct evidence of a crime in this case because Burke denied the existence of a conspiracy. What is left is bare bones circumstantial evidence and

given this O'Neill was forced to make improper statements (Spellissy's Brief p.31-38) in trying to desperately salvage his case.

Agent Calvert's actions and his false and misleading Affidavit are also prosecutorial misconduct. (Dkt 44). Jones' and Rooney's sworn testimony confirms that there is additional fraud upon the Court at the Franks Hearing and trial. This alone is enough evidence to grant a new trial. Finally, on two occasions the AUSA did not disclose all exculpatory evidence to the trial lawyers. The alleged government taped interview with Jones (Spellissy Brief p.25) and the initial services agreement with Burke (Spellissy Brief p.33) are missing from the record. These are Brady violations.

The misconduct of the Government is well documented with scores of errors made by the Government. At the very least, cumulatively they necessitate a new trial given the weakness of the case and lack of evidence against Spellissy. 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).

E. The Affidavit is Fatally Flawed- No Probable Cause Existed

The general idea of the Affidavit was that Spellissy was a high ranking procurement officer, who was responsible for \$3,400,000,000.00 and was working for NAMMO while having procurement authority. The Trial Judge accurately found that Agent Calvert's statements were false and misled the Magistrate Judge into

believing that Spellissy was a high ranking procurement officer when he was employed by NAMMO. This false statement was redacted. (Dkt 44, p.6). At the Franks Hearing, the Court erroneously concluded that probable cause existed because Spellissy attended a “70mm warhead” meeting in Norway. (Dkt 44, p.13). Now the Court also knows because of Jones’ and Rooney’s testimonies which was impossible to obtain for the hearing or trial that Spellissy was not employed by NAMMO and never attended the 70mm warhead meeting that was the center of probable cause.

The arguments asserted by both Spellissy and the Government embrace a very simple question. By considering the totality of the information available to him, did Agent Calvert, while working in concert with O’Neill, act with a reckless disregard for the truth, or intentional dishonesty, when they crafted the probable cause affidavit that they submitted to the Magistrate Judge, and were his omissions and misrepresentations of sufficient materiality to void the fruits of the search? After a review of the record is complete, the answer is a clear and resounding “yes”. The genesis and foundation of Spellissy’s argument boils down to the very straightforward fact that Calvert and O’Neill (Dkt 158-3) misled the Magistrate Judge with a probable cause affidavit that not only contained statements made with reckless disregard for the truth, but that Calvert and O’Neill also omitted material facts that clearly demonstrate no probable cause existed for a U.S.C. § 207 violation.

The ultimate point that the Government has disregarded in its brief is that

Calvert and O'Neill crafted the affidavit by cherry - picking and manipulating the information in his possession in an effort to bolster the appearance of criminal conduct while effectively ignoring, or misrepresenting, any indication, regardless of how clear, of Spellissy's actual innocence. (Dkt 44). The cumulative effect of their omissions and misrepresentations was a fatally tainted affidavit that materially misrepresented the facts and the law, and ultimately influenced the Magistrate Judge's decision to issue the search warrant.

The clearest indicator of Agent Calvert's and AUSA O'Neill's bad faith, dishonesty, and recklessness is the fact that they sought a search warrant based on a § 207 violation when, by the Government's own admission, the effective date by which to measure 18 U.S.C. § 207 violations was going forward from the effective date of Spellissy's actual retirement on December 31, 2004.

Therefore, according to the Government's own admission, any violation of § 207 could have only occurred after the date Spellissy actually retired from the military on December 31, 2004. Yet, Calvert and O'Neill presented the Magistrate Judge with an affidavit that alleged a violation of § 207 had occurred on the Norway trip Spellissy took at the beginning of December, weeks before the effective measuring date for a § 207 violation began. Therefore, probable cause could not have possibly existed for any § 207 violation that occurred before the December 31, 2004 date. Calvert's affidavit drafted in concert with O'Neill, clearly made an effort

to characterize the Norway meetings, which took place before Spellissy's retirement, as the origin of the alleged violations for which probable cause was said to exist. (See Affidavit for Search Warrant p.3-6). Because Spellissy could not have violated § 207, or § 208 for that matter, before his retirement date had passed, the District Judge erred by failing to recognize this material fact and that error is clear error.

Regardless of the clear error in the measuring date of the alleged violations, the Government's argument that the District Court Judge ruled correctly in denying Spellissy's motion to suppress completely misses the mark by attempting to justify and explain away Agent Calvert's and O'Neill's material omissions and statements made with a reckless disregard for the truth. 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 and he must have known what particular matter was subject to prohibition. Now, the Court knows based on Jones' and Rooney's sworn testimony that Spellissy did not represent NAMMO at the 70mm warhead meeting or any meeting. Spellissy was in Norway for the United States Government. And based upon Spellissy's clear intent to avoid running afoul of any conflict of interest laws, as evidenced by the NAMMO ethics letter cited by the Government in Dkt 38 no reasonable person could find probable cause existed for a 18 U.S.C. § 207(a)(2) violation.

Also, Spellissy's argument in his Brief is clear that his Sixth Amendment right to confrontation was violated because he did not have a meaningful opportunity to cross examine the witnesses against him. Those witnesses were Major Shannon Jackson and Don Jones, the unidentified co-attende, Jerry Kaffa, the unknown indicted co-conspirators in the indictment. Contrary to the Government's argument on page 54, the Court states in Crawford, the Confrontation Clause:

“...commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross – examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.” Crawford v. Washington, 541 U.S. 36, 61 (2004).

There can be no doubt that Crawford places strong emphasis on effective and meaningful cross – examination. Thus, Spellissy was denied the opportunity to confront the witnesses against him, even after the Court ordered the Government to make witnesses available; therefore, his Sixth Amendment constitutional rights were violated.

CONCLUSION

For the foregoing reasons, this Court should reverse the conspiracy conviction against Spellissy or grant a new trial or grant permission to file an initial 28 U.S.C. § 2255.

Respectfully Submitted,

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

DATE: December 5, 2008

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 5th day of December, 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 December 5, 2008.

/s/ John F. McGuire _____

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