

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:05-CR-475-T-27TGW

THOMAS SPELLISSY and
STRATEGIC DEFENSE INTERNATIONAL, INC.

**UNITED STATES' RESPONSE IN OPPOSITION TO
DEFENDANT THOMAS SPELLISSY'S AND
DEFENDANT STRATEGIC DEFENSE INTERNATIONAL, INC.'S
JOINT MOTION FOR NEW TRIAL
BASED UPON NEWLY DISCOVERED EVIDENCE**

The United States of America, by A. Brian Albritton, United States Attorney for the Middle District of Florida, hereby files its Response in Opposition to Defendant Thomas Spellissy's and Defendant Strategic Defense International, Inc.'s Joint Motion for New Trial Based Upon Newly Discovered Evidence (Dkt. 185) and, in support thereof, states as follows:

1. First, on procedural grounds, the instant motion should be denied summarily for failure to comply with the Local Rules of the United States District Court for the Middle District of Florida. Specifically, Rule 3.01(c) states as follows: "Absent prior permission of the Court, no party shall file any brief or legal memorandum in excess of twenty (20) pages in length." Defendants' motion exceeds the twenty page limit. The government is not aware of any Order issued by this Court which granted permission to the defendants to exceed the limit imposed by the Local Rules. Consequently, defendants' motion should be denied.

2. Second, again based on procedural grounds, the instant motion should be denied in that this Court lacks jurisdiction to entertain the motion. On September 10, 2008, defendants filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's Order denying defendants' "Alternative Authority Motion for New Trial Filed Pursuant to Fed. R. Crim. P. Rule 33(a) and/or 60(b)(6)." That matter is now pending before the Eleventh Circuit Court of Appeals.

3. "It is the general rule of this Circuit that the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal. United States v. Hitchmon, 602 F.2d 689, 692 (5th Cir. 1979) (en banc)." United States v. Shewchun, 797 F.2d 941, 942 (11th Cir. 1986). See United States v. Wilson, 307 Fed. Appx. 314, 315 (11th Cir. 2009): "The filing of a notice of appeal normally divests the district court of jurisdiction over matters concerned in the appeal and transfers jurisdiction over those matters to the court of appeals. Shewchun v. United States, 797 F.2d 941, 942 (11th Cir. 1986)." See also, United States v. Vernier, 152 Fed. Appx. 827, 834 (11th Cir. 2005): "The filing of a notice of appeal will generally divest the district court of jurisdiction over the matters at issue in the appeal, except to the extent that the court must act 'in aid of the appeal.' Shewchun v. United States, 797 F.2d 941, 942 (11th Cir. 1986)."

4. The rationale underlying this precept is evident: judicial economy. It would be a waste of judicial resources for the district court concomitantly to address an issue pending before an appellate court. Once the matter is accepted for consideration by the appellate court, as a general rule, the district court is divested of jurisdiction.

In the usual case, with limited exceptions not present here, the filing of a notice of appeal divests the district court of jurisdiction over the aspects of the case involved in the appeal. “[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982) (*per curiam*). See also United States v. Vicaria, 963 F.2d 1412, 1415 (11th Cir.), *cert. denied*, 506 U.S. 998, 113 S.Ct. 596, 121 L.Ed.2d 534 (1992); United States v. Mavrokordatos, 933 F.2d 843, 846 (10th Cir. 1991); United States v. Prows, 888 F.2d 100, 101 (11th Cir. 1989); Shewchun v. United States, 797 F.2d 941, 942 (11th Cir. 1986); United States v. Rogers, 788 F.2d 1472, 1475 (11th Cir. 1986). This serves to avoid the confusion and waste of time that would result from dual jurisdiction. Shewchun, 797 F.2d at 943.

United States v. Tovar-Rico, 61 F.3d 1529, 1532 (11th Cir. 1995).

5. There is an exception to the general rule. If the trial court can act in aid of the appeal by considering the motion, then it is free to do so. Such a situation is not present here. As this Court noted in its Order, dated September 2, 2008, on page one: “The instant motion is the seventh post trial motion filed by the same attorneys in which they sought either a new trial or to have Defendant's convictions vacated.” Then, on page two, this Court states: “The instant motion includes allegations of a denial of their Sixth Amendment right of confrontation during the Franks hearing, newly discovered evidence, ineffective assistance of counsel, and prosecutorial misconduct through the knowing use of perjured testimony (citations omitted).” It is clear that the previous motion for a new trial does not differ markedly from the instant motion for a new trial wherein defendants argue lack of probable cause adduced at the Franks hearing, newly discovered evidence, ineffective assistance of counsel, and prosecutorial misconduct,

among other things. In short, the allegations contained in the instant motion are so strikingly similar to those contained in the previously filed motion for a new trial that the appellate court does not need the district court to address these new allegations in order to resolve the previous ones. The issues raised in the instant motion are already before the appellate court.

6. Turning to the merits of the instant motion, it is difficult to fathom defendants filing, yet another, § 2255 motion. Yet, that is exactly what defendants have done herein. Despite this Court's admonition in its Order dated September 2, 2008, defendants have filed another, successive petition. On page two of the Order, this Court wrote: "In light of the number of post trial filings seeking collateral relief, that order explained the limitation on successive petitions and the requirement of obtaining an order from the court of appeals authorizing the district court to consider a successive § 2255 motion (Dkt. 145). Apparently, this Court mistakenly presumed that Defendants' attorneys 'were aware of the limitation on successive petitions.' (Dkt. 145, p.2, n.3)."

7. As stated previously, the claims made by defendants in this petition are eerily similar to the ones made in previous applications which likewise bore headings intended to disguise the true nature of the petition, that is, a collateral attack on defendants' conviction based on Title 28, United States Code, Section 2255. In the instant petition, defendants claim lack of probable cause at the Franks hearing, ineffective assistance of counsel, and prosecutorial and government misconduct. As such, the claims plainly constitute yet another § 2255 motion, no matter what designation is utilized by defendants in describing their latest allegations. This is now, according to this Court's count, the eighth "post trial motion filed by the same attorneys

in which they sought either a new trial or to have Defendants' convictions vacated.” (Order, dated September 2, 2008, page one). Inasmuch as this petition constitutes yet another successive petition, it necessarily must be dismissed as its predecessors have been. “When a federal prisoner has previously filed a § 2255 motion to vacate, he must obtain permission from the Circuit Court before filing a second § 2255 motion. 28 U.S.C. §§ 2255, 2244(b)(3)(A); In re Blackshire, 98 F.3 1293, 1293 (11th Cir. 1996). There is no indication that Defendants have obtained permission from the Eleventh Circuit to file this motion. Accordingly, the claims raised in the successive motion, at least to the extent they collaterally attack the underlying convictions, must be dismissed. 28 U.S.C. § 2244(b)(2)-(3). United States v. Terrell, 141 Fed. Appx. 849, 852 (11th Cir. 2005).” (Order, dated September 2, 2008, page five).

8. In addition to the collateral attack on their convictions, defendants also make a claim of “newly discovered evidence.” Specifically, defendants have produced affidavits from two individuals, Fred Chan and Donald Allgrove. Defendants contend that these affidavits constitute new evidence. Defendants fail completely to explain how this is “newly discovered evidence.” Indeed, it would be impossible for defendants to accomplish that task. Both individuals were known to defendants, and there is absolutely no evidence in the record suggesting that these individuals were not available to testify at trial. Therefore, it is abundantly clear that the testimony of these two individuals does not constitute “newly discovered evidence.” Instead, present counsel is merely trying to re-try the case by adopting a strategy different from that of trial counsel.

9. In support of their claim that the two affidavits amount to “newly discovered evidence,” defendants allege that the government prevented other individuals in similar positions from testifying at the Franks hearing and at trial. That statement is simply false. It is nothing more than a misunderstanding of the law. Like all other litigants, defendants herein were required to comply with the dictates of the law. The government did not engage in any untoward conduct in prohibiting defense witnesses at either the Franks hearing or at trial. It is simply just another allegation propounded by defendants that has no basis whatsoever.

10. Apparently acknowledging that defendants did not even seek to secure the attendance of these witnesses at trial, defendants alter their argument from government misconduct to ineffective assistance of trial counsel. “There is no question that Defendant's trial counsel should have compelled these witnesses to testify.” Again, with no basis whatsoever, defendants allege that prior counsel was ineffective. Trial counsel is well known to this Court and to counsel for the government. They are able, competent, and indeed, outstanding trial attorneys. Trial counsel vigorously defended their clients before, during and after trial. Disparaging their efforts with unsupported allegations, although apparently a common practice for present counsel, does not give rise to the relief requested.

11. Indeed, through this argument of ineffective assistance of counsel, it is evident that defendants are, in fact, making a collateral attack on their conviction as opposed to seeking a new trial based on “newly discovered evidence.” Defendants are merely arguing, once again, that trial counsel should have adopted a different strategy in the defense of this action. As such, this “motion is properly construed as a

successive § 2255, notwithstanding its designation as a Rule 60(b) motion.” (Order, dated September 2, 2008, page two). Since it is a successive § 2255 petition, it must necessarily be denied.

WHEREFORE, the United States of America respectfully requests that defendants' Joint Motion for New Trial Based Upon Newly Discovered Evidence be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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