

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA

CASE NO: 8:05-Cr-475-T-27TGW

vs.

THOMAS SPELLISSY

and

STRATEGIC DEFENSE INTERNATIONAL, INC.

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**DEFENDANT THOMAS SPELLISSY'S AND DEFENDANT STRATEGIC  
DEFENSE INTERNATIONAL, INC.'S JOINT MOTION FOR NEW TRIAL  
BASED UPON NEWLY DISCOVERED EVIDENCE**

Defendants Thomas Spellissy and Strategic Defense International, Inc. (SDI) (hereinafter referred to as "Defendants") through their undersigned counsel, hereby move for a new trial under Fed.R.Crim.P. 33 on the basis of new evidence that has a direct impact on ameliorating the injustices done by the Government to the Defendants in this case.

**MEMORANDUM OF LAW**

Pursuant to Fed. R. Crim. P. 33, the Court "may vacate any judgment and grant a new trial if the interest of justice so requires." In the instant case, the Court should vacate the judgment against the Defendants based on newly discovered evidence. The Defendants have submitted this motion in a timely manner pursuant to the Rules of Criminal Procedure Rule 33 (b) (1). Any motion for a new trial grounded on newly discovered evidence must be filed **within 3**

**years after the verdict or finding of guilty.** If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

### **Summary of the Argument**

#### **Witness Issues and New Evidence**

During pre-trial and trial the Government prevented witnesses from being interviewed by Defendants' trial counsel, who were not allowed to honor their subpoenas. (Dkt 172, p.8-11, Dkt 125 p. 2 and Dkt 125, Exhibit A). Since trial, both Government and non-Government witnesses have voluntarily come forward to be interviewed and/or to give affidavits in support hereof. (Dkts 159 & 160).

#### **Fred Chan and Lieutenant Colonel (Ret) Donald Allgrove**

Mr. Fred Chan (Government Program Manager and former U.S. SOCOM Program Manager) and a former end user representative for SOCOM, [Lieutenant Colonel (Ret.) Donald Allgrove] have come forward and given sworn affidavits. See Dkts 173 and 174. These two affidavits are additional new evidence within the meaning of Rule 33. Their testimony was not available at trial because the Government prevented program managers and end user representatives (including personnel in similar positions as Chan and Allgrove) from testifying at the Franks Hearing and trial. Their sworn affidavits directly contradict the Government's theory that William Burke (who recanted any involvement by Defendants' on the stand) was in a position to give preferential treatment to Defendants or their clients. Now, based on Chan's and Allgrove's sworn affidavits, there is direct evidence in the record showing that Burke did not have the authority to influence SOCOM's Foreign Comparative Test Program or

Defense Acquisition Challenge Program in order to benefit Defendants or anyone doing business with them. This evidence supports the Defendants' innocence in this case, and should have been made available to the jury. Instead, the Government prevented it, and violated Defendants' due process rights as a result.

**Jeffrey J. Del Fuoco Affidavit, New Evidence**

Del Fuoco contacted the undersigned counsel and subsequently rendered his affidavit (See Dkt 184), which contains serious and compelling evidence showing gross prosecutorial misconduct in this case. Del Fuoco's affidavit in its entirety is hereby incorporated herein by reference as if set forth fully, and his arguments and observations are hereby adopted in tandem. It should be noted (as it was by Del Fuoco) that he had no prior connection to Defendants; he has no financial or other interest in this case; and that his only interest (given his intimate knowledge of the way the U.S. Attorney's Office and the Department of Justice (DOJ) have operated over the last 8 years) is in seeing that justice is done here and with the DOJ in general.

**Demands by Lee Bentley, First Assistant United States Attorney**

On Friday, April 24, 2009, undersigned counsel received a telephone call (and later an email, see attached Exhibit H, Email exchanges from Bentley and McGuire) from Mr. Bentley, who is presently the First Assistant United States Attorney (FAUSA) in this district. Mr. Bentley demanded by stating "I'm asking, in fact I'm demanding that you withdraw and strike that affidavit" to the undersigned, McGuire. Bentley demanded counsel to withdraw Del Fuoco's affidavit from the

record, and told the undersigned that he (Bentley) would file a bar complaint with the Florida Bar as well as with the Middle District of Florida Grievance Committee and this honorable Court if the undersigned did not immediately withdraw this crucial evidence. Mr. Bentley stated that Del Fuoco was a “disgruntled employee” and suggested in no uncertain terms that Del Fuoco’s affidavit was false, despite the fact that Del Fuoco claims that his affidavit is corroborated by three other AUSAs, Jeff Downing, Ernest Peluso and Robert Mosakowski. Former U.S. Attorney Donna A. Bucella is also alleged as a corroborated witness to Del Fuoco’s claims. Bentley went on to say “that he would haul” undersigned counsel “in front of Judge Whittemore, who knows Bobby O’Neill very well and approves of his work and would not be happy with you [undersigned counsel].” While the undersigned, Attorney McGuire, has no actual knowledge about Del Fuoco’s time as an AUSA, it appears from the evidence that Mr. Bentley is trying to keep the affidavit from surfacing, and that he is willing to use his position in order to do so. Defendants are now forced to file this motion before the completion of their Freedom of Information investigation because of aforementioned demand.

### **Argument**

Ordinarily, five prerequisites must be met to justify the grant of new trial on the ground of newly discovered evidence: (1) the new evidence was discovered after trial; (2) the Defendant used due diligence to discover the evidence; (3) the newly discovered evidence is material to issues before the court; (4) the evidence is not merely cumulative or impeaching; and (5) a new trial will produce a different result. However, the decision to grant or deny a motion for a new trial

is within the discretion of this Court. United States v. Bazar, 2002 WL 31640578 at \*2 (D.VI. 2002).

This Court has already stated that “a miscarriage of justice may very well have occurred, if the verdicts are based on Bill Burke’s plea agreement and guilty plea.” (Dkt 113, p.66, line 12). Defendants respectfully assert that any failure by the Court to review this case based upon the newly discovered evidence raised herein will “result in a fundamental miscarriage of justice.” See Murray v. Carrier, 477 U.S. 478, 485 (1986). In Murray v. Carrier, the Court stated that procedural default would be excused, even in the absence of cause, when a “constitutional violation has probably resulted in a conviction of one who is actually innocent.” 477 U.S. at 496. See also, House v. Bell, 126 S. Ct. 2064, 2076-77 (2006) (“[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” (Quoting Schlup v. Delo, 513 U.S. 298, 327 (1995); See, e.g., Gonzalez v. Abbot, 967 F.2d 1499, 1504 (11<sup>th</sup> Cir. 1992) (procedural default excused under actual innocence exception because petitioners claim if true, rendered conviction void and could not be legal cause of imprisonment), amended by 986 F.3d 461 (11<sup>th</sup> Cir. 1993). There still is no procedural barrier to a second habeas petition because the 11th Circuit has said that persuasive, free-standing innocence claims should not be barred by procedural default.

In the instant case, it is now clear based on Chan’s and Allgrove’s affidavits that Burke did not have the authority to benefit Defendants or

Defendants' clients. At trial 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). The alleged preferential treatment in the indictment is not defined and the specific contractors represented by Spellissy who were to benefit from the undefined preferential treatment were never identified by the Government in the indictment. There is no evidence that Burke was in a position with the authority to do what the Government alleges in the indictment. Burke **cannot** approve, disapprove, rank or change an acquisition proposal for testing. (Dkts 173 & 174). No witness testified at trial that Burke had this authority. Mr. James Santa Lucia and Mr. Charles Snellgrove, of the Sentel Corporation, gave testimony that Burke never made any decisions as a contractor. See Dkt 151, Exhibit 9 p.4, Dkt 151, Exhibit 9 p.5 and Dkt 151, Exhibit 10 p.4.

Therefore, the record is now clear and without question that Burke was in no position and had no authority to do anything to benefit Defendants. There is no evidence Burke made or could make a recommendation to benefit Defendants. Burke was a private contractor who possessed no authority and his influence on the process was non existent as evidenced by testimony from Dr. Uhler, (SOCOM Acquisition Executive) who stated that he never sought Burke's opinion on a project or proposal to include ranking them. (Dkt 114, p. 33). Also, Former Ammunition Program Manager Donald Jones' testified in sworn testimony that USSOCOM priorities are determined by the end users

and the priorities cannot change without coordinating with the end users. (Dkt 159, p. 24)

The record is void of any evidence to substantiate that Burke had the authority to provide any preferential treatment to Defendants. The Government did not even present Burke's contract, performance reports or any proposal or document with Burke's signature directing or recommending to direct **any** government action. Therefore, the record is now clear that Burke could not give Defendants preferential treatment.

Post trial, this Honorable Court found vague circumstantial evidence to justify the jury's conviction of Defendants for conspiracy by finding that they "agreed to commit the offense of mail fraud, that is, deprive the United States of the intangible right of William Burke's honest services." (Dkt 72, p.2). However, Defendants were not charged in the indictment with conspiracy to commit mail fraud. (Dkt 1) Defendants cannot be found guilty of a conspiracy to commit mail fraud, since mail fraud was not an object of the charged conspiracy. Even if the indictment had properly charged Defendants with conspiracy to commit the offense of "honest services" wire fraud, witnesses Chan, Allgrove, Jones, Lucia and Snellegrove state that there was no action Burke could take to benefit Defendants. As such, the facts beg the question of "how could Burke's 'honest services' be compromised given that he had no authority to make a decision or recommendation potentially benefiting Defendants?" Indeed, such evidence was crucial, and should have been presented to the jury in evaluating the entire case. Now that the record is more complete, this Court should vacate this conviction

because the evidence of record clearly shows that not only did Defendants not intend or agree to commit a crime, but also that Burke was not in a position to benefit Defendants at all, proving actual innocence.

### **Ineffective Assistance of Trial Counsel**

There is no question that Defendants' trial counsel should have compelled these witnesses to testify. This Court has already cited lack of due diligence of trial counsel for not compelling witnesses at the Franks Hearing and during trial. The lack of due diligence by the trial attorneys reaches a point of ineffective assistance of counsel. The record has many other instances showing that trial counsel failed in their duties to Defendants. (Dkts 16, 21, 22, 146, 151, 159, 160, 161, 166 p.6-8). An ineffective assistance of counsel claim is a mixed question of law and fact. The 11<sup>th</sup> Circuit will review the district court's findings of fact for clear error and its decision on the ultimate issue de novo. Conklin v. Schofield, 366 F.3d 1191, 1201 (11<sup>th</sup> Cir. 2004). The right to counsel is the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's performance so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. at 686, 104 S. Ct. at 2064. To make such showing, a petitioner must prove that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. In this case trial counsel did not conduct due diligence to compel witnesses, and they failed to inform the District Court of continued

witness tampering by the Government, all despite the fact that the Government was obstructing the Defendants' access to these crucial witnesses.

The Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. In Fortenberry v. Haley, 297 F.3d 1213, 1227-28 (11th Cir. 2002), the Court considered the duty to investigate with regard to a defendant's argument that his counsel was ineffective for failing to uncover certain testimony to present to the jury. In this case Defendants have shown that trial counsel did fail to uncover testimony that would have established Defendants innocence.

**The Franks Hearing, "Actual Innocence" – no probable cause**

At the Franks Hearing, Captain Huss testified that the 70mm rocket warhead was considered to be "synonymous" with NAMMO. (Dkt 44, p. 9).

Defendants have found new evidence that is contrary to Captain Huss' testimony. The Huss testimony referred to an entirely different procurement which was not supervised by Spellissy, and which occurred after Spellissy's retirement. The Court determined that the 70mm "Bunker Buster" warhead was a "particular matter" under Spellissy's responsibility because Huss testified that NAMMO's warhead was "synonymous" with the 70mm FCT request. The FCT request that Huss is referring to is not the same request for the "Bunker Buster" warhead that Doctor Uhler's office had requested. Huss is referring to the FCT proposal that was staffed under his authority. See Exhibit C, 70mm Warhead FCT Proposal. Huss based his comment on the result of two market surveys that

he had reviewed. (Dkt 121 p.18). Exhibits A and B are Notices titled “70mm Multipurpose Penetrator,” that would potentially produce market surveys. However, the 70mm warhead in the notices is not the same warhead that the center of the Franks hearing. The Franks hearing focused on the particular matter as the “Bunker Buster” warhead as referred to in Dr. Uhler’s request in May, 2004. The dates of these notices or requested information for market surveys, Exhibits A & B, are dated after Defendant Spellissy gave up procurement authority. Additionally, Exhibit C is the FCT proposal sent by USSOCOM to the Office of Secretary of Defense, it is dated January 18, 2005 which is after Defendant Spellissy retired from active duty and a month and half after the Norway meeting. Therefore, Defendant Spellissy was not in violation of any “particular matter” pending in the last year of his responsibility even if he did attend the 70mm warhead meeting in Norway as a government consultant because the Multipurpose Penetrator warhead proposal did not even exist under Spellissy’s responsibility while on active duty.

As such, considering the totality of the information available to him, did Agent Calvert, while working in concert with AUSA O’Neill (See Dkt 158-3), act with a reckless disregard for the truth, or with intentional dishonesty, when they crafted the probable cause affidavit that they submitted to the Magistrate Judge? Were his omissions and misrepresentations of sufficient materiality to void the fruits of the search? After a full review of this record, the answer to both questions is a clear and resounding “yes”. The fact is that Calvert and O’Neill (Dkt 158-3) misled the Magistrate Judge with a probable cause affidavit that not

only contained statements made in reckless disregard for their truth, but that also omitted material facts that clearly would have shown that no probable cause existed *ab initio*. Given the strong, newly discovered evidence from Del Fuoco, as well as the recent demand to the undersigned by FAUSA Bentley, there can be no question about the Government's lack of integrity in general and about its wrongful actions in this case. As such, this Court is duty bound to conduct a full and probing review of the Government misconduct at the heart of this case.

Also, O'Neill and Calvert crafted an affidavit (that was first denied, Dkt 121 p. 93), by "cherry-picking" and manipulating the information in their possession, all in a wrongful and corrupt effort to give the "appearance" of criminal conduct, and all while ignoring clear evidence of innocence. The cumulative effect of their omissions and misrepresentations resulted in a fatally tainted affidavit that materially misrepresented the facts, manipulated the law, and ultimately influenced the Magistrate Judge's decision to issue the search warrant *ab initio*.

Neither the facts nor the law supported the search warrant. For probable cause to have existed for a violation of 18 U.S.C. § 207(a)(2), Defendant Spellissy must have actually represented NAMMO before the Government, and he must have known what "particular matter" was subject to prohibition. Based on Jones' and Rooney's (Dkts 159 & 160) sworn testimony that Spellissy did not represent NAMMO at the 70mm warhead meeting or any meeting, this was not possible had the real truth been sought. Furthermore, given evidence that Defendant Spellissy's clear intent was 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 magistrate could have found that probable cause existed for a 18 U.S.C. § 207(a)(2) violation.

### **FOIA Request and Additional New Evidence**

On 5 January, 2009 Defendant Spellissy filed a civil complaint (See Exhibit D, Complaint, Case No.: 8:08-CV-02479T-26-MAP) against SOCOM concerning a denied FOIA request and the illegality of his retirement grade being reduced by the U. S. Army Grade Determination Board.

On 3 April, 2009, the United States Attorney's Office responded to the complaint. The response included a SOCOM "Vaughn matrix" listing all of the evidence that SOCOM has pertaining to the investigation of Defendants. The Vaughn matrix was provided under a sworn statement by the SOCOM Chief of Staff. See Exhibit E, USSOCOM Vaughn Matrix. This matrix is "new evidence" within the meaning of Rule 33 and concerns documents, interviews and tapes that SOCOM had and withheld from Defendants' trial counsel. Of critical note, the Vaughn matrix is missing an alleged "taped interview" between, Mr. Don Jones, SOCOM Ammunition Program Manager and Colonel Rupp, Inspector General. See Application and Affidavit for Search Warrant of Former Special Agent Robert Calvert (DCIS) which stated *inter alia*, "(y)our affiant learned from a **taped interview** conducted on March 2, 2005, between Col. Robert Rupp, Deputy Inspector General, SOCOM, and Don Jones, Program Manager, PEO-SP, Jones stated that approximately one or two weeks before their departure in November, 2004, for the meeting in Norway, Spellissy made the following comment to him: 'I'm there not as a consultant, I'm there as a NAMMO rep.' "

The “taped interview” was relied upon by this Honorable Court by two different judges. First, Magistrate Judge Scriven approved the **amended** (the second application was granted) Search Warrant at face value which included reference to the tape. Second, this Court relied on this alleged “taped interview” when it allowed probable cause to stand, even though this Court found that Calvert’s Affidavit was riddled with falsehoods and omissions, including those by the SOCOM Inspector General. See Dkt 44. This Court again relied on the “taped interview” when it made a ruling in a post trial motion. See Dkt 166, p.9. The alleged “taped interview” is also currently being referenced by AUSA Linda McNamara in the Government’s Reply Brief now pending before United States Eleventh Circuit Court of Appeals in Case No. 08-15208-E. Notwithstanding all of this, The Government’s own Vaughn matrix suggests that this tape does not exist. If this is so, then Agent Calvert committed more perjury that this Court must examine in order for justice to prevail in this case. Defendants further assert that if AUSA O’Neill knew or should have known that the tape never existed, then he has suborned perjury in this case. AUSA Sean Flynn stated that they [USSOCOM] had the tape, and then gave it to another investigative agency. According to the United States Attorney there were three investigative agencies, USSOCOM Inspector General, Defense Criminal Investigative Service and the Federal Bureau of Investigation in this case. See Exhibit F, U.S. Attorney Press Release. Witnesses testified for the Government at trial from all three agencies and there was no taped interview of Jones given to Defendants trial counsel as part of discovery. If the tape does exist, then this is a Brady violation. Given Del

Fuoco's strong evidence alleging that O'Neill has perjured himself and obstructed justice in other matters before this Court, it stands to reason that this is a very serious matter that needs a complete "airing out."

During the Motion to Suppress hearing, the Court determined that the 70mm "Bunker Buster" warhead was a "particular matter" under Spellissy's responsibility because Navy Captain Huss testified that NAMMO's warhead was synonymous with the 70mm Foreign Comparative Test (FCT) request. See Dkt 44. Huss based his comment on **two market survey results** that he had reviewed. See Dkt 121, p. 16, line 13. These referenced documents are directly related to the investigation of Defendants and these documents were not disclosed in SOCOM's Vaughn matrix. Given the Government misconduct that has been going on since the beginning, Defendants doubt if they exist at all. According to the Vaughn matrix they don't exist and if they do exist, it was not part of the discovery

Special Agent Calvert stated at paragraph 6 in his Sworn Application and Affidavit for Search Warrant: "Your affiant has **learned from documents as provided by SOCOM** that Spellissy was assigned as the Program Executive Officer, Special Operations (PEO-SP) for the SOCOM from April, 2001 to his retirement on December 31, 2004." Where are these documents? They certainly are not mentioned in the referenced Vaughn matrix.

Calvert states at paragraph 7 in his Sworn Application and Affidavit for Search Warrant: "According to Col. Kruelskie, **his investigation** to date revealed that Spellissy.....Col. Kruelskie **provided a copy of the letter**.....U.S.

Department of Defense.” Where are the documents from Kruelskie’s investigation and where is the letter? They too are not disclosed on the Vaughn matrix.

Based on information and belief Defendants learned that AUSA O’Neill’s misconduct is presently being reviewed by the U.S. DOJ, and that staff personnel from the DOJ Office of Professional Responsibility (OPR) have indicated that investigating lawyers are being assigned to the matter. See Dkt 184. Thus, Defendants have information and now believe that O’Neill is under investigation for perjury and for witness tampering, among other things. This is new evidence going to the heart of O’Neill’s role as the prosecutor in this case. When coupled with FAUSA Bentley’s attempt at demanding the undersigned in an effort to hide these facts, a very serious situation indeed has developed that requires immediate Court intervention in this case, all in accord with Rule 33.

This new evidence helps to fully substantiate O’Neill’s misconduct in the prosecution of this case, and brings into question the following:

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

“In order to determine whether defendant Spellissy violated the terms of his employment, and thus violated §§ 207(a) and (b) and 208(a), it was material for the government to state the date that defendant Spellissy retired. It is undisputed that defendant Spellissy retired from military service on December 31, 2004. Consequently, the restrictions on post-employment activities embodied in 18 U.S.C. § 207(a) and (b) are measured from that

date, as opposed to the date that he no longer was involved in the procurement process which is meaningless.” (Dkt 22, pages, 5-6)

Mr. O’Neill makes the same statements at Dkt 41, page 12 and at Dkt 121, page 120. Therefore, according to Oneill’s own admission, any violation of § 207 could have only occurred after the date Defendant Spellissy actually retired from the military (December 31, 2004). Despite this evidence, Calvert (with O’Neill’s knowledge, Dkt 158-3) presented the Magistrate Judge with an affidavit that alleged that a violation of § 207 had occurred on the Norway trip in November 2004 (a full month before Spellissy retired). The trip [one that SOCOM hired him for (Dkts 38, 158, 159, 160, 161)], was proper since he had permission to work from his superiors (Dkt 38); he had secured ethics letters (Dkt 38) and he didn’t even attend the SOCOM 70mm program meeting (Dkts 158, 159, 160, 161).

b. With regard to Calvert’s false affidavit, O’Neill stated on the record: “They’re [affidavits] normally drafted by non lawyers in a midst and haste of criminal investigation. Technical requirements of elaborate specificity, once exacted under common law pleadings have no proper place in this area. And so – and it goes on, of course, as Your Honor knows.” (Dkt 44, p. 144)

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

statements O'Neill's argument is clear that Calvert's falsehoods were excusable. As Del Fuoco points out, however, "despite AUSA O'Neill's excuse-making and rationalizations, however, he was ultimately responsible for the affidavit prepared in the search warrant matter as the prosecutor supervising the case." Dkt. 184.

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

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

This statement directly contradicts Calvert's Affidavit placing Spellissy in Norway as a "NAMMO Representative."

d. The Court should consider the fact that although AUSA O'Neill prosecuted Burke for a false statement, he never took one iota of action to investigate Calvert's clear misconduct, with which it appears he had a hand in.

e. O'Neill failed to turn over all exculpatory evidence to the defense before the trial. At trial, Burke testified that he gave investigators a copy of his and SDI's initial work agreement – "general services agreement." (Dkt 109, p. 359-360). No evidence or testimony was presented by the Government to contradict Burke's statement. Justice is done when evidence favorable to the defendant is disclosed because such evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. 667, 676 (1985).

All evidence exculpatory and impeaching evidence in the Government's possession is required to be disclosed to the defense. Brady v. Maryland, 373

U.S. 83, 87-88 (1963). Furthermore, Defendants should have received this agreement and other evidence as a part of Discovery or under the Jencks Act, 18 U.S.C §3500. At trial, immediately after Burke made the above statement, AUSA O'Neill showed Burke a July 2005 contract document between Defendant Spellissy and Burke, then knowing that this was not the document that his witness was referring to. Burke then explained that there are two separate signed agreements. (Dkt 109, p. 361). This helps to prove that O'Neill and/or his agents kept evidence from the Defendants. This agreement defines a legal agreement between Spellissy and Burke, **not a conspiracy**.

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

In order to establish a Brady violation, the defendant bears the burden of establishing (1) that the prosecution suppressed the evidence, (2) that the evidence was favorable to the accused, and (3) that the evidence was material. The criteria for materiality is met when there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed to the defense. United States v. Gonzalez-Montoya, 161 F.3d 643, 649 (1998) (quotation marks and citation omitted). The prosecution cannot overcome materiality by demonstrating that there was sufficient evidence to convict absent the undisclosed evidence. Kyles v. Whitley, 514 U.S. 419, 434-35 (1995). The gist of materiality is a "showing that the favorable evidence could reasonably be

taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435. Cf. Agurs, 427 U.S. at 112 ("[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.").

O'Neill stated in his rebuttal argument at trial that:

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

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

contradicted testimony. This is untrue, and further bolsters O'Neill's gross misconduct in this case.

j. AUSA said in his closing statement,

“One of the questions that was asked was why did William Burke not get a check in February? You might recall that the inspector general began their investigation in January. That is why. No sense in accepting money after you're being investigated.” (Dkt 111, page 868).

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

#### **Additional Witness Issues**

Also, in December 2007 undersigned counsel, McGuire, was with Plaintiff eating lunch at Capogna's Dugout Restaurant, Clearwater, FL and Steven Fetherman was also there. Fetherman and Spellissy discussed the investigation and Fetherman told us that he was interviewed by the USSOCOM Inspector General and Spellissy did not know this, and this interview which happens to be favorable to Spellissy was not disclosed by USSOCOM. Fetherman stated that Brad Mohr was also interviewed. This interview was not disclosed. See Exhibit G, Spellissy Affidavit.

This Court stated on the record that “. . . a miscarriage of justice may very well have occurred, if the verdicts are based on Burke's plea agreement and guilty plea.” (Dkt 113, p.66, line 12). This is exactly the case here. When

coupled with the overwhelming quantum and quality of the new evidence in this case, Defendants assert that given the “totality of circumstances”, the failure of this Honorable Court to review this matter based upon this newly discovered will indeed “result in a fundamental miscarriage of justice.” An alleged accomplice’s guilty plea is not evidence that a defendant is guilty, and it cannot be used a defendant in any way. As the 11<sup>th</sup> Circuit Pattern jury instruction on the matter requires, an alleged co-conspirator’s guilty plea is not evidence in and of itself of the guilt of any other person. See, e.g., Eleventh Circuit Patter Jury Instructions (Criminal Cases), Instruction No. 1.2 (2003).

A prosecutor cannot improperly vouch for evidence contradicted by the witness on the stand. Such vouching “consists of placing the prestige of the government behind (evidence) through personal assurances of the (evidence’s) veracity. United States v. Necoechea, 986 F. 2d 1273, 1276 (9<sup>th</sup> Cir. 1993). By vouching in the manner he did, O’Neill intruded upon the jury’s right to make all credibility determinations. United States v. Joy, 192 F. 3d 761, 769 (7<sup>th</sup> Cir. 1999). Numerous cases have found such vouching to be an improper practice, all violative of due process. See, “Defending Federal Criminal Cases: Attacking the Government’s Proof”, Law Journal Press (2006), p. 9-62 (citations omitted). As the U.S. Supreme Court has stated with regard to such vouching:

“such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can *thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury; and a prosecutor’s opinion carries with it the imprimatur of the government and may induce*

*the jury to trust the Government's judgment rather than its own view of the evidence."*

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

In this case, O'Neill's conduct was highly improper, and it constituted an impermissible violation of the Defendants' due process rights. Analyzing the record as a whole, 5 factors come into play: (1) the nature and the seriousness of the prosecutor's misconduct; (2) whether the prosecutor's remarks were invited by the defense; (3) whether the trial court's instructions to the jury were adequate; and (4) whether the defense was able to counter the improper comments through rebuttal; and (5) the weight of the evidence against the defendant. Joy, 192 F. 3d at 769. In this case, none of these factors weighs in favor of the Government. Particularly with regard to factor (5), the Government's "star witness" went "south" on Mr. O'Neill on the stand. Thereafter, O'Neill made himself a witness in the case, and the defense was unable to rebut his testimony when the Government failed to turn over evidence.

Given all of the foregoing misconduct, Defendants were denied due process, and were wrongfully convicted by a prosecutor who has demonstrably engaged in the worst kinds of abuse, including threats of physical violence, *inter alia*. As such, the Government should be severely sanctioned for its misconduct, and justice requires that Defendants' convictions be overturned by granting a new trial.

Submitted April 27, 2009.

Respectfully,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of the foregoing has been furnished by Electronic Filing to Sheryl L. Loesch, Clerk of the Court, U.S. District Court, Middle District of Florida, located at U.S. Courthouse, 801 N. Florida Ave., #223, Tampa, FL 33602-3800, and that e-mail notification of this filing will be sent to all interested persons on this 27<sup>th</sup> day of April, 2009.

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